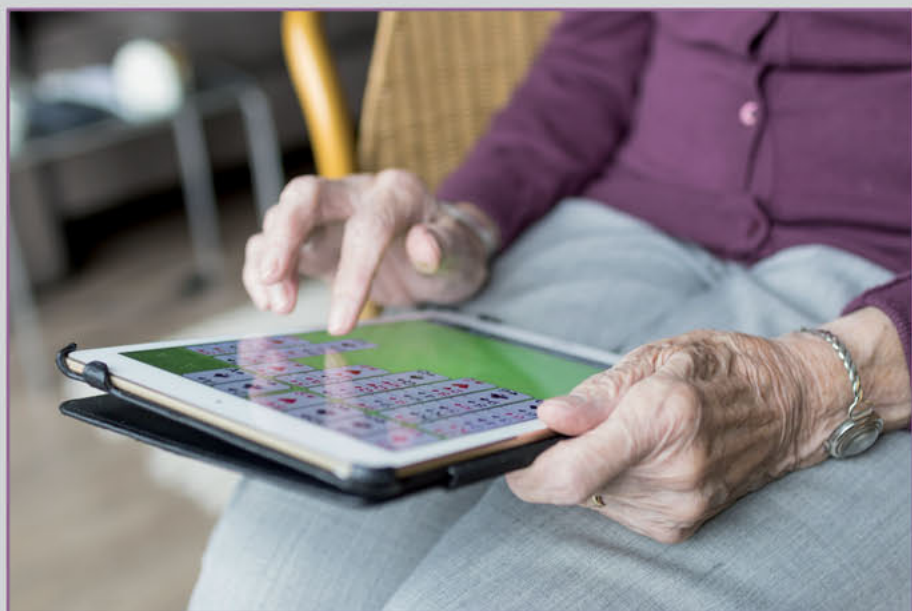


Barbara Mikołajczyk

# Social Inclusion for Older Persons and Human Rights Law The Potential for Universal and European Instruments



UNIWERSYTET ŚLĄSKI  
WYDAWNICTWO

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Joanna Ryszka

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# Abbreviations

- ARSIWA – International Law Commission’s Draft Articles on Responsibility of States for Internationally Wrongful Acts
- ASEAN – Association of Southeast Asian Nations
- BAGSO – German National Association of Senior Citizens’ Organisations
- CEACR – Committee of Experts on the Application of Conventions and Recommendations
- CEDAW – Convention on the Elimination of All Forms of Discrimination against Women
- CEDAW Committee – Committee on the Elimination of Discrimination against Women
- CESCR – Committee on Economic, Social and Cultural Rights
- CETS – Council of Europe Treaty Series
- CFREU – Charter of Fundamental Rights in the European Union
- CJEU – Court of Justice of the European Union
- CoE – Council of Europe
- CLCs Australia – Community Legal Centres Australia
- CONGO – Conference of Non-governmental Organizations
- COST – European Cooperation in Science and Technology
- CRPD – Convention on the Rights of Persons with Disabilities
- CRPD Committee – Committee on the Rights of Persons with Disabilities
- CSOs – civil society organisations
- DIHR – Danish Institute of Human Rights
- DISD – UNDESA Division for Inclusive Social Development
- ECHR – Convention for the Protection of Human Rights and Fundamental Freedoms, European Convention on Human Rights
- ECHR – European Convention for the Protection of Fundamental Rights and Freedoms
- ECLAC – Economic Commission for Latin America and the Caribbean
- ECSR – European Committee of Social Rights

EctHR – European Court of Human Rights  
 EGMs – Expert Group Meetings (EGMs)  
 ENNHRI – European Network of National Human Rights Institutions  
 ESC – European Social Charter of 1961  
 ESCAP – Economic and Social Commission for Asia and the Pacific  
 ETUC – European Trade Union Confederation  
 EU – European Union  
 EY2012 – European Year for Active Ageing and Solidarity between Generations  
 FIAPA – La Fédération Internationale des Associations de Personnes Âgées  
 FRA – Fundamental Rights Agency  
 GANHRI – Global Alliance of National Human Rights Institutions  
 GAROP – Global Alliance for the Rights of Older People  
 GNSH – Global Network for Sustainable Housing  
 HLPF – High-level Political Forum on Sustainable Development  
 HRBA – human rights-based approach  
 HRC – Human Rights Committee  
 IAGG – International Association of Gerontology and Geriatrics  
 ICCPR – International Covenant on Civil and Political Rights  
 ICESCR – International Covenant on Economic, Social and Cultural Rights  
 ICHRoP – International Expert-Conference on Human Rights of Older Persons  
 ICJ – International Court of Justice  
 IFA – International Federation on Ageing  
 IGO – Inter-governmental organisations  
 IIL – Institute of International Law  
 ILA – International Law Association  
 ILC – Global Alliance International Longevity Centre Global Alliance  
 ILC – International Longevity Centre  
 ILGA – International Lesbian and Gay Association  
 ILO – International Labour Organization  
 INPEA – International Network for the Prevention of Elder Abuse  
 ISSA – International Social Security Association  
 ITU – International Telecommunication Union  
 LGBT+ – lesbian, gay, bisexual, transgender, queer + others  
 LNOB – “leave no one behind”  
 LOI – List of Issues  
 MDGs – Millennium Development Goals

MIPAA – Madrid International Plan of Action on Ageing  
 NGOs – non-governmental organisations  
 NHRIs – National Human Rights Institutions  
 O.J. – Official Journal  
 OAS – Organization of American States  
 OECD – Organisation for Economic Cooperation and Development  
 OEIGWG – the open-ended intergovernmental working group on transnational corporations and other business enterprises  
 OEWGA – UN Open-ended Working Group on Ageing  
 OMC – Open Method of Coordination  
 OPCAT – Optional Protocol to the Convention Against Torture  
 OSCE – Organization for Security and Co-operation in Europe  
 OSCE PA – Organization for Security and Co-operation in Europe Parliamentary Assembly  
 para. – paragraph  
 PCIJ – Permanent Court of International Justice  
 RES – resolution  
 RESC – Revised European Social Charter  
 RIS – Regional Implementation Strategy  
 ROSEnet – Reducing Old-Age Social Exclusion: Collaborations in Research and Policy  
 SDG – Sustainable Development Goal  
 SGA – Stakeholder Group on Ageing  
 SGAA – Stakeholder Group on Ageing Africa  
 SSE – social and solidarity economy  
 TEU – Treaty on European Union  
 TVET – Convention on Technical and Vocational Education  
 U3A – Universities of the Third Age  
 UCLG – United Cities and Local Governments  
 UDHR – Universal Declaration of Human Rights  
 UHRI – Universal Human Rights Index  
 UN Independent Expert – UN Independent Expert on the enjoyment of all human rights by older persons  
 UN – United Nations  
 UNDESA – United Nations Department of Economic and Social Affairs  
 UNDG – United Nations Development Group

UNDP – United Nations Development Programme  
UNECA – the United Nations Economic Commission for Africa  
UNECE – United Nations Economic Commission for Europe  
UNECWA – United Nations Economic and Social Commission for Western Asia  
UNESCO – United Nations Educational, Scientific and Cultural Organisation  
UNFPA – United Nations Population Fund  
UNGA – United Nations General Assembly  
UNGPs – Guiding Principles on Business and Human Rights  
UN-Habitat – United Nations Human Settlements Programme  
UNHCR – Office of the United Nations High Commissioner for Refugees  
UNITAR – United Nations Institute for Training and Research  
UNTS – United Nations Treaty Series  
UN-Women – United Nations Office for Gender Equality and the Empowerment of Women  
UPR – Universal Periodic Review  
VCLT – Vienna Convention on the Law of Treaties  
Venice Commission – European Commission for Democracy through Law  
VNRs – Voluntary National Reviews  
WHO – World Health Organization

# Introduction

Various aspects of the inclusion of older people in mainstream society continue to be of interest to researchers in many disciplines. Traditionally, the research in this area has focused on human physical health and cognitive functioning. Over time, the research has expanded to include the quality of life as people age, as well as various aspects of the integration of older people into the society, including their dependency, social isolation and psychological loneliness, poverty and age discrimination. The research has also covered some economic aspects of exclusion, driven by the pressures arising from ageing populations (e.g. the uncertainty of pension schemes and poverty) and the turmoil in the global financial system.<sup>1</sup> The academic output in various branches – primarily medical, economic, and social sciences – is enormous in this field.

Meanwhile, ageing and the need for the social inclusion of older people is also a challenge to human rights law, because, despite formal equality, those concerning the older sections of society are far more vulnerable to a range of social, economic and political barriers, which effectively exclude them from the mainstream society.

Research in this field is justified by the demography trends. According to the World Population Prospect published in 2022, the share of the global population aged 65 or older will increase from 10 per cent in 2022 to 16 per cent by 2050. In Europe and North America, it is expected to reach 26.9 per cent. On the other hand, it is essential to stress that not every older person is likely or able to be marginalised, and not every older adult is vulnerable. Older age does not automatically mean exclusion, but specific social circumstances cause many older adults to find themselves outside of society's mainstream. As Titti Mattsson noted: "human beings are not more vulnerable because of

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1 Jeni Warburton, Sik Hung Ng, and Steven Shardlaw, "Social Inclusion in an Ageing World: Introduction to the Special Issue," *Ageing & Society* 33, no. 1 (2013): 2, <https://doi.org/10.1017/S0144686X12000980>.

certain characteristics or various stages in their lives. Individuals do, however, experience the world with differing levels of resilience.”<sup>2</sup>

Thus, older adults are people with different conditions, experiences, health and needs,<sup>3</sup> living in diverse social, cultural, environmental, geographical and economic circumstances.<sup>4</sup> Their situation depends not only on how they are ageing biologically, but also on factors such as their gender, race, ethnicity, sexuality, disability and socioeconomic status.<sup>5</sup>

In addition, age is not a unifying factor in the group of older adults. Who, then, should be considered old, when the difference in life expectancy in various regions of the world is almost 40 years – from 51 years in Africa to 88 years in Japan, Hong Kong and Macau? That is why the rigid definitions of an “older person” and “older age” (usually 60+ or 65+) adopted at the international level do not reflect the ambiguity of older age and heterogeneity of the older population. On the other hand, these criteria are important for statistical purposes and for gathering information about older people. However, this book refers to older people regardless of their age. Such an approach follows the proposal by the European Union Agency for Fundamental Rights to adopt intersecting perspectives to describe age and ageing, covering physical, mental and social changes that occur as a person ages.<sup>6</sup> Such an approach counteracts stereotypes relating to older people<sup>7</sup> and corresponds with the concept of the human rights-based approach.

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2 Titti Mattsson, “Age, Vulnerability and Disability,” in *Ageing, Ageism and the Law: European Perspectives on the Rights of Older Persons*, ed. Israel Issi Doron and Nena Georgantzi (Edward Elgar Publishing, 2018), 47.

3 Ivana Milas Klarić, “Is There any (Legal) Future for the Elderly?,” in *Les solidarites entre generations/ Solidarity between Generations*, ed. Hugues Fulchiron (Bruylant, 2013), 1005–1013.

4 Janet Sigal, Nélide Quintero, Emily Valente, “Human Rights and Well-Being of Older Persons: Challenges and Opportunities”, in *The Cambridge Handbook of Psychology and Human Rights*, ed. Neal S. Rubin and Roseanne L. Flores (CUP 2020), 303–16.

5 OHCHR, “Update to the 2012 Analytical Outcome Study on the normative standards in international human rights law in relation to older persons” Working Paper,” March 2021, 11, <https://social.un.org/ageing-working-group/documents/eleventh/OHCHR%20HROP%20working%20paper%2022%20Mar%202021.pdf>.

6 Fundamental Rights Agency, *Shifting Perceptions: Towards a Rights-Based Approach to Ageing*, Focus / FRA, European Union Agency for Fundamental Rights (Luxembourg: Publications Office of the European Union, 2018), 9, 10, <https://doi.org/10.2811/533946>.

7 Jonathan Herring, *Family Law* (Longman, 2007), 633.



It appears clear that social inclusion cannot be discussed in isolation from human rights, as it is a precondition for the enjoyment of human rights in practice. On the other hand, social inclusion needs action from states and other stakeholders, while they will only take steps if they recognise and understand the human rights of older people. Thus, in this volume, “instruments” are understood broadly as hard law, which is the source of states’ obligations, and soft law, with its specific methods of exercising influence on states’ behaviour and their awareness of human rights of older persons. These instruments, of course, also include secondary international law, determining whether primary rules are violated. To a certain extent, the considerations in this book also apply to the future elder international human rights law, being still in its infancy, with various stakeholders increasing influence on its formation and observance.

That is why the motivation for this research was the need to verify whether international law, of which international human rights law is a huge branch, can contribute to improving the situation of excluded older people. In its foundation, this branch of international law is primarily aimed at protecting the individual, especially the vulnerable one. At its core is the concept of equality linked to the personal dignity of the human being as an inherent value of every human being. Hence, this book is about something other than the social inclusion of older persons *per se*, namely international human rights law and its mechanisms in relation to the need to mainstream older people.

This book is a result of the research conducted as part of the long-term project –“Social and digital inclusion of older persons as a special task for NGOs. An international human rights law perspective”,<sup>8</sup> based primarily on an analysis of international human rights law – treaties, soft law, jurisprudence, the activities of international bodies and civil society organisations, as well as the effectiveness (usually potential) of human rights monitoring instruments.

Indeed, the international protection of older people’s human rights has been discussed already and this book is not the first study considering this issue. The excellent monographs *Human Rights of Older People: Universal and Regional Legal Perspectives* (2015) by Claudia Martin, Diego Rodríguez-Pinzón and Bethany Brown (2015)<sup>9</sup> and *The Human Rights of Older Persons. A Human*

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8 Financed by the National Science Centre, Poland [grant number: OPUS 16 no. 2018/31/B/HS5/00435.

9 Claudia Martin, Diego Rodríguez-Pinzón, and Bethany Brown, *Human Rights of Older People, Ius Gentium: Comparative Perspectives on Law and Justice* (Netherlands: Springer, 2015).

*Rights-Based Approach to Elder Law* by Bridget Lewis, Kelly Purser and Kirsty Mackie (2020)<sup>10</sup> should be mentioned here. Various aspects of international human rights protection of older persons appear in publications by Israel (Issi) Doron, Benny Spanier and Andrew Byrnes, and their works are invoked in almost all parts of this book. Particular attention should be paid to *Ageing, Ageism and the Law: European Perspectives on the Rights of Older Persons* edited by Israel Doron and Nena Georgantzi (2018),<sup>11</sup> as this book deals with the fight against ageism, a fundamental barrier to the social inclusion of older people. The analyses included therein refer both to vulnerability and social justice theories, as well as to various aspects of protecting older people's rights from a European perspective. In the context of the European Union law, the output of researchers from Lund University's NORMA project, with the publication *Introduction to the Norma Elder Research Environment: Different Approaches to Elder Law; the Norma Elder Law Workshop, Lund, 19 March 2013*,<sup>12</sup> edited by Ann Numhauser-Henning, should be also noted.

The present study, however, differs from the above-mentioned ones by focusing on the ability of international bodies and mechanisms to promote the social inclusion of older people and the influence of international instruments on the states' approach to older people. Moreover, the considerations of this book go beyond an analysis of the activity of the "traditional" actors of international law, as the international community needs fresh impetus from various new stakeholders to promote the human rights of older people effectively. This book is topical, because it was written during the COVID-19 pandemic and in the post-pandemic period, and therefore it addresses the response of the international community to the situation of older persons in the circumstances of the lockdown and the problems of access to healthcare. Finally, this book aims to propose a model of how to improve national ageing policies internationally. To some extent, this model draws from the five-dimensional interpretation of the protection of the human rights of older people proposed

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10 Bridget Lewis, Kelly Purser, and Kirsty Mackie, *The Human Rights of Older Persons: A Human Rights-Based Approach to Elder Law* (Singapore: Springer, 2020).

11 Israel Issi Doron and Nena Georgantzi, *Ageing, Ageism and the Law: European Perspectives on the Rights of Older Persons* (Edward Elgar Publishing, 2018).

12 Ann Numhauser-Henning, ed., *Introduction to the Norma Elder Research Environment: Different Approaches to Elder Law; the Norma Elder Law Workshop, Lund, 19 March 2013* (Lund: Univ, 2013).

by Andrew Byrnes. This interpretation requires the perception of older age as a socially constructed concept that varies according to particular social and cultural contexts, as well as the recognition of ageism and intersectionality or the many forms of discrimination concerning older people. This is known as the “life course approach” and takes into account the impact of a person’s previous life experiences on their situation in old age. It is also essential in order to prevent human rights violations in old age. Another dimension on Byrnes’s list is the reorientation (the paradigm shift) in thinking about ageing, its social and economic implications and the place of older people in ageing societies.<sup>13</sup> A paradigm shift from perceiving older persons as passive beneficiaries of medical or social assistance to full human rights holders, partners and contributors is a critical element of their social inclusion.

Thus, the paradigm shift is one of three main elements of the model of pushing states to take action towards the social inclusion of older people. Apart from the involvement of various stakeholders (states and other actors) in the process of the “paradigm shift”, this element is to raise the international community’s awareness of human rights in older age, ageism and the intersectionality of discrimination. Finally, mainstreaming ageing while performing international obligations by states is indispensable for making older people’s rights a reality.

The main premise of this study is that international human rights instruments can contribute to changing the current paradigm in the perception of older persons, thereby improving, at least indirectly, their social integration in the domestic forum. The aim of this work, therefore, is to evaluate the potential of human rights law in this area and to reveal any loopholes in the international protection of older people’s rights.

To achieve this goal, the book is divided into six chapters. The first part of the work deals with the visibility, or lack thereof, and the understanding of the concept of age, ageing and of older people on the international forum. Chapter One is devoted to understanding of the concept of social inclusion of older people in the international form and its interdependence with human rights. It indicates the concepts of intergenerational solidarity, a human rights-based approach, the mainstreaming of ageing and the main message from the Agenda 2030 – “leave no one behind” – which opens the door to

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13 Andrew Byrnes, “Older Persons,” in *Elgar Encyclopedia of Human Rights*, ed. Christina Binder et al. (Northampton: Edward Elgar Publishing, 2022), 595.

understanding the social inclusion of older people. Chapter Two looks at the history of recognising the human rights of older people on the international forum – from the reluctance to single out these rights in the international human rights law system to the first nucleus of international ageing law. The central hypothesis of this section is that international ageing law will only be complete with a treaty dedicated to the rights of older people. Chapter Three offers an analysis of the existing universal and European international law provisions that (should) refer to older people. It discusses the nature of states' obligations and interpretative instruments that may contribute to (or impede) the identification of states' obligations to respect, protect and fulfil the rights of older people. The fourth chapter complements the previous one in that it reviews human rights monitoring mechanisms and considers their usefulness in influencing states to foster older people's enjoyment of human rights. Social inclusion requires the action of many actors, including older people themselves, and not just governments. Therefore, Chapter Five is a search for those actors who have the potential to act in favour of older people, both nationally and internationally. Finally, Chapter Six corresponds to that part of the proposed model for influencing states that addresses the need to combat ageism and recognise the intersectionality of discrimination against older people. The last subsection reviews barriers to the social inclusion of older people in practice, based on NGOs' submissions to the 13th session of the United Nations Open-Ended Working Group on Ageing (OEWGA) held in April 2023.

The scope of the research presented in this study has been narrowed down to global and European forums. This limitation is related to the desire to examine dynamic systems that are continuously under construction, or which use various soft instruments to replace hard norms on older persons. Within the Organization of American States and the African Union, regional treaties have already been adopted that represent a certain circumscribed level to which states aspire or should aspire. These are, therefore, relatively entrenched systems. By contrast, the situation in the global and European forums, where there is no treaty on the rights of older people, leaves much more room to interpret the existing legislation. At the same time, there are also many more gaps and ambiguities to be explained in this area.

For this reason, this study examines selected provisions and procedures of universal international law, as well as comments, reports and studies by human rights bodies, with the aim of clarifying the essence of the rights of older

people and the obligations of states in this regard, as well as identifying steps to foster the social inclusion of older people. The procedures and provisions of regional international law adopted within the Council of Europe are also explored. Although the law of the European Union is an autonomous legal order of a *sui generis* nature, it is also covered by this research. After all, EU solutions affect the fate of millions of Europeans, with EU law going deeply into the sphere of human rights, including those of older people, notably through the EU Charter of Fundamental Rights.

This book is not only addressed to human rights researchers, but also all stakeholders interested in working on behalf of those older people who are facing barriers to social inclusion. Therefore, the book not only contains an analysis of the legislation and references to the scholarship's output, but also provides a brief explanation of the nature of various human rights instruments.



# Chapter One

## Conceptualising the Social Inclusion of Older People in a Global and European Agenda

### 1. Values and benchmarks

The core of social inclusion lies in the values protected by international law and in most constitutions.<sup>1</sup> For this reason, this volume begins with a reference to dignity and other values and processes that are decisive for full participation in society and the enjoyment of human rights. Human dignity appears as an essential value shared globally by the international community, regardless of cultural traditions and the legal system.<sup>2</sup> In the European legal space, states in the framework of regional organisations have created “the most sophisticated international legal and institutional framework for human rights in the world, based on equality and personal dignity as fundamental axioms of legal and human protection”.<sup>3</sup> On the other hand, dignity is an ambiguous, controversial and complex concept that is not easy to put into a legal frame, as it brings many interpretative difficulties<sup>4</sup> causing it to be questioned as a source

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1 Doron Shultziner and Guy E. Carmi, “Human Dignity in National Constitutions: Functions, Promises and Danger,” *The American Journal of Comparative Law*, 62, no. 2 (2014): 461–90, <https://doi.org/10.5131/AJCL.2014.0003>.

2 Hoda Mahmoudi, “Universal Consciousness of Human Dignity,” in *Interdisciplinary Perspectives on Human Dignity and Human Rights*, ed. Hoda Mahmoudi, Michael L. Penn (Bingley: Emerald Publishing Limited, 2020), 21, 10.1108/978-1-78973-821-620191002.

3 Iwona Wrońska, “An Axiology of the European Legal Space,” *Forum Prawnicze*, no. 6(62) (16 December 2020): 11, [https://doi.org/10.32082/fp.voi6\(62\).36](https://doi.org/10.32082/fp.voi6(62).36).

4 For example: Henk Botha, “Human Dignity in Comparative Perspective,” *Stellenbosch Law Review*, 20, no. 2 (2009): 171–220, <http://hdl.handle.net/10019.1/103998>; Catherine Dupré, *The Age of Dignity: Human Rights and Constitutionalism in Europe* (Oxford; Portland, Oregon: Hart Publishing, 2015); Christian Erk, *Health, Rights and Dignity: Philosophical Reflections*

of human rights.<sup>5</sup> However, despite all the interpretative problems, since work began on the Universal Declaration of Human Rights (UNHR)<sup>6</sup>, it has been constantly invoked on international forums and recognised as the basis for human rights and for gap-filling in their interpretation.<sup>7</sup>

Scholars have indicated many functions of dignity, but for this study, its function to protect those most vulnerable,<sup>8</sup> including those excluded or at risk of exclusion, is the most important. Interpreting dignity as, among other things, respect, the right to respect and the right to respectful treatment<sup>9</sup> is

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*on an Alleged Human Right* (Paris, Frankfurt, Lancasters, New Brunswick: Ontos Verlag, 2011); Jürgen Habermas, "The Concept of Human Dignity and the Realistic Utopia of Human Rights" *Metaphilosophy*, 41, no. 4 (2010): 464–80; Michael Karlberg, "Reframing Human Dignity," in *Interdisciplinary Perspectives on Human Dignity and Human Rights*, ed. Hoda Mahmoudi Michael L. Penn (Bingley: Emerald Publishing Limited, 2020), 35–48, doi.org/10.1108/978-1-78973-821-620191004; Mahmoudi, "Universal Consciousness of Human Dignity"; Christopher McCrudden, "Human Dignity and Judicial Interpretation of Human Rights," *European Journal of International Law*, 19, no. 4 (2008): 655–724, https://doi.org/10.1093/ejil/chn043; Michael Rosen, *Dignity. Its History and Meaning* (Cambridge Massachusetts and London: Harvard University Press, 2012); Judge Christian Byk, "Is Human Dignity a Useless Concept? Legal Perspectives," in *The Cambridge Handbook of Human Dignity*, ed. Marcus Düwell, Jens Braarvig, Roger Brownsword and Dietmar Mieth (Cambridge: Cambridge University Press, 2014), 362–67; Govert Den Hartogh, "Is Human Dignity the Ground of Human Rights?" in *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives*, ed. Marcus Düwell, Jens Braarvig, Roger Brownsword and Dietmar Mieth (Cambridge: Cambridge University Press, 2014), 200–207.

5 Doris Schroeder, "Human Rights and Human Dignity. An Appeal to Separate the Conjoined Twins," *Ethical Theory and Moral Practice*, 15 (2012): 323–35, https://doi.org/10.1007/s10677-011-9326-3.

6 UN General Assembly, "Universal Declaration of Human Rights Adopted by the United Nations General Assembly in Paris on 10 December 1948 General Assembly Resolution 217 A." 1948, https://www.un.org/en/ga/search/view\_doc.asp?symbol=A/RES/217(III).

7 Glenn Hughes, "The Concept of Dignity in the Universal Declaration of Human Rights," *The Journal of Religious Ethics*, 39, no. 1 (2011): 1–24, http://www.jstor.org/stable/23020122; M Glen Johnson and Janusz Symonides, *The Universal Declaration of Human Rights A History of Its Creation and Implementation 1948–1998* (Paris: UNESCO Publishing, 1998); Pinghua Sun, "P. C. Chang's Concept of Human Dignity for the Universal Declaration of Human Rights," *Journal of East Asia & International Law*, 12, no. 1 (2019), https://doi.org/10.14330/jeail.2019.12.1.05.

8 Shultziner and Carmi, "Human Dignity in National Constitutions: Functions, Promises and Danger," 479.

9 Erk, *Health, Rights and Dignity: Philosophical Reflections on an Alleged Human Right*, 230; Rosen, *Dignity. Its History and Meaning*, 54.



also crucial in light of the prevalent phenomena of ageism and elder abuse. Finally, the concept of linking dignity with the process of empowerment<sup>10</sup> is critical for anyone who is excluded. Understanding this is principal for older adults, because, as Robert N. Butler noted, one of the greatest losses that ageing brings is the loss of choice.<sup>11</sup>

Dignity is a reference point for other values and the legal norms protecting them, including freedom, understood also as autonomy, which is another value necessary for inclusion. Michael Marmot defines “autonomy” as having control over own life and enjoying the opportunities “for full social engagement and participation are crucial for health, well-being and longevity”.<sup>12</sup> Autonomy is the right to decide on matters of daily life, property, income, finances, place of residence treatment, end-of-life care and funeral following their beliefs.<sup>13</sup>

That is why inclusive actions taken by various actors (e.g. governments, local authorities, NGOs, institutions, the private sector<sup>14</sup>) should lead to granting an individual the right to freely shape their own situation.<sup>15</sup> According to Amartya Sen, whole generations should also be given the freedom and possibility to evaluate and identify their own goals.<sup>16</sup>

A further basis for social inclusion is equity, as human beings are “free and equal” in their dignity.<sup>17</sup> Equity refers to how fairly services, opportunities and

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10 Charles R. Beitz, “Human Dignity in the Theory of Human Rights: Nothing But a Phrase?” *Philosophy & Public Affairs*, 41, no. 3 (2013): 289, <https://doi.org/10.1111/papa.12017>.

11 Robert N. Butler, “Age-Is: Another Form of Bigotry,” *The Gerontologist*, 9, no. 4 (1969): 246, [https://doi.org/10.1093/geront/9.4\\_Part\\_1.243](https://doi.org/10.1093/geront/9.4_Part_1.243).

12 Michael Marmot, *The Status Syndrome: How Your Social Standing Directly Affects Our Health and Life Expectancy* (London: Bloomsbury, 2004), 2.

13 Anna Mäki-Petäjä-Leinonen and Suvi-Maria Saarelainen, “Funeral Wills and the Autonomy of a Dying Person: Experiences of Older People in Palliative Care and Their Carers,” *International Journal of Law, Policy and the Family*, 35, no. 1 (March 18, 2021): 7, <https://doi.org/10.1093/lawfam/ebab034>; Committee of Ministers of the Council of Europe, “Explanatory Memorandum of Recommendation CM/Rec(2014)2 of the Committee of Ministers to Member States on the Promotion of Human Rights of Older Persons,” 35.

14 For example hospitals, care institutions, housing sector.

15 Magdalena Małecka-Łyszczek and Radosław Mędrzycki, “Axiological Paradigm of Social Inclusion Intensification – Selected Remarks,” *Review of European and Comparative Law*, XXXVIII (2019): 83–85, <https://doi.org/10.31743/recl.4826>.

16 Amartya Sen, “The Ends and Means of Sustainability,” *Journal of Human Development and Capabilities*, 14, (February 2013): 6–20, <https://doi.org/10.1080/19452829.2012.747492>.

17 Rosen, *Dignity. Its History and Meaning*, 38.

access are distributed across groups of people or places. Equal access to health-care services, education, new technologies, culture, etc. is crucial for the social inclusion of older adults. Equity and freedom should be considered together with common welfare. Common welfare should be a guideline for inclusive and compensatory actions for persons suffering from social exclusion.<sup>18</sup>

Freedom and equality are looked at by Rosie Harding in her considerations on theoretical fundamentals of new international human rights protection for older people. She investigates the effectiveness of various theoretical approaches to equality and its aspects – equality of resources, recognition, power and condition. However, she argues that in the case of older persons, a heterogeneous and non-normative group who experiences intersectional inequalities and social injustices on a daily basis, it is difficult to effectively counteract these inequalities. That is why she refers to the work of Amartya Sen and Martha Nussbaum offering the “capabilities approach”, which could be the most persuasive conceptual basis for a new convention on older persons. Under this approach, rather than focusing on inequalities as the centre of regulatory or governmental action, the focus should be on meeting the needs of older persons and giving them the freedom to be and do what they choose or value.<sup>19</sup> This interpretation supports the paradigm shift about older people as subjects able to exercise their rights and make conscious decisions, rather than as objects of social protection.

Finally, the value of solidarity is associated with all the previously mentioned values. Indeed, like those other values, solidarity is understood and defined in various ways and different authors highlight different aspects of it. According to Ruud ter Muelen, solidarity arises from the inherent dignity of all human beings and “connects a concern for the well-being of the other with the universality of human rights and the protection of dignity.”<sup>20</sup> For this study, essential aspects of solidarity are those aimed at building a common society,

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18 Małecka-Łyszczek and Mędrzycki, “Axiological Paradigm of Social Inclusion Intensification – Selected Remarks,” 86–88.

19 Rosie Harding, “Equality, Social Justice and Older People,” in *Ageing, Ageism and the Law: European Perspectives on the Rights of Older Persons*, ed. Israel Doron and Nena Georgantzi, Elgar Studies in Law and Society (Cheltenham, UK: Edward Elgar Publishing, 2018), 29–33.

20 Ruud ter Muelen, “Solidarity, Justice, and Recognition of the Other,” *Theoretical Medicine and Bioethics*, 37, no. 6 (2016): 525, <https://doi.org/10.1007/s11017-016-9387-3>.

motivated by “us”, and based on identification with the values of humanity and responsibility for the other, while also not being confused with charity.<sup>21</sup>

Meanwhile, solidarity requires accountability covering compassion (e.g. of social workers and caregivers) and justice understood as fairness.<sup>22</sup> Indeed, John Rawls’s interpretation of justice as fairness, and his assumption that social and economic inequalities should be to the most significant benefit of the least-advantaged members of society, may be additional guidelines for understanding social inclusion.<sup>23</sup>

Although the values underpinning social inclusion, such as dignity, freedom or equality, have broken through to the international agenda, there is no legally binding definition of social inclusion as such in international law. Moreover, there is no general human right of each person to social inclusion expressed explicitly in contemporary human rights law. However, this does not mean that international human rights law does not address social inclusion at all. The right to social inclusion is, in fact, a conglomerate of many rights of various social, civil and cultural categories that should be enjoyed by all, regardless of age.

The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR),<sup>24</sup> the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>25</sup> and regional human rights law set a standard for the promotion of social inclusion and the protection of all vulnerable individuals.<sup>26</sup> Their provisions recognising everyone’s right “to take

21 Małecka-Lyszczek and Mędrzycki, “Axiological Paradigm of Social Inclusion Intensification – Selected Remarks,” 91; ter Muelen, “Solidarity, Justice, and Recognition of the Other,” 527.

22 Sarah B. Garlington, Mary Elizabeth Collins, and Margaret R. Durham Bossaller, “An Ethical Foundation for Social Good: Virtue Theory and Solidarity,” *Research on Social Work Practice*, 30, no. 2 (2020): 199, <https://doi.org/10.1177/1049731519863487>.

23 John Rawls, *Theory of Justice. Revised Edition* (Cambridge, MA: The Belknap Press of Harvard University Press, 1999), 65.

24 United Nations, “International Covenant on Civil and Political Rights,” New York, 16 December 1966 (UNTS, vol. 999, p. 171 and vol. 1057, p. 407).

25 United Nations, “International Covenant on Economic, Social and Cultural Rights,” New York, 16 December 1966, (UNTS vol. 993, p. 3).

26 Joshua Castellino and Sarah Bradshaw, “Sustainable Development and Social Inclusion: Why a Changed Approach Is Central to Combating Vulnerability, 24 459 (2015),” *Washington International Journal Law Journal Association*, 24, no. 3 (2015): 459, <https://digitalcommons.law.uw.edu/wilj/vol24/iss3/4>.

part in the conduct of public affairs” (ICCPR) or the right “to take part in cultural life” (ICESCR) are the best examples.

The relevant provisions fostering social inclusion may also be found in regional human rights law, the International Labour Organization and UNESCO conventions and recommendations. Ann Taket, following the Committee on Economic, Social and Cultural Rights (CESCR), also notes that the right to the highest attainable standard of health (ICESCR, the Constitution of the World Health Organization) or of “a living adequate for health and wellbeing” (UDHR) covers the right to participation in all health-related decision-making at all levels, from individual care decisions to planning and policymaking.<sup>27</sup>

However, the treaty provisions on the rights of persons with disabilities are worth special attention, as they proclaim their right to social integration or to “being included in the community”. The Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities of 1999, in its Article III, obliges states to adopt long-range legislative, social, educational, labour-related and other measures needed to eliminate discrimination against people with disabilities and to promote their full integration into society.<sup>28</sup> The right of people with disabilities to independence, social integration and participation in community life is stipulated in Article 15 of the Revised European Social Charter (RESC). It imposes various obligations on states “with a view to ensuring to persons with disabilities, irrespective of age and the nature and origin of their disabilities, the effective exercise of the right to independence, social integration and participation in the life of the community”.<sup>29</sup>

Finally, Article 19 of the Convention on the Rights of Persons with Disabilities (CRPD) of 2006, titled “Living independently and being included in the community”, is of particular importance as it clearly links the independ-

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27 Ann Taket, “Social Inclusion and Human Rights,” in *Handbook of Social Inclusion*, ed. Pranee Liamputtong (Cham: Springer International Publishing, 2022), 97, [https://doi.org/10.1007/978-3-030-89594-5\\_5](https://doi.org/10.1007/978-3-030-89594-5_5); CESCR, “General Comment No 14: The Right to the Highest Attainable Standard of Health (Art. 12), 11 August 2000, E/C.12/2000/4,” August 11, 2000.

28 Organization of American States, “Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities,” 7 June 1999, AG/RES. 1608 (XXIX-O/99).

29 Council of Europe, “European Social Charter (Revised),” Strasbourg, 03 May 1996, (CETS, No. 163).

ent living and the right to decide on one's own place of residence with living in a community:

States Parties to the present Convention recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:

- a) Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement;
- b) Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community;
- c) Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs.<sup>30</sup>

The CPRD and other international norms on people with disabilities have a limited impact on the situation of older persons, who are disadvantaged not for medical reasons but because of social structures based on their chronological age.<sup>31</sup> Moreover, the cited norms refer to only a few aspects of inclusion, mainly connected with a place of living. On the other hand, these provisions, especially Article 19 of the CRPD, can guide how to understand older people's social inclusion. For older people and those with disabilities (as well as older people with disabilities), autonomy in making decisions about their own affairs is a pre-condition for social inclusion.

As older people cannot enjoy their own convention, discussion on their social inclusion should be started by explaining how and in what context social inclusion, especially of older people, is presented on international forums by human rights bodies and various assemblies.

30 United Nations, "Convention on the Rights of Persons with Disabilities," New York 13 December 2006, (UNTS 2515, vol. 2515, p. 3).

31 Paul Harpur, "Old Age Is Not Just Impairment: The CRPD and the Need for a Convention on Older Persons," *University of Pennsylvania Journal of International Law*, 37, no. 3 (2016): 1051.

## 2. Indicating the facets of exclusion

The concept of social inclusion has emerged on the international agenda as a remedy to the social exclusion of various vulnerable groups or individuals. The Expert Group Meetings (EGMs) gathering experts from the UN system, governments, academia, think tanks, and civil society, can be a starting point for further considerations. EGMs, in the report “Vision for an Inclusive Society” prepared for the United Nations Department of Economic and Social Affairs (UNDESA), proposed the following definition of social exclusion:<sup>32</sup>

[S]ocial exclusion is understood as the condition (barriers and process) that impede social inclusion. Social exclusion is a process through which individuals or groups are wholly or partially excluded from fully participating in all aspects of life of the society, in which they live, on the grounds of their social identities, such as age, gender, race, ethnicity, culture or language, and/or physical, economic, social disadvantages. Social exclusion may mean the lack of voice, lack of recognition, or lack of capacity for active participation. It may also mean exclusion from decent work, assets, land, opportunities, access to social services and/or political representation.<sup>33</sup>

The report indicates various areas of exclusion and gives directions for actions for inclusion, such as cultural, economic, social, environmental, legal, physical, political, relational and spatial. The experts have also revealed that exclusion might be manifested through:

- exclusive policies and legislation;
- lack of respect for human rights, discrimination, intolerance, stigma, stereotyping, violence and abuse;

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32 There are certainly many definitions of social exclusion, with the one proposed in the UNDESA Report on the World Social Situation 2016 describing social exclusion in a very general way: “social exclusion refers to a state in which individuals are unable to participate fully in economic, social, political and cultural life, as well as the process leading to and sustaining such a state” UNDESA, “Leaving No One behind: The Imperative of Inclusive Development Report on the World Social Situation 2016,” ST/ESA/362, 4, <https://www.un.org/esa/socdev/rwss/2016/full-report.pdf>. However, taking into account the further considerations, the EGMs’ definition as the most comprehensive, is worthy of particular attention.

33 UNDESA, “Vision for an Inclusive Society (Draft),” 2009, 3, <https://www.un.org/esa/socdev/documents/compilation-brochure.pdf>.

- lack of access to essential services, including education and healthcare;
- lack of access to decent work and employment, as well as resources to sustain a livelihood;
- lack of access to land, credits, transportation, information and communications, as well as public spaces;
- lack of transparency in decision making and access to political processes.<sup>34</sup>

All the aspects of older persons' exclusion have been also identified in scholarship: economic exclusion in the area of production and consumption; political exclusion, which manifests itself in impediments to participation in the political life of society; social exclusion consisting in reduced contacts in family and non-family relationships; and lastly, social exclusion, consisting in absence from mass culture, social communication and public space.<sup>35</sup>

Kieran Walsh and colleagues hit upon the heart of exclusion in old age, describing it as a complex process that

[i]nvolves interchanges between multi-level risk factors, processes and outcomes. Varying in form and degree across the older adult life course, its complexity, impact and prevalence are amplified by old-age vulnerabilities, an accumulated disadvantage for some groups and constrained opportunities to ameliorate exclusion. Old-age exclusion leads to inequities in choice and control, resources and relationships, and power and rights in key domains of neighbourhood and community; services, amenities and mobility; material and financial resources; social relations; sociocultural aspects of society; and civic participation. Old-age exclusion implicates states, societies, communities and individuals.<sup>36</sup>

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34 UNDESA, "Vision for an Inclusive Society (Draft)".

35 Tania Burchardt, Julian Le Grand, and David Piachaud, "Degrees of Exclusion: Developing a Dynamic, Multidimensional Measure," in *Understanding Social Exclusion*, ed. John Hills, Julian Le Grand, and David Piachaud (Oxford: Oxford University Press, 2002), 30–43; Barbara Szatur-Jaworska, "Polityka Społeczna Wobec Starzenia Się Ludności – Propozycja Konceptualizacji Pojęcia," *Studia Oeconomica Posnaniensia*, 4, no. 9 (2016): 7–27.

36 Kieran Walsh, Thomas Scharf, and Norah Keating, "Social Exclusion of Older Persons: A Scoping Review and Conceptual Framework," *European Journal of Ageing*, 14, no. 1 (March 2017): 93, <https://doi.org/10.1007/s10433-016-0398-8>; See also: RosNET, "Multidimensional Social Exclusion in Later Life: Briefing Paper and a Roadmap for Future Collaborations in Research and Policy," in K. Walsh and T. Scharf (Series Eds.), *ROSEnet Briefing Paper Series: no 6. CA 15122 Reducing Old-Age Exclusion: Collaborations in Research and Policy*, 2020, [http://rosenetcost.com/wp-content/uploads/2017/01/cost\\_rosenet\\_actionpolicy6\\_web.pdf](http://rosenetcost.com/wp-content/uploads/2017/01/cost_rosenet_actionpolicy6_web.pdf).

This definition as well as afore-mentioned aspects of older persons' exclusion are identified in the report submitted to the UN General Assembly in 2018 by the UN Independent Expert on the enjoyment of all human rights by older persons (further: UN Independent Expert). The report is entirely devoted to the exclusion of older persons.<sup>37</sup>

The UN Independent Expert, Rosa Kornfeld-Matte,<sup>38</sup> paid a good deal of attention to older persons' exclusion from material and financial resources, especially women's. She noted that "[P]overty can exacerbate the denial of basic human rights as well as limit choices and opportunities for a tolerable life. In many societies, older persons comprise a disproportionate number of the poor, the persistent poor and the poorest among the poor".<sup>39</sup>

Indeed, social exclusion is not limited to material deprivation. Poverty is an important aspect of exclusion, but only one of many others. That is why the Independent Expert referred to manifestations of social exclusion in other spheres, including spatial planning, socioeconomic segregation and the gentrification of areas where older persons live. She also indicates stereotypes and prejudices, the lack of acknowledgement of their contributions, and their untapped potential as the main barriers to securing human rights and social inclusion. The report analyses the obstacles to enjoying the rights to housing, protection, work, health and independent living in the community. For the Independent Expert, it is crucial that older persons can age in place and thoroughly enjoy their right to adequate housing. She refers to the New Urban Agenda adopted at the United Nations Conference on Housing and Sustainable Urban Development (Habitat III), which offers a set of guidelines for states, local and regional authorities, civil society, United Nations agencies and other stakeholders on creating inclusive, fair, safe, healthy and sustainable environments and policies.<sup>40</sup>

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37 UN Independent Expert, "Report of the Independent Expert on the Enjoyment of All Human Rights by Older Persons (the Impact of the Social Exclusion of Older Persons)," 10 July, 2018, A/HRC/39/50.

38 The first UN Independent Expert on the enjoyment of all human rights by older persons, Ms. Rosa Kornfeld-Matte from Chile, was appointed by the UN Human Rights Council in May 2014 and held this position until May 2020.

39 UN Independent Expert, "Report of the Independent Expert on the Enjoyment of All Human Rights by Older Persons (The Impact of the Social Exclusion of Older Persons)," 6.

40 UN General Assembly, "New Urban Agenda, Resolution," 23 December 2016, A/RES/71/256.



Similar aspects of exclusion were noted in the report prepared for the European Commission, “Strategies for supporting social inclusion at older age” in 2019. The report lists various factors that may lead to social exclusion, isolation, and loneliness. The report shows that people with poor health, with sensory and mobility impairments are ten times more likely to be lonely or socially isolated. Unemployed widowed people living alone also face a higher risk of loneliness and social isolation, which exacerbates with age. People with low income (especially women) or debt also tend to have a higher risk of emotional and/or social loneliness. The loneliness, social isolation and social exclusion of older persons may also be linked with living in declining regions where younger people have moved away, the remaining population has limited public transport and restricted access to health and social services, or other types of support. In cities, older inhabitants can be confronted with more expensive housing costs, so they cannot move out of inappropriate housing, such as apartments with no lifts. Language and cultural barriers are other reasons for the isolation of older migrants and members of ethnic minorities.<sup>41</sup>

Indeed, loneliness and social isolation are closely connected with the exclusion of older persons and should be considered in ageing policies and creating a legal framework for protecting older persons. The COVID-19 pandemic deepened older persons’ isolation and loneliness. The situation of older persons during lockdowns encouraged a reconsideration of the whole idea about the “human right against social deprivation”, as proposed by Kimberly Brownlee to meet the human need for minimally adequate access to social contact. She defines “social deprivation” as “a persisting lack of minimally adequate opportunities for decent or supportive human contact including interpersonal interaction, associative inclusion, and interdependent care”.<sup>42</sup>

Moreover, the pandemic revealed the significant scale of exclusion of the older population in the digital sphere, not only due to the lack of access to devices, but as a result of the lack of appropriate skills and self-exclusion from

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41 European Commission, “Directorate-General for Employment, Social Affairs and Inclusion: Peer Review on ‘Strategies for Supporting Social Inclusion at Older Age’,” Berlin (Germany), 23–24 September 2019, <https://ec.europa.eu/social/main.jsp?langId=en&catId=1024&furtherNews=yes&newsId=9418>; UNECE, “Approaches to Measuring Social Exclusion. Prepared by the UNECE Task Force on the Measurement of Social Exclusion,” 2022, <https://unece.org/statistics/publications/approaches-measuring-social-exclusion>.

42 Kimberly Brownlee, “A Human Rights against Social Deprivation,” *The Philosophical Quarterly*, 63, no. 251 (2013): 199, <https://doi.org/10.1111/1467-9213.12018>.

using the internet.<sup>43</sup> Meanwhile, in the contemporary world, particular attention is paid to digital exclusion or self-exclusion, as the information society incorporates into its networks the individuals and groups that are the most valuable to them, namely those with relevant information skills. At the same time, it excludes individuals without relevant skills and access to a global network, while also reducing their chances for inclusion.<sup>44</sup>

Very often older adults have no chance to obtain relevant skills. The UNDESA in its contribution to the 13<sup>th</sup> session of the UN Open-ended Working Group on Ageing (OEWGA)<sup>45</sup> dedicated to the social inclusion of older persons, argues that in many countries, due to the high costs of education, digital learning platforms, and the privatisation of institutions of higher learning, many older persons are systematically left out in education. Legal age limits that prevent the full and equal participation of older persons in various spheres of life (employment, vocational training) are another source of exclusion indicated by the UNDESA.<sup>46</sup> Certainly, the intensity and nature of the reasons for excluding

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43 Council of the European Union, "Human Rights, Participation and Well-Being of Older Persons in the Era of Digitalisation. Council Conclusions, 11717/2/20, SOC 607," 2020; UN Independent Expert, "Impact of the Coronavirus Disease (COVID-19) on the Enjoyment of All Human Rights by Older Persons. Report of the Independent Expert on the Enjoyment of All Human Rights by Older Persons, Claudia Mahler," 21 July 2020, A/75/205; Stefania Milan, "Techno-Solutionism and the Standard Human in the Making of the COVID-19 Pandemic," *Big Data & Society*, 7, no. 2 (2020): epub, <https://doi.org/10.1177/2053951720966781>; Alexander Seifert, "The Digital Exclusion of Older Adults during the COVID-19 Pandemic," *Journal of Gerontological Social Work*, 63:6-7, 63, no. 6-7 (2020): 674-76, <https://doi.org/10.180/01634372.2020.1764687>; Alexander Seifert, Sheila R. Cotten, and Bo Xie, "The Digital Exclusion of Older Adults during the COVID-19 Pandemic," *The Journals of Gerontology. Series B*, 76, no. 3 (2021): e99-103, <https://doi.org/10.1093/geronb/gbaa098>.

44 Manuel Castells and Peka Himanen, *The Information Society and the Welfare State: The Finnish Model* (SITRA Helsinki: Oxford University Press, 2002); Barbara Mikołajczyk, "Universal Human Rights Instruments and Digital Literacy of Older Persons," *The International Journal of Human Rights*, 27, no. 3 (March 16, 2023): 404, <https://doi.org/10.1080/13642987.2022.2131772>.

45 The primary forum for debate as to the adoption of a treaty on the human rights of older persons. About the OEWGA see Chapter Two and Chapter Six.

46 UNDESA, "Substantive Inputs on the Focus Area 'Social Inclusion'. Working Document Submitted by the Department of Economic and Social Affairs (DESA)," 20 March 2023, A/AC.278/2023/CRP.4.

older people from mainstream society, including the information society, vary from region to region, country to country, and community to community.<sup>47</sup>

### 3. Social inclusion as a response – general remarks

The “history” of social inclusion on the international forum began when “the inclusive society as a society for all” as one of the key factors of social development was indicated at the Copenhagen World Summit for Social Development in 1995. The general message of the Copenhagen Declaration and the Plan of Action is that every individual, each with rights and responsibilities, has an active role to play in an inclusive society.<sup>48</sup> This concept can also be identified among the Millennium Development Goals (MDGs), even though the Millennium Declaration does not mention *expressis verbis* “inclusive society” or “social inclusion”.<sup>49</sup> However, it reached its apogee in the 2030 Agenda for Sustainable Development adopted in 2015.<sup>50</sup> The 2030 Agenda’s slogan, “leave no one behind”, affected the shift in the centre of gravity from addressing exclusion on the international forum to inclusion. Finally, after years of framing social exclusion, international bodies and assemblies have started to place more emphasis on the promotion of social integration, cohesion, and social inclusion.

Promoting universal social, economic and political inclusion is one of the targets in the framework of Sustainable Development Goal (SDG) No 10, which calls for reducing inequality within and among countries. As explained in the UN Department on Economic and Social Affairs’ report of 2016, social inclusion in the 2030 Agenda is understood as a goal, but also as a process of “improving the terms of participation in society, particularly for people who are disadvantaged on the basis of age, sex, disability, race, ethnicity, origin, re-

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47 Sunwoo Lee, “Social Exclusion and Subjective Well-Being Among Older Adults in Europe: Findings From the European Social Survey,” *The Journals of Gerontology. Series B*, 72, no. 2 (2021): 425–34, <https://doi.org/10.1093/geronb/gbaa172>.

48 World Summit for Social Development, “Copenhagen Declaration on Social Development – World Summit for Social Development,” 14 March 1995, A/CONF.166/9.

49 UN General Assembly, “United Nations Millennium Declaration,” 18 September 2000, A/RES/55/2.

50 UN General Assembly, “Transforming Our World: The 2030 Agenda for Sustainable Development,” 25 September 2015, A/RES/70/1.

ligion, or economic or other status, through enhancing opportunities, access to resources, voice and respect for rights".<sup>51</sup>

However, the Expert Group Meeting in Paris proposed precise steps to achieve social inclusion for various vulnerable groups. It is reasonable as these groups should firstly become recognised and visible in society, and then their needs should be considered by policymakers. Moreover, they must have access to social interactions, services (housing, education, transport, healthcare, cultural life, etc.) and resources (financial, physical and others) to fully participate in society. If their needs and rights are not met, they should have the right to claim redress.<sup>52</sup>

In seeking to develop a definition of social inclusion, the EMG also dealt with other concepts, without which such a definition would be incomplete and would not reflect the essence of inclusion. For this reason, it is also worth quoting them:

*Social integration* – a dynamic and principled process of promoting the values, relations and institutions that enable all people to participate in social, economic, cultural and political life on the basis of equality of rights, equity and dignity. It is the process in which societies engage in order to foster societies that are stable, safe and just – societies that are based on the promotion and protection of all human rights, as well as respect for and value of dignity of each individual, diversity, pluralism, tolerance, non-discrimination, non-violence, equality of opportunity, solidarity, security, and participation of all people, including disadvantaged and vulnerable groups and persons.

*Social cohesion* – refers to the elements that bring and hold people together in society. In a socially cohesive society all individuals and groups have a sense of belonging, participation, inclusion, recognition and legitimacy. Social cohesive societies are not necessarily demographically homogenous. Rather, by respecting diversity, they harness the potential residing in their societal diversity (in

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51 UNDESA, "Leaving No One Behind: The Imperative of Inclusive Development Report on the World Social Situation 2016," 17.

52 Zana Marie Lutfiyya and Nadine Bartlett, A., "Inclusive Societies," in *Oxford Encyclopedia of Inclusive and Special Education*, ed. Umesh Sharma and Spencer Salend (New York: Oxford University Press, 2020), DOI: 10.1093/acrefore/9780190264093.013.1022; UNDESA, "Recommendations of the Expert Group Meeting on Creating an Inclusive Society: Practical Strategies to Promote Social Integration Paris, France 10 – 13 September 2007," <https://www.un.org/esa/socdev/sib/egm%2707/documents/recommendations-final.pdf>.

terms of ideas, opinions, skills, etc.). Therefore, they are less prone to slip into destructive patterns of tension and conflict when different interests collide.

*Social participation* is understood as the act of engaging in society's activities. It refers to the possibility to influence decisions and have access to decision-making processes. Social participation creates mutual trust among individuals, which forms the basis for shared responsibilities towards the community and society.<sup>53</sup>

Finally, EMG proposed that

*social inclusion* is understood as a process by which efforts are made to ensure equal opportunities for all, regardless of their background, so that they can achieve their full potential in life. It is a multi-dimensional process aimed at creating conditions which enable full and active participation of every member of the society in all aspects of life, including civic, social, economic, and political activities, as well as participation in decision-making processes.<sup>54</sup>

In other words, social inclusion is a process based on improving the ability, opportunity and dignity of disadvantaged persons and groups, as well as their participation in the decision-making process in cases that affect their lives and their human rights.<sup>55</sup>

Social inclusion, therefore, requires inclusive policies and legislation ensuring access to information and communication, public spaces, resources, services (including education and healthcare), transportation, transparent and accountable decision-making processes, adequate income and employment opportunities, affirmation of human rights, the opportunity for personal development, respect for diversity, participation in decision-making, social protection and solidarity.<sup>56</sup>

Thus, social inclusion goes beyond eliminating manifestations of exclusion on an ongoing basis and taking preventive measures by a state. It also requires planning, adopting appropriate social policies, including ageing policies,

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53 UNDESA, "Vision for an Inclusive Society (Draft)," 3.

54 UNDESA, 3.

55 World Bank, *Inclusion Matters: The Foundation for Shared Prosperity* (Washington: World Bank, 2013), 3, doi:10.1596/978-1-4648-0010-8.

56 UNDESA, "Vision for an Inclusive Society (Draft)."

observing human rights and international cooperation since demographic changes are global in nature. Such an approach demands that all stakeholders (not only states) significantly change their attitudes, paradigms and policies.<sup>57</sup>

That is why the rearrangement of public policies to become more inclusive to reduce inequalities in various areas are indicated the UN Secretary-General in the report, “Empowering people and ensuring inclusiveness and equality”:

Like poverty, inequality is a multidimensional phenomenon. A range of pro-equality public policies can, in concert, advance the empowerment, inclusion and equality of all. This includes policies to promote active participation in decision-making, labour inclusion and social protection, universal policies that are sensitive to differences in health and education and policies that address the challenges and vulnerabilities of specific population subgroups, as well as policies for digital inclusion. Public policies must aim to reduce inequalities while effectively addressing concentrations of wealth and power. An integrated approach is needed that includes universal social protection measures and mechanisms for participation and the exercise of rights, which are all critical for reducing inequalities and fostering empowerment. A progressive approach in reforms towards universal health coverage can ensure that those being left behind are prioritized.<sup>58</sup>

The report refers to the inclusion of all vulnerable groups following the ideas of the 2030 Agenda and, as other bodies, calls for the social, economic and political inclusion of many marginalised groups and persons. However, apart from the UN Independent Expert’s observations and reports, older persons are usually just one of the many disadvantaged groups identified in these documents as those at risk of being thrown outside mainstream society. Thus, examining international output dedicated exclusively to older persons is indispensable.

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57 UNECE, “Approaches to Measuring Social Exclusion. Prepared by the UNECE Task Force on the Measurement of Social Exclusion.”

58 UN Secretary-General, “Report of the Secretary-General: Empowering People and Ensuring Inclusiveness and Equality,” Economic and Social Council, 1 May 2019, E/2019/65, 15.

#### 4. Recognition of older persons' social inclusion

Analysing the wording of the key international documents on older persons, we can observe a certain evolution in addressing “social inclusion”. The Vienna International Plan of Action on Ageing – the first global and comprehensive document on older persons, adopted in 1982,<sup>59</sup> does not contain any references to this notion. When the Vienna Action Plan was adopted, the concept of social inclusion was known, but was not yet popular on the international agenda. Documents adopted at that time, and even decades later, did not indicate *expressis verbis* the “social inclusion of older persons”. On the other hand, the United Nations Principles for Older Persons, adopted by the UN General Assembly in 1991, give a contemporary understanding of social inclusion, especially in terms of participation and self-fulfilment. We can read there:

Older persons should remain integrated in society, participate actively in the formulation and implementation of policies that directly affect their well-being and share their knowledge and skills with younger generations [...] Older persons should be able to seek and develop opportunities for service to the community and to serve as volunteers in positions appropriate to their interests and capabilities. [...] Older persons should be able to pursue opportunities for the full development of their potential. Older persons should have access to the educational, cultural, spiritual and recreational resources of society.<sup>60</sup>

A significant shift in indicating “full inclusion and participation of older persons in societies” occurred in 2002. Other milestone documents in the history of the protection of human rights of older persons are the Madrid International Plan of Action on Ageing (MIPAA) and the Political Declaration, adopted at the Second World Assembly on Ageing in 2002.<sup>61</sup> These contain many objec-

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59 UN General Assembly, “Vienna International Plan of Action on Ageing, Report of the World Assembly on Ageing,” Vienna, 26 July–6 August 1982, General Assembly Resolution “Question on Ageing,” A/RES/37/5.

60 UN General Assembly, “United Nations Principles for Older Persons,” 16 December 1991, A/RES/46/91.

61 Second World Assembly on Ageing. “Madrid International Plan of Action on Ageing and the Political Declaration, Report of the Second World Assembly on Ageing,” Madrid, 8–12 April 2002, (United Nations Publication, Sales No. E.02.IV.4).

tives, actions and recommendations of an inclusive nature. Particular attention should be paid to Article 6 of the Political Declaration, which stipulates:

The modern world has unprecedented wealth and technological capacity and has presented extraordinary opportunities: to empower men and women to reach old age in better health and with more fully realized well-being; to seek the full inclusion and participation of older persons in societies; to enable older persons to contribute more effectively to their communities and to the development of their societies; and to steadily improve care and support for older persons as they need it. We recognize that concerted action is required to transform the opportunities and the quality of life of men and women as they age and to ensure the sustainability of their support systems, thus building the foundation for a society for all ages. When ageing is embraced as an achievement, the reliance on human skills, experiences and resources of the higher age groups is naturally recognized as an asset in the growth of mature, fully integrated, humane societies.

Thus, the idea of social inclusion of older persons was more than a decade ahead of the 2030 Agenda calling “leave no one behind”.<sup>62</sup> Moreover, the MIPAA is not “a one-off event”, it is a long-term process within the UN framework. Every year since 2002, the UN Secretary-General presents the reports in the framework of the “Follow-up to the Second World Assembly on Ageing”. For example, the report of 2021 refers to the promotion of social inclusion for older persons during the COVID-19 pandemic and steps to be taken in the post-pandemic reality (UN Secretary-General 2021). In turn, the report provided in 2022 is entirely dedicated to the digital inclusion of older persons.<sup>63</sup>

The MIPAA also provides for a systematic review of its implementation by the member states. Thus, the report of the UN Secretary-General on the preliminary findings of the fourth review and appraisal of the implementation of the MIPAA on prevailing and emerging issues devotes particular at-

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62 UN General Assembly, “Transforming Our World: The 2030 Agenda for Sustainable Development.”

63 UN Secretary-General, “Follow-up to the International Year of Older Persons: Second World Assembly on Ageing Report of the Secretary-General,” 7 July 2022, A/77/134.



tention to global ageing within an era of rapid technological innovations.<sup>64</sup> It indicates, among other things, the International Telecommunication Union (ITU) report “Ageing in a Digital World: from Vulnerable to Valuable” of 2021, which is dedicated to the digital inclusion of older persons, especially in the context of healthy ageing.<sup>65</sup>

The social inclusion of older persons is still vital due to the United Nations Economic Commission for Europe (UNECE) ministerial conferences. UNECE, in its “Synthesis Report on the implementation of the Madrid International Plan of Action on Ageing in the ECE region between 2017 and 2022”, indicated notable progress in focusing on the human rights of older persons, combatting ageism and preventing and addressing violence, abuse and neglect. UNECE also noted that the COVID-19 pandemic has renewed impetus to initiatives in various areas, such as digital inclusion.<sup>66</sup>

Particular attention should be paid to the activities of the UN Independent Expert. They aim to include various aspects of older persons' social inclusion in the international agenda. Rosa Kornfeld-Matte, in her report of 2018, observed that the social inclusion of older persons coincides with independent living requiring equal access to all services offered to the whole of society and with various types of support enabling older persons to participate in all areas of social life.<sup>67</sup>

Finally, the “guiding questions” for states, National Human Rights Institutions (NHRI), the UN bodies and NGOs outlining the scope of their contributions to the 13<sup>th</sup> session of the UN Open-ended Working Group on Ageing (OEWGA) on the social inclusion of older persons, explained that:

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64 UN Economic and Social Council, “Preliminary Assessment of the Fourth Review and Appraisal of the Madrid International Plan of Action on Ageing, 2002. Report of the Secretary-General,” 17 November 2021, E/CN.5/2022/4.

65 International Telecommunication Union, *Ageing in a Digital World: From Vulnerable to Valuable*, (ITU, 2021), [https://www.itu.int/dms\\_pub/itu-d/opb/phcb/D-PHCB-DIG\\_AGE-2021-PDF-E.pdf](https://www.itu.int/dms_pub/itu-d/opb/phcb/D-PHCB-DIG_AGE-2021-PDF-E.pdf).

66 UNECE, “Ageing Policy in Europe, North America and Central Asia in 2017-2022 Synthesis Report on the Implementation of the Madrid International Plan of Action on Ageing in the ECE Region between 2017 and 2022,” 42, [https://unece.org/sites/default/files/2022-08/Synthesis-report\\_o.pdf](https://unece.org/sites/default/files/2022-08/Synthesis-report_o.pdf).

67 UN Independent Expert, “Report of the Independent Expert on the Enjoyment of All Human Rights by Older Persons (The Impact of the Social Exclusion of Older Persons),” 70.

social inclusion is a precondition for the ability of older persons to exercise multiple human rights. Social inclusion is the process of improving the terms of participation in society for people who are disadvantaged on the basis of age, sex, disability, race, ethnicity, origin, religion, or economic or other status through (1) enhanced opportunities, (2) access to resources (3) voice and (4) respect for rights.<sup>68</sup>

The “inclusive trend” is also clearly seen in the European forum,<sup>69</sup> especially in Directive 2019/882 of the European Parliament and of the Council of 17 April 2019 on the accessibility requirements for products and services. Its target group are people with disabilities,<sup>70</sup> so it certainly does not meet all the needs of older Europeans. However, the directive’s aim to create a more inclusive society focusing on independent living can be copied.

Various conditions for the social inclusion of older people are usually addressed in the European Union policy documents, including the European Social Pillar, partnerships and initiatives like the European Innovation Partnership on Active and Healthy Ageing. Indeed, in recent years, the EU has paid a good deal of attention to the digital inclusion of older citizens. For example, this issue was included in the European Council Conclusions of 2020, “Improving the well-being of older persons in an era of digitalisation”<sup>71</sup> and the European Commission’s “Green Paper on Ageing” of 2021. The Green Paper indicates the needs of disadvantaged older persons in the area of automation and digitalisation, urban infrastructure and services. Indeed, the Green Paper considers many other factors and ideas for inclusion or remaining in the social main-

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68 OEWSGA, “Open-Ended Working Group of Ageing, Guiding Questions for the Thirteenth Session Focus Area 2: Social Inclusion,” 2023, [https://social.un.org/ageing-working-group/documents/thirteenth/Guiding%20Questions\\_Social%20Inclusion.pdf](https://social.un.org/ageing-working-group/documents/thirteenth/Guiding%20Questions_Social%20Inclusion.pdf).

69 European Commission, “Directorate-General for Employment, Social Affairs and Inclusion: Peer Review on ‘Strategies for Supporting Social Inclusion at Older Age,’ Berlin (Germany), 23–24 September 2019.”

70 European Union, “Directive (EU) 2019/882 of the European Parliament and of the Council of 17 April 2019 on the Accessibility Requirements for Products and Services,” 2019 O.J. EU (L 151) 70.

71 Council of the European Union, “Human Rights, Participation and Well-Being of Older Persons in the Era of Digitalisation: Council Conclusions,” 11717/2/20 REV 2, SOC 607, 2020.

stream, including senior entrepreneurship, which can prolong working lives, reduce old-age unemployment, and enhance innovation through start-ups.<sup>72</sup>

Reviewing the other European forum's output – the Council of Europe – relating to older persons' rights, it may be observed that its bodies adopted many resolutions and recommendations of an inclusive nature, although the notion of “inclusiveness” is usually not indicated *expressis verbis* in their titles and contents. The Council of Europe (CoE) Council of Ministers' Recommendation CM/Rec(2009)6 on ageing and disability in the 21<sup>st</sup> century: sustainable frameworks to enable greater quality of life in an inclusive society is an exception.<sup>73</sup>

The principal CoE document – the Recommendation CM/Rec(2014) 2 of the Committee of Ministers to Member States on the promotion of human rights of older persons does not even mention social inclusion of older persons.<sup>74</sup> However, there are several references to the social inclusion of older persons in the Explanatory Memorandum to this recommendation, and in the states' good practices attached to the recommendation. Most importantly, the member states provide information on their inclusive policies in their replies regarding implementing this Recommendation CM/Rec(2014)2. Some of them (e.g. Poland) presented their good practices in the field of digital inclusion.<sup>75</sup>

In this context, the newest study prepared for the Council of Europe, titled “The Digital Era? Also my Era! Media and information literacy: the key to ensuring seniors' rights to participate in the digital era” is worth attention. It may be recognised as a sign of our times, as it promotes dignified digital inclusion

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72 European Commission, “Green Paper on Ageing: Fostering Solidarity and Responsibility between Generations,” 27 January 2021 COM(2021) 50 Final.

73 Committee of Ministers of the Council of Europe, “Recommendation CM/Rec(2009)6 of the Committee of Ministers to Member States on Ageing and Disability in the 21st Century: Sustainable Frameworks to Enable Greater Quality of Life in an Inclusive Society,” 8 July 2009.

74 Committee of Ministers, “Recommendation CM/Rec(2014)2 Promotion of Human Rights of Older Persons,” 19 February 2014, Council of Europe, 2014.

75 Steering Committee for Human Rights, “Steering Committee for Human Rights, Report on the Implementation of the Committee of Ministers' Recommendation CM/Rec (2014) 2 on the Promotion of Human Rights of Older Persons Adopted by the CDDH at Its 90th Meeting (27–30 November 2018),” CDDH(2018)R90 Addendum, Council of Europe 2019.

for all and a human-centred transformation based on the fundamental rights, freedoms and values of democratic societies.<sup>76</sup>

## 5. Intergenerational solidarity as a key element of social inclusion

The social inclusion of older people is impossible without solidarity between all age groups. The flipside of this is that social solidarity needs the inclusion of older citizens. So, intergenerational solidarity and the social inclusion of older persons should be two interdependent goals. Indeed, one must be realistic and not expect every excluded person to reintegrate into mainstream society and that all generations will function with mutual understanding and shared interests. However, intergenerational solidarity is a goal worth pursuing through governments and other stakeholders creating inclusive social policies. That is why it seems reasonable to verify whether any solutions are proposed at the international level that may prove to be a helpful reference point for national policies.

On the international forum, intergenerational solidarity, also called “solidarity across generations”<sup>77</sup> or “intergenerational justice”<sup>78</sup> is deeply embedded in the 2030 Agenda. Solidarity with future generations now appears to be coming to the fore due to the need to preserve the natural environment and mitigate climate change<sup>79</sup> but the concept first emerged in the context of global ageing

76 An Hermans, *The Digital Era? Also My Era! Media and Information Literacy: The Key to Ensure Seniors' Rights to Participate in the Digital Era* (Council of Europe, 2022).

77 Eri Kasagi, *Solidarity Across Generations. Comparative Law Perspectives* (Switzerland: Springer Nature, 2020), [https://doi.org/10.1007/978-3-030-50547-9\\_13](https://doi.org/10.1007/978-3-030-50547-9_13).

78 OECD, “Organisation for Economic Co-Operation and Development. Governance for Youth, Trust and Intergenerational Justice Fit for All Generations?” OECD Public Governance Reviews (Paris, 2020).

79 Marie-Claire Cordonier Segger, Marcel Szabó, and Alexandra R. Harrington, *Intergenerational Justice in Sustainable Development Treaty Implementation: Advancing Future Generations Rights through National Institutions (Treaty Implementation for Sustainable Development)* (Cambridge: Cambridge University Press, 2021), DOI: 10.1017/9781108768511; Marianne Takle, “Common Concern for the Global Ecological Commons: Solidarity with Future Generations?” *International Relations*, 35, no. 3 (2021): 403–21, <https://doi.org/10.1177/00471178211036218>; Marianne Takle, “Solidarity with Future Generations Protection Clauses in Constitutions,” in *Generational Tensions and Solidarity Within Advanced Welfare States* (London-New York: Routledge, 2022), 59–76, DOI:10.4324/9781003129592-4.

due to existing or potential tensions among older and younger generations.<sup>80</sup> Tensions and even conflicts are inevitable when a significant percentage of society is made up of people of post-working age. In such a situation, the conflicts between younger and older generations are no longer limited to differences in views on life but may take the form of a conflict over the redistribution of wealth, workplaces and access to costly benefits as well as health and social services.<sup>81</sup> For example, in Western countries, older persons are blamed as the primary recipients of public income transfer programmes, whereas children are largely privately financed by their parents.<sup>82</sup>

The Organisation for Economic Co-operation and Development (OECD) noted that young people are currently finding it harder than previous generations to become homeowners due to the rapid increase in house prices, but at the same time, most property is held by older people.<sup>83</sup> The labour market is another area of conflict, especially when young people do not have a chance at finding a stable and decently paid job. Older workers are seen as those who block workplaces. Moreover, a series of stereotypes are diffused on them, for example, lower flexibility in their work performance, less familiarity with the use of new technologies, an unwillingness to undertake vocational training, and, finally, taking sick leave.<sup>84</sup>

The ageing of societies also has a political dimension and causes fears about the state of democracy and sustainable development due to overcoming “silvercracy” and the imbalance between the old and young generations as a voting electorate. The proposal to revise the concept of equality and rethink

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80 Asgeir Falch-Eriksen, Marianne Takle, and Britt Slagsvold, *Generational Tensions and Solidarity Within Advanced Welfare States* (London–New York: Routledge, 2022).

81 Radosław Mędrzycki, “Samorząd terytorialny wobec zjawiska długowieczności,” *Samorząd Terytorialny*, no. 3 (2021): 24.

82 Ulrich Feeser-Lichterfeld, “Intergenerational Justice in an Extreme Longevity Scenario,” in *Demographic Change and Intergenerational Justice. The Implementation of Long-Term Thinking in the Political Decision Making Process*, ed. Joerg Chet Tremmel (Berlin/Heidelberg: Springer, 2008), 131.

83 OECD, “Organisation for Economic Co-Operation and Development. Governance for Youth, Trust and Intergenerational Justice Fit for All Generations?” 131.

84 Barbara Barabaschi, “Intergenerational Solidarity in the Workplace: Can It Solve Europe’s Labor Market and Social Welfare Crises?” *Journal of Workplace Rights*, no. October–December (2015): 1–11, <https://doi.org/10.1177/2158244015621464>.

voting systems due to “equality between generations” to preserve the interests of younger and future generations has appeared in scholarship.<sup>85</sup>

On the other hand, the COVID-19 pandemic showed clearly that the growing number of older people does not result in a better quality of life for them. Moreover, despite the pandemic affecting older persons the most, they were blamed for being the reason for lockdowns and other restrictions.<sup>86</sup> As Claudia Mahler, the UN Independent Expert, noted, “the pandemic shone a spotlight on the gaps in human rights protection of this chronically invisible segment of the population and magnified existing violations of their rights”.<sup>87</sup> She also concluded that “in many instances, response plans had failed to include the specific needs of older persons, and that policies put in place to address the pandemic had reiterated discriminatory approaches, which had not been as visible or apparent before the pandemic”.<sup>88</sup> In the context of the pandemic, The UNDESA, in its Policy Brief of May 2020, also indicated that

Older persons face barriers to community engagement, whereby they may not be able to gain access to information about protecting themselves and accessing relevant services, which can aggravate exclusion or marginalisation experienced by some older persons. Such barriers include language barriers or lack of access to technologies.<sup>89</sup>

Thus, intergenerational solidarity failed in many countries and many fields. As a result, a failure to meet older adults’ needs in crisis and the flow of ageists’

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85 Yongseok Seo, “Democracy in the Ageing Society: Quest for Political Equilibrium between Generations,” *Futures*, 85 (2017): 42–57, <https://doi.org/10.1016/j.futures.2016.11.002>.

86 Sarah Fraser, Martine Lagacé, and Bienvenu Bongué, “Ageism and COVID-19: What Does Our Society’s Response Say about Us?” *Age and Ageing*, 49, no. 5 (2020): 692–95, <https://doi.org/10.1093/ageing/afaa097>; UN Independent Expert, “Impact of the Coronavirus Disease (COVID-19) on the Enjoyment of All Human Rights by Older Persons Report of the Independent Expert on the Enjoyment of All Human Rights by Older Persons, Claudia Mahler,” 21 July 2020, A/75/205.

87 UN Independent Expert, 5.

88 UN Independent Expert, “Report of the Independent Expert on the Enjoyment of All Human Rights by Older Persons, Claudia Mahler. Ageism and Age Discrimination,” 5 August 2021, A/HRC/48/53, para. 18.

89 UNDESA, “COVID-19 and Older Persons: A Defining Moment for an Informed, Inclusive and Targeted Response,” (Policy Brief No 68, May 2020), 3.

behaviours caused, in May 2020, 146 states to sign a statement expressing their deep concern over the escalation of ageism, including age discrimination and the stigmatisation of older persons, which aggravates their vulnerabilities.<sup>90</sup>

The pandemic confirmed the views that intergenerational solidarity should be based on a sense of mutual responsibility towards those belonging to other generations<sup>91</sup> and on taking action by all actors of public life, aimed at maintaining positive relations in society and meeting the needs and interests of persons belonging to other generations.<sup>92</sup> According to Maria Amparo Cruz-Saco, intergenerational solidarity is, de facto, a social contract that enables socioeconomic development, sustainability, endurance and the ability to build bridges and overcome adversity within families and communities who share common identities and interests.<sup>93</sup>

Certainly, intergenerational solidarity is multidimensional<sup>94</sup> and, being ambiguous, is not easy to define. Moreover, the issues concerning solidarity across generations differ from country to country, usually depending on the security systems in place.<sup>95</sup> The implication of intergenerational solidarity is different in high, middle and low-income countries. Where these systems are weak or not functioning, solidarity within families plays a lead role.

However, from the perspective of human rights law and its (potential) influence on states and other actors, “public solidarity” is crucial. Eri Kasagi defines

90 UN Secretary-General, “Policy Brief: The Impact of COVID-19 on Older Persons,” (United Nations, 2020), <https://www.un.org/development/desa/ageing/wp-content/uploads/sites/24/2020/05/COVID-Older-persons.pdf>.

91 Piotr Szukalski, “Czym Jest Solidarność Międzypokoleniowa?” in *Jakość Życia Seniorów w XXI Wieku z Perspektywy Polityki Społecznej*, eds. Dorota Kałuża, Piotr Szukalski (Łódź: Wydawnictwo Biblioteka, 2010), 9.

92 Gabriela Czapiewska, “Solidarność międzypokoleniowa z perspektywy ekonomii i polityki społecznej,” *Nierówności Społeczne a Wzrost Gospodarczy/Social Inequalities and Economic Growth*, no. 61 (2020): 96, <https://doi.org/10.15584/nsawg.2020.16>.

93 María Amparo Cruz-Saco and Sergei Zelenev, *Intergenerational Solidarity* (New York: Palgrave Macmillan, 2010), 10, <https://doi.org/10.1057/9780230115484>.

94 Ariela Lowenstein, “Global Ageing and Challenges to Families,” in *The Cambridge Handbook of Age and Ageing*, eds. Malcolm L. Johnson, Vern L. Bengtson, Peter G. Coleman, Thomas B. L. Kirkwood (Cambridge: Cambridge University Press, 2005), 406.

95 Eri Kasagi, “Solidarity across Generations from the Perspective of Comparative Law: Reconfiguration of Different Types of Solidarity in the Context of an Aging Society,” in *Solidarity Across Generations. Comparative Law Perspectives*, ed. Eri Kasagi (Switzerland: Springer Nature, 2020), 6.

public solidarity as “collective solidarity with state (or local government) intervention, which is organised, and often required by law, for the entire population of the country, as well as a part of the population (workers, persons in need, etc.), sometimes at the regional level”.<sup>96</sup>

Indeed, the notion of intergenerational solidarity as such does not exist in general human rights law. However, intergenerational solidarity is a core idea of the human right to social security and an appropriate standard of living stipulated in the UDHR (Articles 22 and 25 sec. 1) and the universal and regional human rights treaties containing social and economic rights. Certainly, intergenerational solidarity fills in the content of the International Labour Organization conventions and recommendations dedicated to social security, invalidity and survivors’ benefits and social protection floors. Solidarity between generations is mentioned *expressis verbis* in the Treaty on European Union (TEU). Its Article 3 sec. 3 establishes the European Union’s aims, including combating social exclusion and discrimination, promoting social justice and protection, equality between women and men and, finally, solidarity between generations.<sup>97</sup> It may be also observed that a “spirit of solidarity” is present in the Council of Europe social law and in resolutions referring to older workers and decent pensions.

It could have been expected that the regional treaties dedicated to older persons’ rights would be couched in this concept. Meanwhile, the Inter-American Convention on Protecting the Human Rights of Older Persons of 2015 indicates only “solidarity and the strengthening of family and community protection” as one of its principles. Additionally, Article 8b obliges states to “[p]romote the participation of older persons in intergenerational activities to strengthen solidarity and mutual support as key components of social development”.<sup>98</sup> Surprisingly, the Protocol to the African Charter on Human and Peoples’ Rights

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96 Kasagi, 5.

97 European Union, “Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union,” 13 December 2007, 2016 O.J. (C 202) 1.

98 Organization of American States, “Inter-American Convention on Protecting the Human Rights of Older Persons,” adopted at the General Assembly of the Organization of American States in Washington, DC, on June 15, 2015, (OAS, A-70) 2015.



on the Rights of Older Persons adopted by the African Union states in 2016 does not contain a notion of intergenerational solidarity.<sup>99</sup>

Therefore, an extensive description of intergenerational solidarity should be sought in the relevant soft law. Indeed, it is present in the Madrid Political Declaration and the International Plan of Action on Ageing. The participants of the Madrid Assembly on Ageing declared: “We recognise the need to strengthen solidarity among generations and intergenerational partnerships, keeping in mind the particular needs of both older and younger ones, and to encourage mutually responsive relationships between generations (Article 16 of the Madrid Political Declaration)”.

The MIPAA provides a profound explanation of intergenerational solidarity:

Solidarity between generations at all levels – in families, communities and nations – is fundamental for the achievement of a society for all ages. Solidarity is also a major prerequisite for social cohesion and a foundation of formal public welfare and informal care systems. Changing demographic, social and economic circumstances require the adjustment of pension, social security, health and long-term care systems to sustain economic growth and development and to ensure adequate and effective income maintenance and service provision. At the family and community level, intergenerational ties can be valuable for everyone. Despite geographic mobility and other pressures of contemporary life that can keep people apart, the great majority of people in all cultures maintain close relations with their families throughout their lives. These relationships work in both directions, with older persons often providing significant contributions both financially and, crucially, in the education and care of grandchildren and other kin. All sectors of society, including Governments, should aim to strengthen those ties. Nevertheless, it is important to recognize that living with younger generations is not always the preferred or best option for older persons (paras. 42–43).

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99 African Union, “Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Older Persons in Africa of 31 January 2016,” <https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-older-persons>.

The MIPAA also provides guidelines for states and other stakeholders on strengthening solidarity through equity and reciprocity between generations. The MIPAA calls for the following actions:

- (a) Promote understanding of ageing through public education as an issue of concern to the entire society;
- (b) Consider reviewing existing policies to ensure that they foster solidarity between generations and thus promoting social cohesion;
- (c) Develop initiatives aimed at promoting mutual, productive exchange between the generations, focusing on older persons as a societal resource;
- (d) Maximise opportunities for maintaining and improving intergenerational relations in local communities, *inter alia*, by facilitating meetings for all age groups and avoiding generational segregation;
- (e) Consider the need to address the specific situation of the generation of people who have to care, simultaneously, for their parents, their own children and their grandchildren;
- (f) Promote and strengthen solidarity among generations and mutual support as a key element for social development;
- (g) Initiate research on the advantages and disadvantages of different living arrangements for older persons, including familial co-residence and independent living in different cultures and settings (para. 44).

These guidelines bring together all the essential aspects of intergenerational solidarity and are a valuable benchmark for national ageing policies. Over 20 years, intergenerational solidarity has become a common element of many national policies. According to the United Nations Economic Commission for Europe report of June 2022 on the Regional Implementation Strategy for the MIPAA (RIS/MIPAA), countries have developed various measures to foster intergenerational contact, for instance, through volunteering and intergenerational housing initiatives. The UNECE provides the example of “multi-generation houses” in hundreds of municipalities in Germany set up to support intergenerational contact and solidarity.<sup>100</sup>

Meanwhile, on the EU forum, the year 2011 was crucial for promoting solidarity between generations. The European Parliament and the European Commission proclaimed 2012 the European Year for Active Ageing and Solidarity

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100 UNECE, “MIPAA/RIS +20. 20 Years of Action towards Creating Societies for All Ages in the UNECE Region,” United Nations, Geneva, 2022.

between Generations – the EY2012.<sup>101</sup> At the end of 2012, the European Council issued a “Declaration on the European Year for Active Ageing and Solidarity between Generations (2012): The Way Forward” stressing the importance of this concept and indicating the balanced distribution of resources and opportunities between generations, as its main pre-condition: “Solidarity between generations in an ageing society notably requires creating conditions which permit older people to achieve more independence that will allow them to take better charge of their own lives and to contribute to society, enabling them to live in dignity as full members of society. This requires a balanced distribution of resources and opportunities between generations”.

Moreover, the declaration indicated the key political messages. Two of them have a solidarity aspect:

The transmission of older people’s knowledge and skills to the younger generations and vice-versa should be encouraged and their skills could also be utilised after retirement, for example in the social economy and through voluntary work [...]

Measures encouraging cooperation between generations should be promoted and the negative perceptions and stereotypes, including gender stereotypes, should be eliminated at central, regional and local levels.<sup>102</sup>

The “Guiding Principles for Active Ageing and Solidarity between Generations” annexed the declaration. They primarily focus on active ageing issues, leaving intergenerational solidarity rather in their shadow. However, it is noticeable in principles on age management strategies, employment services for older workers and preventing age discrimination and stereotypes about older workers. The Guiding Principles for Active Ageing and Solidarity between Generations, serving as a checklist for national authorities and other stakeholders to promote the EY2012, relate to its three aspects: employment, social participation and independent living. The principles indicate actions to be taken to

101 European Parliament and European Commission, “European Parliament and Council of the European Union, Decision No 940/2011/EU of the European Parliament and Council of the European Union of 14 September 2011 on the European Year for Active Ageing and Solidarity between Generations (2012),” 2011 O.J. (L 246) 5.

102 Council of the European Union, “Council Declaration on the European Year for Active Ageing and Solidarity between Generations (2012): The Way Forward,” Brussels, 7 December 2012, 16592/12 SOC 948 SAN 289, 2012, 5.

ensure the full participation of older people in society. These are, among other things, providing adequate incomes in old age, preserving the financial autonomy of older people and enabling them to live in dignity; fighting the social exclusion and isolation of older people by offering them equal opportunities to participate in society through cultural, political and social activities; creating a better environment for volunteer activities of older people and removing existing obstacles so that older people can contribute to society by making use of their skills, abilities and experience; providing older people with learning opportunities, notably in areas such as information and communication technologies (ICT), self-care and personal finance, empowering them to participate actively in society and to take charge of their own life.<sup>103</sup>

The EY2012 was accessed as a success, especially in terms of stimulating public debate and fostering mutual learning around the themes of active ageing and solidarity between generations. In addition, its positive impact on the EU activities and national policies was identified.<sup>104</sup>

Ten years after the crucial 2011 decision on the EY2012, the Green Paper on Ageing – “Fostering Solidarity and Responsibility between Generations” provides a diagnosis of ageing conditions in the EU and stimulates discussion on matters crucial for older Europeans. The Green Paper repeats the EY2012 message that well-being may be achieved through intergenerational solidarity. It points out volunteering activities and intergenerational learning as those that can promote intergenerational solidarity and cooperation, creating value and benefiting young and old alike in terms of knowledge, experience and self-esteem. At the same time, it indicates that social intermixing is limited as younger and older persons cluster in different neighbourhoods and regions according to residential preferences that depend on their stage of life. The Commission notes that around 30 million adults in the EU frequently feel lonely and that the COVID-19 crisis has highlighted mental problems and digital

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103 Council of the European Union, 8–11.

104 European Commission, “Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Implementation, Results and Overall Assessment of the 2012 European Year for Active Ageing and Solidarity between Generations,” Brussels, 15 September 2014 COM(2014) 562 Final; Jan Tymowski, “European Year for Active Ageing and Solidarity between Generations (2012) In-Depth Analysis. March 2015 – PE 536.344,” (European Parliament, 2015), [www.europarl.eu/thinktank](http://www.europarl.eu/thinktank).

deficits preventing contact between generations.<sup>105</sup> According to the European Commission, these aspects limiting intergenerational solidarity should be addressed in the EU and national policies.

## 6. Concepts strengthening the social inclusion of older persons

As indicated above, the social inclusion of older persons requires an active attitude from states and other stakeholders. This means, for example, adopting ageing policies, conducting inclusive employment, improving the participation of older persons, creating conditions for healthy ageing, active ageing, long-life learning, introducing good quality long-term care, taking various compensatory measures, etc. However, such actions may be misguided if older people are not treated as full human rights holders, partners and contributors to the well-being of society as a whole. It happens that adopted programmes or ageing policies, apparently for the benefit of the ageing people, tend to create a society of older people being “parallel” to mainstream society (e.g. estates only for old inhabitants), or that applied measures lead to the deactivation of older people (e.g. early retirement). In such cases, it is possible to say that we are dealing with new, hidden, and very “insidious” forms of ageism.<sup>106</sup> Hence, it is worth indicating the concepts worked out at the international level that can become a benchmark for national policies and contribute to effective action for the inclusion of older people.

### 6.1. Leave no one behind

The first of these concepts is the above-mentioned and well-known message from the 2030 Agenda for Sustainable Development – “leave no one behind” (LNOB). The 2030 Agenda does not refer explicitly to older persons, but at least gives space for further developments, as it promotes the inclusion of people of

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105 European Commission, “Green Paper on Ageing: Fostering Solidarity and Responsibility between Generations.”

106 Stefan Hopf, Federica Previtali, and Nena Georgantzi, “New Forms of Ageism as a Challenge for a UN Convention on the Rights of Older Persons,” *University of Toronto Quarterly*, 90, no. 2 (2021): 242–62, <https://doi.org/10.3138/utq.90.2.12>.

all ages.<sup>107</sup> Therefore, some guidelines on how not to leave older persons behind should be sought in the post-2030 Agenda developments, including the mentioned UNDESA report of 2016. It explains that

Ensuring that no one is left behind encompasses multiple meanings. For some, it will mean focusing action on disadvantaged groups of society, for example, people living in poverty, women, indigenous people, youth, older people, persons with disabilities, migrants, or people in conflict and post-conflict situations. Others will focus on reducing inequalities between countries, including focusing action on countries at the lowest stages of development or facing challenging circumstances...<sup>108</sup>

Another document worthy of attention is the High-level Committee on Programmes report titled “Equality and Non-Discrimination at the Heart of Sustainable Development: A Shared United Nations Framework for Action”. It explains that the 2030 Agenda, with its central message LNOB aims to build “just and inclusive societies” that provide “equal access to justice” and that “are based on respect for human rights”.<sup>109</sup> It also explains other important notions:

equality (the imperative of moving towards substantive equality of opportunity and outcomes for all groups), non-discrimination (the prohibition of discrimination against individuals and groups on the grounds identified in international human rights treaties) and the broader concept of equity (understood as fairness in the distribution of costs, benefits and opportunities). It addresses both horizontal inequalities (between social groups) and vertical in-

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107 Patricia Conboy, “Older-Age Exclusion and the 2030 Agenda for Sustainable Development,” in *Social Exclusion in Later Life Interdisciplinary and Policy Perspectives*, eds. Kieran Walsh, Thomas Scharf, Sofie Van Regenmortel, Anna Wanka, *International Perspectives on Aging* (359–372: Springer Nature, 2021), 359, 030-51406-8 (eBook) <https://doi.org/10.1007/978-3-030-51406-8>.

108 UNDESA, “Leaving No One Behind: The Imperative of Inclusive Development Report on the World Social Situation 2016,” 4.

109 UN Chief Executives Board, “Equality and Non-Discrimination at the Heart of Sustainable Development: A Shared United Nations Framework for Action. Report of the High-Level Committee on Programmes at Its Thirty-Second Session,” New York: UN CEB/2016/6/Add.1 (UN Chief Executives Board, 2016).

equalities (in income, etc.) and inequalities of both opportunities and outcomes. Intergenerational equity is addressed, as are inequalities among countries.<sup>110</sup>

From the perspective of the social inclusion of older persons, this description is crucial as it tackles the intersectionality of exclusion, which will be considered in Chapter Six of this book.

Paradoxically, the UN documents need to provide a clear definition of LNOB as such. However, they do establish that it covers three concepts that are critical to improving the welfare of societies: ending extreme poverty (in all its forms), reducing inequalities, and addressing discriminatory barriers that might arise from geography or aspects of social identity.<sup>111</sup> Moreover, they indicate that people being left behind are often economically, socially, spatially, and/or politically excluded for various reasons, including due to their age. They lack the choices and capabilities that enable them to benefit from human development; they are disconnected from societal institutions and lack information networks and economic and social support systems. Excluded persons are invisible when policies and programmes are being developed and have no voice to affect them. Moreover, a new generation of inequalities and discrimination is opening up around education and technology.<sup>112</sup>

Among various studies provided by UN agencies, we can also extract a kind of instruction on how to prevent inequality, exclusion and discrimination, and generally to achieve SDGs. The United Nations Development Programme (UNDP), in its paper titled “What does it mean to leave no one behind? A UNDP discussion paper and framework for implementation”, offers government assistance in an integrated approach in this area. The UNDP proposes a three-level action. First, governments must examine why people are left behind. They should understand and address the drivers that leave people behind. For this reason, they must collect and use more and better-disaggregated data and people-driven information. The second step is the empowerment of those who are

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110 UN Chief Executives Board, 2.

111 Stephan Klasen and Marc Fleurbaey, “Leaving No One Behind: Some Conceptual and Empirical Issues” (Department of Economic & Social Affairs, 2018), 4.

112 Justice Mensah, Amos Mensah, and Aba Mensah Nyameyie, “Understanding and Promoting the ‘Leaving No One Behind’ Ambition Regarding the Sustainable Development Agenda: A Review,” *Visegrad Journal on Bioeconomy and Sustainable Development*, 11, no. 1 (2022): 8, <https://doi.org/10.2478/vjbsd-2022-0002>.

being left behind. They must become full, equal agents of sustainable development. States should enable them to participate in decision-making processes and establish safe and inclusive mechanisms for their civic engagement. Finally, states should enact policies, laws, reforms, and interventions to confront the drivers that leave people behind across SDGs. It means that all stakeholders, duty bearers and rights holders will have to shape, implement and improve policies to reduce inequality and maintain minimum welfare standards.<sup>113</sup>

## 6.2. Human rights-based approach

The mentioned human rights-based approach (HRBA) is enshrined in the Agenda 2030, which is crucial for the social inclusion of older persons as its SDGs include poverty reduction, health and well-being improvements, as well as better quality of education.

First of all, the HRBA is perceived as a general guideline for the UN agencies and stakeholders operating at international, national and local levels. The HRBA is also the basis for dialogue with governments and for building a culture of human rights. It intends to move the discourse from charity to implementing rights and obligations.<sup>114</sup>

In general, the HRBA has two objectives, closely connected with the three steps toward the inclusion of all vulnerable persons and groups mentioned above. The first is to empower rights-holders (individuals or social groups) to claim and exercise their rights. The second one is to strengthen the capacity of duty-bearers (state or non-state actors) who have an obligation to respect, protect, promote, and fulfil the human rights of rights-holders.

The primary assumption of the HRBA conceptual framework is that all programmes of development cooperation, policies and technical assistance should be aimed at achieving human rights as laid down in the Universal Declaration of Human Rights and other international human rights instruments. Certainly, all these actions require accountability. Following the HRBA, the

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113 UNDP, "United Nations Development Programme What Does It Mean to Leave No One Behind? A UNDP Discussion Paper and Framework for Implementation July 2018," 2018, 4-5, <https://www.undp.org/publications/what-does-it-mean-leave-no-one-behind>.

114 Manfred Nowak, Karolina Januszewski, and Tina Höffstrater, *All Human Rights for All* (Vienna/Gratz: Insertina, 2012), 277.



adopted programmes, policies and strategies should establish clear targets and benchmarks defined by international human rights law and be verifiable.<sup>115</sup>

According to the “The Human Rights-Based Approach to Development Cooperation Towards a Common Understanding among UN Agencies” drawn up by the United Nations Development Group (UNDG) in 2003, human rights principles guide all programming at all phases of the programming process, including assessment and analysis, programme planning and design (including the setting of goals, objectives and strategies); implementation, monitoring and evaluation. These human rights principles are universality and inalienability; indivisibility; inter-dependence and inter-relatedness; non-discrimination and equality; participation and inclusion; accountability and the rule of law. Indeed, for further discussion, the principle of participation and inclusion is of crucial importance. It is explained that everyone is entitled to active, free and meaningful participation in contribution to, and enjoyment of civil, economic, social, cultural and political development in which human rights and fundamental freedoms can be achieved.<sup>116</sup>

Thus, the HRBA is also a principal guideline for regional national ageing policies. In their book, *The Human Rights of Older Persons. A Human Rights – Based Approach to Elder Law*, Bridget Lewis, Kelly Purser and Kristy Mackie analyse the elements of the HRBA concerning older persons’ rights. They argue that the HRBA is the most capable of addressing the main challenges facing people as they age. Most importantly, they propose the HRBA model for older persons consisting of three spheres. The values of dignity, autonomy, liberty and equality, which all have their foundations in the core human rights treaties and the Universal Declaration of Human Rights, are the first element of this model. The second element is wider and, apart from these values, also contains specific rights and states’ duties to respect, protect and fulfil. Finally, the last element, the framework principles, goes beyond values and states’ treaty obligations and refers to landmark soft-law documents dedicated to

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115 Nowak, Januszewski, and Höffstrater, 278; Taket, “Social Inclusion and Human Rights,” 102.

116 UNDG, “United Nations Development Group, The Human Rights Based Approach to Development Cooperation Towards a Common Understanding Among UN Agencies,” 2003, [https://undg.org/wp-content/uploads/2015/05/6959-The\\_Human\\_Rights\\_Based\\_Approach\\_to\\_Development\\_Cooperation\\_Towards\\_a\\_Common\\_Understanding\\_among\\_UN1.pdf](https://undg.org/wp-content/uploads/2015/05/6959-The_Human_Rights_Based_Approach_to_Development_Cooperation_Towards_a_Common_Understanding_among_UN1.pdf).

older persons, calling on their participation, respect for will and preferences, non-discrimination and access to justice.<sup>117</sup>

Only several years ago, many governments and non-government partners were largely ignorant of the human rights-based approach.<sup>118</sup> Today the HRBA, as a model that places the principles and standards of human rights at the centre of all aspects of service planning, policy and practice, is identified in healthcare and long-term policies in many countries. Moreover, the HRBA is also applied beyond the health and care sectors in relation to “participation”, “accountability”, “non-discrimination”, “empowerment” and “legality”.<sup>119</sup> Some progress has certainly been made in this area, but obviously, this model can still be developed by adding international jurisprudence, the output of human rights treaty bodies and other human rights bodies setting the protection standards to treaties and the soft law crucial documents.

### 6.3. Mainstreaming ageing

Mainstreaming ageing is a concept which has been promoted since the 1990s, particularly in connection with the International Year of Older Persons in 1999. Its main message was “towards society for all ages”,<sup>120</sup> and is continuing under the Madrid process of “building a society for all ages”. The idea of a society for all ages directly corresponds with the 2030 Agenda’s concept of “leaving no one behind”.

The concept of mainstreaming ageing is constantly being updated and completed. In 2021, two new guidelines were provided on the international forum. The “Guidelines for Mainstreaming Ageing” were drawn up under the

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117 Bridget Lewis, Kelly Purser, and Kirsty Mackie, *The Human Rights of Older Persons: A Human Rights-Based Approach to Elder Law* (Springer, Singapore, 2020), 67–81.

118 André Frankovits, *The Human Rights Based Approach and the United Nations System*, UNESCO Strategy on Human Rights (Paris: UNESCO, 2006), 61.

119 John G. Love and Rory Lynch, “Enablement and Positive Ageing: A Human Rights-Based Approach to Older People and Changing Demographics,” *The International Journal of Human Rights*, 22, no. 1 (January 2, 2018): 90–107, <https://doi.org/10.1080/13642987.2017.1390310>.

120 UN General Assembly, “Resolution of 16 October 1992 Proclamation on Ageing,” A/RES/47/5; Asghar Zaidi and Bernd Marin, *Mainstreaming Ageing: Indicators to Monitor Sustainable Progress and Policies*, Public Policy and Social Welfare 32 (New York: Routledge, 2007).

auspices of the United Nations Economic Commission for Europe to support governments in building a strategic framework for mainstreaming ageing. They consider ageing from a societal perspective and an individual life course perspective, taking into consideration the changing needs and capacities of human beings.<sup>121</sup> However, these guidelines are not dedicated to any specific age group, as they propose a coherent, holistic policy towards all generations (from the cradle to the grave) to achieving a society for all ages in which more equitable development within society will benefit everyone.

First, the guidelines set out a definition of “mainstreaming ageing”, described as “a strategy, process and multi-dimensional effort of integrating ageing issues into all policy fields and levels. The ultimate objective is to achieve a more equitable societal development that will benefit all social and age groups. Successful mainstreaming means including all relevant stakeholders in decision-making to ensure that the needs of all age groups are met in all policy fields”.<sup>122</sup> It is easy to notice that “the mainstreaming ageing” approach considers the heterogeneity and diversity within and across age groups and promotes intra- and intergenerational solidarity and social cohesion.

The guidelines establish the “Strategic Framework for Mainstreaming Ageing” consisting of five stages. The first refers to preparatory activities, securing political commitment, carrying out stakeholder mapping and analysis and setting up a team to develop the Strategic Framework within the subsequent stages. The second stage is dedicated to analysing the data, social situations and existing mainstreaming mechanisms to identify any gaps. The third stage focuses on formulating the vision, goals, objectives and expected outcomes for mainstreaming ageing. The fourth helps to define specific activities to support mainstreaming ageing, creating the coordination mechanism and selecting implementing partners. Finally, the fifth stage is dedicated to monitoring and evaluating the efforts taken.

The proposed strategic framework is a very flexible tool suggesting and sharing approaches that can be adapted to each country’s context, government structure, levels of decentralisation, and traditions and cultures. What is essential, the guidelines contain recommendations on the involvement of

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121 UNECE, “Guidelines for Mainstreaming Ageing” (Geneva: United Nations Economic Commission for Europe, 2021), [https://unece.org/sites/default/files/2021-03/ECE-WG.1-37\\_Guidelines\\_for-Mainstreaming\\_Ageing\\_1.pdf](https://unece.org/sites/default/files/2021-03/ECE-WG.1-37_Guidelines_for-Mainstreaming_Ageing_1.pdf).

122 UNECE, xi.

the whole society in developing, implementing and monitoring this strategic framework.<sup>123</sup>

On the other hand, the Conclusions on Mainstreaming Ageing in Public Policies of 12 March 2021 adopted by the Council of the European Union are much more oriented towards old age, and aim to face long-term socio-economic and demographic implications of ageing to encourage the EU to take action enabling older people to enjoy their fundamental rights and reach their full potential.

The Council indicates, among other things, that

Social isolation and unwanted solitude, which are a consequence of social disengagement in general community-based activities, must be prevented; this can be done, inter alia, by promoting digital literacy, especially for women, that allows people to have easier access to culture and leisure activities, to goods and services, including financial services, to life-long education and training opportunities, to rehabilitation, healthcare and social services, all of which promote a dignified, meaningful and healthy active life.<sup>124</sup>

Therefore the EU Member States are invited to develop, if they still need to do so, a national Strategic Framework for Mainstreaming, and promote coherent, coordinated and cross-cutting public policies to minimise the potential risks and address the main challenges of the population's increasing longevity. States should provide a cross-cutting and lifelong approach to longevity based on human rights, considering gender equality aspects and involving all stakeholders in public, private and third sectors, and older persons.

The Council's conclusions contain many references to crucial elements of the social inclusion of older persons. The Council invites states, among other things, to consider more flexible retirement pathways, provide incentives for a longer active working life and promote solidarity and intergenerational interaction to avoid loneliness and isolation; to foster active and healthy ageing and the full integration of older people into society and the community; to promote substantial investment in the "silver economy"; to promote lifelong

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123 UNECE, 9–21.

124 Council of the European Union, "Council Conclusions on Mainstreaming Ageing in Public Policies General Secretariat of the Council to Delegations," Brussels, 12 March 2021, 6976/21, 4.

learning opportunities for all, including for older people, in order to maintain and improve their skills (mainly digital) to support their active participation in the labour market and their social inclusion; to promote active citizenship and participation of older people at EU, national, regional and local levels. The council's voice is powerful in combating ageism, age discrimination and stereotyping of older people, primarily based on age beyond employment. The Council encourages the development of a constructive culture towards the diverse groups of older people, fostering a positive image of them, keeping in mind their heterogeneous needs, opportunities and preferences, in order to promote an inclusive society that does not segregate, discriminate or spread prejudice against older people.

Finally, mainstreaming ageing has become an important point of the Rome Declaration of the Ministerial Conference on Ageing, adopted in 2022. The representatives of states declared that they would be introducing mainstreaming ageing in all policies at all levels of government to create a society for all ages by developing or strengthening, as well as coordinating, national strategic policies. Their actions are to include, among others:

- intensifying age- and gender-sensitive research and data collection disaggregated by gender, age and disability and the diverse situation of older people to inform evidence-based policy, monitoring and evaluation;
- building a human rights-based, lifespan-oriented approach to mainstreaming ageing;
- addressing multiple and intersecting forms of discrimination and the diverse needs, preferences and capacities of older people;
- developing a participatory approach to stakeholder engagement across government and society as a whole, to ensure that older people and the organisations that represent them are listened to and actively engaged in meaningful cross-sectoral dialogue and collaboration on ageing between all relevant public and private sector actors, academia, social partners and civil society; strengthening the protection of older people in the full enjoyment of their human rights;
- addressing the challenges posed by emergencies (including COVID-19) and conflicts and strengthening international cooperation in this area.<sup>125</sup>

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125 UNECE, “Rome Ministerial Declaration ‘A Sustainable World for All Ages: Joining Forces for Solidarity and Equal Opportunities Throughout Life’, MIPAA 20” 16–17 June 2022, [https://unece.org/sites/default/files/2022-06/Rome\\_\\_Ministerial\\_Declaration.pdf](https://unece.org/sites/default/files/2022-06/Rome__Ministerial_Declaration.pdf).

It is easy to observe that this section of the Declaration covers a range of ideas about the social inclusion of older persons, solidarity between generations, and the concepts of “leave no one behind” as well as a human rights-based approach. However, it still is merely a non-binding declaration.

## Conclusion

The considerations above have shown that the concept of the social inclusion of older persons, understood briefly as having resources, opportunities and capabilities, has been recognised on the international forum. The Madrid Process, the efforts of international bodies and various initiatives such as the proclamation of years of active ageing and intergenerational solidarity have all contributed to identifying social exclusion and inclusion in old age. A profound diagnosis of exclusion of older persons conducted on the international forum and embedding social inclusion in values, indicated at the beginning of this chapter, are the main achievements.

A review of the contributions mentioned above demonstrates that international bodies and assemblies are currently more frequently trying to focus on social inclusion rather than exclusion of older persons. This is a challenge, as exclusion is a state of being witnessed, while inclusion is a goal to be pursued through a process, with further, sometimes impractical, barriers to be overcome. The selected reports, analyses, declarations and guidelines, as well as the research, all lead to the conclusion that the social inclusion of older people requires an active attitude on the part of states, non-state actors and older people themselves.

Certainly, the concepts proposed on international forums of intergenerational solidarity, the HRBA, and mainstreaming ageing linked to the idea of “leaving no one behind” undoubtedly foster an understanding about the social exclusion of older persons, as well as better targeting of national policies on the social inclusion of older adults.

On the other hand, the HRBA and mainstreaming ageing are applied to varying degrees, not everywhere and not always. In addition, their effects are very difficult to measure. Transforming the rights-based approach into hard

law, including the EU legislative, and fixed policy actions at a national and regional levels, is a very long process.<sup>126</sup>

Similarly, although the 2030 Agenda is recognised as unprecedented international community mobilisation, some of its SDGs are still a long way from being implemented worldwide.<sup>127</sup> Moreover, taking into account the agenda's idea of covering all groups and people on the one hand, and the heterogeneity of older persons on the other, there is a risk of diluting their capacities, potential and needs when achieving those SDGs.

Reports and policy papers, as well as, less frequently, soft law documents, have become the main sources addressing social exclusion, inclusion and integration of older people on the international agenda. Good diagnosis and guidelines are valuable, but more is needed to make the social inclusion of older persons real. Without "hard" treaty arguments it is difficult to "convince" states to adopt ageing policies meeting HRBA and mainstreaming ageing guidelines as well as improving solidarity between generations. A failure to comply with the pledges contained in states' declarations or resolutions does not entail legal responsibility, nor really any political liability or reputational damage.

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126 Fundamental Rights Agency, *Shifting Perceptions: Towards a Rights-Based Approach to Ageing* (Luxembourg: Publications Office of the European Union, 2018), 16, <https://doi.org/10.2811/533946>.

127 Markus Kaltenborn, Markus Krajewski, and Heike Kuhn, *Sustainable Development Goals and Human Rights* (Cham: Springer Open, 2020), 30, <https://link.springer.com/book/10.1007/978-3-030-30469-0>; Garlington, Collins, and Durham Bossaller, "An Ethical Foundation for Social Good: Virtue Theory and Solidarity," 70.





## Chapter Two

# Competitive Visions of the Legal Framework for Older Persons' Rights

As shown in the previous chapter, the social inclusion of older people is inextricably linked to the enjoyment of human rights in old age. However, this issue has historically been neglected by human rights law and, ultimately, it was only significant global demographic changes that have led to increased general interest in older persons' human rights.<sup>1</sup> For this reason, it is worth pointing out the most important moments in the "history of ageing" on the international forum, to trace how the international community's position regarding the human rights of older persons has been shaped.

### 1. Global forum

#### 1.1. Towards a global treaty – struggles and dilemmas

The issue of human ageing and the rights of older persons appeared very early on the international forum. The Argentinian draft Resolution on a Declaration of Old Age Rights,<sup>2</sup> presented to the UN General Assembly's Third Committee, preceded the adoption of the Universal Declaration on Human Rights in 1948.<sup>3</sup> The draft's preamble recalled Article 55 of the Charter of the United

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1 Sara Tonolo, "International Human Rights Law and the Protection of the Elderly in Europe," *Medicine, Law & Society*, 11, no. 2 (October 22, 2018): 107, <https://doi.org/10.18690/mls.11.2.107-120.2018>.

2 Israel Doron and Kate Mewhinney, *The Rights of Older Persons: Collection of International Documents*, eds. (Association for the Planning and Development of Services for the Aged in Israel, 2007), 25–26, <https://ifa.ngo/publication/rights-of-older-people/the-rights-of-older-persons-a-collection-of-international-documents/>.

3 UN General Assembly, "Universal Declaration of Human Rights Adopted by the United Nations General Assembly in Paris on 10 December 1948 General Assembly Resolution 217 A," 1948.

Nations on economic and social cooperation and promotion of higher standards of living, full employment and conditions of economic and social progress and development, as well as universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.<sup>4</sup>

The draft declaration touched on many fundamental aspects that are still relevant today and offered solutions to unsolved dilemmas, including definitional ambiguities referring to the concept of “old age” and an “old person”. The title of the proposed declaration indicated “rights in later life” regardless of a person’s chronological age. This approach of over 70 years old is inclusive by nature and may still be used today, as differences in life expectancy are still considerable (up to as much as 30 years) among states and continents, usually corresponding with the level of prosperity of the country or region concerned.<sup>5</sup>

The draft declared such rights as the right to assistance, housing, physical and mental health, appropriate food and clothing, and the rights to practice religion, rest and work, comprising elements crucial to the initial conditions of social inclusion of older persons, especially the “right to stability”. The “right to stability” was explained as follows: “Every aged person has the right to a definite and assured state of stability and a life free from distress and worry in the final years of their life”.<sup>6</sup> The right to stability has not appeared more explicitly in any further international document. On the other hand, the “right to respect”, formulated as “[A]ged persons are entitled to the full respect and consideration of their fellow men”, may be perceived as a prototype of anti-ageism provisions as well as a call for intergenerational solidarity.

Despite the draft being communicated to the Economic and Social Council<sup>7</sup>, followed up by the UN Secretary-General report titled “Welfare of the Aged: Old Age Rights” in 1950,<sup>8</sup> no further action was taken. Until the end of the 1960s,

4 United Nations, “Charter of the United Nations and Statute of the International Court of Justice,” San Francisco, 26 June 1945, <https://treaties.un.org/doc/publication/ctc/uncharter.pdf>.

5 Statista, “Mortality and Life Expectancy Statistics: Life Expectancy by Continent and Gender 2022,” Statista Research Centre 20 October 2022. [https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Mortality\\_and\\_life\\_expectancy\\_statistics](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Mortality_and_life_expectancy_statistics).

6 Doron and Mewhinney, *The Rights of Older Persons: Collection of International Documents*, 26.

7 UN Secretary-General. Declaration of Old Age Rights: Memorandum, E/CN.4/163, 1949.

8 UN Secretary-General, “Old Age Rights,” Memorandum by the Secretary-General, 16 March 1950, E/CN.4/362, 1950.

the issue of older people was hardly dealt with at all at the UN forum.<sup>9</sup> In the 1970s, some initiatives resulted in calling on states to adopt particular policies for older people. Finally, the ageing issue appeared during the World Population Conference in 1974 and was included in the World Population Action.<sup>10</sup>

The turn of the 1970s and 1980s was marked by several initiatives, including a call by the US Congress to raise global public interest in the situation of older people and the ageing of entire societies,<sup>11</sup> which finally resulted in convening the World Assembly on Ageing in 1982 and the adoption of the Vienna International Plan of Action on Ageing.<sup>12</sup> This was the first landmark document that opened up a new era in making global ageing and older persons more visible on the international human rights agenda.

Another milestone in increasing the international visibility of aged people and their human rights was invoked in the first chapter, namely the UN General Assembly Resolution 49/91 comprising the Principles for Older Persons in areas of independence, participation, care, self-fulfilment and dignity. Undoubtedly, all of these principles are at the core of the social inclusion of older persons, but special attention should be paid to principles 7–9 and 15–16:

[...] 7. Older persons should remain integrated in society, participate actively in the formulation and implementation of policies that directly affect their well-being and share their knowledge and skills with younger generation.

8. Older persons should be able to seek and develop opportunities for service to the community and to serve as volunteers in positions appropriate to their interests and capabilities.

9. Older persons should be able to form movements or associations of older persons.

[...]

15. Older persons should be able to pursue opportunities for the full development of their potential.

9 Michael G. Schechter, *United Nations Global Conferences*, 1<sup>st</sup> ed. (Routledge, 2005), 89.

10 Doron and Mewhinney, *The Rights of Older Persons: Collection of International Documents*, 252–355.

11 Schechter, *United Nations Global Conferences*, 89–90.

12 UN General Assembly, "Vienna International Plan of Action on Ageing, Report of the World Assembly on Ageing, Vienna, 26 July–6 August 1982," General Assembly Resolution "Question on Ageing," A/RES/37/51.

16. Older persons should have access to the educational, cultural, spiritual and recreational resources of society.<sup>13</sup>

However, it is the Madrid International Plan of Action on Ageing (MIPAA) and the Political Declaration adopted at the Second World Assembly on Ageing in April 2002, as endorsed by the General Assembly in Resolution 57/167;<sup>14</sup> that should be recognised as the most comprehensive achievement of the global international community in raising awareness of global ageing and the rights of older people. The added value of the MIPAA is its key message, “building a society for all ages”, and its specific guidelines focusing on older persons’ development, health and well-being into old age and ensuring enabling and supportive environments. Most importantly, the MIPAA is a long-term process with a follow-up mechanism requiring a systematic review of its implementation, distinguishing it from many other plans and declarations.

However, despite the unquestionable values of the MIPAA, this mechanism is not based on hard provisions of law, so its power to impact on states is limited. This deficiency was stressed in 2009 by the Human Rights Council Advisory Committee, which submitted a working paper to the Human Rights Council on “The Necessity of a Human Rights Approach and Effective United Nations Mechanism for the Human Rights of the Older Person” (the Chung Report). The committee recommended the intensification of international cooperation to ensure the legal protection of the rights of older persons supported by various United Nations bodies towards the establishment of an international convention. That is why, the Human Rights Council was recommended to establish a new agenda where the human rights of older persons were discussed.<sup>15</sup>

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13 UN General Assembly, “United Nations Principles for Older Persons,” 16 December 1991 A/RES/46/91.

14 Second World Assembly on Ageing, “Madrid International Plan of Action on Ageing and the Political Declaration, Report of the Second World Assembly on Ageing,” Madrid, 8–12 April 2002, (United Nations Publication, Sales No. E.02.IV.4).

15 Human Rights Council, “The Necessity of a Human Rights Approach and Effective United Nations Mechanism for the Human Rights of the Older Person: Working Paper Prepared by Ms. Chinsung Chung, Member of the Human Rights Council Advisory Committee,” 4<sup>th</sup> December 2009 A/HRC/AC/4/CRP.1.

This document gave rise to the General Assembly establishing the Open-Ended Working Group on Ageing (OEWGA) in December 2010,<sup>16</sup> which must be accessed as another turning point in the history of older people's rights. The first task of this body, composed of the states' delegations and civil society organisations (later joined by the National Human Rights Institutions), was to analyse the existing international framework for the protection of the human rights of older persons and to identify possible legal gaps and propose the best possible solutions for the future.<sup>17</sup> In 2012, under the General Assembly resolution of 20 December 2012, "Towards a Comprehensive and Integral International Legal Instrument to Promote and Protect the Rights and Dignity of Older Persons",<sup>18</sup> the OEWGA was commissioned to draft a treaty protecting the rights and dignity of older persons. However, the vote on this issue revealed, if not reluctance, then at least caution towards a future convention. There were 54 states that voted in favour of starting work on a new treaty, four were against (the USA, Canada, Israel, Seychelles and South Sudan) and as many as 118 abstained. The abstentions included all the European Union Member States.

The discussion about the pros and cons of the convention has been going on for years.<sup>19</sup> Although the arguments of civil society and academia are convincing, the states remain reluctant. As Annie Herro noted, states "focus on costs, believing that such a treaty is a kind of Trojan horse for their budgets".<sup>20</sup>

Over time, only a few new countries have taken the position that a new global treaty is needed. However, the United States has expressed constant opposition to this idea. The EU has softened its position against the treaty

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16 UN General Assembly, "Resolution Adopted by the General Assembly on 21 December 2010, Follow-up to the Second World Assembly on Ageing," A/RES/65/182.

17 OEWGA, "Report of the Open-Ended Working Group on Ageing, First Working Session," New York, 18–21 April 2011, A/AC.278/2011/4.

18 UN General Assembly, "Towards a Comprehensive and Integral International Legal Instrument to Promote and Protect the Rights and Dignity of Older Persons," A/RES/67/139.

19 Israel (Issi) Doron and Apter, Itai, "The Debate Around the Need for an International Convention on the Rights of Older Persons," *The Gerontologist*, 50, no. 5 (2010): 589–90, <https://doi.org/10.1093/geront/gnq016>; Mégret Frédéric, "The Human Rights of Older Persons: A Growing Challenge," *Human Rights Law Review*, 11, no. 1 (2011): 39, <https://doi.org/10.1093/hrlr/ngq050>.

20 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*, 23, no. 1 (2017): 101, <https://doi.org/10.1080/1323238X.2017.1314806>.

and no longer stresses the view that the best way forward would be to work with existing international human rights instruments and seems to be more open to discussions about a possible convention and its content.<sup>21</sup> There was a belief that the EU's position would shift, especially after Slovenia broke out of the EU-wide convention narrative,<sup>22</sup> but the joint Trio Declaration on Ageing, being the result of work by Germany, Portugal and Slovenia, holding the presidency of the Council of the European (from July 2020 to December 2021) does not call for steps to be taken towards the adoption of a new global convention. It refers to the currently existing European and international human rights framework that obliges and encourages the international community to guarantee the full enjoyment of all human rights to everyone, regardless of age or impairments.<sup>23</sup>

Meanwhile, between 2011 and 2022, a number of key issues were examined by the OEWGA: the right to equality and non-discrimination; the right to autonomy and independence; the right to be free from violence, exploitation, abuse and neglect; the right to health, including the right of access to palliative care; the right to an adequate standard of living; the right to work and to access the labour market; the right to social protection and social security, including social protection floors, care and support; the right to care and support; the right to education, training, lifelong learning, capacity-building, economic security and contribution of older persons to sustainable development. This last issue, considered at the twelfth session in 2022, exemplifies the perception of older people as active participants in all aspects of social life, rather than merely passive witnesses of changes.<sup>24</sup> Finally, the 2023 session was dedicated to eco-

21 William B.T. Mock, "Human Rights and Aging," *Generations: Journal of the American Society on Aging*, 43, no. 4 (2019): 82, <https://www.jstor.org/stable/e26908283>.

22 Annie Herro, "Domestic Interest Groups and Rights Mobilization: Explaining the Case of Slovenia's Support for the Proposed Convention on the Rights of Older Persons," *Global Networks*, 18, no. 4 (2018): 625-43, <https://doi.org/10.1111/glob.12192>; Annie Herro, "Advocating a UN Convention on the Rights of Older Persons in the United Kingdom: The Case for a Radical Flank," *Journal of Human Rights Practice*, 11, no. 1 (2019): 132-150, <https://doi.org/10.1093/jhuman/huz001>.

23 European Council Presidency, "Germany, Portugal, Slovenia: Trio Presidency Declaration on Ageing," 2021, <https://www.bmfsfj.de/bmfsfj/meta/en/publications-en/trio-presidency-declaration-on-ageing-163914>.

24 OEWGA, "Report of the Open-Ended Working Group on Ageing on Its Twelfth Session Rapporteur: Mr. Tomáš Grünwald (Slovakia)," 16 May 2022, [A/AC.278/2022/2](https://www.oewga.org/AC/AC.278/2022/2).

conomic security and, the most important in the context of this study, the social inclusion of older persons.<sup>25</sup> The OEWGA decided that its 14<sup>th</sup> session in 2024 will focus on “participation in public life and in decision-making processes” and “accessibility, infrastructure and habitat (transport, housing and access)”.<sup>26</sup>

Despite more than 800 documents having been submitted to the OEWGA on a number of key issues and identifying gaps in the protection of the rights of older people, the international community is no closer to adopting a treaty.<sup>27</sup> In the beginning of 2022, the UN High Commissioner for Human Rights, Michele Bachelet, noted in her report that “despite significant normative developments at the regional level over the last decade, the current international framework provides fragmented and inconsistent coverage of the human rights of older persons in law and practice”.<sup>28</sup>

That is why, in 2022, Argentina supported by 28 states<sup>29</sup> proposed to establish an “intersessional Working Group with the objective of preparing and presenting a draft text determining the main gaps in the international human rights system for older persons, which would be the basis for the further negotiations of instruments and measures to close these gaps by Member States and Observers in the Working Group”.<sup>30</sup> This gives the impression that the OEWGA is going back to square one by setting up a smaller working group to once again diagnose the gaps.

On the other hand, despite a persistent lack of consensus on a global treaty, in the second decade of the 21st century, there have also been successes in

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25 See more in Chapter Six.

26 OEWGA, “Open-Ended Working Group on Ageing (Thirteenth Session), Identification of Possible Gaps in the Protection of the Human Rights of Older Persons and How Best to Address Them,” 23 April 2023, A/AC.278/2023/L.1/Rev.1.

27 OHCHR, “Summary of the Multi-Stakeholder Meeting on the Human Rights of Older Persons Report of the Office of the United Nations High Commissioner for Human Rights,” 27 December 2022, A/HRC/52/49, 2022, para. 6.

28 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,” 28 January 2022, A/HRC/49/70, para. 55.

29 Angola, Austria, Bangladesh, Bolivia, Brazil, Burundi, Cameroon, Canada, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Germany, Guatemala, Italy, Mexico, Morocco, Nigeria, Panama, Peru, Philippines, Slovakia, Slovenia, Turkey, United Kingdom, United States, and Uruguay.

30 OEWGA, “Report of the Open-Ended Working Group on Ageing on Its Twelfth Session Rapporteur: Mr. Tomáš Grünwald (Slovakia),” 14.

making older people's issues more visible internationally, thereby influencing work on a new treaty. Firstly, in 2013, the Human Rights Council decided to establish, as a special procedure, the mandate of the UN Independent Expert on the enjoyment of all human rights by older persons. This mandate was created to assess the implementation of national, regional and international standards relevant to the rights of older persons; also to identify, exchange and promote best practices relating to the promotion and protection of these rights; to report on developments, challenges and protection gaps in achieving the rights of older persons; and make related recommendations.<sup>31</sup> This step has undoubtedly improved the visibility of the older persons' needs among the international community due to the UN Independent Expert's country visits and made older persons' rights the topic of thematic reports. In 2019, the Human Rights Council decided to extend this special procedure for a period of three years and requested the Independent Expert to work in close coordination, while avoiding unnecessary UN duplication, with the Open-ended Working Group on Ageing, including by participating at its annual session.<sup>32</sup>

Secondly, on 15 June 2015, the Inter-American Convention on Protecting the Human Rights of Older Persons was adopted by the Organization of American States (OAS) General Assembly.<sup>33</sup> The convention's aim is to promote older persons' integration and participation in society, protect and ensure the full recognition of their human rights and prevent social exclusion. The convention covers the most important issues for older persons, ensures that the implementation process is monitored and provides for individual and inter-state complaints. However, not all OAS states supported the idea of the treaty. The United States and Canada opposed the convention. Many countries of the region did not reject the convention, but introduced reservations expressing concerns regarding particular issues.<sup>34</sup>

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31 Human Rights Council, "Resolution 24/20 Adopted by the Human Rights Council on 8 October 2013 – The Human Rights of Older Persons," A/HRC/RES/24/20.

32 Human Rights Council, "Resolution 42/12 Adopted by the Human Rights Council on 26 September 2019 – The Human Rights of Older Persons," A/HRC/RES/42/12.

33 Organization of American States, "Inter-American Convention on Protecting the Human Rights of Older Persons" adopted at the General Assembly of the Organization of American States in Washington, DC, on June 15, 2015, (OAS, A -70) 2015.

34 Luis Humberto Toro Utillano, "The Inter-American Convention on Protecting the Human Rights of Older Persons," in *The Cambridge Handbook of New Human Rights*, eds. Andreas



Finally, the adoption on 31 January 2016 of the Protocol on the Rights of Older Persons to the African Charter on Human and Peoples' Rights on the African Union<sup>35</sup> is another important moment in the "history of older persons' rights" at an international level. Admittedly, the protocol is not as extensive as the Inter-American treaty and is quite general in nature, but it targets violations of the rights of older persons that are specific to the African continent. The African Commission on Human Rights supervises the implementation of the treaty, interprets its provisions in accordance with the African Charter on Human and Peoples' Rights of 1981<sup>36</sup> and in the event of a dispute, may refer a case to the African Court of Human Rights. However, the protocol is not "popular" among African states. Of the 55 AU member states, twenty signed it and only eleven ratified it.<sup>37</sup> In 2019, the African Regional High Level Conference on the Situation of Human Rights of Older Persons in Africa adopted a declaration calling for improving national policies toward older persons and to ratify the protocol.<sup>38</sup> However, the states' reaction to this call has been lacklustre.

The consequences of adopting regional treaties on the OAS and African Union forums are twofold. Firstly, it is a success for the regional international community (or at least part of it) and contributes to the visibility of older people and their rights at international level. However, on the other hand, these achievements may be used as an argument against putting older persons' rights into a global normative framework. Opponents to a global treaty may argue that older persons' rights are already included in two regional treaties

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von Arnould, Kerstin von der Decken, and Mart Susi, 1st ed. (Cambridge University Press, 2020), 176, <https://doi.org/10.1017/9781108676106.013>.

35 African Union, "Protocol to the African Charter on Human And Peoples' Rights on the Rights of Older Persons in Africa," 31 January 2016," <https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-older-persons>.

36 Organization of African Unity, "African Charter on Human and Peoples' Rights (Banjul Charter) Adopted 27 June 1981, Organisation of African Unity, Doc. CAB/LEG/67/3 Rev. 5, 21" (21 International Legal Materials 58, 1981).

37 As of June 2023.

38 ECOWAS, "Africa Regional High-Level Conference, The Human Rights Situation of Older Persons in Africa ECOWAS Parliament Complex, Abuja-Nigeria 25th and 26th November 2019. Conference Declaration and Call for Action," 2019, [https://www.chr.up.ac.za/images/centrenews/2019/files/Abuja\\_2019\\_High-Level\\_Conference\\_-\\_Call\\_for\\_Action\\_-\\_Declaration\\_-\\_Final\\_-\\_26112019.pdf](https://www.chr.up.ac.za/images/centrenews/2019/files/Abuja_2019_High-Level_Conference_-_Call_for_Action_-_Declaration_-_Final_-_26112019.pdf).

that take specific regional conditions into account, or are covered by soft law documents in regions where a hard law format is unnecessary (e.g. Europe).

Despite the fact that the regional treaties promoting older persons' rights have met with far less approbation than might have been expected, they cannot be ignored as important outposts for raising awareness of the rights of older people. Regardless of the number of ratifications and reservations, they remain a pattern to follow at international and national levels. The 2020s started with a substantive and crucial resolution 48/3 of the Human Rights Council of 7 October 2021 on the rights of older persons. Among other things, the resolution calls:

upon all stakeholders, including States, the entities of the United Nations system, civil society, national human rights institutions and the private sector to combat ageism and eliminate age discrimination in all its forms and to adopt a human-rights based approach in all programmes, campaigns and activities relating to ageing and older persons [...]

[...] upon all States to take measures to raise awareness in society, including among public officials, the private sector and older persons themselves, about the meaning and consequences of discrimination in old age and about existing legal provisions and judicial remedies.<sup>39</sup>

This milestone resolution also stipulates that states, in collaboration with other stakeholders, should develop and adopt a comprehensive convention on the human rights of older persons that builds on existing rights and regional instruments. It also indicates the long list of aims of the future convention, including the aim of enabling older persons' full inclusion in society.<sup>40</sup>

## 1.2. Practical domain – examples of cooperation, support and capacity-building

An action to promote the human rights of older people is about more than pushing for the adoption of a global treaty. It is also the technical cooperation

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39 Human Rights Council, "Resolution Human Rights of Older Persons Adopted by the Human Rights Council on 7 October 2021," A/HRC/RES/48/3, para. 9.

40 Human Rights Council, para. 38.

and capacity building of state efforts undertaken by various United Nations entities, bodies and the UN system agendas.<sup>41</sup>

The UNDESA's cooperation with the UN economic commissions<sup>42</sup> demonstrates, through its organisation of meetings of expert groups, its briefing on national social policies, and its support in the production and analysis of statistical information and conferences, including conferences following the MIPAA's idea of a "society for all ages".

The conferences organised under the *aegis* of the economic commissions have resulted in the adoption of documents with the undoubtedly significant potential to shape awareness of the regional community on older persons' rights. The 2007 Brasilia Declaration, adopted by the Second Regional Intergovernmental Conference on Ageing in Latin America and the Caribbean: "Towards a Society for All Ages and Rights-Based Social Protection"<sup>43</sup> is one example of this. Another is the 2012 San José charter on the rights of older persons in Latin America and the Caribbean,<sup>44</sup> adopted at the next regional intergovernmental conference. There is little doubt that these documents became the building blocks for the final adoption of the regional treaty on the rights of the older persons in 2015. However, the ECLAC's activity in relation to ageing and older persons' rights has not been finished together with the adoption of the Inter-American Convention on Protecting the Human Rights of Older Persons. The process is continuing. The Fourth Regional Intergovernmental Conference on Ageing and the Rights of Older Persons in Latin America and

41 Claudia Martin, Diego Rodríguez-Pinzón, and Bethany Brown, *Human Rights of Older People*, *Ius Gentium: Comparative Perspectives on Law and Justice* (Springer Netherlands, 2015), 11–15.

42 The United Nations Economic Commission for Africa (UNECA), the Economic and Social Commission for Asia and the Pacific (ESCAP), the Economic Commission for Latin America and the Caribbean (ECLAC), the United Nations Economic and Social Commission for Western Asia (UNECWA), and United Nations Economic Commission for Europe (UNECE).

43 ECLAC, "Brasilia Declaration Adopted by the Representatives of the Countries Gathered in Brasilia, Brazil, from 4 to 6 December 2007 at the Second Regional Intergovernmental Conference on Ageing in Latin America and the Caribbean: Towards a Society for All Ages and Rights-Based Social Protection," [https://www.un.org/esa/socdev/ageing/documents/regional\\_review/Declaracion\\_Brasilia.pdf](https://www.un.org/esa/socdev/ageing/documents/regional_review/Declaracion_Brasilia.pdf).

44 ECLAC, "San José Charter on the Rights of Older Persons in Latin America and the Caribbean Adopted at the Third Regional Intergovernmental Conference on Ageing in Latin America and the Caribbean," San Jose, Costa Rica, 8 to 11 May, 2012, [https://repositorio.cepal.org/bitstream/handle/11362/21535/1/S2012897\\_en.pdf](https://repositorio.cepal.org/bitstream/handle/11362/21535/1/S2012897_en.pdf).

the Caribbean adopted the Asunción Declaration “Building Inclusive Societies: Ageing with Dignity and Rights”.<sup>45</sup> At the Fifth Regional Intergovernmental Conference in Santiago (December 2022), the participating states adopted the Santiago Declaration encouraging states to continue their contribution to the work of the OEWSGA, in particular by presenting measures to enhance the promotion and protection of the human rights and dignity of older persons. These include best practices, lessons learned and proposed content for a multilateral legal instrument, as appropriate, to strengthen the international regime for the protection of older persons.<sup>46</sup>

Similarly, five Ministerial Conferences on Ageing gathered the UNECE member states, civil society, researchers and international organisations were organised to review and appraise the progress made and set priorities for the way forward. The recent 2022 Rome Declaration was preceded by ministerial declarations adopted in Berlin, León, Vienna and Lisbon. All of them endorsed the political commitment to the MIPAA and the regional strategy, addressing the issues that have emerged over time.<sup>47</sup> Although, in the UNECE area, the ministerial declarations did not bring the region closer to a consensus on the treaty, they certainly raised awareness about older persons’ situation in the region.

It is worth noting that, between 2009 and 2022, UNECE published 27 Policy Briefs of significant importance explaining the social inclusion of older persons. Among other things, they refer to mainstreaming ageing (invoked in the first chapter), older persons as consumers, the integration and participation of older persons in society, lifelong learning, advancing intergenerational solidarity, age-friendly employment, the potential of volunteering, images of older persons, active ageing, abuse of older persons, older persons in rural and remote areas, achieving the potential of living longer, innovative social services

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45 ECLAC, “Fourth Regional Intergovernmental Conference on Ageing and the Rights of Older Persons in Latin America and the Caribbean, Asunción Declaration ‘Building Inclusive Societies: Ageing with Dignity and Rights,’” 27–30 June 2017, <https://conferenciaenvejecimiento.cepal.org/4/sites/envejecimiento4/files/c1700614.pdf>.

46 ECLAC, “Fifth Regional Intergovernmental Conference on Ageing and the Rights of Older Persons in Latin America and the Caribbean, Santiago Declaration ‘Human Rights and Participation of Older Persons: Towards an Inclusive and Resilient Care Society,’” 15 December 2022, [https://conferenciaenvejecimiento.cepal.org/5/sites/envejecimiento5/files/22-01248\\_cre5\\_santiago\\_declaration.pdf](https://conferenciaenvejecimiento.cepal.org/5/sites/envejecimiento5/files/22-01248_cre5_santiago_declaration.pdf).

47 UNECE, “MIPAA/RIS +20. 20 Years of Action towards Creating Societies for All Ages in the UNECE Region. United Nations, Geneva 2022,” 2022, 27.

and supportive measures for independent living in old age, combating ageism in the world of work, the challenging roles of informal carers, gender equality in ageing societies, ageing in sustainable and smart cities, and ageing in the digital era.<sup>48</sup>

It appears that the work of the UN economic commissions is bearing fruit in raising awareness of the situation of older people worldwide. The most recent reports, for example, those drafted by ESCAP or UNECE, note the progress in spreading awareness about the social situation of older persons, as well as in the creation of ageing policies.<sup>49</sup> Undoubtedly, the support of the UN Independent Expert on the enjoyment of all human rights by older persons for states in creating their ageing policies is evident and is discussed widely in this book.

Moreover, several supportive initiatives were presented by the UN High Commissioner for Human Rights in his 2019 report titled “Activities of the Office of the United Nations High Commissioner for Human Rights, the United Nations system and regional organisations to support states’ efforts to promote and protect the human rights of older persons”.<sup>50</sup> According to the report, the UN entities and the specialised agencies within the UN system provided states with policy and technical advice, fostered the exchange of good practices, supported legal reforms and ageing strategies and the implementation of relevant programmes. For example, the Working Group on Ageing, operating within the Economic Commission for Europe, drew up a programme covering the organisation of policy seminars and in-depth discussions, prepared policy briefs with examples of good practices, and monitored the regional implementation of the MIPAA. This entity cooperates with experts from academia and civil

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48 UNECE, 28.

49 ESCAP, “United Nations, Economic and Social Commission for Asia and the Pacific Asia-Pacific Report on Population Ageing 2022: Trends, Policies and Good Practices Regarding Older Persons and Population Ageing” (ST/ESCAP/3041), <https://www.unescap.org/kp/2022/asia-pacific-report-population-ageing-2022-trends-policies-and-good-practices-regarding>; UNECE, “Ageing Policy in Europe, North America and Central Asia in 2017-2022 Synthesis Report on the Implementation of the Madrid International Plan of Action on Ageing in the ECE Region between 2017 and 2022,” 42, [https://unece.org/sites/default/files/2022-08/Synthesis-report\\_o.pdf](https://unece.org/sites/default/files/2022-08/Synthesis-report_o.pdf).

50 OHCHR, “Activities of the Office of the United Nations High Commissioner for Human Rights, the United Nations System and Regional Organizations to Support States’ Efforts to Promote and Protect the Human Rights of Older Persons, Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General,” 21 June 2019 A/HCR/41/32.

society organisations. The “Guidelines for Mainstreaming Ageing”, indicated in the previous chapter, are the result of such cooperation.<sup>51</sup>

The awareness-raising effect can also be attributed to a significant number of reports and background papers along with other activities coordinated by the UNDESA Division for Inclusive Social Development (DISD). The division monitors national and global socio-economic trends, identifies emerging issues and assesses their implications for social policy at national and international levels.

Other UN entities are also taking practical steps toward the social inclusion of older people. The Office of the United Nations High Commissioner for Refugees (UNHCR) and its offices in many countries can be such an example. Thus, the UNHCR India project, conducted in 2021, illustrates the UNHCR’s cooperation with community-based structures to support and enhance the protection of at-risk community members. This initiative was entirely inclusive, as it envisaged that youth leaders from migrant communities would help older persons and persons with disabilities to receive timely information on the available services and the assistance they need and to avoid isolation and marginalisation, especially during the COVID-19 pandemic.<sup>52</sup>

In turn, the Statistical Commission established the Group on Ageing Statistics and Age-Disaggregated Data to identify gaps and establish international standards and methods for compiling statistics and data on the main aspects of ageing and age-disaggregated data across the life cycle. Meanwhile, the United Nations Office for Gender Equality and the Empowerment of Women (UN-Women) has issued a policy report on gender-sensitive pension systems. It makes several recommendations on how pension systems can be transformed to reduce gender gaps and protect women’s income security in old age.<sup>53</sup>

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51 UNECE, “Guidelines for Mainstreaming Ageing,” Geneva, 2021, [https://unece.org/sites/default/files/2021-03/ECE-WG.1-37\\_Guidelines\\_for-Mainstreaming\\_Ageing\\_1.pdf](https://unece.org/sites/default/files/2021-03/ECE-WG.1-37_Guidelines_for-Mainstreaming_Ageing_1.pdf).

52 UNHCR, “Youth Mobilized to Engage with Older Persons and Persons with Disabilities, Geneva February 2022,” (United Nations High Commissioner for Refugees, 2022), 5, <https://www.unhcr.org/protection/operations/63c56ef74/youth-mobilized-engage-older-persons-persons-disabilities.html?query=older%20persons>.

53 OHCHR, “Activities of the Office of the United Nations High Commissioner for Human Rights, the United Nations System and Regional Organizations to Support States’ Efforts to Promote and Protect the Human Rights of Older Persons,” Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General, 21 June 2019 A/HCR/41/32; UN Women, “United

The United Nations Population Fund (UNFPA) and its Global Ageing Network are worth mentioning among a number of programmes and funds to address particular humanitarian and development concerns. It supported, for example, a South-South cooperation initiative between Bosnia and Herzegovina and North Macedonia to exchange experiences, lessons learned and good practices in addressing the health needs of older people.<sup>54</sup>

Another example of the activity of the UN fund is a handbook prepared under the auspices of the Global Network for Sustainable Housing (GNSH) managed by the UN-Habitat Housing Unit. The “Accessibility of Housing. Handbook of Inclusive Affordable Housing Solutions for Persons with Disabilities and Older Persons” presents practical solutions to overcome accessibility barriers for people with disabilities and older people in the context of slum upgrading, reconstruction and affordable social housing. Containing concepts and proposing different policy approaches, practical information and technical tools, it aims to build capacity in accessibility design and implementation.<sup>55</sup>

The activities and programmes of the UN specialised agencies should also be mentioned. For example, the World Bank Group declares its technical assistance, lending, and analytical work to help states manage the ageing transition. Its strategy on “societal ageing” is based on four principles to shape inclusive and productive ageing societies:

- Provide choice for aging people with policies and practices that maximize individual agency in work, retirement, living and care decisions and arrangements. Establish defaults that protect those who do not exercise choice and encourage socially desirable outcomes, e.g., default opt-ins or auto-enrolment for pension schemes.
- Maintain flexibility in policies, programs and markets to reflect the diversity among older people and the evolution across the life cycle.

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Nations Entity for Gender Equality and the Empowerment of Women Protecting Women’s Income Security in Old Age: Toward Gender-Responsive Pension Systems,” Policy Brief 2015, no. 3.

- 54 OHCHR, “Activities of the Office of the United Nations High Commissioner for Human Rights, the United Nations System and Regional Organizations to Support States’ Efforts to Promote and Protect the Human Rights of Older Persons,” para. 32.
- 55 Marja Edelman and Ana Carolina Moreira Pudenzi, “Accessibility of Housing. A Handbook of Inclusive Affordable Housing Solutions for Persons with Disabilities and Older Persons,” (United Nations Human Settlements Programme (UN-Habitat) 2014.

– Practice empathy toward older people by eliminating age-based discrimination, promoting autonomy and dignity, valuing their social and economic contribution to society and providing equal access to services and opportunities.<sup>56</sup>

The report “Ageing in a Digital World – from Vulnerable to Valuable” by the International Telecommunication Union (ITU), mentioned in Chapter One, is also an example of support/guidance for countries. In addition, the ITU promotes the idea of smart, sustainable cities as one element of an inclusive society in which all segments of society, regardless of gender, income and age, have access to essential services and ICTs for urban living.<sup>57</sup>

In the context of social inclusion, the UNESCO Institute for Lifelong Learning is also worth mentioning. The institute supports strengthening states’ capacity to improve the quality of their lifelong learning policies and strategies for building inclusive lifelong learning systems through policy review, policy dialogue and the provision of capacity development to key national stakeholders.<sup>58</sup>

The International Labour Organization provides specific guidance to countries on ways to give effect to the right of older persons to social security, from the provision of basic social security to the full realisation of that right. An interesting example of the practical support for officials and all stakeholders creating pension and social protection schemes at the national level is the ILO knowledge-sharing platform on social protection offering, among others, online courses on old-age pensions.<sup>59</sup>

Finally, the UN General Assembly resolution proclaimed the United Nations’ Decade of Healthy Ageing.<sup>60</sup> The resolution follows the 73<sup>rd</sup> World Health Assembly’s decision of August 2020<sup>61</sup> and is embedded in the 2030 Agenda

56 World Bank Group, “Adapting Social Protection & Jobs to an Actively Aging World,” (Washington, 2022), 6.

57 OHCHR, “Activities of the Office of the United Nations High Commissioner for Human Rights, the United Nations System and Regional Organizations to Support States’ Efforts to Promote and Protect the Human Rights of Older Persons,” para. 40.

58 OHCHR, para. 40.

59 See: <https://socialprotection.org/>.

60 UN General Assembly, “Resolution Adopted by the General Assembly on 14 December 2020 The United Nations Decade of Healthy Ageing (2021–2030),” A/RES/75/131.

61 WHO, “The Seventy-Third World Health Assembly Decision on the Decade of Healthy Ageing 2020–2030, WHA73(12),” 2020.



for Sustainable Development. This strategy has three priorities: age-friendly communities, promoting person-centred healthcare, and providing long-term care. It is a very ambitious project with significant potential to affect social inclusion in later life. The WHO intends to support states with their planning and actions, collecting data and promoting research on healthy ageing, identifying older people's health and care needs, reducing ageism, and enhancing the global network for age-friendly cities and communities. On the other hand, the project has come under some criticism, as it is challenging to measure the effects of healthy ageing<sup>62</sup> and, as for now, there is little evidence of the application of active ageing frameworks in developing countries.<sup>63</sup> On the other hand, the idea of "healthy ageing" cannot be denied its educative value.

It is easy to observe that there are various non-legal ways to increase states' and other stakeholders' awareness of the social inclusion of older persons in the global forum. All these efforts need coordination. That is why the United Nations Inter-Agency Group on Ageing (IAGA) – an informal network of over twenty UN entities, was established to coordinate issues relevant to ageing and older persons.<sup>64</sup> Here, just a few were selected to illustrate the various activities of international structures. However, it depends solely on the states' will to see whether they are eager to use the tools proposed by the international entities.

## 2. The European soft approach

In the European forum, the adoption of a regional convention on the rights of older people was never envisaged. The European approach is based on the assumption that the existing instruments and mechanisms under the European Convention for the Protection of Fundamental Rights and Freedoms (further:

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62 Jotheeswaran Amuthavalli Thiyagarajan et al., "The UN Decade of Healthy Ageing: Strengthening Measurement for Monitoring Health and Wellbeing of Older People," *Age and Ageing*, 51, no. 7 (July 1, 2022): afac147, <https://doi.org/10.1093/ageing/afac147>.

63 Ewa Rudnicka et al., "The World Health Organization (WHO) Approach to Healthy Ageing," *Maturitas*, 139 (September 2020): 6–11, <https://doi.org/10.1016/j.maturitas.2020.05.018>.

64 See more: <https://social.desa.un.org/issues/ageing/united-nations-inter-agency-group-on-ageing-iaga-strengthening-the-inclusion-of-older>.

the European Convention on Human Rights – ECHR)<sup>65</sup> and the European social law, or the Charter of Fundamental Rights in the European Union (CFREU),<sup>66</sup> which will be discussed in the next section, are sufficient to protect all categories of people, including older persons. This belief is supported by the fact that the Revised European Social Charter (RESC) of 1996 contains the right to social security and other rights and freedoms (e.g. freedom from poverty and adequate housing).<sup>67</sup> Specific references to older persons and their social inclusion can be found in the various recommendations, resolutions, programmes, policies, policy papers, and strategies that are adopted to support “hard” instruments.

Generally, most of the bodies of the Council of Europe have the power to take on the problem of ageing and older persons’ rights, in particular the Parliamentary Assembly and the Committee of Ministers, but also the CoE Commissioner for Human Rights, whose tasks are fostering the effective observance of human rights, assisting Member States in implementing human rights standards, promoting education in and awareness of human rights, as well as taking part in proceedings before the European Court of Human Rights (ECtHR).<sup>68</sup> Whereas, reviewing the Congress of Local and Regional Authorities’ activity, it may be assumed that its significant potential to enhance older persons’ issues at the local level remains almost untapped.

The various aspects of ageing in Europe emerged at the Council of Europe forum in the late 1980s, and have been continued for decades. The main instrument used by the Council of Europe in relation to ageing, ageing strategies and older persons’ rights is soft law, which includes the CoE bodies’ recommendations and resolutions. They cover various aspects of the lives of all older Europeans, such as participation, work conditions, comprehensive care, dissent pensions, as well as problems of specific groups, including older women, migrants or those affected by dementia.<sup>69</sup>

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65 Council of Europe, “Convention for the Protection of Human Rights and Fundamental Freedoms,” Rome, 4 November 1950, (CETS, No 005).

66 European Union, “Charter of Fundamental Rights of the European Union,” 18 December 2000, 2012 O.J. (C 326) 391.

67 Council of Europe, “European Social Charter (Revised),” Strasbourg, 3 May 1996, (CETS, No 163).

68 Committee of Ministers, “Resolution (99) 50 on the Council of Europe Commissioner for Human Rights,” Council of Europe, 1999.

69 Israel Doron and Gerard Quinn, *Against Ageism and Towards Active Social Citizenship for Older Persons. The Current Use and Future Potential of the European Social Charter* (Strasbourg:

However, the most important act referring to older persons' human rights in general is the mentioned in Chapter One Recommendation (2014)<sup>2</sup> of the Committee of Ministers to Member States on the promotion of human rights of older persons.<sup>70</sup> It calls on Member States to consider making an explicit reference to age in their national anti-discrimination legislation, and to take effective measures to prevent multiple discrimination. The recommendation indicates useful good practices of states in this area, to encourage others to adopt similar solutions.

Recommendation (2014)<sup>2</sup> is an outgrowth of various recommendations and resolutions adopted so far. However, contrary to them, it considers the rights of older persons as a whole. It is applicable to anyone who, because of their advanced age, either as a single factor or linked to others such as stereotypes or prejudice, experiences barriers to the full enjoyment of human rights and fundamental freedoms, as well as barriers to their full and effective participation in society on equal terms. It proclaims that older people should fully enjoy the rights guaranteed in human rights treaties, to the extent that they bind the Council of Europe Member States.

This recommendation should be seen as a package of interpretative guidelines for Member States when fulfilling their treaty obligations, so that these also take into account the specific needs of older people. The recommendation contains several guidelines on non-discrimination, autonomy and participation of older persons in various spheres of social life, protection against violence and abuse, social security and employment, care (including issues related to consent to treatment, institutionalised care and palliative care), as well as access to justice and the situation of older prisoners.

Various measures that directly or indirectly concern older people and their social inclusion have been adopted within the European Union. Introducing "age" as a premise of non-discrimination into the EU primary and secondary

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Council of Europe, 2021), <https://rm.coe.int/against-ageism-and-towards-active-social-citizenship-for-older-persons/1680a3f5da>; Barbara Mikołajczyk, "The Council of Europe's Approach towards Ageism," in *Contemporary Perspectives on Ageism*, eds. Liat Aylon and Clemens Tesh - Romer (Springer, Cham, 2018), 321–39; Barbara Mikołajczyk, "Legal Basis for Active Ageing," in *Ageing, Ageism and the Law: European Perspectives on the Rights of Older Persons*, eds. Israel Issi Doron and Nena Georgantzi (Edward Elgar Publishing, 2018), 73–97.

70 Committee of Ministers of the Council of Europe, "Recommendation CM/Rec(2014)2 Promotion of Human Rights of Older Persons," 19 February 2014.

law, and making older persons visible in EU law due to Article 25 of the CFREU are of crucial importance.

Article 25 of the CFREU states that “[t]he Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life”. This provision opens the door to the whole “elder law” in the EU,<sup>71</sup> but on the other hand, it does not entail any specific “hard” legal consequences for older Europeans. In fact, the EU’s activity towards older persons tends to be based mainly on soft instruments in a social scope discussed in the next chapters.

It is not possible within the scope of this study to refer to all initiatives and documents developed within the EU, as ageing and older persons issues appears in hundreds of documents that do not directly target demographic change and the situation of older people. For example, ageing and the situation of older Europeans are included in the EU Action Plan on Human Rights and Democracy 2020–2024 of 18 November 2020, which indicates the need to advocate for the enjoyment of all human rights by older persons at all times, as well as for ensuring appropriate and sustainable solutions for their needs.<sup>72</sup>

However, there are a few leading policy documents that are of key relevance to this study. Firstly, as was indicated in Chapter One, there was the European Year for Active Ageing and Solidarity between Generations (2012), which, together with the “Guiding Principles for Active Ageing and Solidarity between Generations”, mobilised various governmental and non-governmental actors to create new policies aimed towards older citizens or to develop existing ones, and undoubtedly contributed to raising public awareness and changing attitudes towards ageing.<sup>73</sup>

Secondly, there are several political commitments of crucial importance for the social and digital inclusion of older persons in the Council’s conclusions. For example, in the conclusions on “Combating Poverty and Social Exclusion: an Integrated Approach”, the Council called on Member States to implementing

71 Ann Numhauser-Henning, ed., *Introduction to the Norma Elder Research Environment: Different Approaches to Elder Law; the Norma Elder Law Workshop, Lund, 19 March 2013* (Lund: Univ, 2013), 23.

72 Council of the European Union, “EU Action Plan on Human Rights and Democracy 2020–2024,” 12848/20, 2020.

73 Council of the European Union, “Council Declaration on the European Year for Active Ageing and Solidarity between Generations (2012): The Way Forward. Brussels,” 7 December 2012, 16592/12 SOC 948 SAN 2892012.

measures against social exclusion, including measures targeted at older persons.<sup>74</sup> The Council's conclusions on the "Economy of Wellbeing" are in favour of promoting lifelong learning and securing the advantages of digitalisation for all,<sup>75</sup> and the conclusions on "Demographic Challenges – The Way Ahead" focus on the skills needed in the digitalised world, on healthy and active ageing and on raising awareness of the rights of older people.<sup>76</sup> Another document described in the previous chapter, adopted in 2021, the "Council Conclusions on Mainstreaming Ageing in Public Policies", calls for the gaps in the protection of older people's rights to be closed.<sup>77</sup>

The third significant document is the "Green Paper on Ageing: Fostering Solidarity and Responsibility between Generations", published by the European Commission in January 2021. This launched a debate on demographic transformations in Europe and stressed the importance of healthy and active ageing and life-long learning as basic concepts for a thriving ageing European society.<sup>78</sup>

Finally, on 1 July 2021, the European Parliament adopted the resolution "Old Continent Growing Older – Possibilities and Challenges Related to Ageing Policy Post-2020".<sup>79</sup> This resolution calls on the Commission and the Council to establish another Year of Intergenerational Solidarity and Active Ageing in order to raise awareness about the problems older people face and promote strategies to mitigate them, making it important in terms of the "visibility" perspective. It also states that the situation of older people should be taken into account when implementing the Sustainable Development Goals. The resolution also clarifies that protecting and empowering individuals means

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74 Council of the European Union, "Council Conclusions on Mainstreaming Ageing in Public Policies General Secretariat of the Council to Delegations, Brussels," 12 March 2021, 6976/21.

75 Council of the European Union, "Council Conclusions on the Economy of Wellbeing," 2019 OJ (C 400) 9.

76 Council of the European Union, "Council Conclusions on the Council Demographic Challenges – the Way Ahead," 2000 O.J. (C 205) 3.

77 Council of the European Union, "Council Conclusions on Mainstreaming Ageing in Public Policies General Secretariat of the Council to Delegations," 9.

78 European Commission, "Green Paper on Ageing: Fostering Solidarity and Responsibility between Generations," 27 January 2021 COM(2021) 50 Final.

79 European Parliament, "European Parliament Resolution of 7 July 2021 on an Old Continent Growing Older – Possibilities and Challenges Related to Ageing Policy Post-2020," P9\_TA(2021)0347.

ensuring that everyone can fully enjoy civil, political, as well as economic, social and cultural rights. On the other hand, the resolution, like other EU documents, does not promulgate any steps promoting the idea of a global convention or adopting other “hard” solutions.

Generally, the EU social policy toward older persons and ageing is constantly evolving. The Fundamental Rights Agency (FRA) noted that “legal and policy developments at the EU level signal a slow but clear shift towards a human rights-based approach to older people”.<sup>80</sup> The issues of ageing and older Europeans, as well as intergenerational solidarity, appear on a number of levels and with varying intensity. The EU initiatives in this area can be observed periodically, as they intensify every few years. An intensification of activities can be observed mainly in 2021, which is, among other things, a result of the COVID-19 pandemic, which clearly highlighted the inequalities faced by older people. Ten years after the proclamation of the European Year for Active Ageing and Solidarity between Generations, ageing and the inclusion of older persons became popular again as a separate topic in 2021. However, rather like EY2012, it has not resulted in any real steps towards supporting the idea of framing the older persons’ rights in a treaty.

In addition to the European Union and Council of Europe, the Organisation for Security and Co-operation in Europe (OSCE) also operates on the European forum. Its activities should also be considered when analysing the European approach to older persons’ rights. The OSCE agenda focuses on European security and arms control, democratic reform and the rule of law, as well as respect for human rights and economic security development. However, for many years the subject of older persons’ rights remained outside its interests. At most, seminars, workshops or round tables on the safety of older people were organised under the auspices of the OSCE. A breakthrough came in 2021 when the Parliamentary Assembly (OSCE PA) appointed its Special Representative on Elderly Issues.<sup>81</sup> The Special Representative’s task is to promote

80 Fundamental Rights Agency, *Shifting Perceptions: Towards a Rights-Based Approach to Ageing* (Luxembourg: Publications Office of the European Union, 2018), 22; <https://doi.org/10.2811/533946>.

81 OSCE PA, “Press Releases, OSCE PA President Cederfelt Appoints Special Representatives to Promote Engagement on Pressing Regional and Topical Issues, Copenhagen, 20 August 2021,” 2021, <https://www.oscepa.org/en/news-a-media/press-releases/press-2021/osce-pa-president-cederfelt-appoints-special-representatives-to-promote-engagement-on-pressing-regional-and-topical-issues>.

the OSCE PA's engagement on issues facing senior citizens in the OSCE area and facilitate the exchange of best practices on issues affecting older persons. The Special Representative should also strive to enhance welfare policies and support for the older persons through the OSCE and focus the assembly's attention on promoting measures to facilitate healthy ageing.

It is a progress in furthering the recognition of older persons on the international agenda, as the OSCE is a platform of dialogue "from Vancouver to Vladivostok".<sup>82</sup> However, in this case a legal breakthrough is unlikely as the OSCE operates in the political sphere, and the acts issued in this forum are closer to soft law, which is reflected in the non-authoritarian activities of the OSCE institutions: in particular monitoring, formulating findings, following up, performing expert work and reporting.<sup>83</sup> Exactly these activities have been undertaken by the OSCE PA Special Representative, Paola Taverna, in her first year of work.<sup>84</sup>

The European approach to ageing, older persons, their rights and consequent social inclusion certainly has its followers. The soft and political approach to older persons' rights has also been developed by the states gathered in the Association of Southeast Asian Nations (ASEAN). In 2012, they adopted the ASEAN Human Rights Declaration.<sup>85</sup> It has been severely criticised as it does not meet existing standards of international human rights,<sup>86</sup> but taking into

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82 OSCE, "OSCE Ministerial Council Ministerial Declaration on the OSCE Corfu Process: Reconfirm-Review-Reinvigorate Security and Co-Operation from Vancouver to Vladivostok. Organization for Security and Co-Operation in Europe, Athens, 2 December 2009, MC(17) Journal No 2, Agenda Item 8," 2009.

83 Andrzej Bisztyga, "Nature of Organization for Security and Co-Operation in Europe Commitments in the Area of Democracy, the Rule of Law and Human Rights," *Przegląd Prawa Konstytucyjnego*, 51, no. 5 (October 31, 2019): 271, <https://doi.org/10.15804/ppk.2019.05.19>.

84 OSCE PA, "OSCE PA Special Representative on Elderly Issues, Paola Taverna Annual Report August 2021-July 2022 29th OSCE PA Annual Session, Birmingham 2-6 July 2022," 2022, <https://www.oscepa.org/en/documents/special-representatives/elderly-issues/4418-annual-report-of-the-osce-pa-special-representative-on-elderly-issues-paola-taverna-july-2022/file>.

85 ASEAN, "ASEAN Human Rights Declaration of November 19, 2012," <https://asean.org/asean-human-rights-declaration/>.

86 Amnesty International, "Amnesty International Public Statement: Civil Society Rejects Flawed ASEAN Human Rights Declaration, 15 November 2012, Index: IOR 64/005/2012," 2012, <https://www.amnesty.org/en/wp-content/uploads/2021/06/ior640052012en.pdf>; OHCHR, "Pillar Encourages ASEAN to Ensure Human Rights Declaration Is Implemented in

account the topic of this study, it should be mentioned that older persons and ban of age discrimination are visible in its text. It states that “The rights of women, children, the elderly, persons with disabilities, migrant workers, and vulnerable and marginalised groups are an inalienable, integral and indivisible part of human rights and fundamental freedoms” (general principles, sec. 4).

More importantly, in 2015, the ASEAN states adopted the Kuala Lumpur Declaration on Ageing: Empowering Older Persons in ASEAN.<sup>87</sup> This declaration is a very laconic document, but it points out the most important aspects of the social inclusion of older people, such as intergenerational solidarity, participation, eliminating discrimination, promoting a rights-based/needs-based approach and mainstreaming ageing. In 2019, the “Regional Plan of Action to Implement the Kuala Lumpur Declaration on Ageing: Empowering Older Persons in ASEAN” was developed. It is difficult to assess its effects today, especially as this regional international community is still starting to build its human rights system, so for the human rights-based approach of Kuala Lumpur Declaration to be effective, it should go beyond the regional consensus and correspond to universal standards.

## Conclusion

This “brief history” of ageing in the global and European agenda shows that the international community has come a long way in making older people’s issues visible on the international forum. The most vital signs of change are two regional treaties, establishing the OEWGA and the mandate of the UN Independent Expert on the enjoyment of all human rights by older persons.

However, despite ten years of intensive work and the involvement of many actors, including the UN Independent Expert and civil society organisations, there is still a long way to go to reach a consensus on the adoption of the convention and its content. None of the many initiatives taken at global and European

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Accordance with International Obligations,” *UN Human Rights Office*, 2012, <https://www.ohchr.org/en/press-releases/2012/11/pillay-encourages-asean-ensure-human-rights-declaration-implemented?LangID=E&NewsID=12809>.

87 ASEAN, “Kuala Lumpur Declaration on Ageing: Empowering Older Persons in ASEAN,” <https://asean.org/wp-content/uploads/2021/01/Kuala-Lumpur-Declaration-on-Ageing-Empowering-Older-Persons-in-ASENAdopted.pdf>.



levels, including the adoption of soft law documents, as well as the regional treaties on other continents, have yet convinced the European or global international communities to adopt a binding instrument on older persons' rights.

Andrew Byrnes and Annie Herro have analysed various approaches to the initiative to draft a treaty on older persons' rights. They indicate that analyses of the same normative gaps in international law may lead to two competing solutions – the promotion of the convention or the rejection of the idea of a new treaty and strengthening the existing international human rights mechanism.<sup>88</sup> Thus, the future of the convention is still uncertain.

Moreover, the increased awareness of older people's rights and the number of documents do not necessarily translate into the inclusion of older people at a national level and ensuring their human rights. Indeed, raising awareness is the first step, but human rights can only be achieved where states are legally obliged to respect them and where monitoring mechanisms are thoughtfully operationalised.<sup>89</sup>

The universal convention on older persons' rights could certify about the emergence of the new branch of international law. Already two decades ago, the "idea of public international elder law", understood as hard law, soft law, and international case law, aiming at protecting, supporting, and empowering older persons, emerged in academia.<sup>90</sup> Perhaps we are now witnessing, step by step, the emergence from soft law of a new branch of law that will encompass not only the provisions of international human rights law, but will also infect other branches of international law with the message of mainstreaming ageing. A universal convention dedicated to older persons would testify to the creation of such law.

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88 Annie Herro and Andrew Byrnes, "Transcending the Framing Contests over the Human Rights of Older Persons," *Australian Year Book of International Law*, 38 (2020): 258, [https://doi.org/doi:10.1163/26660229\\_o3801012](https://doi.org/doi:10.1163/26660229_o3801012).

89 Martin, Rodríguez-Pinzón, and Brown, *Human Rights of Older People*, 25.

90 Israel Doron, "From National to International Elder Law," *Journal of International Aging, Law and Policy*, 43, no. 1 (2005): 43–67, <https://ssrn.com/abstract=2286579>; Israel Doron, "A Multi-Dimensional Model of Elder Law: An Israeli Example," *Ageing International*, 28, no. 3 (2003): 242–59, <https://ssrn.com/abstract=500522>; Israel Doron and Benny Spanier, "International Elder Law: The Future of Elder Law," in *Beyond Elder Law*, eds. Israel Doron and Ann M. Soden (Berlin, Heidelberg: Springer Berlin Heidelberg, 2012), 125–48, [https://doi.org/10.1007/978-3-642-25972-2\\_6](https://doi.org/10.1007/978-3-642-25972-2_6); Israel Doron, "25 Years of Elder Law: An Integrative and Historical Account of the Field of Law and Aging," *Theoretical Inquiries in Law*, 21, no. 1 (2019): 1–24, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3526797](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3526797).

However, the very name “elder law” seems to be inaccurate. As Sue Westwood notes – admittedly referring to UK and US law – the term “elder law” (“elder client law” in the UK), reinforces the stereotyping of people in law and society, instead enhancing older people’s rights.<sup>91</sup> Hence, it would be better to consider the notion of “international ageing law” or “international law of old age”. Such an approach would correspond better to the existing nomenclature, which usually reflects the actions of states (their ageing policies), and would not stigmatise anyone, as ageing affects us all and requires states to take action in various fields. In general “international ageing law” has a more inclusive connotation. It may be naming that partly holds the key to convincing reluctant states to accept a global convention. Perhaps it would be easier for states to accept a treaty on human rights in old age, emulating Argentina’s idea from 1948.

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91 Sue Westwood indicates that these terms are “misleading, over-generalizing terms linked to physical and cognitive frailty, dependency, and the medicalisation of older age, masking great diversity in functional ability among older people. These terms convey a false suggestion of homogeneity among older people whose identities actually cut across the social spectrum and vary widely according to not only those identities and their intersection, but also chronological age, cohort, and life course events”. Sue Westwood, “I May Be Older, but I Ain’t No Elder: A Critique of Elder Law,” *Temple Political & Civil Rights Law Review*, 21, no. 2 (2012): 485.

# Chapter Three

## Identifying States' Obligations towards Older Persons

### 1. Essence of states' obligations in a nutshell

The previous chapter sets out the progress that has been made in making older persons visible at the international level, revealing that it occurred largely outside of international treaties. This chapter traces the states' obligations arising from "hard" instruments. The states' commitments will be discussed in the area of civil and political rights, socio-economic rights and, finally, solidarity rights separately. This model of review of human rights is very helpful for the purpose of ordering, though the classification into generations of human rights, proposed in the late 1970s,<sup>1</sup> appears today to be quite outdated in the context of the indivisibility and interdependence of human rights, which are well embedded in the contemporary international law theory<sup>2</sup> and recognised in international documents, with the Vienna Declaration and Programme of

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1 Karel Vašák, "Human Rights: A Thirty-Year Struggle: The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights," *UNESCO Courier*, 11, November 1977 (1977): 29.

2 Gauthier de Beco, "The Indivisibility of Human Rights and the Convention on the Rights of Persons with Disabilities," *International and Comparative Law Quarterly*, 68, no. 1 (January 2019): 141–60, <https://doi.org/10.1017/S0020589318000386>; Sandra Fredman, *Comparative Human Rights Law*, First edition (Oxford, United Kingdom, New York, NY: Oxford University Press, 2018); Manfred Nowak, "Social Rights in International Law: Categorization versus Indivisibility," in *Research Handbook on International Law and Social Rights*, eds. Christina Binder, Jane A. Hofbauer, Flávia Piovesan, Amaya Úbeda de Torres (Cheltenham, UK; Northampton, Massachusetts, USA: Edward Elgar Publishing Limited, 2020), 2–18; Bruce Porter, "Interdependence of Human Rights," in *Research Handbook on International Law and Social Rights*, eds. Christina Binder, Jane A. Hofbauer, Flávia Piovesan, Amaya Úbeda de Torres (Cheltenham, UK; Northampton, Massachusetts, USA: Edward Elgar Publishing Limited, 2020), 301–26; Ariel Zylberman, "The Indivisibility of Human Rights," *Law and Philosophy*, 36, no. 4 (August 2017): 389–418, <https://doi.org/10.1007/s10982-017-9296-2>.

Action at the forefront.<sup>3</sup> A politically-motivated division into civil and political rights on one side and social, economic and cultural rights on the other promoted an overriding position of civil and political rights (the first generation) at the expense of social rights,<sup>4</sup> resulting in some leniency towards states when they have failed in their social responsibilities.<sup>5</sup> This underestimation of social and economic rights hits vulnerable groups, including older people, the hardest. Unfortunately, undervaluing economic rights is not consigned to the past. In times of economic crises, there is tolerance for reducing states' obligations on economic, social and cultural rights in order to "accommodate" emergencies.<sup>6</sup> This is a clear step backwards.

That is why Asbjørn Eide's views on the implementation of states' obligations towards vulnerable groups (he did not mention older persons, but his findings are general) are worth mentioning here. He stressed, among other things, that

efforts to ensure the enjoyment of economic and social rights for the vulnerable must respect their dignity, focusing on helping them to identify and implement their own solutions to their problems. Their potential energy and resourcefulness, in situations where they can enjoy the basic necessities of adequate food, shelter and education, can be put to more productive use, rather than recourse to hand-outs, which add to their self-depreciation.<sup>7</sup>

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3 World Conference on Human Rights, "Vienna Declaration and Programme of Action Adopted by the World Conference on Human Rights in Vienna on 25 June 1993," <https://www.ohchr.org/en/professionalinterest/pages/vienna.aspx>.

4 Zdzisław Kędzia, "Social Rights Protection under the ICESCR and Its Optional Protocol – the Role of the Committee on Economic, Social and Cultural Rights," in *Research Handbook on International Law and Social Rights*, eds. Christina Binder, Jane A. Hofbauer, Flávia Piovesan, Amaya Úbeda de Torres (Cheltenham, UK; Northampton, Massachusetts, USA: Edward Elgar Publishing Limited, 2020), 92.

5 Fredman, *Comparative Human Rights Law*, 59.

6 Ben TC. Warwick, "Socio-Economic Rights During Economic Crises: A Changed Approach to Non-Retrogression," *International and Comparative Law Quarterly*, 65, no. 1 (January 2016): 251, <https://doi.org/10.1017/S0020589315000494>.

7 Asbjørn Eide, "Economic and Social Rights," in *Human Rights: Concepts and Standards*, ed. Janusz Symonides (Dartmouth: UNESCO Publishing/ Ashgate, 2000), 160–61.

Such an approach is crucial in relation to creating conditions for inclusive ageing. What is essential for the social inclusion of older persons is understanding the nature and scope of states' obligations, not the classification of human rights.<sup>8</sup> The states' obligations arising from the human rights law are traditionally based on three basic commitments: respect, protect and fulfil. A failure to perform one of these three obligations constitutes a violation of such rights. Firstly, concerning "respect", a state should refrain from interfering with the enjoyment of human rights. Secondly, a state undertakes to protect against human rights abuses by non-state actors. Thirdly, it should take positive action to facilitate the enjoyment of rights.<sup>9</sup> This triad of obligations is most often attributed to states in terms of economic, social and cultural rights. However, they actually run across the divisions of rights and it is difficult today to speak about purely "negative obligations" (to refrain) and "positive obligations" (to take steps).<sup>10</sup>

## 2. Commitments in the area of civil and political rights

### 2.1. Universal standard – a long way to visibility

The social inclusion of older persons is usually associated with the economic and social spheres, as well as socio-economic rights. Nevertheless, any consideration of the states' commitments should begin with the obligations of states under international law norms protecting civil and political rights, as they determine an individual's place in the life of society. Demographic changes, in particular the process of population ageing, generate consequences of fundamental importance for all aspects of how the state and society function, including the labour market, innovation, expenditure on pensions and other benefits,

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8 Fredman, *Comparative Human Rights Law*, 60.

9 Marthe Fredvang and Simon Biggs, "The Rights of Older Persons. Protection and Gaps under Human Rights Law," Social Policy Working Paper (Brotherhood of St Laurence: Brotherhood of St Laurence, Centre for Public Policy, 2012), 9.

10 Dinah Shelton and Ariel Gould, "Positive and Negative Obligations," in *The Oxford Handbook of International Human Rights Law*, ed. Dinah Shelton (Oxford: Oxford University Press, 2013), 562–83.

healthcare, social assistance, the financial and real estate markets, access to culture and many others. Older people should be able, without facing any obstacles, to participate in public debate and decision-making in order “not to be left behind”, to paraphrase the Agenda 2030 slogan.

Therefore, the social inclusion of older people is inextricably linked to their enjoyment of all rights, regardless of generation. By securing the right to life, freedom from torture and degrading treatment, freedom from age discrimination, the right to political participation, assembly, to form organisations, access to office and freedom of expression in public debate, the right to expression, and the right to receive and spread information, older people will remain nationally and internationally more visible.

It is notable that older people are more likely than young people to participate in elections and that national ageing policies are more and more often the subject of election campaigns. On the political scene, especially in North America and Europe, entities representing the interests of older people, such as local senior citizens' councils<sup>11</sup> and political parties of pensioners at the central or local government level are relatively common.<sup>12</sup> The Slovenian example shows that pensioners' parties can also influence international politics. When the Democratic Party of Pensioners of Slovenia entered the government and its chairman became Minister for Foreign Affairs, Slovenia started supporting the idea of a convention on the rights of older people in the OEWSGA forum.<sup>13</sup>

The key treaties containing civil and political rights are the International Covenant on Civil and Political Rights (ICCPR)<sup>14</sup> on the global forum and the Convention for the Protection of Human Rights and Fundamental Freedoms

11 Aldona Frączkiewicz-Wronka et al., “The Growing Role of Seniors Councils in Health Policy-Making for Older People in Poland,” *Health Policy*, 123, no. 10 (October 2019): 906–11, <https://doi.org/10.1016/j.healthpol.2019.05.016>.

12 Seán Hanley, “Explaining the Success of Pensioners’ Parties: A Qualitative Comparative Analysis of 31 Polities,” (University College London, 2011), [https://discovery.ucl.ac.uk/id/eprint/239927/2/Generational\\_Politics\\_-\\_Hanley\\_-\\_ch\\_2\\_%28for\\_UCL\\_eprint%29.pdf](https://discovery.ucl.ac.uk/id/eprint/239927/2/Generational_Politics_-_Hanley_-_ch_2_%28for_UCL_eprint%29.pdf); Andrzej Klimczuk, *Putting Theory into Practice*, Economic Foundations for Creative Ageing Policy / Andrzej Klimczuk, volume II (New York, NY, U.S.A.: Palgrave Macmillan, 2017), 8, <https://doi.org/10.1057/978-1-137-53523-8>.

13 Annie Herro, “Domestic Interest Groups and Rights Mobilization: Explaining the Case of Slovenia’s Support for the Proposed Convention on the Rights of Older Persons,” *Global Networks*, 18, no. 4 (2018): 632, <https://doi.org/10.1111/glob.12192>.

14 United Nations, “International Covenant on Civil and Political Rights,” New York, 16 December 1966 (UNTS, vol. 999, p. 171 and vol. 1057, p. 407).

(European Convention on Human Rights or ECHR)<sup>15</sup> on the European scene. However, in the area under discussion, the relevant obligations arise also from the sectoral treaties, including the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),<sup>16</sup> the certainly the Convention on the Rights of Persons with Disabilities (CPRD) mentioned above, and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.<sup>17</sup> Their provisions, especially those aimed at preventing discrimination, are crucial in combating ageism, which is one of the main obstacles to inclusion in older age.

All of these key treaties also contain many other provisions protecting civil and political rights, which have to be observed to ensure social inclusion, along with those connected with participation in public life. These rights and freedoms, classified as belonging to the first generation of human rights in traditional terms, have been associated primarily with the protection of citizens against states, which have to refrain from unjustified interference in the area of protected rights. Many provisions proclaiming these rights are manifested in negative form as “prohibitions” addressed towards a state power. It is easy to see that the older the document, the more prohibitions it contains, like the UDHR (in the part containing political and civil rights) and the ECHR. However, the ICCPR, which was adopted several years later, in 1966, more often formulates rights in a positive way. In addition to prohibitions, such as a prohibition on torture (Art. 7) or slavery and forced labour (Art. 8), the ICCPR uses the phrases stating that each person “shall have the right” or “states shall undertake”, though the ICCPR Article 25, setting out the right and opportunity to participate in public affairs, directly or through freely chosen representatives, requires activity from states. States have a positive obligation to ensure that all those entitled have a real opportunity to participate in elections, e.g. older

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15 Council of Europe, “Convention for the Protection of Human Rights and Fundamental Freedoms,” Rome, 4 November 1950, (CETS, No 005).

16 United Nations, “Convention on the Elimination of All Forms of Discrimination against Women,” New York, 18 December 1979, (UNTS, vol. 1249, p. 13).

17 United Nations, “International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families,” New York, 18 December 1990, (UNTS, vol. 2220, p. 3).

and infirm persons – by voting by post or proxy. A failure by the state to do so may be considered a breach of this provision.<sup>18</sup>

The interpretation of states' obligations under the ICCPR is a model for interpreting other obligations arising from other universal treaties. The ICCPR's preamble itself points to the need to take positive action to achieve the rights enshrined in this treaty: "Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights".

Article 2 of the ICCPR sets out another obligation to undertake the necessary steps to achieve the rights recognised in the covenant in which it is contained:

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.
3. Each State Party to the present Covenant undertakes:
  - (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
  - (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

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18 Roman Wieruszewski, "Artykuł 25 - prawa obywatelskie," in *Międzynarodowy pakt praw obywatelskich (osobistych) i politycznych: komentarz*, eds. Roman Wieruszewski and Aleksandra Gliszczyńska-Grabias, *Praktyczne komentarze Lex* (Warszawa: Wolters Kluwer Polska - LEX, 2012), 619.



(c) To ensure that the competent authorities shall enforce such remedies when granted.

Interpreting the states' obligations arising from Article 2, the Human Rights Committee, in its general comment No. 31 on the nature of the general legal obligation imposed on states parties to the covenant, stressed that the parties should protect individuals, not just against violations of the covenant rights by its agents, but also against acts committed by private persons or entities. In addition, a state fails to ensure the rights by permitting or by not taking appropriate measures or exercising due diligence to prevent, punish, investigate or redress the harm caused by such acts by individuals or entities. The committee also stressed that the requirement under Article 2, paragraph 2, to take steps to achieve the covenant rights is unqualified and of immediate effect. Non-compliance with these obligations cannot be justified by reference to political, social, cultural or economic circumstances within the state. This means that a state-party must respect, protect and fulfil the rights stipulated in the covenant.<sup>19</sup> Thus, the state will not fulfil its obligations towards older people under the covenant if, for example, elections are not organised in care institutions, or important information is shared in a way that excludes a significant number of older people (e.g. exclusively *via* the internet and apps).

Moreover, the committee noted that parties must ensure that individuals also have accessible and effective remedies to vindicate the rights stipulated in the covenant. These remedies should be appropriately adapted to take into account the particular vulnerability of specific categories of people.<sup>20</sup> The committee did not indicate other groups *expressis verbis*, but these remedies may be equally applied to vulnerable older persons.

However, from the perspective of research on states' obligations regarding the inclusion of older persons, Article 26 of the covenant deserves special attention: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex,

19 Human Rights Committee, "General Comment No 31. The Nature of the General Legal Obligation Imposed on States Parties to the Covenant," 29 March 2004 (2187th Meeting), CCPR/C/21/Rev.1/Add. 13, 2004.

20 Human Rights Committee.

language, religion, political or other opinion, national or social origin, property, birth or other status”.

It is easy to notice that “age” has not been introduced in Articles 2 or 26. Therefore, only the premises of “other status” could be taken into account as the grounds for a prohibition on age discrimination. However, for years this had not been so obvious. Finally, in 2011, the Human Rights Committee considering the case *Néstor Julio Canessa Albareda et al. v. Uruguay*, took the view that “age may constitute one of the grounds for discrimination prohibited under Article 26, provided that it is the ground for establishing differentiated treatment that is not based on reasonable and objective criteria”.<sup>21</sup>

Thus, this non-discrimination clause, covering also age, is not limited to the rights contained in the covenant, but prohibits discrimination as such, also in the social sphere,<sup>22</sup> and shows that there is no real division between different categories of human rights. In addition, interdependence between various human rights and the direct overlap between the two covenants can be observed. The overview of the Human Rights Committee’s output shows that the committee considered cases referring to the rights to work, social security, housing, health, education, property, formation of trade unions and strike.<sup>23</sup>

The Human Rights Committee, in its general comment No 18 on non-discrimination, stressed that the legislation adopted by a state party “must comply with the requirement of Article 26 that its content should not be discriminatory. In other words, the application of the principle of non-discrimination contained in Article 26 is not limited to those rights which are provided for in the Covenant”.<sup>24</sup>

Moreover, the committee pointed out as follows:

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21 Human Rights Committee, *Néstor Julio Canessa Albareda et al. v. Uruguay*, communications Nos. 1637/2007, 1757/2008 and 1765/2008, views of 24 October 2011, CCPR/C/103/D/1637/2007, 1757 & 1765/2008, para. 9.2.

22 Paul O’Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences*, Routledge Research in Human Rights Law (Milton Park, Abingdon, Oxon; New York: Routledge, 2012), 45.

23 Martin Scheinin, “Human Rights Committee Not Only a Committee on Civil and Political Rights,” in *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, ed. Malcolm Langford (Cambridge; New York: Cambridge University Press, 2008), 540–52.

24 Human Rights Committee, “General Comment No 18: Non-Discrimination,” 10 November 1989; CCPR/C/21/Rev.1/Add.1, 1989, para. 12.

the principle of equality sometimes requires States Parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population.<sup>25</sup>

This interpretation is undoubtedly crucial for older persons, as it has the potential to have a significant effect on state policies, resulting in inequalities among the older part of population in various areas, e.g. pension schemes, retirement conditions, or access to healthcare.

## 2.2. European developments

### 2.2.1. States' obligations under the ECHR – dynamics and uncertainties

Meanwhile, establishing the scope of states' obligations under the ECHR, especially those affecting social inclusion the most, is not easy. The convention was tailored to the times it was adopted; today, compared with later human rights treaties, we could describe it as a modest document. Like the ICCPR, it contains “negative rights” (though the right to education appeared in the first additional protocol to the ECHR) and its antidiscrimination clause (Article 14) also fails to indicate “age” as a premise of non-discrimination. However, contrary to Article 26 of the ICCPR, Article 14 of the ECHR does not have an autonomous character and the ban of discrimination is strictly tied with the rights and freedoms contained in the convention and its protocols.<sup>26</sup> However,

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<sup>25</sup> Human Rights Committee, para. 10.

<sup>26</sup> The ECHR sets out the rights to life, freedom and security, respect for private and family life, freedom of expression, freedom of thought, conscience and religion, vote in and stand for election, a fair trial in civil and criminal matters, property and peaceful enjoyment of possessions. In addition to the prohibition on discrimination in the enjoyment of the rights and freedoms secured by the convention, it prohibits the death penalty, torture or inhuman or degrading treatment or punishment, slavery and forced labour, arbitrary and unlawful detention, deportation of a state's own nationals or denying them entry and the collective deportation of foreigners.

the Additional Protocol No 12 to the ECHR<sup>27</sup> contains a non-discrimination clause that goes beyond the convention, but up to date, only 20 of 46 Council of Europe states have ratified it.

In addition, in contrast to Article 2 of the ICCPR, Article 1 of the ECHR makes a very succinct reference to the states' obligations. It stipulates that states parties "shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention". In this way, specific legal obligations have been imposed on states. Their fulfilment is ensured by using control mechanisms – the European Court of Human Rights (and previously also the European Commission of Human Rights). Thus, the case law here plays a crucial role in shaping the states' obligations.<sup>28</sup> The nature of the state's obligations under the convention and the role of the European Court of Human Rights in verifying and explaining these obligations has been extensively analysed in the international law scholarship, both in terms of its development, trends and reasoning.<sup>29</sup> The obligations concerning particular rights or vulnerable groups, especially children and minorities, have also been

27 Council of Europe, "Protocol No 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms," Rome, 4 November 2000, (CETS, No 177).

28 Andrew Z. Drzemczewski, *European Human Rights Convention in Domestic Law: A Comparative Study* (Oxford University Press, 1983), 22; Vesna Stefanovska, "Retrospective of the Dynamic and Evolutive Interpretation of ECHR: Framing the Strasbourg's Interpretative Ethic," *Iustinianus Primus Law Review*, 11, no. 1 (2020): 4.

29 For example, Jean-François Akandji-Kombe, *Positive Obligations under the European Convention on Human Rights: A Guide to the Implementation of the European Convention on Human Rights*, Human Rights Handbooks, no. 7 (Council of Europe, 2007); Jakub Czepek, *Zobowiązania pozytywne państwa w sferze praw człowieka pierwszej generacji na tle Europejskiej Konwencji Praw Człowieka* (Olsztyn: Wydawnictwo UWM, 2014); Ignacio de la Rasilla del Moral, "The Increasingly Marginal Appreciation of the Margin-of-Appreciation Doctrine," *German Law Journal*, 7, no. 6 (2006): 611-23; Monika Florczak-Wątor, "The Role of the European Court of Human Rights in Promoting Horizontal Positive Obligations of the State," *International and Comparative Law Review*, 17, no. 2 (2017): 39-53, <https://doi.org/10.2478/iclr-2018-0014>; Andreas Follesdal, "Appreciating the Margin of Appreciation," in *Human Rights: Moral or Political?* ed. Adam Etinson (Oxford: Oxford University Press, available at SSRN, 2017), <https://ssrn.com/abstract=2957070>; Steven Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention On Human Rights*, Human Rights Files 17 (Council of Europe Publishing, 2000); Laurens Lavrysen, *Human Rights in a Positive State. Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights* (Cambridge-Antwerp-Portland: Intersentia, 2016); Elżbieta Morawska, "Zobowiązania pozytywne państw-stron Konwencji o Ochronie Praw Człowieka i Podstawowych Wolności," *Prawa Człowieka i Prawo Międzynarodowe*, no. 6

profoundly analysed.<sup>30</sup> These findings show that, despite the convention being 70 years old, we can say it is “actively ageing” as it reveals more and more fields of human rights. This does not mean that the court creates new rights, but it can develop and adapt existing provisions to cover new concepts.<sup>31</sup> This approach gives hope that, despite the lack of reference to older persons and the premise of age as a prohibition on discrimination in the ECHR text, this treaty can be the basis for deriving positive obligations of states in the discussed area. However, the issue is certainly complex and nuanced.

The ECtHR has worked out interpretative tools to adjust the treaty to new circumstances and supplement its provisions with a new understanding. This is possible due to the doctrine of the “living instrument”, “dynamic” and “evolutive” interpretation of the convention, and finally, the doctrine of the “margin of appreciation”. These concepts have often provoked dissatisfaction among states due to uncertainty about their obligations and raise the ongoing debate about the proper limits of the court’s interpretative jurisdiction among academics and even among the ECtHR’s judges.<sup>32</sup>

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(Warszawa: UKSW, 2016); Dimitris Xendos, *The Positive Obligations of the State under the European Convention of Human Rights* (London-New York: Routledge, 2012).

- 30 Recently: Stephanie Eleanor Berry, “A Positive State Obligation to Counter Dehumanisation under International Human Rights Law,” *Erasmus Law Review*, 13, no. 3 (2020): 5–20, <https://doi.org/10.5553/ELR.000161>; Andrea Boderick, “The United Nations Convention on the Rights of Persons with Disabilities and the European Convention on Human Rights: A Tale of Two Halves or a Potentially Unified Vision of Human Rights?” *Cambridge International Law Journal*, 7, no. 2 (2018): 199–224, <https://doi.org/10.4337/cilj.2018.02.02>; Lilla Farkas and Theodoros Alexandridis, “The Potential of Positive Obligations Against Romaphobic Attitudes and in the Development of “Roma Pride,” *Erasmus Law Review*, 13, no. 3 (2020): 65–81, <https://doi.org/10.5553/ELR.000153>; Alina Tryfonidou, “Positive State Obligations under European Law: A Tool for Achieving Substantive Equality for Sexual Minorities in Europe,” *Erasmus Law Review*, 13, no. 3 (2020), <https://doi.org/10.5553/ELR.000149>.
- 31 Brenda M. Hale, “The Baroness Hale of Richmond’s Speech on the Seminar ‘What Are the Limits to the Evolutive Interpretation of the Convention?’ The European Court of Human Rights Strasbourg, January 28, 2011,” *Dialogue Between Judges 2011 (What are the limits to the evolutive interpretation of the Convention? The European Court of Human Rights, Strasbourg: European Court of Human Rights, 2011)*, 11, [https://www.echr.coe.int/Documents/Dialogue\\_2011\\_ENG.pdf](https://www.echr.coe.int/Documents/Dialogue_2011_ENG.pdf).
- 32 Eirik Bjorge, “The Convention as a Living Instrument: Rooted in the Past, Looking to the Future,” *Human Rights Law Journal*, 36, no. 7–12 (2017): 243–55; Nicolas Bratza, “Living Instrument or Dead Letter - the Future of the European Convention on Human Rights,” *European Human Rights Law Review*, 2 (2014): 116–28; Hale, “The Baroness Hale of Richmond’s Speech on the Seminar “What Are the Limits to the Evolutive Interpretation of the Convention?”

However, the question can be asked, “are these interpretive instruments advantages or disadvantages in older people’s cases before the ECtHR?” Thus, the margin of appreciation doctrine appeared a long time ago, in the Strasbourg case law, in the judgement in *Marckx v. Belgium*.<sup>33</sup> The court still mainly applies the margin of appreciation doctrine in cases referred to Article 8 (respect for private and family life), Article 9 (freedom of thought, conscience and religion), Article 10 (freedom of expression), and, significantly for this study, Article 14 (the antidiscrimination clause). Formally, the “margin of appreciation” was introduced into the convention’s preamble by Protocol No. 15, which entered into force on 1 August 2021. The amended preamble proclaims that the contracting parties: “in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention”.<sup>34</sup>

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The European Court of Human Rights Strasbourg, January 28, 2011; Hale; Rachael Ita and David Hicks, “Beyond Expansion or Restriction? Models of Interaction between the Living Instrument and Margin of Appreciation Doctrines and the Scope of the ECHR,” *International Human Rights Law Review*, 10, no. 1 (2021): 40–74, <https://doi.org/10.1163/22131035-01001004>; George Letsas, “The ECHR as a Living Instrument: Its Meaning and Its Legitimacy,” *SSRN*, 12 March 2012, <https://doi.org/10.2139/ssrn.2021836>; Letsas; Paul Mahoney, “Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin,” *Human Rights Law Journal*, 11, no. 57 (1990): 57–88; Mahoney; Paul Mahoney, “The Changing Face of the European Court of Human Rights: Its Face in 2015?” *The Queen Mary Human Rights Law Review*, 1, no. 1 (2014): 4–17; Pieter van Dijk, “Positive Obligations” Implied in the European Convention on Human Rights: Are the States Still the “Masters” of the Convention?” in *The Role of Nation-State in the 21st Century, Human Rights, International Organisations and Foreign Policy. Essays in Honour of Peter Baehr*, eds. Monique Castermans-Holleman, Fried van Hoof, Jacqueline Smith (The Hague-Boston-London: Kluwer Law International, 1998); Koen Lemmens, “Criticising the European Court of Human Rights or Misunderstanding the Dynamics of Human Rights Protection?” in *Criticism of the European Court of Human Rights*, eds. Patricia Popelier, Sarah Lambrecht, and Koen Lemmens, 1st ed. (Intersentia, 2016), 23–40, <https://doi.org/10.1017/9781780685175.002>; Eszter Polgári, “The Role of the Vienna Rules in the Interpretation of the ECHR: A Normative Basis or a Source of Inspiration?” *Erasmus Law Review*, 14, no. 2 (November 2021): 82–95, <https://doi.org/10.5553/ELR.000193>.

33 ECtHR, *Marckx v. Belgium*, application No 6833/74, judgment 13 June 1979.

34 Council of Europe, “Protocol No 15 Amending the Convention for the Protection of Human Rights and Fundamental Freedoms,” Strasbourg, 24 June 2013, (CETS, No 213).

According to the Explanatory Report to Protocol No. 15, the new preamble to the convention should be understood following the ECtHR's longstanding case law in this area,<sup>35</sup> but this case law has not always been coherent and predictable.<sup>36</sup> The introduction of the principle of subsidiarity and the margin of appreciation without reference to the principle of proportionality and clarification of their relationship to other interpretative tools have been criticised. The scope of the margin of appreciation for some states may be considered wider, but for others, it may be narrower.<sup>37</sup>

Considering that the concept of the margin of appreciation and the principle of subsidiarity are vague, the court may vary in its assessments of the steps that states take toward implementing older persons' rights under the ECHR. Therefore, in these cases, a lot depends on several circumstances, such as the type of right infringed and the degree of severity.<sup>38</sup>

On the other hand, there are voices that the concept of the margin of appreciation allows the ECtHR court "to maintain the convention system in a state of equilibrium in the face of the aforementioned tensions and antinomies".<sup>39</sup> Dominic McGoldrick argues that "the margin of appreciation is a complex, sophisticated and defensible intellectual instrument for international bodies supervising polycentric rights claims. Its application may entail different and

35 Committee of Ministers, "Explanatory Report to Protocol No. 15 Amending the Convention for the Protection of Human Rights and Fundamental Freedoms CETS No. 213," Council of Europe, 2013, <https://rm.coe.int/1680a5278a>.

36 Jan Kratochvíl, "The Inflation of the Margin of Appreciation by the European Court of Human Rights," *Netherlands Quarterly of Human Rights*, 29, no. 3 (2011): 324–57, <https://doi.org/10.1177/016934411102900304>.

37 Amnesty International, Helsińska Fundacja Praw Człowieka, Human Rights Watch, InterRights, International Commission of Jurists, REDRESS, EHRAC, Justice, and Open Society Justice Initiative. "Draft Protocol 15 to the European Convention on Human Rights: A Reference to the Doctrine of the Margin of Appreciation in the Preamble to the Convention: Open Letter to All Member States of the Council of Europe," April 15, 2013, A1 61/006/2013, 2013. <https://www.amnesty.org/en/documents/ior61/006/2013/en/>.

38 Jan Eric Helgesen, "Speech on the Seminar "What Are the Limits to the Evolutive Interpretation of the Convention?" The European Court of Human Rights Strasbourg, January 28, 2011," Dialogue Between Judges 2011 (What are the limits to the evolutive interpretation of the Convention?" The European Court of Human Rights Strasbourg, January 28, 2011, Strasbourg: European Court of Human Rights, 2011), 27, [https://www.echr.coe.int/Documents/Dialogue\\_2011\\_ENG.pdf](https://www.echr.coe.int/Documents/Dialogue_2011_ENG.pdf).

39 Adam Wiśniewski, "On the Theory of Margin of Appreciation Doctrine," *Polish Review of International and European Law*, 21 January 2012, 83, <https://doi.org/10.21697/priel.2012.0.0.02>.

results in a single case, but on the other hand, it is a sensible pragmatic legal doctrine for a system applying to a diverse international community".<sup>40</sup>

However, he has also observed that contrary to the ECtHR, the Human Rights Committee has tended to avoid applying the margin of appreciation doctrine in its views and its general comments. Among other reasons, this is so as not to encourage states to rely on arguments of "cultural relativism".<sup>41</sup> This seems essential from an older person's perspective. Perceptions of older people, old age and the responsibilities of states and families towards dependent older people vary from one society to another. States may be too willing to appeal to tradition, culture, privacy, diversity, etc., to shift all burden of care for older persons onto family members, or refrain from taking measures that ensure or facilitate social inclusion of older people.

Thus, the margin of appreciation doctrine may act in favour of older people, as it requires an examination of various contexts of each case. On the other hand, it provides a lot of uncertainty about the understanding of the rights of older people. The future ECtHR case law will demonstrate whether the amendment of the ECHR preamble strengthens or weakens positive obligations of states arising from the convention.

*McDonald v. United Kingdom* was the first ECtHR judgement referring to an older person's rights, in which the question of both positive obligations and margin of appreciation emerged for the first time. The court considered whether there was a breach of Ms McDonald's rights due to reducing her night care package. In this case, the court considered that the state had positive obligations to ensure that an older person with a disability was provided with support respecting her right to privacy and family life. The court also decided that, in the period when the reduction was based on the local authority's decision taken without examining the applicants' conditions, the state had not fulfilled its obligations. However, for the period after the local authority revised Ms McDonald's individual care plan, the court found no breach of the convention, arguing that the state had a wide margin of appreciation regarding how to deliver care, and that it was up to the national authorities to make a proper

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40 Dominic McGoldrick, "A Defence of the Margin of Appreciation and an Argument for Its Application by the Human Rights Committee," *International and Comparative Law Quarterly*, 65, no. 1 (2016): 57, <https://doi.org/10.1017/S0020589315000457>.

41 McGoldrick, 53.



balance between care needs and available resources, particularly in a situation of scarcity of sources.<sup>42</sup>

This case proves that, according to the ECtHR, the obligations arising from the first generation rights also include older persons' rights and states have an active role. However, in cases involving older persons, the assessment of the margin of appreciation will also depend on how sensitive judges are to the specific situation of older applicants.

The doctrine of the "living instrument" also seems particularly important in the context of social inclusion, as here the ECtHR goes beyond the sphere of "negative rights" and extends the protected scope of individual rights (along with states' obligations) to the area of the second generation of human rights. The court first interpreted the convention as a "living instrument" in its landmark *Airey v. Ireland* judgment. The ECtHR argued that many civil and political rights have implications of a social or economic nature, and there is no watertight division separating that area from what is covered by the convention.<sup>43</sup>

Since that time, the case law covering socio-economic rights has been developing. Besides the *McDonald* case, the ECtHR has also considered other complaints involving socio-economic rights, in which the applicants' age was a significant circumstance. For example, the insufficiency of old-age pensions to maintain an adequate standard of living was present in complaints *Larioshina v. Russia*<sup>44</sup> and *Budina v. Russia*,<sup>45</sup> under the prohibition on degrading treatment contained in Article 3 ECHR (the ECtHR found both applications inadmissible). Discriminatory tax rules, in light of the non-discrimination clause and right to property, were subject matters in *Burden v. the United Kingdom*<sup>46</sup> and *Carson and Others v. the United Kingdom*<sup>47</sup> cases considered by the Grand Chamber. In the case *Jivan v. Romania*,<sup>48</sup> the applicant, an older person

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42 ECtHR, *McDonald v. United Kingdom*, application No 4241/12, judgment 20 May 2014, para. 26.

43 ECtHR, *Airey v Ireland*, application, No 6289/73, judgment 9 October 1979.

44 ECtHR, *Larioshina v. Russia*, application No 56869/00, decision 23 April 2002.

45 ECtHR, *Budina v. Russia*, application 45603/05, Decision 18 June 6 2009.

46 ECtHR, *Burden v. the United Kingdom*, application No 13378/05; judgement 29 April 2008.

47 ECtHR, *Carson and others v. the United Kingdom*, application No 42184/05; judgement 16 March 2010.

48 ECtHR, *Jivan v. Romania*, application No 62250/19; judgement 8 February 2022.

of 85 with a disability, complained, in particular, that he had been forced into isolation by the Romanian authorities' decision and the consequent denial of support and length of procedures for social assistance. In this case, the ECtHR ruled on a violation of Article 8 ECHR. The pending (to date<sup>49</sup>) cases *Taipale v. Finland* and *Tulokas v. Finland* concern national legislation providing, in certain situations, for higher taxation of pension income than earned income. They are being considered under Article 13 (right to an effective remedy) and Article 14 (prohibition on discrimination) of the convention and Article 1 of Protocol No. 12 (general prohibition on discrimination).

The ECtHR rulings in "social cases" are justified by the effectiveness and indivisibility of human rights. However, as stated above, states enjoy a wide margin of appreciation when choosing the measures necessary to effectively implement rights and freedoms. Unfortunately, the court has not provided clear guidance in this area, including such matters as a social and economic policy concerning pensions and wages, the application of austerity measures, or housing or employment.<sup>50</sup>

Considering older persons' inclusion under the ECHR, some hopes can be pinned on the "evolutive" and "dynamic" interpretation of the convention supporting the "living instrument doctrine". These concepts can potentially profile the states' obligations regarding new demographic conditions, for example. As Stefan Theil observes, the textual and originalist interpretation dating back over seven decades is blind to modern developments. It unduly ignores the altered nature of threats to human dignity, freedom, and equality in the 21<sup>st</sup> century, for example, in relation to the internet, or societal attitudes to sexuality and gender.<sup>51</sup>

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49 June 2023.

50 Ingrid Leijten, *Core Socio-Economic Rights and the European Court of Human Rights*. In *Core Socio-Economic Rights and the European Court of Human Rights*, Cambridge Studies in European Law and Policy (Cambridge: Cambridge University Press, 2018), 292–93; Ellie Palmer, "Protecting Socio-Economic Rights Through the European Convention on Human Rights: Trends and Developments in the European Court of Human Rights," *Erasmus Law Review*, 2, no. 4 (2009): 421. Elena Sychenko, "Enlarging the Scope of the European Convention on Human Rights: History, Philosophical Roots and Practical Outcomes," *Zbornik Pravnog Fakulteta u Zagrebu*, 65, no. 2 (2015): 324.

51 Stefan Theil, "Is the 'Living Instrument' Approach of the European Court of Human Rights Compatible with the ECHR and International Law?" *European Public Law*, 23, no. 3 (2017): 614, <https://doi.org/10.17863/CAM.8478>.

Thus, applying the “evolutive” interpretation, the court answers new facts or issues resulting from societal changes and issues that have never been considered before the court, whereas “dynamic” means giving new answers to problems considered by the court in the past.<sup>52</sup> Both these approaches to interpreting the convention tend to narrow the states’ margin of appreciation<sup>53</sup> and may affect the states’ outdated attitude to certain social phenomena. In the landmark judgement *Tyrer v. United Kingdom*, the ECtHR stated that “the Convention is a living instrument [...] which must be interpreted in the light of the conditions of today”.<sup>54</sup> The court has repeated this position in subsequent judgments.

The evolutive and dynamic interpretation of conventional obligations is also relevant to the issues discussed in this study. In 1950, when the convention was adopted, the demographic structure of Europe was very different. Back then the phenomena of ageism, the grey digital divide or a silver economy were unknown, and issues related to discrimination based on age (older) were not considered.

However, in some cases, the court avoids applying these interpretive tools so as not to provoke chaos or legal uncertainty.<sup>55</sup> For example, the circumstances of the *Carvalho Pinto de Morais v. Portugal*<sup>56</sup> ruling are worth mentioning. In this case, the Portuguese court acknowledged that the badly conducted surgery had caused the applicant, in addition to physical ailments, depression, suicidal thoughts, isolation from family and friends and a feeling that she was less valuable as a woman. The court found a causal link between the surgeon’s conduct and the injury suffered by 50-year-old Ms Carvalho Pinto de Sousa Morais and awarded her financial compensation, part of which was due to the costs incurred by the applicant in having to employ domestic help. However, the hospital appealed against the first instance judgment, and the

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52 Helgesen, Speech on the Seminar “What Are the Limits to the Evolutive Interpretation of the Convention?”, 20; Stefanovska, “Retrospective of the Dynamic and Evolutive Interpretation of ECHR: Framing the Strasbourg’s Interpretative Ethic,” 5.

53 Hale, “The Baroness Hale of Richmond’s Speech on the Seminar ‘What Are the Limits to the Evolutive Interpretation of the Convention?’”, 17.

54 ECtHR, *Tyrer v. The United Kingdom*, application No 5856/72, judgment 15 March 1978, para. 31

55 Stefanovska, “Retrospective of the Dynamic and Evolutive Interpretation of ECHR: Framing the Strasbourg’s Interpretative Ethic,” 5.

56 ECtHR, *Carvalho Pinto de Morais v. Portugal*, application No. 17484/15, judgment 25 July 2017.

second instance court reduced the compensation and damages, including those covering the home help.

The national judges justified their decision to award less compensation and damages because, in their view, the effects of the surgery had only aggravated the applicant's pre-existing complaints and were not anything new. Secondly, it was likely that employing a full-time domestic helper was not at all necessary for the applicant, because, given the age of her children, she was only expected to look after her husband. Thirdly, for the applicant, who had two children and was in her fifties, intimate relations were not that important, as in women, their importance decrease significantly with age. The situation would have been different if the applicant had been younger.

Ms Carvalho Pinto de Sousa Morais filed a complaint with the ECtHR claiming that Portugal had violated Articles 8 (right to respect for private and family life) and 14 (prohibition of discrimination) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. In her complaint, she highlighted the concurrence of two grounds of discrimination – gender and age. In this case, the ECtHR, by a vote of five to two, ruled that Portugal had violated the prohibition on discrimination on the grounds of sex and “other status” (Article 14 ECHR), and the right to respect for private life contained in Article 8 of the Convention.

The ECtHR pointed out that the national court was not tempted to examine the circumstances and evidence individually, but instead had been guided by stereotypes. Such an approach to the case at hand calls into question the fairness of the assessment of the evidence and circumstances and the fairness of the entire judicial process. Stereotypes cannot be allowed to replace evidence, so the ECtHR cracked down on what it called “judicial stereotyping” concerning gender and pointed out the shortcomings in the national court's reasoning. Although the applicant, who was in her fifties at the time of the surgery, could hardly be classified as an older adult under European conditions, she was an evident victim of ageism.

In this case the majority of the ECtHR judges of the adjudicating chamber focused more on gender discrimination than on age discrimination, ageism and evident stereotyping. Thus, in this judgement the ECtHR passed over the chance to apply an evolutive (as the court never considered ageism) interpre-

tation toward ageism and age stereotyping.<sup>57</sup> Such a reasoning appears to be the result of the invisibility of old age and ageism in international treaties. After all, international human rights courts, and thus individual judges, do not operate in a legal vacuum and refer, to a greater or lesser extent, to acts of international law adopted on other international fora and to the *acquis* of other international bodies.<sup>58</sup> This is a crucial argument in favour of adopting a global treaty on older persons' rights, as their presence in "hard" international law could not then be overlooked.

### 2.2.2. EU law – a hard basis for soft actions

Under EU law, establishing the obligations of states seems, at least on appearance, a somewhat simpler way forward, as introducing "age" as a premise for non-discrimination into EU primary law, the Treaty on the Functioning of the European Union – TFEU<sup>59</sup> and the Charter of Fundamental Rights in the European Union – CFREU<sup>60</sup> would differentiate this agenda from other law systems.

A ban on age discrimination was also introduced to secondary EU law through the Council's Directive 2000/78/EC – the Equality Employment Directive.<sup>61</sup> This directive sets out a general framework for combating discrimination based on religion or belief, disability, sexual orientation and, most notably for this subject, age. At the same time, its Article 6 allows for differences in treatment on the grounds of age. This solution raises many doubts among national courts about the interpretation of this provision, especially in the context of compulsory retirement. In the preliminary rulings, the Court of Justice of the

57 Eugenio Mantovani, Benny Spanier, and Israel Doron, "Ageism, Human Rights, and the European Court of Human Rights: A Critical Analysis of the *Carvalho v. Portugal* Case," *DePaul Journal for Social Justice*, 11, no. 2 (2018): 1–14.

58 Magdalena Forowicz, *The Reception of International Law in the European Court of Human Rights* (New York: Oxford University Press, 2010), DOI: 10.1093/acprof:oso/9780199592678.001.0001.

59 European Union, "Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union," 13 December 2007, 2016 O.J. (C 202) 1.

60 European Union, "Charter of Fundamental Rights of the European Union," 18 December 2000, 2012 O.J. (C 326) 391.

61 European Union, "Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation," 2000 O.J. (L 303) 16.

European Union (CJEU) confirmed that, in certain circumstances, differences in treatment might be fully justified by the situation in the labour market, which often requires special provisions allowing for the diversification and adaptation of employment to permanently changing conditions. Different treatment of employees (including forced retirement at a certain age) is also acceptable, but it needs to be distinguished from discriminatory practices. However, all the measures introduced by the Member States must be proportional, objective, reasonably appropriate, necessary, and reasonable in light of the objective pursued.<sup>62</sup> Certainly, mandatory retirement and pushing out older workers in the labour market are vital sources of social exclusion.

On the other hand, the directive does not go beyond employment. Whereas, the endeavours to adopt a horizontal directive on implementing the principle of equal treatment between persons,<sup>63</sup> irrespective of religion or belief, disability, age or sexual orientation, proposed in 2008, ended in a fiasco. It was to be applied to everybody in the private or public sectors, and its scope was to cover social protection (including social security and healthcare), social advantages, education, as well as access to and supply of goods and services, such as housing and transport. Unfortunately, during the negotiations, the principle of age equality was so weakened that older people became practically excluded from the scope of the directive.<sup>64</sup> Perhaps, it is better that the directive proposal in

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62 Elise Muir, "(Il)Legitimate Differential Treatment," *International Journal of Discrimination and the Law*, 15, no. 1–2 (March 2015): 3–10, <https://doi.org/10.1177/1358229114558389>; B.P. ter Haar, "EU Age Discrimination Law: A Curse or a Blessing for EU Youth Policy?" in *EU Anti-Discrimination Law Beyond Gender*, eds. Uladzislau Belavusau and Kristin Henrard (Hart Publishing, 2019), 295–318, <https://doi.org/10.5040/9781509915033>; Israel Doron, "Older Europeans and the European Court of Justice," *Age and Ageing*, 42, no. 5 (2013): 606, <https://doi.org/10.1093/ageing/aft053>; Barbara Mikołajczyk, "International Law and Ageism," *Polish Yearbook of International Law*, 35 (2015): 99, <https://doi.org/doi.org/10.7420/pyil2015c>; Helen Meenan, "Age Discrimination In the EU and the Framework Directive," in *Age Discrimination in the EU and the Framework Directive Edited by Malcolm Seargent* (Alphen aan den Rijn: Kluwer Law International, 2008), 9–27.

63 Commission of the European Communities, "Proposal for a Council Directive of 2 July 2008 on Implementing the Principle of Equal Treatment between Persons Irrespective of Religion or Belief, Disability, Age or Sexual Orientation," COM (2008) 426 Final.

64 Nena Georgantzi, "The European Union's Approach towards Ageism," in *Contemporary Perspectives on Ageism*, eds. Liat Ayalon, Clemence Tesch-Römer, *International Perspectives on Aging* 19 (Cham: Springer, 2018), 346, <https://doi.org/10.1007/978-3-319-73820-8>.

such a limited form was not adopted, because if it had been accepted, it would probably send a damaging message about older persons' position in society.

Indeed, the ban on age discrimination in EU law is important for older persons, but it does not capture the specific nature of later life and the needs of older adults that go far beyond non-discrimination. Meanwhile, combating social exclusion and as well as promoting social justice and protecting solidarity between generations are mentioned in Article 3 of the Treaty on European Union (TEU) among aims of the European Union.

The Charter of Fundamental Rights in the European Union copies the list of civil political rights stipulated in the ECHR. However, in the context of the considerations contained in Chapter One, the right to dignity (Article 1)<sup>65</sup> and the right to personal integrity should be mentioned (Article 3). Respect for dignity and physical and mental integrity is crucial for older persons.

Finally, older persons are visible in EU law due to Article 25 of the CEREU, which was cited in the previous chapter.<sup>66</sup> This provision, belonging to primary EU law, is essential for older persons. However, compared to other provisions of the CFREU, e.g. on gender equality and children's rights, it is declaratory and ambiguous in nature. "Recognition" and "respect" may be interpreted differently and do not indicate specific measures towards older persons. Indeed, as was argued in the previous chapter, the EU's activity towards older persons tends to be based mainly on soft instruments in a social scope.<sup>67</sup> The social policies, including national ageing/demographic strategies, remain at the discretion of the states.

This arises from the principle of subsidiarity stating that the EU intervention is only justified in exercising its powers when Member States are unable to achieve the objectives of a proposed action satisfactorily, and where added value can be provided by carrying out the action at EU level. According to Article 10 sec. 3 of the Treaty on European Union (TEU) "Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen".<sup>68</sup>

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65 "Human dignity is inviolable. It must be respected and protected".

66 "The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life".

67 See more in the next subchapter.

68 European Union, "Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union".

Thus, EU primary law provides foundations for future actions that may affect older people's rights of all types. Article 10 sec. 3 of the TEU, as mentioned above, clearly indicates the responsibilities of those applying EU law, e.g. those organising elections to the European Parliament. In turn, the requirement to take decisions as close to the citizen as possible leads to local and regional authorities whose actions directly and specifically may (or not) improve the inclusion or exclusion of older people and the conditions of age in place.

### 3. Obligations in the socio-economic sphere

#### 3.1. Universal protection – broad but blind

The fundamental issues related to the social inclusion of older persons are closely connected with the second-generation rights, which in turn are related to such aspects as active ageing, economic possibilities, participation (including digital) in social life and intergenerational solidarity. That is why the states' obligations in this area should be extracted also from treaties covering social, economic and cultural rights, especially the International Covenant on Economic, Social and Cultural Rights and the European social law, including the European Social Charter of 1961 and the Revised European Social Charter of 1996.<sup>69</sup> Relevant obligations in this respect are also imposed by the CEDAW and the CRPD and the International Labour Organization conventions. Moreover, the United Nations Educational, Scientific and Cultural Organisation (UNESCO) output, including the Convention against Discrimination in Education,<sup>70</sup> and the Convention on Technical and Vocational Education – TVET<sup>71</sup> should be taken into account when discussing the states' obligations concerning the inclusion of older persons.

Compared with the ICCPR and ECHR indicated above, the treaties containing socio-economic rights place more focus on state parties' activities. States

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69 Council of Europe, "European Social Charter (Revised)," Strasbourg, 3 May 1996, (CETS, No 163).

70 UNESCO, "Convention against Discrimination in Education, 14 December 1960," Paris, 1960, (UNTS 1999, vol. 1696, p. 380).

71 UNESCO, "Convention on Technical and Vocational Education," 10 November 1989, Paris, 1989, (UNTS 1999, vol. 1696, p. 451).



typically should “recognise the rights of everyone...” and then start their action to achieve these rights in full. Traditionally, these rights are perceived as being programmatic by nature and dependent on positive state’s action and resources.

There is no doubt that Article 2 of the International Covenant on Economic, Social and Cultural Rights is the central provision that formulates the states’ obligations towards economic, social and cultural rights stipulated in the covenant and helps to understand the nature of the whole economic, social and cultural rights as such. It stipulates as follows:

1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.
2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

The nature of the obligations arising from the covenant is interpreted by the Committee on Economic, Social and Cultural Rights (CESCR) in its concluding observations addressed to particular states, or in the general comments, and mainly in general comment No. 3 and general comment No. 24.<sup>72</sup> Over the years, the development of the interpretation of these obligations was profoundly analysed in the human rights literature.<sup>73</sup>

72 CESCR, “General Comment No 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities,” E/C.12/GC/24, 2017, para. 11.

73 For example, Philip Alston and Gerard Quinn, “The Nature and Scope of States Parties’ Obligations under the International Covenant on Economic, Social and Cultural Rights,” *Human Rights Quarterly*, 9, no. 2 (1987): 156–229, <https://doi.org/10.2307/762295>; Mashood Baderin and Robert McCorquodale, “The International Covenant on Economic, Social

Here, only the selected aspects of commitments under the ICESCR are highlighted. Thus, according to the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (the successor of the Limburg and Syracuse principles) adopted by a group of experts in 1997 and reissued in 2000 as the official CESCR document, states' obligations to respect, protect and fulfil contain elements of the obligation of conduct and the obligation of result. The obligation of conduct requires action reasonably calculated to ensure that a particular right can be enjoyed. The obligation of result requires states to achieve specific targets in order to satisfy a detailed substantive standard.<sup>74</sup>

The obligations arising from the IESCR are different than those contained in Article 2 of the ICCPR, which requires an immediate obligation to respect and ensure all relevant rights. According to Article 2 of the IESCR, the full realisation of the relevant rights may be achieved progressively, but steps towards that goal must be taken within a reasonably short time, and they should be deliberate, specific and targeted as clearly as possible towards meeting the obligations recognised in the covenant. A state cannot use the concept of "progressive realisation" as a pretext for non-compliance.<sup>75</sup> Immediate action is required in relation to discrimination in the enjoyment of the rights contained

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and Cultural Rights: Forty Years of Development," in *Economic, Social, and Cultural Rights in Action (the First Chapter)* (Oxford University Press, 2007), 3–26; Christina Binder et al., eds., *Research Handbook on International Law and Social Rights*, Research Handbooks in International Law (Cheltenham, UK; Northampton, MA, USA: Edward Elgar Publishing Limited, 2020); Zdzisław Kędzia and Anna Hernandez-Polczyńska, *Międzynarodowy Pakt Praw Gospodarczych, Społecznych i Kulturalnych. Komentarz* (Warszawa: C.H. Beck, 2018); Audrey R. Chapman, "A Violations Approach for Monitoring the International Covenant on Economic, Social and Cultural Rights," *Human Rights Quarterly*, 18, no. 1 (1996): 23–66; Matthew C.R. Craven, *International Covenant on Economic, Social and Cultural Rights. A Perspective of Its Development*, Oxford Monographs in International Law (Oxford: Clarendon Press, 1995); Asbjørn Eide, Katarina Krause, and Allan Rosas, *Economic, Social and Cultural Rights - A Textbook* (Dordrecht: Brill|Nijhoff, 2001); Malcolm Langford, ed., *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge; New York: Cambridge University Press, 2008); Paul O'Connell, *Vindicating Socio-Economic Rights. International Standards and Comparative Experiences* (Routledge Research in Human Rights Law. Milton Park, Abingdon, Oxon; New York: Routledge, 2012).

74 CESCR, "Maastricht Guidelines Violations of Economic, Social and Cultural Rights," E/C.12/2000/13, 2000, [https://www.un.org/ga/search/view\\_doc.asp?symbol=E/C.12/2000/13](https://www.un.org/ga/search/view_doc.asp?symbol=E/C.12/2000/13).

75 CESCR, "General Comment No 3: The Nature of States Parties Obligations (Art. 2, Para. 1, of the Covenant)," 1990, para. 2.

in the covenant, as well as to the development of programmes for achieving these rights and establishing a monitoring system.<sup>76</sup>

These types of actions were indicated by the CESCR in 1995 in its general comments No. 6, devoted exclusively to the rights of older persons. The committee stressed that the state parties should fulfil their obligations under the covenant in respect of older persons through such actions as determining the nature and scope of problems within a state, using regular monitoring, adopting the properly designed policies and programmes to meet requirements, introducing the necessary anti-discriminatory legislation, and eliminating any discriminatory legislation, as well as ensuring the relevant budget support for such activities.<sup>77</sup>

The CESCR paid a good deal of attention to the concept of the “minimum core obligations”. The committee applies the minimum core standard when evaluating state compliance under the state-reporting process, in its views issued in individual cases and in the general comments.<sup>78</sup> Martin Scheinin argues that every human right has its own minimum core of obligations.<sup>79</sup>

Thus, the primary duty of a state is to take steps to achieve the minimum core of obligations, and only later the other (peripheral) elements of rights. A state must demonstrate that every effort has been made to use all the resources at its disposal to satisfy these minimum obligations as a matter of priority. In its general comment No. 3, the CESCR provided an example of failing to discharge obligations under the covenant. It may happen when any significant number of individuals are deprived of essential foodstuffs, essential primary healthcare, basic shelter and housing, or the most basic forms of education.<sup>80</sup>

76 Katarzyna Bryl, “Zasada progresywnej realizacji. Obowiązki państw,” in *Międzynarodowy Pakt Praw Gospodarczych, Społecznych i Kulturalnych. Komentarz*, eds. Zdzisław Kędzia & Anna Hernandez-Polczyńska (Warszawa: C.H. Beck, 2018), 142.

77 CESCR, “General Comment No 6: The Economic, Social and Cultural Rights of Older Persons,” 8 December 1995, E/1996/22, 1995, para. 18.

78 Joie Chowdhury, “Unpacking the Minimum Core and Reasonableness Standards,” in *Research Handbook on International Law and Social Rights*, eds. Christina Binder, Jane A. Hofbauer, Flávia Piovesan, Amaya Úbeda de Torres (Cheltenham, the UK; Northampton, Massachusetts, USA: Edward Elgar Publishing Limited, 2020), 251–74.

79 Martin Scheinin, “Core Rights and Obligations,” in *The Oxford Handbook of International Human Rights Law*, ed. Dinah Shelton (Oxford: Oxford University Press, 2013), 532.

80 CESCR, “General Comment No 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the Covenant),” para. 10.

This explanation of the minimum core obligations is of principal importance as older persons are often the poorest in society. The UN Secretary-General noted in one of his reports: "...the single most pressing human rights challenge for older persons is poverty. Homelessness, malnutrition, unattended chronic diseases, lack of access to safe drinking water and sanitation, unaffordable medicines and treatment, and income insecurity are just a few of the most critical human rights issues that a large number of older persons confront on a daily basis".<sup>81</sup>

Considering that healthy ageing is a crucial element of full participation in society, the minimum core obligations in relation to the right to the highest attainable standard of health must be mentioned here. The CESCR, in its general comment No. 14, indicated that in this area, minimum core obligations mean, among other things, access to health facilities, goods and services on a non-discriminatory basis, the provision of essential drugs and immunisation against the major infectious diseases occurring in the community.<sup>82</sup> Undoubtedly, the COVID-19 pandemic, when individuals in their seventies were 20 times more likely to require hospitalisation than young adults, enhanced the value of the minimum core obligations concerning older persons' health and their access to healthcare.<sup>83</sup>

The committee also analysed Article 12 of the covenant, requiring parties to undertake steps towards the full realisation of everyone's right to enjoy the highest attainable standard of physical and mental health in relation to gender discrimination. According to the committee, the minimum core obligations mean the removal of legal and other obstacles that prevent men and women from accessing and benefiting from healthcare based on equality. It includes, among other things, addressing how gender roles affect access to determinants of health, such as water and food.<sup>84</sup> Determining the minimum core obligations in the area of social security is also crucial as, without securing core human

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81 UN Secretary-General, "Follow-up to the Second World Assembly on Ageing Report of the Secretary-General," 22 July 2011, A/66/173.

82 CESCR, "The Right to the Highest Attainable Standard of Health (Article 12)," E/C.12/2000/4, 2000, paras. 43-44.

83 UN Independent Expert, "Report of the Independent Expert on the Enjoyment of All Human Rights by Older Persons, Claudia Mahler: Impact of the Coronavirus Disease (COVID-19)," 21 July 2020, A/75/205.

84 CESCR, "General Comment No 16 - The Equal Rights of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3)," E/C.12/2005/4, 2005, para. 29.

needs, it is difficult to consider real social inclusion. Interpreting the right to social security, the committee, in its general comment No. 19, stipulates that the states have a core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights set out in the covenant. That is why the state party should ensure access to social security systems and schemes on a non-discriminatory basis. Primarily, they should protect disadvantaged and marginalised individuals and groups. States should also respect existing social security schemes and protect them from unreasonable interference, adopt and implement a national social security strategy and plans of action, and finally, monitor the extent of achieving the right to social security.

In this context, the CESCR's views in the case *Marcia Cecilia Trujillo Calero v. Ecuador*<sup>85</sup> should be invoked. The CESCR found that Ecuador had violated Ms Trujillo Calero's rights to social security, non-discrimination, and gender equality stipulated in the covenant when it had failed to provide her with timely and adequate retirement plan eligibility information and denied her pension based on disproportionate and discriminatory grounds.

Joie Chowdhury observed that in this case, the CESCR utilised a complex approach by using not only the minimum core standard in determining the normative content of the right to social security, but also the concept of reasonableness to evaluate state compliance with obligations under the ICESCR.<sup>86</sup> The CESCR uses the test of reasonableness when it intends to assess "whether the steps had taken into account the precarious situation of disadvantaged and marginalized individuals or groups and, whether they were non-discriminatory, and whether they prioritized grave situations or situations of risk".<sup>87</sup>

The concept of "reasonableness" has been also invoked in the CESCR general comment No. 26 of 2022 on the right to land and in the context of forced evictions. The committee stated that "the relevant authorities shall ensure that evictions are only carried out in accordance with legislation that is compatible and in conformity with the Covenant and in accordance with the general prin-

85 CESCR, *Marcia Cecilia Trujillo Calero v. Ecuador*, Communication No 10/2015, UN Doc. E/C.12/63/D/10/2015 (Views 26 March 2018), 2018.

86 Chowdhury, "Unpacking the Minimum Core and Reasonableness Standards," 257.

87 CESCR, "Committee on Economic Social and Cultural Rights, An Evaluation of the Obligation to Take Steps to the Maximum of Available Resources under an Optional Protocol to the Covenant," 21 September 2007, E/C.12/2007/1, 2007, para. 8f.

ciples of reasonableness and proportionality between the legitimate objective of the eviction and its consequences for the evicted persons”.<sup>88</sup>

The UN Independent Expert on the enjoyment of all human rights by older persons, Claudia Mahler, in her report on adequate housing, also indicated similar obligations of states towards older persons: “States have the obligation to adopt measures to tackle homelessness and to protect older persons from forced eviction. In cases of forced evictions, States should take all appropriate measures to ensure that adequate alternative housing, resettlement or access to productive land is available, especially in situations of crisis, such as during the COVID-19 pandemic”.<sup>89</sup>

Therefore, this interpretation of the IESCR is also vital for older persons. The concepts of minimum core and reasonableness may affect states’ behaviour concerning older persons’ basic needs and may be applied to achieve their survival interests, for example, in situations of financial abuse or illegal evictions.<sup>90</sup> However, social inclusion requires more states’ activity going far beyond the minimum core of rights. Typically, many elements of social inclusion of older persons are not among the core elements of rights but are on the periphery. That is why, similarly to the ECtHR margin of appreciation doctrine, the concept of reasonableness may act in favour of the social inclusion of older persons, but it may also limit a state’s obligations in this area, if the older persons’ needs were deemed to be beyond the capacity of the state.

Another issue in examining state compliance with the obligations under the covenant is the “AAAQ” test. Initially developed for testing the states’ effectiveness in the healthcare sector, the “availability, accessibility, acceptability and quality” (AAAQ) framework<sup>91</sup> has become a benchmark for reviewing the states’

88 CESCR, “Committee on Economic, Social and Cultural Rights, General Comment No 26 on Land and Economic Social and Cultural Rights,” 22 December 2022, E/C.12/GC/26, para. 23.

89 UN Independent Expert, “Report of the Independent Expert on the Enjoyment of All Human Rights on Older Persons and the Right to Adequate Housing,” 19 July 2022, A/77/239, para. 107.

90 David Bilchitz, “Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence,” *South African Journal on Human Rights*, 19, no. 1 (January 2003): 11, <https://doi.org/10.1080/19962126.2003.11865170>.

91 WHO, “Gender, Equity and Human Rights: Availability, Accessibility, Acceptability, Quality–Infographic,” 2016, <https://www.who.int/gender-equity-rights/knowledge/aaaq-infographic/en/>.

progress in fulfilling other socio-economical rights. Considering the vulnerability of older persons (particularly those poor, sick, with disabilities and living in remote rural areas), the AAAQ parameters may be a helpful instrument in identifying the barriers that impede access to many types of services.<sup>92</sup> Thus, the “availability” test helps verify the existence of services and their sufficiency and type. A long list of services may be indicated here, from healthcare and long-term services, *via* banking products, to tourist services. The test of “accessibility” comprises “physical accessibility”, e.g. connected with transportation, architectural barriers and “financial accessibility” as the costs of services. Older persons also face barriers to administrative accessibility. Sometimes, the procedures, or simply obtaining a piece of information in order to use a service, are too complicated or require digital literacy, internet access, mobile phone, etc. Ageism, stereotypes and old age discrimination also create barriers to social accessibility, e.g. older persons are not provided with information on the given services or facilities as in advance they are regarded as too old, outdated, or not a target group due to economic or other reasons.

The “acceptability test” can show if the provided services are age-sensitive and respect older persons’ dignity, culture, and physical and mental conditions. Finally, the “quality” test may verify the skills of service providers and standard of supplies, their flexibility and adaptability to older persons’ needs, and the staff’s attitude to older persons during and after accessing services.

Finally, in addition to the AAAQ parameters, states must strive for “adequacy” of the adopted solution and steps. Article 11 of the ICESCR proclaims *expressis verbis* that “[...] the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions”. Obviously, “living conditions” are an umbrella term covering many factors affecting social inclusion; however, the assessment of the required “adequacy” in relation to older persons depends on states’ awareness of the needs of this category of inhabitants.

Fulfilling the obligations arising from the second generation of human rights, states enjoy not only a margin of discretion (the CESCR does not use the term “appreciation”) in selecting the means of implementation, but the full

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92 UNICEF, “Availability, Accessibility, Acceptability, Quality” (AAAQ), 2019, <https://gbvguidelines.org/wp/wp-content/uploads/2019/11/AAAQ-framework-Nov-2019-WEB.pdf>.

realisation of the rights may depend upon the availability of adequate financial and material resources.<sup>93</sup>

Thus, the protection under the covenant is quite flexible. States may adopt a broad and convenient range of policy measures to implement the rights set out in the covenant. Reasonableness allows the committee to skilfully manoeuvre between respect for state sovereignty and ensuring meaningful accountability for economic, social, and cultural rights violations.<sup>94</sup> In this context, the committee's jurisprudence may be evaluated as cautious, seeing as it avoids imposing any unqualified obligations on states parties and is relatively flexible in the interpretation of the minimum core obligations. Moreover, in contrast to its previous practice of reminding states that socio-economic rights are more important, not less, in times of economic crisis, the CESCR has approved a new emergency implementation regime, meaning the near suspension of some essential obligations in times of economic crisis.<sup>95</sup> The committee did so in the form of an open letter to states,<sup>96</sup> the interpretative value of which may be questioned, but it is clear that states are keen to benefit from such a lowering of standards, leaving vulnerable groups, including older persons, as the inevitable victims of this process.

### 3.2. European achievements *à la carte*

On the European forum, the above-mentioned European Social Charter of 1961 and the (Revised) European Social Charter of 1996 are the main treaties that safeguard socio-economic rights. The Revised Charter introduced "new" rights to the European social law framework, including such rights as the right of older persons to social protection (Article 23), the right to protection against poverty and social exclusion (Article 30), and the right to housing (Article 31).

93 CESCR, "The Right to the Highest Attainable Standard of Health (Article 12)," para. 53.

94 Sandra Liebenberg, "Between Sovereignty and Accountability: The Emerging Jurisprudence of the United Nations Committee on Economic, Social and Cultural Rights Under the Optional Protocol," *Human Rights Quarterly*, 42, no. 1 (2020): 84, <https://doi.org/10.1353/hrq.2020.0001>.

95 Warwick, "Socio-Economic Rights During Economic Crises: A Changed Approach to Non-Retrogression," 250.

96 "Letter dated 16 May 2012 addressed by the Chairperson of the Committee on Economic, Social and Cultural Rights to States parties to the International Covenant on Economic, Social and Cultural Rights," CESCR/48th/SP /MAB/SW Warwick, 264.



It also contains an antidiscrimination clause (repeating the ECHR). All of these are significant for the inclusion of older people, but only Article 23, quoted below, explicitly indicates “the right of elderly persons”:<sup>97</sup>

With a view to ensuring the effective exercise of the right of elderly persons to social protection, the Parties undertake to adopt or encourage, either directly or in co-operation with public or private organisations, appropriate measures designed in particular:

– to enable elderly persons to remain full members of society for as long as possible, by means of:

a) adequate resources enabling them to lead a decent life and play an active part in public, social and cultural life;

b) provision of information about services and facilities available for elderly persons and their opportunities to make use of them;

– to enable elderly persons to choose their life-style freely and to lead independent lives in their familiar surroundings for as long as they wish and are able, by means of:

a) provision of housing suited to their needs and their state of health or of adequate support for adapting their housing;

b) the healthcare and the services necessitated by their state;

– to guarantee elderly persons living in institutions appropriate support, while respecting their privacy, and participation in decisions concerning living conditions in the institution.

Thus, the scope of states’ obligations arising from the RESC towards older persons is very broad. This provision contains “keywords” that oblige states to perform a number of actions that are not visible “at first glance”, but without them the purpose of this provision cannot be achieved. States should therefore implement the general obligation to combat age discrimination in many areas, namely access to goods, facilities and services, healthcare and education. They must develop an appropriate legal framework to combat age discrimination and are also obliged to establish healthcare programmes and services specifically targeted at older people. In particular, states should provide primary healthcare, including home nursing care and mental health programmes

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97 The rights of older persons are also indirectly protected in the 1961 Charter, relating, for example, to adequate vocational guidance, training and rehabilitation, and social security at a higher level (Article 12).

to address any psychological problems affecting older persons, as well as appropriate palliative care services. Older people living in institutions should be provided with adequate support and respect for their privacy, and have the right to participate in decisions about their living conditions in the institution. It may be also interpreted that Article 23 covers the right to personal dignity, protection of property as well as the right to personal contact with relatives and the right to complain about treatment in care institutions. An essential duty of state authorities is to take appropriate measures, including legislative ones, to prevent elder abuse. States must take measures to assess the extent of the problem and raise awareness of the need to eradicate it.<sup>98</sup>

Thus, the RESC standard appears very challenging, but only apparently, because the construction of states' obligations under the charter is based on what is known as the *à la carte* ratification system.<sup>99</sup> According to Article A of the RESC, the states' obligations are divided into two groups. Each party should consider the RESC Part I, containing a list of the rights, as a declaration of their aims to pursue by all appropriate means. It is stated that the parties must agree to "accept as the aim of their policy, to be pursued by all appropriate means both national and international in character, the attainment of conditions in which the following rights and principles may be effectively realised as stated in the introductory paragraph of that part".

Meanwhile, in the case of the RESC Part II, comprising the relevant undertakings in achieving these rights, a state must "consider itself bound by at least six of the following nine articles of Part II of this Charter: Articles 1, 5, 6, 7, 12, 13, 16, 19 and 20. Thus, it is easy to observe that, among the 'obligatory commitments', there are no provisions of primary importance for older persons. As the states may choose the commitments from Part II, of the 35 states parties to the charter, 20 are bound by the key Article 23, 19 have ratified the provisions on social inclusion, and just 11<sup>100</sup> are bound by Article 31

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98 Katarzyna Dunaj and Joanna Ryszka, "The Protection of Vulnerable People in the Charter System," in *The European Social Charter: A Commentary*, ed. The Academic Network on The European Social Charter and Social Rights, Stefano Angelieri, and Carole Nivard (Brill | Nijhoff, 2022), 340, [https://doi.org/10.1163/9789004434042\\_014](https://doi.org/10.1163/9789004434042_014).

99 Benny Spanier and Israel Doron, "The European Social Charter and the Rights of Older Persons," in *Ageing, Ageism and the Law. European Perspectives on the Rights of Older Persons*, Elgar Studies in Law and Society (Cheltenham, UK, Northampton, MA, USA: Edward Elgar Publishing, 2018), 147.

100 As of June 2023.

sec. 3, which obliges states “to make the price of housing accessible to those without adequate resource”.

The possibility of choosing the relevant provisions means that states parties are urged to satisfy the standards set out in the accepted articles or paragraphs, in principle, irrespective of their national resources and immediately upon ratification. According to Article I, “without prejudice to the methods of implementation foreseen in these articles the relevant provisions of Articles 1 to 31 of Part II of this Charter shall be implemented by: laws or regulations; agreements between employers or employers’ organisations and workers’ organisations; a combination of those two methods; other appropriate means”. As it turns out, in practice, states are keen to exercise their ability to choose their obligations and even unilaterally boost the scope of this flexibility by making reservations, declarations, or both, to provisions they have chosen to be bound by.<sup>101</sup>

On the other hand, unlike the IESCR, the RESC does not refer to limits in the implementation of obligations due to the availability of a state’s economic and other resources. It does not mention the “progressive realisation” of socio-economic rights under the charter. However, the European Committee of Social Rights (ECSR) has been steadily developing this notion as the relevant obligations, including those affecting older people, are “dynamic” by nature and may be achieved progressively.<sup>102</sup> The concept of the margin of appreciation or discretion is not mentioned in the text of the charter, but as Israel Doron and Gerard Quinn found out, the Explanatory Memorandum to the key document on older persons’ rights in Europe – the Recommendation CM/Rec(2014)2 on the promotion of human rights of older persons<sup>103</sup> – points out that the European Court of Human Rights and the European Committee of Social Rights both take the view that the states parties, “enjoy a margin of appreciation in assessing whether and to what extent differences in similar

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101 Wojciech Burek, “Treaty Flexibility Unilaterally Boosted: Reservations to European Social Charters,” *Netherlands Quarterly of Human Rights*, 41, no. 1 (March 2023): 51, <https://doi.org/10.1177/09240519231151950>.

102 Israel Doron and Gerard Quinn, *Against Ageism and Towards Active Social Citizenship for Older Persons: The Current Use and Future Potential of the European Social Charter* (Strasbourg: Council of Europe, 2021), 116.

103 Committee of Ministers of the Council of Europe, “Explanatory Memorandum of Recommendation CM/Rec(2014)2 of the Committee of Ministers to Member States on the Promotion of Human Rights of Older Persons,” para. 14, <https://rm.coe.int/1680695bce>.

situations justify different treatment".<sup>104</sup> So again, one can assume a certain degree of discretion for states in implementing social rights, including older persons' rights in this area.

Social rights are also protected at the EU level and originate not only in the CFREU, but also in other primary law and secondary legislation concerning employment and non-employment matters. A number of initiatives aimed at meeting the challenges posed by the phenomenon of an ageing European population was taken under the Open Method of Coordination (OMC), introduced by the European Council at the Lisbon summit in 2000 and revised in 2005.<sup>105</sup> In general, the OMC is premised on the assumption that in areas such as the elimination of poverty, social inclusion, pensions and health, the "hard" integration methods (directives and regulations) do not work, so it is better to use flexible methods of action.<sup>106</sup> In the "EUROPE 2020 – A strategy for smart, sustainable and inclusive growth", the European Commission decided to transform the OMC in the areas of social exclusion and social protection into a platform for cooperation, peer review and the exchange of good practices, as well as an instrument to encourage public and private actors to reduce social exclusion and to take specific actions, including through targeted support from the Structural Funds.<sup>107</sup>

Other references to the economic and social well-being of older persons and ageing issues are mostly found in documents of a programmatic character, such as Presidency conclusions, the European Commission's communications, strategies, partnerships and action plans.<sup>108</sup> The relevant aspects of ageing and inclusion of older persons are placed in the European Pillar of Social Rights

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104 Doron and Quinn, *Against Ageism and Towards Active Social Citizenship for Older Persons: The Current Use and Future Potential of the European Social Charter*, 118.

105 European Council, "Presidency Conclusions – Brussels, 22 and 23 March 2005, 7619/1/05 REV 1," (European Union, 2005), [https://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/ec/84335.pdf](https://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/84335.pdf).

106 Nadia Maccabiani, *The Effectiveness of Social Rights in the EU Social Inclusion and European Governance. A Constitutional and Methodological Perspective*, Studi Di Diritto Pubblico (Milano: Franco Angeli Open Access, 2018), 101–26.

107 European Commission, "Communication from the Commission: EUROPE 2020 A Strategy for Smart, Sustainable and Inclusive Growth," 3 March 2010, COM(2010) 2020 Final.

108 Eurostat, *Ageing Europe – Looking at the Lives of Older People in the EU* (Luxemburg: European Union, 2020), 9–10, <https://ec.europa.eu/eurostat/documents/3217494/11478057/KS-02-20-655-EN-N.pdf/9b09606c-d4e8-4c33-63d2-3b20d5c19c91?t=1604055531000>.

(EPSR), proclaimed by the European Parliament and the Council and the Commission in 2017 at the Gothenburg Summit. Among twenty key principles there are those referring to long-life learning, flexible employment, minimal income, healthcare, social security, pensions and the integration of persons with disabilities, housing rights, long-term care and access to basic services. It also offers a work-life balance for parents and carers of disabled or older family members. In 2021, the updated European Pillar of Social Rights Action Plan was adopted to enforce these principles.<sup>109</sup>

The EPSR contains social rights proclaimed in the CFREU, but through its inclusive nature, the pillar provides new content to the charter and goes beyond its scope. Thus the EPSR develops existing social rights that are already part of the EU legal order. However, it should be remembered that the protection depends, in practice, on the scope of the division of competencies between the EU and its Member States.<sup>110</sup> Moreover, commitments towards enforcing the EPSR almost entirely involve only soft law measures.

Meanwhile, most of the tools for delivering on the EPSR are in the hands of local, regional and national authorities. In this context, it is important to bear in mind the social and legal differences between Member States. Moreover, in the past, any attempt by the EU to take action in the social field has been met with criticism regarding interference in national welfare systems by at least some governments.<sup>111</sup> Thus, the EU institutions (mainly the Commission) can only encourage and help by setting the framework, giving direction and establishing a level playing field.<sup>112</sup> Therefore, Member States, without being particularly coerced, can implement only some elements from the whole EPSR package to varying degrees and speeds.

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109 European Commission, *European Pillar of Social Rights. Action Plan Adopted 4 March 2021*, [https://ec.europa.eu/info/publications/european-pillar-social-rights-action-plan\\_pl](https://ec.europa.eu/info/publications/european-pillar-social-rights-action-plan_pl).

110 Joanna Ryszka, "Protection of Social Rights as a Permanent Challenge for the European Union," *Review of European and Comparative Law*, 46, no. 3, 2021: 128–41, <https://doi.org/10.31743/recl.11955>.

111 Zane Rasnaca, "Bridging the Gaps or Falling Short? The European Pillar of Social Rights and What It Can Bring to EU-Level Policymaking," (Unpublished, 2017), 6–7, <http://rgdoi.net/10.13140/RG.2.2.32569.26724>.

112 Beatrice Carella and Paolo Graziano, "Back to the Future in EU Social Policy? Endogenous Critical Junctures and the Case of the European Pillar of Social Rights," *JCMS: Journal of Common Market Studies*, 60, no. 2 (March 2022): 385, <https://doi.org/10.1111/jcms.13236>.

#### 4. Searching for older persons' rights in sectoral protection

Taking into account the phenomenon of intersectional discrimination<sup>113</sup> and the gendered face of global ageing, the states' obligations arising from such key treaties as the Convention on the Elimination of All Forms of Discrimination Against Women and the certainly the Convention on the Rights of Persons with Disabilities should be taken into account.

In the case of the CEDAW, the first guidelines on the states' obligations can be found in the preamble, which ties the convention with both covenants: "Noting that the States Parties to the International Covenants on Human Rights have the obligation to ensure the equal rights of men and women to enjoy all economic, social, cultural, civil and political rights".

However, the main provisions on the states' duties are Articles 2, 3 and 24. Article 2 obliges states to condemn discrimination against women in all forms and agree to pursue, by all appropriate means and without delay, a policy of eliminating discrimination against women. The undertakings indicated in this article are immediate and focus on the role of national legislation. According to the CEDAW Committee, this provision entails obligations of means or conduct and obligations of results. States parties should consider that they have to fulfil their legal obligations to all women through designing public policies, programmes and institutional frameworks that are aimed at meeting the specific needs of women leading to the full development of their potential on an equal basis with men. Importantly, Article 2 also imposes a due diligence obligation on states parties to prevent discrimination by private actors.<sup>114</sup> The committee recognises in Article 2 the essence of the state parties' obligations under the convention. Therefore, it does not permit any reservations to Article 2 or to subparagraphs of Article 2, in principle, as it would be incompatible with the object and purpose of the convention.<sup>115</sup> This interpretation is of particular importance, taking into account the record number of reservations submitted by the states to the convention. Judith Resnik compares the prac-

113 Various aspects of intersectionality will be discussed in Chapter Six.

114 CEDAW Committee, "General Recommendation No 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women," 16 December 2010, CEDAW/C/GC/28, paras. 8–13.

115 CEDAW Committee, "General Recommendation No 27 on Older Women and Protection of Their Human Rights," 10 December 2010, CEDAW/C/GC/27, para. 41.

tice of submitting reservations to the ECtHR's "margin of appreciation" doctrine. In her opinion, both these instruments weaken the power of the treaty and reduce the meaning of the rights contained therein and make the states' commitments unequal.<sup>116</sup>

The CEDAW Committee also stressed the multiple forms of discrimination against women in the general recommendation No. 27 of 2010, dedicated exclusively to older women. The committee outlined the content of the states' obligations with regard to ageing with dignity and older women's rights. It formulated the policy recommendations aimed at mainstreaming the responses to the concerns of older women into national strategies, development initiatives and positive action so that older women can fully participate in society without discrimination and on an equal basis with men.<sup>117</sup> This approach corresponds with Article 3, obliging States to "take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men".

As Christine Chinkin, in the commentary to the CEDAW, argues, Article 3 is imprecise but has considerable potential for progressive interpretation. She also stresses that the open-ended wording allows all matters not covered by other articles to be included.<sup>118</sup> Meanwhile, the CEDAW Committee notes that in Article 3, the convention anticipates the emergence of new forms of discrimination that had not been identified at the time when it was drafted.<sup>119</sup>

Whereas, Article 24 requires states parties to "undertake to adopt all necessary measures at the national level aimed at achieving the full realization of

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116 Judith Resnik, "Comparative (in)Equalities: CEDAW, the Jurisdiction of Gender, and the Heterogeneity of Transnational Law Production," *International Journal of Constitutional Law*, 10, no. 2 (2012): 545, 548, <https://doi.org/10.1093/icon/mor064>.

117 CEDAW Committee, "General Recommendation No 27 on Older Women and Protection of Their Human Rights," para. 9.

118 Christine Chinkin, "Commentary to Article 3," in *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary*, eds. Marsha Freeman, Christine Chinkin, and Beate Rudolf, Oxford Commentaries on International Law (Oxford: Oxford University Press, 2012), 121.

119 CEDAW Committee, "General Recommendation No 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women," para. 8.

the rights recognized in the present Convention". According to Andrew Byrnes, this provision affirms that the convention is an instrument imposing on states the obligation to take positive actions at a national level and to ensure the aims of the convention are achieved. He also indicates the complicated nature of measures taken to guarantee the full realisation of rights stipulated in the convention. The measures are not described in Article 24 as "progressive", but he argues that it does not mean that they should be immediate, as achieving specific goals "immediately" could be difficult. However, they should undoubtedly be comprehensive.<sup>120</sup>

The CEDAW Committee also stresses the requirement to effectively implement the convention, linking it with accountability. The committee indicates that a state party "should be accountable to its citizens and other members of its community at both the national and international levels. In order for this accountability function to work effectively, appropriate mechanisms and institutions must be put in place".<sup>121</sup>

Another principal treaty that should be considered crucial for older persons is certainly the Convention on the Rights of Persons with Disabilities. This is a treaty that most clearly demonstrates the interpenetration of generations of human rights, and consequently the types of state obligations.<sup>122</sup>

Its Article 4 is a key provision defining the scope of the states parties' obligations and their legal nature. This extensive provision obliges them to "undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability". This provision also contains a list of conduct ranging from refraining from actions incompatible with the convention to taking a whole inventory of appropriate measures and the promotion of certain activities, including efforts to eliminate discrimination based on dis-

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120 Andrew Byrnes, "Commentary to Article 24," in *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary*, eds. Marsha Freeman, Christine Chinkin, and Beate Rudolf, Oxford Commentaries on International Law (Oxford: Oxford University Press, 2012), 540–41.

121 CEDAW Committee, "General Recommendation No 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women," para. 40.

122 Boderick, "The United Nations Convention on the Rights of Persons with Disabilities and the European Convention on Human Rights: A Tale of Two Halves or a Potentially Unified Vision of Human Rights?" 199.



ability by any person, organisation and private enterprise. Generally, Article 4 requires states to give full effect, at the domestic level, to the rights set out in the convention: “without discrimination of any kind on the basis of disability and making explicit a set of detailed obligations to achieve this purpose”.

Valentina Della Fina, commenting on this provision, noted that, unlike similar norms contained in the ICCPR and the CEDAW, this provision “is a cross-cutting provision, which not only establishes a general obligation of compliance but also enumerates specific obligations in several areas (non-discrimination, universal design, new technologies, accessible information, and others) covered by other articles”.<sup>123</sup> She also argues that, in the cases where states parties should undertake to “ensure and promote the full realization” of the rights recognised by the CRPD, their obligations are of immediate effect and are both negative and positive by nature. At the same time, there are also obligations requiring “all appropriate legislative, administrative and other measures”, which are not limited only to legislative, administrative, financial, judicial and educational ones. For example, a state may adopt national plans, laws, policies and practices in line with the convention. She also notes that, in terms of accessibility and universal design (which are crucial for older persons, not only those with disabilities), according to Article 4 sec. 1f, states should undertake and promote certain activities with the minimum possible adaptation and the least cost to meet the specific needs of people with disabilities. This construction gives states a wide margin of appreciation in implementing these provisions at the domestic level.<sup>124</sup>

Contrary to previous treaties, this convention clearly explains, in Article 4 sec. 2, that “with regard to economic, social and cultural rights, each State Party undertakes to take measures to the maximum of its available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively the full realization of these rights, without prejudice to those obligations contained in the present Convention that are immediately applicable according to international law”. Therefore, nobody should expect that in this area the conventional goals will be achieved in a short period. Thus, states can be inventive in meeting their obligations under the CPRD.

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123 Valentina Della Fina, Rachele Cera, and Giuseppe Palmisano, *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary* (Cham: Cham: Springer International Publishing, 2017), 141, <https://doi.org/10.1007/978-3-319-43790-3>.

124 Valentina Della Fina, Rachele Cera, and Giuseppe Palmisano, 143, 146.

Undoubtedly, the CRPD is a treaty of a particular importance as it may serve as a model for shifting the paradigm of an older person and old age. With a human rights-based approach, like for people with disabilities, older people would start to be seen as full members of society. As mentioned in Chapter One, its Article 19 is a model for the relevant provision in the future convention on the rights of older persons. However, the CRPD is also perceived as the most significant barrier to adopting a convention on older persons.<sup>125</sup> The misconception that the CRPD is a sufficient instrument to cover the needs of older persons is widespread. However, more profound research proves that this treaty primarily protects only older persons who are disadvantaged by their medical conditions, and that its influence on older persons who are disadvantaged due to social structures based on their chronological age is very limited.<sup>126</sup> Moreover, it does not consider the specificities of ageism and discrimination based on older age, which are the main barriers to the social inclusion of older adults. It does not address violence, neglect and abuse of older people, their digital exclusion, lifelong learning, preparation for old age, shaping a friendly environment for ageing or intergenerational solidarity.

Indeed, the list of treaties and states' obligations remains open. There are many other treaties imposing many other obligations on states arising from them, with the potential to foster older persons' inclusion into the mainstream of society. At the same time, even as parties to these treaties, states still enjoy a large margin of discretion to create their domestic policies, including ageing policies. For example, the International Labour Organization (ILO) Convention No. 128 on Invalidity, Old-Age and Survivors' Benefits of 1967 is based on an *à la carte* ratification system similar to the European Social Charters. Moreover, Article 4 allows states with insufficiently developed economies to avoid performing certain obligations by submitting declarations on the temporary exceptions.<sup>127</sup>

Another example is the UNESCO Convention on Technical and Vocational Education of 1989 (TVET Convention). This is of significance for the inclusion

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125 Paul Harpur, "Old Age Is Not Just Impairment: The CRPD and the Need for a Convention on Older Persons," *University of Pennsylvania Journal of International Law*, 37, no. 3 (2016): 1032, <https://scholarship.law.upenn.edu/jil/vol37/iss3/4>.

126 Harpur, 1051.

127 ILO, "Convention No.128 on Invalidity, Old-Age and Survivors' Benefits Convention," 1967, (UNTS 1998, vol. 1562, p. 422).

of older persons as it contains many immediate and progressive obligations, as described above, but it also includes some ambiguous wording, as in Article 2 sec. 4: “The Contracting States shall pay attention to the special needs of the handicapped and other disadvantaged groups and take appropriate measures to enable these groups to benefit from technical and vocational education”.<sup>128</sup> As a result, the states’ obligations from this treaty appear very weak, as “paying attention” may take many different forms.

## 5. Beyond two generations

International human rights law is constantly evolving. New rights are recognised and states’ obligations are being formulated, as the right to development, which is undoubtedly crucial for the social inclusion of older persons. It is stipulated in the UN General Assembly Declaration on the Right to Development<sup>129</sup> and occupies a prominent place among solidarity rights (the rights of the third generation). Article 1 sec. 1 of this declaration proclaims: “The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized”.

It is easy to see that the right to development corresponds with the UN Principles for Older Persons in the area of participation and self-fulfilment cited in the previous chapter. Moreover, according to Article 2 sec. 3 of the declaration: “States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom”. To date, these states’ duties remain in the realm of postulation, as they are included in a soft law document, not in a treaty.

Various elements of “development” can be found under binding international law, though identifying states’ obligations in this field requires “cherry-picking”

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128 UNESCO, “Convention on Technical and Vocational Education,” (UNTS 1999, vol. 1696, p. 451).

129 UN General Assembly, “Declaration on the Right to Development,” 4 December 1986, A/RES/41/128.

relevant provisions from several treaties, mainly those containing socioeconomic rights. In the case of older persons, who are, after all, invisible in human rights treaties, this task is much more challenging. In 2014, the UN Independent Expert on the enjoyment of all human rights by older persons, Rosa Kornfeld-Matte, in her first annual report, noted, among other things, that the general human rights standards do not consider the recognition of third-generation specific rights in favour of older persons.<sup>130</sup>

Indeed the draft Convention on the Right to Development, presented in 2020 and 2022 (the reviewed version) to the UN Human Rights Council,<sup>131</sup> does not mention the older population or development in older age. However, it contains a lot of concepts and provisions aimed at social inclusion. The preamble of the proposed convention confirms, among other things, the right to development as an inalienable human right of all human beings and peoples. On the other hand, the preamble contains a long list of severe obstacles to achieving the right to development, including poverty, racism, inequality within and across countries and the denial of human rights. Ageism is not listed among them.

Article 3 of the draft indicates the principles that states should follow. These include the principles of equality, non-discrimination, empowerment, participation, transparency, accountability, equity, subsidiarity, universality, inalienability, interdependence and indivisibility, and taking a human rights approach. It also indicates other stakeholders, individuals, peoples, groups, institutions and NGOs, playing an important role and having responsibility in the promotion and realisation of “the right of everyone to a social and international order in which the right to development can be fully realized”.

Article 4 proclaims the right to development, which strongly corresponds with the concept of social inclusion, as its main elements are “participation” and “inclusion”:

1. Every human person and all peoples have the inalienable right to development, by virtue of which they are entitled to participate in, contribute to and

130 UN Independent Expert, “Report of the Independent Expert on the Enjoyment of All Human Rights by Older Persons, Rosa Kornfeld-Matte,” 24 July, 2014, A/HRC/27/46, para. 31.

131 Human Rights Council, “Revised Draft Convention on the Right to Development, Chair-Rapporteur: Zamir Akram, Chair-Rapporteur of the Working Group on the Right to Development,” 6 April 2022, A/HRC/WG.2/23/2.

enjoy civil, cultural, economic, political and social development that is indivisible from and interdependent and interrelated with all other human rights and fundamental freedoms.

2. Every human person and all peoples have the right to active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.

The draft also describes the general obligations of states parties – to respect, protect and fulfil. Besides these, it also contains the “duty to cooperate” (Article 13), obliging states parties to reaffirm and undertake to implement their duty to cooperate, through joint and separate action, among other things, to promote higher standards of living, full employment, and conditions of economic and social progress and development. The states’ primary responsibility in this area is

to undertake to take deliberate, concrete and targeted steps, separately and jointly, including through cooperation within international organizations, and as appropriate, in partnership with civil society: (a) To ensure that human and legal persons, groups and States do not impair the enjoyment of the right to development; (b) To ensure that obstacles to the full realization of the right to development are eliminated in all international legal instruments, policies and practices.

Adopting effective ageing policies falls within these measures, especially as Article 15 sec. 1 explicitly refers to marginalised groups and the age premise:

States Parties recognize that certain human persons, groups and peoples, owing to their marginalization or vulnerability because of race, colour, sex, language, religion, political or other opinion, nationality, statelessness, national, ethnic or social origin, property, disability, birth, age or other status, including as human rights defenders, may need specific and remedial measures to accelerate or achieve de facto equality in their enjoyment of the right to development. Specific and remedial measures can include, among others, enabling the full, effective, appropriate and dignified participation of such human persons, groups, and peoples in decision-making processes, programmes and policymaking that affect

their full and equal enjoyment of the right to development, without subjecting them to structural, environmental or institutional constraints or barriers.

The work on this convention is at an advanced stage, though it is still difficult to predict the extent to which countries will be willing to be bound by it. It is also not easy to assess whether and what impact it will have on countries' policies on ageing and inclusion. While the proposed convention is definitely inclusive and there is some potential to promote the inclusion of older persons in Article 15, this group of individuals may not receive renewed attention under the general right to development. Already while drafting the 1986 declaration, Jack Donnelly expressed the view that the formulation of the right to development as a synthesis of human rights, and the focus on the implementation of human rights at the international rather than the national level, would be harmful and lead to the erosion of human rights.<sup>132</sup> Discourse on the effectiveness and rationale of the human right to development has been ongoing for decades.<sup>133</sup> One of the many arguments against this is the invisibility of specific vulnerable groups under this right.<sup>134</sup> However, if the convention is adopted, the answers will be found in the practice of states.

Finally, the development of international human rights law goes beyond the third generation of rights. However, older persons' rights are again missing in the fourth generation of human rights. The potential scope of this new concept of human rights varies depending on backgrounds that advocate their legal framing on the international agenda. The fourth generation is supposed to cover, among other things, the rights of future generations, reproductive rights, rights of indigenous people, and rights related to genetic lineage and technological change.<sup>135</sup> Unlike the rights of future generations, usually in the

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132 Jack Donnelly, "In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development," *California Western International Law Journal*, 15, no. 3 (1985): 502.

133 Bonny Ibhawoh, "The Right to Development: The Politics and Polemics of Power and Resistance," *Human Rights Quarterly*, 33, no. 1 (2011): 76–104, <https://doi.org/10.1353/hrq.2011.0001>.

134 Başak Etkin, "The Cynic's Guide to Compliance: A Constructivist Theory of the Contestation Threshold in Human Rights," *Revue Québécoise de Droit International*, 27 July 2021, 183–203, <https://doi.org/10.7202/1079428ar>.

135 Mattias Risse, *The Fourth Generation of Human Rights: Epistemic Rights in Digital Lifeworlds*, Carr Centre Discussion Paper (Cambridge, MA: Harvard Kennedy School, Harvard University, 2021), 8.

context of the climate change,<sup>136</sup> the rights of “passing generations” are not mentioned in the proposed catalogues.<sup>137</sup>

The discourse on the fourth generation of human rights is still open, so when proposing the recognition of new rights or a new approach to already recognised rights, it would be a good idea to make older persons visible, especially in the context of the changing reality, and in particular the development of new communication technologies and artificial intelligence. These developments leave older persons at risk of exclusion from the knowledge-based information society.

## 6. Good faith as a guide

Human rights stipulated in treaties should be respected in accordance with the principle of *pacta sunt servanda*. By binding themselves to treaties, states agree, as *per* Article 26 of the Vienna Convention on the Law of Treaties – VCLT, that “every treaty in force is binding upon the parties to it and must be performed by them in good faith”.<sup>138</sup> This principle is central to the international community and demonstrates the values on which international law is based. It applies, without exception, to every treaty, including human rights treaties, and must be observed by all the organs of a state.<sup>139</sup>

However, human rights treaties cannot be considered here as just a “simple” state-state relationship. Their purpose is not to accomplish the reciprocal exchange of rights for the contracting states’ mutual benefit, but to protect individual human beings for the common good. This means that states have

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136 UN Secretary-General, “Intergenerational Solidarity and the Needs of Future Generations Report of the Secretary-General,” 5 August 2013, A/68/322.

137 Adrian-Vasile Cornescu, “The Generations of Human Rights,” 2009, Kamil Stępiak, “Koncepcja jurydyzacji czwartej generacji praw człowieka w międzynarodowym systemie ochrony,” *Przegląd Sejmowy* nr 2(151), no. 2(151) (2019): 97–112, <https://doi.org/10.31268/PS.2019.26>.

138 United Nations, “Vienna Convention on the Law of Treaties,” 23 May 1969, (UNTS, vol. 1155, p. 331).

139 Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (London: Brill/Nijhof, 2009), 368.

various obligations, not to other states, but to all individuals within their jurisdiction.<sup>140</sup>

How should states ensure that they “respect”, “protect” and “fulfil” the right of older persons, and how do they foster social inclusion under international law, as this group of people is largely invisible under the human rights core treaties? Martin Scheinin stresses the importance of interpretation in order to ensure a proper understanding and application of human rights. He notes that none of these concepts, rules or principles exist by themselves, but they are “tools for making sense of the substantive content – rights and obligations”.<sup>141</sup> Meanwhile, Eszter Polgári suggests that if the ECtHR referred to the VCLT to a greater extent, it would avoid criticism of the use of the interpretive tools of margin of appreciation and evolutive and dynamic interpretation.<sup>142</sup>

Article 31 sec. 1 of the VCLT stipulates that “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. Commenting on this provision, Richard Gardiner notes: “one of the most difficult areas of treaty interpretation is how to cope with silence, or absent terms”. He also poses the following question: “[I]f the treaty does not expressly make provision for the matter in issue, must it be assumed that it is not covered?”<sup>143</sup>

The answer can be found by acting in “good faith”, which makes the treaties effective. It dictates performing treaties following their purpose and context and prevents an excessively literal interpretation.<sup>144</sup> In the case of human rights treaties, the interpretation should go beyond the advantages or disadvantages of states and lead to the protection of the common interest. If a treaty contains the rights of “every human being”, “everyone”, “each person” and “all persons”, it means that the purpose of the treaty was not to leave anyone behind, even if a relevant category of persons is not precisely indicated in

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140 European Commission on Human Rights, *Austria vs Italy*, Application No 788/60, (1961); Inter-American Court of Human Rights, *Advisory Opinion Oc-2/82 of September 24, 1982. The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 And 75) Requested by The Inter-American Commission on Human Rights* (Inter-American Court of Human Rights 1982).

141 Scheinin, “Core Rights and Obligations,” 540.

142 Polgári, “The Role of the Vienna Rules in the Interpretation of the ECHR.”

143 Richard Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2015), 165.

144 Gardiner, 197.



a given treaty. Therefore, there should be no threat that acting in “good faith” would create new obligations of states in areas not covered by the wording of the treaty or the intent of the signatories. The requirement of good faith will also apply where the states parties enjoy a margin of appreciation or discretion. In such cases, good faith constitutes a hint as to the best, most efficient way of performing obligations.<sup>145</sup>

Certainly, “good faith” is an ambiguous concept, so any effort to define it would be unsuccessful as it would not be able to cover all the aspects of “good faith”. That is why its essence and understanding must be sought in every case. In scholarship, “good faith” is analysed as a “principle of international law”, but also as a “standard”. The standard reflects the content of the principle of good faith in the process of interpreting and applying treaties.<sup>146</sup> Therefore, for the effective protection of the rights of older persons, the good faith standard in respecting, protecting, and fulfilling their human rights should be decoded.

Indeed, the nature of the human rights treaties requires a *pro homine* interpretation.<sup>147</sup> However, in the case of older persons, who are invisible in international treaties, decoding the treaty provisions requires more effort. A “double-check approach” in decision-making and drawing up social strategies and programmes may be proposed. First, states (more precisely, their administrative, legislative, and judicial authorities) should apply a human rights-based approach (HRBA). Secondly, they should follow the “ageing mainstreaming” concept. This, described in the first chapter the UNECE “Guidelines for Mainstreaming Ageing”,<sup>148</sup> appears to be a helpful tool for states to maintain the “good faith standard” in performing states’ obligations, especially concerning older persons’ inclusion into the mainstream of society.

145 Cezary Mik, “Zasada wykonywania zobowiązań w dobrej wierze. Wstęp do teorii zobowiązań prawnomiędzynarodowych. Zarys problematyki, in *Manfred Lachs - Wybitny Prawnik Świata*, ed. Katarzyna Myszone-Kostrzewa, Zdzisław Galicki, Tomasz Kamiński (Warsaw: Stowarzyszenie Absolwentów Wydziału Prawa i Administracji Uniwersytetu Warszawskiego, 2011), 171.

146 Marcin Kałduński, *Zasada dobrej wiary w prawie międzynarodowym [The Good Faith Principle in International Law]*, Monografie Prawnicze (Warsaw: C.H. Beck, 2017), 118, 148.

147 Małgosia Fitzmaurice, “Interpretation of Human Rights Treaties,” in *The Oxford Handbook of International Human Rights Law*, ed. Dinah Shelton (Oxford: Oxford University Press, 2013), 754.

148 UNECE, “Guidelines for Mainstreaming Ageing,” Geneva: 2021, [https://unece.org/sites/default/files/2021-03/ECE-WG.1-37\\_Guidelines\\_for-Mainstreaming\\_Ageing\\_1.pdf](https://unece.org/sites/default/files/2021-03/ECE-WG.1-37_Guidelines_for-Mainstreaming_Ageing_1.pdf).

## Conclusion

Over the last decade, older persons' rights have become much more recognisable on the international level. So far, however, this fact has not been materialised in adopting a global normative instrument. The fundamental factor contributing to the ambiguity of states' obligations on older persons' rights is the lack of any binding universal treaty provisions dedicated to them. Therefore, scoping and interpreting the extent of states' commitments in this area is challenging, because the existing regulations are scattered over various treaties. The invisibility of human rights of older persons among hard law norms at the universal level causes the relevant states' obligations to be imperceptible at first glance. Their determination requires the extraction of the relevant provisions and their respective interpretation. Moreover, states and other stakeholders should not only be aware of existing obligations, but also prudent and responsive, since even the obligations formulated negatively require positive steps to fulfil them. The differences between generations and types of obligations blur and intertwine when we try to establish states' duties in the area of social inclusion of vulnerable persons, including older adults.

The general comments and recommendations issued by the human rights treaty bodies might contribute to a better understanding of the scope and nature of human rights obligations imposed on states in relation to older persons. Meanwhile, almost thirty years have passed since the CESCR issued the general comment No. 6 on the rights of older persons. Since that time, the world demographic situation and societies have changed, and the needs of older persons are different, for example, due to the development of the internet and artificial intelligence. This is why we need a new interpretation of older persons' rights.

Meanwhile, under the existing normative framework, states have many possibilities to avoid or soften their duties in the area of human rights. They can make reservations to treaties, choose *à la carte* obligations and enjoy a considerable margin of appreciation in the implementation of their obligations. The staggered timing necessary to achieve certain objectives prescribed in a given treaty and the "necessary flexibility device"<sup>149</sup> can also dilute states' obligations essential for the social inclusion of older adults.

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149 CESCR, "General Comment No 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)," 14 December 1990, E/1991/23, para. 9.

On the other hand, international law requires states to keep the “good faith standard” when performing their obligations. With older persons’ rights, when states are creating their policies and taking decisions, they should act through the lens of mainstreaming ageing and the HRBA and should draw on the whole (including soft law) *acquis* of international human rights law.



## Chapter Four

# Verification of States' Good Faith

### 1. From responsibility to accountability

Considerations about states' obligations in human rights naturally lead to questions about their responsibility in the event of violations of these rights and possible ways of verifying their good faith. This chapter demonstrates the potential of the various mechanisms available under international law, particularly universal and European human rights laws, which are or would be applied to influence states' performance of their obligations towards older persons. As this study is about international law, the considerations will start with certain aspects of state responsibility for breaches of human rights under general international law. However, the specialised rules of human rights law, with its specific mechanisms, are more relevant to verify the states' compliance with obligations towards their older citizens. Thus, the human rights mechanisms will be at the heart of the considerations.

The complex nature of human rights obligations, analysed in Chapter Three, results in the model of states' responsibility for not complying with human rights treaties, which usually contain *erga omnes* obligations. These are non-reciprocal; there is no inter-state damage in the event of violations; it is also challenging to identify an "injured state" and to attribute violations committed by non-state actors to the state.<sup>1</sup> Christian Tomuschat aptly outlined the specific nature of state responsibility for human rights violations by stating that "human rights essentially protect individuals against their States of

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1 Malgosia Fitzmaurice, "Interpretation of Human Rights Treaties," in *The Oxford Handbook of International Human Rights Law*, ed. Dinah Shelton (Oxford: Oxford University Press, 2013), 743; Menno T. Kamminga, *Inter-State Accountability for Violations of Human Rights* (Profesorschrift, Leiden, 1990); Dinah L. Shelton, *Remedies in International Human Rights Law*, 2nd ed. (Oxford: Oxford University Press, 2005), 97.

nationality, there is some paradox in the State, a potential violator of human rights, simultaneously protecting them at the international level".<sup>2</sup>

The complex nature of human rights' obligations is an object of continuous discourse on whether states' responsibility in this regard should be considered under a closed "self-containment regime" of human rights law, or whether this issue is subject to the general principles of international responsibility. However, searching for the potential of general international law to make states responsible for conduct against the human rights of vulnerable groups, including older persons, is still reasonable, as human rights law is still a branch of international law. As states bear responsibility, it means that international law is not merely a set of moral norms, but is a law with the fundamental principle whereby the unlawful conduct of a state makes the state responsible for its actions. This general principle of responsibility, expressed in the Factory at Chorzów case,<sup>3</sup> plays a pivotal role in the whole international system as it guarantees that states observe their international obligations.<sup>4</sup>

Nowadays, this principle also guides the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA).<sup>5</sup> Although ARSIWA has not been framed into the form of a treaty, it is a part of the "process of customary law articulation",<sup>6</sup> reflecting customary law principles and it "belongs to realm of hard law".<sup>7</sup> Therefore, ARSIWA is the benchmark against which the states' responsibility is measured.

2 Christian Tomuschat, "The Implementation of International Responsibility. Ch.67 Individuals," in *The Law of International Responsibility*, eds. James Crawford et al., Oxford Commentaries on International Law (New York: Oxford University Press, 2010), 986.

3 PCIJ, Case Concerning the Factory at Chorzów (Germany v. Poland) (Jurisdiction) 1927 PCIJ Rep Series A No 9. (Permanent Court of International Justice 26 July 1927).

4 Anna Czaplińska, "Responsibility in International Law: General Principle or Institution of Customary Law?" *Wroclaw Review of Law, Administration & Economics*, 8, no. 2 (1 December 2018): 252, <https://doi.org/10.1515/wrlae-2018-0046>.

5 UN General Assembly, "Responsibility of States for Internationally Wrongful Acts," 28 January 2002, A/RES/56/83 (International Law Commission, "Draft Articles on Responsibility of States for Internationally Wrongful Acts," Yearbook of the International Law Commission, 2001, vol. II, Part Two, 2001).

6 James Crawford, "The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect," *The American Journal of International Law*, 96, no. 4 (2002): 890.

7 Martin Scheinin, "Just Another Word? Jurisdiction in the Roadmaps of State Responsibility and Human Rights," in *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law*, eds. Malcolm Langford, Wouter Vandenhoe,

ARSIWA does not exclude human rights from its scope. In interpreting particular articles, the International Law Commission often refers to human rights obligations and the international human rights courts' jurisprudence. On the other hand, the human rights courts often invoke this document when clarifying their rulings.<sup>8</sup>

Article 1 expresses the basic principle that every internationally wrongful act of a state entails its international responsibility. Article 2 specifies the conditions required to establish the existence of an internationally wrongful act of a state:

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

- (a) is attributable to the State under international law; and
- (b) constitutes a breach of an international obligation of the State.

The construction of this article is potentially crucial for interests of these beneficiaries of human rights provisions, who are not mentioned *expressis verbis* in the treaties. "Omissions" in performing obligations by states are very likely in the case of invisible older persons' rights in international treaties.

Moreover, Article 12 covers breaches of all international obligations: "There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character". Thus, ARSIWA does not only cover the consequences of a serious breach of states' obligations arising under the peremptory norms of general international law (Article 41), such as the prohibition of genocide or racial discrimination or slavery. This is important for the matter at hand, as the norms crucial for the social inclusion of older persons are not imperative by nature.

Another provision worth noting is Article 48, which permits a third state to invoke the responsibility of a state that has breached an obligation to the

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Martin Scheinin, and Willem van Genugten (Cambridge: Cambridge University Press, 2012), 215, doi:10.1017/CBO9781139002974.

8 Rosana Garcíandia, "State Responsibility and Positive Obligations in the European Court of Human Rights: The Contribution of the ICJ in Advancing towards More Judicial Integration," *Leiden Journal of International Law*, 33, no. 1 (March 2020): 177–87, <https://doi.org/10.1017/S0922156519000591>.

international community. There is no consensus about the meaning of “international community” in the doctrine (whether it means only states or also other stakeholders), but according to Anne-Laure Vaurs-Chaumette, the state responsibility towards the “international community” translates into a legal form of the will to safeguard collective goods and values, including human rights.<sup>9</sup>

Moreover, under Article 54, states, other than an injured state, may take lawful measures “against [breaching] that state, to ensure the cessation of the breach and reparation in the interest of [...] the beneficiaries of the obligation breached”. Thus, this article theoretically opens the door to protecting beneficiaries of human rights obligations, as international human rights law, while it may have emerged from the mutual obligations between states, aims to protect individuals, rather than states. The issue of reciprocity here is of secondary importance. This provision is essential when the violations concern nationals of the responsible state. Without this provision, the obligation to protect human rights would not have much practical significance.<sup>10</sup>

However, the concept of applying ARSIWA in practice runs into problems when responsibility is attributed to a state for failing to take positive actions to ensure human rights, especially those belonging to the second generation of human rights. It is difficult, on the basis of ARSIWA, to attribute responsibility to a state, for example, for the poor condition of geriatric care, especially in private healthcare, the right to adequate housing, or the lack of long-life learning institutions. Its chapter two contains articles on holding a state responsible if an internationally wrongful act was the result of conduct by the state's organs, persons or entities exercising elements of governmental authority, an organ placed at the disposal of a state by another state, a person or group of people acting on the instructions, or under the direction or control of a state, or if conduct was carried out in the absence or default of official authorities.

Moreover, the diverse nature of human rights also results in restitution and compensation problems. As Dinah Shelton noted, “many of the violations

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9 Anne-Laure Vaurs-Chaumette, “The Implementation of International Responsibility, Ch.70 The International Community as a Whole,” in *The Law of International Responsibility*, eds. James Crawford et al., Oxford Commentaries on International Law (New York: Oxford University Press, 2010), 1025.

10 Giorgio Gaja, “The Implementation of International Responsibility, Ch.64 States Having an Interest in Compliance with the Obligation Breached,” in *The Law of International Responsibility*, eds. James Crawford et al., Oxford Commentaries on International Law (New York: Oxford University Press, 2010), 961.



are irreparable”, and some injuries “cannot be placed back in the situation that existed before the violation”. That is why in the area of human rights, “measures of satisfaction and guarantees of non-repetition are increasingly sought and awarded”<sup>11</sup>

Thus, only particular articles, and only in certain situations, will apply to responsibility for the breakdown of human rights. However, in practice, inter-state human rights trials are very few and far between, usually in cases of mass human rights violations, especially those protected in peremptory norms. It also happens when the international community reacts to a breach of humanitarian law or human rights violations by totalitarian regimes.<sup>12</sup>

Each inter-state claim is a decision of a political nature, given that it involves some aspects of tensions between a state’s right to national sovereignty, its political independence and, on the other hand, the states’ obligations concerning human rights.<sup>13</sup> That is why it appears improbable that, under current general international law, a state that has not been injured would go before the International Court of Justice, for example, to invoke the responsibility of another state due to its non-compliance with obligations in respect of any aspect of older persons’ inclusion. Theoretically, it might be more likely in a situation, for example, of mass elder abuse or violations of older persons’ right to life.

It is also unlikely that in such cases, one state would sue another one based on “liability” not determined by ARSIWA,<sup>14</sup> resulting from the conduct of hazardous, albeit lawful, activities. Liability is characteristic of such branches of international law as environmental law, climate change or space law.<sup>15</sup> Failing to meet the triad of human rights obligations to respect, protect and fulfil cannot be qualified as “lawful hazardous activity”. The omissions and negligence, which usually affect the older population, cannot be qualified as “lawful” and always constitute “wrongful acts”, even though they are not directed against a foreign state or anyone, but they breach obligations arising from human rights

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11 Dinah L. Shelton, *Remedies in International Human Right Law*, 103.

12 Annie Bird, “Third State Responsibility for Human Rights Violations,” *The European Journal of International Law*, 21, no. 4 (2011): 897.

13 Kamminga, “Inter-State Accountability for Violations of Human Rights,” 1.

14 Katja Creutz, *State Responsibility in the International Legal Order: A Critical Appraisal*, 1st ed. (Cambridge University Press, 2020), chapter IV, <https://doi.org/10.1017/9781108637367>.

15 Julio Barboza, *The Environment, Risk and Liability in International Law* (Brill | Nijhoff, 2011), 21–29, <https://doi.org/10.1163/ej.9789004188785.i-204>.

treaties indicated in the previous chapter. Although, given the experience of the pandemic, it is possible to imagine a hypothetical situation where some government, in order to protect older citizens against a pandemic, introduces compulsory new medicines or vaccinations with disastrous consequences. Then the term “liability” would be more appropriate.

Thus, the above considerations on general international rules on responsibility show that they do not catch the nuances of human rights law. Therefore, specific controlling and monitoring mechanisms are necessary to verify a state's conduct in the area of human rights.

ARSIWA and its Article 55 provide such a possibility: “These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law”. Article 55 refers to the parts of international law that are more effective. Indeed, the human rights law regime provides operational mechanisms of much stronger effectiveness to achieve its goals.<sup>16</sup> Moreover, only the human rights mechanisms can verify what happens “inside” a given state. On the other hand, each state must agree on relevant human rights procedures, so not all states are controlled in the framework of all human rights' mechanisms.<sup>17</sup> Currently, provisions for inter-state communications before universal human rights treaty bodies remain mostly untapped, as states are not willing to agree to the committees' competence in this area.<sup>18</sup>

The ECHR also provides the possibility to submit inter-state complaints. Its Article 34 states that “any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party”. However, this possibility is applied by the Council of Europe member states as a very exceptional measure. This is evident if we compare them with the vast number of individual complaints

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16 Bruno Simma and Dirk Pulkowski, “Of Planets and the Universe: Self-Contained Regimes in International Law,” *The European Journal of International Law*, 17, no. 3 (2006): 510, <https://doi.org/10.1093/ejil/chl015>.

17 Tomuschat, “The Implementation of International Responsibility. Ch.67 Individuals,” 986.

18 In 2018, before the UN Committee on the Elimination of Racial Discrimination three state-to-state communications were submitted: Palestine v. Israel, Qatar v. UAE, Qatar v. Saudi Arabia. Certainly, they do not refer to matters discussed in this study.

to the ECtHR.<sup>19</sup> To date, there are more than thirty completed and pending inter-state cases<sup>20</sup> and over 25 thousand judgements in individual cases since 1959.<sup>21</sup> States are hesitant to openly declare that another government is involved in severe human rights abuses, so obviously they do not take any action before an international court in cases of senior citizens' rights of another state. However, such an action would be more likely to occur if the case had a cross-border element. In 2020, Lichtenstein lodged an inter-state application against the Czech Republic, alleging breaches of the rights of its citizens in property cases.<sup>22</sup> Hence, an inter-state complaint about the rights of older citizens of one state residing in another is also possible. It could concern, for example, discriminatory pension or long-term care legislation.

On the other hand, the law does not always have to rely on judicial adjudication in the traditional sense to be effective. As Naiade el- Khoury has noted, in contrast to domestic law, international human rights law consciously moves away from sanctions in favour of the appellative or discursive effect of law.<sup>23</sup> The vast majority of procedures controlling and monitoring states' performance of their treaty obligations do not rely on dispute settlement and "hard" judgments, but on "softer" solutions. Therefore, in the case of international human rights law, it is more appropriate to focus not so much on the responsibility of states towards others, but above all on their accountability, which is a much broader concept and covers, among other things, the "traditional" responsibility of states.

Accountability in international law scholarship is often associated with restoring order and peace and bringing those responsible to justice after conflicts and violations of *jus cogens* norms in various parts of the world.<sup>24</sup> However, in

19 Isabella Risini, *The Inter-State Application under the European Convention on Human Rights. Between Collective Enforcement of Human Rights and International Dispute Settlement*, International Studies in Human Rights 125 (Leiden: Brill/Nijhof, 2018), 7.

20 ECtHR, "European Court of Human Rights, List Inter-State Applications. January 2023," 2023, <https://www.echr.coe.int/Pages/home.aspx?p=caselaw/interstate&c=>.

21 ECtHR, "European Court of Human Rights, Violations by Article and by State 1959-2022," 2023, [https://www.echr.coe.int/Documents/Stats\\_violation\\_1959\\_2022\\_ENG.pdf](https://www.echr.coe.int/Documents/Stats_violation_1959_2022_ENG.pdf).

22 See information about the complaint: [https://hudoc.echr.coe.int/eng-press#{%22item id%22:\[%22003-6769236-9041940%22\]}](https://hudoc.echr.coe.int/eng-press#{%22item id%22:[%22003-6769236-9041940%22]}).

23 Naiade el-Khoury, *Irrational Human Rights? An Examination of International Human Rights Treaties*, International Studies in Human Rights 135 (Leiden: Brill/Nijhof, 2021), 10.

24 Cherif Bassiouni, "Searching for Peace and Achieving Justice: The Need for Accountability," *Law and Contemporary Problems*, 59, no. 4 (1996): 9–28, <https://scholarship.law.duke.edu/lcp/>

the context of the concept of “leave no one behind”, accountability covers all situations that involve redressing social inequalities and encroaches on new areas like healthcare during a pandemic,<sup>25</sup> using new technologies<sup>26</sup> or even organising large sporting events.<sup>27</sup>

In environmental law, accountability corresponds with diligence.<sup>28</sup> This concept could be copied in the case of older persons, who, being invisible in international treaties, need diligence in order not to be excluded.

Certainly, “accountability” has also entered the area of human rights and today is a cornerstone of the human rights framework. It usually refers to the exercise of functions, power, authority and compliance with standards.<sup>29</sup> Moreover, it requires interaction among many stakeholders, with rights holders, duty bearers, civil society organisations and monitoring institutions interacting on various platforms.<sup>30</sup> That is why it should be explained as “a web of relationships”.<sup>31</sup>

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vol59/iss4/3/; Emma Charlene Lubaale and Ntombizozuko Dyani, eds., *National Accountability for International Crimes in Africa* (Cham: Palgrave Macmillan, 2022); Lisa Yarwood, *State Accountability under International Law: Holding States Accountable for a Breach of Jus Cogens Norms* (London: Routledge, 2012).

- 25 Olivier Beaud, “From Political Accountability to Criminal Liability: The Strange Case of French Penal Populism,” in *Democracy in Times of Pandemic*, eds. Miguel Poiars Maduro and Paul W. Kahn, 1st ed. (Cambridge University Press, 2020), 54–65, <https://doi.org/10.1017/9781108955690.004>.
- 26 Kostina Prifti, Evert Stamhuis, and Klaus Heine, “Digging into the Accountability Gap: Operator’s Civil Liability in Healthcare AI-Systems,” in *Law and Artificial Intelligence*, eds. Bart Custers and Eduard Fosch-Villaronga, vol. 35, Information Technology and Law Series (The Hague: T.M.C. Asser Press, 2022), 279–95, [https://doi.org/10.1007/978-94-6265-523-2\\_15](https://doi.org/10.1007/978-94-6265-523-2_15).
- 27 Daniela Heerd, Geert van Calster, and Lucas Roorda, *Shaping International Accountability around Mega-Sporting Events* (The Hague: Asser Press, 2022).
- 28 Anne Peters, Heike Krieger, and Leonhard Kreuzer, “Due Diligence in the International Legal Order: Dissecting the Leitmotif of Current Accountability Debates,” in *Due Diligence in the International Legal Order*, eds. Anne Peters, Heike Krieger, and Leonhard Kreuzer (Oxford University Press, 2020), 1–20, <https://doi.org/10.1093/oso/9780198869900.003.0001>.
- 29 Jutta Brunnée, “International Legal Accountability Through the Lens of the Law of State Responsibility,” *Netherlands Yearbook of International Law*, no. 36 (2005): 3.
- 30 OHCHR, *Who Will Be Accountable? Human Rights and the Post-2015 Development Agenda* (New York/Geneva: United Nations, 2013); Bridget Sleep, “Using Human Rights Accountability Mechanisms to Promote and Protect Older Women’s Rights,” *Gender and Development*, 17, no. 3 (2009): 427–39, <https://www.jstor.org/stable/27809247>.
- 31 OHCHR, *Who Will Be Accountable? Human Rights and the Post-2015 Development Agenda*, 57; Christopher G. Reddick, Tansu Demir, and Bruce Perlman, “Horizontal, Vertical, and

According to the Office of the United Nations High Commissioner for Human Rights, “accountability” covers three aspects: responsibility, answerability, and enforceability. Responsibility requires that those in positions of authority have clearly defined duties and performance standards, enabling their behaviour to be assessed transparently and objectively. Answerability requires public officials and institutions to provide reasoned justifications for their actions and decisions to those they affect, including the public at large, voters who invest public officials with authority and institutions mandated to provide oversight. Enforceability requires public institutions to put mechanisms in place that monitor the degree to which public officials and institutions comply with established standards, impose sanctions on officials who do not comply, and ensure that appropriate corrective and remedial action is taken when required.<sup>32</sup>

## 2. Human rights mechanisms

Accountability, with its three elements, has both internal and external aspects. This latter side of accountability is a core of the following considerations, as they will be dedicated to international verification mechanisms that can improve national ageing policies and the international visibility of older people’s rights. The 2013 Summary Report of the Consultation on the Promotion and Protection of the Human Rights of Older Persons report states that “most international human rights instruments are applicable to all age groups, including older persons, a number of human rights issues that are particularly relevant to older persons have not been given sufficient attention either in the wording of existing human rights instruments or in the practice of human rights bodies and mechanisms”.<sup>33</sup> Therefore, in this subchapter, these mechanisms, which are a crucial element of the “accountability web”, will be explored to verify their ability to influence states in the area of the rights of older persons

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Hybrid: An Empirical Look at the Forms of Accountability,” *Administration & Society*, 52, no. 9 (October 2020): 1416, <https://doi.org/10.1177/0095399720912553>.

32 OHCHR, *Who Will Be Accountable? Human Rights and the Post-2015 Development Agenda*, 10.

33 UN Secretary-General, “Summary Report of the Consultation on the Promotion and Protection of the Human Rights of Older Persons, Report of the Office of the United Nations High Commissioner for Human Rights,” 1 July 2013, A/HRC/24/25, para. 78.

and their social inclusion. They include human rights courts, quasi-judicial bodies, reporting and the special Human Rights Council procedures, which provide a degree of international political accountability, mainly the Universal Periodic Review (UPR). Finally, the follow-up mechanisms under the soft law on older persons' rights will also be indicated.

## 2.1. Individual complaints

The strongest power to influence states' conduct is usually attributed to the Council of Europe human rights machinery established on the basis of the ECHR, as well as to the ECtHR rulings. Individuals can bring human rights complaints against each of the 46 states parties to the ECHR, after they have used up every possible chance of appeal at the national level. If the court finds that the applicant's human rights have been violated, a state must provide justice to the individual and take steps to prevent such violations in the future. Preventing future violations appears crucial to the discussed issue, as in this case the judgments have a broader impact and go beyond *inter partes* (an individual v. state) relations. In order to prevent further violations of a similar type, states often have to take legislative action or change their administrative practices. Moreover, the purpose of a judgment is not only to settle a given case, but also to formulate a legal principle that will affect not only the state party to the dispute, but all states parties to the convention.<sup>34</sup>

The ECtHR's pilot judgments have a similar function. They refer to an individual case arising from the systemic problems of the legal orders in the state parties to the ECHR. This procedure allows the court to prescribe in its judgments general measures that oblige a state to resolve large-scale problems with systematic human rights at the domestic level. Primarily, the pilot judgment procedure was introduced to handle overloading the court with repeated cases, but the pilot judgment procedure has partially changed the role of the court and transformed it into a *sui generis* constitutional court.<sup>35</sup> Theoretically,

34 Leszek Garlicki, *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności. Komentarz, Tom II*, (Warsaw: C.H. Beck, 2010), 360–61.

35 Jakub Czepek, "The Application of the Pilot Judgment Procedure and Other Forms of Handling Large-Scale Dysfunctions in the Case Law of the European Court of Human Rights," *International Community Law Review*, 20, no. 3–4 (2018): 347–73, <https://doi.org/10.1163/18719732-12341379>; Dominik Haider, *The Pilot-Judgment Procedure of the European Court of Human Rights* (Leiden: Brill/Nijhof, 2013); Eline Kindt, "Giving up on Individual Justice? The Effect

the ECtHR's rulings of general consequences could appear in the cases relating to older age discrimination in various areas of social life.

Some aspects of old age, including age discrimination, could come before the ECtHR under Protocol 16 to the ECHR,<sup>36</sup> which enables the highest national courts and tribunals of the Council of Europe states to ask the court for advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the convention and its protocols. Requests can be made in the context of pending cases. If the ECtHR accepts the requests, the Grand Chamber delivers the advisory opinions. They are non-binding, but if such an advisory opinion were issued, it would have the potential to contribute to an “age friendly interpretation” of human rights at a national level.

Meanwhile, a quantitative and descriptive analysis of cases considered by the ECtHR in the first decade of the 21st century showed that about 12% of all judgments referred to older persons. The court decided on the violation of human rights in a significant majority of them. However, only in approximately 3% of cases did the court discuss older persons' rights specifically.<sup>37</sup> Due to global ageing, such problems as “ageism” and “older age stereotyping”, and maybe “marginalisation”, or “exclusion” in old age will probably start to appear before the court sooner or later.

The human rights treaty bodies – the committees of experts established on the basis of the human rights global core treaties – also have the powers to consider individual complaints (communications) regarding violations allegedly committed by a state. The committees' views, apart from recommendations on

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of State Non-Execution of a Pilot Judgement on Victims,” *Netherlands Quarterly of Human Rights*, 36, no. 3 (2018): 173–88; Dilek Kurban, “Forsaking Individual Justice: The Implications of the European Court of Human Rights’ Pilot Judgment Procedure for Victims of Gross and Systematic Violations,” *Human Rights Law Review*, 16, no. 4 (2016): 731–70, <https://doi.org/10.1093/hrlr/ngwO32>; Wojciech Sadurski, *Partnering with Strasbourg: Constitutionalization of the European Court of Human Rights, the Accession of Central and Eastern European States to the Council of Europe, and the Idea of Pilot Judgment*, EU Working Papers, LAW 2008/33 (Florence: European University Institute, 2008), [https://cadmus.eui.eu/bitstream/handle/1814/9887/LAW\\_2008\\_33.pdf?sequence=1&isAllowed=y](https://cadmus.eui.eu/bitstream/handle/1814/9887/LAW_2008_33.pdf?sequence=1&isAllowed=y).

36 Council of Europe, “Protocol No 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms,” 2 October 2013 (CETS, No 214).

37 Benny Spanier, Israel Doron, and Faina Milman-Sivan, “Older Persons’ Use of the European Court of Human Rights,” *Journal of Cross-Cultural Gerontology*, 28 (2013): 416, <https://doi.org/10.1007/s10823-013-9212-7>.

a specific infringement, may also include recommendations of a general nature. The views are not judgments and are classified as non-binding. On the other hand, when considering individual cases, the committees act as *quasi-judicial* bodies and states "have legal obligations to attach great legal weight to the finding of the treaty bodies".<sup>38</sup> Moreover, rejecting the committees' recommendations is taken as evidence of a state's bad faith.<sup>39</sup> We can also talk about *sui generis* "sanctions" for a failure to implement the views of a committee, as this fact becomes a matter of public record, including being reported to the UN General Assembly.<sup>40</sup> After all, exposing a state's failure to meet its human rights obligations is not convenient for any state.

Taking into account the *ratione materiae* of the human rights treaty bodies, the Human Rights Committee (as indicated in the previous chapter), the Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of Discrimination against Women and the Committee on the Rights of Persons with Disabilities are the ones with the greatest potential to deliver views relating to the various aspects of the social inclusion of older people.

Particular attention should be paid to the Optional Protocol to the IESCR, which, after lengthy negotiations, was adopted in 2008 and entered into force in 2013. The new protocol, introducing complaint proceedings, has opened up a new chapter in the implementation of the ICESCR<sup>41</sup> and is recognised as a historical development in "advancing accountability under international human rights law for violations of economic, social, and cultural rights".<sup>42</sup> How-

38 Geir Ulfstein, "Individual Complaints," in *UN Human Rights Treaty Bodies. Law and Legitimacy*, eds. Helen Keller and Geir Ulfstein (Cambridge: Cambridge University Press, 2012), 115.

39 Helen Keller and Geir Ulfstein, "Conclusions," in *UN Human Rights Treaty Bodies. Law and Legitimacy*, eds. Helen Keller and Geir Ulfstein (Cambridge: Cambridge University Press, 2012), 414-25; Human Rights Committee, "General Comment No 33: Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights," 25 June 2009, CCPR/C/GC/3, para.11.

40 Human Rights Committee, para. 17.

41 Zdzisław Kędzia, "Social Rights Protection under the ICESCR and Its Optional Protocol – the Role of the Committee on Economic, Social and Cultural Rights," in *Research Handbook on International Law and Social Rights*, eds. Christina Binder, Jane A. Hofbauer, Flávia Piovesan, Amaya Úbeda de Torres (Cheltenham, UK; Northampton, Massachusetts, USA: Edward Elgar Publishing Limited, 2020), 99.

42 Sandra Liebenberg, "Between Sovereignty and Accountability: The Emerging Jurisprudence of the United Nations Committee on Economic, Social and Cultural Rights Under



ever, in the 10 years in which the Optional Protocol has been in force, only 26 states have agreed to the CESCR having the authority to consider individual complaints. States have generally been reluctant to bind themselves to this instrument, although the committee, as it was noted in the previous chapter, when examining the admissibility of a communication, considers the reasonableness of the steps taken by the state party and takes into account a margin of appreciation (Article 8 sec. 4).

On the other hand, the committee focuses on the vulnerability of particular claimants, as in the case of *Marcia Cecilia Trujillo Calero v. Ecuador* mentioned in Chapter Three. Here, the CESCR analysed her age and experience of systemic gender discrimination, as well as the lack of an alternative non-contributory social security scheme. This case is an example of the committee's search for balance between the claimant's personal situation and an assessment of the Ecuadorian pensions' system.<sup>43</sup>

In the context of the previous considerations on the need for sensitivity to the nuanced situation of older persons, the CESCR's views in the *Lorne Joseph Walters v. Belgium case*<sup>44</sup> should be highlighted. The case referred to the human right to adequate housing Article 11 (1) of the ICESCR. The claimant, born in 1945, was evicted from his home – an apartment in Brussels which he had rented and lived for 24 years – following a unilateral termination of the lease by the landlord. He could not be accused of any contractual breach, as he had neither damaged the premises nor failed to pay any rent. Mr Walters was offered two alternative housing options: supported transitional housing or a care home for older persons. He rejected these proposals, as they did not constitute an alternative suitable to his needs. As a result, he became homeless.

In this case, the committee indicated the crucial aspects of older persons' social exclusion, their dignity, vulnerability and “shrinking rights” in older age. The committee noted:

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the Optional Protocol,” *Human Rights Quarterly*, 42, no. 1 (2020): 48, <https://doi.org/10.1353/hrq.2020.0001>.

43 Gijsbert Vonk and Edward Bambrough, “The Human Rights Approach to Social Assistance: Normative Principles and System Characteristics,” *European Journal of Social Security*, 22, no. 4 (December 2020): 382, <https://doi.org/10.1177/1388262720971297>.

44 CESCR, *Lorne Joseph Walters v. Belgium*; Communication No 61/2018, Views; E/C.12/70/D/61/2018, (Views 23 November 2021), 2021.

A dramatic change in accommodation for a person of the author's age would risk disrupting his lifestyle, which was the case for the author, as established by his psychiatrist. In this context, the author's request for alternative accommodation that would avoid breaking with his existing social network is not unreasonable, particularly given the fact that the State party is among the countries with the highest per capita income in the world (para. 12.6).

The committee found that Belgium had violated the claimant's right to adequate housing and recommended that he be provided with effective reparation, in particular to ensure that he had appropriate housing, that he was compensated for the violations suffered and reimbursed for the legal costs reasonably incurred in submitting this communication (para. 15).

However, the committee also formulated general recommendations to the state that could affect the law and social policy toward older citizens. The CESCR indicated that the state party has obligations, including:

- a) To review its current legislation that allows the landlord to terminate the lease without cause in order to introduce flexibility and special measures to avoid a disproportionate impact on the right to adequate housing of disadvantaged groups, such as older persons in a disadvantaged socioeconomic situation.
- b) To regularly evaluate legislation that allows the landlord to terminate the lease without cause in order to assess the overall impact of these regulations on the enjoyment of the right to adequate housing, in particular for disadvantaged groups, and, if necessary, make the necessary adjustments to protect this right;
- c) To take the necessary measures, to the maximum of available resources, to ensure that disadvantaged groups, such as older persons in unfavourable socioeconomic situations, who are evicted from their homes, have access to alternative accommodation that meet their particular needs and provide them with stability and security commensurate with their age and circumstances" (para. 16).

It is also worth noting that the states' obligation is particularly important for raising awareness of older persons' vulnerability in terms of housing. Belgium

was asked to publish the committee's views and to "distribute them widely, in an accessible format, so that they reach all sectors of the population" (para. 17).

Of particular concern is the individual communication *Ciobanu v. Republic of Moldova*<sup>45</sup> considered by the CEDAW Committee. In this case, the committee had to address economic exclusion, intersectional and indirect discrimination and applied the "life course approach". Natalia Ciobanu claimed that Moldova had violated her rights under Articles 3 and 11 (2) (c) of the CEDAW Convention by failing to include in her social security pension the period of 13 years when she had been providing constant care for her disabled daughter. Ms Ciobanu pointed to the role traditionally attributed to women in Moldovan society as the primary carers of their disabled children. At the same time, a lack of assistance from the state prevented her from combining their childcare responsibilities with their professional duties. These circumstances left the applicant in a critical material situation at an older age.

The CEDAW Committee found that Moldova had violated the provisions of the convention, stressing that depriving women who are caring for children with disabilities the possibility to contribute to the social security fund constituted direct discrimination. As part of its recommendations, the committee called on Moldova to provide redress to women who cared for their children with severe disabilities.

The committee also provided a general guideline on positive steps which should be taken by states:

The Committee considers that States must therefore take effective measures, and periodically revise them when necessary, to fully realize the right of all persons without any discrimination to social security, including the social insurance pension. They must also take steps to ensure that, in practice, men and women enjoy their political, economic, social, cultural and civil rights on a basis of equality; consequently, their public policies and legislation must take account of the economic, social and cultural inequalities experienced in practice by women. States must therefore at times take measures in favour of women in order to attenuate or suppress conditions that perpetuate discrimination. (para. 7.9.)

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45 CEDAW Committee, *Natalia Ciobanu v. Republic of Moldova*; Communication No. 104/2016 CEDAW/C/74/D/104/2016, (Views, 04 November 2019), 2019.

Meanwhile, relating to the Ms Ciobanu's individual situation, the committee requested that the applicant's social security pension be recalculated and that she be awarded appropriate compensation for violations suffered during the period in which her right to a social security pension was denied, as well as compensation for non-pecuniary damage.

These cases show that the particular situations of older persons may be addressed internationally, and that human right treaty bodies formulate general recommendations with reference to national policies. Thus, here the potential power of international human rights law is identified. However, the international enforcement of views depends, in practice, on the good faith of the state authorities.

## 2.2. Collective complaints

Another instrument of human rights protection under the auspices of the Council of Europe is the system of collective complaints, introduced by the Additional Protocol to the European Social Charter of 1995<sup>46</sup> and overtaken by the Revised European Social Charter.<sup>47</sup> They are submitted to the expert body – the European Committee of Social Rights (ECSR). The ECSR rules on the conformity of the situation in states with the 1988 Protocol to the European Social Charter of 1961, which supplemented the ESC with the right of older persons to social protection,<sup>48</sup> and the Revised European Social Charter. Its composition, role, competencies and procedures are determined in the *Rules* adopted for the first time in 1999 and developed over time. The committee adopted the newest version of the *Rules* in 2022.<sup>49</sup>

In the “collective complaint procedure” there are some similarities to the procedures before the committees acting on the basis of the core global human rights treaties and before the ECtHR, but there are also many differences. First,

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46 Council of Europe, “Additional Protocol to the European Social Charter Providing for a System of Collective Complaints,” Strasbourg, 9 November, 1995, (CETS, No 158), Article D.

47 Council of Europe, “European Social Charter (Revised) Strasbourg”, 03 May 1996 (CETS No. 163).

48 Council of Europe, “Additional Protocol to the European Social Charter,” Strasbourg, 5 May 1988, (CETS No 12).

49 ECSR, “Rules of the European Committee of Social Rights,” amended during the 328th Session on 6 July 2022.

the right to bring a complaint before the ECSR is not granted to individuals, but may be submitted, among others, by representative national non-governmental organisations authorised to pursue statutory activities within a Council of Europe member state (Part VII of the *Rules*). From the perspective of civil society organisations, including those gathering older persons, the simplicity of complaining to the European Committee of Social Rights is an unquestionable advantage. Secondly, unlike in many similar systems, exhausting the national legal protection system is not a condition of admissibility. Moreover, the complaint does not have to refer to a legal problem, but may be based solely on the facts. It considerably facilitates the process of claiming protection in respect of the social rights guaranteed by the charter.<sup>50</sup>

However, similarly to the human rights treaty bodies and the ECtHR, the ECSR may apply “interim measures”, here called “immediate measures”, if they are necessary to avoid irreparable injury or harm to the persons concerned (Chapter IV of the *Rules*). Israel Doron and Gerard Quinn noted that

It is not hard to imagine how this might be an exceptionally valuable tool in some cases involving the rights of older persons. If, for example, the relevant collective complaint involves unequal treatment or discrimination with respect to the rationing of healthcare services (like ventilators), then “immediate measures” might be sought if there were older people about to be disadvantaged (putting it mildly) as a result of such policies.<sup>51</sup>

Another element distinguishing the case law of the European Committee of Social Rights is of particular importance, as it refers to implementing provisions guaranteeing the rights decreed in the charter’s provisions. The committee’s decisions are not “judgements”, but their influence on Member States’ domestic law and practice appears as having a considerable potential, because the committee does not only confine itself to checking whether a state has introduced into its legal system provisions conferring certain rights, but is also interested

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50 Macin Wujczyk, “Procedura skarg zbiorowych jako instrument ochrony praw socjalnych,” in *Europejska Karta Społeczna: wyzwania i możliwości 25. rocznica przystąpienia Polski do Rady Europy* (Warsaw, 2016), 155.

51 Israel Doron and Gerard Quinn, *Against Ageism and Towards Active Social Citizenship for Older Persons. The Current Use and Future Potential of the European Social Charter* (Strasbourg: Council of Europe, 2021), 92.

in determining whether these rights can be effectively exercised. The committee often does not consider specific measures taken by states to be sufficient until the objective contained in a particular provision is fully satisfactory.

Moreover, collective complaints may be lodged even if the case is pending with another authority, or has already been decided by another body (*res iudicata*). The rule of *ne bis in idem*, whereby no legal action can be instituted again for the exact same cause, does not apply in this procedure, either.<sup>52</sup> For example, the case considered by the committee in 2020, *International Federation of Associations of the Elderly (FIAPA) v. France*, referred to the age limit of 71 years for candidates for an election to the board of the Order of Healthcare Professionals and involved Articles 5 (right to organise), 23 (right of older persons to social protection) and E (non-discrimination) of the Revised European Social Charter. The committee considered that

the means chosen were neither reasonable nor proportionate to the aim pursued. The Government itself states that persons affected by the prohibition to stand as candidates to the councils of the professional orders may nevertheless continue to be involved in matters relating to their profession and the bodies with which they are affiliated. This statement demonstrates that the age limit introduced by the impugned Ordinance is not based on sufficient justification. Accordingly, the Committee considers that these measures represented direct discrimination on the basis of age that denied the individuals concerned the benefit of the right guaranteed by Article 5 of the Charter. Therefore, there was a violation of Article E read in conjunction with Article 5 of the Charter.<sup>53</sup>

However, the French government did not comply with the committee's decision on the merits in this case, so a subsequent FIAPA complaint submitted in the same case was registered in April 2022.<sup>54</sup>

There are more completed and pending "older persons' cases" before the ECSR. In 2022, FIAPA submitted another complaint against France, alleging

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52 Aleksander Gadkowski, "The European Committee of Social Rights as a Monitoring Body in the System of the European Social Charter," *Przegląd Prawniczy Uniwersytetu im. Adama Mickiewicza*, 8 (2018): 71, <https://doi.org/10.14746/ppuam.2018.8.04>.

53 ECSR, *International Federation of Associations of the Elderly (FIAPA) v. France*, application No 162/2018, adopted 10 December 2020, (European Committee of Social Rights 2020), para. 89.

54 ECSR, *Fédération Internationale Des Associations de Personnes Âgées (FIAPA) c. France*, réclamation N° 210/2022; enregistrée au Secrétariat le 28 Avril 2022.

that the legal and judicial protection of older persons is not ensured due to France's failure to implement legislation on the legal protection of adults in civil and criminal matters. In this case, the federation invoked Articles 23 (the right of older persons to social protection), 15 (the right of persons with disabilities to independence, social integration, and participation in the life of the community), 16 (the right of the family to social, legal and economic protection), 30 (the right to protection against poverty and social exclusion), 31 (the right to housing), E (non-discrimination) and G (restrictions) of the RESC.<sup>55</sup> In an older case *International Federation of Human Rights Leagues v. Ireland*, the committee considered the alleged discrimination of pensioners not residing permanently in Ireland in relation to their access to the Free Travel scheme when they returned to Ireland.<sup>56</sup>

There are also two pending cases involving standing up for persons with disabilities, including older persons. In the case *Validity v. Finland*, an NGO raised allegations that the response of the Finnish government to the coronavirus pandemic in the spring of 2020 violated the rights of persons with disabilities, as the government failed to adopt appropriate measures to protect the life and health of persons with disabilities during the pandemic, and adopted restrictive measures that led to the complete isolation of persons with disabilities in institutions with a ban on accepting any visits.<sup>57</sup>

The complaint in the *Validity Foundation – Mental Disability Advocacy Centre v. Czech Republic* case, registered in December 2019, concerns the right to protection of health and the right of older persons to social protection. In this case, the NGO alleges that the use of cage beds and net beds as a means of managing older persons and persons with disabilities in psychiatric hospitals in the Czech Republic constitutes a violation of the provisions mentioned above of the 1961 Charter and its 1988 Additional Protocol.<sup>58</sup>

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55 ECSR, Fédération Internationale Des Associations de Personnes Âgées (FIAPA) c. France, réclamation N° 205/2022, enregistrée au Secrétariat le 14 Février 2022.

56 ECSR. International Federation of Human Rights Leagues (IFHR) v. Ireland Complaint no. 42/2007, 3 June 2008 (European Committee on Social Rights 2008).

57 ECSR, *Validity v. Finland*, Complaint No 197/2020, registered at the Secretariat on 27 November 2020.

58 ECSR, *Validity v. Czech Republic*, Complaint No 188/2019, registered at the Secretariat on 5 December 2019 2019.

Meanwhile, another pending complaint *Sindacato autonomo Pensionati Or.S.A. v. Italy* concerns Article 12(3) (right to social security) of the RESC. The complainant union claims that the legislation introduced in 2015 and 2013 led to a significant decrease in statutory pensions, in a breach of the charter.<sup>59</sup>

The committee also found admissible the complaint of *Associazione Sindacale Militari (ASSO.MIL.) v. Italy*. The association alleges that the failure by the Italian state to establish a supplementary pension fund in favour of civil servants belonging to the armed forces and police with military status breaches Article 12 (right to social security) and Article E (non-discrimination).<sup>60</sup>

There can be little doubt that complaints or particular allegations concerning social security, participation in organisations, freedom from poverty, discrimination and isolation show that various elements of social inclusion of older persons are on the ECSR agenda. In this way, the decisions of the European Committee of Social Rights may affect the states' policies on ageing, or at least raise awareness about older persons' rights. The committee's decisions provide an essential guideline to the development of social rights within the states, as they, similarly to the ECtHR's pilot judgements, can act as precedent-setting decisions, guiding the course for the interpretation of an issue.<sup>61</sup> In its decisions on complaints, the committee not only analyses the provisions of the charter, but also places its position in a broader legal context, including not only the charter but also the ECHR, the covenants, the ILO *acquis* and the European Union output.<sup>62</sup>

Finally, it is also worth noting that, in 2021, the High-Level Group of Experts on Social Rights, analysing the implementation of the European Social Charter at the domestic level, proposed complementing the ESC system with an advisory opinion procedure permitting national courts to obtain interpretations of the relevant provisions of the charter by the European Committee

59 ECSR, *Sindacato autonomo Pensionati Or.S.A. v. Italy*, Complaint No 187/2019, Decision on Admissibility 20 October 2020 (2020).

60 ECSR, *Associazione Sindacale Militari (ASSO.MIL.) v. Italy*, Complaint No 213/2023, Decision on Admissibility 23 May 2023 (2023).

61 Wujczyk, "Procedura skarg zbiorowych jako instrument ochrony praw socjalnych," 160.

62 Monika Schlachter, "The European Social Charter: Could It Contribute to a More Social Europe?" in *Resocialising Europe in a Time of Crisis*, eds. Nicola Countouris and Mark Freedland (Cambridge: Cambridge University Press, 2014), 115.



on Social Rights.<sup>63</sup> If such a procedure is adopted, it would have significant potential for raising awareness.

### 2.3. Reporting

The human rights treaty bodies are also competent to consider the reports that states parties are obliged to submit periodically on steps taken to implement the provisions of a relevant treaty. They review these reports, identify issues of concern and make “concluding observations”. In the case of periodic reports, these concluding observations issued to states parties should be the starting point for identifying the issues to be included in the report, as committees examine the progress and challenges faced by the states parties in implementing earlier recommendations.

The national human rights institutions and civil society organisations are involved in the reporting process – from the preparation of the report and the review process by a committee, to the implementation of the concluding observations.

However, analysing the concluding observations issued by the human rights treaty bodies using the Universal Human Rights Index (UHRI)<sup>64</sup> – the UN repository of human rights information – it is easy to note that older persons, their rights and their social inclusion are not of particular interest to the committees. This is due to the lack of a sectoral convention and the hard provisions dedicated to older persons’ rights. If older persons do appear in this procedure, it is mostly in the concluding observations of the CESCR and the CEDAW Committee; usually not separately, indicated together with other marginalised groups. On the other hand, there is a way to make older persons more visible on the committees’ agendas and improve the monitoring of states’ compliance with their obligations towards older persons.

The states’ reports are evaluated by a relevant committee, which, before submitting the report, sends the government a List of Issues, or List of Issues

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63 High-Level Group of Experts on Social Rights, “Social Rights Monitoring in the Council of Europe: Ways Forward Report of the High-Level Group of Experts on Social Rights Prepared at the Request of the Secretary General of the Council of Europe,” Strasbourg 19 March 2021.

64 See: <https://uhri.ohchr.org/en/>.

Prior to Reporting, according to the simplified procedure<sup>65</sup> to which the report should be dedicated. If states were permanently obliged at a specific point to report on the situation of older people, then states should at least have to review their laws and social policies in this area. Thus, if the list were to include a number of issues related to the specific situation of older persons, especially by the CESCR, that may positively influence the states' awareness and, as a result, observance of the obligations under the covenant, including Article 9 (right to social security) and other components of social inclusion.

Most of the human rights treaty bodies, including the Human Rights Committee, CESCR, CEDAW Committee, and CRPD Committee, have adopted a follow-up procedure under which they identify between one and three recommendations from the concluding observations that require immediate attention and implementation.<sup>66</sup> This solution corresponds with the immediate effect of certain state obligations imposed by the human rights treaties, as discussed above.

At a European level, not all the member states of the Council of Europe accept the collective complaints procedure, and not all of them are parties to the RESC with its provisions of principal importance for the social inclusion of older persons. That is why the reporting system set out in Part IV of the 1961 European Social Charter and amended by the 1991 Turin Protocol<sup>67</sup> is of broader coverage and has the potential to improve the enforcement of social rights at a domestic level.

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65 Inter-Committee Technical Working Group, "Harmonized Guidelines on Reporting under the International Human Rights Treaties, Including Guidelines on a Common Core Document and Treaty-Specific Documents, Report of the Inter-Committee Technical Working Group," 2006, <https://digitallibrary.un.org/record/600446>; Kędzia, "Social Rights Protection under the ICESCR and Its Optional Protocol – the Role of the Committee on Economic, Social and Cultural Rights;" UN Secretary-General, "Compilation of Guidelines on the Form and Content of Reports to Be Submitted by States Parties to the International Human Rights Treaties Report of the Secretary-General," 3 June 2009, HRI/GEN/2/Rev.6, 98, <https://digitallibrary.un.org/record/600446>; Zdzisław Kędzia, "Komitet Praw Gospodarczych, Socjalnych i Kulturalnych," in *Mechanizmy ochrony praw człowieka w ramach ONZ*, ed. Roman Wieruszewski, Monografie Prawnicze (Warsaw: C.H. Beck, 2017), 110.

66 OHCHR, *Reporting to the United Nations Human Rights Treaty Bodies. Training Guide* (New York/Geneva: Office of the United Nations High Commissioner for Human Rights, 2017), 55, <https://www.ohchr.org/EN/PublicationsResources/Pages/TrainingPackage.aspx>.

67 Council of Europe, "Protocol Amending the European Social Charter," Turin, 21 October 1991 (CETS No 142).

The reports submitted by the states parties are examined by the ESCR, which then decides whether the national situations they describe comply with the charter. States parties present a report on the provisions relating to one of the four thematic groups annually. The group crucial for older persons is group No. 2, covering states' commitments concerning health, social security, social protection and the right to protection against poverty and social exclusion.

The committee adopts conclusions on conformity or non-conformity with the charter. It is worth mentioning here that, even if, under the *à la carte* system mentioned above, a state is not bound by given provisions, it must still report on non-accepted provisions every five years following ratification.

The conclusions issued by the committee are not binding, but they may affect the member states' jurisprudence, law and practice.<sup>68</sup> They certainly contribute to raising the awareness of both the authorities and other entities involved in reporting.

The form for reports adopted by the Committee of Ministers also deserves particular attention. It not only contains questions to states about their compliance with the charter, but also explains the purpose of a given provision and the interpretation provided by the European Committee of Social Rights. For example, in the case of Article 23 of the RESC, the ECSR provided its interpretation, which appears significant for the understanding of older persons' social inclusion, as it states:

With a view to ensuring the effective exercise of the right of elderly persons to social protection, the Parties undertake to adopt or encourage, either directly or in co-operation with public or private organisations, appropriate measures designed in particular:

- to enable elderly persons to remain full members of society for as long as possible, by means of:
  - a. adequate resources enabling them to lead a decent life and play an active part in public, social and cultural life;
  - b. provision of information about services and facilities available for elderly persons and their opportunities to make use of them;

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68 Andrzej Marian Świątkowski and Marcin Wujczyk, "Karta Praw Społecznych Rady Europy jako szansa ustanowienia jednolitej koncepcji obywatelstwa Unii Europejskiej," *Roczniki Administracji i Prawa*, XVI, no. 2 (2016): 433.

– to enable elderly persons to choose their life-style freely and to lead independent lives in their familiar surroundings for as long as they wish and are able, by means of:

- a. provision of housing suited to their needs and their state of health or of adequate support for adapting their housing;
  - b. the health care and the services necessitated by their state;
- to guarantee elderly persons living in institutions appropriate support, while respecting their privacy, and participation in decisions concerning living conditions in the institution.<sup>69</sup>

The interpretation of this provision in relation to its scope is no less important. The European Committee of Social Rights stated that

To enable elderly persons to remain full members of society for as long as possible, pensions and other State benefits must be sufficient to lead a “decent life.” Pensions must be index-linked, and they will be compared with average wage levels and the overall cost of living to assess national situations.

Elderly persons should be provided with information about services and facilities available to them (the extent and cost of home help services, community-based services, specialised day care provision, etc.).

The needs of elderly persons must be taken into account in national or local housing policies. National policies should help elderly persons to remain in their own homes for as long as possible, through the provision of sheltered/ supported housing and assistance for the adaptation of their homes.

Healthcare programmes and services for the elderly, necessitated by their state, must exist (in particular domiciliary nursing/healthcare services).

Elderly persons living in institutions should be guaranteed the right to appropriate care and services, the right to privacy, to personal dignity and to participate in decisions concerning the living conditions in their institution. There should be a sufficient supply of institutional facilities for elderly persons.<sup>70</sup>

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69 Committee of Ministers of the Council of Europe, “Form for the Reports to Be Submitted in Pursuance of the European Social Charter (Revised),” 26 March 2008, 47, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804922f8>.

70 Committee of Ministers, 47.

Finally, it is also worth adding that the involvement of NGOs in the reporting process to the ECSR is another important factor, on the one hand for the verification of states' actions and, on the other for raising awareness of the rights of older people. They may submit their comments and other information relating to the states' national reports.<sup>71</sup>

Moreover, the controlling and monitoring mechanisms of the Council of Europe are permanently developed in the framework of the Turin process. For example, in September 2022, the Committee of Ministers, in the operational proposals for the reform of the European Social Charter system, proposed, among other things, expanding group No. 2 with the right to housing, all workers' right to dignity at work and non-discrimination of persons with family responsibilities to their employment.<sup>72</sup> Therefore, even if they are not parties to the RESC, reporting states would have to review their legal and practical arrangements in areas of crucial importance to older people and their carers. This might encourage governments to improve their law and practice.

## 2.4. Inquiries

Analysing the possibilities for using the human rights machinery to encourage states to take inclusive steps towards older persons, especially those who are vulnerable, we should also examine the potential of inquiry procedures. Inquiries carried out according to the optional protocols to the CPRPD<sup>73</sup> and the IESCR<sup>74</sup> should be considered when looking for opportunities to improve the situation of older persons in a state. Such a procedure may be initiated if a state recognises the committee's competence to carry out inquiries and the committee receives reliable information indicating that a state party is systematically violating the rights contained in the relevant treaty.

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71 ECSR, "Rules of the European Committee of Social Rights," Rule 21 A.

72 Committee of Ministers, "Ministers' Deputies, Human Rights Implementation of the Report on Improving the European Social Charter System Operational Proposals for the Reform of the European Social Charter System. 1444th Meeting, 27 September 2022, CM(2022)114-Final," Council of Europe, 2022.

73 United Nations, "Optional Protocol to the Convention on the Rights of Persons with Disabilities," New York, 13 December 2006 (UNTS, vol. 2518, p. 283), para. 6.

74 United Nations, "Optional Protocol to the International Covenant on Economic, Social and Cultural Rights," New York, 10 December 2008 (Doc. A/63/435; C.N.869.200, 2008), para. 11.

The advantages of an inquiry procedure are its flexibility, confidentiality and the fact that it does not require the exhaustion of domestic remedies. However, looking at the CEDAW Committee's experience, despite some progress in recent years, inquiries are not commonly used, as they are not sufficiently well-known and are difficult to access, especially for people without legal assistance.<sup>75</sup> To date, the CESCR has not initiated any inquiry procedures. By contrast, the CRPD Committee has conducted such inquiries concerning the United Kingdom, Spain and Hungary.

The areas of these CRPD Committee inquiries are also crucial for the social inclusion of older persons, which is why they are worth presenting. Concerning Hungary, the committee decided to conduct a confidential inquiry into alleged grave or systematic violations of the rights of persons with disabilities to equal recognition before the law (Article 12 of the Convention), to live independently, and be included in the community (Article 19) and to equality and non-discrimination (Article 5).<sup>76</sup> Concerning Spain, the inquiry examined alleged grave or systematic violations of Article 24 of the Convention (on the right to an education), the structural exclusion, and segregation of persons with disabilities from the mainstream education system based on disability.<sup>77</sup>

The inquiry procedure toward the United Kingdom examined the cumulative impact of the legislation, policies and measures adopted by the state party on the social security schemes, work and employment (Article 27), the right to live independently and to be included in the community (Article 19), and finally the right to an adequate standard of living and social protection (Article 28).<sup>78</sup> When looking at the follow-up report submitted by the government in this case in 2021, it is easy to observe that this procedure is demanding.<sup>79</sup> It

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75 Catherine O'Rourke, "Bridging the Enforcement Gap? Evaluating the Inquiry Procedure of the CEDAW Optional Protocol," *American University Journal of Gender, Social Policy & the Law*, 27, no. 1 (2019): 25.

76 CRPD Committee, "Inquiry Concerning Hungary under Article 6 of the Optional Protocol to the Convention. Report of the Committee," 17 September 2020, CRPD/C/HUN/IR/1.

77 CRPD Committee, "Inquiry Concerning Spain under Article 6 of the Optional Protocol to the Convention. Report of the Committee," 4 June 2018, CRPD/C/20/3.

78 CRPD Committee, "Inquiry Concerning the United Kingdom of Great Britain and Northern Ireland under Article 6 of the Optional Protocol to the Convention. Report of the Committee," 24 October 2017, CRPD/C/15/4.

79 CRPD Committee, "Inquiry Concerning the United Kingdom of Great Britain and Northern Ireland under Article 6 of the Optional Protocol to the Convention. Follow-up Report

requires a proactive state attitude. The follow-up report shows that this international mechanism at least forced the UK to review its solutions for the social inclusion of persons with disabilities. The report also confirms that inquiries may impact a state's law and policy, but only if it has the will and capacity to cooperate in the framework of an international mechanism.<sup>80</sup>

In Europe, the inquiry procedure set out in the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment<sup>81</sup> follows the first-established inquiry mechanism under the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 (UN), supplemented by the Optional Protocol of 2002 (UN).<sup>82</sup> Applying these instruments in “social inclusion situations” is unlikely but not impossible. As noted in Chapter Six, the NGOs and the UN Independent Expert on the enjoyment of all human rights by older persons report on difficult situations of older prisoners. Meanwhile, the annual reports provided by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) show that it visits various psychiatric and care establishments where older persons are placed and formulates recommendations to the visited states. For example, in 2021, the CPT issued a public statement concerning Bulgaria. The committee noted that it had conducted 14 visits to Bulgaria since 1995, visiting 10 out of the 12 state psychiatric hospitals and 16 social care institutions for persons with psychiatric disorders and learning disabilities. However, the CPT observes:

the persistent lack of implementation of long-standing recommendations of the CPT concerning the situation of persons placed in social care institutions and

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Submitted by the United Kingdom of Great Britain and Northern Ireland,” 21 November 2021, CRPD/C/GBR/FIR/1/Add.1.

- 80 Alejandro Anaya-Muñoz and Amanda Murdie, “The Will and the Way: How State Capacity and Willingness Jointly Affect Human Rights Improvement,” *Human Rights Review*, 23, no. 1 (March 2022): 127, <https://doi.org/10.1007/s12142-021-00636-y>.
- 81 Council of Europe, “European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment,” Strasbourg, 26 November 1987 (CETS No 126).
- 82 United Nations, “Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,” New York, 10 December 1984, (UNTS, vol. 1465, p. 85); United Nations, “Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,” New York, 18 December 2002 (UNTS, vol. 2375, p.237).

psychiatric hospitals in Bulgaria. The Committee's aim in making this public statement is to motivate and assist the Bulgarian authorities, and in particular the Ministry of Health and the Ministry of Labour and Social Policy, to take decisive action in line with the fundamental values to which Bulgaria, as a member state of the Council of Europe and the European Union, has subscribed. In this context, the CPT's long-standing recommendations should be seen as a tool that helps the Bulgarian authorities to identify shortcomings and make the necessary changes. In furtherance of its mandate, the Committee is fully committed to continuing its dialogue with the Bulgarian authorities to this end.<sup>83</sup>

The results of these inquiries prove that there is no will and probably no capacity to cooperate in this case. At the same time, this case also shows this procedure's weakness in cases where there is no political will to cooperate.

## 2.5. Human Rights Council procedures

Along with monitoring and evaluating states' obligations under human rights treaties, the system of procedures adopted under the Human Rights Council Resolution 5/1 of 2007 on institution-building of the United Nations should be indicated. The core mandate of these procedures is to promote universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind.<sup>84</sup>

According to the UN General Assembly resolution establishing the Human Rights Council in 2006, the council obtained a mandate to respond swiftly to

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83 European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, "The 31st Annual Report 1 January - 31 December 2021," 58, <https://www.coe.int/en/web/cpt/annual-reports>.

84 Rosa Freedman, "The Human Rights Council," in *The UN and Human Rights: A Critical Appraisal*, eds. Frédéric Mégret and Philip Alston, Second edition (New York: Oxford University Press, 2019), 181–238; Christophe Golay, Irene Biglino, and Ivona Truscan, "The Contribution of the UN Special Procedures to the Human Rights and Development Dialogue," *SUR International Journal on Human Rights*, 9, no. 17 (2012): 15–37. Human Rights Council, Resolution "Institution-Building of the United Nations," A/HRC/RES/5/1, 2007. Bertrand G. Ramcharan, *The Law, Policy and Politics of the UN Human Rights Council* (Leiden: Brill/Nijhof, 2015), DOI: 10.1163/9789004289031\_002.



grave and escalating situations at special sessions.<sup>85</sup> However, this mechanism can be set aside when discussing older persons' rights. Violations of their rights usually happen without notice and they are marginalised in society little by little. Thus, no special session will be organised on this issue.

However, the system of the Human Rights Council Special Procedures should certainly be taken into account. It is a central element of the United Nations human rights machinery and covers all human rights generations. The strong point of this system is that states are subject to it not because treaties bind them, but because they belong to an international community within the framework of the UN. The Special Procedures Mandate Holders are guided in their actions by the Universal Declaration of Human Rights and soft law documents, which are crucial in the case of persons who do not enjoy "their own" treaty. The Special Procedures may undoubtedly improve the understanding of human rights and the identification of sources and violations.

The mandate holders act as independent experts, operate in dialogue with the relevant government authorities and cooperate with civil society organisations and other stakeholders.<sup>86</sup> Their task is to shape human rights standards, both soft and hard law, and promote human rights, for example, by collecting best practices.<sup>87</sup>

One of the thematic special procedures is the UN Independent Expert on the enjoyment of all human rights by older persons. As stressed above, this body plays a most crucial role in including older persons' rights in international debate. If a government wants to act toward older persons in good faith, the UN Independent Expert's output is the perfect material to use.

The impact of the Independent Expert's activities on governments and other stakeholders may be threefold. Firstly, thematic reports and statements can raise general awareness about older people, their rights, and ways of their social inclusion. Secondly, the UN Independent Expert acts as *sui generis* "advisor" to governments, undertaking, at their invitation, country visits to study national legislation, policy, regulatory frameworks, institutions and practices in seeking

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85 UN General Assembly, "Resolution Adopted by the General Assembly 60/251, Human Rights Council," 3 April 2006, A/60/L.48, 2006, para. 1.

86 Human Rights Council, "Code of Conduct for Special Procedures Mandate-Holders of the Human Rights Council," A/HCR/RES/5/2, 2007.

87 Anna Hernandez-Polczyńska, *Procedury Specjalne Rady Praw Człowieka* (Warsaw: Instytut Nauk Prawnych PAN, 2019).

to identify best practices and gaps in the implementation of existing law.<sup>88</sup> Such country visits also allow comparisons on how states address similar human rights problems, and set criteria to examine their compliance with relevant human rights norms.<sup>89</sup> Finally, as in the case of other Special Procedures, the UN Independent Expert may intervene due to received communications. This procedure is not an inquiry or complaint (communication) procedure before the human rights treaty bodies. Here, communications can be issued regardless of whether an alleged victim has exhausted domestic remedies and whether a given state has ratified international or regional human rights instruments. The goal of this procedure is to seek clarifications from concerned stakeholders on the presented cases and on any actions undertaken by them, including remedial action for the victims' redress and reparation.<sup>90</sup> Thus, it is targeted at solving the problem of a particular person or group, but may indirectly affect the general policies of a state, for example ageing policies.

It seems, however, that the theme of ageing and older people's rights and inclusion could also be incorporated into the works of other Special Procedures, for example the Special Rapporteur on the right to education, the Special Rapporteur on the rights of persons with disabilities, the Working Group on the issue of human rights and transnational corporations and other business enterprises, the Special Rapporteur in the field of cultural rights, the Special Rapporteur on the right to development, the Special Rapporteur on the promotion and protection of freedom of opinion and expression, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, and the Special Rapporteur on extreme poverty and human right.

Given the scope of these mandates, various aspects closely related to the social inclusion of older people can be the subject of their research, monitoring

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88 Human Rights Council, "Resolution National Institutions for the Promotion and Protection of Human Rights," 29 September 2016, A/HRC/RES/33/15.

89 Felice D. Gaer, "Picking and Choosing? Country Visits by Thematic Special Procedures," in *The United Nations Special Procedures System*, eds. Aoife Nolan, Rosa Freedman, and Thérèse Murphy (Brill | Nijhoff, 2017), 88, [https://doi.org/10.1163/9789004304703\\_005](https://doi.org/10.1163/9789004304703_005).

90 Human Rights Council, "Code of Conduct for Special Procedures Mandate-Holders of the Human Rights Council".

and individual interventions that fall within their purview, e.g. ageism in the media, lifelong learning, healthy ageing, ageing in place, accessibility, exclusion from the labour market, etc.

However, this line of action has remained largely untapped, although already in the landmark Chung Report of 2009, mentioned in the previous chapters, there was a recommendation to involve independent experts and special rapporteurs in monitoring how the rights of older persons are being protected (or violated) in their work.<sup>91</sup> Establishing the UN Independent Expert on the enjoyment of all human rights by older persons should not be a reason for limiting the action of other mandate-holders on behalf of this vulnerable group. On the contrary, only an intersectional approach, providing in-depth expertise in several areas, allows barriers to the social inclusion of older people to be identified. That is why consolidated action and a better flow of information between mandate-holders would undoubtedly contribute to greater visibility of the rights of older persons among the international community. This coordination of the activities of the special procedures, in general, is currently advocated in scholarship.<sup>92</sup>

Another Human Rights Council procedure is the Universal Periodic Review (UPR), which involves a review of the human rights records of all UN member states. Unlike the special procedures, no independent experts carry out the monitoring. The review of achievements and shortcomings in a state's respect for human rights and fulfilment of its obligations is carried out periodically by other states, which are often guided by their political preferences.<sup>93</sup> The UPR is a process where politics and law intersect.<sup>94</sup> It has its advantages and

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91 Human Rights Council, "The Necessity of a Human Rights Approach and Effective United Nations Mechanism for the Human Rights of the Older Person: Working Paper Prepared by Ms. Chinsung Chung, Member of the Human Rights Council Advisory Committee," 4th December 2009 A/HRC/AC/4/CRP.1, para. 62.

92 Eleonora Zielińska, "Procedury specjalne ONZ ds. ochrony praw człowieka kobiet. Ogląd od zewnątrz," in *O prawach człowieka. Księga Jubileuszowa Profesora Romana Wieruszewskiego*, eds. Grażyna Baranowska, Aleksandra Gliszczyńska-Grabias, Anna Hernandez-Polczyńska, Katarzyna Sekowska-Kozłowska (Warsaw: Wolters Kluwer, 2017).

93 Hernandez-Polczyńska, *Procedury Specjalne Rady Praw Człowieka [Human Rights Council Special Procedures]*, 27.

94 Sara Bertotti, "Separate or Inseparable? How Discourse Interpreting Law and Politics as Separable Categories Shaped the Formation of the UN Human Rights Council's Universal Periodic Review," *The International Journal of Human Rights*, 23, no. 7 (9 August 2019): 1157, <https://doi.org/10.1080/13642987.2019.1596894>.

disadvantages, as despite or thanks to the UPR's political character, some critical issues may become visible on international forums. Not so long ago, older persons' problems were not addressed in the UPR framework at all. Whereas, during recent UPR cycles, older persons' rights have become a more and more frequent topic of review. In 2021, as in previous years, older persons often appeared as one of the various vulnerable groups in the UPR recommendations, but as the Universal Human Rights Index (UNHRI)<sup>95</sup> shows, to a much greater degree, older persons have also become visible as a separate group. For example, Argentina advised many states to take all necessary measures to strengthen the promotion and protection of older persons' human rights and dignity, as they were particularly vulnerable during the COVID-19 pandemic. However, there were also recommendations to enhance measures aiming at reducing ageism and age discrimination at all levels to increase the participation of older persons.

States also recommended to each other to revise their social policies, strengthen measures to combat the social exclusion of older persons, in particular in relation to the social assistance and pensions provided, intensify efforts to improve living conditions for older persons, implement successful pension reform, etc. For example, in 2023, several countries advised Morocco to support and enhance an integrated national programme to promote the rights of older persons and provide an enabling environment for them, including by taking measures to strengthen their participation in political, social and cultural life. In 2022, Slovenia advised the United Kingdom to apply a combined gender and age perspective in tax and benefits policy changes to avoid disproportionate negative effects on older women. In previous years, Argentina advised Brazil and Paraguay to consider signing and ratifying the Inter-American Convention on Protecting the Human Rights of Older Persons. Somalia encouraged Niger to ratify the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa of 2016. Finally, Vietnam called on Singapore to enhance measures to protect the rights and well-being of older persons, including efforts to reduce ageism.<sup>96</sup>

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95 UHRI is a central repository of human rights information. See: <https://uhri.ohchr.org/en/>.

96 All recommendations available at <https://uhri.ohchr.org/en/search-human-rights-recommendations>.

Whereas, the complaint procedure established in section IV of the Human Rights Council Resolution 5/1 of 2007<sup>97</sup> refers to gross and reliably attested violations of all human rights made on the basis of a consistent pattern. Complaints may be submitted by victims or by any person or group of people, including non-governmental organisations, acting in good faith following human rights principles (para. 87d). The complaint is first considered by the Working Group on Communications. If this body considers that the complaint is justified and meets the conditions stipulated in Resolution 5/1, the complaint, supplemented by recommendations, is sent to the Working Group on Situations. It, in turn, examines the situation, draws up a report and forwards it to the Human Rights Council, which examines the case in a closed meeting. Hypothetically, the Human Rights Council could take up the complaint referring to the consistent pattern of violations of older persons' rights in a given state, for example, where measures have been adopted that restrict their access to healthcare. Indeed, this procedure could improve their situation at a national level, as the result of measures taken due to the position taken by the Human Rights Council due to section F of the resolution. However, as with the inquiries mentioned above, its confidential nature causes its contribution to the visibility of older persons internationally to be limited.

Finally, the activity of the Human Rights Council Advisory Committee, created by Resolution 5/1 of 2007, should be mentioned here. This body consists of experts, serves as a think-tank to the Human Rights Council and focuses on drawing up the implementation-oriented solutions. It is mandated to function as a “think-tank” for the council and is a body that analyses issues and problems at the council's request, provides expert advice and makes recommendations to the council.<sup>98</sup>

In 2020, the Human Rights Council Advisory Committee prepared a study that can help states to implement the 2030 Agenda for Sustainable Development by integrating human rights into national policies – “Study on national policies and human rights”. According to this study, older persons are one of

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97 Human Rights Council, “Institution-Building of the United Nations Human Rights Council Resolution”.

98 Laurence Boisson de Chazournes and Andrzej Gadkowski, “Critical Appraisal of the Human Rights Council Advisory Committee,” in *The UN and Human Rights: A Critical Appraisal*, eds. Frédéric Mégret and Philip Alston, second edition (New York: Oxford University Press, 2019), 240.

the vulnerable groups who are left behind in many countries. The committee advises adopting appropriate policies and measures requiring reliable statistics and data as the baseline assessment and evaluating the results of the measures taken. The relevant national policies, plans and programmes should give practical contents to the commitment to leave no one behind and must be adopted with the broadest participation of local government, representatives of those concerned and other stakeholders, including the private sector. The committee refers states to the recommendations addressed to them under the UPR process and the consideration of their periodic reports and individual communications by human rights treaty bodies, as well as recommendations made in the reports of the special procedures of the Human Rights Council. Reviewing the states' policies, the committee comments on various elements of social inclusion of older persons:

The Economic Commission for Europe drew attention to the diversity of individual needs and aspirations throughout the life cycle and the need to take into account aging populations and the capacity of older persons to contribute to the economy and to society (see E/2019/16). The Economic and Social Commission for Western Asia noted the relatively weak and non-inclusive social protection systems, which leave many older persons vulnerable to poverty, sickness and isolation (see E/2019/20). Although in their reports States of the Southern Asia referred to the rights to subsistence and to development as the paramount rights relating to the human dignity of elderly, the Economic and Social Commission for Asia and the Pacific drew attention to the reduced investment in social protection in developing countries in the region, which left many without protection, in particular persons with disabilities, pregnant women and older persons (see E/2019/18).<sup>99</sup>

To date,<sup>100</sup> the Advisory Committee has not provided a report or a study exclusively dedicated to older persons. However, if one is drafted, it will be background material for the Human Rights Council. Although such contributions are public, we should not expect them to be commonly used in domestic policies. Their direct effect is limited, but their findings may be visible in the Human Rights Council standard-setting.

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99 Human Rights Council, "Study on National Policies and Human Rights. Report of the Human Rights Council Advisory Committee," 16 July 2020, A/HRC/45/39, para. 45.

100 June 2023.

### 3. Other selected international procedures

As “leave no one behind” is the main slogan of the Sustainable Development Goals, the social inclusion of older persons can potentially be borne within the Voluntary National Reviews (VNRs), being the cornerstone of the follow-up and review framework of the 2030 Agenda.<sup>101</sup> The review could provide information on how a country’s institutional framework has evolved in light of the 2030 Agenda and include information on how the views of the various ministries, agencies, levels of government and non-governmental stakeholders, including representatives of vulnerable groups, have been mobilised to achieve the goals and how their views are considered.<sup>102</sup> States are encouraged to go beyond social policies and include macroeconomic policies and technology that impact the situation of those furthest behind, providing support to the social and economic inclusion of all, irrespective of age, sex, disability, race, ethnicity, origin, religion or economic or other. According to the “Voluntary common reporting guidelines for voluntary national reviews at the High-level Political Forum on Sustainable Development (HLPF)”, the “new and emerging challenges” that can create new vulnerable and marginalised groups should appear in the states’ reports.<sup>103</sup> The Synthesis Report of the Voluntary National Reviews for 2021 revealed that most states referred to older persons in their reports. It has been noted that the states identified them as vulnerable or having special needs. Some of them discussed social protection systems and pensions. Others raised the issue of discrimination faced by older persons. The need for better inclusion across generational boundaries of older persons and young people has been underlined in some countries. Most countries noted that the COVID-19 pandemic illuminated society’s vulnerabilities, particularly in this respect.<sup>104</sup> It

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101 UN General Assembly, “Transforming Our World: The 2030 Agenda for Sustainable Development,” 25 September 2015, A/RES/70/1, para. 74.

102 UN Secretary-General, “Critical Milestones towards Coherent, Efficient and Inclusive Follow-up and Review at the Global Level,” 15 January 2016, A/70/684.

103 High-Level Political Forum, “Voluntary Common Reporting Guidelines for Voluntary National Reviews at the High-Level Political Forum on Sustainable Development (HLPF),” (Sustainable Development Knowledge Platform, 2021), <https://sustainabledevelopment.un.org/vnrs/>.

104 UNDESA, “2021 Voluntary National Reviews Synthesis Report,” <https://sustainabledevelopment.un.org/vnrs/>.

was apparent that the active ageing issue and potential of older persons were not widespread in the states' reports.

In the synthesis report for 2022, the UNDESA noted considerable progress in employment promotion for older workers, long-term care, healthcare, age-based discrimination, nutrition, and use of public spaces among 44 states presenting their VNR in that cycle. Some states reported on reforms of the healthcare and pension systems as well as additional cash grants for older people in the face of challenges posed by COVID-19. However, the UNDESA noted also that in some countries, older people still do not receive any form of pension and are forced to work in the informal economy due to income shortfalls.<sup>105</sup>

Considering the limited access to the labour market, ageism and discrimination at work, mandatory retirement or work in the informal economy, which are all issues tied to the social exclusion of older persons, the International Labour Organization instruments should also be taken into account. The ILO participates in some of the activities of the human rights treaty bodies described above, as well as in procedures based on the UN Charter. Its output and principles, such as social justice, equality, freedom and dignity at work, have inspired the development of human rights law. Today, the ILO operates in its usual way based on tripartite dialogue and uses instruments involving a range of interest groups. However, states ratifying ILO conventions alongside human rights treaties are closer to meeting all their obligations under both systems.<sup>106</sup> As Daniel Maul notes, the supervisory mechanism for ILO standards is the closest to enforcing social and economic rights.<sup>107</sup>

According to the ILO Constitution, the implementation of ILO conventions and recommendations is subject to multi-level control by the organisation. The complaints procedure is set out in Articles 24–25 of the ILO Constitution.<sup>108</sup> Employers' and workers' organisations can submit complaints to the International Labour Office against a state that, in their view, is not ensuring

105 UNDESA, "2022 Voluntary National Reviews Synthesis Report," 27, <https://sustainabledevelopment.un.org/vnrs/>.

106 Janelle M. Diller, "Social Justice, Rights, and Labour," in *The Oxford Handbook of International Human Rights Law*, ed. Dinah Shelton (Oxford: Oxford University Press, 2013), 318–23.

107 Daniel Maul, *The International Labour Organization: 100 Years of Global Social Policy* (Berlin: De Gruyter Oldenbourg, 2019), 184.

108 ILO, "Constitution of the International Labour Organisation (ILO)," 1 April 1919, [https://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62\\_LIST\\_ENTRIE\\_ID:2453907:NO](https://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO).



compliance with any convention to which it is a party. However, taking into account the awareness-raising potential, the reporting procedure is probably more effective.

States are obliged to submit periodic reports on ratified conventions. However, the ILO may also require states to submit reports on unratified conventions and recommendations to be aware of any progress (or the lack of progress) in incorporating the standards contained in the conventions into national legal orders. These are reviewed by the Committee of Experts on the Application of Conventions and Recommendations (CEACR) – an independent body composed of legal experts. In turn, the CEACR reports are examined by the Conference Committee on the Application of Standards in a tripartite setting. This committee selects several observations for discussion. The governments referred to in these comments are invited to respond before the conference committee and provide information on the situation.

These reports of the committees are an important source of knowledge on matters at the core of social inclusion. For example, the report of the conference committee contains many references to older workers and pensions and is attached by the General Survey Concerning the Social Protection Floors Recommendation, 2012 (No. 202) titled “Universal social protection for human dignity, social justice and sustainable development”.<sup>109</sup> This survey guides all stakeholders involved in developing social protection systems at the country level, governments, employers’ and workers’ organisations, representatives of other persons concerned, international organisations and development partners. The discussion on this survey revealed, for example, that only 68 per cent of people who have reached retirement age receive a pension, and this proportion falls to under 20 per cent in low-income countries. Moreover, it is worth mentioning a general observation that appeared during this discussion that “the level of civilization of a country can be measured by the care that it provides to its members, and to its most vulnerable members, particularly children and the oldest”.<sup>110</sup>

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109 ILO, “Conference Committee on the Application of Standards, Record of Proceedings International Labour Conference 108th Session,” Geneva, 2019 (International Labour Office, Geneva, 2019), [https://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_673680.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_673680.pdf).

110 ILO, 5B Part II/3.

UNESCO has a specific system for the protection of human rights that is not based on treaties. Individuals and non-governmental organisations can submit communications concerning (alleged) human rights violations within UNESCO's field of competence, so also in areas crucial for social inclusion.<sup>111</sup> The *sui generis* complaint procedure, established in the 104 EX/Decision of the Executive Board of 1978, is entirely confidential and based on dialogue with governments, so it is not easy to estimate its awareness-raising potential.<sup>112</sup>

Finally, mechanisms to review the achievements of states in implementing admittedly soft but targeted instruments devoted to the rights of older people should also be indicated. Cyclical reviews examining what countries have done to put these soft guidelines into practice will undoubtedly influence public awareness of ageing and the situation of older people. In practice, these mechanisms can indirectly bring to light factors that constitute barriers to the full participation of older people in society. Involving non-state actors in these procedures, as in the case of reporting to treaty bodies, is a significant element of accountability.

#### 4. Procedures based on the soft *lex specialis*

Apart from recommendations and guidelines "on merits", the Madrid Plan of Action contains provisions for a systematic review of its implementation and appraisal by the UN member states. Every five years, information is submitted and analysed at national, regional and global levels. The UN regional social commissions are coordinators of this procedure. In June 2020, the UN Economic and Social Council adopted a resolution containing the format for the fourth review and appraisal, which was agreed upon at the 58th session of the Commission for Social Development.<sup>113</sup>

111 Yvonne Donders, "UNESCO's Communications Procedure on Human Rights," Amsterdam Law School Legal Studies Research Paper No 2018-25 (Amsterdam: Amsterdam Law School, 2018); David Weissbrodt and Rose Farley, "UNESCO Human Rights Procedure: An Evaluation," *Human Rights Quarterly Journal*, 16, no. 2 (1994): 391-414.

112 UNESCO, "Decisions Adopted by the Executive Board at Its 104th Session, Paris, 24 April-9 June 1978," 1978, <https://unesdoc.unesco.org/ark:/48223/pf0000028409.locale=en>.

113 UN Economic and Social Council, "Resolution Modalities for the fourth review and appraisal of the Madrid International Plan of Action on Ageing, 2002," 18 June 2020, E/RES/2020/8.

This appraisal of the implementation of the Plan of Action involves older people's organisations, cross-government working groups on social and development policy, NGOs working with disadvantaged older people, private sector organisations, employers and insurance providers, academic institutions, researchers engaged in social policy research, and finally the UN programmes and agencies. It should be stressed that the issues indicated in the UNECE Guidelines for National Reports are of basic importance for the social inclusion of older persons. The states are invited to provide information on recognising the potential of older persons, encouraging a longer working life and the ability to work, and ensuring ageing with dignity.<sup>114</sup> These issues follow the goals of the UNECE ministerial conferences, notably the Lisbon Conference on "A Sustainable Society for All Ages: Realising the potential of living longer".<sup>115</sup> In the context of awareness-raising, the scale of this undertaking and its bottom-up approach must therefore be appreciated.

Moreover, the UNDESA supports the MIPAA process by, for example, publishing a special guide to its implementation at the national level, including, among other things, a section on promoting social inclusion and political participation of older persons.<sup>116</sup> In 2022, national ageing policies were evaluated in the framework of the fourth regional review of the Madrid International Plan of Action on Ageing.

A follow-up mechanism was also created under the CoE Council of Ministers recommendation 2014(2) to member states on the promotion of the human rights of older persons. The Committee of Ministers agreed to examine the implementation of the recommendation five years after its adoption – in

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114 UNECE, "Department 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) 2018 - 2022," September 2020 adopted by the Bureau of the Standing Working Group on Ageing 2020, [https://unece.org/fileadmin/DAM/pau/age/Review\\_and\\_appraisal/Guidelines\\_for\\_National\\_Reports-final\\_EN.pdf](https://unece.org/fileadmin/DAM/pau/age/Review_and_appraisal/Guidelines_for_National_Reports-final_EN.pdf).

115 UNECE, "2017 Lisbon Ministerial Declaration "A Sustainable Society for All Ages: Realizing the Potential of Living Longer" 22 September 2017," [https://unece.org/fileadmin/DAM/pau/age/Ministerial\\_Conference\\_Lisbon/Declaration/2017\\_Lisbon\\_Ministerial\\_Declaration.pdf](https://unece.org/fileadmin/DAM/pau/age/Ministerial_Conference_Lisbon/Declaration/2017_Lisbon_Ministerial_Declaration.pdf).

116 UNDESA, "Guide to the National Implementation of the Madrid International Plan of Action on Ageing," 2008, para. 6, <https://www.un.org/esa/socdev/ageing/documents/papers/guide.pdf>.

2019.<sup>117</sup> That is why the Council of Europe member states were asked to provide information on the authorities assigned as responsible for the implementation and dissemination of the recommendation, and about their opinions on the impact of the recommendation on the human rights of older persons. There were also questions on specific measures for promoting and protecting the human rights of older persons adopted in connection with the recommendation, and on obstacles in implementing the recommendation. The states were also asked about the translation and distribution of this document. In addition, they were invited to provide their good practices in promoting the human rights of older persons and of the specific manner of implementing these practices. The novelty, in comparison with other mechanisms, is that, within this overview, states could formulate their recommendations on the continuation of this procedure (most of them said “yes”) and on specific issues that should be analysed.<sup>118</sup>

In the first overview (2018–2019), 21 Council of Europe member states took part and the AGE Platform Europe submitted contributions, the European Network of National Human Rights Institutions (ENNHRI) and the European Trade Union Confederation (ETUC). In its report on these submissions, the Steering Committee for Human Rights (CDDH) noted that member states have devoted valuable efforts to enhancing the social inclusion of older persons and their participation in public and cultural life, as well as improving services.<sup>119</sup> Even soft documents, if equipped with an overview mechanism, may contribute to ageing mainstreaming and a better awareness of older persons' rights, including those not connected with care and pensions.

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117 Committee of Ministers of the Council of Europe, “Recommendation CM/Rec(2014)2 Promotion of Human Rights of Older Persons,” 19 February 2014.

118 Steering Committee for Human Rights, “Steering Committee for Human Rights, Request for Information on the Implementation of the Committee of Ministers' Recommendation CM/Rec(2014)2 on the Promotion of Human Rights of Older Persons,” 6 April 2018, CDDH-AGE(2018)02.

119 Steering Committee for Human Rights, “Steering Committee for Human Rights, Report on the Implementation of the Committee of Ministers' Recommendation CM/Rec (2014) 2 on the Promotion of Human Rights of Older Persons,” CDDH 90th Meeting (27–30 November 2018), 07 January 2019, CDDH(2018)R90 Addendum.

## Conclusion

Verifying states' good faith in implementing and enforcing their human rights obligations is a complex issue, involving the concept of sovereignty and the multiplicity of procedures that can be utilised. This chapter has shown that the universal and European human rights laws, as well as the ILO and UNESCO regimes, have various encouraging, monitoring and controlling mechanisms at their disposal. These are binding and non-binding; they sometimes oblige states to behave in a certain way and, at other times, merely invite them to do so. Their effectiveness depends on general awareness about them, their application, the capacity of the relevant bodies and, above all, their implementation at the domestic level.<sup>120</sup> That is why states' consent in creating international law still plays an essential role that is sometimes a primary barrier to addressing various social and other problems. After all, states still create international law, and it is up to them to decide which controlling mechanisms are adopted, and which they want to be bound by. States are not always willing to cooperate with international human rights bodies, and sometimes their actions are only apparent.<sup>121</sup> In addition, in the case of some mechanisms, such as the UPR or the Human Rights Council Special Procedures, the processes of their establishment on the intergovernmental fora are intensely politicised. Political circumstances are also reflected in the proliferation of human rights procedures, which results in their dilution.<sup>122</sup>

However, regardless of the type of mechanism, there are no guarantees that states will implement all the judgements, views, observations or recommenda-

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120 Keller and Ulfstein, "Conclusions," 418; Rosanne van Alebeek and Andre Nollkaemper, "The Legal Status of Decisions by Human Rights Treaty Bodies in National Law," in *UN Human Rights Treaty Bodies. Law and Legitimacy*, eds. Helen Keller and Geir Ulfstein (Cambridge: Cambridge University Press, 2012), 356–413.

121 Rhona K M Smith, "States of Denial: Rationalising UK Government Responses to UN Special Procedures," *Human Rights Law Review*, 21, no. 2 (12 March 2021): 458–74, <https://doi.org/10.1093/hrlr/ngaa049>.

122 Freedman, "The Human Rights Council," 202–3; Rosa Freedman and Jacob Mchangama, "Expanding or Diluting Human Rights?: The Proliferation of United Nations Special Procedures Mandates," *Human Rights Quarterly*, 38, no. 1 (2016): 164–93, <https://doi.org/10.1353/hrq.2016.0012>.

tions.<sup>123</sup> We cannot be overoptimistic, even given the ECtHR's rulings, as they do not finish the case. Reports of the CoE Committee of Ministers, which monitors the implementation of the ECtHR judgements, show that the implementation of judgements meets severe obstacles from the respondent states.<sup>124</sup>

In addition, several defects and hinderances for victims in the communications procedures, including a lack of public transparency diminishing states' accountability and discouraging cooperation. The limited technical capacity of the committees, along with a lack of awareness and understanding of procedures and accession to them are other obstacles.<sup>125</sup>

On the other hand, what if all these mechanisms were not in place? Would the situation of states' observance of human rights be better? How could the rights of older persons have been strengthened in other ways? Today, this wide range of human rights procedures is not a guarantee, but just an opportunity to improve the visibility of older persons in international law. It raises states' awareness and (perhaps) improves their behaviour at a domestic level. Many of them remain untapped concerning older persons. However, they have the potential to improve the visibility of older persons on the international stage and contribute to the promotion of their rights in various sectors of life. In each case, however, the good faith of states and the awareness of all participants in society are essential.

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123 Committee of Ministers, "Supervision of The Execution of Judgments and Decisions of the European Court of Human Rights. 14th Annual Report of the Committee of Ministers," Strasbourg, March 2021, <https://rm.coe.int/2020-cm-annual-report-eng/1680a1f4e8>; Michael O'Flaherty, "The Concluding Observations of United Nations Human Rights Treaty Bodies," *Human Rights Law Review*, 6, no. 1 (2006): 27–52; Ulfstein, "Individual Complaints"; UN Secretary-General, "Status of the Human Rights Treaty Body System. Report of the Secretary-General," 10 January 2020, A/74/643; Xuelian Zhang, "On the Concluding Observations of the United Nations Human Rights Treaty Bodies," *Journal of Human Rights*, 18, no. 3 (2019): 351–64.

124 Committee of Ministers; Francisco López-Bermúdez, "Creating and Applying Human Rights Indicators," in *The Oxford Handbook of International Human Rights Law*, ed. Dinah Shelton (Oxford: Oxford University Press, 2013), 874–920; Agnieszka Szklanna, Christian Strohal, and Stefan Kieber, "Delays in the Implementation of ECtHR Judgments: The Example of Cases Concerning Electoral Issues," *European Yearbook on Human Rights*, 2018, 445–64, <https://doi.org/10.1017/9781780688008.019>.

125 Emilie Hafne-Burton, *Making Human Rights a Reality* (Princeton, New Jersey: Princeton University, 2013); Kędzia, "Social Rights Protection under the ICESCR and Its Optional Protocol – the Role of the Committee on Economic, Social and Cultural Rights," 110.

Nowadays, issues related to states' accountability for the particular elements of the social inclusion of older persons are more and more frequently considered within international human rights mechanisms, not only by the Independent Expert. Thus, there are greater expectations about progress in improving the rights of older people on the international agenda and the impact of international mechanisms on states' conduct in this area. It may happen even if there are no hard legal grounds for such practices, like a universal convention on older persons' rights. As Elvira Domínguez Redondo concluded: "a more general phenomenon in international law, that is, that normative progress is often slower than advances made by the institutional monitoring mechanism".<sup>126</sup>

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126 Elvira Domínguez Redondo, "Rethinking the Legal Foundations of Control in International Human Rights Law - The Case of Special Procedures," *Netherlands Quarterly of Human Rights*, 29, no. 3 (September 2011): 288, <https://doi.org/10.1177/016934411102900302>.





# Chapter Five

## Multi-Stakeholder Capacity

### 1. Identifying stakeholders

As demonstrated in previous chapters, the social inclusion of older people requires action not only by governments performing their obligations under human rights treaties but also by the involvement of other actors at different levels – local, national, regional, and ultimately global. This chapter focuses on those stakeholders which are active in the international arena, contribute to the visibility and/or implementation of international law on older persons at a national level, or those having the possibility to do so.

Many of the documents cited in the previous chapters clearly identify different stakeholders in various aspects of social inclusion. For example, Article 13 of the 2002 Madrid Declaration proclaims:

We stress the primary responsibility of Governments in promoting, providing and ensuring access to basic social services, bearing in mind the specific needs of older persons. To this end we need to work together with local authorities, civil society, including non-governmental organizations, the private sector, volunteers and voluntary organizations, older persons themselves and associations for and of older persons, as well as families and communities.<sup>1</sup>

The UN Independent Expert on the enjoyment of all human rights by older persons, in her 2018 annual thematic report, stressed “the need to foster partnerships between multisector stakeholders, including local authorities, public health professionals, architects, housing providers, community organiza-

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1 Second World Assembly on Ageing, “Madrid International Plan of Action on Ageing and the Political Declaration, Report of the Second World Assembly on Ageing,” Madrid, 8–12 April 2002, (United Nations Publication, Sales No. E.02.IV.4).

tions, universities, the private sector and older persons themselves, to develop innovative and inclusive responses to urban regeneration”.<sup>2</sup>

As quoted in Chapter One, the Human Rights Council in Resolution 48/3 on Older Persons of 2021 asked

[T]he Office of the United Nations High Commissioner for Human Rights to convene a multi-stakeholder meeting, fully accessible to persons with disabilities, with the participation of the Independent Expert on the enjoyment of all human rights by older persons, human rights experts and expert representatives of Member States, the treaty bodies and the special procedures, regional mechanisms, the United Nations system, academia, national human rights institutions and civil society, including with the meaningful and effective participation of older persons and of persons of different ages, to discuss the report, and to prepare a summary with conclusions of the meeting that includes recommendations on addressing possible gaps and the dispersiveness of international human rights law with regard to older persons, and to submit the report to the Human Rights Council by its fifty-first session.<sup>3</sup>

The 2021 WHO Global Report on Ageism indicates governments, civil society organisations, UN agencies, development organisations, academic and research institutions, businesses and people of all ages as these who can play a role to reduce ageism.<sup>4</sup>

In the Rome Declaration of the Ministerial Conference on Ageing, adopted in 2022, the governments declared cross-sectoral dialogue and collaboration on ageing between all relevant public and private sector actors, academia, social partners and civil society; strengthening the protection of older people in the full enjoyment of their human rights.<sup>5</sup>

2 UN Independent Expert, “Report of the Independent Expert on the Enjoyment of All Human Rights by Older Persons (the Impact of the Social Exclusion of Older Persons),” 10 July, 2018, A/HRC/39/50. para. 87.

3 Human Rights Council, “Resolution Human Rights of Older Persons Adopted by the Human Rights Council on 7 October 2021,” A/HRC/RES/48/3, para. 9.

4 WHO, “Global Report on Ageism,” (Geneva, 18 March 2021), 160, <https://www.who.int/teams/social-determinants-of-health/demographic-change%20and-healthy-ageing/combating-ageism/global-report-on-ageism>.

5 UNECE, “Rome Ministerial Declaration ‘A Sustainable World for All Ages: Joining Forces for Solidarity and Equal Opportunities Throughout Life,’ MIPAA 20,” 16–17 June 2022, [https://unece.org/sites/default/files/2022-06/Rome\\_\\_Ministerial\\_Declaration.pdf](https://unece.org/sites/default/files/2022-06/Rome__Ministerial_Declaration.pdf).

Inter-governmental organisations (IGO), including United Nations agencies and development organisations, are crucial actors. For example, in the area of combating ageism, the WHO attributed many functions to them, so they can

develop and contribute to the global coalition aiming to combat ageism, particularly by bringing the organization's expertise to the coalition (e.g. the International Labour Organization could support policies and legislation in the workplace); support governments and civil society organizations seeking to build capacity to implement evidence-based strategies; develop technical guidance to help different stakeholders change the narrative around age and ageing; take steps to end ageism within the UN and within developmental organizations, including by reviewing existing policies and practices and developing new norms and standards as required.<sup>6</sup>

All those functions of developing, contributing, supporting, monitoring, etc., are characteristic not only of combating ageism, but also of other areas of social inclusion of older persons. Examples of such actions conducted by IGOs and their entities were provided in the previous chapters of this book. These considerations confirm the constantly expanding functions of international organisations in human rights-sensitive areas<sup>7</sup> and the complex nature of IGOs, which, on the one hand, express the intentions of the states that created them, but on the other hand, they enjoy a certain degree of autonomy towards their member states.<sup>8</sup> Chapter Four shows that certain IGO entities may have a real influence on states' domestic law and policies, especially when controlling and monitoring the performance of the obligations by states.

This chapter looks at the potential of other selected actors identified as important in the social inclusion of older persons. It aims to outline the

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6 WHO, "Global Report on Ageism," ix.

7 Manfred Nowak and Karolina Miriam Januszewski, "Non-State Actors and Human Rights," in *Non-State Actors in International Law*, eds. Math Noortmann, August Reinisch, and Cedric Ryngaert (London: Hart Publishing, 2015), 113–62, <https://doi.org/10.5040/9781474202916>.

8 Tadeusz Gadkowski, *Podmiotowość prawnomiędzynarodowa organizacji międzynarodowych a ich zdolność traktatowa*, Wydanie I (Poznań: Wydawnictwo Naukowe SILVA RERUM, 2019), 108–93; Nicolaos Voulgaris, "International Organisations as Autonomous Actors," in *International Organisations, Non-State Actors, and the Formation of Customary International Law*, eds. Sufyan Droubi and Jean d'Aspremont (Manchester University Press, 2020), 21–41, <https://doi.org/10.7765/9781526134165.00008>.

contribution (or potential contribution) of various stakeholders to advancing the protection of older persons within the framework of international human rights law and, conversely, to examine how international law can shape new approaches by specific actors to the human rights of older persons. “Stakeholders” in this chapter include actors categorised as “non-state actors”, such as NGOs, especially those with some form of recognised international status, academia, and businesses (private sector).<sup>9</sup> Moreover, local communities, and national human rights institutions also have important roles to play, with the potential to act internationally.

The many movements, groups, networks and organisations of various interconnected profiles, with each involved in international debate, certify the evolution of international law, including the area of human rights law,<sup>10</sup> and is characteristic of global governance.<sup>11</sup> The OEWGA sessions are an example of interconnectivity among various actors. Another example is the International Expert-Conference on Human Rights of Older Persons (ICHRoP), organised by the Federal Ministry of Labour, Social Affairs, Health and Consumer Protection in Vienna in 2018. It was dedicated to new challenges and opportunities regarding the human rights of older persons, including their right to education and lifelong learning, related to technological developments such as digitalisation, robotics, automation and artificial intelligence. National and international

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9 ILA, “Non-State Actors. Final Report International Law Association Johannesburg Conference (2016)” (International Law Association, 2016), [https://www.ila-hq.org/en\\_GB/documents/conference-report-johannesburg-2016-4](https://www.ila-hq.org/en_GB/documents/conference-report-johannesburg-2016-4); Barbara K. Woodward, “The Role of International NGOs: An Introduction,” *Willamette Journal of International Law and Dispute Resolution*, 19, no. 2 (2011): 203–31; Barbara K. Woodward, *Global Civil Society in International Lawmaking and Global Governance: Theory and Practice* (Leiden: Martinus Nijhoff Publishers, 2010).

10 Philip Alston, ed., *Non-State Actors and Human Rights*, Collected Courses of the Academy of European Law, v. 13/3 (Oxford [England] ; New York: Oxford University Press, 2005); Tawanda Hondora, “Civil Society’s Role in the Development of International Law Through Strategic Litigation in Challenging Times,” *SSRN Electronic Journal*, 2018, <https://doi.org/10.2139/ssrn.3262661>; Karen N. Scott et al., eds., *Changing Actors in International Law*, Developments in International Law, volume 74 (Four Societies Conference, Leiden, The Netherlands: Koninklijke Brill NV, 2021); Lottie Lane, “The Horizontal Effect of International Human Rights Law in Practice,” *European Journal of Comparative Law and Governance*, 5, no. 1 (22 March 2018): 7, <https://doi.org/10.1163/22134514-00501001>.

11 Woodward, “The Role of International NGOs: An Introduction,” 206; Mary Kaldor, “The Idea of Global Civil Society,” in *Global Civil Society: Contested Futures*, eds. David Chandler and Gideon Baker, Routledge Advances in International Relations and Global Politics 32 (London; New York: Routledge, 2005), 87.

experts, representatives of domestic and foreign senior-citizens' organisations, representatives from politics, public administration and the European Commission, academia and civil society adopted the Conference Declaration on Human Rights of Older Persons, which invited

all stakeholders, including, inter alia, Member States, National Human Rights Institutions, UN agencies, international organizations, civil society, older persons and experts, to strengthen the dialogue on the protection of the human rights of older persons at regional and national level during the OEWGA inter-sessional period in order to share experiences, intensify collaboration and identify substantive and normative elements that need to be better addressed by the international community to allow older persons to fully enjoy their human rights.<sup>12</sup>

## 2. Civil society and its organisations

The role of non-governmental organisations (NGOs) is fighting for the protection of social rights and “channelling voices of vulnerable groups in the framing of new human rights content”.<sup>13</sup> NGO activism is essential in such areas as healthcare, long-term care, lifelong learning, residential ageing, active ageing, etc., and there is no doubt that consulting older persons' organisations and organisations working on their behalf is a *sine qua non* for rational national and local policies on ageing.

In addition, it is difficult nowadays to imagine the whole system of international human rights protection without non-governmental organisations.<sup>14</sup> They

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12 ICHROp, “Conference Declaration International Expert-Conference on Human Rights of Older Persons 2018 12-13 November 2018, Vienna,” 2018, 3, [http://ageing.at/site/pub\\_html/sites/default/files/ICHROp%20Conference%20Declaration%20Final\\_o.pdf](http://ageing.at/site/pub_html/sites/default/files/ICHROp%20Conference%20Declaration%20Final_o.pdf).

13 Daniela Ikawa, “The Role of Civil Society Organizations in the Protection of Social Rights,” in *Research Handbook on International Law and Social Rights*, eds. Christina Binder et al. (Edward Elgar Publishing, 2020), 298, <https://doi.org/10.4337/9781788972130.00030>.

14 George E. Edwards, “The United Nations and Human Rights Non-Governmental Organizations (NGOs) - Seventy-Five Years of Consultations, Collaboration, and Contributions (1945-2000),” *Peace International Law Review*, 33, no. 327 (2021): 336, <https://digitalcommons.pace.edu/pilr/vol33/iss2/7>.

act as *amicus curiae* before international tribunals and quasi-judicial bodies,<sup>15</sup> and are involved in monitoring the implementation of the ECtHR judgments,<sup>16</sup> reporting to human rights treaty bodies, the UPR process, and the other procedures of the Human Rights Council.<sup>17</sup> They can also submit collective complaints to the ECSR to protect the social rights of workers, retirees, and their families. Finally, they may complain to the ECtHR as alleged victims of human rights violations. All these mechanisms have been described in Chapter Four of this book, whereas this subchapter outlines the NGOs' potential to submit substantive input to the development of international human rights law on older persons. Thus, considerations focus on the place of non-governmental organisations in international law and their capacity for advocating in favour of older persons' issues internationally.

Contemporary international documents, however, do not apply a uniform nomenclature to entities that traditionally have been called "NGOs", meaning that there are many definitions of NGOs in scholarship.<sup>18</sup> The ambiguous notions of "civil society", "civil society organisations" (CSOs), and "the international/global civil society"<sup>19</sup> have also appeared in the international agenda over the

15 Luisa Vierucci, "NGOs in International Law, Efficiency in Flexibility?" in *NGOs in International Law: Efficiency in Flexibility?*, eds. Pierre-Marie Dupuy and Luisa Vierucci (Cheltenham, UK; Northampton, MA: E. Elgar, 2008), 137–61.

16 Council of Europe, "Expert Council on NGO Law The Execution of Judgments Involving Freedom of Association: The Impact on Human Rights Organisations and Defenders Thematic Study Prepared by Carla Ferstman on Behalf of the Expert Council on NGO Law of the Conference of INGOs of the Council of Europe, CONF/EXP(2022)1, 15 March 2022," 2022, <https://rm.coe.int/the-execution-of-judgments-involving-freedom-of-association-15-march-2/1680a5d656>.

17 OHCHR, "Working with the United Nations Human Rights Programme: A Handbook for Civil Society," (Office of the United Nations High Commissioner for Human Rights, 2008), [https://www.ohchr.org/sites/default/files/AboutUs/CivilSociety/Documents/Handbook\\_en.pdf](https://www.ohchr.org/sites/default/files/AboutUs/CivilSociety/Documents/Handbook_en.pdf).

18 For example, Michael Yaziji and Jonathan Doh, *NGOs and Corporations: Conflict and Collaboration*, 1st ed. (Cambridge University Press, 2009), 3–14, <https://doi.org/10.1017/CBO9780511626708>; Kerstin Martens, "Mission Impossible? Defining Nongovernmental Organizations," *Voluntas: International Journal of Voluntary and Nonprofit Organizations*, 13, no. 3 (2002): 271–85, <https://doi.org/10.1023/A:1020341526691>; Shamima Ahmed and David M. Potter, *NGOs in International Politics* (Bloomfield, CT: Kumarian Press, Inc, 2006); Steve Charnovitz, "Nongovernmental Organizations and International Law, 100 Am. J. Int'l L. 348 (2006)," *American Journal of International Law*, 100, no. 348 (2006): 348–72; Alston, *Non-State Actors and Human Rights*, 3–36.

19 Gerald Staberock, "Civil Society," in *Max Planck Encyclopedias of International Law*, Oxford Public International Law Search (Oxford University Press, 2011), <https://opil.ouplaw>.

last couple of decades.<sup>20</sup> The terms CSOs and NGOs are often used interchangeably<sup>21</sup>, though sometimes CSOs are defined as those representing a wider range of interests and ties, including NGOs.<sup>22</sup>

The term “non-governmental organisation” is still better-embedded in international treaties, including Article 71 of the UN Charter.<sup>23</sup> This provision does not define “non-governmental organization”, but at the same time leaves its content open. Nearly eighty years after the adoption of the UN Charter, there are thousands of NGOs, with various consultative statuses determined by the UN Economic and Social Council,<sup>24</sup> and cooperating on a number of levels and in various spheres with the UN. Today, most global and regional intergovernmental organisations<sup>25</sup> cooperate with “NGOs” according to rules adopted in their internal law.

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com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1726; Xenia Chiaramonte, “Social Movements and the Legal Field: Becoming-Constituent,” *Max Planck Yearbook of United Nations Law Online*, 22, no. 1 (7 October 2019): 376–93, [https://doi.org/10.1163/18757413\\_022001015](https://doi.org/10.1163/18757413_022001015).

- 20 Lucio Baccaro, *Civil Society, NGOs, and Decent Work Policies: Sorting out the Issues, DP/127/2001* (Geneva: International Labour Organization, 2001), 30.
- 21 Woodward, *Global Civil Society in International Lawmaking and Global Governance*, 9; Hondora, “Civil Society’s Role in the Development of International Law Through Strategic Litigation in Challenging Times”.
- 22 David Birchall, “The Role of Civil Society and Human Rights Defenders in Corporate Accountability,” in *Research Handbook on Human Rights and Business*, eds. Surya Deva and David Birchall, Research Handbooks in Human Rights (Northampton: Edward Elgar Publishing, 2020), 423.
- 23 Article 71 stipulates: “The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence. Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned. United Nations, United Nations, “Charter of the United Nations and Statute of the International Court of Justice,” San Francisco, 26 June 1945 1945, <https://treaties.un.org/doc/publication/ctc/uncharter.pdf>.
- 24 UN Economic and Social Council, “Consultative Relationship between the United Nations and Non-Governmental Organizations, Resolution 1996/31 49th Plenary Meeting 25 July 1996,” 1996, [https://www.unov.org/documents/NGO/NGO\\_Resolution\\_1996\\_31.pdf](https://www.unov.org/documents/NGO/NGO_Resolution_1996_31.pdf).
- 25 Shamima Ahmed, “The Impact of NGOs on International Organizations: Complexities and Considerations,” *Brooklyn Journal of International Law*, 36, no. 3 (2011): 817, <https://brooklynworks.brooklaw.edu/bjil/vol36/>.

Meanwhile, despite the fact that the concept of “civil society” has a long philosophical history,<sup>26</sup> it is a relatively new notion in human rights hard law. It appeared in the 2006 Convention on the Rights of Persons with Disabilities, Article 33 of which requires civil society’s involvement in the national implementation and monitoring of the convention.<sup>27</sup> It can be assumed that if a convention on the rights of older persons were adopted, it would contain similar provisions.

The Madrid Political Declaration and International Plan of Action on Ageing of 2002 contain many references to “civil society, including non-governmental organizations”. The 2030 Agenda for Sustainable Development, together with the seventeen Sustainable Development Goals, also stress at many points the active role of civil society and civil society organisations. Similarly, the report of the Office of the UN High Commissioner for Human Rights on the multi-stakeholder meeting on the human rights of older persons, which was held in August 2022, contains references to “civil society representatives”.<sup>28</sup>

Thus, “civil society” is an umbrella term covering a broad spectrum of actors that are not just governmental, and cover many NGOs. Michael Edwards’s explanation of this relation appears the most illustrative: “[i]f civil society were an iceberg, then NGOs would be among the more noticeable of the peaks above the waterline, leaving the great bulk of community groups, informal associations, political parties and social networks sitting silently (but not passively) below”.<sup>29</sup>

In this context, it is also worth noting the opinion of Nahuel Maisley, who argues that participation in international life and the impact on the creation of international norms is derived from Article 25(a) of the International Covenant on Civil and Political Rights. This grants every citizen the right and opportunity to “take part in the conduct of public affairs, directly or through

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26 Woodward, *Global Civil Society in International Lawmaking and Global Governance*, 7.

27 United Nations, “Convention on the Rights of Persons with Disabilities,” New York 13 December 2006, (UNTS, vol. 2515, p. 3).

28 OHCHR, “Summary of the Multi-Stakeholder Meeting on the Human Rights of Older Persons Report of the Office of the United Nations High Commissioner for Human Rights,” 27 December 2022, A/HRC/52/49.

29 Michael Edwards, *NGO Rights and Responsibilities: A New Deal for Global Governance* (London: The Foreign Policy Centre, 2000), 7–8.



freely chosen representatives”.<sup>30</sup> In his opinion, this provision dictates that civil society, acting through its organisations, is permitted to participate in international law-making procedures and have a meaningful voice in this regard. International institutions, government officials and other stakeholders should not only grant them a voice, but should also take that voice into account.

In this vein, in 2021, the UNECE Population Unit and HelpAge International, with the support of various NGOs, published the guidance note “Meaningful Participation of Older Persons and Civil Society in Policymaking. Designing a Stakeholder Engagement and Participation Process”. It refers to “older people’s groups” and explains that this term is used to “describe older people’s organizations, associations, platforms and councils of older people. In different contexts, different names are used to describe groups of older people who come together as a collective”.<sup>31</sup>

At the same time, UNECE noted that older people are usually not consulted and not given the opportunity to contribute to the development of the services, policies and programmes designed for them. In general, they are often excluded from mainstream political processes. Hence, UNECE calls on states to promote participatory policymaking, which means that older people, either on their own or through organisations, should have the opportunity and capacity to participate meaningfully in public decisions that affect their lives and communities, to hold decision-makers to account and to provide feedback on the relevance and effectiveness of actions taken by various decision-makers. Participation in decision-making processes should take place at all levels – local, regional, national, but also international.<sup>32</sup>

Similarly, the United Nations Guidelines for the periodic review and appraisal of the Madrid International Plan of Action on Ageing recommended

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30 Nahuel Maisley, “The International Right of Rights? Article 25(a) of the ICCPR as a Human Right to Take Part in International Law-Making,” *European Journal of International Law*, 28, no. 1 (1 February 2017): 110, <https://doi.org/10.1093/ejil/chx010>.

31 UNECE, “Meaningful Participation of Older Persons and Civil Society in Policymaking. Designing a Stakeholder Engagement and Participation Process. Guidance Note,” August 2021, 4, <https://unece.org/sites/default/files/2021-09/UNECE%20meaningful%20participation%20guidance%20note.pdf>.

32 UNECE, 9.

applying a “bottom-up participatory approach” to ensure that older persons have an opportunity to express their views on policies affecting their lives.<sup>33</sup>

Within the scope of this subchapter, it is not possible to discuss all the campaigns and other activities undertaken in an international format, not only by informal groups but also by NGOs and their networks or consortia. Even the UNECE guidance note does not itemise all the activities and all the networks working for older people internationally. It points to just a few examples: Age Platform Europe, Global Alliance for the Rights of Older People (GAROP), HelpAge International, International Association of Gerontology and Geriatrics (IAGG), International Federation on Ageing (IFA), International Longevity Centre Global Alliance (ILC Global Alliance), International Network for the Prevention of Elder Abuse (INPEA), International Social Security Association (ISSA), NGO Committees on Ageing in New York, Geneva and Vienna, Stakeholder Group on Ageing (SGA), Stakeholder Group on Ageing Africa (SGAA).<sup>34</sup> Therefore, just a few examples of activities varying in nature and scope are selected here as an illustration.<sup>35</sup>

An analysis of the endeavours to reach a consensus on the treaty on the rights of older persons shows that NGOs and UN entities, rather than states, are now the “driving force” in developing the content of the convention. Certainly, it is not a new phenomenon. In the past, NGO lobbying led to the adoption of many human rights treaties, including the CRPD. In this case, organisations bringing together people with disabilities or working on their behalf proved very well-organised and motivated. NGOs formed the Global Disability Initiative, and this consolidation of forces turned out to be very effective. They provided material, identified issues, framed the negotiations, and influenced individual states’ attitudes towards the new treaty.<sup>36</sup> It is also the path followed by a large number of organisations advocating for a new convention on the OEWSGA ses-

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33 UNDESA, “United Nations Department of Economic and Social Affairs Guidelines for Review and Appraisal of the Madrid International Plan of Action on Ageing: Bottom-up Participatory Approach,” 2006, [https://unece.org/fileadmin/DAM/pau/\\_images/MIPAA\\_Review\\_guidelines\\_global.pdf](https://unece.org/fileadmin/DAM/pau/_images/MIPAA_Review_guidelines_global.pdf).

34 UNECE, “Meaningful Participation of Older Persons and Civil Society in Policymaking. Designing a Stakeholder Engagement and Participation Process. Guidance Note,” 9.

35 More examples will be provided in Chapter Six.

36 Annie Herro, “The Pre-Negotiation of UN Human Rights Treaties: The Case of the Convention on the Rights of Persons with Disabilities,” *International Negotiation*, 24, no. 2 (25 April 2019): 240–65, <https://doi.org/10.1163/15718069-24021174>.

sions.<sup>37</sup> Much stronger is the voice of the Global Alliance on the Rights of Older Persons (GAROP) – a network of 400 organisations from around the world lobbying for older persons’ rights and framing them into a treaty.<sup>38</sup> GAROP has set up a Steering Group with the aim of developing a strategy to organise activities and ensure that the various organisations speak with one voice.<sup>39</sup>

Other important networks are the Committee on Ageing at the United Nations Headquarters in New York, along with its sister committees – the NGO Committees on Ageing in Geneva and Vienna, all affiliated with the Conference of Non-governmental Organizations (CONGO). They gather hundreds of NGOs and INGOs, aimed at raising global awareness about the opportunities and challenges of global ageing. They collaborate, among others, with GAROP, the UNDESA and the Independent Expert, providing substantive inputs to the OEWGA discussions and other UN forums. For example, when the Global Compact on Refugees was being negotiated, the NGO Committee on Ageing in Geneva called for the recognition of the specific needs of older refugees, their contributions and their roles in families and communities following the United Nations Principles for Older Persons.<sup>40</sup> However, this mission turned out to be “impossible”. The Global Compact on Refugees, adopted in 2018 by the UN General Assembly, does not contain any references to older persons.<sup>41</sup>

The NGO Committee on Ageing belongs to the Stakeholder Group on Ageing (SGA), established to ensure the inclusion of older persons in the implementation of the 2030 Agenda for Sustainable Development.<sup>42</sup> They are also involved in the review and appraisal of the 2002 Madrid International Plan

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37 Ellen Graham and Ken Bluestone, “Global Rights for Older People: Building Civil Society Engagement,” *Human Rights Defender*, 27, no. 1 (2018): 26–28.

38 In 2022 and 2023, GAROP coordinated the “Age With Rights” the global campaign for a new UN convention on the rights of older people coordinated by the Global Alliance for the Rights of Older People, <https://rightsofolderpeople.org/age-with-rights/>.

39 See <https://rightsofolderpeople.org>.

40 NGO Committee on Ageing, Geneva, “The Rights of Older Persons in the Global Compact on Refugees Submitted by the NGO Committee on Ageing, Geneva,” 2018, <https://ageingcommittee-geneva.org/resources/documents/>.

41 UN General Assembly, “Global Compact on Refugees,” 17 December 2018, A/RES/73/15.

42 UNDESA and UNITAR, “Stakeholder Engagement and the 2030 Agenda: A Practical Guide,” 2020, 65, <https://sustainabledevelopment.un.org/StakeholdersGuide>.

of Action on Ageing, and raising many awareness initiatives, including the International Day of Older Persons.<sup>43</sup>

The International Federation on Ageing (IFA) conducts many projects, from scholarships for students, *via* weekly webinars on ageing problems, to legal expertise and crucial documents. In 1990, IFA adopted the Declaration of the Rights and Responsibilities of Older Persons. This 1990 declaration became a prototype for the 1991 UN Principles for Older Persons.<sup>44</sup> When comparing both documents, it is easy to note similarities in relation to the areas of independence, participation, self-fulfilment, care and dignity of older persons. Although the Principles for Older Persons, adopted by the UN General Assembly, did not absorb the part of the IFA's declaration dedicated to "the responsibilities of older persons", they hit the point of social inclusion for older people:

Consistent with individual values and as long as health and personal circumstances permit, older persons should try:

To remain active, capable, self-reliant and useful.

To learn and apply sound principles of physical and mental health to their own lives.

To take advantage of literacy training.

To plan and prepare for old age and retirement.

To update their knowledge and skills, as needed, to enhance their employability if labor force participation is desired.

To be flexible, together with other family members, in adjusting to the demands of changing relationships.

To share knowledge, skills, experience and values with younger generations.

To participate in the civic life of their society.

To seek and develop potential avenues of service to the community.

To make informed decisions about their health care and to make decisions about terminal care known to their physician and family.<sup>45</sup>

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43 See more: <https://www.ngocoa-ny.org/participate/member-organizations-2.html>.

44 UN General Assembly, "United Nations Principles for Older Persons," 16 December 1991, A/RES/46/91.

45 Israel Doron and Kate Mewhinney, *The Rights of Older Persons: Collection of International Documents*, eds. (Association for the Planning and Development of Services for the Aged in Israel, 2007), 18, <https://ifa.ngo/publication/rights-of-older-people/the-rights-of-older-persons-a-collection-of-international-documents/>.

In 1999, IFA organised the Fourth Global Conference in Montreal, bringing together ministers responsible for ageing issues from 61 countries. It resulted in the adoption of the Montreal Declaration on the Rights and Duties of Older People. This called upon the UN to strongly urge every member state to adopt national plans on ageing that would reduce barriers in all spheres of life and ensure dignity and quality of care for older persons, along with universal access to economic security, goods and services.<sup>46</sup>

The second example is the AGE Platform Europe's contribution to the official visit of the UN Special Rapporteur on Extreme Poverty and Human Rights to the European Union in 2021. AGE Platform Europe, which is a European network of over 100 non-profit organisations of and for people aged 50+, had many observations on the European Social Pillar and provided crucial analysis of the economic situation of older persons in the EU Member States, and formulated many recommendations, including those related to social inclusion and participation. They recommended that the EU, among other things, expand the action to update (digital) skills, improve access to broadband and equipment for all – not just the working-age population – promote action to combat social isolation and loneliness among older people and promote inter-generational activity through cultural, social, educational and physical activities, and suggested that it create a European platform for volunteering after retirement.<sup>47</sup>

It is also worth mentioning the Age Platform Europe online “Older Persons’ Self-Advocacy Handbook. An Online Toolkit engaging in processes on the human rights of older persons”. In an accessible manner, it presents the international standard for the protection of the rights of older persons and explains the universal and European mechanisms for the protection of human rights.<sup>48</sup>

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46 Doron and Mewhinney, 19–22.

47 Age Platform Europe, “Contribution of AGE Platform Europe to the UN Special Rapporteur on Extreme Poverty and Human Rights’ Official Visit to the European Union,” (Bruxelles, 2021), <https://age-platform.eu/sites/default/files/AGE%20contribution%20to%20SR%20on%20Extreme%20Poverty%20and%20HR.pdf>.

48 This handbook is available at the Age Platform Europe website <http://publications.age-platform.eu/index.php>

The last selected example of activity is HelpAge International's guidelines "FAIR" for civil society organisations wishing to influence their governments to support a treaty on the human rights of older persons. HelpAge International proposes "steps" within four areas: 1) finding out a government's position; 2) argumentation; 3) involving older people as the most effective advocates for their rights; 4) revising the progress. The organisation also prepared handouts for governments, setting out arguments on the need to adopt a new convention and ideas for its content.<sup>49</sup>

These examples certify NGOs' capacity to participate in international life and raise the awareness of states. However, the reality is rather far from the recommendations made by international entities (e.g. UNECE) and by scholars. This can clearly be observed when tracing the NGOs' attempts to convince states, especially the European Union Member States, to work on a treaty on older persons' rights. Indeed, they seek support internally, build coalitions externally and make substantive contributions to the final negotiations. However, it should be remembered that, if the work on the treaty reaches the decision-making stage, it will still be up to the states to make the final decisions; they, not the NGOs, vote on the treaty. As for now, NGOs have the right to a voice, but not to vote.<sup>50</sup>

### 3. Academia

The documents indicated at the beginning of this chapter indicate "academia" as one of the crucial stakeholders with great potential to contribute to the social inclusion of older persons. Indeed, a significant part of "academia" acts in the form of NGOs and is involved in many international procedures and events,<sup>51</sup> along with civil society initiatives at national and international levels. However, this type of stakeholder cannot be limited merely to academic associations. The

49 These materials are available at the <https://www.helpage.org/newsroom/latest-news/new-advocacy-guidelines-launched-for-a-un-convention-/>.

50 Maisley, "The International Right of Rights?" 110; Molly Ruhlman, *Who Participates in Global Governance?: States, Bureaucracies, and NGOs in the United Nations* (London and New York: Routledge, 2017), 171.

51 Kathryn McNeilly, "How Time Matters in the UN Human Rights Council's Universal Periodic Review: Humans, Objects, and Time Creation," *Leiden Journal of International Law*, 34, no. 3 (September 2021): 607–27, <https://doi.org/10.1017/S0922156521000169>.

Danish Institute of Human Rights defines “academia” as “The environment or community concerned with the pursuit of research, education, and scholarship, including institutions such as universities and research institutions, as well as individuals such as faculty, researchers, and students, engaging in activities such as teaching, training, learning, researching, publishing, collecting, and disseminating knowledge and information”.<sup>52</sup> UPR Info, an international non-profit and non-governmental organisation supporting CSOs within the UPR process, uses the term “academia” as “the set of actors and initiatives that animate academic institutions: professors, lecturers, students, as well as post-graduate programmes and research work with a human rights focus”.<sup>53</sup>

At times when domestic laws are increasingly vulnerable to pressures from external law-making in various areas, including various aspects of human rights, academia undoubtedly plays an important role in implementing international norms into national conditions.<sup>54</sup> On the other hand, academia has great potential to contribute to the development of international law, including human rights law, and therefore shed light on the rights of older people.

In this context, “academia” should be taken together with the contribution of international legal scholars. This face of “academia” has very solid roots in international law as, according to Article 38 of the Statute of the International Court of Justice, when resolving disputes, the court will apply “the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law”.<sup>55</sup> Certainly, international lawyers do not create international norms, but, through their academic writing and other argumentative techniques, they contribute to understanding, establishing meaning,

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52 DIHR, “HRS Concept Note: Academia, Danish Institute for Human Rights May 2018,” 2018, 2, [https://www.humanrights.dk/sites/humanrights.dk/files/media/migrated/hrs\\_toolbox\\_concept\\_note\\_academia\\_may2018.pdf](https://www.humanrights.dk/sites/humanrights.dk/files/media/migrated/hrs_toolbox_concept_note_academia_may2018.pdf).

53 See UPR Info website <https://www.upr-info.org/en/get-involved/academia/role>.

54 René Urueña, “International Law as Expert Knowledge: Exploring the Changing Role of International Lawyers in National Contexts,” in *International Law as a Profession*, eds. Jean d’Aspremont et al., 1st ed. (Cambridge University Press, 2017), 389, <https://doi.org/10.1017/9781316492802.017>.

55 United Nations, “Charter of the United Nations and Statute of the International Court of Justice,” San Francisco, 26 June 1945, <https://treaties.un.org/doc/publication/ctc/uncharter.pdf>.

pointing out gaps and giving direction to the law-making process.<sup>56</sup> Therefore, they have a particular (sometimes imperceptible) influence on international law-making and law enforcement.<sup>57</sup> International lawyers are often not merely “scholars”, but are also international judges, government officials and members of various international entities. After all, the members of the International Law Commission are distinguished professors of international law.

The voice of international lawyers is also expressed collectively. For example, the Institute of International Law (IIL)<sup>58</sup> and the International Law Association are also composed of experts in international law and their contribution to the final shape of the international law norm is significant. The IIL’s resolutions are then brought to the attention of governments, IGOs and the scientific community. For 150 years already, the institute has been explaining the characteristics of the *lex lata* in order to promote its respect and provides *de lege ferenda* contributions in various branches of international law, including human rights.<sup>59</sup> A tangible example is also the ILA’s output<sup>60</sup> to the shape of the Declaration of the Rights of Indigenous Peoples of 2007.<sup>61</sup>

Thus, to sum up, international legal scholars have the potential to affect a future convention on the rights of older persons. However, in the discussed

56 Jean D’Aspremont, *Epistemic Forces in International Law: Foundational Doctrines and Techniques of International Legal Argumentation*, Elgar International Law (Cheltenham, UK: Edward Elgar Publishing, 2015), 27.

57 Gleider Hernández, “The Responsibility of the International Legal Academic: Situating the Grammarian Within the ‘Invisible College,’” in *International Law as a Profession*, eds. Jean d’Aspremont et al., 1st ed. (Cambridge University Press, 2017), 160–88, <https://doi.org/10.1017/9781316492802.008>; Oscar Schachter, “Invisible College of International Lawyers,” *Northwestern University Law Review*, 72, no. 2 (1978 1977): 217–18; Uruena, “International Law as Expert Knowledge”.

58 See the list of current IIL activities at <https://www.idi-iil.org/en/a-propos/>.

59 Gerald Fitzmaurice, “The Contribution of the Institute of International Law to the Development of International Law,” (The Hague: Koninklijke Brill NV, 1973), [https://doi.org/10.1163/1875-8096\\_pp1rdc\\_A9789028602540\\_06](https://doi.org/10.1163/1875-8096_pp1rdc_A9789028602540_06).

60 Timo Koivurova, Federico Lenzerini, and Siegfried Wiessner, “The Role of the ILA in the Restatement and Evolution of International and National Law Relating to Indigenous Peoples,” in *International Actors and the Formation of Laws*, eds. Katja Karjalainen, Iina Tornberg, and Aleksi Pursiainen (Cham: Springer International Publishing, 2022), 89–112, [https://doi.org/10.1007/978-3-030-98351-2\\_5](https://doi.org/10.1007/978-3-030-98351-2_5).

61 UN General Assembly, “United Nations Declaration on the Rights of Indigenous Peoples,” 13 September 2007, A/RES/61/295.



field, the joint efforts of representatives of many academic disciplines are likely to be needed when it comes to advocating for the human rights of older persons.

A field where one can see the active influence of “academia” from a range of academic disciplines is, of course, the OEWGA. One only needs to trace the reports of the various sessions and the expert reports provided by scholars. Here, just two of them are discussed.

Of particular note is the Chicago Declaration on the Rights of Older Persons adopted as the conclusion of the 2014 International Elder Law and Policy Conference organised by the John Marshall Law School, Roosevelt University of Chicago, College of Arts and Sciences, and the East China University of Political Science and Law (Shanghai, China).<sup>62</sup> The declaration was submitted at the 5<sup>th</sup> OEWGA session in August 2014.<sup>63</sup> The main purpose of this declaration is to provide, advance and promote the basis for developing a treaty on older persons’ rights and promote respect for their dignity. That is why respect for inherent dignity is the first principle of the declaration. Other principles include respect for individual autonomy – including the freedom to make one’s own choices, non-discrimination and equality under law, intergenerational solidarity, respect for the independence and capabilities of older persons, as well as interdependence and caring relationships, family relationships and respect for ageing as an integral and continuous part of life. From the perspective of this book, attention should be drawn to the principle of respect for full and effective participation and inclusion in society.

The proposed declaration contains a long list of rights and prohibitions that make equality, non-discrimination and equal opportunity for older persons real. It proclaims *expressis verbis* their inclusion and participation in society. In the part dedicated to independent living, the authors of the declaration pointed out crucial elements of social inclusion in terms of older persons’ choice to facilitate full inclusion and participation in the community, access to in-home formal or informal care and other community support services that are responsive to their needs. Moreover, the older persons’ “right to participate

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62 Janice D. Schakowsky, “The Draft of the Chicago Declaration on the Rights of Older Persons, 11 July 2014,” Pub. L. No Congressional Record Volume, § Extensions of Remarks, 160 issue 118 E1234 (2014), <https://www.govinfo.gov/app/details/CREC-2014-07-25/CREC-2014-07-25-pt1-PgE1234-4>.

63 The text available at <https://social.un.org/ageing-working-group/fifthsession.shtml>

fully in all aspects of life, including equal access to the physical environment, transportation, information, communications, technology, and other facilities and services open to the public” is also stipulated in Article 2(h).

Mirroring the image of the rights and freedoms of older persons are the obligations of the states. The declaration not only lists states’ duties, but also clarifies certain ambiguities regarding the nature of economic, social, and cultural rights, explaining that states “should take measures to the maximum of its available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively the full realisation of these rights, without prejudice to those obligations contained in the present Declaration that are immediately applicable under international law (Article 3 b)”.

Moreover, the declaration addresses the problem of the multiple forms of discrimination and the needs of older populations with specific vulnerabilities. A special section is dedicated to ageism, the elimination of prejudices and stereotypes and a general raising of awareness about older persons’ rights and dignity.<sup>64</sup>

Taking into consideration the potential of international law, the final provision of the declaration is worth mentioning. It calls for states to recognise the importance of international and regional cooperation, and to provide support for achieving the declaration’s purposes and objectives. Moreover, it calls on each state to recognise “the importance of inclusion of older persons in the formulation of national, regional, and international cooperation and development programs” (Article 9).

The second selected example is the discussion paper on the right of older persons to work and access the labour market developed by an informal group of scholars and NGO researchers submitted to the 11<sup>th</sup> OEWGA session. This initiative supports the idea of a convention on the rights of older persons, enriching its contents with crucial normative elements. The submission explores issues relating to the participation of older persons in the labour market, in particular the barriers to their access and participation in paid work, as well as forced retirement. The paper refers to unpaid work in formal and informal

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64 Eugenio Mantovani, Paul Quinn, and Paul de Hert, “Stereotyping and Other ‘Forms of Discrimination’ in the Chicago Declaration on the Rights of Older Persons and in the Case Law of the European Court of Human Rights,” in *Ageing, Ageism and the Law European Perspectives on the Rights of Older Persons*, eds. Israel Doron and Nena Georgantzi (Cheltenham, UK; Northampton, MA: Edward Elgar Publishing Limited, 2018), 116–21.

economies, including caring and volunteer work. The authors pointed out the specific situation of older women facing heightened discrimination. The last part of this paper contains a list of recommendations on the recognition of older persons' rights to work and their rights within employment. It also indicates states' obligations in areas of legal guarantees, non-discrimination and equality, availability and accessibility, remedies and redress, and finally, informal or unremunerated work. The elimination of ageist assumptions and prejudice, and the development of age-inclusive and age-diverse workplaces are among these obligations.<sup>65</sup>

The Jerusalem Declaration on Ageing 2020 is an example of a different type. It is the outcome of the Anglo-Israel Colloquium, which brought together scholars, policymakers, and service providers in the field of ageing from the UK and Israel, in order to critically examine the societal effects and implications of both individual and population ageing. The declaration calls for policymakers to take steps to reduce inequalities resulting from systematic differences in health, employment and life expectancy between countries, between socio-economic groups, between men and women within countries and between different ethnic, religious and cultural groups.<sup>66</sup> Due to its transnational character, the declaration may, at least potentially, contribute to shaping views across borders.

Similarly, states and international entities may draw on the achievements of more or less formal scientific networks, as well as the results of scientific projects, including those funded by the European Union. Examples include such projects as EuroAgeism<sup>67</sup> and COST Action on Ageism,<sup>68</sup> as well as the

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65 Andrew C. Byrnes et al., "The Right of Older Persons to Work and to Access the Labour Market. Submission to the Eleventh Session of the United Nations General Assembly Open-Ended Working Group of Ageing (6 to 9 April 2020)," *UNSW Law Research Paper No. 19-101*, 2019, 1–26, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3504975](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3504975).

66 Sarah Harper and Issi Doron, "The Jerusalem Declaration on Ageing 2020 to Share in English, Arabic and Hebrew," *Journal of Population Ageing*, 15, no. 2 (June 2022): 515–22, <https://doi.org/10.1007/s12062-021-09347-1>.

67 Euroageism - Marie Skłodowska-Curie - Innovative Training Network (2017–2021) financed from the European Union's Horizon 2020 research and innovation programme (<https://euroageism.eu/>). <https://cordis.europa.eu/project/id/764632/pl> COST (European Cooperation in Science and Technology) is a funding organisation for research and innovation networks, <https://www.cost.eu/actions/IS1402/>.

68 Project conducted in 2014–2018 in the framework of COST (European Cooperation in Science and Technology) which is a funding organisation for research and innovation networks, <https://www.cost.eu/actions/IS1402/>; see also <http://notoageism.com>.

ROSEnet (Reducing Old-Age Social Exclusion: Collaborations in Research and Policy), mentioned at the beginning of this book, which focused on exclusion in economic, social, services, civic-rights and community and spatial domains.<sup>69</sup> These are all huge research projects involving many academics from various disciplines as well as other stakeholders (NGOs and healthcare entities). On the other hand, there are also smaller projects, sometimes being the outcomes of personal insight, though with the potential to change approaches to human ageing. Here, the example of Professor Israel Doron's project on "ageivism" is worth indicating. He describes "ageivism" as an ideology serving as the basis for calls for social action on the protection and promotion of the rights of older persons based on the grounds of political, social and economic principles of identity, dignity and social justice. Ageivism focuses on the importance of political self-identity and social activism of older persons.<sup>70</sup>

Another of the researchers' projects is an index of human rights of older persons (the IOPHRI), which fully addresses the social inclusion of older people. It aims to measure and compare the human rights of older persons in different legal systems.<sup>71</sup>

Teaching and learning are other faces of "academia". Academics dealing with international law are often not "only" teachers, as international law is a multi-modal activity.<sup>72</sup> There are also practitioners and human rights activists. There is a good reason why universities have been called "human rights agents".<sup>73</sup>

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69 Project conducted in 2016–2020 in the framework of COST <http://rosenetcost.com/about/>.

70 Israel Doron, "Re-Thinking Old Age: Time for Ageivism," *Human Rights Defender*, 27, no. 1 (2018): 33–35, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3195305](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3195305).

71 See more: Benny Spanier and Israel Doron, "From Well-Being to Rights: Creating and International Older Persons' Human Rights Index (IOPHRI)," *The Elder Law Journal*, 24, no. 2 (2017): 245–92; I Doron et al., "National and International Human Rights of Older Persons INDEX (IOPHRI)," *Innovation in Aging*, 2, no. suppl\_1 (1 November 2018): 526–526, <https://doi.org/10.1093/geroni/igy023.1945>; Doron et al.; Israel Doron, Carole Cox, and Benny Spanier, "Comparing Older Persons' Human Rights: Exploratory Study of the International Older Persons' Human Rights Index (IOPHRI)," *The Gerontologist*, 59, no. 4 (16 July 2019): 625–34, <https://doi.org/10.1093/geront/gny080>.

72 Pierre d'Argent, "Teachers of International Law," in *International Law as a Profession*, eds. Jean d'Aspremont et al., 1st ed. (Cambridge University Press, 2017), 412, <https://doi.org/10.1017/9781316492802.018>.

73 Stephanie Lagoutte and Danielle Soskin, "The Role of Academia in Human Rights' Protection and Promotion," *Matters of Concern. Human Rights Research Papers*, no. 2 (2018): 7, <https://doi.org/10.2139/ssrn.3218324>.

Thus, the human rights of older persons may emerge in the framework of general human rights courses, but in many countries, universities have separate courses or even studies in elder law. Today, it is a known and recognised field of expertise and specialisation within the legal discipline. What is more, it tends to cover more and more areas, such as economic and legal issues around retirement, the finance of long-term care and healthcare, estate tax, new technologies, artificial intelligence supporting people with dementia and many others.<sup>74</sup>

From the perspective of the human right to court, especially for those people who cannot afford legal aid, incorporating legal aid clinics into law curriculums is important. Through assistance provided by law teachers and students, the most marginalised groups within society, including older persons, have an alternative means to protect their human rights. This activity is tangibly linked with achieving human rights and social justice in society.<sup>75</sup> Students providing legal aid for older persons will become lawyers, and some of them may become international legal lawyers understanding the nuances of the protection of the human rights of older persons. The UN High Commissioner for Human Rights described legal aid provided by students as one of the “promising practices” and important from an intergenerational perspective: “The use of law student clinics, paralegal workers and volunteer intermediaries was observed to provide opportunities for access to justice in places such as regional and rural areas. In some cases, intergenerational models had young people providing services to older persons”.<sup>76</sup>

Finally, taking into account the broad definition of academia, the Universities of the Third Age (U3A) should be taken into account. Regardless of how they act, whether as parts of universities or as independent NGOs, they improve the psychological well-being of their students and diminish the risk of social exclusion on the basis of their chronological age. There is little doubt that attending U3A helps older persons to regain power over their own lives

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74 Israel Doron, “25 Years of Elder Law: An Integrative and Historical Account of the Field of Law and Aging,” *Theoretical Inquiries in Law*, 21, no. 1 (2019): 88–89, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3526797](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3526797).

75 Stephanie Lagoutte and Danielle Soskin, “The Role of Academia in Human Rights’ Protection and Promotion,” *SSRN Electronic Journal*, 33 (2018), <https://doi.org/10.2139/ssrn.3218324>.

76 OEWGA, “Substantive Inputs on the Focus Area ‘Access to Justice’ Working Document Submitted by the Office of the High Commissioner for Human Rights,” 8th March 2021, OEWGA 11th Session A/AC.278/2021/CRP.4, [https://social.un.org/ageing-working-group/documents/eleventh/A\\_AC.278\\_2021\\_CRP.4.pdf](https://social.un.org/ageing-working-group/documents/eleventh/A_AC.278_2021_CRP.4.pdf).

and empowers learners through exposure to the politics of daily living.<sup>77</sup> It also means that the Universities of the Third Age – known as “the Largest University in the World”<sup>78</sup> – have the potential to strengthen the capacity of older persons to demand their rights at an international level.<sup>79</sup>

#### 4. National Human Rights Institutions

National Human Rights Institutions (NHRIs) are important actors with the potential to strengthen social inclusion and older persons’ ability to exercise their human rights. They function in modern democracies as bodies with a statutory or even constitutional mandate to protect human rights, the rule of law and good governance. The model and scope of NHRIs’ activities vary significantly from country to country.<sup>80</sup> There are ombudsman-type monocratic institutions and collective entities such as commissions or institutes for human rights, or possibly a combination of the two. Sometimes they are composed of experts with an NGO background and representatives of ministerial departments. Most of the heads of NHRIs are elected by the parliament, which also supervises their work.<sup>81</sup> Thus, they belong to the state apparatus, so they cannot be classified as “non-state actors”.<sup>82</sup> Given that states are both the main “makers” and at the same time “breakers” of international law, the

77 Marvin Formosa, ed., *The University of the Third Age and Active Ageing: European and Asian-Pacific Perspectives*, International Perspectives on Aging (Cham: Springer International Publishing, 2019), 7, <https://doi.org/10.1007/978-3-030-21515-6>.

78 Marvin Formosa, ed., *The University of the Third Age and Active Ageing: European and Asian-Pacific Perspectives*, International Perspectives on Aging (Cham: Springer International Publishing, 2019), vii, <https://doi.org/10.1007/978-3-030-21515-6>.

79 See also activity of the International Association of Universities of the Third Age <https://www.aiu3a.org/v2/index-en.html>.

80 Ryan M. Welch, Jacqueline H. R. DeMeritt, and Courtenay R. Conrad, “Conceptualizing and Measuring Institutional Variation in National Human Rights Institutions (NHRIs),” *Journal of Conflict Resolution*, 65, no. 5 (May 2021): 1012, <https://doi.org/10.1177/0022002720982349>.

81 Luka Glušac, “The Role of National Human Rights Institutions in Post-Legislative Scrutiny,” *European Journal of Law Reform*, 21, no. 2 (March 2019): 157, <https://doi.org/10.5553/EJLR/138723702019021002006>.

82 Rachel Murray, *The Role of National Human Rights Institutions at the International and Regional Levels: The Experience of Africa*, Human Rights Law in Perspective (Oxford; Portland, Or: Hart, 2007), 59; Steven LB Jensen, Stéphanie Lagoutte, and Sébastien Lorion, “The Domestic Institutionalisation of Human Rights: An Introduction,” *Nordic Journal of Human Rights*, 37, no. 3 (3 July 2019): 165–76, <https://doi.org/10.1080/18918131.2019.1682235>.

situation of NHRIs is peculiar.<sup>83</sup> If they are to be effective, i.e. to promote and protect human rights at the national and local level, as well as control public administration and its compliance with human rights obligations, they must be financially, legally and organisationally independent from governments.<sup>84</sup> The independence of NHRIs, their credibility and enjoyment of social recognition<sup>85</sup> place them between the sphere of civil society and government, and this can stimulate cooperation between state and non-state human rights actors.<sup>86</sup>

The status of NHRIs is determined not only by national legislation but also by soft international law, particularly by the Paris Principles Relating to the Status and Functioning of National Institutions for the Protection and Promotion of Human Rights adopted by the UNGA in 1993.<sup>87</sup> On the European forum, NHRIs are of interest to the European Union,<sup>88</sup> the OSCE,<sup>89</sup> and obviously the Council of Europe. Since late 1990s, the Council of Europe institutions have been adopting resolutions, recommendations, and guidelines relating to the role and position of NHRIs, establishing formal cooperation with them,<sup>90</sup> and defending their independence.<sup>91</sup>

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83 Sonia Cardenas, "Emerging Global Actors: The United Nations and National Human Rights Institutions," *Global Governance*, 9, no. 1 (2003): 23, <https://doi.org/10.2307/27800462>.

84 Andrew Wolman, "Sub-National Human Rights Institutions and the Domestication of International Human Rights Norms," *Netherlands Quarterly of Human Rights*, 33, no. 2 (June 2015): 225, <https://doi.org/10.1177/016934411503300206>.

85 Sebastián López Escarcena, "Los Principios de París y Las Instituciones Nacionales de Derechos Humanos En América Latina," *Revista Derecho Del Estado*, no. 52 (28 April 2022): 93, <https://doi.org/10.18601/01229893.n52.03>.

86 Gauthier de Beco, "Networks of European National Human Rights Institutions," *European Law Journal*, 14, no. 6 (November 2008): 861, <https://doi.org/10.1111/j.1468-0386.2008.00445.x>.

87 UN General Assembly. "Principles Relating to the Status and Functioning of National Institutions for the Protection and Promotion of Human Rights (The Paris Principles) Resolution 1992/54," 20 December 1993, A/RES/48/134.

88 Council of the European Union, "Council Conclusions on the Charter of Fundamental Rights after 10 Years: State of Play and Future Work," 12357/19, Brussels, 20 September 2019.

89 OSCE, "Organization for Security and Co-Operation in Europe, Strengthening the Resilience of National Human Rights Institutions Guidance Tool," 26 August 2022, <https://www.osce.org/odihr/524340>.

90 de Beco, "Networks of European National Human Rights Institutions," 863.

91 Venice Commission, "European Commission for Democracy through Law (Venice Commission), Principles on the Protection and Promotion of the Ombudsman Institution ('The Venice Principles')," (Council of Europe, 2019), [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2019\)005-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2019)005-e).

Thus, under the Paris Principles and other international documents, such as those adopted on the Council of Europe forum, NHRIs have an explicit human rights mandate and the ability to investigate allegations, integrate state law with international human rights law, provide advice on domestic legislation, participate in legislative review, inform about states' practices and efforts to combat all forms of discrimination, promote human rights through public education, and interact with international organisations and civil society. In general, NHRIs play a crucial role in domesticating international human rights law,<sup>92</sup> and in increasing public awareness, especially through information, education and making use of all press organs.<sup>93</sup>

NHRIs are responsible, among other things, for cooperation with the United Nations and any other international and national organisations in the areas of the protection and promotion of human rights. As an important source of independent information on the human rights situation in a given country, they are involved in reporting to treaty bodies and the Human Rights Procedures, and in monitoring the implementation of the ECtHR's judgments.<sup>94</sup> Under the Optional Protocol to the Convention Against Torture (OPCAT),<sup>95</sup> NHRIs act as independent national preventive mechanisms for the prevention of torture at the domestic level.<sup>96</sup> The Convention on the Rights of Persons with Disabilities explicitly assigns a role to NHRIs in its implementation or monitoring (Article

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92 R. Carver, "A New Answer to an Old Question: National Human Rights Institutions and the Domestication of International Law," *Human Rights Law Review*, 10, no. 1 (1 March 2010): 1-32, <https://doi.org/10.1093/hrlr/ngp040>; Wolman, "Sub-National Human Rights Institutions and the Domestication of International Human Rights Norms"; Jensen, Lagoutte, and Lorion, "The Domestic Institutionalisation of Human Rights".

93 OHCHR, "National Human Rights Institutions: History, Principles, Roles and Responsibilities," Manual and Guideline, Professional Training Series No. 4 (Geneva: OHCHR, 2010), Glušac, "The Role of National Human Rights Institutions in Post-Legislative Scrutiny".

94 Elif Erken, "Non-Governmental Organisations and National Human Rights Institutions Monitoring the Execution of Strasbourg Judgments: An Empirical Perspective on Rule 9 Communications," *Human Rights Law Review*, 21, no. 3 (1 July 2021): 724-51, <https://doi.org/10.1093/hrlr/ngab007>.

95 United Nations, "Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment," New York, 18 December 2002 (UNTS. vol. 2375, p. 237).

96 Katerina Linos and Tom Pegram, "Architects of Their Own Making: National Human Rights Institutions and the United Nations," *Human Rights Quarterly*, 38, no. 4 (2016): 1110, <https://www.jstor.org/stable/44488961>.



33 sec. 2).<sup>97</sup> NHRIs are also important actors in the implementation of the UN Declaration on the Rights of Indigenous Peoples.<sup>98</sup> Therefore, older persons may expect NHRIs to advocate for the respect, protection and fulfilment of the rights of older people at a national level, but will also take action at the international level to promote their rights.

Thus, at a national level, NHRIs can press state authorities into changing their approach towards older citizens by adopting efficient ageing policies. The NHRIs have a duty, among other things, to react to violations of older persons' rights in individual cases, as well as violations arising from the legal system or social policies. As intermediaries between the international and domestic levels of human rights protection, they may exert an influence in terms of engagement with the treaty on the rights of older persons<sup>99</sup> and sensitise the public to the need for such ratification to bring further pressure on the state.<sup>100</sup>

At an international level, NHRIs act independently or in coalitions, and these have bigger potential to affect the states' position. NHRIs created the Global Alliance of National Human Rights Institutions – GANHRI to coordinate the relationship between NHRIs and the UN human rights system. The Working Group on Ageing, consisting of eight members, acts within GANHRI to support NHRIs' contribution to the OEWSGA, and foster advocacy efforts for the extension of formal participation rights for NHRIs internationally when promoting the idea of a binding instrument on the rights of older persons.<sup>101</sup>

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97 Elisabeth Kamundia and Faizah Sidi, "The Role of National Human Rights Institutions in Advancing Article 19 of the UN Convention on the Rights of Persons with Disabilities," *African Disability Rights Yearbook* 8 (2020): 52–70, <https://doi.org/10.29053/2413-7138/2020/v8a3>.

98 Brenda L. Gunn, "Engaging National Human Rights Institutions in Implementing the UN Declaration on the Rights of Indigenous Peoples," CIGI Papers (Waterloo, Canada: Centre for International Governance Innovation, 2018), <https://reliefweb.int/report/world/engaging-national-human-rights-institutions-implementing-un-declaration-rights>.

99 Mirosław Wróblewski, "Ochrona Praw Osób Starszych w Działalności Rzecznika Praw Obywatelskich Jako Krajowej Instytucji Ochrony Praw Człowieka," *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 74, no. 3 (2 November 2018): 128–38, <https://doi.org/10.14746/rpeis.2012.74.3.8>; Barbara Mikołajczyk, "Addressing Ageism in Polish Ageing Policy – Critical Remarks," *Research on Ageing and Social Policy*, 11, no. 1 (2023): 93, <http://10.4471/rasp.11226>.

100 Murray, *The Role of National Human Rights Institutions at the International and Regional Levels*, 40.

101 In 2023, NHRIs from Peru, El Salvador, Korea, Philippines, Georgia, Poland, Kenya, Nigeria, Egypt. See more: <https://ganhri.org/working-group-ageing/>.

At a European level, NHRIs established the European Network of National Human Rights Institutions (ENNHRI) providing a platform for collaboration, exchange and solidarity in addressing human rights challenges for NHRIs across Europe. ENNHRI facilitates peer learning and capacity-building activities for its members. It also provides technical advice and practical assistance to members preparing for accreditation with GANHRI. ENNHRI offers its members a formal channel for shaping regional agendas and representing the NHRIs' interests in the region and at the UN forums.<sup>102</sup> Most importantly for the discussed problem, older persons' issues are in the ENNHRI Strategic Plan for 2022–2025.<sup>103</sup> The ENNHRI Core Group on Human Rights of Older Persons draws up reports, handbooks, briefings and policy papers in areas that are crucial for older persons and serves as an information and co-ordination hub in the advocacy work of NHRIs.<sup>104</sup>

NHRIs have been present at the OEWGA's sessions from the beginning, though their position in the first meetings was fairly weak. The situation changed in 2015 when the UN General Assembly adopted a resolution on the role of national human rights institutions in promoting human rights.<sup>105</sup> The next year, the Human Rights Council took a position on the same issue,<sup>106</sup> and the OEWGA itself also regulated the rules for the participation of the NHRIs in its work.<sup>107</sup> Undoubtedly, the NHRIs' formal presence at the OEWGA's sessions has

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102 Corina Lacatus, "Regulatory Networks and Regional Human Rights Governance: A Study of the European Network of National Human Rights Institutions," *International Relations*, 36, no. 2 (June 2022): 207, <https://doi.org/10.1177/00471178211052880>.

103 ENNHRI, "European Network of National Human Rights Institutions, Strategic Plan 2022–2025," 2022, [https://ennhri.org/wp-content/uploads/2022/03/ENNHRI-Strategic-Plan-2022-2025\\_ADOPTED.pdf](https://ennhri.org/wp-content/uploads/2022/03/ENNHRI-Strategic-Plan-2022-2025_ADOPTED.pdf).

104 For example "Applying a Human Rights-Based Approach to Long-term Care for Older Persons: A Toolkit for Care Providers," (2017); "We Have the Same Rights" – Human Rights of Older Persons in Long-term Care in Europe (2017); ENNHRI Policy Brief: The CRPD and Older Persons with Disabilities – The Transition to Community-Based Long-term Care Services, (2016); Human Rights of Older Persons: Review of Previous NHRI Findings, September (2015).

105 UN General Assembly, "National Institutions for the Promotion and Protection of Human Rights," 17 December 2015, A/RES/70/163.

106 Human Rights Council, "National Institutions for the Promotion and Protection of Human Rights," 29 September 2016, A/HRC/RES/33/15.

107 OEWGA, "Open-Ended Working Group on Ageing, Modalities of Participation of National Human Rights Institutions in the Work of the Open-Ended Working Group on Ageing," 1 December 2016, A/AC.278/2016/L.1, <https://digitallibrary.un.org/record/850390>.

made these preliminary negotiations more credible and provides a new quality to the OEWGA's work.<sup>108</sup> Usually, they contain an analysis of national legal solutions and (good) practices in the areas of the OEWGA's concern. However, ENNHRI and GANHRI usually provide synthesis reports and recommendations.

For example, in 2017, ENNHRI and over twenty NHRIs submitted contributions in two areas – “equality and non-discrimination” and “neglect, violence and abuse”.<sup>109</sup> The following year, 2018, GANHRI prepared analyses and recommendations for the OEWGA on autonomy, independence, non-discrimination, long-term and palliative care.<sup>110</sup>

In 2019, NHRIs submissions were dedicated to long-term care and palliative care as well as the autonomy and independence of older persons. It is worth noting the joint submission of the German Institute for Human Rights (GIHR) and the Commissioner for Human Rights of the Republic of Poland. Their input is a proposal for the inclusion of the most relevant elements in the future convention in the areas to which the 10th OEWGA session was dedicated.

They proposed the dignity, autonomy and independence of older persons and non-discrimination as the principles stipulated in a new treaty. They also determined the conditions that the new convention on older persons' rights should satisfy:

- a) The new instrument should not lower existing international human rights standards.
- b) A new convention needs to declare clearly that States are the duty bearers.
- c) The instrument should state that the rights holders are older persons, who constitute a heterogeneous group of persons of various capabilities and needs.
- d) The new instrument should stress the positive potential of older persons and guarantee the enjoyment of their capabilities and human rights on an equal basis.

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108 Annie Herro, “Advocating a UN Convention on the Rights of Older Persons in the United Kingdom: The Case for a Radical Flank,” *Journal of Human Rights Practice*, 11, no. 1 (2019): 133, <https://doi.org/10.1093/jhuman/huz001>; Claudia Mahler, “Protecting and Promoting the Rights of Older Persons through NHRIs,” *Human Rights Defender*, 27, no. 1 (2018): 31.

109 See more: <https://social.un.org/ageing-working-group/eighthsession-inputnhris.shtml>.

110 GANHRI, “Contribution of The Global Alliance of National Human Rights Institutions to the Ninth Session of the United Nations General Assembly Open-Ended Working Group on Ageing,” New York, 23–26 July 2018, <https://social.un.org/ageing-working-group/documents/ninth/FinalGANHRIpaper.pdf>.

e) The instrument should indicate the changing technologies which will play a role in the lives of older persons and ageing societies in the future and frame them in the context of human rights.<sup>111</sup>

Moreover, both NHRIs indicate the normative elements of the older persons' right to long-term care and palliative care as well as the normative elements of autonomy and independence. In addition, they describe steps which should be taken in the discussed areas.

In subsequent years, the NHRIs' inputs referred to the rights to work, the access to justice, education, social protection, the contribution of older persons to sustainable development and economic security. Finally, the 13<sup>th</sup> OEWSGA session was dedicated to social inclusion.

In December 2022, ENNHRI presented the "Guidance paper – how European NHRIs can work towards a new UN Convention on the Human Rights of Older Persons", which indicates how the European NHRIs can advocate at the national, regional and international levels in favour of a new convention. ENNHRI proposes that NHRIs: inform their governments and civil society of recent developments; cooperate with international and regional CSOs networks and NGOs at the national level; ask their governments to voice support at the next OEWSGA session in April 2023 for the decision to establish an Intersessional Working Group that would prepare a document on gaps in the international legal framework, as a procedural step forward in fulfilling the OEWSGA's mandate; advise their governments of the need for a new binding instrument and encouraging authorities to cooperate more closely with delegations fostering the idea of a new convention; advocate stronger engagement by their government at a regional level, on both procedural progress and support for the new convention at the Council of the European Union forums and at all levels of the work at the UN; support the UN Independent Expert and take part

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111 GIHR and Commissioner for Human Rights, "German Institute for Human Rights and Commissioner for Human Rights of the Republic of Poland, The Key Elements of the Normative Content for the Development of a Possible International Standard on the Protection of the Rights of Older People to Long Term Care and Palliative Care and the Right to Autonomy and Independence," 2019, 1, [https://social.un.org/ageing-working-group/documents/tenth/Inputs%20NHRIs/Joint\\_Submission\\_Key%20elements\\_LTCPC\\_AI-%20German\\_and\\_Polish\\_NHRIs.pdf](https://social.un.org/ageing-working-group/documents/tenth/Inputs%20NHRIs/Joint_Submission_Key%20elements_LTCPC_AI-%20German_and_Polish_NHRIs.pdf).

in the Human Rights Council's procedures to call for stronger protection of the human rights of older persons, also in the cases of intersectionality.<sup>112</sup>

Like a lens, this document shows the capabilities and potential of NHRIs on the international stage. The specific positioning of NHRIs within state structures may result in NHRIs having a greater impact on governments in terms of working on the convention, and generally perceiving the rights of older people, than NGOs and academia.

## 5. Local governments

International documents, reports and studies relating to older persons' rights promote "ageing in place", which usually means living at home as long as possible,<sup>113</sup> as well as "active ageing" and "independent living", often linking these goals with local governments or self-governments, local authorities, local communities, cities or municipalities.<sup>114</sup> For example, in the WHO and EU handbook on age-friendly environments in Europe, we can read that

Municipal and local government services are critical in ensuring communication and coordination across sectors. Furthermore health, care and community services that are delivered by the local authority to older people are essential for promoting healthy ageing and enabling a dignified life. Services from all different sectors and actors of the community need to be well integrated in order not to create unnecessarily high demand on older people.<sup>115</sup>

Despite the fact that local governments operate locally, they are placed in the structure of a given state, where the state is responsible for the behaviour

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112 ENNHRI, "European Network of National Human Rights Institutions, Strategic Plan 2022–2025".

113 Sojung Park et al., "Ageing in Place of Vulnerable Older Adults: Person–Environment Fit Perspective," *Journal of Applied Gerontology*, 36, no. 11 (November 2017): 1327–50, <https://doi.org/10.1177/0733464815617286>.

114 UNDESA, *World Social Report 2023: Leaving No One Behind in An Ageing World* (United Nations, 2023).

115 WHO and European Commission, "Age-Friendly Environments in Europe A Handbook of Domains for Policy Action," 8. <https://apps.who.int/iris/bitstream/handle/10665/334251/9789289052887-eng.pdf>.

of its local units.<sup>116</sup> The CESCR, in its general comment No 16, emphasised that “[v]iolations of the rights contained in the Covenant can occur through the direct action of, failure to act or omission by States parties, or through their institutions or agencies at the national and local levels”.<sup>117</sup>

Thus, on the surface, there might be no point in considering the potential of local governments to improve older persons’ social inclusion from an international law perspective, as they are just parts of states whose duties were analysed in the previous chapters. On the other hand, local public administration can be exercised by local self-government entities (e.g. municipalities) and local units of state administration. The former are directly elected by the local population and usually enjoy wide-ranging autonomy based on the principle of decentralisation. The local state administration, on the other hand, is based on the principle of deconcentration.<sup>118</sup> In both cases, they enjoy (or should enjoy) a certain degree of independence and can act internationally (e.g. cooperating with foreign municipalities or regions) and conduct their own social and ageing policy. They also have a certain margin of freedom in shaping their human rights-based approach. In a resolution of 2018, the Human Rights Council encourages the interaction and exchange of knowledge between local authorities and local stakeholders (mainly local civil society organisations) to implement programmes aimed at achieving Sustainable Development Goals and ensuring the participation of local stakeholders in public affairs.<sup>119</sup> In a resolution of 2020, the council emphasised the essential role of self-local government in ensuring a human rights-compliant response to the COVID-19 pandemic at a local level.<sup>120</sup>

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116 Human Rights Council, “Role of Local Government in the Promotion and Protection of Human Rights – Final Report of the Human Rights Council Advisory Committee,” 7 August 2015, A/HRC/30/49, para. 8, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/174/88/PDF/G1517488.pdf?OpenElement>.

117 CESCR, “General Comment No 16: The Equal Rights of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3),” 11 August 2005, E/C.12/2005/4, para. 42.

118 Human Rights Council, “Role of Local Government in the Promotion and Protection of Human Rights – Final Report of the Human Rights Council Advisory Committee,” 7 August 2015, A/HRC/30/49, para.11.

119 Human Rights Council, “Resolution Adopted by the Human Rights Council - Local Government and Human Rights,” 27 September 2018, A/HRC/RES/39/7.

120 Human Rights Council, “Resolution Adopted by the Human Rights Council - Local Government and Human Rights,” 6 October 2020, A/HRC/RES/45/7.

Indeed, the pandemic revealed the crucial role of local governments, which performed various functions as part of activities supporting older adults when assistance received by older adults from their family members proved impossible or insufficient. Units of local governments acted as initiators, coordinators, financing entities or executors.<sup>121</sup>

Local (self) governments are present at the international level in a twofold manner. First, their position is addressed on intergovernmental organisations' forums, treaties, resolutions, and other documents adopted by international bodies or in programmes and strategies. Second, the local units take part in "global governance", taking action over borders, conducting their own diplomacy<sup>122</sup> and even implementing agreements adopted in international fora.

In 2019, following the Human Rights Council resolution of 2018, the UN High Commissioner for Human Rights presented her report on local governments (understood as self-government) and human rights. She highlighted that while the central government is primarily responsible for promoting and protecting human rights, local governments have an important complementary role to play. Both states and local authorities should enable, including through capacity building, civil society actors to effectively exercise their right to participate in public affairs and to meaningfully engage with local authorities on human rights issues. Concerning older persons and persons with disabilities, the commissioner affirmed that local governments, through implementing their policies and programmes, play a critical role in ensuring the participation of persons with disabilities and older persons. Furthermore, local governments should be increasingly involved in the work of regional and international hu-

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121 Anita Richert-Kaźmierska, "Support for Older Adults during COVID-19. How Did Local Authorities in the Pomeranian Region Respond to the Challenge?," in *Ageing and COVID-19: Making Sense of a Disrupted World*, eds. Maria Łuszczynska and Marvin Formosa, 1st ed. (London: Routledge, 2021), 141, <https://doi.org/10.4324/b22774>; Radosław Mędrzycki, "Standards of Public Administration Services for the Elderly A Lesson in Pandemic Time," in *Instruments of Public Law: Digital Transformation during the Pandemic*, eds. Irena Lipowicz, Grażyna Szpor, and Aleksandra Syryt, Routledge Research in EU Law (London; New York: Routledge, Taylor & Francis Group, 2023), x.

122 Rogier van der Pluijm and Jan Melissen, *City Diplomacy: The Expanding Role of Cities in International Politics*, Clingendael Diplomacy Papers, no. 10 (The Hague: Netherlands Institute of International Relations "Clingendael," 2007), 6.

man rights mechanisms, especially the UPR, and the implementation of recommendations formulated in this process.<sup>123</sup>

Older persons are clearly visible in the outcomes of the United Nations Conferences on Human Settlements (Habitat II) and on Housing and Sustainable Urban Development (Habitat III), as well as in the United Nations Human Settlements Programme (UN-Habitat). The New Urban Agenda (Habitat III)<sup>124</sup> addresses older persons' needs by calling for age-responsive planning and universal design. The states and other stakeholders, including local governments, should promote equitable and affordable access to sustainable basic physical and social infrastructure for all, without discrimination (also age discrimination), including affordable serviced land, housing, modern and renewable energy, safe drinking water and sanitation, safe, nutritious and adequate food, waste disposal, sustainable mobility, healthcare and family planning, education and culture, as well as information and communications technologies. Various stakeholders at all levels are reminded of the digital divide, where service delivery can leave out individuals who do not have access to communication technologies. It also undertakes efforts "to promote equitable and affordable access to sustainable basic physical and social infrastructure".<sup>125</sup>

In this context, the concept of smart cities and villages should be indicated as strongly promoted on international and European forums.<sup>126</sup> If adopted by local governments, they may foster active ageing and independent living. A smart living environment supports ageing in place for frail older adults.<sup>127</sup>

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123 OHCHR, "Report of the United Nations High Commissioner for Human Rights: Local Government and Human Rights," 2 July 2019, A/HRC/42/22.

124 UN General Assembly, "Resolution Adopted by the General Assembly, New Urban Agenda," 23 December 2016, A/RES/71/256.

125 UN-Habitat, *The New Urban Agenda* (Nairobi, Kenya: UN-Habitat, 2020), 15.

126 Oskar Wolski, "Smart Villages in EU Policy: How to Match Innovativeness and Pragmatism?" *Wieś i Rolnictwo*, no. 4 (181) (2018): 163–80, <https://doi.org/10.7366/wiro42018/09>; European Parliament, "Think Tank: Smart Villages: Concept, Issues and Prospects for EU Rural Areas. Briefing," 2021, [https://www.europarl.europa.eu/thinktank/en/document/EPRS\\_BRI\(2021\)689349](https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2021)689349); UNECE and ITU, "United 4 Smart Sustainable Cities," 2016, [https://unece.org/fileadmin/DAM/hlm/projects/SMART\\_CITIES/U4SSC-brochure.pdf](https://unece.org/fileadmin/DAM/hlm/projects/SMART_CITIES/U4SSC-brochure.pdf).

127 Thomas Tannou et al., "Effectiveness of Smart Living Environments to Support Older Adults to Age in Place in Their Community: An Umbrella Review Protocol," *BMJ Open*, 12, no. 1 (January 2022): 1, <https://doi.org/10.1136/bmjopen-2021-054235>.



However, not all the “smart solutions” may be “age-friendly”.<sup>128</sup> That is why, the idea of smart cities and villages requires the inclusion of inhabitants of all age groups in local planning and creating social networks.<sup>129</sup> A smart city is not only a place with convenient physical infrastructure,<sup>130</sup> it is a place for self-fulfilment and participation.<sup>131</sup>

At a European level, the European Charter of Local Self-Government of 1985,<sup>132</sup> the Committee of Ministers of the Council of Europe statutory resolutions creating the Congress of Local and Regional Authorities of the Council of Europe and that congress’s resolutions as such should be taken into account when considering the role of local self-government in the promotion of human rights, including the rights of older persons. For example, in 1992 and 2008, the congress adopted the European Urban Charters. In European Urban Charter II, we can read that

Our towns and cities must also be rid of all forms of stigmatisation of particular groups, which are seriously detrimental to the sense of belonging to an

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128 Camilla Lewis and Tine Buffel, “Aging in Place and the Places of Aging: A Longitudinal Study,” *Journal of Aging Studies*, 54 (September 2020): 10870, <https://doi.org/10.1016/j.jaging.2020.100870>; Manlin Li and Ryan Woolrych, “Experiences of Older People and Social Inclusion in Relation to Smart ‘Age-Friendly’ Cities: A Case Study of Chongqing, China,” *Frontiers in Public Health*, 9 (13 December 2021): 779913, <https://doi.org/10.3389/fpubh.2021.779913>; Norberto Knebel, Mateus de Oliveira Fornasier, and Gustavo Silveira Borges, “Smart Cities, Human Rights and Social Sustainability,” *Veredas Do Direito*, 19, no. 43 (2022): 240.

129 Marek Niezabitowski, “Social Aspects of Smart City - Some Sociological Remarks on the Issue,” *Scientific Papers of Silesian University of Technology. Organization and Management Series* 2022, no. 165 (2022): 235, <https://doi.org/10.29119/1641-3466.2022.165.17>.

130 Oliver Gassmann, Jonas Böhm, and Maximilian Palmié, *Smart Cities: Introducing Digital Innovation to Cities*, First edition (Bingley, UK: Emerald Publishing, 2019), 27.

131 For example “councils of senior citizens” have been established in some countries. Their purpose is to secure the right of older people to actively participate in the life of the local community and have a more significant influence on the representation of their interests by ensuring close interaction with local government bodies. Aldona Frączkiewicz-Wronka et al., “The Growing Role of Seniors Councils in Health Policy-Making for Older People in Poland,” *Health Policy*, 123, no. 10 (October 2019): 906–11, <https://doi.org/10.1016/j.healthpol.2019.05.016>; Emilia Gulińska, “Communal Seniors Council as an Institution of Social Participation in Local Government,” *Studia Iuridica Lublinensia*, 29, no. 1 (29 March 2020): 99, <https://doi.org/10.17951/sil.2020.29.1.99-108>.

132 Council of Europe, “European Charter of Local Self-Government,” Strasbourg 15 October 1985, (CETS, No 122).

urban community and which, more often than not, are the root of the urban violence, antisocial behaviour and insecurity that is painfully felt by our urban citizens, particularly the most vulnerable among them (the elderly, children, people living alone, immigrants, the poor).<sup>133</sup>

The congress certainly promotes human rights in general. In recent years, however, older inhabitants are indicated as just one of many vulnerable groups requiring actions from local self-governments.<sup>134</sup>

In the European Union, the presence of local governments is natural,<sup>135</sup> especially since the European Committee of the Regions is composed of locally and regionally elected representatives from all 27 Member States. Through the committee, they can share their opinions on the EU legislation that directly impact regions and cities. According to Article 307 of the TFEU, the European Commission, the Council and the European Parliament consult the Committee when drawing up legislation concerning local and regional government matters, including health, education, social policy, economic and social cohesion or transport.<sup>136</sup>

An interesting example, outside the EU legislation process, is the contribution that the Euromontana Association<sup>137</sup> “Ageing in mountain areas” brings to

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133 Congress of Local and Regional Authorities of the Council of Europe, “European Urban Charter II Manifesto for a New Urbanity Adopted by the Congress on the Occasion of Its 15th Plenary Session in Strasbourg on 29 May 2008,” 11.

134 Congress of Local and Regional Authorities of the Council of Europe, “Promoting Human Rights at Local and Regional Level. Report by Harald Bergmann, Congress Spokesperson on Human Rights at Local and Regional Level CG34(2018)10final 27 March 2018,” 2018; Congress of Local and Regional Authorities of the Council of Europe, Resolution 365 (2014) on the “Best Practices of Implementation of Human Rights at Local and Regional Level in Member States of the Council of Europe and Other States,” 7 April 22014; Congress of Local and Regional Authorities of the Council of Europe, *Human Rights Handbook for Local and Regional Authorities. Fighting Against Discrimination. Vol. I* (Council of Europe, 2019); Congress of Local and Regional Authorities of the Council of Europe, *Human Rights Handbook for Local and Regional Authorities. Social Rights Vol. II* (Council of Europe, 2021).

135 European Parliament, *The Role of Cities in the Institutional Framework of the European Union*. (LU: Publications Office, 2017), <https://data.europa.eu/doi/10.2861/035470>.

136 European Union, “Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union,” 13 December 2007, 2016 O.J. (C 202)1.

137 It assembles around 65 members, including regions, from 15 European countries and aims to improve the quality of life of mountain people, <https://www.euromontana.org/en/about-us/>.

the EU Green Paper on Ageing. Euromontana's aim is to provide an in-depth analysis of the situation of older persons in mountain areas facing permanent and structural handicaps, such as hypersensitivity to climate change and the impact of slopes, altitude, remoteness and accessibility, the outmigration of young people, the sparseness of population and the loss of businesses.<sup>138</sup> This contribution confirms inequalities between urban and rural areas. The latter experience more pronounced population ageing than in cities and have a higher share of older residents, while simultaneously being disadvantaged in economic development and prosperity opportunities. In the EU, the significant urban/rural divide in the proportion of people covered by a national or any other health insurance scheme, health coverage, infrastructure, public transportation, life – long learning, etc., has been diagnosed. The EU proposes that local authorities take action *via* the European funds and programmes.<sup>139</sup> It is worth noting that cities, municipalities and other local units may compete for EU funding, for example, from the Citizens, Equality, Rights and Values Programme (over €1.5 billion), for town-twinning projects and networks to promote rights and values.<sup>140</sup>

In addition, local self-governments are important actors in the framework of the new European Pillar of Social Rights Action Plan of 2021<sup>141</sup> as well as in the new strategy to strengthen the application of the Charter of Fundamental Rights of 2020.<sup>142</sup> The Council in its conclusions of 8 March 2021, stated that “cities and local governments are important actors in the promotion of

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138 Euromontana, “Ageing in Mountain Areas Contributions of Euromontana for the Green Paper on Ageing Updated Position Paper March 2021,” 2021, <https://www.euromontana.org/en/green-paper-on-ageing-our-recommendations-to-support-older-adults-in-mountain-areas/>.

139 European Parliament, *Older People in the European Union's Rural Areas: Issues and Challenges: In Depth Analysis* (LU: Publications Office, 2020), 22–24, <https://data.europa.eu/doi/10.2861/114962>.

140 See about the programme: [https://commission.europa.eu/funding-tenders/find-funding/eu-funding-programmes/citizens-equality-rights-and-values-programme\\_en](https://commission.europa.eu/funding-tenders/find-funding/eu-funding-programmes/citizens-equality-rights-and-values-programme_en).

141 European Commission, *European Pillar of Social Rights Action Plan Adopted 4 March 2021*, [https://ec.europa.eu/info/publications/european-pillar-social-rights-action-plan\\_pl](https://ec.europa.eu/info/publications/european-pillar-social-rights-action-plan_pl).

142 European Commission, “Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Strategy to Strengthen the Application of the Charter of Fundamental Rights in the EU,” 2 December 2020, COM(2020) 711 Final.

fundamental rights at national and European level”.<sup>143</sup> The role of cities and municipalities in promoting human rights is also an important item on the agenda of the Fundamental Rights Agency.<sup>144</sup>

While it is essential that local authorities take a human rights approach, practical solutions are crucial for ensuring older persons’ inclusion. That is why the Urban Agenda for the EU (the Pact of Amsterdam), adopted in 2016 at the Informal Meeting of EU Ministers Responsible for Urban Matters, must be mentioned here. It aims to involve urban authorities in achieving better regulation, funding, knowledge base and exchange of experiences. The ministers declared, among many other things, to improve connectivity at local and regional levels and focus on the accessibility of public transport and soft mobility (walking, cycling, public space) for older citizens and persons with disabilities.<sup>145</sup>

Urbanised areas are much more visible on the international agenda than rural areas. For example, they are identified as important actors in achieving the Sustainable Development Goals, particularly Goal 11 “Make cities inclusive, safe, resilient and sustainable”. This goal is to be achieved, among others, through the Sustainable Urbanisation Strategy of the United Nations Development Programme<sup>146</sup> and the UNESCO Cities Platform.<sup>147</sup>

Cities have a long history in international law<sup>148</sup> but after centuries of invisibility in international relations, cities and other local units have become

143 Council of the European Union, “Council Conclusions on Strengthening the Application of the Charter of Fundamental Rights in the European Union,” 8 March 2021, 6795/21.

144 FRA, *Human Rights Cities in the EU: A Framework for Reinforcing Rights Locally: Report* (LU: Publications Office, 2021), <https://data.europa.eu/doi/10.2811/362711>.

145 European Commission, “Urban Agenda for the EU Pact of Amsterdam Agreed at the Informal Meeting of EU Ministers Responsible for Urban Matters on 30 May 2016 in Amsterdam, The Netherlands,” 2016, [https://ec.europa.eu/regional\\_policy/sources/policy/themes/urban-development/agenda/pact-of-amsterdam.pdf](https://ec.europa.eu/regional_policy/sources/policy/themes/urban-development/agenda/pact-of-amsterdam.pdf).

146 UNDP, “Sustainable Urbanization Strategy: UNDPs Support to Sustainable, Resilient and Inclusive Cities in the Development World, New York, 13 October 2016,” 2016, [https://www.undp.org/sites/g/files/zskgke326/files/publications/UNDP\\_Urban-Strategy.pdf](https://www.undp.org/sites/g/files/zskgke326/files/publications/UNDP_Urban-Strategy.pdf).

147 See the Platform on <https://www.unesco.org/en/sustainable-cities/unesco-sustainable-cities>; see also: UNESCO, “Human Rights Go Local: What Works” – Academy and Conference on Human Rights at the Local and Regional Levels,” 1–8 February 2023, 7 February 2023 [https://www.humanrightsgolocal.org/wp-content/uploads/2023/02/ACCO23\\_Outcome\\_Document.pdf](https://www.humanrightsgolocal.org/wp-content/uploads/2023/02/ACCO23_Outcome_Document.pdf).

148 Karol Karski, *Osoba prawna prawa wewnętrznego jako podmiot prawa międzynarodowego*, Wyd. 1 (Warszawa: Wydawnictwo Uniwersytetu Warszawskiego, 2009), 21.

active again in recent decades. Nowadays, cities cooperate with other cities on a transnational level and conclude broad agreements.<sup>149</sup> So, cities and other local units may create networks and movements (e.g. the World Organization of United Cities and Local Governments, the Council of European Municipalities and Regions, and Eurocities) adopting documents like the European Charter for the Safeguarding of Human Rights in the City, adopted in 2000 in St. Denis, and today signed by over 400 local authorities.<sup>150</sup>

Another crucial document is the World Charter for the Right to the City, which is conceived as a tool helping to reduce social inequalities and protect human security.<sup>151</sup> The charter, in its version of 2005, describes “the right to the city” as: “interdependent of all internationally recognized and integrally conceived human rights, and therefore includes all the civil, political, economic, social, cultural and environmental rights which are already regulated in the international human rights treaties”.<sup>152</sup>

So, the right to the city is a concept that can be considered in the context of third-generation human rights.<sup>153</sup> It is an aggregate of many human rights stipulated in the charter, including the rights to public information, freedom and integrity, political participation, justice, public security, solidarity and multicultural coexistence, healthy and sustainable environment, work, housing, water, access and the supply of domestic and urban public services, public transportation and urban mobility, as well as freedoms of assembly and association and the democratic use of the urban public space.

Everyone, regardless of their gender, age, health status, income, nationality, ethnicity, migratory condition, or political, religious or sexual orientation, should enjoy these components of the right to the city. Considering the weak

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149 Agnieszka Szpak et al., *The Role of Cities in International Relations: The Third-Generation of Multi-Level Governance?*, Cities Series (Cheltenham, UK ; Northampton, MA, USA: Edward Elgar Publishing, 2022), 47–48.

150 Text of the charter: <https://uclg-cisd.org/en/news/european-charter-safeguarding-human-rights-city>.

151 Agnieszka Szpak, “Right to the City as a New Paradigm within the Concept of Human Security,” *Polish Political Science Yearbook*, 45, no. 1 (31 March 2016): 378, <https://doi.org/10.15804/ppsy2016027>.

152 World Social Forum, “World Charter on the Right to the City,” 2005, <https://www.uclg-cisd.org/sites/default/files/documents/files/2021-06/WorldCharterRighttoCity.pdf>.

153 Joanna Kielin-Maziarz, “The ‘Right to the City’ and the New Urban Agenda Habitat III,” *Krytyka Prawa*, 13, no. 4 (15 December 2021), <https://doi.org/10.7206/kp.2080-1084.496>.

position of the prohibition on age discrimination in international treaties, this premise of non-discrimination is worth noting. Moreover, the charter also contains provisions for taking special measures to protect and integrate vulnerable persons, including older persons, especially concerning adequate housing.

Meanwhile, the Global Charter-Agenda for Human Rights in the City, adopted by United Cities and Local Governments in 2011 in Florence, calls for cities to promote human rights at an international level through local transnational cooperation and in the implementation of international mechanisms for the protection of human rights.<sup>154</sup>

Particular attention should be paid to the movement of the Human Rights Cities, whose intention is to promote and implement global standards on human rights and sustainable development. Three pillars are at the heart of the human rights city concept: social development, human rights culture and urban justice. Human Rights Cities are municipalities that base their policies, or some of them, on human rights as set out in international treaties. These self-declared human rights cities seek to develop new methods of generating human rights solutions and incorporate them into their daily work of governance and service delivery.<sup>155</sup>

Human Rights Cities are usually large and prosperous (compared with other municipalities in a given country) urban units. So, to some extent, they are able to conduct their own policy, without always following the national government's policy.<sup>156</sup> For example, San Francisco and Los Angeles implemented provisions of the Convention on the Elimination of All Forms of Discrimination against Women, despite not being ratified by the USA. In turn, other

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154 UCLG, United Cities and Local Governments, "Global Charter-Agenda for Human Rights in the City," Florence, 11 December 2011, [https://www.uclg-cisd.org/sites/default/files/UCLG\\_Global\\_Charter\\_Agenda\\_HR\\_City\\_o.pdf](https://www.uclg-cisd.org/sites/default/files/UCLG_Global_Charter_Agenda_HR_City_o.pdf).

155 Karina Gomes da Silva, "The New Urban Agenda and Human Rights Cities: Interconnections between the Global and the Local," *Netherlands Quarterly of Human Rights*, 36, no. 4 (December 2018): 298, <https://doi.org/10.1177/0924051918806721>; Barbara Oomen and Moritz Baumgärtel, "Human Rights Cities," in *The SAGE Handbook of Human Rights*, eds. Anja Mihr and Mark Gibney (1 Oliver's Yard, 55 City Road, London EC1Y 1SP United Kingdom: SAGE Publications Ltd, 2014), 709, <https://doi.org/10.4135/9781473909335.n39>.

156 Agnieszka Szpak, Robert Gawłowski, and Joanna Modrzyńska, "Pact of Free Cities – A New Form of European Cities' Cooperation," *Polish Political Science Yearbook*, 52 (2023), <https://doi.org/10.15804/ppsy202308>.

municipalities apply the Paris Climate Agreement, despite the reluctance of central authorities.<sup>157</sup>

Considering these examples, cities and even smaller municipalities can be more effective in ensuring social inclusion and protecting the human rights of older persons than states, being more oriented to a new treaty on older persons. As was noted in the previous chapters, many governments, including most of the EU Member States, are reluctant to adopt a new treaty protecting the rights of older persons. If the convention is adopted, municipalities might follow the solution taken by San Francisco and Los Angeles, namely to bypass the central government's inaction. However, this would only be possible in countries where the state structure is sufficiently decentralised.

## 6. Business sector

Another stakeholder mentioned in the international documents dedicated to older people is the “private sector”, though mostly in the context of business and economic activity.<sup>158</sup> Although, unlike with NGOs, the UN Charter does not mention any business entities, including multinational corporations, their relations with states and their financial capacity allow them to exert a particular influence on the shape of international law.<sup>159</sup> However, the position of business in international relations and, subsequently, in international law,

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157 Szpak et al., *The Role of Cities in International Relations*, 45.

158 John E. Trent and Laura Schnurr, *A United Nations Renaissance: What the UN Is, and What It Could Be* (Opladen Berlin Toronto: Barbara Budrich Publishers, 2018), 84.

159 Barbara Mielnik, *Kształtowanie się pozapaństwowej podmiotowości w prawie międzynarodowym*, *Acta Universitatis Wratislaviensis*, no. 3081 (Wrocław: Wydawn. Uniwersytetu Wrocławskiego, 2008), 216; Sarah Castels, “The Influence of the Individual and the Corporation on the State’s Exercise of Jurisdiction under International Law: The Case of Business and Human Rights Arbitration,” in *Changing Actors in International Law*, eds. Karen N. Scott et al., *Developments in International Law*, volume 74 (Four Societies Conference, Leiden; Boston: Brill Nijhoff, 2021), 282; Oonagh E. Fitzgerald, ed., *Corporate Citizen: New Perspectives on the Globalized Rule of Law* (Waterloo, Ontario, Canada: Centre for International Governance Innovation, 2020), 1; Nowak and Januszewski, “Non-State Actors and Human Rights,” 136; Jay Butler, “Corporations as Semi-States,” *Columbia Journal of Transnational Law*, 57 (2019): 221–82; Trent and Schnurr, *A United Nations Renaissance*.

including human rights law, has evolved over time.<sup>160</sup> Today, apart from states and other actors, business entities also have special duties in protecting fundamental human rights.<sup>161</sup> Surya Deva sketches the evolution of the relationship between human rights and business from an “era of business or human rights” to an “era of business and human rights”. Moreover, he identifies an emerging “business of human rights era”.<sup>162</sup>

The links between the areas of business and human rights are most visible during times of crisis. The COVID-19 pandemic and other epidemics have highlighted the duties of the public and private healthcare sectors and pharmaceutical companies in the prevention of diseases and access to essential medicines.<sup>163</sup>

Indeed, we are witnesses to various approaches by business entities to human rights. Corporations violate the human rights of individuals and communities, devastating the natural environment, breaching workers’ rights or ignoring the needs of the most vulnerable groups, including older persons, for example in the housing<sup>164</sup> or finance<sup>165</sup> sectors. These vulnerable groups face the most significant procedural, financial, and practical barriers to redress in

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160 Ludovica Chiussi Curzi, *General Principles for Business and Human Rights in International Law*, Queen Mary Studies in International Law, volume 43 (Leiden Boston: Brill Nijhoff, 2020), 226.

161 David Bilchitz, “Corporations and the Limits of State-Based Models for Protecting Fundamental Rights in International Law,” *Indiana Journal of Global Legal Studies*, 23, no. 1 (2016): 143–70, <https://doi.org/10.2979/indjglolegstu.23.1.143>; Robert McCorquodale, “Corporate Social Responsibility and International Human Rights Law,” *Journal of Business Ethics*, 87, no. S2 (August 2009): 385–400, <https://doi.org/10.1007/s10551-009-0296-5>.

162 Surya Deva, “From ‘Business or Human Rights’ to ‘Business and Human Rights’: What Next?” in *Research Handbook on Human Rights and Business*, eds. Surya Deva and David Birchall, Research Handbooks in Human Rights (Northampton: Edward Elgar Publishing, 2020), 1.

163 Michael Santoro and Robert Shanklin, “Human Rights Obligations of Drug Companies,” *Journal of Human Rights*, 19, no. 5 (19 October 2020): 557–67, <https://doi.org/10.1080/14754835.2020.1820315>.

164 UN Independent Expert, “Report of the Independent Expert on the Enjoyment of All Human Rights on Older Persons and the Right to Adequate Housing,” 19 July 2022, A/77/239.

165 OECD, “Financial Consumer Protection and Ageing Populations,” 2020, 24, [www.oecd.org/finance/Financial-consumer-protection-and-ageing-populations.pdf](http://www.oecd.org/finance/Financial-consumer-protection-and-ageing-populations.pdf).



national courts against corporations.<sup>166</sup> Still, national legal systems have not evolved adequately to address the magnitude of corporate power or the realities of transnational business operations and corporate abuse of human rights.<sup>167</sup> That is why NHRIs, human right bodies and civil society organisations can play a particularly important role in this regard by monitoring the activities of business.<sup>168</sup>

On the other hand, we can also observe much improvement in the way businesses approach human rights, a phenomenon unknown just a few decades ago. One of the symptoms of this new approach is the NGOs-business partnership.<sup>169</sup>

Therefore, different faces of business in the human rights context can be identified on the international forum and in the research. On the one hand, businesses are juxtaposed with social policy<sup>170</sup> and the accountability of multinational corporations and other business entities for human rights violations is addressed.<sup>171</sup> On the other, the business sector is considered a part of global governance.<sup>172</sup> Moreover, ethical aspects of business activities are discussed,<sup>173</sup>

166 Castels, "The Influence of the Individual and the Corporation on the State's Exercise of Jurisdiction under International Law: The Case of Business and Human Rights Arbitration," 270.

167 Charity Ryerson, Dean Pinkert, and Avery Kelly, "Seeking Justice: The State of Transnational Corporate Accountability," *The Yale Law Journal Forum*, December 2022, 787.

168 Birchall, "The Role of Civil Society and Human Rights Defenders in Corporate Accountability," 422.

169 Hanna Mackiewicz and Edyta Spodarczyk, "Benefits from the Cooperation of Non-Governmental Organizations with Enterprises and Durability of Cooperation," *Management*, 26, no. 2 (15 December 2022): 25, <https://doi.org/10.2478/manment-2019-0094>.

170 For example, the International Labour Organization adopted the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy in 1977; the OECD adopted the Guidelines for Multinational Enterprises in 1976 as part of the OECD's Declaration and Decisions on International Investment and Multinational Enterprises.

171 John Gerard Ruggie, "The Social Construction of the UN Guiding Principles on Business and Human Rights," in *Research Handbook on Human Rights and Business*, eds. Surya Deva and David Birchall (Edward Elgar Publishing, 2020), 63–86, <https://doi.org/10.4337/9781786436405.00009>.

172 Axel Marx et al., eds., *Research Handbook on Global Governance, Business and Human Rights*, Research Handbooks on Globalisation and the Law (Cheltenham, UK: Edward Elgar Publishing, 2022).

173 George G Brenkert, "Business Ethics and Human Rights: An Overview," *Business and Human Rights Journal*, 1, no. 2 (July 2016): 277–306, <https://doi.org/10.1017/bhj.2016.1>.

and finally, business contribution to promoting human rights is taken into account.<sup>174</sup>

On the UN forum, the Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework (UNGPs), developed by the Special Representative of the UN Secretary-General, John Ruggie, and endorsed by the Human Rights Council resolution 17/4 of 16 June 2011 are applied to “all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure”.<sup>175</sup> In the CESCR’s general comment No. 24, business activities are defined as any events that are undertaken by a corporation for the purpose of earning a profit.<sup>176</sup> Thus, reference is made to all of the economy that is run by individuals, companies or enterprises (terms often employed synonymously) or corporations, including transnational corporations.<sup>177</sup>

The United Nations has engaged in several projects to promote the accountability of businesses for human rights, including the UN Global Compact adopted in 1999 encouraging businesses and firms worldwide to implement sustainable and social policies, and to report on them. Today, the UN Global Compact is the largest corporate sustainability initiative in the world.<sup>178</sup> However, the shortcomings of the Global Compact are pointed out as not being strong enough without a comprehensive enforcement system, which in fact extends corporate soft power at the expense of the United Nations and its members.<sup>179</sup>

174 Olivier De Schutter, “The Accountability of Multinationals for Human Rights Violations in European Law,” in *Non-State Actors and Human Rights*, ed. Philip Alston, Academy of European Law (Florence, Italy), and New York University, *Collected Courses of the Academy of European Law*, v. 13/3 (Oxford [England]; New York: Oxford University Press, 2005), 295.

175 Human Rights Council, “Resolution 17/4 Human Rights and Transnational Corporations and Other Business Enterprises,” 6 July 2011, A/HRC/RES/17/4, para. 1.

176 CESCR, “General Comment No 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities,” 10 August 2017, E/C.12/GC/24.

177 Chiussi Curzi, *General Principles for Business and Human Rights in International Law*, 15.

178 António Guterres, “UN Global Compact,” *UN Global Compact Yearbook Poland 2020/2021 (2021)*: 8, <https://ungc.org.pl/wp-content/uploads/2021/04/YB-2020-21.pdf>.

179 Gordon Alexander Schlicht, “Reflecting on the UN Global Compact: What Went Wrong?” *LSE Business Review* (blog), 22 July 2022, <https://blogs.lse.ac.uk/businessreview/2022/07/26/reflecting-on-the-un-global-compact-what-went-wrong/>.

This is why special attention should be drawn to the UNGPs mentioned above, as they recommend that states adopt laws and policies shaping appropriate human rights-supporting business behaviours. The Guiding Principles offer an expansive moral norm that “corporations should not remove or reduce any individual’s rights by any means”.<sup>180</sup> They are built on a framework of three pillars: protect, respect and remedy. Thus, states have a duty to protect against human rights abuses by third parties, including businesses, through policies, regulations, legislation, and effective enforcement. Business enterprises have an independent responsibility to respect human rights: that is, to avoid people’s human rights being harmed through their activities or business relationships, and to address harms that do occur. Finally, where human rights are violated, the affected individuals and communities should have access to an effective remedy, and both states and enterprises have a role to play in enabling this.<sup>181</sup>

The UNGPs are not binding, so in 2014 the Human Rights Council, in its resolution 26/9, decided to establish the open-ended intergovernmental working group on transnational corporations and other business enterprises (OEIGWG) with respect to human rights, in order to draft an international legally binding instrument regulating, in international human rights law, the activities of transnational corporations and other business enterprises.<sup>182</sup> The treaty process turned out to be very difficult and it polarised global opinion,<sup>183</sup> but in 2023, the OEIGWG presented the Human Rights Council with the third revised draft of a legally binding instrument with textual proposals submitted by states. From the perspective of this study, the most important is that this draft includes older persons among the groups exposed to the distinctive and disproportionate impact of business-related human rights abuses. More-

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180 David Birchall, “Any Act, Any Harm, To Anyone: The Transformative Potential of ‘Human Rights Impacts’ Under the UN Guiding Principles on Business and Human Rights,” *University of Oxford Human Rights Hub Journal*, 2, no. 1 (2019): 123.

181 Ruggie, “The Social Construction of the UN Guiding Principles on Business and Human Rights,” 63.

182 Human Rights Council, “Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights,” 14 July 2014, A/HRC/RES/26/9.

183 Radu Mares, “The United Nations Draft Treaty on Business and Human Rights: An Analysis of Its Emergence, Development and Potential,” in *Research Handbook on Global Governance, Business and Human Rights*, eds. Axel Marx et al. (Edward Elgar Publishing, 2022), 23, <https://doi.org/10.4337/9781788979832.00009>.

over, this draft proposes that states should be obliged to adopt a gender and age perspective when regulating business activities and consult the measures taken with individuals or communities whose human rights can potentially be affected by business activities.<sup>184</sup> Older persons are on the list of groups that should be consulted. Indeed, if the treaty is adopted, it will be an important step towards strengthening the visibility of older persons in the international law framework.

Meanwhile, at the European forum in 2022, the European Commission proposed the Corporate Sustainability Due Diligence Directive. To some extent, this corresponds with the UNGPS and the OECD Guidelines for Multinational Enterprises.<sup>185</sup> However, today it is hard to identify a direct impact of the future directive on the situation of older people, especially as the Office of the UN High Commissioner for human rights noted that the proposal neglects significant human rights impacts related to business activities, including on-line and offline technology-related harm, such as algorithmic discrimination, as well as parts of the retail, tourism, hospitality, food and beverage, and consumer finance sectors.<sup>186</sup>

The EU initiatives, especially the European Action Plan for Social Economy (the roadmap) of 2021<sup>187</sup> in the area of social economy seem to be more effective from the perspective of the social inclusion of many older Europeans as they aim at the professional and social integration of people at risk of social marginalisation, job creation, the provision of social services of general interest and local development.<sup>188</sup>

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184 Human Rights Council, "Text of the Third Revised Draft Legally Binding Instrument with Textual Proposals Submitted by States during the Seventh and the Eighth Sessions of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights," 23 January 2023, A/HRC/52/41/Add.1.

185 European Commission, "Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU)," 23 February 2022, 2019/1937 COM/2022/71 Final.

186 OHCHR, "Mandating Downstream Human Rights Due Diligence," 13 September 2022, <https://www.ohchr.org/sites/default/files/documents/issues/business/2022-09-13/mandating-downstream-hrdd.pdf>.

187 European Commission, "European Action Plan for Social Economy (the Roadmap)," Directorate General for Employment, Social Affairs and Inclusion, Ref. Ares (2021)1543010 - 01/03/2021, 2021.

188 Magdalena Małecka-Lyszczek, *Współpraca administracji publicznej z podmiotami ekonomii społecznej: aspekty administracyjnoprawne*, Stan prawny na 31 grudnia 2016 r, Monografie (Warszawa: Wolters Kluwer, 2017), 17.

The social economy, placed between the public and the private sphere, includes a variety of businesses, organisations and legal entities, such as social enterprises, cooperatives, mutual benefit societies, non-profit associations and foundations.<sup>189</sup> The cooperation of all these various stakeholders to combat the social exclusion experienced by many marginalised groups during the COVID-19 pandemic was stressed in the OECD report of 2020. However, the most significant OECD contribution in this area is the Recommendation on the Social and Solidarity Economy and Social Innovation, which was adopted by the OECD Council at the Ministerial level on 10 June 2022. It is the first international standard providing an internationally agreed policy framework to foster the social economy and social innovation development and ensure their ongoing expansion.<sup>190</sup>

The various elements of the social and solidarity economy are also promoted by the International Labour Organization<sup>191</sup> to reduce poverty and inequalities, build inclusive societies, enable recovery and imbue resilience in the aftermath of crises. In 2022, the International Labour Conference adopted a resolution concerning decent work and the social and solidarity economy (SSE). It provides a flexible definition of the aims of the social and solidarity economy<sup>192</sup> which include developing “an inclusive, integrated and gender-responsive approach to the promotion of the SSE, including with respect to groups in situations of vulnerability, recognizing the value of care and unpaid work”.<sup>193</sup>

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189 Agnieszka Pacut, “Drivers toward Social Entrepreneurs Engagement in Poland: An Institutional Approach,” *Administrative Sciences*, 10, no. 1 (21 January 2020): 3, <https://doi.org/10.3390/admsci10010005>.

190 OECD, “Recommendation of the Council on the Social and Solidarity Economy and Social Innovation, 10 June 2022, OECD/LEGAL/0472,” 2022, <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0472%20>.

191 ILO instruments such as the Promotion of Cooperatives Recommendation, 2002 (no. 193), the Transition from the Informal to the Formal Economy Recommendation, 2015 (no. 204), and the Employment and Decent Work for Peace and Resilience Recommendation, 2017 (no. 205).

192 Marie Bouchard and David Hiez, “A Universal Definition For The Social And Solidarity Economy: A First Appraisal of The International Labour Organization Resolution,” *SSRN Electronic Journal*, 12, 2022, <https://doi.org/10.2139/ssrn.4294563>.

193 ILO, “Resolution Concerning Decent Work and the Social and Solidarity Economy, International Labour Conference – 110th Session, 10 June 2022,” [https://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_848633.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_848633.pdf).

All these documents on the social and solidarity economy also refer to entities of “responsible business”. In addition, it is not currently possible to imagine the implementation of the Sustainable Development Goals without the business sector. It is a vehicle of economic growth, job creation, technology innovation, wealth accumulation and political influence.

So what is the role of business, and the private sector in general, in the social inclusion of older people? Companies can contribute to the social inclusion of older people directly, by adapting their products to the needs of a longer-living population and developing the various sectors of the silver economy (e.g. connected health, robotics and games, integrated care, silver tourism, smart homes, age-friendly universities, active and healthy lifestyles, driverless cars, etc.)<sup>194</sup>

They may also affect the situation of older citizens indirectly – just by meeting their tax obligations. In addition, they can contribute to the well-being of older persons through social investments, creating jobs, developing technology, supporting education at all levels and promoting cultural activities, as well as promoting good health, raising awareness of diseases and supporting access to essential healthcare services.<sup>195</sup> However, to meet older persons’ needs, the private sector should be sensitive to their nuances and adopt an ageing mainstreaming approach. For example, entities in the IT industry should be aware that the growing deployment of new technologies, including artificial intelligence, can be beneficial to the participation of older persons in society<sup>196</sup> but at the same time, it can exacerbate or introduce new forms of ageism.<sup>197</sup>

So, taking into account the Janus-faced nature of business in the area of human rights, the specific mindfulness and caution of many stakeholders is

194 European Commission, Technopolis, and Oxford Economics, *The Silver Economy: Final Report* (LU: Publications Office, 2018), 13–14, <https://data.europa.eu/doi/10.2759/685036>.

195 Alan Gutterman, “Businesses and Human Rights of Older Persons,” *SSRN Electronic Journal*, 2022, 119, <https://doi.org/10.2139/ssrn.4024373>.

196 Elena Carpanelli, “The Role of Corporations as Standards Setters: The Case of Business Actors Involved in the Development and Deployment of Artificial Intelligence Tools,” in *Legal Sources in Business and Human Rights: Evolving Dynamics in International and European Law*, ed. Martina Buscemi, *Developments in International Law*, volume 73 (Leiden; Boston: Brill Nijhoff, 2020), 172.

197 WHO, *WHO Policy Brief: Ageism in Artificial Intelligence for Health*; Kostina Prifti, Evert Stamhuis, and Klaus Heine, “Digging into the Accountability Gap: Operator’s Civil Liability in Healthcare AI-Systems,” in *Law and Artificial Intelligence*, eds. Bart Custers and Eduard Fosch-Villaronga, vol. 35, *Information Technology and Law Series* (The Hague: T.M.C. Asser Press, 2022), 279–95, [https://doi.org/10.1007/978-94-6265-523-2\\_15](https://doi.org/10.1007/978-94-6265-523-2_15).

required. The CESCR, in its general comment No. 6 of 1995 on human rights of older persons, failed to address this issue *expressis verbis*, though its interpretation of the human right to work, health or the highest attainable standard of life allows us to expect the states to take an active stand in the business area. The MIPAA is very modest in addressing the business sector's tasks and duties towards older persons. Similarly, other global and European acts on older persons' rights do not provide a precise message in this area. Sometimes, they do this indirectly and in a very general way, like with the CoE Parliamentary Assembly Resolution 1958 (2013) on combating discrimination against older persons on the labour market.<sup>198</sup>

On the other hand, the UN Independent Expert refers to the UNGPs and reminds states of their obligations to regulate private entities to ensure they do not discriminate against older persons. For example, in the report on the visit to China, Rosa Kornfeld-Matte noted:

In light of the important role conferred to the smart ageing industry, and to businesses more generally, in providing care services for older persons, the Independent Expert takes the opportunity to refer to the Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework. She also wishes to draw the attention of the Government to its obligation to ensure respect for, protection of and compliance with human rights in the sphere of business activities by public or private enterprises. The Guiding Principles provide an opportunity to close the governance gaps in business and human rights if supported by appropriate legislation and regulations, together with compliance mechanisms.<sup>199</sup>

The “business issue” is also present in the UN High Commissioner for Human Rights reports and contributions to the OEWGA.<sup>200</sup>

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198 Council of Europe Parliamentary Assembly, “Resolution 1958 (2013) Combating Discrimination against Older Persons on the Labour Market Adopted on October 2013,” Council of Europe, 2013.

199 UN Independent Expert, “Report of the Independent Expert on the Enjoyment of All Human Rights by Older Persons, Visit to China (2020),” A/HRC/45/14/Add.1, para. 99.

200 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,” 28 January 2022, A/HRC/49/70; OEWGA, “Substantive Inputs on the Focus Area ‘Access to Justice.’ Working Document Submitted

Internationally, however, another trend can be discerned, and one that seems to be becoming more pronounced as it can contribute to solving various social problems and reduce inequalities among age cohorts.<sup>201</sup> Older people are increasingly, though not yet successfully, seen as “contributors”, including in the context of the SDGs, which, as indicated above, are impossible to achieve without the involvement of business. The 12<sup>th</sup> OEWGA session was dedicated to the right of older persons to contribute to the SDGs, though panellists mainly shared experiences and practices focusing on life-long learning, social protection and living environments.<sup>202</sup> Business activity among older age persons has remained rather in the background, despite being a crucial element of social inclusion.<sup>203</sup> Meanwhile, age limits on bank loans and other financial services impede older people’s financial autonomy and prevent them from starting or expanding their businesses. These problems, among others, were noted by UNDESA and presented at the OEWGA forum.<sup>204</sup>

The barriers to business activity have also been analysed in a series of publications within the “Missing Entrepreneurs” project by the OECD and the European Union. The OECD assessed the inclusive entrepreneurship policies across the EU, examining approaches to promoting and supporting inclusive entrepreneurship. Business activity among older persons is diverse, but in nearly two-thirds of EU Member States it is at a slightly lower level than for other target groups such as women, immigrants and youths. The OECD noted that demographic challenges will force states to change their entrepreneurship policies in the coming decades, in addition to the untapped potential to leverage the experience of older businesspeople in supporting younger busi-

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by the Office of the High Commissioner for Human Rights,” 8 March 2021, OEWGA 11th Session A/AC.278/2021/CRP.4.

201 Marco Socci, David Clarke, and Andrea Principi, “Active Aging: Social Entrepreneurship in Local Communities of Five European Countries,” *International Journal of Environmental Research and Public Health*, 17, no. 7 (3 April 2020): 3, <https://doi.org/10.3390/ijerph17072440>.

202 OEWGA, “Report of the Open-Ended Working Group on Ageing on Its Twelfth Session Rapporteur: Mr. Tomáš Grünwald (Slovakia),” 16 May 2022, A/AC.278/2022/2, 11.

203 Justyna Stypińska, Annette Franke, and Janina Myrczyk, “Senior Entrepreneurship: The Unrevealed Driver for Social Innovation,” *Frontiers in Sociology*, 4 (24 April 2019): 14, <https://doi.org/10.3389/fsoc.2019.00030>.

204 OEWGA, “Substantive Inputs on the Focus Area ‘Contribution of Older Persons to Sustainable Development’. Working Document Submitted by the Department of Economic and Social Affairs (DESA),” 22 March 2022 A/AC.278/2022/CRP.3, 9.



nesspeople. Meanwhile, while business creation and self-employment can be part of the solution to extend older people's careers and keep them active and engaged in society, less than one-third of EU Member States have taken any relevant measures. That is why, according to this OECD/EU study, governments can do more to support people who wish to extend their careers through business creation. They should take action to

create a positive awareness of entrepreneurship as a late-career option through promotional activities aimed at different stakeholder groups (e.g. business support organisations, financiers) to remove negative age bias as a potential barrier to senior entrepreneurship; offer digital training and financial literacy training to potential senior entrepreneurs; and ensure that enterprise support officials receive sensitivity training so that they can offer support to older people in an appropriate way.<sup>205</sup>

Therefore, encouraging older people to become businesspeople and helping older businesspeople stay in business requires governments to act with a considered policy on ageing to ensure that age does not become an obstacle in the economic sphere.

## Conclusion

This chapter outlines the areas in which particular stakeholders have the potential to contribute to raising awareness of the rights of older people and, in some cases (NGOs, academia), also to the development of international law.

As demonstrated above, NGOs (in other words, civil society and its organisations) are leading the way in advocating for older people internationally. They have unquestionably contributed to developing international law and raising the international community's awareness of human rights in general. In recent decades, they have shed light on the rights of older persons. At the same time, however, they have their limits, which is proven by work on a global binding instrument on the human rights of older persons (they have a voice, but not

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<sup>205</sup> OECD and European Commission, *The Missing Entrepreneurs 2021: Policies for Inclusive Entrepreneurship and Self-Employment*, The Missing Entrepreneurs (OECD, 2021), Conclusions <https://doi.org/10.1787/71b7a9bb-en>.

a vote). Moreover, paradoxically, the multiplicity and diversity of civil society organisations may weaken their voices. That is why all initiatives to channel their proposals are critical.

In turn, NHRIs are relatively new players in international law, but their contribution is substantial, given their work in the framework of the OEWGA, for example, and, conversely, their potential to transfer concepts worked out on international fora to the domestic level. However, it must be remembered that their status and independence from the national governments, as defined by national law, vary. Nor do they all necessarily consider the social inclusion of older people to be their priority, if the human rights of all citizens are at risk in their countries.

The input of academia should also be noted, but this is usually the contribution of informal groups of researchers or individual academics, rather than formal international academic associations which would have a much stronger position. Thus, here the untapped potential may be identified.

Similarly, there is the potential for local governments when they act internationally and implement international law into their policies, even bypassing the host states. Nevertheless, it would be naïve to expect such actions on a broad scale. Local governments' status, competencies, economic conditions, practical possibilities and awareness of older persons' human rights vary considerably and face different and complex challenges.<sup>206</sup>

Many cities and other municipalities are still a long way from offering their inhabitants equitable living conditions and opportunities. Many of the urban population are deprived of or limited to satisfying only their fundamental needs and rights. In such a situation, making an age-friendly place for living appears an abstraction.

Finally, the international community and international bodies are trying to steer the private sector towards human rights-based activities. Significant improvements in business-human rights relations in recent decades can be observed. However, as of today, business is expected, at most, to adhere to the principles of "Protect, Respect and Remedy". Thus advocacy for human rights, including the rights of older persons, remains outside the realm of their expected responsibilities. Nevertheless, older businesspeople may create associations

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206 Nereide A. Curreri et al., "Rural Communities in CESW Africa and Latin America: Contexts for Well-Being of Older Adults," *Journal of Population Ageing*, 15, no. 4 (December 2022): 1030, <https://doi.org/10.1007/s12062-022-09398-y>.

and become a considerable force defending the interests of their community in their countries and internationally.

Despite certain limitations, all the indicated stakeholders play (or could play) an essential role in promoting and securing the social inclusion of older persons and their rights at a national level. However, they are also (or could be) involved in advocacy for the visibility and promotion of older persons' human rights internationally. However, their contributions vary widely. On the other hand, their diversity and operation in various areas are their strong points, if they are able to exchange good practices,<sup>207</sup> cooperate<sup>208</sup> and interact with states and intergovernmental organisations. The COVID-19 pandemic revealed that interconnectivity is indispensable in many areas, including the healthcare system, arranging public space and transport, education, trade and the needs of vulnerable groups.

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207 UNECE, "UNECE Policy Brief on Ageing No 27," February 2022, <https://unece.org/sites/default/files/2022-02/ECE-WG.1-39-PB27.pdf>.

208 Markus Möstl and Wanda Tiefenbacher, "Building Bridges between Local Governments and the Scientific Community to Promote Human Rights," in *European Yearbook on Human Rights 2021*, eds. Philip Czech et al., 1st ed. (Intersentia, 2021), 651–60, <https://doi.org/10.1017/9781839702266.026>.



# Chapter Six

## Main Lines of Action

Strengthening the social inclusion of older people at a national level through instruments of international law has a chance of success as long as the critical areas where inclusion requires specific support are identified. For this reason, this chapter will present the possibilities of international law addressing ageism and other reasons for exclusion. In addition, the areas of particular importance for the social inclusion of older persons, mostly those indicated by NGOs at the 13<sup>th</sup> OEWGA session dedicated to the inclusion of older persons, will be outlined.

### 1. Addressing ageism

Ageism is the principal barrier to the social inclusion of older persons,<sup>1</sup> especially when, according to the World Health Organization, one in two people in the world holds ageist attitudes towards older people.<sup>2</sup> The COVID-19 pandemic has brought the scale of ageism to light, revealing the extent to which older people are misrepresented and undervalued in the public debate.<sup>3</sup> Ageism, just as racism, sexism or ableism, leads to their dignity and rights being violated. However, it is a problematic phenomenon to diagnose given that older adults are people of different ages, living conditions, health and needs, meaning that age is not a factor that connects them.<sup>4</sup>

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1 Indeed, ageism may be directed against a person belonging to each age group, but this book considers only the phenomenon of ageism due to older age.

2 WHO, "Global Report on Ageism," (Geneva, 18 March 2021), 37, <https://www.who.int/teams/social-determinants-of-health/demographic-change%20and-healthy-ageing/combating-ageism/global-report-on-ageism>.

3 Sarah Fraser, Martine Lagacé, and Bienvenu Bongué, "Ageism and COVID-19: What Does Our Society's Response Say about Us?" *Age and Ageing*, 49, no. 5 (2020): 692–95, <https://doi.org/10.1093/ageing/afaa097>; UN Independent Expert, "Report of the Independent Expert on the Enjoyment of All Human Rights by Older Persons, Claudia Mahler. Ageism and Age Discrimination," 5 August 2021, A/HRC/48/53. para. 5.

4 Ivana Milas Klarić, "Is There Any (Legal) Future for the Elderly?" in *Les Solidarites Entre Generations/ Solidarity between Generations*, Fulchiron, Hugues (Bruxelles: Bruylant, 2013),

The “history of ageism” is presently well known.<sup>5</sup> This phenomenon was coined by Robert N. Butler in the late 1960s as the “prejudice of one age toward the other age groups”<sup>6</sup> and then clarified as “a process of systematic stereotyping and discrimination against people because they are old, just as racism and sexism [...] Ageism allows the young to see older people as different from themselves, thus they subtly cease to identify their elders as human beings”.<sup>7</sup> Butler described ageism as negligence, ignorance and the negative assumption that old people are old-fashioned, unproductive, incompetent, slow-thinking, inflexible, unattractive, sexless, etc.<sup>8</sup>

Ageism can manifest itself in various forms, ranging from talking down to, disrespecting and ridiculing, through neglect, segregation, social isolation, financial and physical abuse, right up extermination, defined as a deliberate attempt to shorten the “worthless” or suffering-filled life of an older person.<sup>9</sup> Moreover, ageism is highly “insidious”, as, for example, various ill-considered policies and strategies designed to meet the needs of older people may actually stigmatise them or require them to be constantly active, regardless of their capabilities.<sup>10</sup>

However, the concept of ageism and the call to combat it has struggled to make its way into international forums, slowly starting to appear in reports and studies prepared by international bodies and in soft law. It has only really been in the last decade that the subject has been developed. Paradoxically, it was

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1005–1013; Csilla Kollonay Lehoczky, “Who, Whom, When, How? Questions and Emerging Answers on Age Discrimination,” *The Equal Rights Review*, 11, no. 1 (2013): 69–98.

5 Andrew W. Achenbaum, “A History of Ageism Since 1969,” *Generations. American Society on Aging*, 39, no. 3 (2015): 10–16.

6 Robert N. Butler, “Age–Ism: Another Form of Bigotry,” *The Gerontologist*, 9, no. 4 (1969): 243, [https://doi.org/10.1093/geront/9.4\\_Part\\_1.243](https://doi.org/10.1093/geront/9.4_Part_1.243).

7 Robert N. Butler, *Why Survive? Being Old in America* (New York: Harper & Rowe, 1975), 12.

8 Robert N. Butler, *Longevity Revolution: The Benefits and Challenges of Living a Long Life* (New York: Public Affairs, NY, 2008), 40–41.

9 Piotr Szukalski, “Ageizm – Przyczyny, Przejawy, Konsekwencje,” in *Starzenie Się Ludności Polski – Między Demografią a Gerontologią Społeczną*, eds. Jerzy T. Kowaleski, Piotr Szukalski (Łódź: Wydawnictwo Uniwersytetu Łódzkiego, 2004), 162.

10 Simon Biggs, “New Ageism: Age Imperialism, Personal Experience, and Aging Policy,” in *Ageing and Diversity: Multiple Pathways and Cultural Migrations*, eds. Svein Olav Daatland and Simon Biggs (Bristol: The Policy Press, 2006), 96–1006; Alan Walker, “The New Ageism,” *Political Quarterly*, 83, no. 4 (2012): 812–19, <https://doi.org/10.1111/j.1467-923X.2012.02360.x>.

the COVID-19 pandemic that became an impulse to define, condemn and call to counteract ageism on the international forum and by international bodies.<sup>11</sup>

The year 2021 was rich in initiatives against ageism internationally. The Global Report on Ageism titled “Kicking off a global conversation about ageism: launch of the first UN Global report on ageism” was presented by the World Health Organization. This report gathers previous global research, good and bad practices, policies and strategies, as well as individual testimonies. It also contains a profound description of ageism indicating its three aspects: stereotypes, prejudice and discrimination. It explains that age stereotypes (positive or negative) relate to human thoughts and tend to differ by contexts and culture. Regardless of their nature, they rely on generalisations, so are frequently inaccurate and potentially harmful. Prejudices (positive or negative) operate in the sphere of feelings and emotions directed towards a person based on their perceived (age) group membership. Finally, age discrimination refers to actions or behaviours that are particularly harmful practices and policies directed towards people based on their age.<sup>12</sup>

Moreover, the WHO addresses ageism also in the context of new technologies in its policy brief on “Ageism in artificial intelligence for health”, published in 2022. This policy brief considers the potential interplay between ageism and AI where health is concerned, where AI may exacerbate forms of ageism towards older people. In addition, it proposes legal, non-legal and technical measures that can be taken to minimise the risk of ageism in AI. On the other hand, it points out directions for maximising AI for the benefit of older people. The authors of the brief emphasise the need to include older people in designing AI technologies for health and training AI developers and designers in recognising and avoiding ageism. They further recommend that design teams be diverse regarding age and other demographic characteristics. States, in turn, should ensure investment in digital infrastructure and digital literacy and skills for older people, their carers and health professionals.<sup>13</sup>

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11 UN Secretary-General, “Policy Brief: The Impact of COVID-19 on Older Persons,” United Nations, May 2020, <https://www.un.org/development/desa/ageing/wp-content/uploads/sites/24/2020/05/COVID-Older-persons.pdf>; UN Independent Expert, “Report of the Independent Expert on the Enjoyment of All Human Rights by Older Persons, Claudia Mahler. Ageism and Age Discrimination”.

12 WHO, “Global Report on Ageism,” 5.

13 WHO, “Ageism in Artificial Intelligence for Health: WHO Policy Brief,” (Geneva, 2022), 12–13, [https://www.who.int/health-topics/ageism#tab=tab\\_1](https://www.who.int/health-topics/ageism#tab=tab_1).

In 2021, the UN Independent Expert on the enjoyment of all human rights by older persons – Claudia Mahler – dedicated her thematic annual report exclusively to ageism. In this report, she provides many examples of states' ageist approaches to older citizens, covering other issues as mandatory retirement, cut-off social policy entitlements, or exclusion from the labour market. She also indicates particular barriers to access to goods and services, including financial tools connected with age limits, digitalisation, poverty or low income. Special attention in the report is paid to ageism in the healthcare sector and care. In general, the report reveals inadequate gerontological culture. Through the report, Claudia Mahler calls on states to take legislative and organisational steps against ageism and age discrimination by developing age-equality policies and strategies adopting appropriate special measures for their inclusion and equal participation in society. She stresses that older persons and their subgroups, who are at risk of multiple forms of discrimination, should be identified and consulted. In many paragraphs of the report, she underlines the crucial and active role of older people in the cultural and societal transformation of how society sees ageing. She also indicates the importance of awareness-raising efforts coupled with strategies to empower older persons, build up their skills and capacities, and reduce internalised and self-directed ageism. Finally, she calls on states and other stakeholders to take measures to encourage the media to avoid stereotypical portrayals of older adults and promote a culture of tolerance, empathy, diversity and intergenerational solidarity, which are essential for anti-discrimination measures to be effective.<sup>14</sup>

Another important voice on ageism can be heard in the study “Update to the 2012 Analytical Outcome Study on the Normative Standards in International Human Rights Law in Relation to Older Persons”, published in March 2021 by the Office of the UN High Commissioner for Human Rights. Among other things, this study contains an analysis of ageism and its harmful consequences, as well as indicates gaps in the normative international framework to combat this phenomenon.<sup>15</sup>

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14 UN Independent Expert, “Report of the Independent Expert on the Enjoyment of All Human Rights by Older Persons, Claudia Mahler. Ageism and Age Discrimination,” paras. 60, 64–65, 68.

15 OHCHR, “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,” March 2021, <https://social.un.org/>



Ageism and calls to take action against it also appears in a number of soft law documents, though this is an achievement of the last decade. At a global level, neither the Vienna International Plan of Action on Ageing of 1982 nor the United Nations Principles for Older Persons of 1991 mention “ageism” explicitly, but certainly they refer to aspects of it (e.g. in the labour market and in the media), setting out important guidelines on older persons’ dignity.

The Madrid International Plan of Action on Ageing and the Political Declaration of 2002 indicate ageism only once, when calling on the media and the private and public sectors to avoid ageism in the workplace and to present positive images of older persons as wise, productive and experienced. It also encourages states to combat stereotypes and prejudices in various spheres of life, especially in employment.

However, the MIPAA is a long-term process and every year since 2002, the UN Secretary-General has been submitting to the UN General Assembly reports “Follow-up to the Second World Assembly on Ageing” and the UN General Assembly adopts resolutions. Since 2009, these reports have addressed ageism and its components as systematic stereotyping and discrimination against older persons that reinforce a negative image of them as a burden, a drain on resources and persons in need of care. For example, in the 2021 report, the Secretary General argued that the COVID-19 pandemic had sharpened ageist attitudes towards older people, especially in the area of provision of health and other critical services and resources, and in long-term care facilities. That is why he called to combat ageism and age discrimination and address the intersectional discrimination that affect older persons, as well as to build stronger legal frameworks at the national and international levels to protect the human rights of older persons, including accelerated efforts to develop proposals for a convention protecting human rights and dignity in older age.<sup>16</sup>

In the report provided in 2022, the Secretary General addressed the issue of ageism in relation to new technologies and artificial intelligence. He noted that despite the fact that they are designed with older people in mind, they can often be influenced by stereotypes about old age or disability, thus failing to take into account the needs and real interests of older users. Age-related

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ageing-working-group/documents/eleventh/OHCHR%20HROP%20working%20paper%2022%20Mar%202021.pdf.

16 UN Secretary-General, “Follow-up to the Second World Assembly on Ageing Report of the Secretary-General, 15 July 2021,” A/76/156, paras. 3, 16.

stereotypes may explain the disproportionate number of products for older people that focus on health and care needs, as opposed to education, work or leisure. Moreover, artificial intelligence and its algorithms that do not adequately reflect the heterogeneous characteristics and needs of this group may also perpetuate ageist stereotypes, thus limiting the opportunities and benefits of digital products and services aimed at older people, undermining their quality and, moreover, potentially weakening intergenerational engagement.<sup>17</sup> In December 2022, in the framework of the MIPAA follow-up process, the UN General Assembly adopted a resolution emphasising, among other things, “the need to take effective measures against ageism and to view older persons as active contributors to society and not as passive receivers of care and assistance and an impending burden on welfare systems and economies, while promoting and protecting their human rights”.<sup>18</sup>

Special attention should be paid to the Human Rights Council resolution of 7 October 2021 on the rights of older persons, referred to several times in this book. Similarly to the WHO report, it recognises that ageism “can be associated with stereotypes, prejudice and/or discriminatory actions or practices, including hate speech, against older persons based on their chronological age or on a perception that a person is ‘old’, and that ageism can be implicit or explicit and be expressed at different levels”.<sup>19</sup> Therefore, it encourages states “to take measures to combat ageism and eliminate age discrimination, and to protect the human rights of older persons in, inter alia, employment, social protection, housing, education and training, access to new technologies and the provision of financial, social, health-care, long-term support and palliative care services, and to promote the development of comprehensive care systems”.<sup>20</sup>

On the European forum, the Council of Europe Parliamentary Assembly resolution titled “Promoting Active Ageing–Capitalising on Older People’s Working Potential” of 2011 was the first soft law act adopted on this

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17 UN Secretary-General, “Follow-up to the Second World Assembly on Ageing Report of the Secretary-General, 7 July 2022,” A/77/134, paras. 11, 14.

18 UN General Assembly, “Resolution Adopted by the General Assembly on 15 December 2022, Follow-up to the Second World Assembly on Ageing,” A/RES/77/190, para. 5.

19 Human Rights Council, “Resolution Human Rights of Older Persons Adopted by the Human Rights Council on 7 October 2021,” A/HRC/RES/48/3, 2021, para. 4.

20 Human Rights Council, para. 3.

forum describing age discrimination in connection with ageism.<sup>21</sup> Another resolution – “Combating Discrimination Against Older Persons on the Labour Market” of 2013 also explicitly refers to ageism and age discrimination. It encourages states to start campaigns to change beliefs and attitudes in order to eliminate stereotypes and build a positive and accurate image of workers in all age groups.<sup>22</sup>

Meanwhile, the terms “ageism”, “stereotypes” and “prejudices” are not present in the principal Council of Europe document on older persons – the Committee of Ministers Recommendation on the Promotion of Human Rights of Older Persons, adopted in 2014.<sup>23</sup> On the other hand, the recommendation aims to eliminate barriers denying older adults their human rights, so it does potentially cover ageism, even if not mentioning it by name.

Finally, ageism, age stereotyping and prejudices are not directly indicated in EU law,<sup>24</sup> but it should be noted that the European Commission’s Green Paper on Ageing “Fostering Solidarity and Responsibility Between Generations” does mention ageism specifically as a potential barrier to economic activity of older adults.<sup>25</sup>

Contrary to reports and studies provided by international bodies, as well as soft law documents, international treaties do not address ageism as such. Even the Inter-American Convention on Protecting the Human Rights of

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21 Council of Europe Parliamentary Assembly, “Resolution 1793 (2011) Promoting Active Ageing – Capitalising on Older People’s Working Potential,” 28 January 2011.

22 Council of Europe Parliamentary Assembly, “Resolution 1958 (2013) Combating Discrimination against Older Persons on the Labour Market,” 4 October 2013.

23 Committee of Ministers of the Council of Europe, “Recommendation CM/Rec(2014)2 Promotion of Human Rights of Older Persons,” 19 February 2014.

24 Israel Issi Doron and Nena Georgantzi, *Ageing, Ageism and the Law: European Perspectives on the Rights of Older Persons* (Edward Elgar Publishing, 2018); Nena Georgantzi, “The European Union’s Approach towards Ageism,” in *Contemporary Perspectives on Ageism*, eds. Liat Ayalon, Clemence Tesch-Römer, International Perspectives on Aging 19 (Cham: Springer, 2018), 341–68, <https://doi.org/10.1007/978-3-319-73820-8>; Ann Numhauser-Henning, “Ageism, Age Discrimination and Employment Law in the EU,” in *Ageing, Ageism and the Law. European Perspectives on the Rights of Older Persons*, eds. Israel Doron, Nena Georgantzi (Cheltenham, UK, Northampton, MA, USA: Edward Elgar Publishing, 2018), 98–115.

25 European Commission, “Green Paper on Ageing: Fostering Solidarity and Responsibility between Generations,” 27 January 2021 COM(2021) 50 Final.

Older Persons of 2015<sup>26</sup> and the Protocol on the Rights of Older Persons to the African Charter on Human and Peoples' Rights of 2016,<sup>27</sup> which contain provisions obliging the states parties to take steps towards the elimination of "age discrimination in old age" and eradicating prejudices, stereotypes, stigmatisation and marginalisation resulting in preventing older persons from fully enjoying their human rights, do not mention "ageism" explicitly.

As the hard international human rights law does not condemn ageism, and as no global treaty on older persons' rights has been adopted yet, it is necessary to search for other possibilities to address ageism. Therefore, it may be assumed that the legal basis for the elimination of ageism under international law are those provisions that refer to human dignity. According to the Universal Declaration of Human Rights, which gives rise to all presently binding international human rights treaties, "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world".<sup>28</sup> (UN General Assembly, 1948, Preamble). Consequently, the concept of dignity has been introduced into both covenants and treaties protecting particular groups of people, as well as into treaties protecting specific human rights and freedoms, especially freedom from torture and racial discrimination. We can also find some references to human dignity in the international labour, environmental, and humanitarian laws.

It is worth stressing that the milestone 2012 UN General Assembly resolution "Towards a comprehensive and integral international legal instrument to promote and protect the rights and dignity of older persons", being the starting point for work on the new convention, indicates both human rights and the dignity of older persons.<sup>29</sup>

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26 Organization of American States, "Inter-American Convention on Protecting the Human Rights of Older Persons," adopted at the General Assembly of the Organization of American States in Washington, DC, on June 15, 2015, (OAS, A-70) 2015.

27 African Union, "Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa of 31 January 2016," <https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-older-persons>.

28 UN General Assembly, "Universal Declaration of Human Rights Adopted by the United Nations General Assembly in Paris on 10 December 1948 General Assembly Resolution 217 A," 1948, [https://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/217\(III\)](https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/217(III)).

29 UN General Assembly, "Towards a Comprehensive and Integral International Legal Instrument to Promote and Protect the Rights and Dignity of Older Persons," 12 December 2012, A/RES/67/139.

Undoubtedly, counteracting ageism, which is a principal threat to older persons' dignity and rights, requires a precise response that encompasses raising awareness of the international community. It seems that the international human rights mechanisms, described in Chapter Four, provide such possibilities. In addition, various extra-legal actions by international bodies, states, NGOs and other stakeholders should also be appreciated in this area.

Therefore, the human rights machinery, under the auspices of the Human Rights Council, can be explored further, to shape the international community's awareness of the harmful effect of ageism. Certainly, combating ageism is a priority for the UN Independent Expert on the enjoyment of all human rights by older persons. Both Independent Experts contributed significantly to raising awareness of the harmful effects of ageism in their annual reports, statements and observations on their country visits. For example, in 2015, the Independent Expert encouraged the Austrian authorities to further mainstream the rights of older persons in all state policies and programmes, which should actively combat ageism, as well as the marginalisation and social exclusion of older persons, thereby reducing their vulnerability, including to abuse and violence.<sup>30</sup>

In Mozambique, the UN Independent Expert also observed various aspects of ageism, notably age discrimination in many areas of life and contexts, from decision-making in households with limited resources to ageist attitudes of health workers towards older people, even resulting in a denial of treatment.<sup>31</sup> Elder abuse and violence as a consequence of ageism were identified in the reports from visits to Montenegro and Uruguay. In relation to these countries, she also expressed concern about various aspects of discrimination and stereotyping in the private sector. She reminded companies to respect the Guiding Principles on Business and Human Rights.<sup>32</sup>

In a report on her visit to China in 2020, the UN Independent Expert noted that there is no equivalent for "ageism" in the many languages and dialects spoken in China. She recommended translating and mainstreaming it

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30 UN Independent Expert, "Report of the Independent Expert on the Enjoyment of All Human Rights by Older Persons, Visit to Austria (2015)," A/HRC/30/43/Add.2.

31 UN Independent Expert, "Report of the Independent Expert on the Enjoyment of All Human Rights by Older Persons, Visit to Mozambique (2019)," A/HRC/42/43/ADD.2.

32 UN Independent Expert, "Report of the Independent Expert on the Enjoyment of All Human Rights by Older Persons, Visit to Montenegro (2018)," A/HRC/39/50/Add.2; Independent Expert, "Report of the Independent Expert on the Enjoyment of All Human Rights by Older Persons, Visit to Uruguay (2019)," A/HRC/42/43/ADD.1.

into a dedicated normative response. She also encouraged the authorities to establish an independent national equality body to monitor and report on discrimination, including discrimination against older persons or ageism.<sup>33</sup>

Finally, in the report on her country visit to Finland, the UN Independent Expert, Claudia Mahler

urges the Government of Finland to review its new laws, strategies and action plans, in particular as they relate to older persons, with a view to ensuring that ageism and ageist practices are not perpetuated or tolerated. Furthermore, taking into account the diversity of the age group would be a benefit to society. Intergenerational approaches should be strengthened, recognizing that younger generations are future generations of older persons. Recognizing the need for human rights protection during the life course is relevant to persons of all ages because access to human rights in older age ensures dignified ageing in an inclusive society.<sup>34</sup>

Other Special Procedure Holders do not name and shame ageism in their reports and observations. The only exception is the Special Rapporteur on violence against women, its causes and consequences, who called on the Australian government to develop a national plan to promote the autonomy and agency of older people by addressing ageism and promoting better community understanding of elder abuse, achieving national consistency in standards, safeguarding at-risk adults and improving responses, as well as building the evidence base for responding to elder abuse.<sup>35</sup>

The Universal Periodic Review is another mechanism with the potential to encourage states to address ageism, and yet another mechanism that remains untapped. During recent UPR cycles, older persons' rights and dignity and the dangers of age discrimination have been more and more frequent topics of dialogue, but states do not indicate ageism in their recommendations to other

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33 UN Independent Expert, "Report of the Independent Expert on the Enjoyment of All Human Rights by Older Persons, Visit to China (2020)," A/HRC/45/14/Add.1, para. 70.

34 UN Independent Expert, "Report of the Independent Expert on the Enjoyment of All Human Rights by Older Persons, Visit to Finland (2022)," A/HRC/51/27/Add.1.

35 Special Rapporteur on violence against women, "Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences on Her Mission to Australia (2018)," A/HRC/38/47/ADD.1, para. 96.

states. Only Vietnam recommended that Singapore enhance measures to ensure the protection of the rights and well-being of older persons, including efforts to reduce ageism.<sup>36</sup> Undoubtedly, the example of Vietnam is worth following by other countries, even if there is no hard law prohibiting ageism.

Similarly, the lack of the notion of “ageism” in the text of the Council of Ministers recommendation 2014 (2) of the Council of Europe to Member States on the promotion of the human rights of older persons caused that, during the overview of the implementation of the recommendation in 2019, only Austria was the only one of the 21 reporting states to address ageism in its report, declaring that “in light of the recommendation, we continue to mainstream these rights in all policies and programmes, in order to actively combat ageism, the marginalisation and social exclusion of older persons”.<sup>37</sup> Another relevance to combating ageism is contained in the Age Platform Europe submission, which noted that “Still, budgetary constraints and growing ageism perpetuate images of older people as a cost and a burden, reinforce and deepen inequalities and disadvantage against the older population. The recommendation lacks the legal strength and political teeth to drive change”.<sup>38</sup>

## 2. Capturing intersectionality and multiple discrimination

Addressing ageism and its components cannot be done in isolation from other factors that cause the exclusion of older people. It is necessary to recognise the intersecting inequalities that affect the lives of older people, for example race, ethnicity, nationality, gender, sexual orientation, religion, membership of a particular social group, etc. Inequalities can also multiply when people experience any kind of disadvantage or crisis, e.g. in connection with a pandemic, war or displacement. Thus, inequalities and their roots have many contexts and aspects. Therefore, considering only one section of unjustified, inferior treatment

36 Human Rights Council, “Report of the Working Group on the Universal Periodic Review Niger,” 15 July 2021, A/HRC/48/5.

37 Steering Committee for Human Rights, “Steering Committee for Human Rights, Report on the Implementation of the Committee of Ministers’ Recommendation CM/Rec (2014) 2 on the Promotion of Human Rights of Older Persons,” CDDH 90th Meeting (27–30 November 2018), 7 January 2019, CDDH(2018)R90 Addendum.

38 Steering Committee for Human Rights, 93.

may prove insufficient. The Carvalho Pinto case, cited in Chapter Three, is an example showing that the ECtHR's decision focusing on the comparison of the situation of a strictly defined disfavoured group with a non-disfavoured group (women and men), leads to a sense of inadequacy. This deficit was one of the reasons why two judges drafted a dissenting opinion. Their doubts concerned the comparison between the situation of men and women, not between older and younger women. Indeed, the Carvalho Pinto case does not concern the inferior treatment of the applicant compared to men in a similar situation, but a combination of ageism and sexism presented by national judges.

Meanwhile, the intersectional theory, coined by the Kimberlé Crenshaw in the late 1980s<sup>39</sup> and constantly developed and refined since then,<sup>40</sup> allows for a more accurate understanding of multi-aspect human rights violations and changes in thinking about equality. Although intersectionality was initially designed to capture various aspects of inequality based on race and gender,<sup>41</sup> it can also be applied to different variants of intersectional and compound discrimination. However, as Alan S. Gutterman notes, currently the combination of age and other grounds for discriminating is not particularly emphasised in the scholarship.<sup>42</sup> The same insufficiency is also noted by human rights bodies

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39 Kimberle Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics," no. 1 (1989): Article no. 8, <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1052&context=uclf>.

40 Timo Makkonen, *Multiple, Compound and Intersectional Discrimination: Bringing the Experience of the Most Marginalized to the Fore* (Abo: Institute of Human Rights, 2002), <https://www.abo.fi/wp-content/uploads/2018/03/2002-Makkonen-Multiple-compound-and-intersectional-discrimination.pdf>; Emily Grabham et al., eds., *Intersectionality and Beyond: Law, Power and the Politics of Location*, 1st ed. (Routledge-Cavendish, 2009), <https://doi.org/10.4324/9780203890882>; Kimberle Crenshaw and Patricia Shultz, "Intersectionality in Promoting Equality," *The Equal Rights Review* Sixteen (2016): 2016–2219, <https://www.equalrightstrust.org/equal-rights-review-volume-sixteen-2016>; Sandra Fredman, *Intersectional Discrimination in EU Gender Equality and Non-Discrimination Law* (LU: Publications Office, 2016), <https://data.europa.eu/doi/10.2838/241520>; Ivona Truscan and Joanna Bourke-Martignoni, "International Human Rights Law and Intersectional Discrimination," *The Equal Rights Review*, Sixteen (2016): 103–31, <https://www.equalrightstrust.org/equal-rights-review-volume-sixteen-2016>; Johanna Bond, *Global Intersectionality and Contemporary Human Rights*, First edition (Oxford, United Kingdom: Oxford University Press, 2021).

41 Bond, *Global Intersectionality and Contemporary Human Rights*, 2–26.

42 Alan Gutterman, "Intersectionality and Rights of Older Persons," *SSRN Electronic Journal*, 8 (2023), <https://doi.org/10.2139/ssrn.4024373>.



and international agencies. For example, the UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, in his report of 2022, indicates the scarcity of contemporary literature in the area of the health and well-being of older lesbian women.<sup>43</sup>

The intersectional approach is principally used to diagnose discrimination of older persons who do not form a homogenic group and are present in all social groups. Intersectionality proposes a departure from the traditional comparison of the treatment of strictly defined groups to identifying inequalities and discovering many nuances. According to Gerard Quinn:

intersectionality leads us to understand justice from a social justice perspective as well as a civil rights perspective. It should generate more thought into ‘accumulated disadvantage’, which often locks disfavoured groups into endemic cycles of poverty. Through time people begin to believe the stereotypes set about themselves – they conform to the image, and re-start the cycle of exclusion and leave intact closed systems that tolerate this. The slogans about interdependence of civil and political rights on the one hand and economic, social and cultural rights on the other are generally vacuous. There is a deep nexus between the two – and intersectionality helps bring this to life.<sup>44</sup>

Thus, an intersectional approach to various types of exclusion can give substance to the slogan of “leave no one behind”, and of the interdependence of human rights.<sup>45</sup> Ultimately, an intersectional approach is a key element of the human rights-based approach, as analysed in Chapter One.

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43 UN Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity, “The Right to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health of Persons, Communities and Populations Affected by Discrimination and Violence Based on Sexual Orientation and Gender Identity in Relation to the Sustainable Development Goals. Report of the Independent Expert on Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity, Victor Madrigal-Borloz,” 22 November 2022, A/HRC/50/27.

44 Gerard Quinn, “Reflections on the Value of Intersectionality to the Development of Non-Discrimination Law,” *The Equal Rights Review*, Sixteen (2016): 72, <https://www.equalrightstrust.org/equal-rights-review-volume-sixteen-2016>.

45 Johanne Boucharde and Patricie Meyer-Bisch, “Intersectionality and Interdependence of Human Rights: Same or Different?” *The Equal Rights Review*, Sixteen (2016): 197, <https://www.equalrightstrust.org/equal-rights-review-volume-sixteen-2016>.

For the heterogeneous group of older people who are members of various vulnerable groups, capturing the overlapping and multiplying causes of inequality and exclusion is of fundamental importance. On the one hand, the intersectionality of diverse reasons for discrimination is visible in enduring characteristics that affect the position of an older person in question, and on the other hand, in the specific life situation they find themselves in.

A key intersection in older age appears with physical and mental disability,<sup>46</sup> as older adults represent the majority of the overall population of people with disabilities (more than 46 per cent of older persons worldwide have an impairment).<sup>47</sup> According to the Special Rapporteur on the rights of persons with disabilities – Catalina Devandas-Aguilar – regardless of when an older person acquired their disability (whether they grew old with a disability or acquired their disability in old age), they are exposed to ageism and ableism. Older people with disabilities are therefore discriminated against and disadvantaged not only because of their disability, but also because of stereotypes about older people. As a result, older people with disabilities are more subject to loss of empowerment, denial of autonomy, marginalisation and cultural devaluation. They are also more vulnerable to social isolation, exclusion, poverty and abuse. Furthermore, the combined effect of ageism and ableism leads to gaps in human rights protection and age-sensitive interpretation of human rights standards. Finally, the Special Rapporteur noted that older women with disabilities have consistently poorer life prospects and outcomes than older women without disabilities and older men with disabilities. Thus, older women may experience an accumulation of ageism, ableism and sexism. Certainly, those can be joined by, for example, racism or homophobia and many other stereotypes and prejudices leading to harmful behaviour against them, including elder abuse.<sup>48</sup>

The phenomenon of double standards in relation to ageing between man and woman and the feminisation of ageing are well known and described in

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46 Michelle Putnam and Christine Bigby, eds., *Handbook on Ageing with Disability*, 1 Edition (New York City: Routledge, 2021).

47 Special Rapporteur on the rights of persons with disabilities, “Report of the Special Rapporteur on the Rights of Persons with Disabilities, Catalina Devandas-Aguilar,” 17 July 2019, A/74/186.

48 Patricia Brownell and Denise Gosselin, “Neglect, Abuse, and Violence in Later Life: Intersectionality of Gender and Age,” in *Older Women and Well-Being*, ed. Mala Kapur Shankardass (Singapore: Springer Singapore, 2021), 401–14, [https://doi.org/10.1007/978-981-16-4605-8\\_21](https://doi.org/10.1007/978-981-16-4605-8_21).

the doctrine<sup>49</sup> as well as in the UN Independent Expert's milestone report titled "Human rights of older women: the intersection between ageing and gender".<sup>50</sup> Age discrimination against older women and what is known as gendered ageism are evident in the workplace, affecting recruitment, career opportunities and, ultimately, receipt of a decent pension. This was explicitly shown in the *Trujillo Calero v. Ecuador* case considered by the CESCR in 2018.<sup>51</sup> All these factors affect women's health and independence in older age. In addition, there is a strong gender aspect to ageism concerning long-term care, as women, who tend to live longer than men, need more long-term care services. Lifelong economic discrimination means that many women may not have the resources needed to provide care at home, and may not think about going beyond the institutionalised forms of care for women who have often provided care for others, all of which compounds the phenomenon of their exclusion.<sup>52</sup>

The *Ciobanu v. Moldova* case mentioned in Chapter Four, examined by the CEDAW Committee, perfectly illustrates such a situation. In this case an applicant argued, among other things, that

cultural factors make women the main caregivers for their children in Eastern European societies characterized by profound patriarchal patterns, and in the Republic of Moldova in particular. Having children with disabilities undermines women's prospects for fulfilling their lifetime potential to a greater extent than is the case for men. Such women are therefore dependent on their husbands, not only during the period when they provide care for their children with severe disabilities, but also when they no longer provide care

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49 Margaret M. Gullette, *Agewise: Fighting the New Ageism in America* (Chicago: Chicago University Press, 2011); Clary Krekula, Pirjo Nikander, and Monika Wilińska, "Multiple Marginalizations Based on Age: Gendered Ageism and Beyond," in *Contemporary Perspectives on Ageism* (Springer, Cham, 2018), 33–50; Paula A Rochon, Surbhi Kalia, and Paul Higgs, "Gendered Ageism: Addressing Discrimination Based on Age and Sex," *The Lancet*, 398, no. 10301 (August 2021): 648–49, [https://doi.org/10.1016/S0140-6736\(21\)01636-6](https://doi.org/10.1016/S0140-6736(21)01636-6).

50 UN Independent Expert, "Report of the Independent Expert on the Enjoyment of All Human Rights on Human Rights of Older Women: The Intersection between Ageing and Gender," 16 July 2021 A/76/157.

51 CESCR, Marcia Cecilia Trujillo Calero v. Ecuador, Communication No 10/2015, UN Doc. E/C.12/63/D/10/2015 (Views 26 March 2018), 2018. See also in Chapters Three and Four of this book.

52 Rochon, Kalia, and Higgs, "Gendered Ageism," 648.

for them, since they do not benefit from the social insurance pension for the caregiving period.<sup>53</sup>

The committee, in its views, addressed explicitly the intersectionality of discrimination against older women, stating that

The Committee notes, in addition, that the author is an older person who is in a critical economic situation after having provided care for her severely disabled (and now deceased) daughter for 20 years and that the intersection of the alleged gender discrimination and discrimination on the grounds of her association with her disabled child makes her particularly vulnerable to discrimination in comparison with the general population in the Republic of Moldova.<sup>54</sup>

Older women are also not exempt from stigmatisation and discrimination in the context of the right to health.<sup>55</sup> Issues such as post-menopausal, post-reproductive and other age- and gender-specific problems, expose women to unequal access to healthcare and ineffective enforcement of the right to health.<sup>56</sup>

Another example of blatantly visible intersectional inequality can be observed in the case of older members of indigenous peoples. They have to face the difficult conditions of daily living, lack of employment, low income, low education, food insecurity, degradation of the natural environment, barriers to accessing healthcare systems, poor community infrastructure, resources and capacities, and many other factors, including poor communication with healthcare professionals and, on top of everything, racism.<sup>57</sup> The loss of land by indigenous and tribal communities also deepens their vulnerability, as they cannot

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53 CEDAW Committee, *Natalia Ciobanu v. Republic of Moldova*; Communication No 104/2016 CEDAW/C/74/D/104/2016, (Views, 04 November 2019), para.712.

54 CEDAW Committee, para. 711.

55 Joan C. Chrisler, Angela Barney, and Brigida Palatino, "Ageism Can Be Hazardous to Women's Health: Ageism, Sexism, and Stereotypes of Older Women in the Healthcare System: Ageism Can Be Hazardous to Women's Health," *Journal of Social Issues*, 72, no. 1 (March 2016): 86–104, <https://doi.org/10.1111/josi.12157>.

56 "Report of the Independent Expert on the Enjoyment of All Human Rights on Human Rights of Older Women: The Intersection between Ageing and Gender," paras. 36–42.

57 Ian Anderson et al., "Indigenous and Tribal Peoples' Health (The Lancet–Lowitja Institute Global Collaboration): A Population Study," *The Lancet*, 388, no. 10040 (July 2016): 131–57, [https://doi.org/10.1016/S0140-6736\(16\)00345-7](https://doi.org/10.1016/S0140-6736(16)00345-7).

access the healing medicines and traditional food that they did in the past.<sup>58</sup> Research shows that older members of indigenous communities experience multiplied discrimination, including racism, as well as stigma and exclusion in the event of dementia and other cognitive impairments.<sup>59</sup> The COVID-19 pandemic highlighted the dramatic situation of persons of indigenous origin in access to healthcare.<sup>60</sup>

Racism combined with ageism does not bypass older members of ethnic minorities and voluntary and involuntary migrants and affects all spheres of their lives, including mental and physical condition.<sup>61</sup> Older migrants are certainly a very heterogeneous group, not only because of their legal status and level of integration, but also because of their circumstances and age and the circumstances of leaving their country of origin and current place of residence.<sup>62</sup> In many low- and middle-income countries, members of ethnic and migrant communities tend to be more likely than other members of society to be unable to live independently in old age due to disability.<sup>63</sup> Older women belonging to various types of minorities often face barriers when accessing health services due to their lower health literacy, disempowerment, and language barriers.<sup>64</sup>

Finally, the older LGBT+ people are at risk of facing accumulated effects of negative stereotypes, stigmas, and discrimination experienced throughout

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58 Priscilla Santau Migiros, ed., *State of the World's Indigenous Peoples. Indigenous Peoples' Access to Health Services* (United Nations, 2016), 30.

59 Juliana N. de Souza-Talarico et al., "Dementia and Cognitive Impairment Prevalence and Associated Factors in Indigenous Populations: A Systematic Review," *Alzheimer Disease & Associated Disorders*, 30, no. 3 (July 2016): 281-87, <https://doi.org/10.1097/WAD.000000000000140>.

60 Tamara Power et al., "COVID-19 and Indigenous Peoples: An Imperative for Action," *Journal of Clinical Nursing*, 29, no. 15-16 (August 2020): 2737-41, <https://doi.org/10.1111/jocn.15320>.

61 Sue Westwood, ed., *Ageing, Diversity and Equality*, Routledge Advances in Sociology (London: Routledge, 2019); Robert Joseph Taylor, "Race and Mental Health Among Older Adults: Within- and Between-Group Comparisons," *Innovation in Aging*, 4, no. 5 (1 September 2020): igaa056, <https://doi.org/10.1093/geroni/igaa056>.

62 Pnina Dolberg, Sigurveig H. Sigurðardóttir, and Ursula Trummer, "Ageism and Older Immigrants," in *Contemporary Perspectives on Ageism Edited by Liat Aylon and Clemens Tesh - Romer* (Springer, Cham, 2018), 180.

63 Zeinab Majid et al., "Global Frailty: The Role of Ethnicity, Migration and Socioeconomic Factors," *Maturitas*, 139 (September 2020): 34, <https://doi.org/10.1016/j.maturitas.2020.05.010>.

64 Natasha Reid et al., "Frailty in Ethnic Minority Women," *Maturitas*, 152 (October 2021): 29, <https://doi.org/10.1016/j.maturitas.2021.07.005>.

their lifetime. According to a survey by Age Platform and ILGA, they were twice as likely to experience violence in healthcare settings as younger LGBT+ respondents, with older intersex people, older trans women and older LGBT+ people from ethnic minorities (including those with a migrant background) experiencing the most violence.<sup>65</sup> Older LGBT+ persons encounter multiple barriers to accessing equitable, culturally appropriate mental health and ageing services. Older LGBT+ persons face social isolation and loneliness. Family rejection, limitations in the recognition of certain forms of families, and limited access to assisted reproduction techniques often leave older LGBT+ people with minimal family support. On the other hand, the care and health institutions often refuse to affirm the gender identity of older LGBT+ people and their needs are trivialised by social carers. In addition, their situation deteriorates more sharply after the death of their partners.<sup>66</sup>

All of these multiplied barriers and inequalities can be compounded by all sorts of disasters and crises that only worsen the situation of vulnerable older persons. A recent example is the COVID-19 pandemic, when age and ageism acted as significant risk factors increasing the physical and psychosocial burden on older adults. The pandemic demonstrated the need to understand the experiences of older people in all sorts of cultures and communities, to recognise their diversity and ultimately to redress the past social, cultural, political and historical damage that all exacerbates their vulnerability<sup>67</sup> as older members

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65 Age Platform Europe and ILGA- Europe, "Intersections - Diving into the FRA LGBTI2 Survey Data - Older People," (European Union, 2020), <https://www.age-platform.eu/publications/intersections-diving-fra-lgbti2-survey-data-older-people>.

66 UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, "The Right to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health of Persons, Communities and Populations Affected by Discrimination and Violence Based on Sexual Orientation and Gender Identity in Relation to the Sustainable Development Goals. Report of the Independent Expert on Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity," Victor Madrigal-Borloz, 22 November 2022, A/HRC/50/27, 2022.

67 Mary Beth Quaranta Morrissey, Patricia Brownell, and Thomas Caprio, "Intersectionality of Race, Ethnicity, and Culture in Neglect, Abuse, and Violence Against Older Persons: Human Rights, Global Health, and Systems Approaches in Pandemics," in *Handbook of Interpersonal Violence and Abuse Across the Lifespan*, eds. Robert Geffner et al. (Cham: Springer International Publishing, 2022), 195, [https://doi.org/10.1007/978-3-319-89999-2\\_337](https://doi.org/10.1007/978-3-319-89999-2_337).

of indigenous peoples or older refugees.<sup>68</sup> Migita D'Cruz and Debanjan Banerjee noted in 2020 that “ageism and sexism existed even prior to the pandemic. Others such as an increased risk of morbidity and mortality, and restricted access to essential services have arisen in the context of the pandemic. These risks appear likely to operate even after the world emerges from the pandemic. Marginalization of older adults appears to be the final common path way through which these factors operate”.<sup>69</sup>

Another context to be explored is conscious and unconscious ageism against older persons during armed conflicts. In February 2022, Human Rights Watch published a report revealing older persons' vulnerability in recent international and war conflicts, both those who remained in their homes and those who became war refugees or internally displaced persons.<sup>70</sup> The report does not cover the war in Ukraine, where the situation of older adults, regardless of whether people left their homes or stayed, is particularly dramatic. Due to the demographic structure of Ukraine, with a high rate of older persons (especially women), this war has been called the “oldest humanitarian crisis in the world”.<sup>71</sup> HelpAge International, referring to this humanitarian crisis, noted that “...while war does not discriminate, the international response does. Time and again, the toll of war on older people is overlooked as they struggle to survive and piece together a new normal”.<sup>72</sup> The Special Rapporteur on the rights of persons with disabilities – Gerard Quinn – together with the UN Independent Expert on the enjoyment of all human rights by older persons – Claudia Mahler – in the context of the Russian invasion on Ukraine noted that “persons with disabilities and older persons during armed conflict are often left

68 Evelyn Avalos Cortez and van Blerk van Blerk, “The Impact of COVID-19 on Older Refugees,” *Forced Migration Review*, no. 67 (2021): 36, <https://www.fmreview.org/issue67>.

69 Migita D'Cruz and Debanjan Banerjee, “An Invisible Human Rights Crisis: The Marginalization of Older Adults during the COVID-19 Pandemic - An Advocacy Review,” *Psychiatry Research*, Elsevier 292, 113369epub (2020): 7, <https://doi.org/10.1016/j.psychres.2020.113369>.

70 Human Rights Watch, *No One Is Spared Abuses Against Older People in Armed Conflict* (2022), [https://www.hrw.org/sites/default/files/media\\_2022/02/global\\_olderpeople0222\\_web.pdf](https://www.hrw.org/sites/default/files/media_2022/02/global_olderpeople0222_web.pdf).

71 HelpAge International, “The Impact of War on Older People (in Ukraine and Everywhere Else),” <https://www.helpage.org>, 13 April 2022, <https://www.helpage.org/newsroom/latest-news/the-impact-of-war-on-older-people-in-ukraine-and-everywhere-else/>.

72 HelpAge International.

behind because of a lack of consideration of their particular needs, leading in many cases to abandonment”.<sup>73</sup>

The reasons for inequalities can multiply indefinitely, so it is difficult to discuss all of them. The question must therefore be asked whether international law is sufficiently flexible and prepared to counter ageism overlapping with other similar harmful phenomena and situations. Meanwhile, there are no explicit references to intersectionality in the UDHR or the covenants, or in the regional principal human rights treaties. However, a prohibition on intersectional discrimination can be found in the premise of “other status” contained in the antidiscrimination clauses forming part of the UDHR and these treaties.<sup>74</sup> The CESCR, in its general comment No 20, defines multiple discrimination (para. 17), refers to age and old age (para. 29) and, finally, recognises “others status” (para. 27) as “intersectional discrimination”.<sup>75</sup> It explains:

The nature of discrimination varies according to context and evolves over time. A flexible approach to the ground of “other status” is thus needed in order to capture other forms of differential treatment that cannot be reasonably and objectively justified and are of a comparable nature to the expressly recognized grounds in article 2, paragraph 2. These additional grounds are commonly recognized when they reflect the experience of social groups that are vulnerable and have suffered and continue to suffer marginalization. The Committee’s general comments and concluding observations have recognized various other grounds and these are described in more detail below. However, this list is not intended to be exhaustive. Other possible prohibited grounds could include the denial of a person’s legal capacity because he or she is in prison, or is involuntarily interned in a psychiatric institution, or the intersection of

73 UN OHCHR, “Ukraine: Aged and Those with Disabilities Face Heightened Risks, Say UN Experts. Press Releases,” 4 March 2022, <https://www.ohchr.org/en/press-releases/2022/03/ukraine-aged-and-those-disabilities-face-heightened-risks-say-un-experts>.

74 For example, Article 2 sec. 1 of the ICESCR states: “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.

75 CESCR, “General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights (Art. 2, Para. 2, of the International Covenant on Economic, Social and Cultural Rights),” 2 July 2009, E/C.12/GC/20.



two prohibited grounds of discrimination, e.g. where access to a social service is denied on the basis of sex and disability.<sup>76</sup>

In this context, the principal for the older persons' inclusion and their rights, the CESR's general comment No 6 on the economic, social and cultural rights of older persons appears pretty outdated, referring only to equal rights of men and women<sup>77</sup> and failing to mention intersectionality.

The CCPR and the CESCR do not consider intersectionality and/or intersectional discrimination in relation to age and older persons in their concluding observations. However, in their recommendations to China, Austria and Finland, the committees encourage these states to take steps against multiple forms of discrimination against vulnerable groups, including older persons.<sup>78</sup> Certainly, identifying multiple discrimination is the first step to understanding intersectional discrimination, but these notions are not identical. According to Sandra Fredman, multiple discrimination bases on two or more grounds simultaneously, while intersectional discrimination results from the interaction of grounds of discrimination resulting in a new and different type of discrimination.<sup>79</sup>

Meanwhile, the Committee on the Rights of Persons with Disabilities refers to the intersection between age (as one of several circumstances) and disability. For example, a whole section of the CRPD Committee's general comment on non-discrimination is dedicated *expressis verbis* to intersectionality. The committee calls upon states, among other things, to:

ensure that they consult closely and actively involve such organizations, which represent the vast diversity in society, including children, autistic persons, persons with a genetic or neurological condition, persons with rare and chronic diseases, persons with albinism, lesbian, gay, bisexual, transgender or intersex persons, indigenous peoples, rural communities, older persons, women, victims of armed conflicts and persons with an ethnic minority or migrant background.

<sup>76</sup> CESCR, para. 27.

<sup>77</sup> CESCR, "General Comment No 6: The Economic, Social and Cultural Rights of Older Persons," 8 December 1995, E/1996/22.

<sup>78</sup> According to the Universal Human Rights Index <https://uhri.ohchr.org/en/search-human-rights-recommendations> (14 May 2023).

<sup>79</sup> Fredman, *Intersectional discrimination in EU gender equality and non-discrimination law*, 51.

Only then can it be expected that all discrimination, including multiple and intersectional discrimination, will be tackled.<sup>80</sup>

The committee also addresses intersectionality in its concluding observations in the framework of the reporting procedure. For example, in its recent observation to Georgia, the committee expressed concern about “De facto discrimination against persons with disabilities living in rural areas, mainly due to insufficient access to services in the community, and intersectional discrimination affecting lesbian, gay, bisexual, transgender, queer and intersex persons with disabilities, including the absence of a normative framework recognizing intersectional discrimination”.<sup>81</sup>

As mentioned previously, the CEDAW Committee refers to intersectional discrimination in its case law. It also stresses the multinational character of discrimination against women. From the perspective of this volume, General recommendation No. 27 concerning older women is of principal value. According to the committee: “the discrimination experienced by older women is often multidimensional, with the age factor compounding other forms of discrimination based on gender, ethnic origin, disability, poverty levels, sexual orientation and gender identity, migrant status, marital and family status, literacy and other grounds”.<sup>82</sup>

Consequently, the committee calls on states to

take into account the multidimensional nature of discrimination against women and ensure that the principle of gender equality applies throughout women’s life cycle, in legislation and in the practical implementation thereof. In this regard, States parties are urged to repeal or amend existing laws, regulations and customs that discriminate against older women, and ensure that legislation proscribes discrimination on the grounds of age and sex.<sup>83</sup>

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80 CRPD Committee, “General Comment No 6 on Equality and Non-Discrimination,” 26 April 2018, CRPD/C/GC/6, para. 33.

81 CRPD Committee, “Concluding Observations on the Initial Report of Georgia,” 18 April 2023, CRPD/C/GEO/CO/1, para. 11.

82 CEDAW Committee, “General Recommendation No 27 on Older Women and Protection of Their Human Rights,” 10 December 2010, CEDAW/C/GC/27, para. 13.

83 CEDAW Committee, para. 31.

Thus, there is great potential in addressing the intersectionality of discrimination by the human rights treaty bodies. Johanna Bond notes that they vary in the extent to which they have embraced an intersectional analytical framework in their work, but all of them “offer valuable examples of both intersectional approaches and missed opportunities to use intersectionality as a guiding principle in the important work of interpreting and enforcing human rights”.<sup>84</sup>

The lack of a committee operating on the basis of a convention on the rights of older persons that provides an interpretation of intersectionality in its concluding observations directed to particular states, either by making general comments/recommendations, or by addressing this aspect of discrimination in the committee’s views provided in individual cases, appears to be such a missed opportunity.

Certainly, various aspects of intersectionality are present in some soft law documents, including the ILO recommendation on older workers<sup>85</sup> and the CoE Parliamentary Assembly recommendation on older migrants.<sup>86</sup> The New York Declaration for Refugees and Migrants of 2016 recognises the special needs of all people in vulnerable situations who are travelling within large movements of refugees and migrants, including older persons.<sup>87</sup> However, in general, soft law acts lack a holistic intersectional approach in relation to age in combination with other premises of discrimination.

International law on older persons, including the Inter-American Convention on Protecting the Human Rights of Older Persons and the CoE Council of Ministers recommendation of 2014, indicates states’ duties to develop specific approaches for older persons who are victims of multiple discrimination, but intersectional discrimination is not addressed. Similarly, the MIPAA indicates only goals to achieve in relation to various categories of older persons (women, older members of indigenous populations, inhabitants of rural areas,

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84 Bond, *Global Intersectionality and Contemporary Human Rights*, 57.

85 ILO, “Older Workers Recommendation,” 1980 (no. 162), 3 June 1980 by the General Conference of the International Labour Organisation, 1980.

86 Council of Europe Parliamentary Assembly, “Recommendation 1619 (2003) Rights of Elderly Migrants,” 9 August 2003.

87 UN General Assembly, “The New York Declaration for Refugees and Migrants Expresses the Political Will of World Leaders to Save Lives, Protect Rights and Share Responsibility on a Global Scale,” UN Summit on 19 September 2016,” A/RES/71/1.

migrants, persons with disabilities and illnesses, etc.), and in the context of natural disasters and other humanitarian emergencies.

That is why the reports, policy papers and even handbooks of the international human rights bodies emerge as guidelines on intersectionality. Some aspects of intersectionality are also addressed by the UN High Commissioner for Refugees,<sup>88</sup> and the WHO.<sup>89</sup> They point out the formal and informal barriers in enjoying the right to health by older refugees, war refugees, displaced persons and asylum seekers in emergency situations.

Without a doubt, the UN Independent Expert on the enjoyment of all human rights by older persons has the greatest track record in identifying intersectional discrimination against various categories of older people. This includes reports on country visits. For example, in reports to China, Mozambique and Montenegro the Independent Expert raised concern about ageism mixed with gender-based discrimination arising from patriarchal attitudes and stereotypes regarding the roles and responsibilities of women and men, placing women at a disadvantage.<sup>90</sup> In the report on her visit to Finland, Claudia Mahler explicitly addressed discrimination and a whole section dedicated to intersectionality. She pointed out, among other things, that

The provision of services should take into account specific needs of older persons, especially those with lesbian, gay, bisexual, transgender and intersex, indigenous or ethnic backgrounds, to provide them with culturally sensitive healthcare and social services. Older lesbian, gay, bisexual, transgender and intersex persons, who are one of the most vulnerable groups, receive insufficient services and have poor health outcomes. They are also one of the most invisible groups in old age owing to social stigma and are largely ignored by national laws and policies and by society at large. They may experience multiple forms

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88 UNHCR, "UNHCR's Policy on Older Refugees," EC/50/SC/CRP.1, Annex II, 2000; UNHCR, "Emergency Handbook. Older Persons," 2020, [https://emergency.unhcr.org/protection/persons-risk/older-persons#\\_ga=2.195038444.1980655889.1684257370-604704032.1684257370](https://emergency.unhcr.org/protection/persons-risk/older-persons#_ga=2.195038444.1980655889.1684257370-604704032.1684257370).

89 WHO Regional Office for Europe, "Health of Older Refugees and Migrants," 2018, <https://apps.who.int/iris/handle/10665/342275>.

90 UN Independent Expert, "Report of the Independent Expert on the Enjoyment of All Human Rights by Older Persons, Visit to Montenegro (2018)"; "Report of the Independent Expert on the Enjoyment of All Human Rights by Older Persons, Visit to Mozambique (2019)"; "Report of the Independent Expert on the Enjoyment of All Human Rights by Older Persons, Visit to China (2020)".

of discrimination owing to the stigma linked to their sexual orientation, gender identity and sex characteristics.<sup>91</sup>

She pays special attention to the situation of older persons whose ethnic and indigenous origin makes them particularly vulnerable. She calls for “designing appropriate and culturally sensitive services for persons with dementia with a mother tongue other than Finnish should take into consideration that, in older age, persons with dementia may revert to their original language and lose their previous ability to communicate in another language”.<sup>92</sup>

Capturing the needs of older, non-speaking Finnish persons with dementia appears to be essentially an intersectional approach. Specific aspects of intersectionality are indicated by the UN Independent Expert in her thematic report on the deprivation of liberty in older age. She indicates the need to take into account the intersectional factors in order to protect older persons’ dignity when deciding on imprisonment. She also raises the issue of immigration-related detention, noting that border-enforcement settings generally lack the capacity for individualised assessments of the needs of detainees. Meanwhile, intersectional approaches are needed to assess necessity and proportionality when making decisions about the detention of older persons. Hence, detained migrants who are usually fleeing persecution, generalised violence, conflict, economic insecurity and risks to their lives, may experience trauma in those settings.<sup>93</sup>

Certainly, an intersectional approach may also be found in the output of other Special Procedures Mandate Holders. For example, ageism against older women was also of interest to the Special Rapporteur on violence against women, in terms of its causes and consequences. A reference to ageism can be found in the Special Rapporteur’s report on her visit to Australia in 2018. The Australian government was advised to develop a national plan to promote the autonomy and agency of older people by addressing ageism and promoting a better community understanding of elder abuse, achieving national consistency in standards, safeguarding at-risk adults and improving responses, as well as building up an evidence base for responding to elder abuse. In achieving these goals, it was recommended that the national plan should take into account the

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91 UN Independent Expert, “Report of the Independent Expert on the Enjoyment of All Human Rights by Older Persons, Visit to Finland,” para. 75.

92 UN Independent Expert, para. 23.

93 UN Independent Expert, para. 51.

different experiences and needs of older persons with respect to their gender, sexual orientation, disability and cultural and linguistic diversity.<sup>94</sup>

Finally, in the UPR process, the notion of “intersectionality” has appeared in recommendations from Argentina to Morocco,<sup>95</sup> from Montenegro to Poland<sup>96</sup> and from Honduras to Slovenia<sup>97</sup> in the context of establishing explicit protection in national legislation against multiple and intersecting forms of discrimination on the grounds of sex, gender, sexual orientation, age, disability, national origin, ethnic origin or migration status. Argentina recommended that Denmark design policies to eliminate intersecting forms of discrimination, especially against older persons and migrant women, as well as victims of domestic violence.<sup>98</sup>

It is easy to notice that the recommendations on intersectional approach covering age and older persons are the UPR’s output of last years. They may herald the dissemination of the essence of intersectionality in the international community.

### 3. Identifying focus areas

As was indicated in Chapter One, the social inclusion of older persons depends on removing existing barriers and promoting their participation in various areas of life. Up to 2023, the OEWGA considered the following areas of particular importance for older adults to remain in the mainstream of society: equality and non-discrimination, neglect, violence, and abuse; autonomy and independence; long-term care and palliative care; social protection and social security; education, training, lifelong learning and capacity building; access to justice; the right to work and access to the labour market; economic security; the contribution

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94 Special Rapporteur on violence against women, “Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences on Her Mission to Australia”.

95 Human Rights Council, “Report of the Working Group on the Universal Periodic Review Morocco,” 6 January 2023, A/HRC/52/7, para. 57.64.

96 Human Rights Council, “Report of the Working Group on the Universal Periodic Review Poland,” 4 January 2023, A/HRC/52/15.

97 Human Rights Council, “Report of the Working Group on the Universal Periodic Review Slovenia,” 19 December 2019, A/HRC/43/15A.

98 Human Rights Council, “Report of the Working Group on the Universal Periodic Review Denmark,” 14 July 2021, A/HRC/48/10.

of older persons to sustainable development; the right to health and access to the health service. In the guiding questions for the 13<sup>th</sup> session, the OEWGA announced that the next areas of consideration will cover participation in public life and in decision-making processes, accessibility, infrastructure and habitat, including transport and housing.<sup>99</sup>

Most of these focus areas have been discussed in the previous sections of this volume as a matter of concern of the international community, expressed in the regional treaties on older persons' rights and in acts of soft law, including the 1991 UN Principles on Older Persons<sup>100</sup> and the CoE Committee of Ministers recommendation of 2014.

Certainly, the MIPAA indicates a fairly long list of most critical areas, goals and actions that states should undertake to "build a society for all ages".<sup>101</sup> Moreover, as part of the MIPAA follow-up process, new topical issues are being addressed, such as the situation of older persons during the COVID-19 pandemic and the grey digital divide. Specific areas are also the subject of analysis by international bodies, particularly the UN Independent Expert. Increasingly, though still slowly, references to older adults in the context of the focus areas mentioned above are also appearing within the UPR process.

International documents, regardless of type and binding force, referring to older people are usually direct or indirect responses to analyses, reports and alerts by NGOs, presented at international forums. This implies that the issues raised by NGOs at the 13<sup>th</sup> OEWGA session on the social inclusion of older persons held in April 2023 also have the potential to be included or developed in future international documents. For this reason, the areas to which NGOs have drawn particular attention are worth identifying.

Over twenty accredited NGOs have submitted their substantive input on social inclusion.<sup>102</sup> The subdiscussions were of various types as the NGOs pro-

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99 The form of the guidelines for NGOs available at [https://social.un.org/ageing-working-group/documents/thirteenth/Guiding%20Questions\\_Social%20Inclusion.pdf](https://social.un.org/ageing-working-group/documents/thirteenth/Guiding%20Questions_Social%20Inclusion.pdf).

100 UN General Assembly, "United Nations Principles for Older Persons Adopted 16 December 1991," A/RES/46/91.

101 United Nations, "Madrid International Plan of Action on Ageing and the Political Declaration, Report of the Second World Assembly on Ageing, Madrid, 8–12 April 2002 (United Nations Publication, Sales No E.02.IV.4)," 2002, <https://www.un.org/development/desa/ageing/madrid-plan-of-action-and-its-implementation.html>.

102 All the submissions are available at <https://social.un.org/ageing-working-group/Thirteenth-session-ngos.shtml>.

vided information on the inclusive steps (or the lack of them) taken by authorities in their countries, reported on good or bad practices, including their own activities, and presented older adults' testimonies about experiencing exclusion. There were also submissions of a comparative nature. For example, Age Platform Europe focused on EU law and policy on older persons, as well as reviewing the policies of the EU Member States.<sup>103</sup>

Meanwhile, HelpAge International provided a general in-depth study of certain aspects of inclusion titled "Including us. What older people say about the barriers they face to social inclusion". This study contains five general conclusions arising from older adults' experiences around the world: 1) ageism affects older people's social relations; 2) social activities benefit older people, but are not always available or affordable; 3) older people face several barriers in accessing the digital world; 4) cities and communities are not age-friendly; 5) a lack of income and financial resources limits older people's inclusion in society.<sup>104</sup>

Just like HelpAge International, almost all of the NGOs point to various aspects of ageism and age discrimination (often manifested through unjustified age limits) in various areas of life, particularly those that create structural barriers, devalue their positive contributions to society and limit their right to equal participation. Some NGOs focus on elder abuse and poverty as consequences of ageism and its components described in the previous section. Other NGOs formulate general comments and recommendations, for example, International Longevity Centre (ILC) Canada, in its submission, draws attention to the need to include the perspective of older people when preparing, designing, implementing, monitoring and evaluating policies, laws and regulations to promote age equality and reduce age discrimination. According to ILC Canada, true social inclusion requires a comprehensive human rights-based approach, especially considering multiplier effects such as rampant ageism and racism. The organisation points out that social inclusion means having enough income, safe housing, the skills to seek services and access to health

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103 Age Platform Europe, "AGE Platform Europe Submission on Focus Area: Social Inclusion, 13 Th Session of the United Nations Open-Ended Working Group on Ageing (2023)," 2023, [https://social.un.org/ageing-working-group/documents/thirteenth/INPUTS%20ONGOS/AGE%20PLATFORM%20EUROPE\\_Social-Inclusion.pdf](https://social.un.org/ageing-working-group/documents/thirteenth/INPUTS%20ONGOS/AGE%20PLATFORM%20EUROPE_Social-Inclusion.pdf).

104 HelpAge International, "Including Us: What Older People Say about the Barriers They Face to Social Inclusion," 2023, <https://social.un.org/ageing-working-group/documents/thirteenth/HelpAge%20-%20Including%20Us.pdf>.



and community services, supportive social networks, as well as access to transportation, among other things.<sup>105</sup>

Among those submissions that identify examples of discrimination and ageism or presenting specific actions aimed at eradicating these phenomena worth attention is the submission of the French organisation La Fédération Internationale des Associations de Personnes Âgées (FIAPA), reporting on its efforts to change the ageist vocabulary that does not respect the rights and dignity of older persons (e.g. from “dependent” to “vulnerable”).<sup>106</sup> Meanwhile, Age Platform Europe has highlighted restrictions on people aged 60–65 and over in terms of taking out loans and buying health and travel insurance. Age Platform Europe notes that although there is no clear legal age limit and ageism prevails, making it difficult for older people to take out loans.<sup>107</sup> Similarly, Age Action Ireland draws attention to age limits on most mortgages for persons 66 or older and the lack of alternative financing means. The organisation also notes that discrimination against older people is manifested in fees for driving certificates issued by doctors, which are obligatory for persons over 75, as well as problems with obtaining insurance. These restrictions contribute to poor access to transportation for older people.<sup>108</sup>

NGOs also reveal ageism and age discrimination in the area of employment. Several NGOs, including Age Action Ireland, Canada’s Réseau FADOQ, Japan’s Support Centre for Activity and Research for Older Persons and the German NGO – BAGSO (German National Association of Senior Citizens’ Organisations), note that allowing a mandatory retirement age in law or practice has the effect of pushing older workers out of the labour market, making them unemploy-

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105 ILC Canada, “International Longevity Centre (ILC) Canada. Guiding Questions for UN Open Ended Working Group On Ageing 13 – Focus Area 2 - Social Inclusion,” 2023, 2, <https://social.un.org/ageing-working-group/documents/thirteenth/INPUTS%20ONGOS/ILC-Canada%20-%20Social%20Inclusion%20%20OEWG13.pdf>.

106 FIAPA, “Contribution of La Fédération Internationale Des Associations de Personnes Âgées (FIAPA) Social Inclusion and Participation,” 2023, 2, <https://social.un.org/ageing-working-group/documents/thirteenth/INPUTS%20ONGOS/FIAPA%20%20Social%20Inclusion%20and%20Participation.pdf>.

107 Age Platform Europe, “AGE Platform Europe Submission on Focus Area: Social Inclusion, 13 Th Session of the United Nations Open-Ended Working Group on Ageing (2023),” 4.

108 Age Action Ireland, “Age Action. Age Equality,” 2023, 1, <https://social.un.org/ageing-working-group/documents/thirteenth/INPUTS%20ONGOS/Age%20Action%20Ireland-%20Social%20Inclusion.pdf>.

able, or forcing them to work for lower or irregular wages. In turn, Nigeria's Universal Peace and Violence Amelioration Center reports on the lack of legal protection against age discrimination in employment, recruitment, retirement or promotion of employees in Nigeria. Meanwhile, Agewell Foundation of India points out that older workers in the unorganised sector are highly vulnerable, especially since most cannot count on post-retirement benefits, such as monthly pensions and healthcare benefits.<sup>109</sup>

Access to good-quality healthcare, long-term care and palliative care is also central to NGOs' concerns. For example, Japan Support Center for Activity and Research for Older Persons analyses Japanese law allowing, in practice, lower medical costs for people over 75, but on the other hand providing care of a lower standard than for other age groups, which the organisation cites as an example of systemic discrimination.<sup>110</sup> Moreover, the whole report by Agewell Foundation of India was dedicated to the right to health and access to health services in old age, with a special focus on the social inclusion of older people. Its authors stressed that "Unless the root causes of structural exclusion and discrimination are addressed, it will be challenging to support the sustainable inclusive growth of older people".<sup>111</sup>

Other aspects raised in NGOs' submissions are social ties, isolation and loneliness. In materials submitted to the OEWGA by HelpAge International, social isolation and loneliness are presented as factors increasing the risk of disease, contributing to the development of dementia, reducing the quality of life and ultimately shortening it. Meanwhile, social isolation and loneliness are common among older people in most regions of the world. As HelpAge International notes, despite their devastating impact on our health and well-being,

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109 Agewell Foundation, India, "Substantive Input for the 13th Session of the Open-Ended Working Group on Ageing for the Purpose of Strengthening the Protection of the Human Rights of Older Persons. Focus Area 2: Social Inclusion," 2023, 3-4, [https://social.un.org/ageing-working-group/documents/thirteenth/INPUTS%20ONGOs/Agewell%20Foundation\\_Substantive\\_Focus%20Area-2.pdf](https://social.un.org/ageing-working-group/documents/thirteenth/INPUTS%20ONGOs/Agewell%20Foundation_Substantive_Focus%20Area-2.pdf).

110 Japan Support Center for Activity and Research for Older Persons, "Social Inclusion," 2023, 1, [https://social.un.org/ageing-working-group/documents/thirteenth/INPUTS%20ONGOs/JS-CAROP\\_Social%20inclusion.pdf](https://social.un.org/ageing-working-group/documents/thirteenth/INPUTS%20ONGOs/JS-CAROP_Social%20inclusion.pdf).

111 Agewell Foundation India, "Right to Health and Access to Health Services In Old Age with Special Focus on Social Inclusion of Older People, March 2023," 2023, 13, <https://www.agewellfoundation.org/wp-content/uploads/2023/03/Right-To-HealthAnd-Access-To-Health-Services-In-Old-Age-Social-Inclusionn-March-2023.pdf>.

including in old age, the issue has remained largely unnoticed and unaddressed by governments. Therefore, HelpAge International refers to the actions recommended by the WHO, aimed at improving infrastructure (including digital infrastructure) and promoting age-friendly communities.<sup>112</sup> Similar views, especially emphasising the destructive impact of isolation during COVID-19, were presented by other NGOs, such as Community Legal Centres Australia, Age Platform Europe, ILC Canada, Pallium India, Old'Up, The Global Ageing Network, and Age Action Ireland.

Analysing the NGOs' submissions shows that new technologies and digital inclusion are other areas of focus. HelpAge International emphasises that "leaving no one behind" also means leaving no one offline, with digital inclusion treated as a fundamental aspect of social integration. The COVID-19 pandemic has further highlighted this digital divide, limiting older people's access to information, decision-making and health services. However, older persons do not have equal access to the digital world. Digital exclusion in old age has many sources, both economic and based on stereotypes and prejudices, including the reluctance of older people themselves to adopt new technologies.

Meanwhile, in addition to gaining access to online services, learning digital skills can increase older people's access to employment and continue their personal development. HelpAge International, however, points out the dual effects of digitisation. On the one hand it can strengthen the social bonds of older persons, but on the other it may lead to social isolation and loneliness. Hence, there is a need to promote the digital inclusion of older people, access to digital learning, age-friendly design and appropriateness of digital services, as well as ageism-free, ethical and safe digital environments that accommodate the diversity of older people. However, those who cannot connect digitally also should have access to all public services in-person.<sup>113</sup> Digital inclusion through long-life learning, training and support for older adults to remain in the social mainstream is also raised by Agewell Foundation India, BAGSO and FIAPA.

Age Action Ireland, meanwhile, notes that in the EU, lifelong learning is mainly promoted only among those aged 25–64.<sup>114</sup> BAGSO, analysing German solutions, confirms that even in areas with no formal age restrictions, as in

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112 HelpAge International, "Including Us: What Older People Say about the Barriers They Face to Social Inclusion," 6.

113 HelpAge International, 6.

114 Age Action Ireland, "Age Action. Age Equality," 1.

education, older people are systematically overlooked. Although almost all Länder have enacted legislation on adult education, their funding for adult education is negligible.<sup>115</sup>

Ageing in a friendly environment is another area identified in the NGOs' input. HelpAge International highlights the importance of the concept of age-friendly cities and communities developed in response to the challenges faced by older people due to spatial exclusion. The organisation focuses on mobility, including the provision of age-friendly and accessible transport and safety. Accessible transport improves older people's ability to work, maintain ties with friends and family, access health and other services, and their ability to engage in social and recreational activities. HelpAge International also draws attention to older people's fears of leaving home, either because of unsafe surroundings (e.g. assaults, robberies) or due to pedestrian-unfriendly transport arrangements.<sup>116</sup>

The Agewell Foundation USA draws attention to promoting social inclusion through physical infrastructure improvements, such as walkable neighbourhoods, mobility options and appropriate housing for people with different needs and abilities (Agewell Foundation USA 2023, 1). In turn, Community Legal Centres Australia emphasise the importance of community-based activities and programmes, including transport, delivered meals and day care in centres, to allow older people to live in their homes for as long as possible.<sup>117</sup>

Some NGOs also draw attention to older inhabitants living in rural areas, who often face inaccessible services and limited intergenerational contact. Age Action Ireland has revealed a threefold marginalisation associated with inadequate transport. It is a significant barrier to the social inclusion of older women living in rural areas, as 70 per cent of older persons without driv-

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115 BAGSO, "Bundesarbeitsgemeinschaft Der Seniorenorganisationen Vertritt Die Interessen Der Älteren Generationen in Deutschland, Focus Area 2: Social Inclusion," 2023, 5, <https://social.un.org/ageing-working-group/documents/thirteenth/INPUTS%20ONGOS/BAGSO%20-%20Social%20inclusion.pdf>.

116 HelpAge International, "Including Us: What Older People Say about the Barriers They Face to Social Inclusion," 7.

117 CLCs Australia, "Community Legal Centres Australia, Guiding Questions for the Thirteenth Session. Focus Area 2: Social Inclusion," 2023, 4, <https://social.un.org/ageing-working-group/documents/thirteenth/INPUTS%20ONGOS/CLC-Australia%20-%20Social%20Inclusion.pdf>.

ing licences are women, and more than half of women aged 75+ do not have a driving licence.

For various reasons, intersectionality and marginalisation feature prominently in NGO contributions. Many organisations point to the marginalisation of people with disabilities and the various types and inequalities, including those of a formal nature that they have to face. The formal differences among this category of older adults are also indicated. BAGSO notes, for example, that current measures in Germany make a distinction between people with disabilities who became disabled during their working life and those who acquired their disability after retirement. Indeed, the latter group enjoys fewer integration benefits.<sup>118</sup>

Discrimination due to age and gender is another frequent example of intersectionality that NGOs refer to. For example, Age Platform Europe draws attention to the under-representation of older women in most decision-making positions (members of parliaments, governments, heads of state, supreme court judges, CEOs, boards of directors of large companies, etc.), as well as to the situation of women who have ended their careers or are looking for work at an older age. The organisation also highlights gender differences in the labour market and pension differences.<sup>119</sup>

A particular case of intersectionality is analysed by Pallium India, pointing to women's widowhood as a factor affecting access to housing, infrastructure and inclusion in decision-making processes. The organisation reports that widows in India remain marginalised and particularly vulnerable, facing stigma, grief, isolation and loneliness. Widows of men who used drugs and died of HIV face even more discrimination and stigma. According to the report by Pallium India, a woman's grief after losing her husband is further complicated in India by her loss of position in society and the community. The sudden loss of autonomy and access to money and property further marginalises the widow. Moreover, it is culturally acceptable for older women to beg, but not to claim child support through the courts.<sup>120</sup>

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118 BAGSO, "Bundesarbeitsgemeinschaft Der Seniorenorganisationen Vertritt Die Interessen Der Älteren Generationen in Deutschland, Focus Area 2: Social Inclusion," 2.

119 Age Platform Europe, "AGE Platform Europe Submission on Focus Area: Social Inclusion, 13th Session of the United Nations Open-Ended Working Group on Ageing (2023)," 3.

120 Pallium India, "United Nations Open-Ended Working Group Substantive Input Focus Area Two: Social Inclusion," 2023, 3-4, <https://social.un.org/ageing-working-group/documents/>

Age Platform Europe also points to older Roma facing additional social inclusion and participation barriers. They often live in deprived, rural and remote areas, including sometimes in segregated neighbourhoods, all of which impedes them from accessing services and goods equally. In addition, references to ethnicity and language barriers are found in the reports of organisations from multicultural countries and those traditionally targeted by migrants. In turn, the disadvantageous situation of older members of indigenous communities is present in contributions of NGOs from countries where indigenous peoples live (Canada and Australia).

Other groups facing intersectional and multiple discrimination are older LGBT+ people, who are more likely to experience socio-economic exclusion, social isolation, and double invisibility: as an invisible minority in the LGBT+ community and as a hidden part of an ageing society. Another doubly excluded group are older migrants, who are usually seen as a burden on society rather than an economic asset and are usually ignored in mainstream policies on ageing and migration.

Another category of older persons about whom Age Platform Europe has raised concern are those living in institutions. It turns out that people living in institutions are only able to exercise their socio-cultural rights to the extent that they can do so in institutional settings, and therefore very often lose the right to access culture and develop social relationships outside the walls of institutions, as well as the right to participate in the social, political, economic and cultural life of their communities. In most cases, older people in institutional settings remain separated from society on the outside, even if they do have facilities such as restaurants or libraries.<sup>121</sup>

Lack of contact with the outside world was noted in the case of older prisoners. Age Action Ireland reports that, compared with younger prisoners, older prisoners often do not receive regular visits from friends and relatives and are much more likely to be the victims of bullying.<sup>122</sup> Community Legal Centres Australia notes that, despite positive changes in law, in practice most facilities lack the funding and capacity to provide adequate ageing-related

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thirteenth/INPUTS%20ONGOS/Pallium%20India%20-%20Health-social%20inclusion.pdf.

121 Age Platform Europe, "AGE Platform Europe Submission on Focus Area: Social Inclusion, 13th Session of the United Nations Open-Ended Working Group on Ageing (2023)," 3.

122 Age Action Ireland, "Age Action. Age Equality," 2.

support to older people in prison, especially those with cognitive impairment or dementia.<sup>123</sup>

The NGOs' submissions also refer to exclusion and isolation caused by COVID-19 and various diseases, including dementia, covering a wide range of specific medical conditions, including Alzheimer's disease. That is why an example of a good practice, as provided by BAGSO is worth noting. BAGSO mentions efforts to establish dementia-inclusive communities enabling people suffering from dementia to participate in society and supporting people with dementia and their relatives.<sup>124</sup>

Meanwhile the Japan Support Center for Activity and Research for Older Persons provides an example of people who have recovered from leprosy and their families who face prejudice, discrimination and social rejection, even though an effective drug therapy for leprosy has long been developed.<sup>125</sup>

The NGOs' input testifies about their ability to catch nuances in the position of older people and the sources of their exclusion. All these examples convey that there are no more important or less important areas of social inclusion for older people. They are all essential, though their weight depends on specific needs and circumstances. Therefore, given the heterogeneity of older people and the economic and cultural differences among countries, the actions taken by governments and other stakeholders should vary and be targeted to the needs of older people in a country, region, city, and community, taking into account all relevant specific circumstances, such as a pandemic or other crises.

It is also clear that the catalogue of focus areas is open. They cannot be limited to areas that have "traditionally" coincided with older age, such as care or decent pensions. One of the most critical areas without which it is difficult to function in the information society is the availability of new technologies and digital capability. The use of AI can help in everyday living, but it also brings a risk of disrupting the social mainstream and is another important area where older people and their rights should find their place. Another key area explored outside the 13th OEWGA session by the international human

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123 CLCs Australia, "Community Legal Centres Australia, Guiding Questions for the Thirteenth Session. Focus Area 2: Social Inclusion," 5.

124 BAGSO, "Bundesarbeitsgemeinschaft Der Seniorenorganisationen Vertritt Die Interessen Der Älteren Generationen in Deutschland, Focus Area 2: Social Inclusion," 3.

125 Japan Support Center for Activity and Research for Older Persons, "Social Inclusion," 1.

rights bodies,<sup>126</sup> states, NHRIs and NGOs,<sup>127</sup> is climate change and its impact on the lives of older people, especially older women, persons living in a state of poverty, as well as older persons with disabilities. Despite this, older persons are often not consulted or included in efforts to address the climate crisis. Therefore, another challenge for the OEWGA to work out is the instrument that will give a voice to older persons in this area. During the 12th OEWGA session dedicated to the older persons' contribution to sustainable development, some states' delegations mentioned the impact of climate change on the lives of older persons and underlined the importance of including and taking into account their voices and perspectives in the development of policies, programmes and measures.<sup>128</sup> However, this aspect of including older persons in the debate on climate needs further development.

## Conclusion

This chapter shows the progress in international human rights law, particularly in recent years, in naming and blaming ageism, identifying intersectional discrimination and establishing core areas for the social inclusion of older persons. At the same time, these considerations also show that there is a lot to do in this area. The notion of ageism appears absent in the core human rights treaties and even in the regional treaties on older persons' rights. Consequently, ageism is not addressed in the general conclusions and recommendations provided by the human rights treaty bodies when interpreting the states' obligations under human rights treaties. It is also not as widely used as expected in resolutions and recommendations issued by international bodies. This deficit severely weakens attempts to combat it on international and, consequently,

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126 UN Secretary-General, "Analytical Study on the Promotion and Protection of the Rights of Older Persons in the Context of Climate Change – Report of the Office of the United Nations High Commissioner for Human Rights," 30 April 2021, A/HRC/47/46.

127 See the input provided by states, human rights bodies, including the Independent Expert, NGOs, and NHRIs being a response to the Human Rights Council resolution on human rights and climate change Human Rights Council, "Resolution Adopted by the Human Rights Council on 16 July 2020, Human Rights and Climate Change," A/HRC/RES/44/7, 2020.

128 OEWGA, "Report of the Open-Ended Working Group on Ageing on Its Twelfth Session Rapporteur: Mr. Tomáš Grünwald (Slovakia)," 16 May 2022, A/AC.278/2022/2, 9.



national levels. Hence, introducing this concept into international hard law as a “keyword” covering age discrimination, stereotypes and prejudices would be a clear message to the whole international community.

Thus, on the one hand, there is increased activity by international bodies and some progress in soft law, but ageism and intersectional discrimination as a new quality of discrimination are unknown to human rights treaties. The areas important for older persons are not developed in the global treaty law, as there is no convention on older persons’ rights. If such a convention is adopted, the NGOs’ contributions to the OEWGA suggest that it would probably oblige states to counteract ageism, recognise intersectional discrimination, promote the participation, independence and autonomy of older persons, and call upon states to take action against barriers in the key areas.

However, it is difficult to expect that an international treaty will be able to respond to every disadvantage faced by older people, as the list of intersectional discrimination and diverse inequalities is always open. On the other hand, human rights mechanisms have the potential to sensitise states and other actors to any factors that cause older people to be left behind. International law and its instruments can influence states’ actions by raising awareness of the intersectionality of the causes of exclusion and the need to counter ageism and its intangible elements – prejudice, stereotyping and age discrimination. International bodies themselves need to act jointly and take an intersectional approach as older persons are present in every strata of every society and are at risk of various inequalities and abuses.



## Final Remarks

The social inclusion of older persons, even if limited to issues in international law, is a vast topic. This study shows, especially in Chapters One, Five and Six, that this issue touches on all aspects of humanity, meaning that it is impossible to cover them all within the framework of a single book. In addition, a survey of the entire universal and European *acquis* must also have its limits. Hundreds of international documents varying in their binding force and accompanied by thousands of initiatives make it impossible to deal with each of them individually or even to mention them all.

However, the purpose of this study was not to consider every single act or action of an international body or other entity, but to explore the potential of the instruments of universal international and European law to counter the way that older people, at least the most vulnerable ones, are ejected from mainstream society. This research aimed to trace the ability of international human rights law to improve older persons' social inclusion and to propose ideas on how to do this. The central assumption of this study, as indicated in the Introduction, was that international human rights law may improve the social inclusion of older persons by pushing states to take action in the domestic forum. For this to happen, several conditions need to be met – the visibility of older people's rights internationally, the creation of a robust legal framework, the use of monitoring mechanisms, the involvement of a wide range of actors and, finally, addressing barriers to inclusion and the enjoyment of human rights by older people. These assumptions correspond with the chapters of the book, each containing their own conclusions, so just a few general final remarks are formulated here.

Thus, when referring to the visibility of older persons and their needs and rights, it must be concluded that there is still a lot to do, as most of the international community is still not bound by hard norms devoted exclusively to older people. On the other hand, the last two decades have been notable for the diversity of initiatives to promote the rights of older people and the adoption

of many documents, reports and studies. As indicated in Chapter Two, there is no doubt that the rights of older persons have made a permanent appearance on the international scene. Paradoxically, the COVID-19 pandemic, which revealed various aspects of older persons' exclusion and vulnerability, has gone some way to improving the visibility of older persons on internal and domestic forums.

It can be assumed that the increasing visibility of older people's rights in the international arena, and thus of the various documents, is a step towards building the "international elder law", "international ageing law" or "international law of old age" as advocated in research. Consensus on the extraction, along the lines of, for example, climate change law, of such a section of law from international law is still a long way off, but today it is no longer a fanciful theory and the concept of elder law is present in research, didactics and advocacy for older people. Such a development should not be feared, and this process should be perceived as not destroying international law but rather enriching it. Specialised law will always be a more appropriate response to phenomena occurring than general standards. Such a new branch of international law would undeniably make older persons visible in international agenda and promote the idea of shifting paradigm on older persons. Adopting a universal convention covering various aspects of the protection of human rights in old age and influencing various branches of international law, not only human rights law, would certainly be a milestone in completing such an international ageing law. Currently, however, "the international ageing law under construction" consists of the developed soft law, with its main message of the full social inclusion of older persons, and territorially limited and not very popular hard regional law (the Inter-American Convention and the African Protocol), as well as rules proliferated over many documents, sometimes assuming *a la carte* obligations (the Revised European Social Charter).

That is why, a universal convention would unify all the efforts and introduce a new standard for states' obligations in respecting, protecting and fulfilling the rights of older persons. It could be a benchmark for human rights treaty bodies and the ECtHR in establishing the scope of states' obligations towards older persons, especially when the court applies its interpretation tools described in Chapter Three. Moreover, it would remove any grounds for disregarding or trivialising the discrimination and abuses experienced by older people and would empower them as rights-holders to claim their rights and

be fully involved in public affairs. It would also determine the policy changes in creating conditions that are necessary for social inclusion in old age. From the perspective of this research, it should be noted that such a treaty would fall under all of the points of the model for influencing states to take steps towards improving older people's social inclusion, as proposed in the Introduction, i.e. raising awareness on the paradigm shift, making older people visible internationally, clarifying the obligations of states and, through possible monitoring, involving various stakeholders, mainly NGOs, and challenging all ageist practices, structures, prejudices and stereotypes towards older persons that harm their dignity.

Meanwhile, there are many real or imaginary barriers to achieving a consensus on an international treaty on older persons' rights, including the non-homogenous nature of older persons, the failure to recognise the vulnerability of older persons given that the ageing process is a natural part of human life and refers to all human beings, and the significant economic or cultural differences among states and regions. The failure of states to fulfil their obligations under current treaties and the "overproduction" of human rights instruments are further arguments against such a convention. These matters cannot be ignored, as they are a lesson from which the international community should also learn. In addition, the adoption of regional treaties on older persons and the Convention on the Rights of Persons with Disabilities of 2006 weakens the will of states to work on a binding document on the rights of older persons. Today, many states, especially those belonging to the Global North, are the most sceptical, but at the same time, the idea of adopting a convention prevails among academia, experts and civil society, and the UN bodies.

The convention is an uncertain issue for the future. Meanwhile, as Chapter Three of this book shows, the universal protection of everyone's rights is not sufficient to protect older persons, as their rights are diluted and not recognised. The case of older persons proves that the ideas of interdependence, universality, indivisibility and equality of human rights are not as effective in practice. An example is the draft convention on the right to development, where ageism cannot be found next to sexism and racism, and specific vulnerable groups are not visible.

Similarly, the concept of core rights does not cover essential needs of vulnerable older persons, for example those with dementia, or when a state introduces austerity measures. Contemporary human rights treaties do not cope

with combatting ageism and multiplied and intersectional discrimination in old age. The mainstreaming ageing in performing obligations by states seems to be the weakest point of the model for improving the social inclusion of older persons. In general, international human rights hard law does not follow demographic changes and its influence on states in the discussed area is limited.

The review carried out in Chapter Four shows that some moderate progress can be observed in the scrutiny and monitoring by currently operating international bodies in terms of states' implementation of their obligations to respect, protect and fulfil the rights of older persons. However, apart from the activities of the UN Independent Expert on the enjoyment of all human rights by older persons, these initiatives are largely incidental, and older people are only one of many groups of interest. In turn, European solutions offer many opportunities for states to circumvent or reduce obligations, especially in the area of fulfilment.

At the same time, a review of human rights mechanisms indicates they have great potential to raise awareness of governments and societies on the rights of older persons, especially collective complaints, reports, the UPR process, and the Human Rights Council procedures. This role is met by the follow-up mechanisms provided for in the MIPAA and the 2014 recommendation of the CoE Committee of Ministers. In turn, the jurisprudence of the ECtHR and the views of human rights treaty bodies can play a particular role in preventing violations of human rights in older age, applying the "life course approach". Inquiries may, in turn, contribute to revealing the nuances of intersectional and multiplied discrimination.

However, human rights law does not work wonders and does not provide a clear answer to states' internal demographic and social problems. Hurst Hannum stresses that, in practice, inequalities of various kinds can best be resolved nationally through political debate and activism in society.<sup>1</sup> Thus, international norms and ideas need domestication to become effective, which should take place through various and overlapping means – legislative, judicial, administrative and educational.<sup>2</sup> A unique role is attributed to the courts, as they play

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1 Hurst Hannum, "Reinvigorating Human Rights for the Twenty-First Century," *Human Rights Law Review*, 16, no. 3 (September 2016): 443, <https://doi.org/10.1093/hrlr/ngw015>.

2 Suzanne Egan, "The (In)Effectiveness of Human Rights: Mapping Existing Research—An Introduction," in *Myth or Lived Reality*, eds. Claire Boost et al. (The Hague: T.M.C. Asser Press, 2021), 7, [https://doi.org/10.1007/978-94-6265-447-1\\_1](https://doi.org/10.1007/978-94-6265-447-1_1).

a prominent role in human rights enforcement, ensuring that the implemented provisions are followed.<sup>3</sup>

Hence, the real situation of older persons in a given country depends on national actors, which means, in particular, parliaments (by adopting laws) and governments (by introducing inclusive ageing policies, demographic strategies, programmes, etc.). At the same time, domestication of the international ageing law requires the involvement of different actors, not only the legislator and the courts. NGOs and NHRIS have a particular role to play in this regard. This study confirms that, although international law is still state-centric, they are important actors of the international ageing law (still under construction). They are also the ones who monitor the domestication process, identify key areas of exclusion. They are also those that are able to identify the intersectionality of the exclusion of older people, as discussed in Chapter Six.

There is also no doubt that “academia” is increasingly lobbying for the rights of older people, although one might expect more involvement from formal international law groups. Among the stakeholders described in Chapter Five, the private sector is the one that can be expected to make a greater commitment in the future.

Finally, local (self) governments have the important role to play in domestication of international norms and concepts elaborated at the international forum, including human rights-based approach, mainstreaming ageing and “leave no one behind”. Comprehensive and inclusive ageing policies at local level should also reflect the ideas of intergenerational solidarity. That is why, local units should have possibility to create their own ageing policies adjusted to needs and possibilities (including digital capacity) of their inhabitants. Chapter Five has shown how important the decentralisation of fostering age-friendly local solutions can be.

It can thus be concluded that, although the social inclusion of older people happens locally in practice, its level and quality are influenced by actions taken internationally. Despite all the imperfections and ambiguities mentioned above, human rights treaties and soft law have the ability to affect states’ policies and shape axiology, affecting the development of the human psyche, transforming

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3 Andreas Th. Müller, “The Role of Domestic Actors in the Implementation and Enforcement of Social Rights,” in *Research Handbook on International Law and Social Rights*, eds. Christina Binder, Jane A. Hofbauer, Flávia Piovesan, Amaya Úbeda de Torres (Cheltenham, UK; Northampton, Massachusetts, USA: Edward Elgar Publishing Limited, 2020), 280–97.

it and adapting to living in a society.<sup>4</sup> Thus, they also have the potential to raise awareness of ageism, to point out the intersectionality of exclusion and to change the perception, including by using the law, of older people from “passive receivers of care and assistance and an impending burden on welfare systems and economies to active contributors to society”.<sup>5</sup> Thus, every mechanism and means of influence often untapped today should be used for this to happen. Governments should receive clear signals from international bodies and the “grassroots” from all stakeholders.

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4 Anna Drabarek, “The Motivational Role of Intuitive Law in the Views of Leon Petrażycki,” *International Journal of Pedagogy Innovation and New Technologies*, 6, no. 1 (2019): 2, <https://doi.org/10.5604/01.3001.0013.2861>.

5 UN General Assembly, “Resolution Adopted by the General Assembly on 15 December 2022, Follow-up to the Second World Assembly on Ageing,” A/RES/77/190, para. 5.



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Global ageing is a challenge to human rights law as older people are far more vulnerable to a range of social, economic and political barriers that effectively exclude them from mainstream society. Thus, this book proposes a model of how to improve national ageing policies internationally by changing the current paradigm in the perception of older persons from passive receivers of care and assistance to active contributors to society. The author points to the need to improve the visibility of older persons internationally, promotes the idea of a treaty on their rights, and identifies areas where states and non-state actors can positively influence their social inclusion at the national level.

Globalne starzenie się stanowi wyzwanie dla międzynarodowego prawa praw człowieka, gdyż osoby starsze napotykają na szereg barier społecznych, ekonomicznych i politycznych, które skutecznie wykluczają je z głównego nurtu społeczeństwa. Niniejsza monografia proponuje zatem model poprawy krajowych polityk dotyczących starzenia poprzez instrumenty prawa międzynarodowego w celu odejścia od paradygmatu postrzegania osób starszych jako wyłącznie biernych beneficjentów pomocy medycznej lub społecznej. Autorka wskazuje na konieczność poprawy widoczności osób starszych na forum międzynarodowym, promuje ideę traktatu chroniącego ich prawa i identyfikuje obszary, w których państwa i podmioty niepaństwowe mogą pozytywnie wpływać na ich włączenie społeczne na szczeblu krajowym.

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