

THE RIGHTS OF OLDER PERSONS AND THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

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General Comment No. 6 was heralded as a turning point for the protection of the economic, social and cultural rights of the elderly. It helps all public authorities – from local councils to central governments, from police forces to social services to tribunals and courts – to act compatibly with fundamental rights enshrined in the International Covenant on Economic, Social and Cultural Rights and provides States Parties to the Covenant with useful baseline information for their periodic reports to the Committee on Economic, Social and Cultural Rights. However, more than fifteen years after its adoption, there is a notable absence of a positive culture of respect for the rights of older persons in several Contracting States. Indeed, in recent times the economic, social and cultural rights of the elderly have been more pilloried than celebrated and General Comment No. 6 itself has suffered at the hands of a range of detractors who have repeatedly emphasized its modest utility. This article examines the grand ambition of General Comment No. 6 to transform society through the introduction of a culture of respect for the rights of the elderly. It argues that the failure to secure institutional commitment to positive elderly rights compliance – and translate elderly people's fundamental rights into practical reality as an integral part of public life – has fostered cynicism of General Comment No.

6 and ultimately undermined the adoption in public consciousness of elderly rights as a positive social good.

1. Introduction

Notwithstanding the aged population being the fastest growing segment of society¹ international human rights conferences, meetings and the international and regional intergovernmental organizations (“NGOs”) working in the field of human rights and liberties have normally been rather insensitive to the specific needs and situation of elderly people². In particular the United Nations has failed to keep pace with the worldwide phenomenon of elderly persons properly since not taking them into account in its political Agenda³. Clearly enough, such attitude produced relevant consequences in the field of international law. In this regard, it is worth recalling Rodriguez-Pinzon and Martin who in a leading article published in 2003⁴, duly observed that many human rights treaties refer to rights that are of particular concern to the elderly though none of the international human rights instruments - neither the Universal Declaration of Human Rights (“UNDHR”) nor the International Covenant on Civil and Political Rights (“ICCPR”) nor the Covenant on

¹ See *Economic, Social and Cultural Rights of Older Persons: General Comment 6*, U.N. ESCOR, Econ., Soc., & Cultural Rts. Comm., 13th Sess., para. 1, UN Doc. E/C.12/1995/16/Rev.1 (1995) [*General Comment 6*].

² See NGO COMMITTEE ON AGEING, *Ageing and the rights of older persons: Statement for the Human Rights Commission*, available at: <http://ngo.faurco.org>

³ A. EVRARD, 2005, *La personne âgée dans le droit international et européen des droits de l'homme*, Bruxelles, p. 11 ff.

⁴ See also D. RODRÍGUEZ-PINZÓN, C. MARTIN, 2003, *The International Status of the Rights of Elderly Persons*, in *American University International Law Review*, p. 915, who also stress that: “By 2025, more than 1.2 billion people will be aged sixty or above, and more than seventy percent of them will be residing in what are currently considered developing countries”.

Economic, Social and Cultural Rights (“ICESCR”) - contain any specific provisions relating to the rights of the elderly and though a comprehensive international instrument which adequately addresses the specific protections required for the elderly is still missing⁵, as well as binding supervisory arrangements attached to the various sets of United Nations principles in this area⁶. Unfortunately, unlike the rights of people with disability, the rights and freedoms of the elderly as such are currently recognized only in isolated provisions in international agreements usually encompassing ESCR rights such as, notably, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (“Protocol of San Salvador”)⁷, Art. 17, and the Revised European Social Charter⁸, Art. 23, which both regard the rights of the elderly as ‘rights of progressive implementation’⁹. This is so, even though there are civil and

⁵ See the UN Third Committee of the General Assembly that adopted, on 19 November 2010, a landmark resolution on ageing (A/C.3/65/L.8/Rev.1), in which the General Assembly decided: “to establish an open-ended working group, open to all States Members of the United Nations, for the purpose of strengthening the protection of the human rights of older persons by considering the existing international framework of the human rights of older persons and identifying possible gaps and how best to address them, including by considering, as appropriate, the feasibility of further instruments and measures”.

⁶ See para. 13 of *General Comment No. 6*; see also J. WILLIAMS, *An International Convention on the Rights of Older People?*, in M. ODELLO, S. CAVANDOLI (eds), 2011, *Emerging Areas of Human Rights in the 21st Century: The role of the Universal Declaration of Human Rights*, London, p. 128 ff.

⁷ Additional Protocol to the American Convention on human rights in the area Of economic, social and cultural Rights “Protocol Of San Salvador”, adopted at San Salvador, El Salvador on November 17, 1988, at the eighteenth regular session of the General Assembly, not yet in force, OAS. Treaty Series, N° 69 (1989).

⁸ See European Social Charter (Revised), entered into force Jan. 7, 1999, ETS No. 163, available at: <http://conventions.coe.int/>. 93.

⁹ “Rights of progressive implementation” means that States are not immediately required to fully realize those rights in their jurisdiction, as

political rights provisions such as the right to a fair trial and the right to non-discrimination that can equally be essential for the protection of the rights of the elderly¹⁰. However, there is no explicit prohibition of discrimination on the basis of age in any one of the international human rights instruments.

While several of the human rights denials that such individuals suffer are concerned with civil and political rights, many others relate to economic, social and cultural rights¹¹. The ICESCR dealing with those rights therefore provides an important basis upon which to focus significantly increased attention upon the situation of this very large group of individuals that is projected to reach 1.2 billion by the year 2025, according to paragraph 1 of CESCR General Comment No. 6. The subsequent investigation briefly examines why this dimension has been to some extent ignored to date and then reflects on the chances that could be offered to NGOs and others to modify this situation radically in the future. Moreover, it analyses CESCR General Comment No. 6 on the economic, social and cultural rights of older persons ("General Comment No.6") under the ICESCR.

they are only aims or goals which will be attained to the maximum of the states' available resources. However, even in relation to rights that call for progressive states' implementation, states have the duty "to move as expeditiously and effectively as possible towards the goal" (See CESCR, *General Comment No. 3*, para. 9).

¹⁰ See D. RODRÍGUEZ-PINZÓN, C. MARTIN, *supra* n. 4., p. 918, who pointed out correctly that: 'these are fundamental guarantees that can be used creatively to protect elder persons from certain practices such as forced retirement, slow judicial proceedings regarding health or social benefits, and the death penalty' (emphasis added).

¹¹ See P. ALSTON, *Disability and the International Covenant on Economic, Social and Cultural Rights*, in T. DEGENER, Y. KOSTER-DREESE (eds), *Human rights and disabled persons: essays and relevant human rights instruments*, The Hague, 1994, p. 94; D. BLÁZQUEZ MARTÍN (ed), *Los derechos de las personas mayores*, Madrid, 2007, p. 3 ff.

2. The Debate on the protection of the elderly at UN level.

Firstly, why did the recognition of the elderly as a particular group necessitating international legal recognition and safeguarding not obtain the same priority or the urgency afforded to other 'vulnerable groups' as children, women or, more recently, people with disability?¹² At least two different reasons may be advanced to explicate this lack of concern at international level. Until recently, that is in the 1980's and even more so at the beginning of the 1990's when the phenomenon of the ageing population radically changed its character and the UN General Assembly adopted a set of principles for older people (the "UN Principles for Older Persons")¹³, the ageing cohort, as a substantial section of population, was associated only with the developed countries in North America, Japan and Western Europe, having the economic and legal capacity to set up all-inclusive social security schemes to deal with the problems of the older persons¹⁴. These countries more or less aware, depending on the case, that: 'ageing should be seen as a window of opportunity and life long development of human

¹² Recent analyses of the major documents from the key UN Summits and Conferences show clearly that older people are still the most neglected category of world population, and if they are included it was a special group in use of welfare support. For further references see T. A. OBAID, M. MALLOCH-BROWN, *Joint Statement to the Second World Assembly on Ageing*, Madrid, 2002, p. 10 ff; F. CLARK, *Gender and Human Rights in the Commonwealth: some Critical Issues for Action in the Decade 2005-2015*, London: Commonwealth Secretariat, 2004.

¹³ A/RES/46/91.

¹⁴ In 1992 the United Nations General Assembly ("GA") adopted eight global targets on ageing for fulfillment by the year 2001. In the same year, the GA adopted the Proclamation on Ageing which urged support of national initiatives in general and those relating to older women in particular. The objections were to develop human potential of older people which may have remained dormant during the breadwinning years. In recognition of Humanity's maturity, the year 1999 was declared as the International Year of Older Persons.

values rather than irreversible geriatric decline' to quote Julia Alvarez¹⁵, primarily concentrated their efforts on the enactment of a legislation to recognize and harness the able elderly as a productive segment of the population specifically by adopting non-discrimination laws and equal opportunity legislation¹⁶. The major uncertainties surrounding the language to be adopted to describe older persons may also help in understanding the long-lasting absence of international legal recognition of this category of vulnerable persons¹⁷. The 'aged', the 'ageing', 'the third age', 'the older persons' and, to indicate persons over 80 years of age, 'the fourth age' were the most recurrent terms before the enactment of the so called 'Vienna International Plan of Action on Ageing'¹⁸. This plan – indicating in 62 recommendations, several of which of direct application to the ICESCR, the measures that must be taken by Member States to protect the rights of elderly people within the framework of the rights contained in the international covenants on human rights - was finally adopted by the World Assembly on Ageing in 1982¹⁹. Clear evidence of such uncertainties surrounding the language to be adopted to define the elderly can be found in almost all the

¹⁵ See J. T. ALVAREZ, *Elders for Peace: A Proposal*, available at: <http://www.globalaging.org/waa2/players/julia.htm>

¹⁶ See F. C. PAMPEL, 2008, *Rights of the Elderly*, New York, p. 4 ff.

¹⁷ See *General Comment No. 6*, para. 17, where the CESCR has explicitly stated that the notion of "vulnerable populations" must encompass elderly persons.

¹⁸ The Vienna International Plan of Action on Ageing, the first international instrument on the subject, was endorsed by the United Nations General Assembly in 1982 (resolution 37/51), having been adopted earlier the same year at the World Assembly on Ageing at Vienna, Austria. The text is available at: http://www.un.org/ageing/vienna_intlplanofaction.html

¹⁹ The declaratory principles embodied there were polemically laudable and comprehensive in that the treatment of older persons were categorized under five headings of Independence, Care, Participation, Self-Fulfillment and Dignity but failed to provoke any systematic programming or integrating them in the debates on social development, human rights or human value.

international documents adopted prior to the termination, in the 1980's, of the internal debate within the United Nations on how the ageing population is to be indicated in the official documents, in which a preference was expressed for the term 'Older Persons'.

Concerning the human rights dimension of the elderly, this may only be fully understood against the background of the relationship between the various categories of human rights. Since the principal elements of this relationship have been explored by Rodriguez-Pinzon and Martin in their above mentioned contribution, also discussing the different types of rights as well as the different international regional systems of protection in order to increase the understanding of the concept of elderly rights, there is no need to undertake a similar analysis here²⁰. It is sufficient to emphasize that the unsatisfactory current standing of economic and social right is a key element in explaining part of the neglect that elderly issues have suffered within the ICESCR regime. Briefly, there are several reasons - ideological, philosophical, financial and political - that help to explain the downgrading of ESC rights not only by the vast majority of governments but also by a significant proportion of the major NGOs working to promote respect for internationally recognized human rights. The particular challenges faced by elderly persons supply a valuable lens through which to examine the validity, or otherwise, of some of those reasons.

An argument worthy to be recalled here is that civil and political rights deserve priority over social, cultural and economic rights as they are immediately enforceable and also lead to the satisfaction of the other human rights²¹. This, however, conflicts with the fact that even in relation to rights such as the ESC rights, which call for progressive states

²⁰ See D. RODRÍGUEZ-PINZÓN, C. MARTIN, *supra* n. 4, p. 918 ff.

²¹ See E. TASLIM OLAWALE, *The International Court of Justice and some contemporary problems*, The Hague, 1983, p. 244.

implementation, States parties have the obligation: "to move as expeditiously and effectively as possible towards the goal", as the CESCR has pointed out in its General Comment No. 3²². Furthermore, and more interestingly here, even the case of the elderly reveals, as clearly as any other, the deceptive nature of this logic. In fact, it is quite possible to accord political and civil rights to elderly persons, while effectively silencing and disenfranchising them through the safeguarding of policies relating to access to the media and public facilities, access to employment, transport and communications and so on, that ignore the specific needs and situations of the elderly. Unless the social and economic rights and freedoms dimension is also addressed, the enjoyment of civil and political rights may become fundamentally misleading. Arguments such as these should be addressed if the human rights of the elderly are to be promoted effectively in the future. It is for this reason, among others, that the work of the CESCR is potentially very significant in this with regard to the overall situation. This statement is indeed supported by various elements, particularly the fact that, by the end of its thirteenth session, the Committee and, previously its predecessor, the Sessional Working Group of Governmental Experts, had examined 144 initial reports, 70 second periodic reports and 20 initial and periodic global reports on articles 1 to 15 of the Covenant²³. As recalled by paragraph 14 of General Comment No. 6 such assessment made it possible to recognize many of the problems which can be encountered in implementing ICESCR in a substantial number of States parties representing all the regions of the world and having diverse political, socio-economic and cultural systems. The reports examined to date have not supplied any information in a systematic way on the situation of elderly people with regard to compliance with the Covenant, apart from information, of varying completeness,

²² See CESCR, *General Comment No. 3*, para. 9.

²³ *Ibidem*, para. 14.

on the implementation of Art. 9 of the Covenant on the right to social security. In this respect, it is worth noting that, in 2005, in its concluding observations concerning Serbia and Montenegro²⁴ and even more explicitly in its earlier concluding observations of 2004 regarding Lithuania²⁵, the Committee expressed deep concern about the exclusion of many low-income persons, including elderly persons, from the social security system, the limited personal scope of sickness and maternity insurance, and the strict eligibility conditions for unemployment benefits²⁶.

3. Background and Structure of General Comment. No. 6.

As partially anticipated above, a great deal of progress has been made over the last decade in strengthening acceptance at international level of the rights of the elderly and clarifying their content. Indeed, more has been achieved on this score in the last decade than in any single period since 1966, when the ICESCR recognized (even though only implicitly) that older persons are entitled to enjoy the full range of rights embodied therein.

The main achievement in this period was the GA's resolution dealing with the 'Implementation of the International Plan of Action on Ageing and related activities'²⁷. This called for the clarification of the fundamental rights and liberties of the elderly, and for particular attention to be given to the implementation and full progressive realization of the rights as a means of achieving comprehensive and effective protection

²⁴ See CESCR Committee, *Concluding Observations: Serbia and Montenegro* (UN Doc. E/C.12/1/Add.108, 2005), available at: <http://www.unhcr.org/refworld/docid/43f306780.html>.

²⁵ See CESCR Committee, *Concluding Observations: Lithuania* (UN Doc. E/C.12/1/Add. 96, 2004), para. 17.

²⁶ See W.VANDENHOLE, *Article 26: the right to benefit from social security*, Leiden, Boston, 2007, p. 32 ff.

²⁷ G.A. Res. 45/106, 68th plenary meeting 14 December 1990.

for all persons belonging to this category of vulnerable people. As a means of achieving this task, in 1992, the G.A. adopted eight global targets on ageing for the year 2001 and a brief guide for setting national targets²⁸. In a number of important respects, these global targets serve to reinforce the obligations of States parties to the Covenant. The same can be said of the so called 'Proclamation on Ageing'²⁹. This was adopted by the G.A., also in 1992, to commemorate the tenth anniversary of the enactment of the Vienna International Plan of Action by the Conference on Ageing. Such Proclamation urged, inter alia, support of national initiatives on ageing so that older women are given adequate support for their largely unrecognized contributions to society and older men are encouraged to develop social, cultural and emotional capacities which they may have been prevented from developing during breadwinning years. It also urged support of national initiatives on families so that they be adequately supported in providing care and all family members be encouraged to cooperate in care-giving. Finally, it urged an expansion of international cooperation concerning the strategies for reaching the global targets on ageing for the year 2001.

One of the direct responses to the G.A's invitation to further initiatives in the field was General Comment No. 6 adopted by the Committee in 1995. Since the ICESCR does not explicitly refer to older persons, the CESCR drew its authority first from interpreting Art. 9 of the Covenant, "the right of everyone to social security, including social insurance", to implicitly refer to the right to old-age benefits. Drawing on a number of inputs from a series of consultations organized by the UN High Commissioner of Human Rights, as well as other sources, General Comment No. 6 formulates the first full and authoritative clarification of the ESC rights and liberties of

²⁸ See Global targets on ageing for the year 2001: a practical strategy. Report of the Secretary General (A/47/339).

²⁹ G.A. Res. 47/5.

older persons as set out in the ICESCR. One of the major sources on which the CESCR drew heavily in formulating its General Comment was the Vienna International Plan of Action by the Conference on Ageing. The Committee also made special mention of the role played by the 'Global targets on ageing for the year 2001' in its consideration of the rights of the elderly, particularly in the context of its day of general discussion. Indeed, the inspiration of the Global targets carried through up to the actual adoption of General Comment No. 6 and has a significant impact on its form and content. This is so, even though some analysts of questions relating to older persons were rather disappointed that the declaratory principles fell far short of rights of the elderly³⁰.

Concerning the structure, General Comment No. 6 has five sections:

- (1-3) introduction;
- (4-8) internationally endorsed policies in relation to older persons;
- (9-15) the rights of older persons in relation to the International Covenant on Economic, Social and Cultural Rights;
- (16-19) general obligations of States parties;
- (20-42) specific provisions of the Covenant.

This structure only partially follows General Comment No. 3 on the nature of States parties duties and General Comment No. 4 on the right to adequate housing. It should be noted, however, that, unlike the most recently adopted general comments, General Comment No. 6 does not have one full section on violations. Like the above mentioned general comments, it contains just two or three paragraphs partially concerning violations.

³⁰ See. e.g. T. A. OBAID, M. MALLOCH-BROWN, *supra* n. 11, p. 15 ff.

In dealing with state obligations at the national level, General Comment No. 6, following the well known work of Asbjörn Eide³¹, identifies the customary three levels of obligation, the obligation to respect, the obligation to protect, to protect and fulfill:

- a. the obligation to respect implies that the state party will secure the physical, psychological and emotional safety of elderly persons with regard to their unique vulnerability to abuse and ill treatment;
- b. the obligation to protect implies that the state party has a legal duty to ensure that third parties under its jurisdiction, including individuals and private entities, do not themselves deprive elderly people of their physical and economic access to fundamental rights such as the right to healthcare, the right to social security, the right to an adequate standard of living, the right to education, etc;
- c. the obligation to fulfill and facilitate, on the other hand, requires more positive action by the state to identify and provide for people belonging to this category of vulnerable people within their jurisdiction.

At the international level, states recognize the essential role of international cooperation and should consider the development of further international legal instruments dealing with the fundamental rights and freedoms of the elderly. Their international policies and programmes should respect the full realization of the elderly people's rights and must provide assistance to any state party to the ICESCR which may require it.

³¹ See A. EIDE, A. ROSAS. *Economic, Social and Cultural Rights: a Universal Challenge*, in A. EIDE, C. KRAUSE, A. ROSAS (eds.) *Economic, Social and Cultural Rights - A Textbook*, The Hague, 2001, at p. 3.

Regarding the overall interpretative principles of General Comment No. 5, these can be summarized in five main points. First, paragraph 9 of General Comment No. 6, explicitly shows, in accordance with the approach adopted in G.A. resolutions 47/5 and 48/98, a preference for the term older persons³². This, according to the practice in the United Nations statistical services, should be interpreted as covering persons aged 60 and above³³.

Second, paragraph 10 firmly establishes elderly people's rights in the context of the other rights recognized in Article 9 of the ICESCR. These are the rights to social security and social insurance. In view of the fact that like all the other Covenant's provisions Art. 9 applies fully to all members of society, it follows that older persons are entitled to enjoy the full range of rights recognized within it. In this regard, the Committee stresses that this implies a recognition of the right to old-age benefits. The same paragraph states that special measures need to be taken to protect the rights of elderly parties. According to this: "States parties are required by the Covenant to do so to the maximum of their available resources".

Third, in several paragraphs of General Comment No. 6, the CESCR proceeds to describe the prohibition of discrimination on the grounds of "other status" as applicable to age. This is so even if it is not yet possible to conclude that discrimination on the grounds of age is comprehensively prohibited by the ICESCR, as the Committee observed in paragraph 12³⁴.

³² See CESCR, *General Comment No. 6* which defines (para. 9) older people as those persons aged sixty and above.

³³ But see Eurostat, the statistical service of the European Union, which considers "older persons" to mean persons aged 65 or above, since 65 is the most common age of retirement and the trend is towards later retirement still (http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/CA-NK-00-003/EN/CA-NK-00-003-EN.PDF).

³⁴ Significantly, the CESCR did not state why it may not or will not interpret "other status" to encompass age. It only affirms (para. 12) that that "the

However, as it duly stresses in the same paragraph, the range of matters in relation to which such discrimination can be accepted is indeed rather limited. This is also because the un-acceptableness of discrimination against older persons is underlined in many international policy documents and confirmed in the legislation of the vast majority of States, as the CESCR again illustrates in paragraph 12. This paragraph points out that in the very few areas in which discrimination continues to be tolerated, such as those in relation to mandatory retirement ages or access to tertiary education, there is an unambiguous trend towards the elimination of such barriers. Thus, the CESCR definitively concludes that States parties should seek to expedite this trend to the greatest extent possible.

Fourth, the CESCR proceeds to comment on its own role in this regard that is rendered all the more important by the fact that, unlike the case of other population groups such as women, people with disabilities and children, no comprehensive international convention exists as yet in relation to the rights of older persons. At the same time, paragraph 15 of General Comment No. 6 insists that the situation of older persons in relation to each of the rights recognized in the Covenant should be adequately addressed in all reports.

Fifth, the CESCR states (para. 25) that rights encompassed in Art. 8, namely trade union rights, should apply to elderly workers. Again, even more interestingly, the CESCR indicates that employers should create retirement preparation programs to prepare elderly employees for the often traumatic transition to retirement³⁵. According to Rodriguez-Pinzon and Martin:

“these programs should address the rights and obligations of pensioners, the opportunities for

range of matters in relation to which such discrimination can be accepted is very limited”.

³⁵ CESCR, *General Comment No. 4*, para. 24.

continuing an occupational activity or undertaking volunteer work, the means of combating detrimental effects of aging, the facilities for adult education and cultural activities and the use of leisure time"³⁶.

It might be recalled to this regard that para. 28 of General Comment No. 6 states that retirement age should be flexible based on a person's occupation and work ability, in addition to demographic, social and economic factors. Being worded as such, this paragraph suggests that elderly people who have worked for a fewer number of years but in a more physically demanding occupation would be able to qualify for the identical amount of benefits as someone who spent more time at a less physical job³⁷.

Based on this structure, approach and interpretative principles, a more in-depth analysis of the actual content of General Comment No. 6 will now be provided.

4. Approaches and Principles of General Comment. No. 6.

The full realization of the rights of older persons does not need to be fulfilled immediately with the entering into force of the Covenant. These rights should nevertheless be realized progressively to the maximum of available resources. As already noted above, the need for a progressive realization of the rights of the elderly has been stressed in Art. 2, para. 1 of the ICESCR and to a fuller extent in General Comment No. 3, at para. 10. Art. 2, para. 1 of the ICESCR also imposes a legal duty on States parties to demonstrate in their periodic reports to the Committee that they have adopted the maximum of the resources available to guarantee that older persons effectively enjoy ICESCR rights. General Comment No. 6 indirectly confirms the relevance of this obligation in the field of the

³⁶ See D. RODRÍGUEZ-PINZÓN, C. MARTÍN, *supra* n. 4, p. 957.

³⁷ *Idem*, p. 959.

protection of the economic, social and cultural rights of the elderly as it states that:

The methods that States parties use to fulfill the obligations they have assumed under the Covenant in respect of older persons will be basically the same as those for the fulfillment of other obligations.

The same reasoning is found in para. 11 of General Comment No. 4 on the right to adequate housing. This tersely provides that: 'States parties must give due priority to those social groups living in unfavourable conditions by giving them particular consideration'³⁸. Such particular consideration of the needs of the so called 'vulnerable people' should indeed be interpreted as a prohibition for the States parties to enact policies and legislation aimed to benefit already advantaged social groups at the expense of others, according to the same paragraph³⁹.

From a different perspective Art. 2, par. 1 of ICESCR provides that the Committee, in determining which actions or omissions amount to a violation of the rights of the elderly, should distinguish between the inability from the unwillingness of a State party to comply. Paragraph 17 of General Comment No. 6 suggests that, even in periods of severe resource constraints, States parties have the obligation to protect the vulnerable members of society. *Prima facie* this provision does not seem to require much comment. However, on a more careful reading, it does not offer sufficient clarity. In particular, it does not specify whether in a situation of insufficient resources to protect and fulfill the full normative content of the ICESCR rights guaranteed to older persons, some priority contents of these rights have to be met first. This priority setting relates also to States parties that might not be resource-poor, but have so far failed to fully

³⁸ *Ibidem*, para. 11.

³⁹ *Ibidem*.

implement the normative content. The terms of minimum core content emerged from the need to clarify further what can be expected from States immediately and what can only be expected progressively. In some General Comments such as General Comment No. 12 the Committee uses the concepts 'core content' and 'core obligations' in parallel. Whereas the term 'core content' is not precisely defined, 'core obligation' is defined in General Comment No. 3 as that States parties have a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights spelt out in the Covenant. Therefore, 'core obligation' is the more appropriate term to use in identifying what States parties have to do as a minimum, while the term 'core content' seems to reduce the scope of the right. Parts of the core obligations are also spelt out in the provisions in paragraph 13 of General Comment No. 6. This reads as follows:

the Committee on Economic, Social and Cultural Rights is of the view that States parties to the Covenant are obligated to pay particular attention to promoting and protecting the economic, social and cultural rights of older persons.

Moreover, States have a core obligation to take necessary actions to adopt properly designed policies and programmes to meet requirements. Furthermore, they have a core obligation to enact legislation when necessary and to eliminate any discriminatory legislation. This means that even at the core obligation level, States parties have to make sure that the rights of the elderly are more than the right not to be discriminated against on the basis of age; older people should also enjoy all the rights and freedoms guaranteed in the Covenant and illustrated in paragraphs 20-42 of General Comment No. 6. It must also be expected from governments that the most severe situations should be addressed and as soon as possible be overcome.

The normative content of the rights of the elderly in General Comment No. 6 is, *inter alia*, developed around the notion of discrimination on the basis of age. Neither the ICESCR nor the Universal Declaration of Human Rights explicitly refers to age as one of the prohibited grounds⁴⁰, as stressed *inter alia* in paragraph 11 of General Comment No. 6⁴¹. The latter also suggests that rather than being seen as an intentional exclusion, such omission is probably best explained by the circumstance that, when these instruments were enacted, the problem of demographic ageing was not as evident or as pressing as it is now. In the chapter dealing with strategies for the implementation at the national level, the CESCR illustrates the kind of actions States parties have to take to avoid discrimination when implementing the ESC rights of the elderly⁴². The methods States parties use to fulfill the obligations assumed under the Covenant in respect of older persons should explicitly include the need to enact legislation when necessary and eliminate any discriminatory legislation, according to paragraph 18 of the General Comment.

Another corner-stone for the rights and freedoms of elderly people is the principle of participation. This should be applied when these rights and freedoms are being interpreted and developed, as well as when States parties draw up their programs for to realize these rights. If the groups concerned participate in programs and decisions related to fundamental rights it is more likely that people's needs will be met. Participation as a human right is established in Art. 25 (a) of the ICCPR. However, unlike other General Comments by the CESCR, General Comment No. 6 omits to stress the

⁴⁰ Arguably, references to "other status" in the ICESCR might include discrimination on the basis of age. Accordingly, D. RODRÍGUEZ-PINZÓN, C. MARTIN, *supra* n. 4, p. 936.

⁴¹ See CESCR, *General Comment No. 6*, paras.11-12 (indicating concern regarding possible discrimination on the basis of age, but also recognizing the lack of clarity regarding age as a basis for discrimination).

⁴² CESCR, *General Comment No. 6*, paras. 18-19.

importance of elderly people's participation in the formulation and implementation of national strategies for the protection of older persons. But this *per se* does not seem sufficient to conclude that older persons are not entitled to enjoy such a right.

5. Substantive Aspects of General Comment. No. 6.

The Committee explicates in paragraph 16 of the Comment that elderly people as a group are as varied and mixed as the rest of the population and their condition depends on different elements such as the country's social and economic situation, demographic, environmental, cultural and employment factors and, at the individual level, on family situation, level of education, urban or rural environment and the occupation of workers and retirees. This statement is rather important in several regards, in particular because it explains why the methods States parties employ to fulfill the duties assumed under the Covenant in respect of older persons should include the need to determine the nature and scope of problems within a State through regular monitoring, as well as the necessity to adopt properly designed policies and programmes to meet requirements, as explicitly confirmed in paragraph 18 of the Comment.

A thorough reading of paragraphs 20-42 of General Comment No. 6 indicates that the UN Principles for Older Persons had a major impact in the orientation of the Comment on various fundamental rights of the elderly such as the rights to health care, social security, work, education and family. Such an impact by the United Nations Principles can be seen respectively:

- a. on the emphasis in several paragraphs of the Comment that the elderly person is not a holder of special rights, but rather of subjective positions implicitly recognized for all subjects, since such

- subjective positions are included in or derived from fundamental rights;
- b. in quite a few aspects of the specific provisions of the Covenant that apply to the elderly, in particular on the definition of the above mentioned and other rights, which often follow, almost word for word, that of the United Nations Principles;
 - c. in the accent on care and dignity and the consequent lack of access to available medical, educational, cultural, spiritual and recreational resources for large segments of the elderly population in several States parties as a root cause of their vulnerability, and the analysis of the three levels of States' duties.

General Comment No. 6, nevertheless, does not go into further detail in discussing the sub-categories of the obligation to fulfill, namely the obligation to facilitate and the obligation to provide. The former requires the State party to engage proactively in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihood, including medical and social assistance. The latter requires the State party to actually provide resources and support in situations where the individuals are, for reasons beyond their control, unable to provide for themselves, as for example in times of recession and of restructuring of the economy where clearly older persons are particularly at risk.

The Comment, quite naturally given its provenance, goes into more detail in its treatment of violations of the specific provisions of the Covenant. According to **this**, violations of the Covenant occur when a State party fails to ensure satisfaction of, at the very least, the minimum essential level of support required to enjoy the full range of rights recognized in the ICESCR, through its voluntary actions or lack thereof⁴³. Should

⁴³ *Ibidem*, paras. 18-19.

a State argue that resource constraints make it unfeasible to offer access to fundamental rights such as the right to healthcare, work and education for those who are unable by themselves to secure such access, the State must demonstrate that every effort has been made to use all the resources at its disposal to meet the minimum levels. Violations also occur when a State party takes positive action to reject or hinder access to fundamental rights such as the rights to work, health and education, or fails to regulate properly the actions of other entities where such failure has the effect of denying access to work, health, social care or education. Some examples are the formal repeal or suspension of legislation necessary for the continued enjoyment of some of the most fundamental rights guaranteed by the ICESCR, or the prevention of access to health or social care due to lack of appropriate financial resources.

Finally, a few words must be offered on the approach by General Comment No. 6 to the rights of older persons at the national level. Interestingly enough, rather than listing specific measures which need to be taken, such as the development of social security systems and the establishment of retirement preparation programmes, the General Comment recognizes that States parties have a margin of discretion in choosing their own approaches to achieving the rights guaranteed in the Covenant and that the most appropriate ways will vary from one State to another. Rather than trying to impose model substantial solutions, General Comment No. 6 prefers to stress the process that States parties are encouraged to follow. The Comment thus stresses the need for each State to adopt a national strategy to meet requirements and eliminate any discriminatory legislation based on human rights principles which define the objectives and the formulation of policies and corresponding benchmarks⁴⁴. The formulation and implementation of national strategies requires full compliance with the principles of transparency, accountability

⁴⁴ *Ibidem*, paras. 18-19.

and legislative capacity. Of special interest in the Comment is the emphasis placed on the need to set verifiable benchmarks for subsequent national and international monitoring, and the recommendation that States parties should consider the adoption of a framework law as a major instrument in the implementation of the national strategy concerning the rights of the elderly. Framework laws should include provisions on the goals and targets to be achieved, the means by which these targets should be achieved, the collaboration to be undertaken with the civil society, institutional responsibility for the process, national mechanisms for monitoring and possible recourse procedures.

At the international level, the General Comment stresses that States parties should enhance international cooperation in accordance with articles 22 and 23 of the Covenant, being this a particularly important way of enabling some developing countries to fulfill their obligations under the ICESCR.

6. Final Remarks.

Undoubtedly, General Comment No. 6 offers the ICESCR a major opportunity to achieve a paradigm shift in the way elderly people are perceived and treated across the States Parties, from objects of welfare to equal human beings with the full set of rights this confers. Equally clearly, the Comment has achieved a great deal in clarifying the ESC rights and freedoms of the elderly and making an authoritative statement of their contents. A number of witnesses referred to the symbolic significance of the drafting from elderly persons aid to the creation of an international, cross-cultural moral standard for the treatment of elderly persons. Furthermore, General Comment No. 6 expands the scope of the Covenant and supplies insight into different mechanisms needed to protect the rights of elderly people worldwide⁴⁵. For this and other reasons

⁴⁵ Accordingly D. RODRÍGUEZ-PINZÓN, C. MARTIN, *supra* n. 4., p. 952.

already indicated above it is indeed a very welcome addition to the CESCR's jurisprudential armory. However, relevant issues concerning the legal duties of States parties for the protection of the elderly remain un-clarified, as evidenced by the language chosen in General Comment No. 6. This is highly symbolic in introducing an abstract recognition of the rights of elderly people but is rather cautious in identifying concrete obligations that the States parties should assume on behalf of the elderly. In fact, General Comment No. 6 is limited in that it declares the rights of the elderly and solicits protection from actual and threatened violations of these rights by other subjects without, however, going as far as to affirm that the public authorities assume a duty of special assistance in favor of the elderly. Moreover, the language of paragraph 19 of the Comment appears rather bland in providing that:

In this context, attention may be drawn to Global target No. 1, adopted by the General Assembly in 1992, which calls for the establishment of national support infrastructures to promote policies and programmes on ageing in national and international development plans and programmes.

If the language of paragraphs 16-19 of General Comment No. 6 dealing with the general obligations of States parties were more engaging, the conclusion would be different. For instance, if the language were: 'the Covenant guarantees' the rights of the elderly, it would naturally follow that public authorities have the active obligation to guarantee effective protection of the elderly. Similarly, an identical result would occur if the language were: 'the elderly have the right to ...' lead a life of independence and dignity. Nevertheless, General Comment No. 6 does not go this far and with all probability could not have done so without interfering with the sovereignty of several States parties.

Consequently, beyond the formal declaration of the above

mentioned 'rights of the elderly' (paragraphs 20 - 42) the central issue remains open whether to recognize in favor of the elderly an additional right 'to an adequate and dignified standard of life' that obliges all, including public authorities, to effectively respect and promote dignity as well as the physical, mental, moral and social independence of the elderly according to a model of society which has been truly inclusive. In the absence of such recognition, General Comment No. 6 appears incomplete from the point of view of a civil and moral evolution of states parties, notwithstanding the relevance and the merit of what this has already expressed and recognized as a fundamental principle.