

2003

The International Human Rights Status of Elderly Persons

Diego Rodriguez-Pinzón

Claudia Martin

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/auilr>



Part of the [International Law Commons](#)

Recommended Citation

Rodríguez-Pinzón, Diego and Claudia Martin. "The International Human Rights Status of Elderly Persons." American University International Law Review 18, no. 4 (2003): 915-1008.

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in American University International Law Review by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact fbrown@wcl.american.edu.

THE INTERNATIONAL HUMAN RIGHTS STATUS OF ELDERLY PERSONS

DIEGO RODRÍGUEZ-PINZÓN* AND CLAUDIA MARTIN**

INTRODUCTION	916
I. WHAT TYPE OF RIGHTS ARE ELDERLY RIGHTS?	918
A. CIVIL AND POLITICAL RIGHTS PROVISIONS AND THE PROTECTION OF THE RIGHTS OF THE ELDERLY	922
B. NON-DISCRIMINATION AND THE “DISADVANTAGED OR VULNERABLE GROUP” APPROACH	935
C. PREFERENTIAL TREATMENT TO DISADVANTAGED GROUPS	938
II. THE UNITED NATIONS AND ELDERLY CONCERNS ...	947
III. THE RIGHTS OF OLDER PERSONS IN RELATION TO THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS	952
A. ARTICLE 3: EQUAL RIGHTS OF MEN AND WOMEN	955
B. ARTICLES 6 THROUGH 8: RIGHTS RELATING TO WORK	956
C. ARTICLE 9: THE RIGHT TO SOCIAL SECURITY	957
D. ARTICLE 10: PROTECTION OF THE FAMILY	960
E. ARTICLE 11: RIGHT TO AN ADEQUATE STANDARD OF LIVING	960
F. ARTICLE 12: RIGHT TO PHYSICAL AND MENTAL HEALTH ..	968
G. ARTICLE 13 THROUGH ARTICLE 15: RIGHT TO EDUCATION AND CULTURE	972

* Diego Rodríguez-Pinzón (J.D., L.L.M., S.J.D.) is Co-Director of the Academy on Human Rights and Humanitarian Law and teaches international human rights law and international law at American University, Washington College of Law.

** Claudia Martin is Co-Director of the Academy on Human Rights and Humanitarian Law and Visiting Associate Professor at American University, Washington College of Law.

The authors want to thank the Bochard Foundation Center on Law & Aging for its support in this endeavor. We also want to thank our research assistants Robin Roizman and Shazia Anwar. Additionally, we also want to thank the collaboration of Inmaculada Barcia and Kevin Fandl.

IV. THE RIGHTS OF THE ELDERLY IN REGIONAL HUMAN RIGHTS TREATIES	975
A. THE EUROPEAN HUMAN RIGHTS SYSTEM	976
B. THE INTER-AMERICAN HUMAN RIGHTS SYSTEM	993
C. THE AFRICAN HUMAN RIGHTS SYSTEM	1004
CONCLUSIONS AND RECOMMENDATIONS	1007

INTRODUCTION

The elderly population is the fastest growing portion of society.¹ 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.² Developed and developing countries address the issues of the aging population in different ways. In developed countries, for example, a social security apparatus bears the strain of caring for the elderly. In developing countries, on the other hand, families traditionally care for the elderly. In these developing countries, the lack of a social security apparatus and the weakening of the family unit present obstacles to the provision of care for elderly family members.³

When considering the rights of any group of persons, one inevitably encounters international human rights instruments. Several international systems recognize and protect human rights: the United Nations system, the European system, the Inter-American system, and the African system. Each system has its own unique set of

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) [hereinafter *General Comment 6*] (noting that the population of elderly people in developing countries is rapidly increasing); see also Sylvia Beales, Briefing paper, *The Mark of a Noble Society: Human Rights and Older People*, HELPAGE INTERNATIONAL (2000) (stating that older people are currently the fastest growing group of the population), available at <http://www.helpage.org> (last visited Feb. 26, 2003).

2. See *General Comment 6*, *supra* note 1, para. 1.

3. See *id.* para. 3 (noting that elderly people in developing countries do not enjoy support from social security systems, and that they risk losing economic security due to the erosion of the traditional role that family plays in such societies).

human rights treaties and supervisory mechanisms. This article will explore each of these systems and determine the current status of elderly rights within these various frameworks.

Although international human rights standards have gained increasing recognition within the realm of the rights of individuals generally, the rights of elderly persons have not yet received the international legal attention they deserve. Many treaties refer to rights that are of particular interest to the elderly, but there is no comprehensive international instrument⁴ that adequately addresses the specific protections required for the elderly. There are many international instruments that recognize specific rights of all persons and are clearly applicable to elderly people as citizens of signatory states. These include the International Covenant on Civil and Political Rights ("ICCPR")⁵ and the International Covenant on Economic Social and Cultural Rights ("ICESCR"),⁶ as well as regional human rights conventions. The treaty making bodies in charge of monitoring compliance with the obligations established therein have also developed protections that have expanded the scope of the respective treaties to protect persons in situations unimagined at the time of the original signing of these documents. Moreover, there are some international treaties that recognize the rights of special groups of persons.⁷ However, given all the legal mechanisms

4. The term international instrument does not refer exclusively to a treaty that generates binding obligations for states. It also encompasses declarations and guiding principles.

5. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] (explaining that all free human beings have a right to civil and political freedoms).

6. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR] (recognizing that all human beings have a right to enjoy economic, social, cultural, civil, and political rights).

7. See generally Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, art. 16, 1577 U.N.T.S. 44, 49 (*entered into force* Sept. 2, 1990); see also Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons With Disabilities, June 7, 1999, Organization of American States, AG/RES. 1608 (XXIX-O/99); Convention Concerning Indigenous and Tribal Peoples in Independent Countries, International Labor Organization Convention No. 169, 72 ILO Official Bull. 59 (1991) (*entered into force* Sept. 5, 1991), available at <http://www1.umn.edu/humanrts/instree/r1c1tp.htm> (last visited Feb. 21, 2003); International Convention on the Elimination of All Forms of Racial

for protection, the elderly population remains a vulnerable group with no legal instrument tailored to its particular needs.

In order to provide useful information for scholars, students, and others interested in further exploring this area of the law, the structure of this article will reflect the current organization of international human rights mechanisms and systems. This article will therefore discuss the different types of rights as well as the various international regional systems of protection in order to expand the understanding of the notion of elderly rights. From this point forward, this article will refer to the relevant population as "elderly," "aged persons," or "older persons," as these are terms used in most international legal instruments.

I. WHAT TYPE OF RIGHTS ARE ELDERLY RIGHTS?

The rights recognized in human rights systems are traditionally classified based on the type of rights protected. The most basic rights, civil and political rights ("CPR"), require immediate protection and strong international supervision through individual adjudication of cases and general reports. Economic, social, and cultural rights ("ESCR") are monitored through general reporting and, in very exceptional cases, through individual adjudication of violations. ESCR are often considered "goals or aims" that do not clearly resemble the traditional characteristics of "rights," but that are more closely linked to political processes and economic resources rather than judicial activity.⁸ The rights of the elderly as such are recognized in isolated provisions in international treaties.

Discrimination, *opened for signature* Mar. 7, 1966, art. 2(d), 660 U.N.T.S. 195; Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 13, Optional Protocol, G.A. Res. 54/4, annex (Oct. 6, 1999) (*entered into force* Dec. 22, 2000).

8. Not all legal commentators agree that economic, social, and cultural rights ("ESCR") are only goals and not rights. The authors of this article do not purport to conclude that ESCR are in fact goals that, if achieved, are a blessing, but otherwise are amenable to the current political economy of the nation involved. Cultural and political rights ("CPR") and ESCR can be immediately applicable and subject to judicial adjudication. Furthermore, they are indivisible from each other, as the implementation and protection of one type of right often allows for the implementation and protection of the other.

The following are examples of elderly-specific provisions included in human rights treaties: Article 17 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador")⁹; Article 23 of the Revised European Social Charter;¹⁰ and Article 18 of the African [Banjul] Charter on Human and Peoples' Rights ("African Charter").¹¹ Most recently, the rights of the elderly have also been recognized in Article 25 of the Charter of Fundamental Rights of the European Union,¹² and Articles 46 and 47 of the Andean Charter for the Promotion and Protection of Human Rights.¹³ Additionally, other provisions of these treaties, and those of other international treaties, make reference to issues that affect the protection of the elderly, such as the right to social security, which is ensured in Article 9 of the Protocol of San Salvador,¹⁴ Article 12 of the Revised European Social Charter,¹⁵ and Article 9 of the ICESCR.¹⁶ The International

9. See Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador," Nov. 17, 1988, *not in force*, art. 17, O.A.S.T.S. 69, 28 I.L.M. 156 (1989), *corrections at* 28 I.L.M. 73, 1341 (1989) *and* 28 I.L.M. 156, 573, 1341, OAS Treaty Series No. 69 (1989) [hereinafter Protocol of San Salvador] (stating that every person has a right to certain protections in old age).

10. See European Social Charter (Revised), *entered into force* Jan. 7, 1999, E.T.S. 163, 36 I.L.M. 31 (1997) [hereinafter Revised European Social Charter] (providing that signatory nations will adopt public or private services designed to allow elderly persons to remain active members of society for as long as possible), *available at* <http://www.worldpolicy.org/globalrights/treaties/eurosocial.html> (last visited Feb. 26, 2003).

11. See African Charter on Human and Peoples' Rights, June 27, 1981, 21 I.L.M. 58, 60 (1982) [hereinafter African Charter] (guaranteeing that the elderly will have the rights to special protection consistent with their own needs).

12. See Charter of Fundamental Rights of the European Union, 40 I.L.M. 266 (2001) (*entered into force* Dec. 7, 2000) (recognizing that the elderly have a right to dignity and independence).

13. See Andean Charter for the Promotion and Protection of Human Rights, *adopted by* the Andean Presidential Council, July 26, 2002 (reiterating that Andean nations will be committed to protecting the human rights of adults, including access to social security), *available at* http://www.comunidadandina.org/ingles/document/andean_charter.htm (last visited Feb. 21, 2003).

14. See Protocol of San Salvador, *supra* note 9, at art. 9 (stipulating that every person has a right to social security in his or her old age).

Labor Organization ("ILO") Convention (C102) Concerning Minimum Standards of Social Security also addresses this topic.¹⁷

Since elderly rights are usually expressly recognized in treaties protecting ESCR, many regard them as "rights of progressive implementation." This is the case with Article 17 of the Protocol of San Salvador, which refers to the "Protection of the Elderly,"¹⁸ Article 23 of the Revised European Social Charter regarding "[t]he right of the elderly to social protection,"¹⁹ and Article 18(4) of the African Charter.²⁰ "Rights of progressive implementation" means that states are not immediately required to fully realize those rights in their jurisdictions, as they are only goals or aims that will be attained to the maximum of the states' available resources.²¹ In practice, however, only the Protocol of San Salvador contains a general clause on "progressive implementation" that applies to all of the provisions of that treaty.²² It is worthy to note that, even in presence of this clause, there are certain rights or aspects of those rights enshrined in the Protocol that require immediate application and can be subject to international complaints. These include trade union rights and the

15. See Revised European Social Charter, *supra* note 10, at art. 12 (agreeing that parties will establish social security systems)

16. See ICESCR, *supra* note 6, at art. 9 (recognizing that every person should be granted access to social security)

17. See International Labor Organization, Convention (C102) Concerning Minimum Standards of Social Security, *opened for signature* June 28, 1952, 210 U.N.T.S. 131, [hereinafter ILO Minimum Standards] (discussing minimum social security standards that governments should provide for their citizens), *available at* <http://www.ilo.org> (last visited Feb. 26, 2003).

18. See Protocol of San Salvador, *supra* note 9, at art. 17.

19. See Revised European Social Charter, *supra* note 10, at art. 23.

20. See African Charter, *supra* note 11, at art. 18(4).

21. See *The Nature of States Parties Obligations: General Comment 3*, U.N. ESCOR, Econ., Soc., & Cultural Rts. Comm., 5th Sess., at 18, 20, para. 9, U.N. Doc./HRI/GEN/1/Rev.5 (2001) [hereinafter *General Comment 3*] (commenting that the goal must be reached within a short time after the covenant is entered into force).

22. See Protocol of San Salvador, *supra* note 9, at art. 1 (commenting that signatory states agree to adopt economic and technical measures to the extent allowed by their available resources).

right to education.²³ The other two treaties, the Revised European Social Charter and the African Charter, both contain obligations that are generally considered to require immediate application.²⁴ 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."²⁵

The fact that elderly rights are identified as ESCR has an effect on the perception that these "rights" are only aims or goals. There are many aspects in the protection of this population, however, that may be immediately enforceable. For example, in addition to the "elderly specific" provisions already mentioned, there are civil and political rights provisions that can be extremely important to protecting the rights of older persons. The right to a fair trial and the right to non-discrimination 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. Similarly, provisions prohibiting cruel and degrading treatment have special meaning and provide specific protections for the elderly in circumstances such as serving labor prison sentences, serving jail time for a crime, and receiving inhumane treatment in health facilities. Moreover, through the right to property, the elderly may protect their rights to pensions and social security benefits.

23. See *id.* arts. 8, 13. Other specific provisions within several articles of the Protocol may also be interpreted as providing for immediate national protection, although may not be subject to international complaints.

24. See DONNA GOMIEN, ET AL., LAW AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE EUROPEAN SOCIAL CHARTER , 381 (1996) (relating to the European Social Charter); see also Chidi Anselm Odinkalu, *Analysis of Paralysis or Paralysis by Analysis? Implementing Economic, Social, and Cultural Rights Under the African Charter on Human and Peoples' Rights*, 23 HUM. RTS. Q. 327, 348 (2001) (describing that African regional bodies will carry out the obligations enumerated in the African Charter).

25. See *General Comment 3*, *supra* note 21, para. 9; see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §111 cmt. h (1986). This section of the Restatement refers to a "reasonable time" requirement both for enacting, non-self-executing implementing national legislation (if considered "non-self executing") and allocating the necessary resources to give effect to rights of progressive implementation.

Independent of the classification of the rights of the elderly, another approach for enhancing the protection of older persons is to treat them as a group that deserves special attention. Human rights law developed the idea that *vulnerable* groups must receive special measures of protection to ensure their enjoyment of human rights guaranteed to other members of society. This approach is based on a broad interpretation of the principle of equality before the law that is enshrined in human rights treaties at both the universal and regional levels, and that is reflected in affirmative action programs or "positive discrimination" measures.

In sum, the rights of the elderly are usually placed in human rights treaties that protect ESCR. This situation creates the perception that these rights are programmatic aspirations but not subjective "rights," in the traditional legal sense of that word. While this perception may be appropriate in relation to particular rights or even certain treaties, it is not necessarily accurate with respect to other rights, such as CPR, which are of immediate application. Moreover, the fact that the elderly are considered a disadvantaged or vulnerable group enhances the protection that states are obliged to ensure them when complying with international human rights obligations. To complement this discussion, the next two sections will analyze existing case law in which civil and political rights are used to protect the elderly. This article then reviews the legal justification for characterizing the elderly as a vulnerable group to which special measures of protection must be afforded.

A. CIVIL AND POLITICAL RIGHTS PROVISIONS AND THE PROTECTION OF THE RIGHTS OF THE ELDERLY

Certain provisions in civil and political human rights instruments confer rights to the elderly exclusively on the basis of their age. These specific protections are particularly significant when considering that civil and political rights are immediately applicable. This is the case with the death penalty, which is prohibited for the elderly under Article 4(5) of the American Convention.²⁶

26. See American Convention on Human Rights "Pact of San Jose, Costa Rica," Nov. 22, 1969, art. 4(5) 1144 U.N.T.S. 123, 147 (1969) (stating that "[c]apital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age").

Interestingly, the ICCPR, the European Convention on Human Rights,²⁷ and the African Charter do not restrict capital punishment with respect to the elderly. Another example of rights conferred on the elderly because of their age is the prohibition against performance of experiments on persons not capable of giving consent contained in Article 7 of the ICCPR.²⁸ The U.N. Human Rights Committee has addressed the prohibition against medical or scientific experimentation without the free consent of the person, which can be of special importance to older persons. The Committee has stated that:

[i]t takes the view that at least in countries where science and medicine are highly developed, and even for peoples and areas outside their borders if affected by their experiments, more attention should be given to the possible need and means to ensure the observance of this provision. Special protection in regard to such experiments is necessary in the case of persons not capable of giving their consent.²⁹

Alternatively, human rights supervisory bodies have resorted to other civil and political rights as a means of extending their protection to the elderly, particularly in the field of social security benefits. Through this approach, these adjudicatory bodies have used the rights to a fair trial, property, and non-discrimination and equality before the law to provide access to or to ensure that social benefits, such as pension rights, are not arbitrarily affected. In the universal system, for example, the Human Rights Committee has applied the right to equal protection under Article 26 of the ICCPR to afford social security rights.

In *Brooks v. Netherlands*, the Committee stated that the scope of Article 26 extends to prohibit discrimination in law and in practice in

27. European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 222, E.T.S. No. 005.

28. See ICCPR, *supra* note 5, at art. 7 (commenting that individuals should not be subjected to torture or cruel punishment). Article 7 also states that people should not be forced to participate in medical or scientific experiments without their consent. *Id.*

29. *Torture or Cruel, Inhuman or Degrading Treatment or Punishment: General Comment 7*, U.N. GAOR, Hum. Rts. Comm., 16th Sess., para. 7, U.N. Doc. HRI/GEN/1/Rev.1 (1994) [hereinafter *General Comment 7*].

any field regulated and protected by public authorities.³⁰ Thus, the principle of equality is applicable to both civil and political as well as economic, social, and cultural rights, including the right to social security. In this case, the petitioner claimed that her right to equality before the law under Article 26 was violated on the ground of sex and other statuses when her social security benefits, awarded on the basis of disability, were suspended.³¹ According to domestic legislation, disability benefits were ensured only to married women who were “breadwinners” or separated from their husbands.³² Since the petitioner did not fit either of these categories, her social security benefits were cut off after a period of time.³³

Before the Committee, the State argued that Article 26 was not applicable to the facts of the case because only civil and political rights were protected under that provision.³⁴ Since the right to social security is enshrined in the ICESCR, it was not covered by the scope of the right claimed.³⁵ In the end, the Committee held that Article 26 requires that domestic legislation bar discrimination, but it does not contain any obligation with respect to the substantive matters covered by that legislation.³⁶ Therefore, although that provision does not require a state to enact laws to provide for social security, “when such legislation is adopted in the exercise of a state’s sovereign power, then such legislation must comply with Article 26 of the Covenant.”³⁷ This case has served as an important precedent for subsequent complaints submitted to the Committee in which the

30. *Brooks v. Netherlands*, U.N. GAOR Hm. Rts. Comm., 39th Sess., Supp. No. 40, U.N. Doc. A/42/40 (1987), available at <http://www1.umn.edu/humanrts/undocs/session42/172-1984.htm> (last visited Feb. 19, 2003).

31. *See id.* para. 2.3 (providing the basis for petitioner’s claim).

32. *See id.* para. 8.2.

33. *See id.*

34. *See id.* para. 8.3 (detailing the state’s response to petitioner’s argument).

35. *See Brooks*, U.N. Doc. A/42/40, para. 8.3 (arguing that the right petitioner seeks to secure overlap with those provided in the ICESCR). A separate organ enforces this treaty. *Id.*

36. *See id.* para. 12.4.

37. *See id.*

rights of the elderly to social security protection without discrimination has been argued.³⁸

Similarly, the former European Commission on Human Rights ("European Commission") and the European Court on Human Rights have applied certain civil and political rights recognized in the European Convention on Human Rights to the elderly. In the *Deumeland case*,³⁹ Johanna Deumeland applied for a widow's supplementary pension, arguing that an industrial accident caused her husband's death.⁴⁰ The proceedings commenced on June 16, 1970, in the Berlin Social Court and were finalized on February 9, 1981, when the Federal Constitutional Court rejected the case.⁴¹ Ms. Deumeland died in December 1976, but her son continued the proceedings and brought the petition to the European Human Rights System upon exhausting domestic remedies.⁴² The applicant claimed that the German courts had not given the case a fair hearing within a reasonable time, which violated Article 6 paragraph 1 of the European Convention on Human Rights.⁴³ The Court assessed the reasonableness of the length of the Deumeland proceedings with regard to criteria established by the Court's case law, namely: the degree of complexity of the case, the behavior of the applicant, and the conduct of the competent courts.⁴⁴ In applying the criteria to the facts of the case, the Court held that, irrespective of certain actions by the applicant that caused delay, the length of the proceedings was

38. See, eg., *S.B. v. New Zealand*, U.N. GAOR Hum. Rts. Comm., 50th Sess., U.N. Doc. CCPR/C/50/D/475/1991 (1994) (claiming that New Zealand and the United Kingdom violated Article 26 of the covenant).

39. *Deumeland v. Germany*, 100 Eur. Ct. H.R. (ser. B) (1986), available at <http://www.echr.coe.int> (last visited Mar. 6, 2003).

40. See *id.* para. 10.

41. See *id.* paras. 11, 45.

42. See *id.* para. 35 (noting that Mrs. Deumeland was the original plaintiff, but that her son pursued the claim following her death).

43. See *id.* para. 58 (quoting the European Convention on Human Rights, Article 6, paragraph 1, in support of the claim that plaintiff had not received a fair hearing within a reasonable time). The relevant provision of the convention states: "In the determination of his civil rights and obligations . . . everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." *Id.*

44. See *Deumeland*, 100 Eur. Ct. H.R. (Ser. B), paras. 78-89.

abnormal.⁴⁵ Consequently, the Court found a violation of the right to a hearing within a reasonable time.⁴⁶ In reaching its conclusion, the Court noted that social security cases required "particular diligence."⁴⁷

In recent cases, the Court has begun to consider the age of the applicant as a factor when assessing the diligence required of domestic courts in deciding social security cases. In the *Süßmann* case,⁴⁸ the applicant commenced proceedings to challenge the legality of an amendment to his pension scheme that resulted in a reduction of the amount of his pension.⁴⁹ In assessing the reasonableness of the length of the proceedings in this case, the Court analyzed the complexity of the case, the behavior of the parties involved, and the significance of what was at risk for the applicant in the litigation.⁵⁰ With regard to the third prong of the test, the Court stated that given the age of the applicant, the proceedings before the domestic courts were undeniably vital to him.⁵¹ In the end, however, the Court concluded that the amendments to the pension scheme "did not cause prejudice to him to such an extent as to impose on the court concerned a duty to deal with [*Süßmann's*] case as a matter of very great urgency, as is true of certain types of litigation."⁵²

The *Süßmann* Court alluded to cases in which applicants infected with the Human Immunodeficiency Virus ("HIV") after receiving blood transfusions at public hospitals sued the state for damages.⁵³ In such situations, the Court established that the administrative and judicial authorities are obligated under Article 6 paragraph 1 to act

45. *See id.* para. 90 (noting that the litigation at issue spanned approximately an eleven year period).

46. *See id.*

47. *See id.*

48. *See Süßmann v. Germany*, App. 20024/92, 25 Eur. H.R. Rep. 64 (1996), available at <http://www.echr.coe.int> (last visited Mar. 6, 2003).

49. *See id.* para. 11.

50. *Id.* para. 48.

51. *Id.* para. 61.

52. *Id.*

53. *See Süßmann*, 25 Eur. H.R. Rep. 64, para. 61 (citing *A. v. Denmark*, 22 Eur. Ct. H.R. 456 (1996)).

with "exceptional diligence."⁵⁴ In conclusion, the *Süßmann* court found no violation of the right to a hearing within a reasonable time.⁵⁵ One dissenting judge concluded that there was a violation of that right and suggested that, in light of the applicant's age, the risk for him matched that of a person who is infected with HIV.⁵⁶

In addition to the right to a fair trial, the European System has recognized the right to property and has applied the non-discrimination clause of the European Convention on Human Rights to cases related to social security benefits and, in particular, to old-age pensions. In a well established line of cases, the former European Commission recognized rights stemming from the payment of contributions to the social insurance system, specifically the right to derive benefits from such a system in the form of a pension. People can assert these rights in accordance with the right to peaceful enjoyment of possessions protected by Article 1 of Protocol No. 1. This provision, however, does not grant an individual a right to a pension of a particular amount.⁵⁷

Most recently, the European Court has reaffirmed this case law in a series of cases in which the reduction of pensions for members of the armed forces or the public security forces in the former communist countries were at stake. In *Jankovic v. Croatia*, the applicant served in the Yugoslav People's Army and retired from service before the dissolution of the Federal Republic of Yugoslavia in 1991.⁵⁸ The Federal Pension Fund provided the source for his pension until that time. Once Yugoslavia dissolved, the Croatian Social Security Fund assessed his benefits and reduced his entitlement to 63.22 percent of what he had previously received.

54. See *A v. Denmark*, 25 Eur. Ct. H.R. 456, para. 78 (1996).

55. See *Süßmann*, 25 Eur. Ct. H.R. Rep. 64, para. 62.

56. See *id.* (dissenting opinion of Judge Foighel, joined by Judge Lohmus).

57. See e.g. *Müller v. Austria*, App. No. 5849/72, 3 Eur. Comm'n H.R., Dec. & Rep. 25 (1975) (deciding that partial loss of the applicant's right to a full pension was not a violation of Article 1), available at <http://www.echr.coe.int> (last visited Feb 23, 2002).

58. See *Jankovic v. Croatia*, App. 43440/98, Eur. Ct. H.R. (2000) (providing an example where the court rejected the argument that a reduction of pensions was a violation of the plaintiff's rights under Article I), at <http://www.echr.coe.int> (last visited Apr. 5, 2003).

Before the European Court, the applicant claimed that the decision to decrease his military pension violated his right to property under Article 1 of Protocol No. 1 and constituted discrimination in violation of Article 14 of the Convention. In relation to the first claim, the Court confirmed the existing jurisprudence and held that the right to property does not include the right to a pension of a particular amount.⁵⁹ The applicant argued that the government intended to discriminate against his category of pensioners when it decreased the military pensions of the former Yugoslav People's Army officers. Moreover, the average pension of the Croatian Army officers was more than two times higher than the pension of the former Yugoslav People's Army officers. The court stated that the test for establishing discrimination requires the existence of a difference in treatment that has no objective and reasonable justification, "which means that it does not pursue a 'legitimate aim' or that there is no 'reasonable proportionality between the means employed and the aim sought to be realized.'"⁶⁰ States enjoy a degree of flexibility in determining the degree and extent to which distinctions in similar situations justify a difference in treatment.⁶¹ In applying this standard, the Court decided that the state did not violate the applicant's right against discrimination. The Court ruled that the state enjoyed a high degree of deference in regulating social policy. In this case it had acted with proper discretion, particularly taking into account the special dissolution of the former Yugoslavia and the fact that members of that State's Army received special privileges. Croatia agreed to pay the pensions of the members of the former Yugoslav People's Army but adjusted them to its own general pension system.⁶² Finally, the Court ruled that the government had the freedom to grant privileges to selected classes of citizens, and the decision to grant higher pensions to the Croatian Army officers was

59. See *id.* (reaffirming the ruling in *Müller v. Austria* and holding that a right to a pension of a specific amount does not fall under property rights).

60. See *id.* (reiterating the standard for assessing whether a measure is discriminatory).

61. *Id.*

62. See *id.* (noting the government's argument that the reduction in pensions was a method of integrating those pensions into Croatia's general pension plan).

within the government's proper discretion.⁶³ The Court has ruled similarly in other cases involving members of security forces, particularly in the context of the integration of Germany and the transition to democracy in Poland.⁶⁴ Likewise, the Court has justified the reduction of pensions of retired civil servants from the former Democratic Republic of Germany.⁶⁵

More recently, in *Wessels-Bergervoet v. the Netherlands*, petitioner complained that the reduction of her pension was the result of discriminatory treatment.⁶⁶ The petitioner's husband received an old-age pension under Dutch legislation. The government reduced his pension because during the time period he was working in Germany and receiving insurance under the German social security system, he did not have insurance under the Dutch system. The petitioner also received an old-age pension, which the government reduced on the same basis as her husband's. In this case, the court held that the difference in treatment, based solely on the fact that the petitioner was a married woman, was not an objective and reasonable justification and therefore constituted a violation of Article 1 of Protocol No. 1 and Article 14 of the Convention.⁶⁷

63. *Id.*

64. See *Schwengel contre l'Allemagne* [Schwengel v. Germany], App. 52442/99, Eur. Ct. H.R. (2000) (rejecting a former East German national's argument that the reduction of his pension to a point equal to West German pensions was nationality discrimination), available at <http://www.echr.coe.int> (last visited Feb. 21, 2003); *Domalewski v. Poland*, App. 34610/97, Eur. Ct. H.R., (1999) (rejecting a Polish national's claim to a veteran benefit, and upholding a law that denied the previous employees of the public security service from receiving or retaining the status of veteran), available at <http://www.echr.coe.int> (last visited Feb. 21, 2003).

65. See *Kuna contre l'Allemagne* [Kuna v. Germany], App. 52449/99, Eur. Ct. H.R. (2001) (dismissing a German doctor's contentions that the reduction of his pension as a result of the conversion of his plan into an "ordinary old-age pension" constituted a violation of his rights), available at <http://www.echr.coe.int> (last visited Feb. 20, 2003).

66. See *Wessels-Bergervoet v. Netherlands*, App. 34462/97, Eur. Ct. H.R. (2002) (asserting that "very strong reasons would have to be put forward before [the court] could regard a difference in treatment based exclusively on the ground of sex and marital status as compatible with the Convention"), available at <http://www.echr.coe.int> (last visited Feb. 20, 2003).

67. *Id.*

The former European Commission has also ruled that the adjustment of two pensions in order to prevent the accumulation of social benefits does not violate the right to peaceful enjoyment of possessions, even if, for that purpose, one of the pensions is reduced. In *Süßmann v. Germany*, the applicant, a German civil servant, received supplementary old-age insurance in addition to the general old-age pension.⁶⁸ On several occasions, the government amended statutes regulating the applicant's pension scheme so that the amounts paid under the general scheme plus the amounts paid under the supplementary system would not exceed the last net salary of the employees in the civil service. Consequently, the state reduced the applicant's supplementary pension. The former European Commission found no violation of the right to the peaceful enjoyment of possessions because there was no deprivation of property in this context.⁶⁹

Finally, in the Inter-American System, only the Inter-American Commission on Human Rights ("Inter-American Commission") has addressed cases dealing with social security and pension rights. In two cases that the Inter-American Commission decided, petitioners argued violations of the rights to equality before the law, to a fair trial (fair hearing within a reasonable time), to an effective remedy, and to property, all of which are protected by the American Convention on Human Rights. As discussed later in this article, petitioners also argued violations of the rights protected by the American Declaration on the Rights and Duties of Man.⁷⁰

In *Saccone v. Argentina*, the petitioners contributed to a compensatory retirement plan that resulted from an agreement between the President of a state-owned company and union representatives.⁷¹ The resolution creating the fund provided that, in

68. See *Süßmann*, 25 Eur. H.R. Rep. 64 (declaring inadmissible the applicant's complaint on Article 1 of Protocol No. 1).

69. See *id.* (deciding that the only admissible point was the applicant's complaint about the length of his proceedings before the Federal Constitutional Court).

70. See discussion *infra* Part II.B (discussing the Inter-American Human Rights System and its focus on civil, political, economic, social, and cultural rights).

71. See Case 11.671, Inter-Am. C.H.R., OEA/ser./L./V/II.95, doc. 7 rev. 193 (1997) [hereinafter *Saccone v. Argentina*] (concluding the inadmissibility of a case dealing with the discontinuance of benefits from a retirement fund), available at

case the establishment of the fund failed, contributions made would return to the workers.⁷² Several years later, the company's board decided to liquidate the fund and discontinued the benefits that had been given to retirees since its inception.⁷³ The petitioners filed a suit requesting an accounting and the return of the funds to the contributors.⁷⁴ The claim was rejected on the basis that it was filed after the applicable statute of limitations had expired.⁷⁵ The petitioners brought a complaint to the Inter-American Commission on Human Rights, arguing violations of the rights to property and equal protection ensured by Articles 21 and 24 of the American Convention on Human Rights.⁷⁶ They also claimed violations of their right to the preservation of health and well-being and social security, as protected by Articles XI and XVI of the American Declaration on the Rights and Duties of Man.⁷⁷ The Inter-American Commission ruled that the amounts the employees contributed to the fund "were part of the patrimony of each of the respective contributors, in proportion to the amount contributed" and accordingly the complaint fell within the scope of the right to property protected by the American Convention.⁷⁸ Regarding the right to equality, the Inter-American Commission found that petitioners had failed to prove the existence of an unreasonable distinction that would justify a finding of discrimination.⁷⁹ Ultimately, the Inter-American Commission found the petition inadmissible, stating that it had no competence to

<http://www1.unmn.edu/humanrts/cases/1997/argenina8-98.html> (last visited Feb. 22, 2002).

72. See *Saccone*, Inter-Am. C.H.R., OEA/Ser./L./V/II.95, doc. 7 rev. 193, para. 3.

73. See *id.* para. 5.

74. See *id.* para. 6.

75. *Id.*

76. *Id.* para. 12.

77. *Id.* para. 50.

78. See *Saccone*, Inter-Am. C.H.R., OEA/Ser./L./V/II.95, doc. 7 rev. 193, paras. 25-26 (assessing the petitioner's claim of the violation of their right to property in relation to the discontinuance of their pension benefits).

79. See *id.* paras 42-43 (reiterating that "no discrimination exists if the difference in treatment has a legitimate purpose and if it does not lead to situations that are contrary to justice, to reason or to the nature of things").

determine whether the Argentine courts erred as to the interpretation and application of domestic civil law.⁸⁰

In *Menéndez v. Argentina*, the petitioners argued that the application of a domestic law reorganizing the social security system in Argentina violated their right to a fair trial, an effective remedy, property, and equal protection under the American Convention, which the Court found admissible.⁸¹ Moreover, the petitioners asserted a violation of Articles XI and XVI of the American Declaration on the Rights and Duties of Man, which protect the right to preservation of health and well-being and social security.⁸² The petitioners in this case were retirees who filed suit demanding an adjustment to the amount of their pensions.⁸³ In 1995, Law 24.463 reorganized the judicial proceedings regarding complaints against the agency that administered the social security system in Argentina.⁸⁴ In addition, the statute provided that the state comply with these judgments until the state had exhausted all budgetary resources allocated to that end in the corresponding fiscal year.⁸⁵ Once the resources were exhausted, compliance with all other awards would be suspended until new budgetary funds were allocated at the beginning of the subsequent fiscal year.⁸⁶ The complainants first claimed that the application of that law delayed judicial proceedings, and therefore their right to secure a decision within a reasonable time had been violated.⁸⁷ In addition, since appropriate compliance with awards was conditioned on the existence of resources, the petitioners

80. See *id.* paras. 54-55 (stating that the Commission's "task is to ensure the observance of the obligations undertaken by the States party to the Convention, but it cannot serve as an appellate court in order to examine alleged errors on internal law or fact").

81. See Case 11.670, Inter-Am. C.H.R., OEA/Ser./L/V/II.111, doc. 20 rev. 95 (2000) [hereinafter *Menéndez et al. v. Argentina*] (involving a case where petitioners aimed to receive an adjustment to their retirement or pension payments), available at <http://www1.umn.edu/humanrts/cases/3-01.html> (last visited Feb. 20, 2003).

82. See *Menéndez*, Inter-Am. C.H.R., OEA/Ser./L/V/II.111, para. 1.

83. *Id.* para. 3.

84. *Id.* para. 14.

85. *Id.* n.14.

86. *Id.*

87. See *Menéndez*, Inter-Am. C.H.R., OEA/Ser./L/V/II.111, para. 3.

argued a violation of the right to an effective remedy.⁸⁸ Third, they maintained that their right to property had been affected since pensions had dwindled to the point of becoming meaningless, due to their growing outdatedness and unwarranted delays in enforcing judgments recognizing this right.⁸⁹ Moreover, the retirement system violated the right to equal protection of the law since certain groups of retirees received “privileged pensions.”⁹⁰ Finally, petitioners argued that the application of the law also affected their rights to preservation of health and well-being and social security.⁹¹ The Inter-American Commission declared the complaints admissible, including those under the American Declaration, and is currently considering the merits of the complaint.⁹²

More recently, in *Cirio v. Uruguay*, the Inter-American Commission declared admissible a case in which the petitioner argued a violation of his right to equality before the law and social security, protected under Articles II and XVI of the American Declaration on the Rights and Duties of Man.⁹³ The petitioner also alleged a violation of the articles of the American Convention that protect the rights to humane treatment in the moral aspect, to a fair trial, to be free from *ex post facto* laws, to compensation in case of judicial error, privacy, freedom of thought and expression, and the right to equality before the law and judicial protection.⁹⁴ The petitioner in this case was a retired military officer who was demoted by a military tribunal in 1972 and given the status of *situación de reforma*.⁹⁵ He claimed that this negatively impacted various rights

88. *See id.* para. 20.

89. *See id.* para. 25.

90. *See id.* para. 31.

91. *See id.*

92. *See id.* para. 66.

93. *See* Case 11.500, Inter-Am. C.H.R., OEA/Ser./L./V/II.114, doc.5 (2001) [hereinafter *Cirio v. Uruguay*] (involving a case where the petitioner alleged to suffer sanctions in retaliation for expressing his concerns about human rights in the context of the counter-insurgency struggle by the Armed Forces in Uruguay), available at <http://www1.umn.edu/humanrts/cases/119-01.html> (last visited Feb. 20, 2003).

94. *See Cirio*, Inter-Am. C.H.R., OEA/Ser./L./V/II.114, para. 1.

95. *See id.* para. 3.

guaranteed to him as a retired officer, including his remunerative rights and his right to health care.⁹⁶ The petitioner also argued that the military court lacked jurisdiction over his case, since he was retired at the time of the ruling.⁹⁷ He claimed that he had been tried *in absentia* and denied the right to defense.⁹⁸ In 1997, the Ministry of Defense issued a resolution annulling his *situación de reforma*, and the petitioner regained his retiree status, partially restoring his rights.⁹⁹ However, he was denied the right to collect money retroactively or to be compensated for the moral damages that he endured during the twenty-five years he was under the *situación de reforma*.¹⁰⁰ The Inter-American Commission, as in *Menéndez*, declared the case admissible under both the American Convention and the American Declaration, and a decision on the merits is still pending.¹⁰¹

In conclusion, the existing case law shows that, in addition to the few provisions that directly address the elderly, petitioners and international adjudicatory bodies have creatively used other civil and political rights to afford protection to the rights of elderly persons. It is important to admit, however, that in practice this protection has been limited because civil and political rights have only applied in the field of social security benefits. Arguably, other provisions, such as the right to personal integrity, could be used to protect, for example, the right to health or the right to food; nevertheless, there is no existing precedent where courts have adjudicated these issues in a case involving the elderly. Other limitations to this approach arise from the fact that the right to a fair trial is restricted to ensure a prompt decision by a court, but has no influence in the determination of the substantive outcome of a case. Lastly, the case law just analyzed shows courts' reluctance to find a violation of the right to property when pension rights are affected. This position suggests that, unless those rights are substantially impaired, human rights

96. *See id.*

97. *See id.*

98. *See id.*

99. *See Cirio*, Inter-Am. C.H.R., OEA/Ser./L./V/II.114, para.4.

100. *See id.*

101. *See id.* para. 42.

adjudicatory bodies are not willing to interfere with the margin of discretion afforded to states in order to shape social security policy.

B. NON-DISCRIMINATION AND THE "DISADVANTAGED OR VULNERABLE GROUP" APPROACH

The non-discrimination clause in international human rights treaties affords protection to all persons against discrimination on the basis of certain characteristics established in those treaties. For example, the Universal Declaration on Human Rights refers to discrimination on the basis of "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."¹⁰² In general, however, non-discrimination clauses in human rights conventions do not expressly mention age as one of the grounds for which illegitimate distinctions are prohibited. As discussed below, there appears to be a concern regarding certain practices that exclude elderly persons exclusively on the basis of age, but there is no consensus regarding whether distinction on the basis of age is, in principle, discrimination.¹⁰³ In fact, certain provisions expressly allow for distinctions on the basis of age.¹⁰⁴ It is worth

102. *Universal Declaration on Human Rights*, art. 2., G.A. Res. 217A (III), U.N. GAOR, 3d Sess., at 71, UN Doc. A/810 (1948).

103. See *General Comment 6*, *supra* note 1, 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). Interestingly, the U.S. Supreme Court has dealt with the question of discrimination on the basis of age under the equal protection clause of the 14th Amendment. See *Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307 (1976) (involving a plaintiff who involuntarily retired from the Massachusetts state police force in accordance with a statute that set a mandatory retirement age of fifty); *Vance v. Bradley*, 440 U.S. 93 (1979) (involving a foreign service officer who was forced to retire at the age of sixty). In these cases, mandatory retirement of certain police officers and of foreign service officers, respectively, was unsuccessfully challenged. The Supreme Court refused to consider age-based distinctions as a "suspect class" and applied the rationality test to uphold the challenged legislation. See *Massachusetts Bd. of Ret.*, 427 U.S. at 312; *Vance*, 440 U.S. at 96; see also Lung-chu Chen et al., *Aging: A New Human Rights Concern*, 82 AM. SOC'Y INT'L L. PROC. 164 (1987) (discussing the United Nation's treatment of aging as a human rights concern).

104. See *American Convention on Human Rights*, *supra* note 26, art. 23 (ensuring the right to participate in government). Article 23 states:

1. Every citizen shall enjoy the following rights and opportunities:

noting, nevertheless, that in most recent developments in the context of the European Union, age is included as one of the grounds on which discrimination is not permitted. In effect, Article 13 of the Treaty establishing the European Community¹⁰⁵ and Article 21 of the Charter of Fundamental Rights of the European Union¹⁰⁶ expressly prohibit discrimination, *inter alia*, on the basis of age. Likewise, Article 10 of the recently adopted Andean Charter includes age as one of the grounds of discrimination.¹⁰⁷

Arguably, references to "other status" in the ICESCR, the ICCPR, the European Convention on Human Rights, the Revised European Social Charter, the African Charter, or to "any other social condition" in the American Convention and the Protocol of San Salvador, could include discrimination on the basis of age. In fact, the Human Rights Committee stated in its General Comment No. 18 that the grounds for discrimination are not limited to those expressly mentioned in the ICCPR. It stated:

-
- a. to take part in the conduct of public affairs, directly or through freely chosen representatives;
 - b. to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and
 - c. to have access, under general conditions of equality, to the public service of his country.
2. The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the *basis of age*, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings.

Id. (emphasis added).

105. See European Union: Consolidated Version of the Treaty on European Union and Consolidated Version of the Treaty Establishing the European Community, Oct. 2, 1997, 37 I.L.M. 56, 81 (stating that the European Parliament "may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation").

106. See Charter of Fundamental Rights of the European Union, *supra* note 12, art. 21 (stating that "[a]ny discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion, or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited").

107. See Andean Charter for the Promotion and Protection of Human Rights, *supra* note 13, art. 10 (reaffirming the decision to "combat all forms of racism, discrimination . . . on account of race, color, sex, language, religion, public opinion, nationality, sexual orientation, immigration status").

While article 2 limits the scope of the rights to be protected against discrimination to those provided for in the Covenant, article 26 does not specify such limitations. That is to say, article 26 provides that all persons are equal before the law and are entitled to equal protection of the law without discrimination, and that the law shall guarantee to all persons equal and effective protection against discrimination on any of the enumerated grounds. In the view of the Committee, article 26 does not merely duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on States parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a State party, it 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.¹⁰⁸

Similarly, the former European Commission on Human Rights appears to have accepted that distinctions on the basis of age fall within the scope of the non-discrimination clause enshrined in Article 14 of the European Convention. In *X v. United Kingdom*, the petitioner argued that the difference in the "age of consent" for homosexual and heterosexual relations constituted discrimination under that provision.¹⁰⁹ At the time the case was argued, domestic law in England provided that it was a criminal offense to have a consensual homosexual relation with a male aged less than twenty-one years, whereas it was criminally prohibited to have consensual sex with a female aged less than sixteen years. The Court, without rejecting the argument that age is an illegitimate ground for distinction, concluded that the state had provided an objective and reasonable justification to support the difference in treatment.¹¹⁰

In a similar case, *Sutherland v. United Kingdom*, the petitioner argued that the difference between the minimum age for lawful

108. See *Non-discrimination: General Comment 18*, U.N. GAOR, Hum. Rts. Comm., 37th Sess., at 26, para. 12, U.N. Doc. HRI/GEN/1/Rev.1 (1994) [hereinafter *General Comment 18*].

109. See *X v. United Kingdom*, App. No. 7215/75, 19 Eur. Comm'n H.R., Dec. & Rep. 66 (1978).

110. *Id.* para. 163.

sexual activities between men at eighteen and women at sixteen violated the right to respect for family life and the prohibition of discrimination of the European Convention.¹¹¹ Following a 1997 report from the European Commission concluding that there was a violation of Article 8 in conjunction with Article 14, the United Kingdom amended its domestic legislation, changing the “age of consent” for homosexual acts between consenting males to sixteen.¹¹² The case reached a friendly settlement and the European Court struck out the case.¹¹³

Notwithstanding the grounds on which discrimination is argued, any state measure that establishes a differential treatment of individuals must comply with a basic requirement – the distinction cannot be arbitrary. If there is a distinction based on one of the grounds expressly established in the international non-discrimination clause, then a *prima facie* case of ‘arbitrariness’ exists. A plaintiff claiming discrimination on a basis that is not expressly stated must prove the claim based on discrimination of “other status.”¹¹⁴

C. PREFERENTIAL TREATMENT TO DISADVANTAGED GROUPS

Traditionally, the prohibition of discrimination in human rights law is a negative obligation, involving the duty of the state to refrain from making distinctions on the basis of certain grounds without having an objective and reasonable justification. This principle, however, also encompasses a positive aspect according to which states appear to be under a duty to adopt special measures to ensure

111. See *Sutherland v. United Kingdom*, App. 25186/94, Eur. Ct. H.R. (2001) (providing an example of when the legislature adopted provisions on the equalization of the age of consent in response to the Commission’s findings), at <http://www.echr.coe.int> (last visited Apr. 5, 2003).

112. See *Sutherland*, App. 25186/94, Eur. Ct. H.R., paras. 4,6.

113. See *id.* paras. 20-21.

114. Such distinction should comply with the traditional test developed by international *fora*: that the measure should be reasonable and proportional. One approach is to consider that if the distinction is made based on one of the grounds stated, there is a presumption of illegality that can, however, be proved permissible if it is a reasonable and proportional distinction (such would be the case of certain “affirmative action” programs). Therefore, the measure must be “necessary in a democratic society,” it must pursue a “legitimate aim,” and it should be the “least restrictive measure possible.”

that certain vulnerable groups enjoy human rights on condition of equality. The Human Rights Committee, in interpreting the principle of non-discrimination and equality before the law, has stated that:

[I]n 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.¹¹⁵

Furthermore, the notion of “special measures of protection” is expressly recognized in Articles 1(4) and 2(2) of the International Convention on the Elimination of All Forms of Racial Discrimination¹¹⁶ and Article 4 of the Convention on the Elimination of All Forms of Discrimination against Women.¹¹⁷ In addition,

115. *General Comment 18*, *supra* note 108, para. 10.

116. See International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, art. 1(4) G.A. Res. 2106 (XX), U.N. GAOR, 20th Sess., Supp. No. 14, at 47, U.N. Doc. A/6014 (1965). The Convention states that:

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups of individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

Id. art. 1(4).

States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms.

Id. art. 2(2).

117. See Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Dec. 18, 1979, art. 4, G.A. Res. 34/180, 34 U.N. GAOR, Supp. No. 46, U.N. Doc. A/34/46 (1979), 1249 U.N.T.S. 13 (*entered into force* Sept. 3, 1981). The Convention states that:

[a]doption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate

Article 5 of the ILO Discrimination (Employment and Occupation) Convention provides that State Parties may adopt "special measures designed to meet the particular requirements of persons who, for reasons such as sex, age, disablement, family responsibilities or social or cultural status, are generally recognised to require special protection or assistance."¹¹⁸ Though this treaty's main concern is the prevention of discrimination in the field of employment and occupation, it constitutes a relevant precedent in light of the fact that it permits special measures of protection on the basis of age.

In the same vein, though the ICESCR does not expressly require the adoption of measures of protection to ensure equality in the enjoyment of economic, social and cultural rights, the Committee appears to recognize that there is an implicit obligation to implement such measures. It requires that states concentrate upon the situation of vulnerable and disadvantage groups in society.¹¹⁹ In this regard, the Committee has indicated that an initial step toward the realization of those rights is to identify the disadvantage or vulnerable sectors of the population that should be the focus of positive state action.¹²⁰ The Committee subsequently reaffirmed this position, in particular in General Comment 5 regarding "disability," where the Committee stated:

The obligation of States Parties to the Covenant to promote progressive realization of the relevant rights to the maximum of their available resources clearly requires Governments to do much more than merely abstain from taking measures which might have a negative impact on persons with disabilities. The obligation in the case of such a vulnerable and disadvantaged group is to take positive action to reduce structural disadvantages and to give appropriate preferential treatment to people

standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

Id. art. 4.

118. Convention Concerning Discrimination in Respect of Employment and Occupation, June 25, 1958, art. 5, 362 U.N.T.S. 31, *available at* http://193.194.138.190/html/menu3/b/d_ilo111.htm (last visited Apr. 5, 2003).

119. See MATTHEW CRAVEN, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS*, 186-88 (1995) (explaining the affirmative duty of states to protect economic, social, and cultural rights).

120. See *Comprehensive Examination of Thematic Issues Relating to Racial Discrimination: The Concept of Affirmative Action*, U.N. ESCOR, 52nd Sess., Provisional Agenda Item 3, U.N. Doc. E/CN.4/Sub.2/2000/11 (2000) (discussing the concept of affirmative action in international law).

with disabilities in order to achieve the objectives of full participation and equality within society for all persons with disabilities. This almost invariably means that additional resources will need to be made available for this purpose and that a wide range of specially tailored measures will be required.¹²¹

In addition to persons with disabilities, the Committee has identified other disadvantaged or vulnerable groups for which states should adopt special measures to discharge their obligations under the ICESCR.¹²² In that respect, the Committee has stated that the notion of "vulnerable populations" includes elderly persons.¹²³

121. *Persons with Disabilities: General Comment 5*, U.N. ESCOR, Econ., Soc., & Cultural Rts. Comm., 11th Sess., para. 9, U.N. Doc. E/C.12/1994/13 (1994).

122. *See Concluding Observations of the Comm. on Econ., Soc. and Cultural Rts.: United Kingdom of Great Britain and Northern Ireland*, U.N. ESCOR, Econ., Soc., & Cultural Rts. Comm., 53rd mtg., para. 22, U.N. Doc. E/C.12/1/Add.19 (1997), available at <http://www.unhchr.ch> (last visited Feb. 18, 2003). In considering the third periodic report of the United Kingdom of Great Britain and Northern Ireland on December 4, 1997, the Committee made the following observations:

The Committee is of the view that social assistance should be more carefully targeted to alleviate poverty among segments of the population in the United Kingdom of Great Britain and Northern Ireland who are suffering from long-term unemployment, those whose overall revenue is low (particularly in relationship to family size), and those who are unable to work. Particular attention should be directed at groups which are statistically disproportionately represented at or near the bottom of the income scale and who appear to have difficulty in moving up from the lowest income group. From the examination, it would appear that such groups would include at least the following: ethnic minorities, women, lone parents, children in vulnerable situations, the elderly, people with disabilities, and Catholics in Northern Ireland. The Committee urges the State party to make further efforts to extend benefits to the approximately 1 million persons who qualify and do not apply to receive them. It is of the view that a less restrictive policy on free legal aid for social and economic rights would facilitate access to these and other social and economic benefits.

Id.

123. *See Concluding Observations of the Comm. on Econ., Soc. & Cultural Rts.: Finland*, U.N. ESCOR, Econ., Soc., & Cultural Rts. Comm., 51st mtg., para. 21, U.N. Doc. E/C.12/1/Add.8 (1996), available at <http://www.unhchr.ch/> (last visited Feb. 18, 2003). In considering the third periodic report of Finland on the rights covered by Articles 1 through 15 of the ICESCR, the Committee adopted the following concluding observations:

The Committee encourages the Government to take adequate measures to ensure that the reduction of the budgetary allocations for social welfare

Additionally, the Committee stated in General Comment 6 that there are many older persons “who do not have adequate means of support . . . and who feature prominently among the most vulnerable, marginal and unprotected groups.”¹²⁴ Consequently, the Covenant requires state parties to take special measures to the full extent of their available resources to protect this group.¹²⁵

These special measures include preparing statistical data on the economic and social situation of the elderly.¹²⁶ This is particularly important considering that data collection in some countries does not focus on older people, especially women, as a discrete category.¹²⁷ These special measures also involve development of special programs specifically targeting the elderly population.¹²⁸ Similarly, the convention requires states to keep the specific vulnerable group in perspective when taking measures that could affect them.¹²⁹ An efficient way to keep such a group in mind is to formally and independently establish and identify the elderly population as a

programmes does not result in the violation of the State party's obligations under the Covenant. The Committee particularly lays emphasis on the need to protect the rights of socially vulnerable groups, such as young families with children, refugees and elderly or unemployed persons.

Id.

124. General Comment 6, *supra* note 1, para.17.

125. See *id.* para. 10 (clarifying that not only do the rights recognized in the ICESCR apply equally to older persons, but that States are required to take affirmative steps to ensure that older persons are able to enjoy these rights).

126. *Id.*; see, e.g., Marta Peláez & Alexandre Kalache, *Aging in Developing Countries: A Public Health and a Human Rights Issue*, in AGING: CULTURE, HEALTH, AND SOCIAL CHANGE 145, 148-49 (David N. Weissstub et al. eds., 2001) (presenting statistical data regarding the ageing population in developing countries).

127. See Beales, *supra* note 1, at 6 (explaining that basic population research on older persons and women is absent in some countries).

128. See *Concluding Observations of the Comm. on Econ., Soc. & Cultural Rts.: Canada*, U.N. ESCOR, Econ., Soc., & Cultural Rts. Comm., 8th Sess., 18th mtg., para. 8, U.N. Doc. E/C.12/1993/5 (1993) (noting that “the poverty rate among elderly couples has declined significantly over the last decade” due to Canadian old age security programs), available at <http://www.unhchr.ch> (last visited Feb. 18, 2003).

129. See *General Comment 6*, *supra* note 1, para. 10 (mandating that states take action to ensure that older citizens are able to enjoy the rights recognized in the ICESCR).

group that requires special attention. Some domestic legal systems, such as Canada, already have such legislation in place. This has clearly contributed toward alleviating the social and economic condition of the elderly in that country.¹³⁰

The duty to provide special protection to the elderly is further reinforced by Article 17 of the Protocol of San Salvador, which states that “[e]veryone has the right to special protection in old age,”¹³¹ and 18(4) of the African Charter which provides that the aged shall “have the right to special measures of protection in keeping with their physical or moral needs.”¹³² Likewise, Articles 46 and 47 of the Andean Charter identify “older adults” as a group deserving special protection.¹³³

In the context of civil and political rights, there is a tendency in existing case law to require states to afford more protections to older persons, given their status as a vulnerable group. The European Court of Human Rights has indicated that the age of an applicant should be considered a factor when analyzing the reasonableness of

130. See *Concluding Observations of the Comm. on Econ., Soc. & Cultural Rts.: Canada*, *supra* note 128, para. 8 (stating that the Canadian Old Age Security Programme and the Guaranteed Income Supplement have contributed to lower poverty rates among older Canadians).

131. Protocol of San Salvador, *supra* note 9, art. 17.

132. African Charter, *supra* note 11, art. 18(4)

133. See Andean Charter for the Promotion and Protection of Human Rights, *supra* note 13, arts. 46-47. The Charter states:

Article 46. [The Member States of the Andean Community] reiterate their commitment to fulfill and enforce fulfillment of the rights and obligations designed to promote and protect the human rights of older adults.

Article 47. They shall address the following main themes with a view to improving the promotion and protection of the human rights of older adults in their respective jurisdictions and in the Andean sphere:

1. Protection of older adults against all forms of discrimination and violence, including domestic violence.
2. Facilitation of opportune attention to older adults in public and private entities and services.
3. Participation of older adults and their organizations in decision-making on public issues concerning them.
4. Effective protection of the right of older adults to social security, particularly in connection with the rights and guarantees related to retirement.
5. Promotion of the participation and integration of older adults in society.

Id.

the length of proceedings under Article 6 of the European Convention on Human Rights.¹³⁴ The Court also assessed the special status of older persons in *Spadea & Scalabrino v. Italy*.¹³⁵ The case implicated the property rights of the applicants as they attempted to evict two elderly women who were renting out two apartments during Italy's severe housing shortage of the mid-1980s. The applicants claimed the Italian government had violated their right to property when Italy continued to suspend evictions in Milan, allowing the elderly women to remain in the property for years after the end of their lease.¹³⁶ Although the elderly women continued to pay their rent, the applicants were forced to buy other property in which to live because they were unable to remove the elderly women from the apartments.¹³⁷ The elderly women claimed that they were awaiting housing assignment from Milan's Housing Council.¹³⁸ The Court ruled that the state legislation protected tenants during a serious housing shortage of subsidized housing, and that therefore the legislation did not violate the Convention.¹³⁹ The European Commission report, annexed to the Court's decision, stated that because the tenants were elderly and had low income, "that the tenants were in fact entitled to special social protection."¹⁴⁰ The European Commission also ruled that the protection afforded to the tenants was not disproportionate to the aim of social justice.¹⁴¹

Similarly, the tenant in *A.O. v. Italy* was a sick and elderly woman who refused to leave the apartment of the applicant at the end of the lease term.¹⁴² Because of Italy's housing shortage, evictions were

134. See *Süßmann*, 25 Eur. Ct. H.R. Rep. at 73-84 (noting the factors to be taken under consideration in determining the length of proceedings under Article 6 of the European Convention).

135. *Spadea & Scalabrino v. Italy*, 21 Eur. H.R. Rep. 482 (1995), available at <http://www.echr.coe.int> (last visited Mar. 6, 2003).

136. *Id.* at 487-88.

137. *Id.* at 486-87.

138. *Id.* at 492.

139. *Id.*

140. *Spadea*, 21 Eur. H.R. Rep. at 491.

141. *Id.* at 490-93.

142. *A.O. v. Italy*, App. No. 22534/93, 29 Eur. H.R. Rep. CD 92, paras. 8-9 (2000), available at <http://www.echr.coe.int> (last visited Apr. 5, 2003).

staggered and police gave assistance only in emergency situations, unlike the applicant's.¹⁴³ The elderly woman eventually left the apartment six years after the end of her lease.¹⁴⁴ The Court stated that because the tenant was elderly and sick, she deserved special protection.¹⁴⁵ However, the Court eventually ruled that the legislation governing evictions violated the Convention because of the excessive length of time that the applicant was not able to exercise his property rights.¹⁴⁶

There is no doubt that the elderly are protected by human rights treaties, as is any member of society. However, in order to realistically guarantee equal enjoyment of those rights to older persons, states must do more than refrain from violating human rights. The principles of non-discrimination and equality before the law require that states adopt special measures to protect disadvantaged and vulnerable groups. These principles also provide legal bases for arguing that those states must take additional steps to ensure the rights of the elderly. The "vulnerable group" approach is central to enhancing the protection of those rights because it is applicable in the context of both civil and political, as well as economic, social, and cultural rights.¹⁴⁷ Moreover, the special treatment that a society affords to the elderly appears to also serve as an indicator of the level of social development of that society. The ICESCR has used such criteria when monitoring the implementation of the Covenant by State Parties.¹⁴⁸ This is an important incentive for states to focus on the social and economic conditions of the elderly, as they could be judged under human rights treaties based on the level of development of the particular group.

143. *Id.* paras. 25-26.

144. *Id.* para. 14.

145. *Id.* para. 29.

146. *Id.* para. 30.

147. See *supra* notes 102-142 and accompanying text (explaining the "vulnerable group" approach).

148. See *Concluding Observations of the Commn. on Econ., Soc. and Cultural Rights: Austria*, U.N. ESCOR, Econ., Soc., & Cultural Rts. Comm., 11th Sess., 52nd mtg., para. 7, U.N. Doc. E/C.12/1994/16 (1994) (noting "its satisfaction at the range and quality of the services provided to the population as a whole, and notably social benefits for elderly persons and the disabled."), available at <http://www.unhchr.ch> (last visited Feb. 21, 2002).

Finally, clearly identifying aged persons as a disadvantaged group requiring heightened protection creates room for arguing that the elderly, like other similar groups that have already been the object of international human rights treaties, deserve to have a specific instrument that addresses their needs.¹⁴⁹ In this regard, discrimination against children is a particularly important point of reference when analyzing the rights of the elderly as a vulnerable group, because it is the only group defined on the basis of age.¹⁵⁰

149. See, e.g., Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, June 9, 1994, art. 9, 33 I.L.M. 1534 (entered into force Mar. 5, 1995) (making specific reference to the vulnerability of elderly women); *Association Pour la Sauvegarde de la Paix au Burundi v. Tanzania, Kenya, Uganda, Rwanda, Zaire and Zambia* [Association for the Safeguard of Peace in Burundi v. Tanzania, Kenya, Uganda, Rwanda, Zaire, and Zambia], African Comm'n on Hum. & Peoples' Rts., Communication No. 157/96 (communicating to the African the particularly harmful effects that a trade embargo has on Burundi's elderly population), available at <http://www1.umn.edu/humanrts/africa/comcases/157-96.html> (last visited Feb. 22, 2003); Peláez & Kalache, *supra* note 126, 149-53 (discussing the special vulnerability of older persons to age discrimination and poor health care services).

150. See *Concluding Observations of the Comm. on the Rts. of the Child: Georgia*, U.N. ESCOR, Rts. of the Child Comm., 24th Sess., 641st mtg., paras. 24-25, U.N. Doc. CRC/C/15/Add. 124 (2000) (noting children's vulnerability to discrimination), available at <http://www.unhchr.ch> (last visited Feb. 22, 2002). The Committee stated:

24. The Committee notes with concern that the principle of non-discrimination is not adequately implemented with respect to certain vulnerable groups of children, including children living in conflict areas, children living in institutions, children living in the mountainous regions, children with disabilities, children of single parent families, children of poor families, children in conflict with the law, children living and/or working on the streets, refugee children and internally displaced children. The Committee is particularly concerned about their limited access to adequate health, education and other social services.

25. The Committee recommends that the State party increase its efforts to ensure implementation of existing laws guaranteeing the principle of non-discrimination and their full compliance with article 2 of the Convention, particularly as it relates to the vulnerable groups.

Id.

II. THE UNITED NATIONS AND ELDERLY CONCERNS

The 1948 Universal Declaration of Human Rights, the founding human rights instrument of contemporary international human rights law, included in its provisions the first reference to elderly people's rights. This reference can be found in Article 25(1), which states that:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.¹⁵¹

Coordinated efforts to incorporate elderly concerns into the United Nation's agenda appeared in the early 1980s with the adoption of the International Plan of Action on Aging adopted by consensus of the 124 nations represented in the 1982 World Assembly on Aging in Vienna ("Vienna Plan").¹⁵² The Vienna Plan included recommendations to assist and protect the elderly.¹⁵³ The main concerns of the Plan were issues related to health and nutrition, protection of elderly consumers, housing, social welfare, family, income security, unemployment, and education.¹⁵⁴ Some scholars have criticized the Vienna Plan for not including a mandate to revisit the national legal structures from an age-based perspective.¹⁵⁵

151. *Universal Declaration of Human Rights*, *supra* note 102, art. 25(1). Earlier in 1948, the American Declaration of Rights and Duties of Man included a sole reference to elderly persons' rights in Article XVI: "Every person has the right to social security which will protect him from the consequences of unemployment, old age, and any disabilities arising from causes beyond is control that make it physically or mentally impossible for him to earn a living." *American Declaration of the Rights and Duties of Man*, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992), available at <http://www.cidh.oas.org/basic.htm> (last visited Mar. 6, 2003).

152. REPORT OF THE WORLD ASSEMBLY ON AGEING, VIENNA, 26 JULY-6 AUGUST 1982, U.N. Sales No. E.82.1.16 (1982), available at <http://www.un.org/esa/socdev/ageing/ageipaa3.htm> (last visited Feb. 24, 2003).

153. *Id.*

154. *Id.*

155. See Lung-chu Chen, *Aging: A New Human Rights Concern*, 38 AM. SOC'Y INT'L L. PROC. 164, 168 (noting that the Vienna Plan could have been improved by

In 1991, the United Nations issued its Implementation of the International Plan of Action on Ageing and Related Activities, which contains the United Nations Principles for Older Persons.¹⁵⁶ The Principles are divided into five sections, which closely correspond to the rights in the ICESCR. "Independence" refers not only to the basic provisions of food, water, shelter, clothing, and health care, but also to the right to work and to have access to education and training.¹⁵⁷ "Participation" refers to the rights of older persons to form associations and movements so that they can actively participate in the "formulation and implementation of policies that affect their well-being."¹⁵⁸ "Care" refers to the right to enjoy human rights protection regardless of whether the elderly person is living in their own home, in a treatment facility, or in a shelter.¹⁵⁹ "Self-fulfilment" [sic] refers to the right to the full development of elderly persons' potential through access to cultural and educational facilities and resources.¹⁶⁰ Finally, "[d]ignity" refers to the right to live in security and free of exploitation, abuse, and discrimination.¹⁶¹

Two other relevant United Nations documents address elderly issues: the 1992 General Assembly Resolution on 2001 global targets on the ageing¹⁶² and the Proclamation on Ageing.¹⁶³ The Proclamation urged states to give support to older women for their

calling on states to do a systemic review of their laws pertaining to the rights of the elderly).

156. G.A. Res. 46/91, U.N. GAOR, 46th Sess., 74th plen. mtg., Annex 1 paras. 1-18, U.N. Doc. A/RES/46/91 (1991).

157. *Id.* paras. 1-5.

158. *Id.* paras. 7-9; see *General Comment 6*, *supra* note 1, para. 5 (explaining that, as contained in the General Assembly Resolution, the "[p]articipation" principle encourages older persons to actively participate in their communities).

159. G.A. Res. 46/91, *supra* note 156, paras. 10-14; see *General Comment 6*, *supra* note 1, para. 5 (summarizing the "[c]are" principle from the Resolution).

160. G.A. Res. 46/91, *supra* note 156, paras. 15-16; see *General Comment 6*, *supra* note 1, para. 5 (restating the principle from the Resolution).

161. G.A. Res. 46/91, *supra* note 156, paras. 17-18; see *General Comment 6*, *supra* note 1, para. 5 (summarizing the "[d]ignity" principle from the Resolution).

162. G.A. Res. 47/86, U.N. GAOR, 47th Sess., 89th plen. mtg., U.N. Doc. A/RES/47/86 (1992).

163. G.A. Res. 47/5, U.N. GAOR, 47th Sess., 42nd plen. mtg., Annex 1, U.N. Doc. A/RES/47/5 (1992).

“largely unrecognized contributions to society,” to encourage older men to continue development after their income-earning years, to support families who are providing care to older persons, and to expand international cooperation strategies in order to reach global targets.¹⁶⁴ It also proclaimed 1999 as the International Year of Older Persons.¹⁶⁵

In April 2002, the United Nations revisited the rights of the elderly at the Second World Conference on Ageing in Madrid, and reviewed the recommendations adopted in the Vienna Plan. The Conference resulted in the International Plan of Action (“the Madrid Plan”), adopted by 159 countries and calling for the promotion and protection of all human rights and fundamental freedoms, including the right to development, the need to include ageing in global agendas, and the need to combat discrimination based on age.¹⁶⁶ The recommendations are organized according to three priorities: Older Persons and Development, Advancing Health and Well-Being into Old Age, and Ensuring Enabling and Supportive Environments.¹⁶⁷ The first priority includes recommendations regarding the development and implementation of policies to ensure economic and social protection for older people, to ensure gender equality in social security systems, and to establish social security systems for older persons who lack other sources of income.¹⁶⁸ The Madrid Plan also highlights the vulnerability of older persons during emergency situations, emphasizing their need to access food, shelter, and medical care, and recommends protecting and assisting older persons through concrete measures taken in situations of armed conflict and foreign occupation.¹⁶⁹ The second priority focuses on health promotion, the need to ensure universal and equal access to health-

164. *Id.* paras. 2(h)-(i), (k), (o).

165. *Id.* para. 3; *see also General Comment 6, supra* note 1, para. 7.

166. *See* REPORT OF THE SECOND WORLD ASSEMBLY ON AGEING, 1-43, U.N. Doc. A/CONF.197/9, U.N. Sales No. E.02.IV.4 (2002) (outlining the Madrid Plan).

167. *Id.*

168. *See id.* at 9-22 (adopting resolutions and plans of action relating to improving the quality of older people’s lives).

169. *See id.* at 20-21 (protecting the elderly during emergencies such as natural disasters and times of war).

care services, and the mental health needs of older people.¹⁷⁰ Finally, the third priority includes recommendations with regard to the availability of services, and the affordability, accessibility, and cultural adequacy of the right to housing.¹⁷¹ The Madrid Plan also calls for the elimination of neglect, abuse, and violence toward older people.¹⁷²

The Madrid Plan includes recommendations aimed at implementation and follow-up. At the national level, the plan places the primary responsibility with national governments.¹⁷³ At the international level, the United Nations Department of Economic and Social Affairs is responsible for facilitating and promoting the plan, the regional commissions are responsible for translating the plan into regional action plans, and responsibility for follow up and review rest on the Commission for Social Development.¹⁷⁴ However, the Madrid Plan fails to call for the development of a specific instrument that would afford protection to the elderly, one of the fastest growing and most vulnerable groups in society.

Certain United Nations special agencies have also played a role in setting development standards that affect the rights of the elderly. The International Labour Organization ("ILO"), for example, has developed in Recommendation 162 standards for preventing the discrimination of older workers in employment, social security, and retirement.¹⁷⁵ The ILO's Recommendation 122 refers to employment

170. See *id.* at 22-32 (approving measures to improve the health and well-being of the elderly).

171. See REPORT OF THE SECOND WORLD ASSEMBLY ON AGEING, *supra* note 166, at 32-39 (adopting steps to aid the daily lives of the elderly by working to ensure, among other things, affordable housing and a positive image of the elderly in the media).

172. See *id.* at 37 (calling on countries to use legislation to end all neglect and violence as it pertains to the elderly).

173. See *id.* 39-40 (stating that national governments have the primary responsibility for implementing the Madrid Plan).

174. See *id.* 39-42 (tasking the United Nations and various other international actors with various aspects of implementation).

175. International Labour Organization Rec. 162, *Recommendation Concerning Older Workers*, Gen. Conf. of the ILO, 66th Sess. (1980), available at <http://ilolex.ilo.ch:1567/english/recdisp1.htm> (last visited Feb. 25, 2003), cited in *Summary Record of the 12th Meeting*, U.N. ESCOR, Econ., Soc., & Cultural Rts.

policy regarding certain vulnerable groups, including the elderly.¹⁷⁶ Similarly, ILO Convention No. 142 indicates that career guidance and vocational training should be provided without discrimination on the basis of age.¹⁷⁷ ILO Convention No. 156 deals with the issue of discrimination of workers who take care of elderly persons and of elderly workers who started work late in their lives because they were caring for their families.¹⁷⁸ It must be noted, however, that the ILO does not have any specific program on the elderly, and there is no ILO convention with a specific provision on the question of age.¹⁷⁹ Another example of a specialized agency relevant to the rights of the elderly (although with less legal relevance) is the World Health Organization ("WHO"). This agency has dealt with the issue of elderly health regarding medical care and social welfare from a technical perspective of gerontology and geriatrics, as well as demography and clinical studies. Regarding these specialized

Comm., 8th Sess., Agenda Item 6, para. 14, U.N. Doc.E/C.12/1993/SR.12 (1993). During the course of a conference before the United Nations Committee on Economic, Social and Cultural Rights, a speaker made reference to ILO Recommendation 162. The author is relying on that speaker's representation of what is in the ILO Recommendation as support for the proposition in the text.

176. International Labour Organization Rec. 122, *Recommendation Concerning Employment Policy*, Gen. Conf. of the ILO, 48th Sess. (1984), available at <http://ilolex.ilo.ch:1567/english/recdisp1.htm> (last visited Feb. 25, 2003), cited in *Summary Record of the 12th Meeting*, *supra* note 175, para. 15 (noting that the ILO's recommendation on employment policy singled out groups of vulnerable people).

177. See International Labour Organization Convention Concerning Vocation Guidance and Vocational Training in the Development of Human Resources, July 19, 1977, art. 4 (stating that vocational training should be available throughout the lifetime of citizens), available at <http://ilolex.ilo.ch:1567/english/convdisp1.htm> (last visited Feb. 25, 2003), cited in *Summary Record of the 12th Meeting*, *supra* note 175, para. 16.

178. See International Labour Organization Convention Concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers With Family Responsibilities, Aug. 11, 1983, art. 7 (requiring that appropriate measures should be taken to allow all workers to re-enter the labor force who have had to leave for family responsibilities), available at <http://ilolex.ilo.ch:1567/english/convdisp1.htm> (last visited Feb. 25, 2003), cited in *Summary Record of the 12th Meeting*, *supra* note 175, para. 18.

179. See *Summary Record of the 12th Meeting*, *supra* note 175, paras. 24, 26 (pointing out that, while the ILO did not have a convention that specifically targeted the rights of the elderly, it did have several publications designed to benefit the elderly).

agencies, it is important to mention that the Committee on Economic, Social and Cultural Rights received comments from the ILO and the WHO and incorporated them in its General Comment 6, which is explored in detail below. Therefore, any human rights standards developed by these agencies have been adequately incorporated by the ICESCR.

III. THE RIGHTS OF OLDER PERSONS IN RELATION TO THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

One of the most relevant international instruments regarding the current international status of elderly rights is the International Covenant on Economic, Social and Cultural Rights ("ICESCR").¹⁸⁰ The supervisory body of the ICESCR is the Committee on Economic, Social and Cultural Rights ("CESCR"). In the Committee's General Comment 6 on the economic, social, and cultural rights of older persons, the Committee developed the most comprehensive legal analysis of the rights of the elderly currently existing at the international level.¹⁸¹ Adopted in 1995 by the Committee, General Comment 6 interprets the ICESCR in the context of older persons.¹⁸² General Comment 6 expands the scope of the ICESCR and provides insight into different mechanisms needed to protect the rights of elderly people worldwide. It has structural divisions that can serve as a blueprint for further analysis and elaboration of a comprehensive set of rights of the elderly. Additionally, the Committee issued several other General Comments that, altogether, provide an authoritative guide to understanding the scope of the ICESCR's provisions, many of which are directly relevant for our analysis.

General Comment 6 begins by defining older people as those persons aged sixty and above.¹⁸³ Since the ICESCR does not

180. ICESCR, *supra* note 6.

181. See *General Comment 6*, *supra* note 1, paras. 1-32 (ensuring the economic and cultural rights of older persons).

182. ICESCR, *supra* note 6, paras. 9-15 (explaining the evolution of the rights of older people through various United Nations documents).

183. *General Comment 6*, *supra* note 1, para. 9.

explicitly refer to older persons, the Committee drew its authority first from interpreting Article 9 of the ICESCR, “the right of everyone to social security, including social insurance,” to implicitly refer to the right to old-age benefits.¹⁸⁴ Secondly, the Committee stated that since the ICESCR applies to all members of society, “it is clear that older persons are entitled to enjoy the full range of rights recognized in the Covenant.”¹⁸⁵ The Committee then referred to the Vienna International Plan on Ageing for support.¹⁸⁶ Finally, the Committee stated that special measures need to be taken to protect the rights of older persons: “[s]tates parties are required by the Covenant to do so to the maximum of their available resources.”¹⁸⁷

General Comment 6 also discusses whether the ICESCR implicitly prohibits discrimination based on age. The Committee noted that neither the ICESCR nor the Universal Declaration on Human Rights explicitly prohibits discrimination based on age.¹⁸⁸ The Committee interpreted this omission as a lack of foresight and not as an intentional reflection of the legal status of elderly persons.¹⁸⁹ The Committee stated that the prohibition of discrimination based on “other status”¹⁹⁰ could include age.¹⁹¹ However, the Committee stopped short of actually doing so. The Committee did not state why

184. *Id.* para. 10 (quoting ICESCR, *supra* note 6, art. 9)

185. *Id.* para. 10.

186. *See id.* para. 7 (describing other U.N.-sponsored activities related to ageing, including the Proclamation on Ageing and Vienna Plan).

187. *See id.* para. 10 (noting that while neither of these instruments contain specific reference to discrimination, it is implicit that both of them apply regardless of age).

188. *See General Comment 6*, *supra* note 1, paras. 9-11 (stating that both the ICESCR and the Universal Declaration of Human Rights explicitly prohibit discrimination based on age).

189. *See id.* (explaining that the problem of demographic aging did not seem to be as pressing as it is today).

190. *See ICESCR*, *supra* note 6, art. 2(2) (requiring the states parties to the Covenant to stop discriminating on the basis of “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”).

191. *See General Comment 6*, *supra* note 1, para. 11 (inquiring into whether the Covenant explicitly prohibits discrimination based on age)

it cannot or will not interpret "other status" to include age.¹⁹² The Committee appears to have given substantial weight to the numerous documents produced in the last decade to support the trend in eliminating age discrimination. However, it fell disappointingly short of interpreting these documents, resolutions, trends, and international plans of action to reach the conclusion that the ICESCR prohibits discrimination based on age.

Regardless, the Committee summarized the responsibilities of member states toward the protection of older persons: "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."¹⁹³ The Committee thus accepted the responsibility for monitoring the implementation of international protection for the elderly because no separate United Nations mechanism exists to specifically focus on the elderly.¹⁹⁴ The Committee also indicated that it has received little information on the status of elderly rights from member states.¹⁹⁵ Regardless, the Committee emphatically stated that from then on "it will insist that the situation of older persons in relation to each of the rights recognized in the Covenant should be adequately addressed in all reports."¹⁹⁶

192. *See id.* para. 12 (reducing the impact of this omission by stating that "the range of matters in relation to which such discrimination can be accepted is very limited").

193. *See id.* para. 13 (emphasizing that states parties to the Convention must protect the rights of the elderly).

194. *See id.* (admitting that no international convention exists to protect the rights of elderly people, which increases the importance of the Committee).

195. *See id.* paras. 14-15 (noting that the reports of member states still do not focus enough on the rights of elderly people).

196. *See General Comment 6, supra* note 1, para. 15. The Guidelines for the content of State Party Reports specifically request information about the elderly for Articles 6, 9 and 11. For Articles 12, 13 and 15, there is no mention of the elderly, but there is a request for information about vulnerable and disadvantaged groups. *See Revised Guidelines Regarding the Form and Contents of Reports to be Submitted by States Parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights*, U.N. ESCOR, Econ., Soc., & Cultural Rts. Comm., UN Doc. E/1992/23 (1991) (highlighting the importance of the

A. ARTICLE 3: EQUAL RIGHTS OF MEN AND WOMEN

The Committee expressed its concern about women who, having stayed at home to raise a family, have made no contributions to a social security plan, and therefore do not have any source of income in their elder years.¹⁹⁷ Unfortunately, many of these same women are also ineligible for widows pensions.¹⁹⁸ To respect the right to social security, the Committee suggested that states should refrain from discriminating against women who choose to stay at home to raise a family. For example, states should acknowledge time spent at home as a homemaker as work experience when evaluating women for employment opportunities. To ensure this right, particularly in connection with Article 9 (the right to social security) of the Covenant, the Committee considered that states should provide non-contributory old-age benefits or some other form of assistance for all persons. This benefit would be given, regardless of sex, to those without adequate resources upon reaching a prescribed age specified in national legislation.¹⁹⁹ To fulfill this right, the Committee indicated that states should promote the need for more men to stay at home to raise families. The Committee suggested that staying at home and raising children helps people attain certain qualities. Men who have not been breadwinners their entire lives lack those qualities; therefore, many programs for the elderly should address this concern in their community programs. One way of addressing this issue in the long run is to promote the idea of men staying at home. This would allow men to gain insights into the raising of a family, while giving more women an opportunity to enter the workforce.

reports prepared by parties to the Convention and that those reports should be both sufficient in detail and consistent).

197. See *General Comment 6*, *supra* note 1, para. 20 (stating that men and women should enjoy equal economic, social, and cultural rights).

198. See *id.* (emphasizing the critical situation of women who stay at home).

199. See *id.* para. 21 (stating that women should be the principal beneficiaries because they have a greater life expectancy and often do not have contributory pensions).

B. ARTICLES 6 THROUGH 8: RIGHTS RELATING TO WORK

The rights to work include the right to earn a livelihood in decent work conditions and the right to individual and personal freedom and dignity.²⁰⁰ Considered one of the more developed of the economic, social, and cultural rights,²⁰¹ these rights relate not only to protection from labor-related violations such as slavery, forced and compulsory labor, and discrimination, but also incorporate such positive aspects as the freedom to work, the choice of occupation, and the choice of place of work.²⁰² Worker rights also encompass the right to free employment services, such as access to information, and guidance and assistance for job-seekers.²⁰³

The Committee expressed a concern about several issues when interpreting these rights. First, the Committee was concerned about elderly persons under the retirement age who had trouble finding or keeping a job. Second, the Committee was concerned with the working conditions of elderly people. Finally, the Committee was concerned about the lack of preparation elderly people receive prior to actually retiring.²⁰⁴

To respect these rights, the Committee again suggested that states refrain from discriminating against elderly people based on their age, both during the hiring process, and during the evaluation process. The Committee suggested that there should not be age requirements

200. See Krzysztof Drzewicki, *The Right to Work and Rights in Work*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK 169 (Asbjørn Eide et al., eds., 1995) (stating that “[t]he right to work and rights in work constitute a core of not only socio-economic rights, but also fundamental human rights”).

201. See *id.* at 171 (explaining that the “relatively developed stage of juridization of labour rights has, to a larger extent, been a contribution of the *objective law* (international labor legislation) than of the *subjective law* (international law of human rights)”).

202. See *id.* at 178 (mentioning that human rights and labor law include freedoms such as the choice of occupation and freedom of choice for a place of their performance).

203. See *id.* at 180 (stating that before this right emerged in the international human rights field, the International Labour Organization Conventions primarily regulated the issue).

204. See *General Comment 6*, *supra* note 1, paras. 22-24 (stating that older people often have difficulties finding and keeping jobs after they reach a retirement age).

for all jobs, nor mandatory retirement provisions. Also, to respect these rights, the Committee stated that rights categorized in Article 8, namely trade union rights, should apply to elderly workers.²⁰⁵ This is a duty that states should undertake immediately.

Moreover, to ensure the rights of the elderly to work, the Committee advised that people who are no longer able to function in their current job because of their age should be transferred laterally to another job. The Committee noted that because elderly people have much to offer their fellow co-workers by way of expertise and knowledge, they should not be demoted but rewarded for their years of experience.²⁰⁶ In addition, the Committee indicated that employers should make more of their jobs wheelchair-accessible to address the health and safety of older employees, while still allowing them the opportunity to continue working.

The Committee further suggested that employers create retirement preparation programs to prepare elderly employees for the often-traumatic change to retirement. These programs should address the rights and obligations of pensioners, the opportunities for 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.²⁰⁷ These obligations do not appear to require immediate action.

C. ARTICLE 9: THE RIGHT TO SOCIAL SECURITY

The right to social security is the only right in the ICESCR that generates any explicit protection for elderly persons. Indeed, the Committee drew its authority to interpret the ICESCR in regards to elderly persons from the existence of this right in the ICESCR.²⁰⁸ Recent interpretations of the scope of this right reaffirm its implicit

205. See *id.* para. 25 (implying that this appears to be a duty that states should undertake immediately).

206. See Protocol of San Salvador, *supra* note 9, art. 17(b) (suggesting that state parties design work programs to assist old people in engaging in activities suited to their abilities and interests).

207. See *General Comment 6*, *supra* note 1, para. 24 (highlighting that participation in such programs should take place before retirement occurs).

208. See *id.* para. 10 (stating that elderly people “are entitled to enjoy the full range of rights recognized in the Covenant”).

application toward the elderly. As Asbjørn Eide states, “[t]he right to social security is essential, particularly when a person does not have the necessary property available, or is not able to secure an adequate standard of living through work, due either to unemployment, *old age* or disability.”²⁰⁹

Several international documents reinforce the right to social security. The Convention on the Elimination of Racial Discrimination, Article 5, the Convention on the Elimination of all Forms of Discrimination against Women, Articles 11 and 13, and the Covenant on the Rights of the Child, Article 27, all mention social security entitlements to the protected group discussed in their respective treaties. Within the European Human Rights system, the right to social assistance for those in need has developed into a genuine human right.²¹⁰ Similarly, the Inter-American Human Rights System, namely article 16 of the Additional Protocol to the American Declaration of the Rights and Duties of Man, lists old age as a specific situation that actualizes the right to social security.²¹¹

The issue of social security is also connected to the right to an adequate standard of living, due to the possible interpretation of social security allowances as property entitlements. The ICESCR does not include the right to property, but discussion of the extents of the right are important because of the implicit effect on the justiciability of social security payments. For example, if social security is more like privilege or benefit granted at the discretion of the state, then property rights may not protect social security. The ICESCR by-passed some of these concerns by articulating the right to social security in Article 9 as an entitlement and not just a benefit. Because social security payments allow the elderly to procure basic needs like food and shelter, one can argue that social security is an

209. See Asbjørn Eide, *Economic, Social and Cultural Rights as Human Rights*, in *ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK* 32 (Asbjørn Eide et al., eds., 1995) (reporting that everyone is “the beneficiary of human rights”) (emphasis added).

210. See Martin Scheinin, *The Right to Social Security*, in *ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK* 163 (Asbjørn Eide et al., eds., 1995) (stating that Article 13 covers the right to social and medical assistance).

211. See *id.* at 166 (mentioning that this declaration promises the right to social security and names old age and mental and physical disability as specific situations).

entitlement that the state must provide and protect due to its connection to the acquisition of basic needs for survival.²¹²

The Committee first emphasized that the definition of social security includes coverage for all risks involved in the loss of means of subsistence for reasons beyond a person's control.²¹³ To ensure this right, states must immediately establish old-age insurance programs that would start at an age prescribed by law.²¹⁴ Also, states should establish flexible retirement ages, depending on the performed occupation and the working ability of elderly persons. This flexibility should also reflect demographic, economic and social factors.²¹⁵ These comments suggests that elderly people who have worked for a fewer number of years but at a more physical occupation than others would be able to qualify for the same amount of benefits as someone who has spent more time at a less-physical job. Additionally, states must immediately enact provisions to protect survivors' and orphans' benefits on the death of the breadwinner who had social security coverage or received a pension.²¹⁶

To fulfill this right, states should provide non-contributory old-age benefits and other assistance to elderly persons, as discussed earlier. These provisions should also include benefits for elderly persons who, upon reaching a retirement age, have not completed a qualifying period of contribution and thus would not qualify for an old-age pension or other social security benefit, and lack other sources of income.²¹⁷

212. See Eide, *The Right to an Adequate Standard of Living Including the Right to Food*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK 94-96 (Asbjørn Eide et al., eds., 1995) (emphasizing that the right to social security is particularly important for the elderly, the unemployed, and the disabled).

213. See *General Comment 6*, *supra* note 1, para. 26 (stating that the Committee does not specify the type and level of social security protection).

214. See *id.* para. 27 (mentioning that establishing some sort of pension or insurance for the elderly is in agreement with Article 9 of the Covenant and International Labour Organization social security conventions).

215. See *id.* para. 28 (stating that retirement age should be flexible, depending on a person's occupation and work ability, in addition to demographic, economic, and social factors).

216. See *id.* para. 29 (enacting those requirements is necessary in order to place into effect the provisions of Article 9 of the Covenant).

217. See *id.* para. 30 (complementing paragraphs 20-21 of the Covenant).

D. ARTICLE 10: PROTECTION OF THE FAMILY

The Committee encouraged states to support, protect, and strengthen the family because many cultures believe that the family unit must provide care for the elderly.²¹⁸ It also suggested that those elderly persons who prefer to stay at home should not be discriminated against, and should be provided for through services from both government and non-governmental agencies.

The Committee further suggested that states provide financial support to family members caring for the elderly at home, particularly poor families. States should also provide financial and logistical assistance to the elderly living alone and to elderly couples who prefer to stay in their own home. The assistance should include transportation, food delivery, nursing care, and doctors' visits.

In sum, the state should encourage the cultural decision to keep the family unit together. Resources that might be spent building nursing homes should instead be spent on compensating families for caring for their elderly relatives at home.

E. ARTICLE 11: RIGHT TO AN ADEQUATE STANDARD OF LIVING

The Committee attached great importance to the right to an adequate standard of living, as it includes the right to "adequate food, water, shelter, clothing and health care through the provisions of income, family and community support and self-help," as articulated in the UN Principles for Older Persons.²¹⁹ Article 11(2) of the ICESCR requires states to provide adequate provisions of food to the elderly, particularly when there is no other possibility for persons to provide it for themselves.²²⁰ Indeed, Article 25(1) of the Universal Declaration of Human Rights obligates states to provide for the "right to security in the event of unemployment, sickness, disability,

218. See *General Comment 6*, *supra* note 1, para. 31 (stating that Recommendation 29 encourages governments and non-governmental organizations to implement social service programs to support the whole family).

219. See *id.* para. 32 (referring to Principle 1 of the United Nations Principles for Older Persons).

220. See Eide, *supra* note 209, at 38 (interpreting Article 11(2) of the ICESCR to mean that a state has an obligation to "assist and fulfill the rights of everyone under economic, social and cultural rights").

widowhood, *old age* or other lack of livelihood in circumstances beyond his control”(emphasis added).²²¹ Moreover, Article 17 of the Additional Protocol to the American Convention in the Inter-American Human Rights System states that Parties should provide food, among other basic necessities, to those who lack the resources to procure those items for themselves.²²²

Interestingly, the Committee did not interpret the ICESCR specifically as it relates to food. However, subsequent to General Comment 6, the Committee interpreted the right to adequate food in General Comment 12.²²³ According to General Comment 12, all states are “obliged to ensure for everyone under its jurisdiction access to the minimum essential food which is sufficient, nutritionally adequate and safe, to ensure their freedom from hunger.”²²⁴ The Committee linked this right to the inherent dignity of all persons and pronounced its indispensability to the fulfillment of virtually every other right in the International Bill of Rights.²²⁵ The core aspects of the right to adequate food include [t]he availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture; [t]he accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights.²²⁶

221. See *Universal Declaration of Human Rights*, *supra* note 102, art. 25(1) (emphasizing that everyone has the right to “a standard of living adequate for the health and well-being of himself and of his family”).

222. See Protocol of San Salvador, *supra* note 9, art. 17 (stating that states shall “provide . . . food and specialized medical care, for elderly individuals who lack them and are unable to provide them for themselves”).

223. See *Right to Adequate Food (Art. 11): General Comment 12*, U.N. ESCOR, Econ., Soc., & Cultural Rts. Comm., 20th Sess., UN Doc. E/C.12/1999/5 (1999) [hereinafter *General Comment 12*] (defining the right to food not in a narrow sense, such as to include only the minimum calories and nutrients).

224. See *id.* para. 14 (stating that the principle obligation of the states is to “take steps to achieve progressively the full realization of the right to adequate food”).

225. See *id.* para. 4 (claiming that the right to adequate food is linked to human dignity and social justice).

226. See *id.* para. 8 (explaining in more detail the core aspects of the right to adequate food named in paragraphs 9-13).

The Committee expanded the notions of these two aspects further. As for availability, this notion refers to the protection of productive lands as well as a functioning distribution of the market systems that move food stuff.²²⁷ As for accessibility, this notion encompasses both economic and physical accessibility. Economic accessibility refers to maintaining costs at a level that is attainable and does not infringe on the exercise of other basic rights.²²⁸ Physical accessibility refers to the ability of those who are physically vulnerable, such as elderly, to have access to food. At times, these groups should be given special, if not priority attention.²²⁹

In articulating all the different aspects of this right, the Committee notes that elderly persons must be protected from physical inaccessibility of adequate food because of their status as a physically vulnerable group. The Committee also notes the need to provide access to adequate food to economically vulnerable groups.²³⁰ A violation of this right would occur if a state refused access to adequate food on the grounds of age.²³¹

An adequate standard of living also requires adequate care. Adequate care is an issue because it encompasses critical factors for the nutritional well-being of all individuals. Protection is therefore necessary for the elderly because the elderly are unable to guarantee for themselves the ability to procure food, to regulate proper intake of food, i.e., vitamins and nutrients, and to evaluate and accommodate the changes in their nutritional statuses. Therefore, while adequate care is necessary for all, the elderly should be given special protection because it is more important in their case. These

227. *See id.* para. 12 (stating that “[a]vailability refers to the possibilities either for feeding oneself directly from productive land or other natural resources, or for well functioning distribution, processing and market systems that can move food from the site of production to where it is needed in accordance with demand”).

228. *See General Comment 12, supra* note 223, para. 13.

229. *See id.* (defining elderly persons as physically vulnerable individuals and emphasizing the need for special or priority consideration with respect to accessibility of food).

230. *See id.*

231. *See id.* para. 18 (stating that any discrimination in access to food on the grounds of age would result in a violation of the Covenant).

examples illustrate the need for society to assist them in securing a healthy lifestyle without abuse or manipulation.

To ensure these rights, states should provide the elderly with adequate access to nutritious food. States should also provide adequate nutritious food without cost to those who are unable to procure food for themselves because of a lack of sufficient resources. States should furthermore reduce environmental pollution that affects food production and should provide the elderly with adequate access to potable water to reduce the spread of disease.²³² Moreover, they should provide the elderly with access to up-to-date information and education regarding food and nutrition.²³³ Additionally, states should refrain from inhibiting people's access to adequate food.²³⁴ States should guarantee that third parties do not inhibit individuals' right to food. This requires states to formulate national food programs that are culturally appropriate.²³⁵

The obligation to guarantee the right to food also requires states to legislate and provide judicial review to protect and enforce the enjoyment of the right to food.²³⁶ States should guarantee that, during times of economic and national emergencies, the elderly population, as a marginalized, vulnerable, and disadvantaged group, be given special protection²³⁷ and priority if possible.²³⁸ Moreover, it is the

232. See Eide, *supra* note 212, at 91-92 (stating that disease and malnutrition can be avoided by removing the dangers and risks associated with environmental pollution).

233. See *id.* (stating that all segments of society should have access to education and information about essential needs and associations with nutrition and health care).

234. See *General Comment 12*, *supra* note 223, para. 15 (noting that states have an obligation to protect vulnerable individuals by taking measures to "ensure that enterprises or individuals do not deprive [them] of their access to adequate food").

235. See *id.* para. 39 (stating that "[p]roducts included in international food trade or aid programmes must be . . . culturally acceptable to the recipient population").

236. See *id.* para. 32 (stating that "[a]ny person or group who is a victim of a violation of the right to adequate food should have access to effective judicial or other appropriate remedies" and that such victims are entitled to "adequate reparation, which may take the form of restitution, compensation, satisfaction or guarantees of non-repetition").

237. See *id.* para. 28 (stating that even where a state faces "severe resource constraints, whether caused by a process of economic adjustment, economic recession, climatic conditions or other factors, measures should be undertaken to

state's duty to refrain from using access to food as a political weapon.²³⁹

The Committee also stressed the psychological and social significance a home provides to an elderly person. The right to housing, while not listed separately in the ICESCR, is understood by the international community as included in the discussion of an adequate standard of living.²⁴⁰ The norm of adequate housing is a right to live somewhere in security, peace and dignity. Applying the norm requires states to respect, ensure, and fulfill this right in a manner that creates a living environment suited to the culture, skills, needs, and wishes of the people.²⁴¹ In a European Court on Human Rights case involving housing rights, the Court considered housing a prime social need, and ruled that "legislation aimed at securing greater social justice in the sphere of people's homes was justified, even when it 'interferes with existing contractual relations between private parties and confers no direct benefit on the State or the community at large.'"²⁴² Thus, a discussion of housing, and not just shelter, is important to secure the full enjoyment of this right for elderly persons.

ensure that the right to adequate food is especially fulfilled for vulnerable population groups and individuals").

238. See *id.* para. 38 (stating that "[p]riority in food aid should be given to the most vulnerable populations").

239. See *General Comment 12, supra* note 223, para. 37 (stating that "[f]ood should never be used as an instrument of political and economic pressure").

240. See generally Eide, *supra* note 212, at 89-105 (discussing the right to housing as one of many factors associated with adequate living standards). Cf. Revised European Social Charter, *supra* note 10, art. 23 (addressing housing within the context of the rights of the elderly).

241. See Scott Leckie, *The Right to Housing*, in *ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK* 113-14 (Asbjørn Eide et al., eds., 1995). States are required to:

place sufficient legal and policy emphasis on the full realization of housing rights, through a series of active measure including national and/or local legislative recognition of the right, the incorporation of housing rights imperatives into housing and related policies, and the identification of discernable 'bench marks' towards the full enjoyment of housing rights by all sectors of society.

Id.

242. *Id.* at 117-18 (citing *James*, 98 Eur. Ct. H.R. (ser. A) para. 47 (1986)).

According to the Committee's General Comment 4, everyone is entitled to adequate housing, and individuals as well as families are entitled to this right "regardless of age, economic status, group or other affiliation or status and other such factors."²⁴³ Therefore, implementation of this right cannot be subject to any form of discrimination. According to the Committee, the focus should not be on providing just shelter, but providing *adequate housing*, as the right to housing is intimately linked with other human rights.²⁴⁴ For example, the Committee linked the right to housing with freedom of expression and association, traditionally civil and political rights, and stated that the full implementation of these other rights is "indispensable if the right to adequate housing is to be realized."²⁴⁵

Understanding that each state party possesses different economic, social and cultural factors, the Committee nonetheless interpreted in general terms what provisions must exist in a national housing plan to constitute *adequate housing*.²⁴⁶ Each of the following seven categories must be addressed in terms of the elderly in order to offer them full legal protection. First, the Committee discussed the need for *legal security of tenure*.²⁴⁷ According to the Committee, "all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats."²⁴⁸ States must take "immediate measures" to confer legal security to those persons who lack such protection.²⁴⁹ Secondly,

243. *Right to Adequate Housing (Article 11(1): General Comment 4*, U.N. ESCOR, Econ., Soc., & Cultural Rts. Comm., 6th Sess., at 53, para. 6 U.N. Doc. HRI/Gen/1/Rev.1 (1994), [hereinafter *General Comment 4*], available at <http://www1.umn.edu/humanrts/gencomm/epcomm4.htm> (last visited Feb. 23, 2003).

244. *See id.* para. 7 (stating that, in the Committee's view, "the right to housing should not be interpreted in a narrow or restrictive sense . . . [r]ather it should be seen as a right to live somewhere in security, peace and dignity").

245. *Id.* para. 9.

246. *See id.* para. 8 (stating that "[w]hile adequacy is determined in part by social, economic, cultural, climatic, ecological and other factors, the Committee believes that it is nevertheless possible to identify certain aspects of the right that must be taken into account for this purpose in any particular context").

247. *Id.* para. 8(a).

248. *General Comment 4*, *supra* note 243, para. 8(a).

249. *Id.*

the Committee addressed the *availability of services, materials, facilities and infrastructure*.²⁵⁰ A home should possess access to needed resources such as safe drinking water, energy, heat and light, and sanitation facilities. Thirdly, the Committee discussed *affordability*.²⁵¹ States should ensure that costs related to housing equate with income levels of the community. This includes access to housing subsidies and financing as well as protection from unreasonable rent increases.²⁵² Fourth, the Committee addressed *habitability*.²⁵³ Homes must provide inhabitants with adequate space and protection from cold, heat and other weather, health, and structural hazards. Fifth, the Committee expanded on the notion of *accessibility*. The Committee stated that “[d]isadvantaged groups must be accorded full and sustainable access to adequate housing resources.”²⁵⁴ The Committee listed the elderly as a disadvantaged group, and stated that disadvantaged persons are entitled to priority consideration in national housing schemes.²⁵⁵ Sixth, the Committee mentioned *location*.²⁵⁶ Homes should be located near employment options, schools, and other social facilities, but should not be located near polluted areas that threaten the right to health. Finally, the Committee recognized the need for *cultural adequacy*.²⁵⁷ Building materials and policies, as examples, should enable cultural expression and allow for technological advances.

Throughout General Comment 4, the Committee reiterated the need to implement the right to housing immediately. The Committee even recommended that those states with insufficient resources request international cooperation in accordance with the Covenant so that there would be no delay in implementing as many aspects of the

250. *Id.* para. 8(b).

251. *Id.* para. 8(c).

252. *See id.* (stating that “tenants should be protected by appropriate means against unreasonable rent levels or rent increases”).

253. *General Comment 4, supra* note 243, para. 8(c).

254. *Id.* para. 8(e).

255. *See id.* (stating that “such disadvantaged groups as the elderly . . . should be ensured some degree of priority consideration in the housing sphere”).

256. *Id.* para. 8(f).

257. *Id.* para. 8(g).

right to housing as possible.²⁵⁸ “In essence, the obligation is to demonstrate that, in aggregate, the measures being taken are sufficient to realize the right for every individual in the shortest possible time in accordance with the maximum of available resources.”²⁵⁹ In terms of remedies, the Committee looked for the ability to lodge legal appeals to prevent evictions and demolitions, legal procedures for compensation, complaints against landlords for inadequate housing conditions, and class action suits addressing discrimination claims to be appropriate remedial measures.²⁶⁰

The right to housing includes the right to be free from arbitrary or forced evictions.²⁶¹ States should avoid arbitrarily interfering with the property of elderly people, as they are often less able to defend themselves against such actions. Similarly, the state should refrain from re-possessing homes of the elderly without due process of law. Furthermore, the state should not evict an elderly person where the action would expose the elderly person to other human rights violations.

To ensure the right to housing in general, states should pass provisions that include financial assistance, loan forgiveness, and home restoration, so that elderly persons who desire to stay at home can do so for as long as possible. Rent or mortgage payments should be reduced to accommodate changes in the financial circumstances of elderly persons. Also, homes should be redesigned to accommodate the physical necessities of the elderly by eliminating stairs, providing elevator access, and offering electrical equipment

258. See *General Comment 4*, *supra* note 243, para. 10 (asserting the need for immediate action by countries in all stages of development with respect to the right to housing); see also ICESCR, *supra* note 6, arts. 11(1), 22, 23 (providing guidance for implementing the rights of the ICESCR through international cooperation).

259. *General Comment 4*, *supra* note 243, para. 14.

260. See *id.* para. 17 (listing potential domestic legal remedies for violations of the right to adequate housing).

261. See *id.* para. 18 (quoting the Committee’s statement that “instances of forced eviction are *prima facie* incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law”); see also *General Comment 7*, *supra* note 7 (noting that older persons “suffer disproportionately from the practice of forced evictions”).

for lawn care. Moreover, states should provide suitable facilities for elderly persons who cannot afford them.²⁶² Additionally, states should protect the elderly from third party abuse, such as arbitrary evictions, discrimination, and harassment.²⁶³

To guarantee these rights, states should acknowledge the particular circumstances of elderly persons when establishing urban development plans and should include community centers and other facilities that account for the needs of elderly people. This would include providing transportation to elderly residents, as well as maintaining constant and direct communication with them.²⁶⁴ Also, states should encourage the elderly to participate in the development of legislation and policies committed to achieving the full implementation of housing rights.²⁶⁵ Finally, states should monitor the housing market for discriminatory practices, excessive rent, inflated housing costs and taxes, availability of adequate public housing, and access to basic services such as heating.²⁶⁶

F. ARTICLE 12: RIGHT TO PHYSICAL AND MENTAL HEALTH

A discussion of the protection of the elderly inevitably requires an examination of the enforcement of health rights. Discrimination in this area involves not only discrimination based on impaired health, which particularly affects the elderly, but also discrimination in the

262. Protocol of San Salvador, *supra* note 9, art. 17 (declaring that everyone has a "right to special protection in old age" and therefore requiring States Parties to provide food and specialized medical care for elderly individuals).

263. See Leckie, *supra* note 241, at 114-15 (specifying that where third parties such as landlords, property developers, and land owners infringe on the rights of housing rights beneficiaries, public authorities should act to prevent future deprivations).

264. See *General Comment 6*, *supra* note 1, art. 11, para. 33 (emphasizing the need to facilitate the "mobility and communication" of elderly people through national policies).

265. See Leckie, *supra* note 241, at 114 (stressing the need to consult with those most affected by existing housing policies, such as the homeless and the inadequately housed, in developing national housing strategies).

266. See *id.* at 115 (explaining that in order to fulfill the right to adequate housing, governments must guarantee persons access to those housing rights otherwise unattainable by their own efforts).

diagnosis (or failed diagnosis) of disease or mental illness.²⁶⁷ Health rights are also related to the right to adequate food, housing, water, working conditions, and environment, since the reduction of malnutrition and other inadequacies in these areas increase an individual's chance to enjoy a healthy life.²⁶⁸

There are four core aspects to the right to health. *Availability* refers to the sufficient quantity and sustainable quality of health care facilities, goods, services and programs. *Accessibility* includes the notions of non-discrimination, and physical, economical and informational accessibility. Thirdly, the notion of *acceptability* refers to cultural appropriateness, including gender sensitivities and data confidentiality. Finally, *quality* refers to the scientifically and medically appropriate production of medical goods, services, facilities, and drugs.²⁶⁹

In General Comment 14, which addressed health issues, the Committee reaffirmed paragraphs 34 and 35 of General Comment 6 when it reiterated the need for "preventative, curative and rehabilitative health treatment" for the elderly, including psychologically as well as physically rehabilitative measures.²⁷⁰ Likewise, the Committee reiterated the recommendations of the Vienna International Plan of Action on Ageing, which took a similar comprehensive view of preserving health.²⁷¹ The Committee also focused on investing resources throughout the life span of

267. See Katarina Tomaševski, *Health Rights*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK 140-41 (Asbjørn Eide et al., eds., 1995) (recounting how, in the past, non-conformity with moral, social, cultural, or political values had been a factor in diagnosing mental illness).

268. *The Right to the Highest Attainable Standard of Health: General Comment 14*, U.N. ESCOR, Econ., Soc., & Cultural Rts. Comm., para. 4, U.N. Doc. E/C.12/2000/4 (2000) [hereinafter *General Comment 14*] (explaining that the reference to the "highest attainable standard of physical and mental health" in the International Covenant on Economic, Social and Cultural Rights expands beyond the right to health care).

269. See *id.* para. 12(a)-(d) (defining the essential elements of the right to health).

270. See *id.* para. 25 (reaffirming an integrated approach to the right to health of older persons).

271. See *General Comment 6*, *supra* note 1, paras. 4-5 (explaining that the Vienna International Plan of Action on Ageing establishes the rights of older persons within the context of the International Covenants on Human Rights).

individuals to avoid old-age trauma. This included spending resources on preventative medicine, better immediate diagnosis and treatment, reduction of costs, and consideration of familial impact on the health of elderly individuals. Addressing these issues will create an overall better life for the aging. In order to respect the right to health, the Committee suggested that states refrain from experimenting on the elderly without their informed consent. Furthermore, they should also refrain from denying elderly persons access to health services, and from prohibiting or impeding traditional preventative care.²⁷² Similarly, states should avoid withholding or intentionally misrepresenting health-related information and marketing unsafe drugs.²⁷³ Additionally, states should abstain from leveraging the delivery of medical equipment and services for political gain. Also, states should refrain from interfering with an elderly person's decision regarding his or her medical treatment.

To ensure this right to health, the Committee indicated that states should provide free emergency services to all elderly persons. Also, the Committee noted that preventative and remedial services should be provided for free to those elderly persons who lack adequate resources.²⁷⁴ Furthermore, the Committee suggested that states provide the elderly with the latest up-to-date health information. At the same time, states should continue to maintain the confidentiality of personal health data.²⁷⁵ Moreover, states must ensure that quality facilities, goods, and services are physically accessible, near in proximity, and affordable to the elderly.²⁷⁶

272. See *General Comment 14*, *supra* note 268, para. 34 (noting that exception to these prohibitions should only be taken for the treatment of either mental illness or the prevention of communicable diseases).

273. See *id.* (addressing generally the States' obligation to refrain from either "prohibiting or impeding traditional preventative care").

274. *Accord Protocol of San Salvador*, *supra* note 9, art. 17 (articulating a similar interpretation to that of the Committee in *General Comment 14*).

275. See *General Comment 14*, *supra* note 268, para. 12(b) (explaining that accessibility of information and ideas concerning health issues should not encroach upon the right to confidentiality).

276. See *id.* (stating that potable water and sanitation facilities should be physically accessible, even in rural areas). Health services should also be affordable for all, including socially disadvantaged groups. *Id.*

In order to adequately guarantee these rights, the Committee recommended that states provide access to facilities, goods, and services without any discrimination based on age, sex or financial ability.²⁷⁷ This involves the states' duty to implement gender-specific aspects of a national health plan in order to address elderly women's issues, such as menopause, breast cancer, and other diseases and conditions.²⁷⁸

States should also refrain from discriminating based on impaired health. Other measures required to ensure the right to health of older persons include the states' duty to implement preventative measures to reduce occupational accidents and diseases; to provide an adequate supply of safe, potable water as well as basic sanitation; to reduce and prevent the exposure of the population to dangerous substances such as radiation, harmful chemicals, or other detrimental environmental conditions; to minimize health hazards in industrial workplaces; to administer checkups for the elderly on a regular basis, giving special attention to chronically and terminally ill persons.²⁷⁹ States also have the duty to prevent harmful cultural practices that violate a person's right to adequate health.

To give effect to many of the above mentioned obligations, states should maintain adequate and enforceable health standards, by providing adequate access to judicial review or other appropriate remedies to address violations of the right to health.²⁸⁰ In addition, states should maintain adequate training standards for health care

277. *See id.* para. 18 (noting that Article 2.2 and Article 3 of the ICESCR proscribes any discrimination in access to health care on the grounds of "race, colour, sex, language, religion, political or other opinion, national or social origin" or other political or social status).

278. *See id.* paras. 20-21 (advocating the integration of a gendered perspective in health related policies).

279. *See id.* paras. 15, 25 (providing general commentary on Article 12 of the ICESCR).

280. *See General Comment 14, supra* note 268, para. 59 (emphasizing the importance of providing adequate judicial reparations to victims of right to health violations, including restitution and compensation, as well as guarantees that the violations will not reoccur). The Committee also encourages formation of patients' rights associations, consumer forums, and other relevant institutions to address remedy and accountability issues. *Id.*

professionals.²⁸¹ States should provide immunization against infectious diseases in order to reduce mortality rates, as well as prevent, treat, and control epidemic diseases. States must also ensure access to nutritionally adequate food.²⁸²

G. ARTICLE 13 THROUGH ARTICLE 15: RIGHT TO EDUCATION AND CULTURE

"Education is a precondition for the exercise of human rights."²⁸³ Found in many of the international human rights manuscripts, the right to education is generally considered a necessary prerequisite to the full enjoyment of both civil and political rights, as well as economic, social, and other cultural rights.²⁸⁴ The Committee stated that "the right to education epitomizes the indivisibility and interdependence of all human rights."²⁸⁵ The Committee also acknowledged that Article 13 of the ICESCR "is the most wide-ranging and comprehensive article on the right to education in international human rights law."²⁸⁶ This right to education encompasses the notions of the right to receive education, equal access to and enjoyment of educational facilities, the freedom to choose education, the freedom to establish and direct educational institutions, the protection of pupils against inhuman disciplinary

281. *See id.* para. 36 (indicating that in order for the States to fulfill their legal obligations to the ICESCR, they must ensure that medical personnel and doctors are adequately trained).

282. *See id.* para. 43 (stating that one of the minimum core obligations of the parties to the ICESCR is to prevent hunger).

283. Manfred Nowak, *The Right to Education*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK 189 (Ashbjørn Eide et al. eds., 1995).

284. *See id.* (explaining that people cannot exercise various civil, political, economic, social, and cultural rights without attaining a minimum level of education, such as literacy).

285. *Plans of Action for Primary Education (Art. 14): General Comment 11*, U.N. ESCOR, Econ., Soc., & Cultural Rts. Comm., 20th Sess., para. 2, UN Doc. E/C.12/1999/4 (1999) [hereinafter *General Comment 11*].

286. *Right to Education (Art. 13): General Comment 13*, U.N. ESCOR, Econ., Soc., & Cultural Rts. Comm., 21st Sess., para. 2, U.N. Doc. E/C.12/1999/10 (1999) [hereinafter *General Comment 13*].

measures, and academic freedom.²⁸⁷ According to the Committee, this right, in all its forms and levels, should be available, accessible, acceptable, and adaptable.²⁸⁸

The Committee stated in its General Comment 13 that “the right to fundamental education is not limited by age” and should be extended to older persons.²⁸⁹ It considered fundamental education an important aspect of adult education and required states to provide all aspects of the right to education in a suitable manner for all different age groups.²⁹⁰ The Committee also required a fellowship system that enhances educational access for disadvantaged groups.²⁹¹ The Committee affirmed its views in General Comment 6 regarding the right to education for the elderly.²⁹²

The Committee stressed the need to interpret these rights from two different perspectives, including the right of the elderly to benefit from educational programs, and the right to have the knowledge and experience of the elderly passed on to persons of younger generations.²⁹³ To ensure these rights, particularly in light of the first perspective, states should provide financial assistance to the elderly who have the capacity and desire to take educational and training courses. These courses should include literacy training, life-long education, and access to university-level education.²⁹⁴ To ensure

287. See generally Nowak, *supra* note 283, at 198-211 (listing and discussing Nowak’s delineation of the secondary rights stemming from the core right to education).

288. See *General Comment 13*, *supra* note 286, para. 6(a)-(d) (explaining that although each state party contends with differing conditions in providing education to its people, the right to education depends on these “interrelated and essential features”).

289. *Id.* para. 24.

290. See *id.* (clarifying that states must develop educational “curricula and delivery systems” that are suitable for students of any age).

291. See *id.* para. 26 (incorporating the non-discrimination and equality clauses of the Covenant into the requirement of establishing a fellowship system).

292. See *id.* para. 36 (affirming paragraphs 36 through 42 of General Comment 6 and its discussion of issues relating to the elderly).

293. See *General Comment 6*, *supra* note 1, para. 36. (outlining two views on how states should approach the education rights of the elderly).

294. See *id.* para. 37 (asserting that access to these educational programs fulfills the recommendations provided in Principle 16 of the United Nations Principles for

these rights, particularly in light of the second perspective, the Committee also suggested that states should provide community centers, both educational and recreational, to further assist the development of life-long education for the elderly.²⁹⁵ These centers would also allow members of younger generations to have easier access to the elderly, both for educational and inter-personal benefits. Furthermore, educational centers would provide elderly persons with a forum in which to teach others about their experiences and insights. States should continue to attach importance and respect to the pivotal role elderly persons play in transmitting information about the society they live in to younger people. Therefore, states should feature elderly programs in order to further enrich the lives of all other members of society.²⁹⁶

To respect the right to culture, the Committee urged states to refrain from segregating the elderly from society. States should actively integrate the elderly into society by acknowledging the benefit to younger generations of their wealth of information and skills.²⁹⁷ States should also use age classifications that incorporate the elderly, as opposed to classifying all people over fifty in the fifty-plus category. Additionally, states should identify elderly participation in events and attendance information, giving the elderly a sense of identity and belonging in the community. Finally, states

Older Persons); see e.g., *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Germany*, U.N. ESCOR, Econ., Soc., & Cultural Rts. Comm., 9th Sess., 46th mtg., para. 11, U.N. Doc. E/C.12/1993/17 (1994) (recommending that Germany provide information "to facilitate the access and the participation of the elderly in educational programs"). This recommendation stems from the Committee's review of Germany's second periodic report regarding the status of rights protected by Articles 13 to 15 of the ICESCR. *Id.* para 1.

295. See *General Comment 6*, *supra* note 1, para. 37 (drawing from the Vienna International Plan of Action and its recommendations in developing a sense of independence for the elderly and the community's responsibility for ensuring the rights of the elderly to education).

296. See *id.* para. 38 (acknowledging the significance of preserving the role of the elderly as sources of "information, knowledge, traditions and spiritual values").

297. See *id.* para. 39 (affirming the importance of integrating the elderly in society as provided in Principle 7 of the United Nations Principles for Older Persons).

should make all social and cultural institutions, such as museums, concert halls, and movie theaters, wheelchair accessible.²⁹⁸

To fulfill the right to enjoy the benefits of scientific progress, the Committee suggested that states promote the study of the biological, medical, and social aspects of aging. These studies should address ways of sustaining functional capacities, as well as preventing and delaying the onset of chronic illness and disabilities. States should also establish educational institutions that specialize in gerontology, geriatrics, and geriatric psychology.²⁹⁹

IV. THE RIGHTS OF THE ELDERLY IN REGIONAL HUMAN RIGHTS TREATIES

Unlike the Universal Human Rights system, several regional human rights treaties contain clauses regarding the rights of the elderly. In the European³⁰⁰ and Inter-American systems,³⁰¹ the provisions on elderly rights are embodied in economic, social, and cultural rights treaties, while the African System protects those rights alongside civil and political rights in a unique instrument.³⁰² The next sections explore the scope of the provisions that guarantee elderly rights under different regional treaties. In particular, these sections examine elderly rights in the context of the Revised European Social Charter,³⁰³ the Additional Protocol to the American Convention on

298. See *id.* para. 40 (citing the Vienna International Plan of Action's Recommendation 14, which promotes governmentally supported programs aimed at providing the elderly with physical accessibility to cultural institutions).

299. See *id.* para. 42 (providing various recommendations to States that ensure that the elderly benefit from scientific progress).

300. See discussion *infra* Part IV.A (explaining that the only exception in the European context is the recently adopted Charter of Fundamental Rights of the European Union, which protects both civil and political rights as well as economic, social, and cultural rights).

301. See discussion *infra* Part IV.B (discussing the Inter-American human rights system).

302. See discussion *infra* Part IV.C (describing the African human rights system).

303. See Revised European Social Charter, *supra* note 10, art. 23 (outlining states' responsibilities to protect the social rights of the elderly).

Human Rights in the Area of Economic, Social and Cultural Rights,³⁰⁴ and the African Charter on Human and Peoples' Rights.³⁰⁵

A. THE EUROPEAN HUMAN RIGHTS SYSTEM

The European Human Rights System refers in particular to the treaties adopted within the Council of Europe, which mainly consist of the European Convention on Human Rights and the Revised European Social Charter. For organizational purposes, this section also covers the relevant aspects of the Charter of Fundamental Rights of the European Union.

The 1988 Additional Protocol to the European Social Charter articulates protection for the rights of elderly persons in Article 4.³⁰⁶ The language of the Protocol, as well as its Explanatory Report, were then incorporated *verbatim* into the Revised European Social Charter of 1996 ("Revised Charter") and accompanying Explanatory Report.³⁰⁷ The language is as follows:

Article 23- The Right of Elderly Persons to Social Protection

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:

304. Protocol of San Salvador, *supra* note 9, art. 17 (providing for the protection of the elderly).

305. See African Charter, *supra* note 11, art. 18 (acknowledging the rights of the elderly to "special measures of protection in keeping with their physical and moral needs").

306. Additional Protocol to the European Social Charter, *opened for signature* May 5, 1988, art. 4, E.T.S. No. 128 (*entered into force* Apr. 9, 1992) (addressing the rights of the elderly to social protection), *available at* <http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm> (last visited Feb. 26, 2003).

307. See Revised European Social Charter, *supra* note 10, art. 23 (incorporating the same provisions regarding the right of elderly persons to social protections).

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 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 institutions.³⁰⁸

The Revised Charter also names the right of the elderly to social protection as one of the aims that State Parties pursue by all appropriate means.³⁰⁹ The scope of the right of elderly persons to social protection is not clearly defined in the language of the Revised Charter or its Explanatory Report. However, the Committee on Experts, which monitors compliance with the obligations under the Revised Charter, stated that the underlying objective of this provision is to “enable elderly persons to play an active part and have some influence in society, to guarantee them sufficient resources to live independently, to provide housing and an environment suited to their needs, and to guarantee adequate health care and social services.”³¹⁰

308. *Id.*

309. *See id.* art. A (stating that States undertake the consideration of particular aims declared in Part I of the Charter). Part I provides that “every elderly person has the right to social protection.” *Id.* pt.1, para. 23.

310. European Comm. of Soc. Rts., *Finland*, in 1 EUROPEAN SOCIAL CHARTER, CONCLUSIONS XV-2 149, 182 (2001) (responding to Finland’s report on the developments in the protections of the social rights of the elderly) [hereinafter

To ensure the effective exercise of this right, states undertake to adopt or encourage *in particular* a set of measures that will enable elderly persons to remain full members of society, to choose their life-style freely, and to lead independent lives. In addition, states must guarantee elderly persons living in institutions appropriate support, privacy, and participation in decisions concerning living conditions in those institutions. The Explanatory Report states that the phrase "in particular" indicates that the enumeration of measures guaranteeing social protection to aged persons is not exhaustive, but rather a guide.³¹¹ In that regard, the Report shows the drafters' intent to establish a minimum core group of rights that states should protect in order to satisfy the obligations arising out of Article 23. In addition to that core, states are free to adopt other special measures in order to fully realize the rights of the elderly population. The minimum core includes measures to enable the elderly to remain full members of society for as long as possible.

The phrase "full members" refers to the fact that:

elderly persons must suffer no ostracism on account of their age, since the right to take part in society's various fields of activity is not granted or refused depending on whether an elderly person has retired or is still vocationally active or whether such a person is still of full legal capacity or is subject to some restrictions in this respect (*diminutio capitis*).³¹²

Arguably, this language, coupled with the general non-discrimination clause contained in Part V, Article E of the Revised Charter,³¹³ suggests that this provision prohibits discrimination on

Conclusions XV-2 on Finland], *available at* http://www.humanrights.coe.int/cseweb/GB/GB2/Conclusions_XV-2/Finland%20XV-2.doc (last visited Apr. 5, 2003).

311. See Explanatory Report to the Additional Protocol to the European Social Charter, E.T.S. No. 128, para. 53 (1988) (asserting that states may adopt other suitable measures to ensure that the social rights of the elderly are protected), *available at* <http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm> (last visited Feb. 26, 2003).

312. *Id.* para. 54.

313. Revised European Social Charter, *supra* note 10, art. E (stating that "[t]he enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status").

account of age. The Explanatory Report further supports this conclusion by clearly providing that the principle of non-discrimination applies to all the provisions of the Revised Charter.³¹⁴ Furthermore, the words “such as” in Article E imply that the enumeration of grounds on which discrimination is prohibited is not exhaustive.³¹⁵ In keeping with prevailing human rights case law, the Revised Charter provides that only “differential treatment based on an objective and reasonable justification” does not constitute discrimination.³¹⁶ To determine whether a particular differential treatment on account of age is considered discriminatory, states should consider the extent of an elderly person’s physical, psychological, and intellectual abilities.³¹⁷ Thus, parties to the Revised European Social Charter should not discriminate against elderly persons on account of age, unless an otherwise impermissible distinction is justified by the particular individual’s lack of physical, psychological, or intellectual capabilities.

In addition to the negative aspect of non-discrimination, states must adopt positive measures to ensure that elderly persons enjoy human rights as full members of society. In particular, states must provide adequate resources to enable them to live decent lives and play an active part in public, social, and cultural life. The Committee has raised concerns which shape the scope of this obligation when assessing state reports. In general, the Committee addresses the “standard of living enabling the elderly to remain full members of society,” by focusing on a country’s financial resources, the cost of community care, and the availability of care.³¹⁸ Financial resources

314. See Explanatory Report to the Revised European Social Charter, E.T.S. No. 163, para. 135 (1996) (indicating that the non-discrimination article of the European Social Charter is based on the European Convention on Human Rights), available at <http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm> (last visited Feb. 26, 2003).

315. See *id.* para. 136 (stating that discrimination does not include “differential treatment based on an objective and reasonable justification,” such as requirements of a certain age).

316. Revised European Social Charter, *supra* note 10, pt. V, art. E.

317. See *id.* app. art. 23 (defining the phrase “as long as” in the context of Article 23).

318. See, e.g., Conclusions XV-2 on Finland Report, *supra* note 310, at 182 (discussing Finland’s programs and policies regarding the elderly).

refer to old-age pensions and other types of benefits that states provide to the elderly.³¹⁹ In principle, the Revised Charter does not require that states follow a particular pension scheme, but rather grants them a certain margin of discretion to implement their own social security system. Nevertheless, the Committee determines whether the scheme developed by the state satisfies the obligations assumed under the Revised Charter. The Committee specifically monitors the conditions required to qualify for an old-age pension, for example minimum age, nationality, or residence.³²⁰ Moreover, the Committee closely scrutinizes whether the national average pension levels and the average national wage are so disparate as to impair the rights of the elderly to have a standard of living that enables them to actively participate in society.³²¹ As part of supervising the standard of living for the elderly, the Committee also monitors the cost of care, specifically home care and pharmaceutical products, to ensure that the costs do not negatively affect their status as full members of society by creating too heavy a financial burden.³²²

Additionally, the Explanatory Report states that the phrase “adequate resources” in Article 23 is to be interpreted in light of Article 13,³²³ and if necessary, Article 12³²⁴ of the Revised Charter,

319. See *id.* (providing the specifics of Finland’s national pension plan, which, in 1998, provided fourteen percent of the country’s elderly with their sole source of income).

320. See European Comm. of Soc. Rts., *Italy*, in 1 EUROPEAN SOCIAL CHARTER, CONCLUSIONS XV-2 291, 327-29 (2001) (addressing Italy’s financial provisions for the elderly) [hereinafter Conclusions XV-2 on Italy], available at http://www.humanrights.coe.int/cseweb/GB/GB2/Conclusions_XV-2/Italy%20XV-2.doc (last visited Feb. 26, 2003). This monitoring by the Committee becomes very relevant in the current context in which State Parties are carrying out important reforms to their social security systems. *Id.*

321. See European Comm. of Soc. Rts., *Norway*, in 2 EUROPEAN SOCIAL CHARTER, CONCLUSIONS XV-2 379, 404 (2001) (stating that “despite [a] substantial increase, there is still a significant difference between the amount of the minimum pension and the average net wage”), available at http://www.humanrights.coe.int/cseweb/GB/GB2/Conclusions_XV-2/Norway%20XV-2.doc (last visited Feb. 26, 2003).

322. See Conclusions XV-2 on Finland, *supra* note 310, at 183-84 (assessing the amount of expenditures Finland devotes to the elderly in subsidizing the costs of home care and pharmaceuticals).

323. See Revised European Social Charter, *supra* note 10, art. 13 (setting forth the obligations to provide social and medical assistance). Article 13 states:

which ensure the right to social and medical assistance and the right to social security, respectively.³²⁵ The Report further states that there is no inconsistency between “social protection” in Article 23 and

With a view to ensuring the effective exercise of the right to social and medical assistance, the Parties undertake:

1. to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance, and, in case of sickness, the care necessitated by his condition;
2. to ensure that persons receiving such assistance shall not, for that reason, suffer from a diminution of their political or social rights;
3. to provide that everyone may receive by appropriate public or private services such advice and personal help as may be required to prevent, to remove, or to alleviate personal or family want;
4. to apply the provisions referred to in paragraphs 1, 2 and 3 of this article on an equal footing with their nationals to nationals of other Parties lawfully within their territories, in accordance with their obligations under the European Convention on Social and Medical Assistance, signed at Paris on 11 December 1953.

Id.

324. *See id.* art. 12 (setting forth the obligations to provide social security). The social security provisions of Article 12 reads as follows:

With a view to ensuring the effective exercise of the right to social security, the Parties undertake:

1. to establish or maintain a system of social security;
2. to maintain the social security system at a satisfactory level at least equal to that necessary for the ratification of the European Code of Social Security;
3. to endeavour to raise progressively the system of social security to a higher level;
4. to take steps, by the conclusion of appropriate bilateral and multilateral agreements or by other means, and subject to the conditions laid down in such agreements, in order to ensure:
 - a. equal treatment with their own nationals of the nationals of other Parties in respect of social security rights, including the retention of benefits arising out of social security legislation, whatever movements the persons protected may undertake between the territories of the Parties;
 - b. the granting, maintenance and resumption of social security rights by such means as the accumulation of insurance or employment periods completed under the legislation of each of the Parties.

Id.

325. *See* Explanatory Report to the Additional Protocol to the European Social Charter, *supra* note 311, para. 55 (identifying the specific rights outlined in the provisions).

“social assistance” in Article 13.³²⁶ In fact, as interpreted by the Committee, it appears that “social assistance” complements the protection that must be afforded under Article 23, but does not overlap with the scope of that provision. While Article 23 ensures access to a pension that enables the aged to participate in the community as full members, Article 13 refers to the protection that Contracting States must provide to those in need, including old persons who are entitled to a pension if that benefit does not cover their basic necessities. In addition, Article 13 refers to both social and medical assistance.

Under the case law of the Committee, states must provide social and medical assistance to those in need as a matter of right,³²⁷ or as stated by this body “as a subjective right, non-discretionary, sometimes subject to budget funds.”³²⁸ To ensure that this right is an enforceable one, as required by the Revised Charter, states must afford a right to appeal the decisions of administrative agencies on the provision of social assistance to an independent authority or judicial tribunal.³²⁹ The Committee assesses whether the particular authority or court is sufficiently independent by looking at the way members are appointed, their term in office, their qualifications, procedures applied, and whether the body concerned has the authority to make enforceable decisions.³³⁰ Moreover, the adequacy

326. See *id.* (noting that the language expressed in Article 13 and Article 23 does not render the provisions incompatible).

327. LENIA SAMUEL, *FUNDAMENTAL SOCIAL RIGHTS: CASE LAW OF THE EUROPEAN SOCIAL CHARTER* 314 (1997) (setting out the position that individuals have the legal right to essential social services).

328. See European Comm. of Soc. Rts., *Spain*, in 2 EUROPEAN SOCIAL CHARTER, CONCLUSIONS XV-1 505, 526 (2001) (describing Committee decisions with regard to the compliance of Spanish laws with the Charter), available at <http://www.humanrights.coe.int/cseweb/FR/PDF/html%20concs/Conclusions%20xvi%20spain.html> (last visited Feb. 22, 2003).

329. See European Comm. of Soc. Rts., *Italy*, in 2 EUROPEAN SOCIAL CHARTER, CONCLUSIONS XV-1 353, 380 (2001) (indicating that Italy is not in compliance with the Charter because of its lack of judicial review or oversight of decisions made by administrative agencies), available at <http://www.humanrights.coe.int/cseweb/FR/PDF/html%20concs/Conclusions%20xvi%20italy.html> (last visited Feb. 21, 2003).

330. See SAMUEL, *supra* note 327 (discussing the requirements of an independent judicial body for the review of administrative decisions).

of the right of appeal is subject, *inter alia*, to the granting of free legal aid to the complainant.³³¹ The Committee also underlined that states “must strive to ensure that all persons who are entitled to social assistance are aware of their entitlements and are not hindered in obtaining their benefit.”³³²

Article 13 also refers to “any person,” which includes not just nationals of a state, according to the Committee, but also nationals of the Contracting Parties legally residing or lawfully working in a state. The Committee noted that Article 13 mandates that “need” must be the sole criterion for social assistance and that “illness” must be the sole criterion for medical assistance. National laws that create further conditions for entitlements, such as “ordinary residence,” are in violation of the scope of the Revised Charter.³³³ Therefore, no length of residence may be required, “nor may such persons be repatriated on the sole ground of seeking social assistance for as long as their lawful residence or regular work lasts.”³³⁴ Finally, the text of Article 13 ensures this right to persons who are without “adequate resources.” Although existing case law has not precisely decided the scope of this expression, it is possible to conclude from the Committee’s assessment of national reports that persons who lack

331. See European Comm. of Soc. Rts., *Norway*, in 2 EUROPEAN SOCIAL CHARTER, CONCLUSIONS XV-1 419, 447 (2001) [hereinafter Conclusions XV-1 on Norway] (noting that the Committee was concerned that free legal aid was not provided to individuals who wished to pursue an appeal of a decision), *available at* <http://www.humanrights.coe.int/cseweb/FR/PDF/html%20concs/Conclusions%20xvi%20norway.html> (last visited Feb. 19, 2003).

332. See European Comm. of Soc. Rts., *United Kingdom*, in 2 EUROPEAN SOCIAL CHARTER, CONCLUSIONS XV-1 621, 643 (2001) (indicating that the Committee was concerned that over one million pensioners were not taking advantage of income support to which they were entitled, and requesting that the United Kingdom provide information regarding the pensioners’ knowledge of the benefits), *available at* <http://www.humanrights.coe.int/cseweb/FR/PDF/html%20concs/Conclusions%20xvi%20united%20kingdom.html> (last visited Feb. 22, 2003).

333. See European Comm. of Soc. Rts., *Ireland*, in 2 EUROPEAN SOCIAL CHARTER, CONCLUSIONS XV-1 13, 34 (2001) (mandating that states should not be able to legislate further restrictions on entitlements that are guaranteed by the Charter), *available at* <http://www.humanrights.coe.int/cseweb/FR/PDF/html%20concs/Conclusions%20xvi%20ireland.htm> (last visited Feb. 22, 2003).

334. See Conclusions XV-1 on Norway, *supra* note 331.

“sufficient resources to provide for the necessities of the life as determined by reference to the prevailing cost and standard of living within the Contracting Party concerned”³³⁵ are covered by that provision. Therefore, to ensure that those individuals who are in need receive adequate social and medical assistance, states must guarantee that the social benefits they provide keep pace with increases in the cost of living.³³⁶ In the end, the Committee found that the general goal that arises from Article 13 is that states must develop an integrated strategy to assist individuals and families in overcoming poverty.³³⁷

With respect to the relationship between Article 23 and Article 12, which ensures a right to social security, the Explanatory Report states that the latter can be utilized to interpret the rights of the elderly to social protection only if necessary.³³⁸ In that sense, it appears from that language that the scope of those provisions may overlap. To avoid such a situation, the more specific protections afforded by Article 12 should be used to further clarify and define the scope of the right embodied in Article 23.

Article 12 guarantees the right to social security, understood in a broad sense, by:

establishing the principle of the institution or maintenance of a social security system (paragraph 1), then by defining a minimum level for this system (paragraph 2) and providing that it should be progressively

335. See SAMUEL, *supra* note 327, at 314-15 (discussing the official interpretation of a lack of “adequate resources”).

336. See European Comm. of Soc. Rts., *Denmark*, in 1 EUROPEAN SOCIAL CHARTER, CONCLUSIONS XV-1 137, 164-65 (2001) (demonstrating the Committee’s concern that cost of living adjustments for social benefits have not kept up with the rate of inflation), *available at* <http://www.humanrights.coe.int/cseweb/FR/PDF/html%20concs/Conclusions%20xvi%20denmark.html> (last visited Feb. 22, 2003).

337. See European Comm. of Soc. Rts., *Malta*, in 1 EUROPEAN SOCIAL CHARTER, CONCLUSIONS XV-1 395, 411 (2001) (stating that a goal of the Charter is for states to have a strategy to assist individuals and families in overcoming poverty), *available at* <http://www.humanrights.coe.int/cseweb/FR/PDF/html%20concs/Conclusions%20xvi%20malta.html> (last visited Feb. 22, 2003).

338. See Explanatory Report to the Additional Protocol to the European Social Charter, *supra* note 311, para. 55 (indicating the relationship between the provisions).

brought up to a higher level (paragraph 3) and, finally, by encouraging measures to ensure equality of treatment between the nationals of one Contracting Party with the nationals of the other Contracting Parties, as well as the granting, maintenance, and resumption of social security rights.³³⁹

To assess whether a system of social security is “maintained” in accordance with Article 12, the Committee examines the population concerned, risks covered, level of benefits, and type of funding.³⁴⁰ In the Conclusions on Iceland, the Committee further expanded the criteria to be used when evaluating the social security system to include coverage of a “significant percentage of the population.”³⁴¹ The Committee also examined state measures to stop employers from delaying payment or refusing to pay social security contributions.³⁴² In the Conclusions on Turkey, the Committee cautioned that permitting the existence of an “informal, unregistered” sector deprives the social security system of significant sources of income, thereby jeopardizing the existence of the system itself. For

339. See SAMUEL, *supra* note 327, at 297 (setting out the means by which the Article establishes the right to social security).

340. See European Comm. of Soc. Rts., *Belgium*, in 1 EUROPEAN SOCIAL CHARTER, CONCLUSIONS XV-1 67, 84 (2001) (setting out the criteria for establishing whether a social security system satisfies the requirements of Article 12, paragraph 1), available at <http://www.humanrights.coe.int/cseweb/FR/PDF/html%20concs/Conclusions%20xvi%20belgium.html> (last visited Feb. 22, 2003).

341. See European Comm. of Soc. Rts., *Iceland*, in 1 EUROPEAN SOCIAL CHARTER, CONCLUSIONS XV-1 321, 339 (2001) (expanding the criteria used by the Committee to evaluate conformity with Article 12, paragraph 1 to include “coverage of a significant percentage of the population,” particularly in essential branches, such as medical care), available at <http://www.humanrights.coe.int/cseweb/FR/PDF/html%20concs/Conclusions%20xvi%20iceland.html> (last visited Feb. 22, 2003).

342. See European Comm. of Soc. Rts., *Cyprus*, in 1 EUROPEAN SOCIAL CHARTER, CONCLUSIONS XV-1 111, 124 (2001) (requesting that Cyprus provide documentation of its efforts to prevent employers from refusing to pay or delaying to pay social contributions), available at <http://www.humanrights.coe.int/cseweb/FR/PDF/html%20concs/Conclusions%20xvi%20cyprus.html> (last visited Feb. 22, 2003).

that reason, it requested information on the penalties applied to employers who fail to register employees.³⁴³

In addition, Article 12 also establishes that the standards set in the European Code of Social Security will assess states' compliance with the duty to maintain a social security system.³⁴⁴ In relation to old-age benefits, for example, the Code regulates the age of qualification for a pension,³⁴⁵ the persons comprised by this benefit,³⁴⁶ and even the procedure by which the amount of the benefits should be calculated.³⁴⁷ In practice, if a Contracting State to the Revised Code does not comply with those standards, the Committee may find that state in breach of its obligation to maintain a system of social security with regard to older persons.³⁴⁸

Finally, the third part of Article 12 embodies a "dynamic obligation" that requires states to make a continuous effort to bring their social security system to a progressively higher level.³⁴⁹ For example, in the context of the assessment of the Swedish report, the Committee asserted that states must provide information on the

343. See European Comm. of Soc. Rts., *Turkey*, in 2 EUROPEAN SOCIAL CHARTER, CONCLUSIONS XV-1 587 (2001) (discussing that the failure by employers to register their employees undermines the solvency and effectiveness of the social security system), available at <http://www.humanrights.coe.int/cseweb/FR/PDF/html%20concs/Conclusions%20xvi%20turkey.html> (last visited Feb. 22, 2003).

344. See European Code of Social Security (Revised), *opened for signature* Nov. 6, 1990, Europ. T.S. No. 139 (establishing harmonized standards for social security programs), available at <http://conventions.coe.int/Treaty/EN/cadreprincipal.htm> (last visited Feb. 24, 2003).

345. See *id.* art. 26 (codifying that the age at which benefits are first granted cannot be over sixty-five, unless appropriate circumstances, such as economic or social criteria, justify a higher age).

346. See *id.* art. 28 (setting out the qualifications of individuals who would receive old-age benefits).

347. See *id.* arts. 29, 71-72 (describing the process of calculating old-age benefits).

348. See SAMUEL, *supra* note 327, at 301 (indicating that there are cases in which the Committee finds no violation of Article 12, paragraph 2, even if a state's social security system does not comply with the European Code of Social Security).

349. See *id.* at 302-03 (mandating that social security systems are not permitted to stagnate in their rate of progression).

reform of the pension scheme and the changes introduced in the system of reimbursement of health care and medical costs to establish whether states complied with Article 12.³⁵⁰ This duty, which is of a progressive nature, allows the Committee to closely monitor whether states are improving their system, and to immediately point out any regressions that might exist in the domestic implementation of the right to social security.

Another obligation that Contracting States assumed under Article 23 is to adopt measures enabling elderly persons to choose their lifestyle and to lead independent lives in their familiar surroundings. To ensure this aspect of the protection, states must take appropriate measures, either directly or in cooperation with public or private organizations, to provide housing suited to elderly needs, or adequate support for adapting elderly persons' houses to those needs. The Explanatory Report states that the ability of aged persons "to remain in their familiar surroundings should be assessed in relation to their psychological and physical state, their living conditions, the standard of their accommodation, etc."³⁵¹ This explanation suggests that the drafters intended for states to implement this duty by providing support, including financial support, so that elderly persons may remain in their houses as long as permitted by their physical or psychological conditions. In that respect, for example, states have reported the adoption of measures such as home help services,³⁵² the construction of new residential buildings for the elderly, the provision of grants for conversion of old housing,³⁵³ special

350. See European Comm. of Soc. Rts., *Sweden*, in 2 EUROPEAN SOCIAL CHARTER, CONCLUSIONS XV-1 553, 570 (2001) (requesting that Sweden provide additional information that would assist the Committee in evaluating the social security system), available at <http://www.humanrights.coe.int/cseweb/FR/PDF/html%20concs/Conclusions%20xvi%20sweden.html> (last visited Feb. 22, 2003).

351. See Explanatory Report to the Additional Protocol to the European Social Charter, *supra* note 311, para. 56 (noting the importance of providing elderly people with the opportunity to live in familiar surroundings).

352. See Conclusions XV-2 on Finland, *supra* note 310, at 184 (setting out provisions that enable elderly individuals to remain in their homes).

353. See Conclusions XV-2 on Italy, *supra* note 320, at 329 (discussing Italian plans for providing additional housing for the elderly).

transportation services, and daycare to comply with that obligation.³⁵⁴ Moreover, Sweden reported that according to the Article 23 requirements, "[t]he principle is that the decision to move a person to special accommodation is taken only as a last resort, when that person can no longer lead an independent life."³⁵⁵ The Committee, when reviewing national reports, requested that states provide additional information regarding the procedures used to assess elderly people's need for home services.³⁵⁶ Also, it has requested information on eviction of elderly persons and the measures adopted to protect them against evictions.³⁵⁷

In addition to housing, Contracting States must adopt measures to provide appropriate health care to elderly persons who remain at home. This aspect of Article 23, however, has not been discussed in the context of the assessment of national reports, probably for lack of information submitted by states. Still, the Revised Charter provides for the right to protection of health in Article 11,³⁵⁸ and the Committee has extensively monitored compliance with this particular right. The Committee noted in its first Conclusions regarding Article 11 that a contracting party will be deemed in satisfaction of its duties under this article if the Contracting Party's

354. See European Comm. of Soc. Rts., *Sweden*, in 2 EUROPEAN SOCIAL CHARTER, CONCLUSIONS XV-2 545, 580-81 (2001) (noting programs that provide transportation and access to adult daycare for elderly individuals who are unable to care for themselves), available at http://www.humanrights.coe.int/cseweb/GB/GB2/Conclusions_XV-2/Sweden%20XV-2.doc (last visited Feb. 22, 2003).

355. See *id.*

356. See Conclusions XV-2 on Finland, *supra* note 310, at 184 (requesting additional information from Finland regarding home help services).

357. See Conclusions XV-2 on Italy, *supra* note 320, at 329 (expressing concern over the possibility of evicting elderly people).

358. Revised European Social Charter, *supra* note 10, art. 11. Article 11 states:

With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in co-operation with public or private organisations, to take appropriate measures designed *inter alia*:

1. to remove as far as possible the causes of ill-health;
2. to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health;
3. to prevent as far as possible epidemic, endemic and other diseases, as well as accidents.

Id.

health system comprises certain provisions.³⁵⁹ One of these provisions, according to the Committee, includes special measures to protect the health of elderly persons.³⁶⁰ Therefore, since the introduction of this article, the Committee has continued to insist on adequate provisions within each Contracting State's health system for special measures to protect the elderly.

The Committee also positively noted those provisions that take into account the age of the individual, focusing on preventative measures.³⁶¹ Given the interpretation by the Committee, specific comments regarding elderly protection would be in sections regarding Article 11.³⁶² In regards to the other provisions of this article, the Committee generally requested information about health education for a variety of age groups, but has not specifically inquired about elderly persons. Also, the Committee noted that each Contracting Party should have adequate vaccination programs. Still, no particular mention of elderly protection has yet been stated.

Next, when elderly persons are unable to stay home, Article 23 establishes that states must adopt measures to provide older persons with the services necessitated by their state of health. In this regard, the word "services" includes admission to specialized institutions for elderly persons when appropriate.³⁶³ The need to provide these services assumes the existence of an adequate number of institutions that the state can establish directly or in cooperation with other relevant public or private organizations.

This aspect of the rights of the elderly is related to the other obligation embodied in Article 23 in which Contracting States must afford specific protections to older persons living in institutions. Those protections include all the measures advocated in the previous sections to elderly persons living by themselves, "but only in so far as this mode of life does not render their implementations impossible

359. See e.g. SAMUEL, *supra* note 327, at 283-84.

360. See *id.*

361. See *id.* at 287.

362. See *id.* at 288.

363. See Explanatory Report to the Additional Protocol to the European Social Charter, *supra* note 311, para. 57.

or manifestly irrelevant.”³⁶⁴ In supervising this duty, the Committee has requested information pertaining to the extent that elderly people or their families have been required to contribute to expenses for care and accommodations when living in such institutions.³⁶⁵ Moreover, it has requested more details about the type of accommodations available, as well as the arrangements for supervision of the quality and operation of institutions for the elderly.³⁶⁶

Lastly, Article 23 also provides that states must adopt special measures to protect the privacy of older persons living in institutions and to guarantee their participation in decisions concerning living conditions in those institutions. The Explanatory Report states that the right to privacy in this context warrants special protection given the vulnerable situation of elderly persons living in institutions.³⁶⁷ In the conclusions regarding national reports, the Committee has insisted that states provide information on legal and administrative measures protecting that right, but has been unable to develop any particular standard given the lack of state response.³⁶⁸ The Committee may choose to draw from the case law of the European Court of Human Rights when defining the scope of the right of the elderly living in institutions to have their privacy respected. Article 8 of the European Convention on Human Rights protects the right to respect for private life, family life, the home, and correspondence and establishes the permissible limitations applicable to its exercise.³⁶⁹ The right to privacy in the European context includes the

364. *See id.*

365. European Comm. of Soc. Rts., *Slovakia*, in EUROPEAN SOCIAL CHARTER, CONCLUSIONS XV-2 addendum 127, 195 (2001), available at www.humanrights.coe.int/cseweb/GB/GB2/Conclusions_XV-2/Slovakia%20XV-2.doc (last visited Apr. 5, 2003).

366. *See id.*

367. Explanatory Report to the Additional Protocol to the European Social Charter, *supra* note 311, para. 59.

368. *See, e.g.*, Revised European Social Charter, *supra* note 10, art. 12 (establishing that Parties must undertake to establish certain standards for elderly people regarding social security).

369. *See* European Convention on Human Rights, *supra* note 10, art. 8. Article 8 reads:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

notion of state non-interference as well as affirmative obligations to ensure this right. While the majority of the case law on this article deals with family issues, homosexuality, and surveillance issues, the former European Commission on Human Rights reaffirmed that the right to privacy is not just the right to live free of publicity. It stated that this right "comprises also, to a certain degree, the right to establish and develop relationships with other human beings . . . for the development and fulfilment of one's own personality."³⁷⁰ This protection should include the protection of elderly persons who are in institutions. These individuals should be free to develop relationships and live private lives while they are within the institutional walls of a nursing home or other facility. The right to privacy should also cover the release of data collected by the authorities, whether public or private. The European Commission's pronouncements on this topic have so far related to those persons who have voluntarily placed themselves in the public sphere.³⁷¹ Regardless, the right to privacy applies to the elderly living in a facility that is not their own private property not only because they are members of society, but because as a vulnerable group that should be afforded special protection. Similarly, the Committee has unsuccessfully requested information on the steps Parties have taken to allow older persons to participate in decisions concerning living conditions in institutions.³⁷²

In addition to defining the scope of Article 23, it is important to consider two other issues that arise out of implementing the right of the elderly to social protection. First, immediate enforceability is an important feature of this right that is different from other economic, social, and cultural rights, particularly those protected by the ICESCR. As the Revised European Social Charter does not embody a clause of "progressive implementation" of the rights protected

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Id.

370. App. No. 6825/74, 5 Eur. Comm'n H.R., Dec. & Rep. 86 (1974).

371. See GOMIEN, *supra* note 24, at 231.

372. See, e.g. Revised European Social Charter, *supra* note 10. art 12.

therein, Contracting Parties must satisfy the obligations arising out of the Revised Charter immediately upon ratification.³⁷³ However, some of the obligations under the Revised Charter are considered “dynamic,” meaning that “compliance turns upon effort and improvement rather than attainment.”³⁷⁴ Another issue to take into account is that Contracting States are not required to accept all the obligations embodied in the Revised European Social Charter upon ratification. In fact, Article A Part III of the Revised Charter states only that Contracting Parties should accept at least six out of a list of nine rights enumerated in Part II of that treaty, among which the right of the elderly to social protection is not included.³⁷⁵ In addition, Article A provides that in order for states to be bound, they must select other rights protected in Part II, up to a total of sixteen articles or sixty-three numbered paragraphs. In this regard, only six states that have ratified the Revised European Social Charter have bound themselves under Article 23.³⁷⁶ This is in addition to another four states that are not yet parties to the Revised Charter, but that have ratified the Additional Protocol to the European Social Charter, which originally embodied these same rights in Article 4.³⁷⁷ The fact

373. See GOMIEN, *supra* note 24, at 381.

374. *Id.*

375. Revised European Social Charter, *supra* note 10, arts. 1, 5-7, 12-13, 16, 19-20 (referring to the individual enumerated rights). These rights include: the right to work (Article 1); the right to organize (Article 5); the right to bargain collectively (Article 6); the right of children and young persons to protection (Article 7); the right to social security (Article 12); the right to social and medical assistance (Article 13); the right of the family to social, legal, and economic protection (Article 16); the right of migrant workers and their families to protection and assistance (Article 19); and the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex (Article 20).

376. See Chart of Signatures and Ratifications of the European Social Charter (Revised), [available](http://conventions.coe.int/Treaty/EN/searchsig.asp?NT=163&CM=1&DF=24/02/03) at <http://conventions.coe.int/Treaty/EN/searchsig.asp?NT=163&CM=1&DF=24/02/03> (last visited Feb. 24, 2003); see also List of Declarations Made with Respect to Treaty no. 163, [available](http://conventions.coe.int/Treaty/EN/DeclareList.asp?NT=163&CM=1&DF=24/02/03) at <http://conventions.coe.int/Treaty/EN/DeclareList.asp?NT=163&CM=1&DF=24/02/03> (last visited Feb. 24, 2003). The six states that have bound themselves to Article 23 of the Revised European Social Charter are: France, Ireland, Italy, Norway, Slovenia, and Sweden.

377. See Chart of Signatures and Ratifications of the European Social Charter (Revised), [available](http://conventions.coe.int/Treaty/EN/searchsig.asp?NT=163&CM=1&DF=24/02/03) at <http://conventions.coe.int/Treaty/EN/searchsig.asp?NT=163&CM=1&DF=24/02/03>

that states have not widely accepted this right has prevented the Committee from developing more extensive case law, thereby confining the protection of the elderly to a less significant position in the implementation of the rights protected by the European Social Charter.

Besides the Revised European Social Charter, the European Union has recently adopted the Charter of Fundamental Rights.³⁷⁸ This Charter, which applies exclusively to the states that are members of the European Union, includes an ambitious and innovative list of human rights covering the range of civil, political, economic, and social rights. In relation to the protection of the elderly, Article 25 states: "The [European] 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."³⁷⁹

The Explanatory Report indicates that this right must be interpreted in light of Article 23 of the Revised European Social Charter and two provisions of the Community Charter of the Fundamental Social Rights of Workers.³⁸⁰ At this point, however, the legal status of the Charter of Fundamental Rights is unclear. Therefore, the impact that Article 25 might have in furthering the rights of the elderly in Europe remains uncertain.

B. THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

Given the political and economic situation of the Western Hemisphere during the last three decades, it is no surprise that Inter-American human rights treaties focused more on the civil and political rights of its citizens than on their economic, social, and

<http://conventions.coe.int/Treaty/EN/searchsig.asp?NT=163&CM=1&DF=24/02/03> (last visited Feb. 24, 2003); *see also* List of Declarations Made with Respect to Treaty no. 163, available at <http://conventions.coe.int/Treaty/EN/DeclareList.asp?NT=163&CM=1&DF=24/02/03> (last visited Feb. 24, 2003). The four states that have ratified the Additional Protocol are: Czech Republic, Denmark, Finland, and Greece.

378. Charter of Fundamental Rights of the European Union, *supra* note 12.

379. *Id.* art. 25.

380. *See* Draft Charter of Fundamental Rights of the European Union, art. 25, Oct. 11, 2000, CHARTE 4473/00 CONVENT 50 (explaining that Article 25 draws on the revised European Social Charter Article 23), available at <http://www.europarl.eu.int/charter> (last visited Feb. 24, 2003).

cultural rights. The Inter-American Commission summarized its own preoccupation with the protection of civil and political rights in its 1983-1984 report to the General Assembly:

In fact, the individual and political guarantees that the effectiveness of those rights tends to ensure include as a basic assumption that the benefits derived from that effectiveness would be reflected in the economic, social and cultural sphere. In other words, it was considered that a political order of representative democracy, by its very nature, should be translated into substantive improvements in the quality of life of the great majority, if not all, of the population.³⁸¹

However, the Inter-American Commission also noted the connection between the concept of civil and political rights with the economic, social, and cultural rights of each individual. It stated that "there is no automatic and necessary relationship between the effectiveness of civil and political rights and the satisfaction of the basic needs of large sectors of the population."³⁸² The Inter-American Commission realized that the hemisphere will not achieve the full implementation of its citizens' civil and political rights without also attacking the perpetual violations of their economic, social, and cultural rights at the same time.

It was in this regard that the General Assembly instructed the General Secretariat to prepare a preliminary draft additional protocol in the area of social, economic, and cultural rights in 1982. Eventually, the Member States of the Organization of American States ("OAS") signed the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights ("Protocol of San Salvador") in November of 1988.³⁸³ A brief summary of the history of the draft protocol shows a general understanding and acceptance that the elderly population requires special protection.

The original draft of the Protocol of San Salvador did not contain any protection for the elderly. In its comments regarding the draft,

381. Inter-Am. C.H.R., 137-144 Ann. Rep. 1983-4, OEA/Ser. P/L/II.63, doc. 10 (1984), available at <http://www.cidh.oas.org/annualrep/83.84sp/indice.htm> (last visited Feb. 24, 2003).

382. *Id.*

383. Protocol of San Salvador, *supra* note 9.

the Inter-American Commission felt it necessary to “include certain relevant groups in the Protocol of San Salvador that have not yet been the object of international protection in the area of human rights such as the elderly.”³⁸⁴ The Inter-American Commission argued that certain minority populations deserve special attention in order for those persons to fully enjoy their economic, social, and cultural rights. In fact, the Inter-American Commission stated that governments should adopt provisions that go beyond the measures adopted for the majority of the population so that minority groups can adequately enjoy those rights. As for the elderly, the Inter-American Commission stated its concern that “often they are obliged to live under seriously unprotected conditions.”³⁸⁵ The Inter-American Commission referred to the elderly as an “especially vulnerable group” and stated they “must receive priority attention from the government.”³⁸⁶

In its draft protocol submitted to the General Assembly through its annual report of 1985-1986, the Inter-American Commission listed the protection of the aged as Article 19.³⁸⁷ It reiterated its concern for the elderly as a group of persons that require special protection, as well as its belief that governments should pass specific measures for

384. Inter-Am. C.H.R., Annual Report 1983-4, *supra* note 381.

385. *Id.*

386. *Id.*

387. Inter-Am. C.H.R., 201-211 Ann. Rep. 1985-86, OEA/Ser.L/V/II.68, Doc. 8 rev. 1 (1986), *available at* <http://www.cidh.oas.org/annualrep/85.86span/Indice.htm> (last visited Feb. 24, 2003). The language of Article 19 reads:

Article 19: Protection of the Aged

Everyone shall have the right to special protection during his old age. To that end, the States Parties undertake to adopt the necessary measures for ensuring the realization of this right, and, in particular:

- a) to provide appropriate facilities, such as specialized food and medical attention for persons of an advanced age who lack it and are unable to provide for themselves,
- b) to undertake specific employment programs for providing the aged with an opportunity to engage in a productive activity appropriate to their ability and respectful of their vocation or wishes,
- c) to promote the formation of social organizations designed to improve the quality of life of the aged.

Id.

groups such as the elderly that go beyond those basic provisions necessary for the general majority.³⁸⁸

In the report of the Permanent Council on the Draft Additional Protocol,³⁸⁹ the Working Group made no comments regarding the Inter-American Commission's addition of Article 17, which protects the elderly, except that it maintained the text of the Inter-American Commission's submission. This new draft took into account comments made by the governments of the Working Group, as well as relevant international organizations. Some governments and organizations made comments about the elderly provision. For example, the Peruvian government reaffirmed the need to extend protection to special social groups such as the elderly.³⁹⁰ The Pan American Health Organization recommended, in its proposal for the article on health, a provision that associated the aged with other high risk populations that deserve specific attention.³⁹¹ The Mexican government wrote in its observations that it considers protection for the elderly to be a right that should be implemented progressively.³⁹² The Argentinean Government reaffirmed the reasonableness in providing special protection to vulnerable groups.³⁹³

In its final report regarding negotiations to the Permanent Council, the Working Group reported on discussions relating to many of the articles in the Draft Protocol. First, the Working Group reported on Article 3, the non-discrimination provision. The Working Group

388. *Id.* at 195-200.

389. Report of the Permanent Council on the Draft Additional Protocol to the American Convention on Human Rights, OEA/Ser.P, AG/doc.2189/87, 30 October 1987.

390. Observations on the Preliminary Draft Additional Protocol to the American Convention on Human Rights, Permanent Mission of Peru to the Organization of American States, OEA/Ser.G, CP/CAJP-622/85 add.3, 9 July 1986, § 2, ¶ 5.

391. Proposal Presented by the Pan American Health Organization (PAHO), OEA/Ser.G, CP/CAJP-622-85 add.5, 15 July 1986.

392. Observations on the Preliminary Draft of the Additional Protocol to the American Convention on Human Rights, Permanent Mission of Mexico to the Organization of American States, OEA/Ser. G, CP/CAJP-622/85 add. 6, 18 August 1986.

393. Observations of the Government of the Argentine Republic on the Additional Protocol to the American Convention on Human Rights, OEA/Ser. G, CP/CAJP-622/85 add. 10, 1 October 1987.

noted that it copied the non-discrimination clause text of the American Convention on Human Rights. It therefore added the specific classifications of groups that are protected, namely race, color, sex, language, religion, political or other opinions, national or social origin, economic status, birth, or any other social condition. Age is once again not in this list, as it was not originally in the American Convention. There appears to be little discussion regarding the inclusion of this provision in the non-discrimination article.

Second, the Working Group did not remove the elderly from the list of groups in Article 9 that should receive social security benefits.³⁹⁴ The Group stated that unemployment was removed because the economic situations of most of the Member States would prevent most governments from being able to guarantee this right.³⁹⁵ But it is fortunate to note that the Working Group did not remove old age from this article.

With respect to Article 17, the Group decided to introduce the concept of progression into the commitment assumed by the states in this provision.³⁹⁶ To this end the term “progressively” was inserted into the opening paragraph of this article, so that its second sentence now reads: “With this in view the States Parties agree to take progressively the necessary steps to make this right a reality.”³⁹⁷

This was the final report of the Working Group. The Draft Protocol, as submitted in this final report, was adopted on November 17, 1988 at the Eighteenth Regular Session of the General Assembly. Thirteen countries signed the protocol that day, but the protocol did not come into force until 1999. The final version of Article 17 states that:

394. Report of the Working Group to Study the Draft Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, sec. B, para. 5, Inter-Am. C.H.R. OEA/Ser. G, CP/CAJP-728/88 corr. 1, 17 Oct. 1988 (including the right to social security to protect against the consequences of old age and to preserve a dignified and decent existence).

395. *See id.* (recognizing the limitations of this agreement because of the limitations of member countries to guarantee economic rights in their financial climates).

396. *See id.* sec. B, para. 9 (establishing goals to provide social organizations and work programs aimed at improving the quality of life for the elderly and participation in society).

397. *Id.*

Everyone has the right to special protection in old age. With this in view the States Parties agree to take progressively the necessary steps to make this right a reality and, particularly, to:

a. Provide suitable facilities, as well as food and specialized medical care, for elderly individuals who lack them and are unable to provide them for themselves;

b. Undertake work programs specifically designed to give the elderly the opportunity to engage in a productive activity suited to their abilities and consistent with their vocations or desires;

c. *Foster the establishment of social organizations aimed at improving the quality of life for the elderly.*³⁹⁸

The language of Article 17 raises three important issues. First, it expressly establishes that the elderly are a vulnerable group that deserves special protection. Consequently, States Parties must adopt special measures to ensure older persons full and equal enjoyment of human rights. Second, the nature of this right is “progressive,” which means that even though states must undertake steps to realize this right, Article 17 is not immediately enforceable upon ratification. Interpretations of Article 17 must be consistent in light of the obligation established in Article 1 of the Protocol of San Salvador. Article 1 states that each state’s compliance with the “progressive implementation” of rights embodied in this instrument will be assessed to the extent allowed by states’ available resources, and taking into account their degree of development.³⁹⁹ Finally, the scope of this right is qualified by the word “particularly,” suggesting that

398. *Id.* (emphasis added).

399. Protocol of San Salvador, *supra* note 9, art. 1. Specifically, Article 1 reads:

The States Parties to this Additional Protocol to the American Convention on Human Rights undertake to adopt the necessary measures, both domestically and through international cooperation, especially economic and technical, to the extent allowed by their available resources, and taking into account their degree of development, for the purpose of achieving progressively and pursuant to their internal legislations, the full observance of the rights recognized in this Protocol.

Id.

the rights contained therein are not exhaustive. States must strive to accomplish protection of at least the minimum core enumerated in Article 17, but remain free to afford additional safeguards if they have resources available.

The minimum core of entitlements ensured in Article 17 appears to include the rights to housing, food, and medical care for those elderly persons who are in need and are unable to provide for themselves. Moreover, states must take steps to develop work programs that give the elderly opportunities to engage in productive lives. Finally, the duty to foster the establishment of organizations designed to improve old persons' lives suggests that states can carry out their obligations either directly or in cooperation with private institutions. This last aspect of the protection is extremely relevant, particularly in the context of the Western Hemisphere where states usually lack the public resources to satisfy all the needs of the elderly.

In comparative terms, the scope of this right is more restrictive than Article 23 of the European Social Charter since it grants very limited protection to elderly persons who are not in need. Similarly, Article 17 appears to be less ambitious than General Comment 6 adopted by the Committee on Economic, Social, and Cultural Rights, which affords broader protection to the elderly, such as in relation to rights such as education. Arguably, the limitations of Article 17 can be complemented by other provisions embodied in the Protocol of San Salvador, namely: the right to social security (Article 9), which expressly recognizes that states should ensure those benefits to older persons; the right to health (Articles 10); the right to food (Article 11); and even the right to education (Article 13). Given the fact that the Protocol of San Salvador came into force very recently,⁴⁰⁰ it is difficult to speculate as to the scope that the appropriate supervisory bodies will attach to the rights of the elderly. However, as a guide, it is very possible that the Inter-American Commission on Human Rights will utilize case law developed by other organs such as the

400. See Press Release, End of 106th regular sessions - March 13, 2000, Inter-Am C.H.R. No.2 -00 (announcing that the Protocol of San Salvador came into force on November 16, 1999), available at <http://www.cidh.oas.org/Comunicados/English/2000/Press2-00.htm> (last visited Feb. 22, 2003)

Committee of Experts under the European Social Charter or the Committee on Economic, Social, and Cultural Rights under the ICESCR, when defining the precise meaning of Article 17.

In addition to the Protocol of San Salvador, the Inter-American Commission has chastised governments when they violate their citizens' economic, social, and cultural rights, including ill-treatment of the elderly. For example, in the 2001 special country report on Paraguay, the Inter-American Commission criticized the government's handling of the social security crisis.⁴⁰¹ In the 1993 special report on Colombia, the Inter-American Commission described its discontentment with the Colombian government's inability to protect its citizens' right to life, including the right of the elderly, during the violence that had subsumed the nation.⁴⁰² Elderly persons account for many of the victims of the violence during the past decade. In the Guatemala report of 1993, the Inter-American Commission expressed concern regarding police brutality when anti-riot police attacked and beat marchers, including elderly persons.⁴⁰³

The Inter-American Commission usually monitors the protection of economic, social, and cultural rights on the basis of Article 26⁴⁰⁴

401. See Third Report on the Situation of Human Rights in Paraguay, paras. 42-43, OEA/Ser.L/V/II.110, Doc. 52, 9 March 2001 (denouncing human rights violations committed during the dictatorship and calling for the Paraguayan State, through the judiciary, to fulfill its duty to investigate and punish the persons responsible for the human rights violations).

402. See Second Report on the Situation of Human Rights in Colombia, sec. B, OEA/Ser.L/V/II.84, Doc. 39 rev., Oct. 14, 1993 (chastising the Colombia government for its inability to protect the personal liberties of its citizens).

403. See generally Report on the Situation of Human Rights in Guatemala, ch. IX, OEA/Ser.L/V/II.83, Doc. 16 rev., June 1, 1993 (discussing how the Guatemalan system has been ineffective in guaranteeing rights right to freedom of thought, expression, and assembly).

404. See American Convention on Human Rights, *supra* note 26, art. 26. Article 26 reads:

The States Parties undertake to adopt measures, both internationally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.

Id.

of the American Convention on Human Rights ("American Convention"),⁴⁰⁵ the Charter of the Organization of American States,⁴⁰⁶ and the American Declaration of the Rights and Duties of Man ("American Declaration").⁴⁰⁷ Although Article 26 of the American Convention and the provisions of the Charter of the OAS are of a general nature, the American Declaration recognizes specific economic, social, and cultural rights that are relevant to further the protection of elderly persons in the Inter-American System.⁴⁰⁸ In particular, the Declaration embodies, *inter alia*: the right to the protection of the family (Article VI); the right to the preservation of health and well-being (Article XI); the right to education (Article XII); the right to work and to a fair remuneration (Article XIV); and the right to social security (Article XVI). Furthermore, the

405. See e.g., Case 12.249, Inter-Am. C.H.R., Annual Report 2000, OEA/Ser./L/V/II.111, Doc. 20 Rev. (2001) [hereinafter *Cortez v. El Salvador*] (alleging that the Republic of El Salvador was in violation of several provisions of the American Convention on Human Rights for its failure to adequately treat Jorge Odir Miranda Cortez and twenty-six other persons who were suffering from HIV or AIDS). Specifically, the petitioners alleged that the Republic of El Salvador was in violation of: the right to life (Article 4); humane treatment (Article 5); equal protection before the law (Article 24); judicial protection (Article 25); and economic, social, and cultural rights (Article 26), in accordance with the general obligation set forth in Article 1(1) and the duty set forth in Article 2 of the aforementioned international instrument. See also Case 11.381, Inter-Am. C.H.R., Annual Report 2001, OEA/Ser./L/V/II.114, Doc. 5 Rev. (2001) [hereinafter *Fajardo v. Nicaragua*] (holding the state of Nicaragua responsible in a case involving striking workers for violations of the right to humane treatment (Article 5), a fair trial (Article 8), compensation (Article 10), freedom of association (Article 16), and judicial protection (Article 25)).

406. See Charter of the OAS, as amended by the Protocol of Buenos Aires in 1967 and the Protocol of Cartagena de Indias in 1985, OAS Doc., OEA/Ser. G, CP/doc.1958/89, Jan. 13, 1989 (detailing the establishment of an international Organization of American States as a regional agency to the United Nations to achieve an order of peace and justice, to promote solidarity, to strengthen collaboration, and to defend the sovereignty, territorial integrity, and independence of all member states).

407. Novena Conferencia Internacional Americana, *Actas y Documentos*, Vol. VI (Bogotá: Ministerio de Relaciones Exteriores, 1953), 297-302.

408. Compare *Universal Declaration of Human Rights*, *supra* note 102; with *American Convention on Human Rights*, *supra* note 26 (recognizing that both these documents recognize civil and political rights, as well as economic, social, and cultural rights).

Declaration contains duties toward parents (Article 30) and duties with respect to social security and welfare (Article 34).

Under the Statute of the Inter-American Commission on Human Rights,⁴⁰⁹ the Inter-American Commission is empowered to monitor the human rights situation of the State Parties to the OAS and to elaborate and publish reports assessing whether or not those states respect all the rights protected by the American Declaration, including economic, social, and cultural rights.⁴¹⁰ The Inter-American Commission has traditionally had the power to review the adjudication of individual cases when the petitions alleged violations of only certain rights of the Declaration.⁴¹¹ However, several recent admissibility cases decided by the Inter-American Commission suggest a change in policy regarding this interpretation. In the *Saccone* case⁴¹² and the *Menéndez* case,⁴¹³ which involved old-age pensions,⁴¹⁴ the petitioners argued a violation of the rights to preservation of health, well-being, and social security protected by

409. See *Statute of The Inter-American Commission on Human Rights*, art. I, para. 1, G.A. Res. 447, Inter-Am C.H.R., 9th Sess. (1979), OAS/Ser.L/V/II.4 rev.8, 22 May 2001, available at <http://www.cidh.oas.org/Basicos/basic15.htm> (last visited Apr. 5, 2003).

410. See *id.* art. 18. (recommending to the governments of the states the adoption of progressive measures in favor of human rights in the framework of their legislation, constitutional provisions, and international commitments, as well as measures to advance observance of those rights).

411. See *id.* art. 20 (emphasizing particular attention to the following rights: life, liberty, and personal security (Article I); equality before the law (Article II); religious freedom (Article III); freedom of investigation, opinion, expression, and dissemination (Article IV); fair trial (Article XVIII); protection from arbitrary arrest (Article XXV); and due process of law (Article XXVI)).

412. See *e.g.*, *Saccone*, Inter-Am. C.H.R., OEA/Ser./L./V/II.95, doc. 7 rev. 193 (alleging that Argentina had violated Articles 11 and 16 of the American Declaration of the Rights and Duties of Man and Article 9 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights by dissolving the state-run Compensatory Fund that provided pensions to retirees).

413. See *e.g.*, *Menéndez*, Inter-Am. C.H.R., OEA/Ser./L./V/II.111, doc. 20 rev. 95 (alleging that fundamental rights protected by Articles 8 and 25 of the Convention were violated by difficulties in securing final judgments and unnecessary delays in adjusting social security income).

414. See *supra* note 81 and accompanying text (detailing the factual background of these cases).

Articles XI and XVI of the American Declaration on the Rights and Duties of Man. Without providing a clear justification, the Inter-American Commission proceeded to analyze whether those claims constituted a "colorable claim" for admissibility purposes. Although in the end *Saccone* was found inadmissible for other reasons,⁴¹⁵ the Inter-American Commission declared *Menéndez* admissible and is currently considering the merits of this case. In the *Cirio* case, which also involved pension rights, the petitioner alleged a violation of, among others, the right to social security protected under Article XVI of the American Declaration.⁴¹⁶ The Inter-American Commission, in its analysis of admissibility, clarified that although some of the alleged violations occurred before the date of Uruguay's ratification of the American Convention, the Inter-American Commission is competent to apply the American Declaration as a source of international obligation. It further noted that Article 29 of the American Convention⁴¹⁷ "upholds the case law of the Inter-American Commission to the effect that the Inter-American Commission is competent to apply both the American Declaration and the American Convention in the same case."⁴¹⁸ If the Inter-American Commission decides that it can adjudicate violations of economic, social, and cultural rights protected by the American Declaration and the American Convention in an individual complaint, it will constitute a significant breakthrough for the enforceability of those rights. Consequently, the decisions in those cases might have an additional impact on the effective realization of

415. See *Saccone*, Inter-Am. C.H.R., OEA/Ser./L./V/II.95, doc. 7. rev. 193 (finding that discrimination does not exist because the government offered a legitimate purpose for difference in treatment and therefore the claim is not reviewable).

416. See *Cirio*, Inter-Am. C.H.R., OEA/Ser./L./V/II.114, doc. 5 (declaring the case admissible with respect to Articles of the American Declaration and of the American Convention). The case involved a retired Uruguayan military officer who was chastised for his comments opposing the government's position. *Id.* The government then stripped him of his pension, health insurance, and ability to obtain credit. *Id.*

417. See American Convention on Human Rights, *supra* note 26, art. 26 (1992) (emphasizing that "[n]o provision of this Convention shall be interpreted as: d. excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have").

418. *Cirio*, Inter-Am. C.H.R., OEA/Ser./L./V/II.114, doc. 5, para. 36.

rights that are essential for the protection of elderly persons, such as the right to social security and the right to health.

C. THE AFRICAN HUMAN RIGHTS SYSTEM

The African Charter on Human and Peoples' Rights ("African Charter") is the only human rights treaty of its nature that embodies both civil and political as well as economic, social, and cultural rights in the same instrument. In the preamble, the African Charter states that "civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights."⁴¹⁹ Not only does this provision connect both categories of rights, but it suggests that it is through the implementation of the economic, social, and cultural rights that civil and political rights will blossom. This is extremely different from the other regional systems discussed thus far. Both the European and Inter-American systems focus predominantly on civil and political rights in their charter documents, and it is only through the adoption of separate documents that these two systems articulate any significant protection for economic, social, and cultural rights.

Article 2 of the African Charter, the non-discrimination clause, states that "[e]very individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status."⁴²⁰

Once again, similar to the other regional systems and the international human rights system, there is no specific prohibition against age discrimination.

The African Charter considers the protection of the elderly in Article 18, alongside the protection of the family and of women. Article 18 states:

419. African Charter, *supra* note 11, prmb., para. 7.

420. *Id.* art. 2.

1. The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral.
2. The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.
3. The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.
4. The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.⁴²¹

The scope of the rights protected by this provision is not immediately clear because, as discussed below, there are very few instances in which the African Commission on Human Rights ("African Commission"), the supervisory body empowered to monitor compliance with the African Charter, has made references to the rights of the elderly. Nevertheless, it is important to note that Article 18(4) also recognizes the elderly as a vulnerable group that deserves special protection. Another important issue to stress is that States Parties to the African Charter must implement the rights protected therein immediately upon ratification.⁴²² According to Article 1, "[t]he Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them."⁴²³ This language suggests that all the rights enshrined in the African Charter are immediately justiciable, which has been reaffirmed by the African Commission on many occasions.⁴²⁴ Furthermore, the African Charter

421. *Id.* art. 18.

422. See Odinkalu, *supra* note 24, at 349 (arguing that the very nature of Article 18 requires a progressive interpretation to protect the dignity and human rights of all).

423. African Charter, *supra* note 11, art. 1.

424. See Odinkalu, *supra* note 24, at 349, n.143-45 (empowering the Commission to consider petitions alleging individual violations of human rights, to

protects rights and prescribes duties at the same time. In that sense, there is a duty corresponding to the right protected in Article 18(4), which is articulated in Article 29 regarding the family. This provision states:

The individual shall also have the duty: 1. To preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need;

This Article reaffirms the cultural norm of providing individual care for elderly members of an individual's family. Thus, taking these two provisions together, the state has a responsibility to provide special protection to the elderly as needed, while acknowledging at the same time that individual members of the elderly person's family will also provide needed care.⁴²⁵

It is also important to note what is not included in the African Charter. The African Charter does not list a right to social security nor a right to an adequate standard of living, housing, food, or protection from forced labor.⁴²⁶ But according to Odinkalu, the African Commission has the opportunity to interpret many of the articles together to form an expansive net of protection for the peoples of Africa.⁴²⁷ In this regard, the African Commission has asserted in a recent Communication⁴²⁸ that the rights to housing or shelter are implicitly guaranteed under the provisions guaranteeing the right to enjoy the best attainable state of mental health, the right to property, and the family protection clause (Articles 14, 16, and 18.1) of the African Charter. Further, the African Commission, in line with the Committee on Economic, Social and Cultural Rights, interpreted the right to adequate housing to embody protection against forced evictions. Moreover, the African Commission asserted

provide a remedy for such violations, and to monitor state parties' compliance with Charter obligations through a public examination of periodic reports).

425. African Charter, *supra* note 11, art. 29.

426. Odinkalu, *supra* note 24, at 341.

427. *Id.*

428. Final Communique, paras. 60, 63-64, Afr. Comm'n on Hum. & Peoples' Rts., 31st Sess., May 2-16, 2002: Pretoria, South Africa, *available at* <http://www1.umn.edu/humanrts/africa/achpr31f.html> (last visited Apr. 5, 2003).

that the African Charter implicitly guaranteed the right to food under the right to life, the right to health, and the right to economic, social, and cultural development (Articles 4, 16, and 22 respectively).

Regarding reports issued by the African Commission under the African Charter, only two communiqués mentioned the status of elderly persons. In the 26th Session of the African Commission in 1999, the African Commission expressed its concern about the treatment of the aged as a group affected by the various conflicts throughout the region.⁴²⁹ And in the 27th Session, the African Commission noted the complaints of non-governmental organizations that listed the elderly among the various victims of regional strife.⁴³⁰

Similar to the prevailing situation in the Inter-American System, the rights of the elderly in the African System remain uncertain. Notwithstanding the ample powers of the African Commission to address civil and political as well as economic, social, and cultural rights, the scope of elderly rights will depend on the will of that body to interpret all the provisions of the African Charter and to work toward their enforcement.

CONCLUSIONS AND RECOMMENDATIONS

Most of the approaches to elderly persons' rights still focus on their development, but legal standards have yet to be fully explored. Most initiatives target discussions surrounding strategies to improve the collective well-being of elderly people through a concerted action of the UN agencies in charge of development cooperation and assistance. However, international legal mechanisms have not yet expanded to meet their full potential. In fact, the absence of a

429. See Final Communique, para. 10, Afr. Comm'n on Hum. & Peoples' Rts., 26th Sess., Nov. 1-25, 1999: Kigali, Rwanda (expressing concern about the human rights situations affecting the elderly in Algeria, Angola, Burundi, Burundi, Cameroon, Chad, Congo Brazzaville, Democratic Republic of Congo, Djibouti, Eritrea, Ethiopia, Liberia, Sierra Leone, Somalia, Sudan, and Uganda), *available at* <http://www1.umn.edu/humanrts/africa/achpr26f.html> (last visited Apr. 5, 2003).

430. See Final Communique, para. 6, Afr. Comm'n on Hum. & Peoples' Rts., 27th Sess., April 27 – May 11, 2000: Algiers, Algeria (listing the elderly as one of the most vulnerable strata in society in regards to human rights abuses in certain African countries), *available at* <http://www1.umn.edu/humanrts/africa/achpr27f.html> (last visited Apr. 5, 2003).

concerted effort to adopt a comprehensive international instrument, a treaty, or at least a declaration, on the rights of the elderly is surprising. Furthermore, advocacy groups have not yet utilized the help of international human rights mechanisms to set enforceable legal standards and to further empower their work in other fields of the international and domestic arena.

A strategy to have a comprehensive legal instrument on elderly rights is missing at the international level in both universal and regional systems. There are very few provisions in international law that directly address elderly rights. There are isolated efforts by certain international bodies to systematically refer to the rights of the elderly when interpreting their corresponding conventions. Some declarations and other isolated statements by international fora have tried to fill this vacuum. However, there is no specific international body with the mandate to focus on the rights of the elderly. Nor is there an elderly rights convention in place. It is, in fact, the only vulnerable population that does not have a comprehensive and/or binding international instrument addressing their rights specifically.

A closely-related model for any effort to craft a comprehensive instrument is the Convention on the Rights of the Child. This convention focuses on a group that is defined on the basis of age and that is considered to be especially vulnerable. These are the same characteristics of the elderly population. Similarly, there are regional instruments that have focused on a specific population, such as the disabled or indigenous communities, that could also serve as models for how to address the rights of the elderly from a legal standpoint. This effort involves not only crafting a specific instrument based on the previous work developed by other international bodies, but also considering the type of supervision necessary for its enforcement. For example, the human rights protection of the United Nations has evolved mainly through specific supervisory bodies for each treaty, while regional systems such as the Inter-American system have entrusted the monitoring of human rights obligations recognized in several treaties to a unique set of bodies: the Inter-American Commission and the Inter-American Court. Whatever the appropriate model, any future plan of action for the elderly must consider this specific goal in its final recommendations and should indicate the international and national fora entrusted with crafting such a comprehensive human rights instrument.