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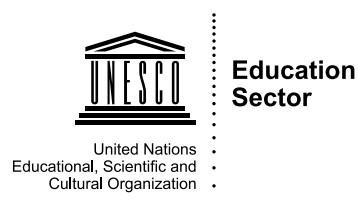
Right to Education

# Right to education handbook

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## UNESCO Education Sector

Education is UNESCO's top priority because it is a basic human right and the foundation on which to build peace and drive sustainable development. UNESCO is the United Nations' specialized agency for education and the Education Sector provides global and regional leadership in education, strengthens national education systems and responds to contemporary global challenges through education with a special focus on gender equality and Africa.



## The Global Education 2030 Agenda

UNESCO, as the United Nations' specialized agency for education, is entrusted to lead and coordinate the Education 2030 Agenda, which is part of a global movement to eradicate poverty through 17 Sustainable Development Goals by 2030. Education, essential to achieve all of these goals, has its own dedicated Goal 4, which aims to *“ensure inclusive and equitable quality education and promote lifelong learning opportunities for all.”* The Education 2030 Framework for Action provides guidance for the implementation of this ambitious goal and commitments.



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## Foreword

Education is a basic human right and the best investment that we can make to ensure a sustainable future and leave no one behind. This is true for every country and every region. However, millions are deprived of educational opportunities every day, many as a result of social, cultural and economic factors.

This handbook represents a landmark for overcoming these barriers and making the right to education a reality. It has been developed by UNESCO and the Right to Education Initiative (RTE), and serves as a definitive reference point for those seeking to understand and advance that right.

For more than 70 years, UNESCO has been defending and advancing the right to education, which lies at the heart of its mandate. This has involved raising awareness on the main principles of the right, advocating for and monitoring the application of legal obligations under the 1960 Convention against Discrimination in Education, and providing support to guarantee its implementation and enforcement in national systems.

The Right to Education Initiative (RTE) is a global human rights organization focused exclusively on the right to education, established by the first United Nations Special Rapporteur on the Right to Education. Since 2000, it has been endeavouring to promote education as a human right, by conducting research and developing tools to help people understand and effectively use mechanisms to claim and enforce this human right.

Today, the right to education is also at the heart of Sustainable Development Goal 4 (SDG 4), which testifies to its fundamental importance. Yet, despite the consensus in human rights instruments and political commitments, we still have a long way to go to fully realize it.

UNESCO's Strategy on Standard-setting Instruments (2016 – 2021) encourages Member States to use normative action on the right to education to achieve SDG 4. This handbook is a central part of delivering on that Strategy. It provides a comprehensive overview of all major aspects of the right to education, tools for understanding this right as an enabler for the enjoyment of other rights as well as implementation strategies and practical insights.

The period between now and 2030 is crucial for delivering on the right to education, and there is no time like the present to step up our efforts. Indeed, without major progress on education, it is clear that the world will not be able to achieve all the Sustainable Development Goals. We trust that this handbook will provide guidance for all those who share our conviction that education has the power to transform the world for the better.



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## Abbreviations and acronyms

<b>ACERWC</b>	African Committee of Experts on the Rights and Welfare of the Child	<b>CIL</b>	customary international law
<b>ACHPR</b>	African Commission on Human and Peoples' Rights	<b>CMW</b>	Committee on Migrant Workers
<b>ACHR</b>	American Convention on Human Rights	<b>CoE</b>	Council of Europe
<b>ACtHPR</b>	African Court on Human and Peoples' Rights	<b>CPR</b>	civil and political rights
<b>ACRWC</b>	African Charter on the Rights and Welfare of the Child	<b>CR</b>	Committee on Conventions and Recommendations
<b>ADB</b>	Asian Development Bank	<b>CRC</b>	Convention on the Rights of the Child
<b>AfDB</b>	African Development Bank	<b>CRIN</b>	Child Rights International Network
<b>AHRC</b>	Arab Human Rights Committee	<b>CRPD</b>	Convention on the Rights of Persons with Disabilities
<b>ALPs</b>	accelerated learning programmes	<b>CSOs</b>	civil society organizations
<b>ASEAN</b>	Association of Southeast Asian Nations	<b>DFID</b>	Department for International Development
<b>ASER</b>	Annual Status of Education Report	<b>EBRD</b>	European Bank for Reconstruction and Development
<b>AU</b>	African Union	<b>ECCE</b>	early childhood care and education
<b>CADE</b>	Convention against Discrimination in Education	<b>ECHR</b>	European Convention for the Protection of Human Rights and Fundamental Freedoms
<b>CBOs</b>	community-based organizations	<b>ECOSOC</b>	UN Economic and Social Council
<b>CCAS</b>	Conference Committee on the Application of Standards	<b>ECOWAS</b>	Economic Community of West African States
<b>CCPR</b>	Human Rights Committee	<b>ECtHR</b>	European Court of Human Rights
<b>CCU</b>	Coalition for Clean Universities	<b>ECSR</b>	European Committee of Social Rights
<b>CEACR</b>	Committee of Experts on the Application on Conventions and Recommendations	<b>EFA</b>	Education for All
<b>CEART</b>	Committee of Experts on the Application of the Recommendation concerning Teaching Personnel	<b>ESCR</b>	economic, social and cultural rights
<b>CEDAW</b>	Convention on the Elimination of All Forms of Discrimination Against Women	<b>ETOs</b>	extraterritorial obligations
<b>CERD</b>	Committee on the Elimination of Racial Discrimination	<b>ETUC</b>	European Trade Union Confederation
<b>CESCR</b>	Committee on Economic, Social and Cultural Rights	<b>EU</b>	European Union
<b>CESR</b>	Center for Economic and Social Rights	<b>FIDH</b>	International Federation for Human Rights
		<b>GBV</b>	gender-based violence
		<b>GDP</b>	gross domestic product
		<b>GEM</b>	Global Education Monitoring

<b>GIESCR</b>	Global Initiative for Economic, Social and Cultural Rights	<b>LGBTQI</b>	lesbian, gay, bisexual, transgender, queer or questioning, and intersex
<b>GPE</b>	Global Partnership for Education	<b>LOIPR</b>	List of Issues Prior to Reporting
<b>HLPF</b>	High-Level Political Forum	<b>LRC</b>	Legal Resources Center
<b>HRC</b>	Human Rights Council	<b>MCOs</b>	minimum core obligations
<b>HRE</b>	human rights education	<b>MDGs</b>	Millennium Development Goals
<b>HRET</b>	United Nations Declaration on Human Rights Education and Training	<b>MGoS-CM</b>	Major Group and Other Stakeholders Coordination Mechanism
<b>HRIA</b>	human rights impact assessment	<b>MoE</b>	ministry of education
<b>IACHR</b>	Inter-American Commission on Human Rights	<b>MoJ</b>	ministry of justice
<b>IACtHR</b>	Inter-American Court of Human Rights	<b>NGOs</b>	non-governmental organizations
<b>ICC</b>	International Criminal Court	<b>NHRI</b>	national human rights institution
<b>ICCPR</b>	International Covenant on Civil and Political Rights	<b>NORAD</b>	Norwegian Agency for Development Cooperation
<b>ICERD</b>	International Convention on the Elimination of All Forms of Racial Discrimination	<b>NSO</b>	national statistical office
<b>ICESCR</b>	International Covenant on Economic, Social and Cultural Rights	<b>OAS</b>	Organization of American States
<b>ICJ</b>	International Court of Justice	<b>OECD</b>	Organisation for Economic Co-operation and Development
<b>ICRMW</b>	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	<b>OHCHR</b>	United Nations Office of the High Commissioner for Human Rights
<b>ICT</b>	information and communication technologies	<b>OIC</b>	Organisation of Islamic Cooperation
<b>IDB</b>	Inter-American Development Bank	<b>OIE</b>	International Organisation of Employers
<b>IDP</b>	internally displaced person	<b>OLD</b>	Oxford Living Dictionary
<b>IHL</b>	international humanitarian law	<b>OP3-CRC</b>	Optional Protocol to the Convention on the Rights of the Child on a communications procedure
<b>IHRL</b>	international human rights law	<b>OP-CEDAW</b>	Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women
<b>ILO</b>	International Labour Organization	<b>OP-CRPD</b>	Optional Protocol to the Convention on the Rights of Persons with Disabilities
<b>INEE</b>	Inter-Agency Network for Education in Emergencies	<b>OP-ICCPR</b>	Optional Protocol to the International Covenant on Civil and Political Rights
<b>INGOs</b>	international non-governmental organizations	<b>OP-ICESCR</b>	Optional Protocol to the International Covenant on Economic, Social and Cultural Rights
<b>IOs</b>	intergovernmental organizations	<b>PRS</b>	Promoting Rights in Schools
<b>ISCED</b>	International Standard Classification of Education	<b>RTE</b>	Right to Education Initiative
<b>LAS</b>	League of Arab States	<b>SAHRC</b>	South African Human Rights Commission
		<b>SC</b>	Steering Committee

<b>SDGs</b>	Sustainable Development Goals	<b>UNGA</b>	United Nations General Assembly
<b>SDG4</b>	Sustainable Development Goal 4	<b>UNHCR</b>	United Nations High Commissioner for Refugees
<b>SRGBV</b>	school-related gender-based violence	<b>UNICEF</b>	United Nations International Children's Emergency Fund
<b>STEM</b>	science, technology, engineering, and mathematics	<b>UNTS</b>	United Nations Treaty Series
<b>TIESR</b>	Toronto Initiative on Economic and Social Rights	<b>US</b>	United States
<b>TVET</b>	technical and vocational education and training	<b>USAID</b>	United States Agency for International Development
<b>UDHR</b>	Universal Declaration of Human Rights	<b>UPR</b>	Universal Periodic Review
<b>UIS</b>	UNESCO Institute for Statistics	<b>USSR</b>	Union of Soviet Socialist Republics
<b>UN</b>	United Nations	<b>VCLT</b>	Vienna Convention on the Law of Treaties
<b>UNESCO</b>	United Nations Educational, Scientific and Cultural Organization	<b>VNR</b>	Voluntary National Reviews
<b>UNESCO IIEP</b>	UNESCO International Institute for Educational Planning	<b>WGC</b>	Working Group on Communications
<b>UNESCO LLI</b>	UNESCO Lifelong Learning Institute	<b>WGS</b>	Working Group on Situations



# Introduction

Seventy years ago, the UN General Assembly adopted the Universal Declaration of Human Rights, recognizing the universal right to education for the first time. Since 1948, every single country in the world has ratified at least one human rights treaty guaranteeing the right to education or some aspect of the right to education and a great number of states have made efforts to enshrine the right to education in their highest legal order.

More recently, the international community adopted the Sustainable Development Agenda in 2015, which established an ambitious and transformational vision to respond to the tremendous challenges to sustainable development, with the determination to ensure that no one is left behind. The ambitions of the 2030 Agenda for education are captured in Sustainable Development Goal 4 (SDG4), which seeks to 'ensure inclusive and equitable quality education and promote lifelong learning opportunities for all' by 2030. The Education 2030 Agenda is a political reaffirmation of the importance of, and continuing commitment to, the right to education.

In states' efforts to meet their commitments to making the right to education a reality for all, most have made impressive progress in recent decades. With new laws and policies that remove fees in basic education, significant progress has been made in advancing free education. This has led to tens of millions of children enrolling for the first time and the number of out of school children and adolescents falling by almost half since 2000. Significant progress has also been made with regard to gender parity, particularly at the

primary level. States have made efforts to raise the quality of education through improved teacher policies and a growing emphasis on learning outcomes.

Despite these efforts, violations and breaches of the right to education persist, illustrated perhaps most starkly by the fact that 262 million primary and secondary-aged children and youth are still out of school. Girls, persons with disabilities, those from disadvantaged backgrounds or rural areas, indigenous peoples, migrants and national minorities are among those who face the worst discrimination, affecting both their right to go to school and their rights within schools. Unequal treatment can both impede their learning and undermine their full development and this has much wider consequences for states and society as a whole. One common factor across the multiple groups that may face exclusion from school is that the cost of education is often a major barrier - hence the crucial importance of asserting the right to free education. When children have to pay to go to school, systems become stratified and the disadvantaged become yet more disadvantaged.

Many more children are in school but still face challenges in securing all aspects of their right to education. The experience within classrooms can still lead to violations of the right to education: if teachers are not adequately trained or the curriculum is too narrow, if the learning environment is not safe, if some children are heard and others ignored, then schools may still fall short. Schools failing to contribute to the full development of the human personality also undermine the right to education.

There are challenges to the achievement of the right to education in every country and in every context. Sometimes these are acute, for example during armed conflict or after natural disasters, in situations of insecurity and fragility, or in environments where climate change is forcing rapid adaptation. When people migrate or are displaced internally or across borders, or where there is rapid urbanization, specific challenges arise in ensuring that the right to education is fulfilled. In a rapidly changing world, new challenges emerge, for example with new commercially-oriented providers who may be more concerned with achieving profits than fulfilling rights. Therefore, understanding the right to education and its practical implications has never been more important.

The full articulation of the right to education sets a standard that is applicable everywhere, against which all education systems and all education providers can and should be held accountable. As such, there is a need for robust processes for people to hold duty-bearers to account, without which the quality and effectiveness of education systems can suffer. It is imperative that states move beyond rhetorical commitment to the right to education and start ensuring that human rights are respected in full.

With these challenges in mind, UNESCO and the Right to Education Initiative (RTE) have developed this handbook to guide action on ensuring full compliance with the right to education. RTE is an international NGO working to promote the right to education as a human right, by making international and national laws accessible to everybody.

## The purposes of this handbook

The ultimate aim of this handbook is to facilitate the realization and universal enjoyment of the

right to education. Its objective is not to present the right to education as an abstract, conceptual, or purely legal concept, but rather to be action-oriented. Where possible, practical guidance is given on how to implement and monitor the right to education along with recommendations to overcome persistent barriers. It seeks to do this by:

- Increasing awareness and knowledge of the right to education. This includes the normative content of the right to education, states' legal obligations, the various sources of law regarding the right to education, what states must do to domestically implement the right to education, how to monitor the right to education, and how to increase accountability of the right to education.
- Providing a summary of current debates and issues regarding education and what human rights law says about them, including on forced migration, education in emergencies, the privatization of education, and the challenge of reaching the most marginalized.
- Providing an overview of the UN landscape and its mechanisms, including a clear understanding of the role of UNESCO and more generally the UN, as well as all relevant stakeholders in education, particularly civil society.

UNESCO's Strategy on standard-setting instruments in the field of education (2016-2021) encourages Member States of the Organization to use normative action in relation with the right to education as a strategic tool to implement and achieve SDG4. In line with this, this handbook – specifically foreseen by the Strategy– will also serve as a reference tool for the design and organization of training modules and workshops in the field of right to education.

Finally, the handbook will also be an important reference for those working towards the achievement of SDG4, by offering guidance on

how to leverage legal commitment to the right to education as a strategic way to achieve this goal.

## Structure of the handbook

This handbook addresses the main components and features of the right to education across eight chapters:

*Chapter 1* presents education as a human right. It deals with questions such as: what is a human right, what is education, what does it mean to have a right to education, what are the benefits of the right to education for both individuals and the state. It shows how states should use the right to education to underpin their education systems, and lists some common misconceptions and criticisms of human rights.

*Chapter 2* presents the various sources of the right to education found in international law. It includes a summary of what is contained in all 48 legally-binding human rights treaties and 23 soft law instruments concerning the right to education.

*Chapter 3* sets out the normative content of the right to education: what rights-holders are entitled to, including, what quality education includes, how states ensure universal access to education, and what the aims of education are from a human rights perspective.

*Chapter 4* focuses on the state as the primary duty-bearer of the right to education and sets out what states' legal obligations are in relation to the normative content of the right to education.

*Chapter 5* explains the relationship between the right to education and the SDG framework.

*Chapter 6* focuses on how states turn their international legal and political commitments into action, through the process of domestic implementation. This includes how states can incorporate the right to education into their

constitutions, legislation, policies, and other important measures.

*Chapter 7* explains why states and other actors must monitor the right to education, detailing what monitoring includes, such as the use of human rights indicators, and the collection and interpretation of data. It also explains the monitoring obligations of various bodies at national, regional, and international levels, including what mechanisms are available and how to engage with them.

*Chapter 8* explores the issue of accountability and what it means from a human rights perspective. It looks at how the right to education can be legally enforced, gives examples of landmark cases from around the world, as well as an overview of the various regional and international accountability mechanisms that can be accessed when the right to education has been violated.

## Who should use this handbook?

This handbook has been developed to assist all stakeholders who have a crucial role to play in the promotion and implementation of the right to education, including but not limited to:

*State officials*, as representatives of the state (the principal duty-bearer regarding the right to education), are uniquely placed to utilize the content of this handbook to ensure education policies and practices are better aligned with human rights. This handbook will be most useful for civil servants, policy-makers, ministers, and senior staff serving the ministry of education, but it is also relevant to officials working in ministries and departments of justice, development, finance, and statistics, as well as National Human Rights Institutions, highlighting that inter-ministerial cooperation is key to effective policy-making.

*Parliamentarians*, their researchers and members of staff will also find this handbook useful in scrutinizing and formulating education, human rights, and development legislation, and in implementing international human rights commitments to national law.

*Judges, magistrates, clerks, and lawyers and other judicial officials* will find this handbook useful in explaining the legal obligations of the state emanating from international law and how to apply them.

*Civil society* will greatly benefit from the content of this handbook as it includes guidance on how to incorporate the right to education in programmatic, research, and advocacy work. Civil society organizations who may benefit include:

- non-governmental organizations (NGOs) and associations
- international non-governmental organizations
- human rights organizations
- development organizations
- community-based organizations
- faith-based organization
- academics, experts, and researchers
- teachers and school leaders
- trade-union and other associations' staff
- journalists and investigators

*Those who work for inter-governmental organizations*, including at key United Nations agencies, will find this handbook useful in carrying out the mandate of their organizations.

*Private actors, multilateral and bilateral donors, and investors* should use the information contained within this handbook to ensure their involvement complies with human rights and

that they understand and can apply their specific responsibilities.

## How to use this handbook

This handbook has been designed to be accessible. Each chapter starts with the key questions addressed in the chapter and ends with a short summary consisting of key points and 'ask yourself' questions, designed to make you think deeper about issues raised in the chapter or to encourage the reader to find out more about the situation in their own country. The content of each is chapter is supplemented with colour coded boxes, each presenting different types of useful information:



**Definition**



**Example**



**Tip**



**Further reading**



**Further information**



**Did you know?**

Above all, UNESCO and RTE wish that this handbook, the first attempt to provide practical technical assistance on the right to education, will not only prove useful for a wide range of readers but will help translate the right to education into concrete action.

# Chapter 1:

## Education as a human right

## Key questions

What is *education*?

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What are *human rights*?

---

Are human rights only legal rights?

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Why is education a human right?

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What is the content of the right to education?

---

Who benefits from the right to education?

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Why should states implement the right to education?

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What are some common misconceptions people have about human rights?

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**Education is not a privilege. It is a human right. Most people would probably agree with this statement. However, beyond the rhetorical force of this claim, the right to education is generally not well understood. As a human right, the right to education means that everyone—children, adolescents, youths, adults, and older people—is entitled to access quality education. This means that states have various obligations to make the right to education a reality for all, based on their legal and political commitments. Inaction is not an option. With this in mind, this chapter aims to give users the background information required to understand what the right to education is.**

This chapter starts by defining key concepts used throughout this handbook, primarily *education* and *human rights*, before moving onto a short overview of the main debates in human rights, including whether human rights are *more* than just legal rights.

The chapter then outlines what the right to education is, its key features, its relationship with human dignity, how it is legally protected, and by which sources of international law.

States may think that by having legislative and policy frameworks on education they are compliant with their human rights' obligations. This is not necessarily true. The right to education entails specific normative content, that is, what exactly rights-holders are legally entitled to under international law. This chapter lists that normative content.

The chapter then focuses on the reasons why states should take their human rights' obligations seriously and fully implement the right to education at the national level. The right to education should not be seen as an obstacle but rather a benefit. This chapter explains the proven

benefits of education to the individual, to society, and to the state.

It is then argued that the right to education and human rights principles, such as inclusion and accountability, provide a practical blueprint for action for states.

Finally, this chapter seeks to clarify some common criticisms and misconceptions about human rights.

## 1.1 What is education?

The Oxford Living Dictionary (OLD) defines education as: 'the process of receiving or giving systematic instruction, especially at a school or university.'

The OLD defines learning as: 'the acquisition of knowledge or skills through study, experience, or being taught.'

Education comprises lifelong learning that takes place in formal and non-formal environments, as well as informal learning. All three elements are important and shape who we are and how we engage with the world around us, at every stage of life. From our cognitive and physical development, our understanding of the world, how we think, our values, our identity, our experience of the world, to the knowledge and skills we develop that help us to negotiate life, education and learning are the foundation of it all.

**Formal education** refers to education that is:

*institutionalised, intentional and planned through public organizations and recognised private bodies, and—in their totality—constitute the formal education system of a country. Formal education programmes are thus recognised as such by the relevant national education or equivalent authorities...Vocational education, special needs education and some parts of adult education are often recognised as being part of the formal education system...Institutionalised*

education occurs when an organization provides structured educational arrangements, such as student-teacher relationships and/or interactions, that are specially designed for education and learning.<sup>1</sup>

**Non-formal education** refers to education that is:

*institutionalised, intentional and planned by an education provider. The defining characteristic of non-formal education is that it is an addition, alternative and/or complement to formal education within the process of lifelong learning of individuals. It is often provided in order to guarantee the right of access to education for all. It caters to people of all ages but does not necessarily apply a continuous pathway structure; it may be short in duration and/or low-intensity; and it is typically provided in the form of short courses, workshops or seminars. Non-formal education mostly leads to qualifications that are not recognised as formal or equivalent to formal qualifications...or to no qualifications at all.*

*Depending on the national context, non-formal education can cover programmes contributing to adult and youth literacy and education for out-of-school children, as well as programmes on life skills, work skills, and social or cultural development. It can include training in a workplace to improve or adapt existing qualifications and skills, training for unemployed or inactive persons, as well as alternative educational pathways to formal education and training in some cases. It can also include learning activities pursued for self-development and, thus, is not necessarily job-related.<sup>2</sup>*

**Informal learning** refers to the:

*forms of learning that are intentional or deliberate, but are not institutionalised. It is consequently less organized and less structured than either formal or non-formal education. Informal learning may include learning activities that occur in the family, workplace, local community and daily life, on a self-directed, family-directed or socially-directed basis. Like formal and non-formal education, informal learning can be distinguished from incidental or random learning.<sup>3</sup>*

This handbook is chiefly, but not exclusively, concerned with formal and non-formal education, that is, education where the state has a more expansive and defined role, although this is not to downplay the importance of informal learning. All three are part of the right to education and are vital for lifelong learning.

## 1.2 What are human rights?<sup>4</sup>

*'A right is not what someone gives you; it's what no one can take from you.'*

— Ramsey Clark.

Since World War II, the international community has committed itself to the promotion and protection of human rights. For example, one of the core purposes of the United Nations is: 'promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.'<sup>5</sup> This commitment has led to the

<sup>3</sup> Ibid., para. 43.

<sup>4</sup> This section is based on Nickel, J. 2017. 'Human Rights', *The Stanford Encyclopedia of Philosophy* (Spring 2017 Edition), Edward N. Zalta (ed.).

<sup>5</sup> Charter of the United Nations (adopted 24 October 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter) Article 1 (3).

<sup>1</sup> UNESCO and UNESCO Institute for Statistics. 2012. *International Standard Classification of Education: ISCED 2011*. UNESCO Institute for Statistics. Montreal, Canada, para. 36.

<sup>2</sup> Ibid., paras. 39-40.



proliferation of human rights instruments, including laws and declarations, which guarantee the human rights of everyone.

The success of human rights is not just in the abundance of human rights' legal instruments and their adoption by states, but is also in how awareness, knowledge, and acceptance of human rights have permeated down to the level of ordinary people.

Today, awareness of human rights is widespread and human rights are readily invoked, take for example, the headlines below.



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However, despite the increasing familiarity with human rights and how easily we invoke human rights, defining human rights is not an easy task. Many people will have an intuition of what is meant by human rights. Some will think of human rights as rights guaranteed by law, for example, in constitutions or international human rights treaties. For others, human rights invoke ideas about justice and fairness. While others may think of human rights as unrealistic goals, arbitrary, or political constructions.

So, what is the truth of it? What exactly are human rights?

**Box 1.1 Definition: Human rights**

Human rights are universal norms that describe standards of behaviour that help protect everyone from political, legal, social, and economic abuses.<sup>6</sup>

According to James Nickel,<sup>7</sup> human rights are generally held to have the following characteristics:

- *human rights are rights*: Human rights are not promises, privileges, or goals, they are rights. Rights are entitlements.<sup>8</sup> Human rights are usually 'claim rights', which means they impose mandatory obligations on duty-bearers.<sup>9</sup> They have two facets: the normative content (or entitlements) owed to rights-holders and the corresponding obligations of duty-bearers
- *human rights are plural*: Human rights encompass a variety of protections, from the right to freedom of speech and the right to a fair trial to the right to health and the right to education
- *human rights are universal*: Human rights apply to everyone by virtue of their status as 'human'
- *human rights are high-priority*: Human rights cannot be ignored. They demand consideration and compete with other concerns

Human rights are probably most commonly thought of as legal rights. With the adoption of the Universal Declaration of Human Rights (1948,

6 Nickel, J., op. cit.

7 Ibid.

8 The Stanford Encyclopedia of Philosophy defines rights as: 'entitlements (not) to perform certain actions, or (not) to be in certain states; or entitlements that others (not) perform certain actions or (not) be in certain states'. Wenar, L. "Rights", *The Stanford Encyclopedia of Philosophy* (Fall 2015 Edition), Edward N. Zalta (ed.).

9 Wenar, L., op. cit., section 2.1.2.

UDHR),<sup>10</sup> the international community codified and adopted 30 human rights as a ‘common standard of achievement for all peoples and all nations.’<sup>11</sup> The UDHR has inspired an entire regime of law and currently there are more than a hundred international and regional instruments on human rights, some of which are legally binding, elaborating the human rights to which everyone is entitled on the basis of their ‘inherent dignity.’<sup>12</sup>

Human rights are also guaranteed under national laws. In fact, human rights as legal rights guaranteed domestically predate their appearance in the UDHR, for example, in national constitutions such as the Bill of Rights to the United States Constitution (1791)<sup>13</sup> and the French Declaration of the Rights of Man and the Citizen (1789).<sup>14</sup> Today, many constitutions protect human rights. The right to education is itself mentioned in 82% of national constitutions.<sup>15</sup>

That human rights are incorporated into international and domestic legal systems and are, as such, legal rights, is an empirical statement that is not open to debate. The argument that human rights are *only* legal rights is, however, more contentious.

Human rights are also claimed to exist independently from the law. There is an entire subfield of philosophy dedicated to human rights focusing on such questions as: what are the key features of human rights, how might human rights be justified, and what is the specific content of human rights?<sup>16</sup>

Although it may seem that thinking about human rights in a philosophical sense is abstract and offers no practical insights, looking to philosophical arguments elucidates why they have such a prominent role in international and national politics and law, particularly as a moral yardstick against which individuals and states are often judged. The example of apartheid in South Africa<sup>17</sup> illustrates that human rights would seem to carry a weightiness that extends beyond a statement of legality. That is that human rights exist independently from the law.

Human rights violations are claimed even when an (in)action is lawful under international and domestic law. At the time, South Africa had not ratified key international human rights treaties prohibiting racial discrimination (meaning it was not legally bound to ensure the rights to non-discrimination and equality based on race) and national law was systematically used as a tool to oppress and segregate. Children were lawfully separated into schools based on race and provided with an inferior quality of education. Yet, apartheid is still considered a systematic human rights violation even though no laws were broken. This is because claims of human rights violations are often invoked because they signal ideas about what is right and wrong in terms of (in)actions that degrade human dignity. As Andrew Fagan puts it: ‘What many found so morally repugnant

10 Universal Declaration of Human Rights (adopted 10 December 1948) United Nations General Assembly Resolution (UNGA Res) 217 A(III) (UDHR).

11 UDHR Preamble.

12 Ibid.

13 The Constitution of the United States. Amendments I-X.

14 Déclaration des droits de l’Homme et du citoyen de 1793.

15 Right to Education Initiative (RTE). 2017. *Accountability from a human rights perspective: The incorporation and enforcement of the right to education in the domestic legal order*. Paper commissioned for the 2017/8 Global Education Monitoring Report, *Accountability in education: Meeting our commitments*, p. 32.

16 A good introduction to the philosophical foundations of human rights is Nickel, J. 2017. op. cit.

17 This example is based on a similar one used in Fagan, A. ‘Human Rights’ The Internet Encyclopedia of Philosophy, p. 9.

about apartheid South Africa was precisely its denial of numerous fundamental moral rights.<sup>18</sup>

The above example shows that to think of human rights only as legal rights has obvious shortcomings. This is because, for many, human rights have a legitimacy that is distinct from their status as legal rights. On these accounts human rights are incorporated and formalized into legal systems because it is a practical way to protect human rights, but human rights are not legitimate because of their legal character, rather because there is an underlying justification that precedes their legalisation.

There are various accounts of how human rights should be understood and how they are justified. One of the most common accounts is to say they are grounded in morality. Arguments based on morality tend to identify something about being human on which to ground human rights. Many preambles to human rights treaties and even national constitutions seem to justify their content in moral terms related to the dignity inherent in all people. For example, the preamble to the UDHR recognizes the: 'inherent dignity and of the equal and inalienable rights of all members of the human family'. Similarly, article 5 of Guinea's Constitution<sup>19</sup> says: 'The human person and their dignity are sacred. The State has the duty to respect them and to protect them. The rights and freedoms enumerated hereafter are inviolable, inalienable and imprescriptible. They found all human society and guarantee peace and justice in the world.'

Debates on the nature of human rights are not just a philosophical enquiry without practical implications. For the health of human rights, it is important that we all reflect on the distinct role they play in protecting everyone from abuses and holding duty-bearers to account. If we cannot articulate why human rights are worth defending, as ethical standards and not just legal standards, then acceptance and adherence to human rights will likely never be as strong as it could be.



### Box 1.2 Further reading: Philosophy of human rights and education

On the philosophy of human rights:

Fagan, A. 'Human Rights', *The Internet Encyclopedia of Philosophy* [www.iep.utm.edu/hum-rts/](http://www.iep.utm.edu/hum-rts/)

Nickel, J. 2017. 'Human Rights', *The Stanford Encyclopedia of Philosophy* (Spring 2017 Edition), Edward N. Zalta (ed.) <https://plato.stanford.edu/archives/spr2017/entries/rights-human/>

Tasioulas, J. *Are human rights anything more than legal conventions?* Aeon <https://aeon.co/ideas/are-human-rights-anything-more-than-legal-conventions>

On the philosophy of education:

Phillips, D.C. and Siegel, Harvey. 2015. 'Philosophy of Education', *The Stanford Encyclopedia of Philosophy* (Winter 2015 Edition), Edward N. Zalta (ed.) <https://stanford.library.sydney.edu.au/archives/win2015/entries/education-philosophy/>

Siegel, H. 2018. 'Philosophy of education', *Encyclopaedia Britannica* <https://www.britannica.com/topic/philosophy-of-education>

<sup>18</sup> Ibid.

<sup>19</sup> Constitution de la République de Guinée, 2010.

### 1.3 The human right to education

Education is guaranteed as a human right in numerous human rights treaties, chiefly the Convention against Discrimination in Education (1960, CADE),<sup>20</sup> the International Covenant on Economic, Social and Cultural Rights (1966, ICESCR),<sup>21</sup> the Convention on the Elimination of All Forms of Discrimination Against Women (1979, CEDAW),<sup>22</sup> and the Convention on the Rights of the Child (1989, CRC).<sup>23</sup>

The preamble to ICESCR states that the human rights contained therein: 'derive from the inherent dignity of the human person.' The Committee on the Rights of the Child, which oversees the implementation of the CRC, states that the purpose of education is to: 'promote, support and protect the core value of the Convention: the human dignity innate in every child and his or her equal and inalienable rights.'<sup>24</sup> Because of this focus on dignity, the right to education necessarily emphasizes the importance of the individual, as all human rights do. Although it does not deny the instrumental and societal benefits of education and indeed that these can be a source of human dignity, under international human rights law, the individual is the primary beneficiary of education.<sup>25</sup> The right to education ensures

that the individual is placed firmly at the centre of education frameworks.

Education as a human right has the following characteristics:

- *it is a right*: Education is not a privilege or subject to political or charitable whims. It is a human right. It places mandatory demands on duty-bearers (particularly the state, but also parents, children, and other actors (see box 1.4). It identifies specific obligations on duty-bearers (see Chapter 4) in relation to specific entitlements of rights-holders (see Chapter 3)
- *it is universal*: Everyone has the right to education without discrimination. This includes children, adolescents, youths, adults, and older people
- *it is high priority*: Education is a key priority of the state. Obligations to ensure the right to education cannot be easily dismissed
- *it is a key right*: Education is instrumental in the exercise of all other human rights. It has economic, social, cultural, civil, and political dimensions

The right to education places legal obligations on states when they make decisions regarding education and the education system. It offers an internationally agreed normative framework for the standards that states must not fall beneath with regards to the education of its citizens and non-citizens. These standards delineate what states must do and refrain from doing in order to ensure the dignity of the individual.

The right to education is broad and covers many aspects of education. This means that for the specific areas related to education (listed below and elaborated on in Chapter 3), states must act within the boundaries permissible under international human rights law (IHRL):

- the aims of education

20 UNESCO Convention against Discrimination in Education (adopted 14 December 1960, entered into force 14 December 1960) 429 UNTS 93 (CADE).

21 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

22 Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW).

23 Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC).

24 UN Committee on the Rights of the Child. 2001. *General Comment 1: Article 29 (1): The Aims of Education*, (Doc. CRC/GC/2001/1.) (CRC General Comment 1) para. 1.

25 The Committee on the Rights of the Child has made clear that the aims of education are: 'all linked directly to the realization of the child's human dignity and rights, taking into account the child's special developmental needs and diverse evolving capacities.' CRC General Comment 1 para. 1.

- non-discrimination and equality in the education system
- free and compulsory universal primary education
- available and accessible, free education at the secondary level, including vocational education
- accessible (on the basis of capacity), free education at the tertiary level
- fundamental education for those who have not received all or part of their primary education
- maintenance of an education system at all levels
- provision of a fellowship system
- the training of teachers, their status, and their working conditions
- educational freedom, that is, the freedom of parents to have their children educated in accordance with their religious and moral convictions
- the freedom of individuals and organizations to set-up private schools
- quality education, including setting minimum standards regarding infrastructure and human rights education
- safe and non-violent learning environments
- the allocation of adequate resources
- academic freedom at all levels of education
- the setting and content of the curriculum
- transparent and accountable education systems

The normative scope of the right to education is wide and includes matters that are foundational to education. International human rights law deliberately leaves certain decisions to the state because the state is ultimately best placed and has the legitimacy to make important decisions about education, the only limiting factor being

that the right to education and other human rights are respected and realized. For example, the right to free and compulsory primary education can be implemented in whichever way the state in question sees fit.



**Box 1.3 Further reading:  
Education as a right**

Right to Education Initiative's (RTE) page *Understanding education as a right* <http://www.right-to-education.org/page/understanding-education-right>

**1.4 Why states should implement the right to education**

Under IHRL, when states ratify or accede to a human rights treaty guaranteeing the right to education, they are legally bound to implement the provisions of that treaty. But why should states ratify treaties containing the right to education in the first place? And why should states then implement the right to education?

There are compelling moral, political, economic, social, and pragmatic reasons for states to legally protect the right to education of everyone in national law.

One way to classify the reasons why states should implement the right to education is to look at the benefits of education to the individual and the external positive effects of education on wider society.



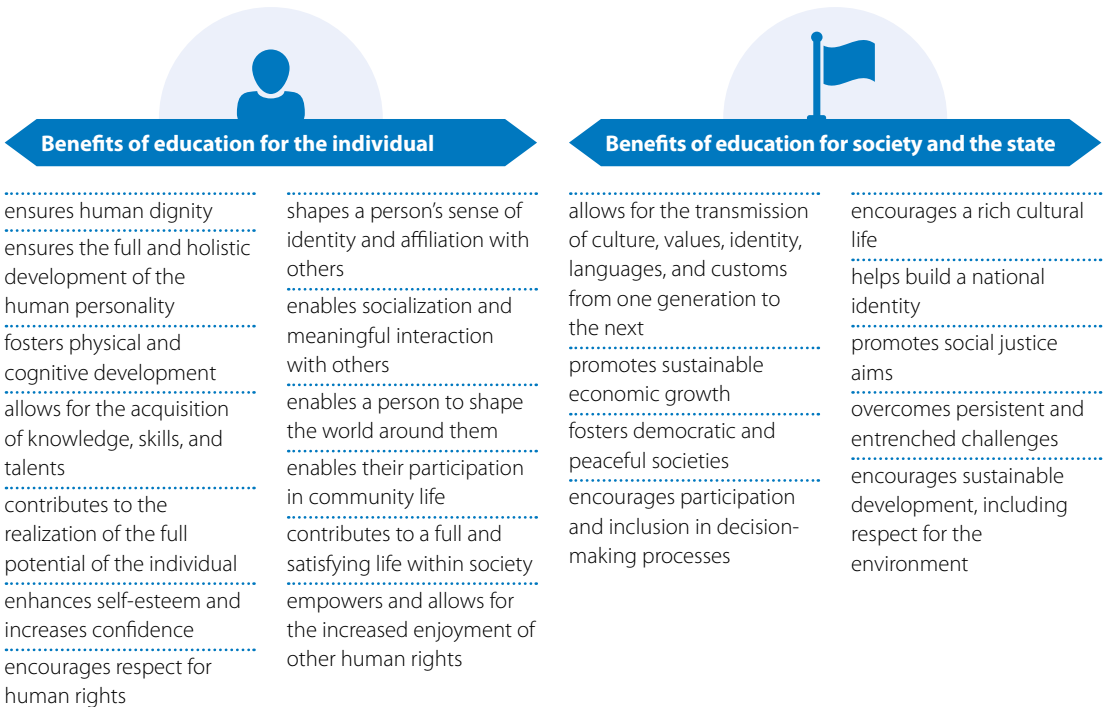
**Box 1.4 Definition: What is meant by the state?**

The right to education is the shared responsibility of a multitude of institutions and actors but under international law, states are the primary duty-bearer when it comes to the right to education. This is because it is states that legally commit to the right to education and the government of the day that therefore delivers and administers national education systems. The state should be understood as including institutions and actors at the national and federal levels, for instance: ministries of education, ministers, government officials, legislators, civil servants. It also includes institutions and actors operating

at the sub-national level, including provincial, regional, municipal, and local levels, such as: local governments, boards of education, local education authorities, principals and headteachers, and teachers.

Non-state actors, such as: intergovernmental organizations, parents, Non-Governmental Organizations (NGOs), the private sector, and even students themselves all have a role to play in realizing the right to education, indeed they are also duty-bearers, however, at the international level they are not deemed to have legal obligations, rather *responsibilities* as defined or expected in national legislation, the human rights framework, and/or other avenues.

**Figure 1.1: The multiple benefits of education**



## 1.4.a The benefits of education to the individual

*'A well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence.'*

—The Committee on Economic, Social and Cultural Rights.<sup>26</sup>

Education in all its forms (informal, non-formal, and formal) is crucial to ensure human dignity. The aims of education, as set out in IHRL, are therefore all directed to the realization of the individual's rights and dignity.<sup>27</sup>

The ICESCR, the CRC, and the UNESCO CADE set out the aims of education from a human rights perspective. The Committee on the Rights of the Child summarizes them as: the holistic development of the full potential of the individual, including development of respect for human rights, an enhanced sense of identity and affiliation, and his or her socialization and interaction with others and with the environment.<sup>28</sup>

The very first aim of education stipulated by the ICESCR which the Committee on Economic, Social and Cultural Rights (CESCR) calls 'perhaps the most fundamental';<sup>29</sup> is, 'the full development of the human personality and the sense of its dignity'.<sup>30</sup>

The CRC expands this to include development of: 'talents and mental and physical abilities to their fullest potential'.<sup>31</sup>

IHRL is clear that the primary purpose of education is to enrich and empower the individual. Education is vital to an individual's cognitive and physical development. It helps shape a person's understanding of the world, how they think, their values, and their identity. Education also influences the way a person experiences the world. It provides for the development of the knowledge and skills that help people negotiate life and achieve the goals they set for themselves.

Education is also vital in ensuring that each individual can interact and shape the world around them. The Committee on the Rights of the Child explains:

*The goal is to empower the child by developing his or her skills, learning and other capacities, human dignity, self-esteem and self-confidence. "Education" in this context goes far beyond formal schooling to embrace the broad range of life experiences and learning processes which enable children, individually and collectively, to develop their personalities, talents and abilities and to live a full and satisfying life within society.*<sup>32</sup>

The importance of developing the human personality to the fullest potential is so that each person can flourish as an individual but also flourish within social environments. Identity, knowledge, skills, language, values, etc. have social dimensions and are gained through social connections, for example, through family, friends, and the wider community. The ability and skills to communicate, including through technology, and take part in family, social, and community life

26 UN Committee on Economic, Social and Cultural Rights (CESCR). 1999. *General Comment 13: The Right to Education (Art. 13 of the Covenant)*, (Doc. E/C.12/1999/10.) (CESCR General Comment 13) para. 1.

27 UN Committee on the Rights of the Child. 2001. *General Comment 1: Article 29 (1): The Aims of Education*, (Doc. CRC/GC/2001/1.) (CRC General Comment 1) para. 1.

28 CRC General Comment 1 para. 1.

29 CESCR General Comment 13 para. 1.

30 ICESCR Article 13 (1). Also guaranteed under UDHR Article 26 (2) and CADE Article 5 (1) (a).

31 CRC Article 29 (1) (a).

32 CRC General Comment 1 para. 1.

are important, particularly for informal learning. Participating in community life also enhances a person’s capability to relate to others in various situations and thus facilitates inclusion, tolerance, respect, and harmonious communities. In turn, a person also learns from participating in social life.

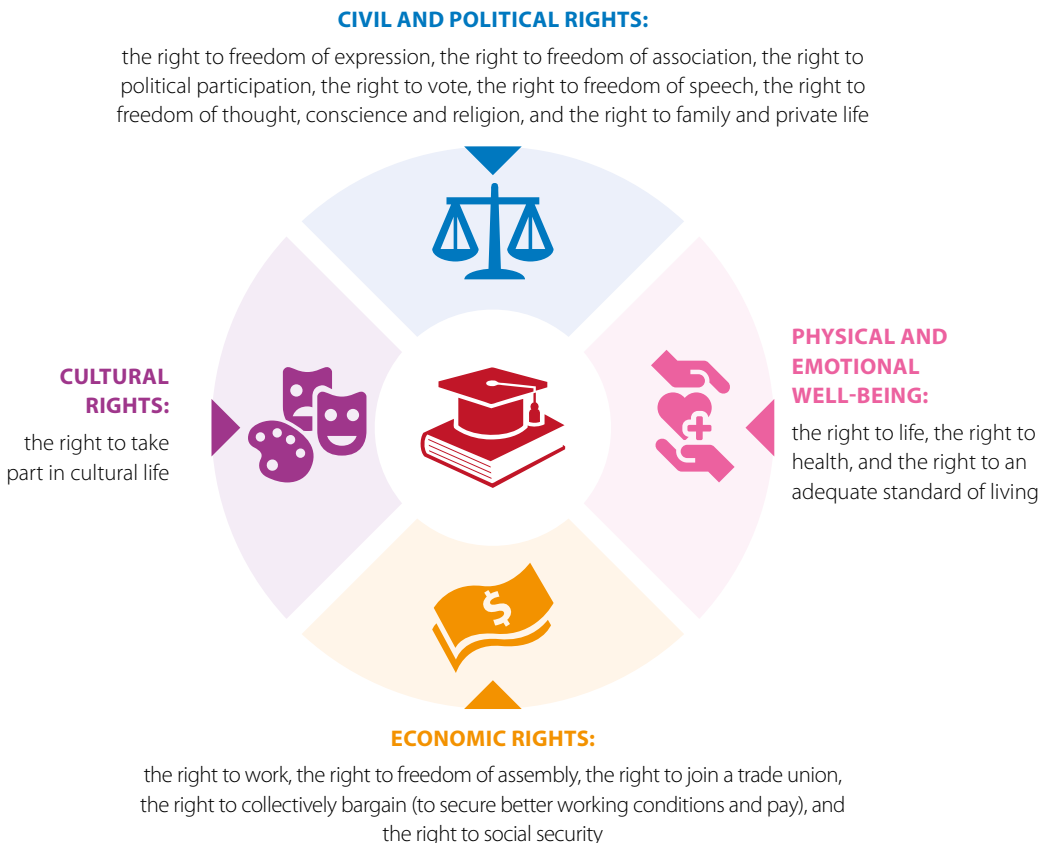
*‘Education is both a human right in itself and an indispensable means of realizing other human rights.’*

— The Committee on Economic, Social and Cultural Rights.<sup>33</sup>

Education has further instrumental benefits to the individual. Education is often called a ‘multiplier right’ meaning that it can unlock and increase enjoyment of other human rights. This is due to the interdependent and interlinked nature of human rights. Human rights are plural and serve to promote human dignity, meaning they are mutually reinforcing and naturally overlap with each other.

33 CESCR General Comment 13 para. 1.

**Figure 1.2: Education as a multiplier right**





The interrelatedness of human rights and the importance of education is most clearly observed in the fact that those who have received an education are more likely to be aware of the human rights they are entitled to and how to claim them. Given the nature of education, the fact that it is empowering and relevant in many domains of people's lives, means that education plays a unique and almost foundational role in the realization of other human rights. This is amplified when education is directed to empowering people to enjoy and exercise their rights and to respect and uphold the rights of others. See Chapter 3, section 3.6.b.i on human rights education for further information.

As illustrated above, education is vital to the full enjoyment of many civil, political, social, economic, and cultural rights.

### The right to education and civil and political rights

Education plays a role in how individuals engage (or choose not to) in political and civic spaces and thus impacts on their civil and political rights.

As Fons Coomans, a law professor and expert on the right to education, points out: 'Civil and political rights, such as freedom of expression, freedom of association or the right to political participation, only obtain substance and meaning when a person is educated.'<sup>34</sup> Added to this list could be: the right to vote, the right to freedom of speech, the right to freedom of thought, conscience and religion, and the right to family and private life.

Education gives individuals the foundational knowledge and provides the necessary skills to

participate in political and public life, including: debating, understanding complex issues, critical-thinking, knowing and representing their own interests, holding duty-bearers to account, influencing decision-makers, and making informed choices. Individuals also gain valuable skills and learnings from participating in political and civic life.

### The right to education and physical and emotional well-being

The rights to life, health, and an adequate standard of living, including food, clothes, and shelter, protect from degrading and harmful conditions affecting physical and emotional well-being.

Empirical evidence suggests that education leads to better outcomes in respect to physical and emotional well-being. Education and maternal education in particular are known to:

- increase life expectancy<sup>35</sup>
- lead to better childhood nutrition<sup>36</sup>
- reduce child mortality<sup>37</sup>
- reduce illness and childhood illness<sup>38</sup>
- prevent and reduce HIV infection rates<sup>39</sup>
- reduce mortality from diseases<sup>40</sup>

35 Mackenzie, D. 2018. *More education is what makes people live longer, not more money*. New Scientist.

36 UNESCO. 2017/8. *Global Education Monitoring Report 2017/8: Accountability in education - Meeting Our Commitments*. Paris. UNESCO, p. 256; Makoka, D and Masibo, P. K. 2015. Is there a threshold level of maternal education sufficient to reduce child undernutrition? Evidence from Malawi, Tanzania and Zimbabwe. *BMC Pediatrics*. Vol 15, No. 96.

37 UNESCO. 2016b. *Global Education Monitoring Report 2016: Education for People and Planet – Creating Sustainable Futures for All*. Paris, UNESCO, p. 82.

38 *Ibid.*, p. 77.

39 UNESCO. 2015. *EFA Global Education Monitoring Report: Education for All 2000-2015 – Achievements and Challenges*. Paris, UNESCO, p. 36.

40 Hahn, R. and Truman, B. 2015. Education Improves Public Health and Promotes Healthy Equity. *Int J Health Serv*. Vol. 45, No. 1, pp. 657-678.

34 Coomans, F. 2007. Content and Scope of the Right to Education as a Human Right and Obstacles to its Realization, *Human Rights in Education, Science and Culture: Legal Developments and Challenges* (edited by Yvonne Donders and Vladimir Volodin), UNESCO Publishing, Paris, France; and Ashgate, Vermont, USA. pp.185-186.

- improve mental health<sup>41</sup>
- positively affect early childhood development<sup>42</sup>
- increase the likelihood of being happy<sup>43</sup>

The mechanisms thought to underlie the relationship between education and mental and physical health include increasing:<sup>44</sup>

- a person's ability to make healthier life choices based on relevant information, for example, choosing healthier food and exercising more regularly
- a person's ability to access and navigate the healthcare system: understand and comprehend what their health needs are, advocate for herself and others, communicate and engage better with care providers
- a person's ability to seek medical advice and follow treatment, for example by taking medicine at the right time and in the right dosages
- responsiveness to awareness-raising campaigns on health issues

Education is of particular importance to the physical and emotional well-being of marginalized groups, for instance, women and girls. Girls who receive more education are less vulnerable to harmful cultural practices, such as female genital mutilation and child marriage, are less likely to become pregnant and young mothers, and are also less susceptible to gender-based violence against women and girls.

According to the UNESCO Education for All Global Monitoring Report, a girl in a low-income country

receiving secondary education is 63% less likely to marry than a girl without education, and has fewer and healthier children.<sup>45</sup> Children of literate mothers are over 50% more likely to live past the age of five and receive good nutrition.<sup>46</sup> There are also significant health benefits for girls and women, with considerable evidence that an increase in a mother's education reduces the likelihood of dying in childbirth.<sup>47</sup>

### The right to education and economic rights

Education and work are deeply connected. Education provides individuals with the skills necessary to find decent work and secure a fair wage. Work is a key way for individuals to lift themselves out of poverty and militates against exclusion and marginalization. Education and work interact to empower individuals, particularly in exercising other human rights. For example, Fons Coomans underscores the link with physical and emotional well-being: 'an educated person will have a greater chance of finding a job, will be better equipped to secure his or her own food supply and is more aware of public health dangers.'<sup>48</sup>

Related rights that are positively impacted by education include: the right to freedom of assembly, including the right to join a trade union, to collectively bargain in order to secure better working conditions, including pay, and the right to social security. Education makes social security systems easier to access and navigate successfully, particularly for marginalized groups, such as

41 World Health Organization and Calouste Gulbenkian Foundation. 2014. *Social determinants of mental health*. Geneva, World Health Organization, pp. 16-17.

42 McMahon, W. and Oketch, M. 2013. *Education's Effects on Individual Life Chances and On Development: An Overview*. British Journal of Educational Studies, Vol. 61, No. 1, p. 95.

43 Ibid., p. 96.

44 Center on Society and Health. 2014. *Why Education Matters to Health: Exploring the Causes*. Virginia Commonwealth University.

45 UNESCO. 2013. *Education for All Global Monitoring Report: Education transforms lives*, section 5.

46 Ibid., sections 2 and 3.

47 Paper commissioned for the EFA Global Monitoring Report 2013/4, Teaching and learning: Achieving quality for all. Sonia Bhalotra with Damian Clarke. 2013. *Educational Attainment and Maternal Mortality*, p. 13.

48 Zimmerman, E., Woolf, S. H. and Haley, A. 2015. *Understanding the Relationship Between Education and Health: A Review of the Evidence and an Examination of Community Perspectives*. Agency for Healthcare Research and Quality. Rockville, MD.

people with disabilities and people from certain socio-economic backgrounds.

Education also plays a role in reducing practices that are exploitative and harmful, notably:

- child labour, including hazardous work
- modern slavery, including trafficking
- prostitution and sexual exploitation

### The right to education and cultural rights

Education and culture are closely related.

Education provides an enabling environment for cultural diversity and allows for the realization of the right to take part in cultural life.<sup>49</sup> Access and participation in cultural life greatly contribute to the development of the self: of one's identity, sense of belonging, personal enrichment, and personal expression. In addition, the promotion of cultural diversity contributes to reinforcing understanding, respect, and tolerance towards others.

#### 1.4.b The benefits of education beyond the individual

*'Education is the most powerful weapon which you can use to change the world.'*

— Nelson Mandela

Education can be transformative not just for the individual but also for the state and society. Education is one of the most important mechanisms by which social groups, in particular indigenous peoples and minorities, are maintained from generation to generation, passing on language, culture, identity, values, and customs. Education is also one of the key ways

states can ensure their economic, social, political, and cultural interests.

Many, although by no means all, of the benefits to the state and society arise from the benefits to the individual. That is, the benefits to the individual can spill over to others. For instance, an educated and skilled person is more likely to find decent work and earn a higher income and therefore contribute, through tax, to the state, which can then allocate that revenue to public services. This is not always the case, however, and states must not forego elements of the right to education in their laws and policies because they return little benefit to the state and society.

Education can also be directed to achieve certain aims that, in turn, benefit wider society. For example, states may use education as a tool to:

- promote economic growth through an educated and skilled labour force
- foster democratic and peaceful societies, by teaching tolerance, mutual respect, and respect for human rights and encouraging participation and inclusion in decision-making processes
- encourage a rich cultural life, by promoting the learning of languages, the arts, sports, etc.
- help build a national identity, by directing the curriculum to teach national values, history, and customs
- promote social justice aims. Education is well-known as an equalising force that can be used to reduce social, political, social, and economic exclusion and marginalization, and combat all forms of discrimination and promote equality
- overcome persistent and entrenched challenges, such as gender inequality

It should be noted that whilst states are required to create the conditions for the enjoyment of all human rights, the pursuit of those conditions must not be at the expense of human rights. For

49 ICESCR Article 15 (1); CRC Article 31.

example, a state should focus on education as a key driver of sustainable economic growth, but it must also ensure that each individual receives an education that focuses on their holistic development, meaning that the education system cannot solely be geared towards the cultivation of a labour force.



### Box 1.5 Further information: Education as a public good

Since the 1990s, a range of development partners, including international organizations, United Nations human rights treaty bodies, and Non-Governmental Organizations have referred to education as a public good, albeit often with diverse interpretations.

At the international level, the principle was first used by UNESCO to reaffirm a humanistic vision of education in contrast to more utilitarian and economic approaches prevalent in the development discourse of the 1990s. A number of reports of the UN Special Rapporteur on the Right to Education since 2000 have referred to education as [a] public good in order to justify the need to safeguard the public interest. The principle of education as a public good has also been used as a reference when advocating for adequate public funding for quality education (GPE, 2016), and when reaffirming the role of the State as the main duty bearer in ensuring the right to education. Indeed, several UN human rights treaty bodies and civil society organizations have referred to this notion in order to “reject calls for increased privatization or commercialization in education” (UNESCO and CCNGO, 2017, p. 5).

These diverse interpretations of the principle of education as a public good in education development discourse are interrelated. Whether interpreted as a humanistic vision, a policy focus or as a principle of governance, the principle of education as a public good refers to the definition and preservation of collective interests of society and to the central responsibility of the State in doing so.

Source: Locatelli, R. 2018. *Education as a public and common good: Reframing the governance of*

*education in a changing context*. Education Research and Foresight Working Papers. UNESCO. (Doc. ED-2018/WP/1.), p. 2.

## The right to education and sustainable development

Education and sustainable development are intrinsically connected. Sustainable development is aimed at the eradication of poverty, and therefore a number of the benefits mentioned above also apply here. For example, education gives people a better chance of finding decent work, thereby being a key means of lifting people out of poverty.

Education also helps people to realize that development should benefit people and communities as a whole. It enables people to recognize that economic development should be pursued to provide long-term benefits in line with human rights and the preservation and conservation of the environment.

In 2015, the international community committed to the 2030 Agenda for Sustainable Development,<sup>50</sup> which is an expansion of the Millennium Development Goals,<sup>51</sup> and which reflects the importance states place on education in achieving sustainable development. Sustainable Development Goal 4 on education<sup>52</sup> sets out a number of targets that are rights-based, for example, Target 4.7 recognizes that education for sustainable development and human rights education are vital to achieving sustainable development.

Education also plays an important role in the realization of environmental rights, that is,

50 United Nations General Assembly (UNGA). 2015. *Transforming our world: the 2030 Agenda for Sustainable Development*. New York, UNGA (Doc. A/RES/70/1.)

51 UNGA. 2000. Resolution 55/2. *United Nations Millennium Declaration* (Doc. A/RES/55/2.)

52 For more information see Chapter 5 on SDG4-Education 2030.

the right to a clean, healthy, and sustainable environment which is a key component of sustainable economic growth. Education and the transfer of knowledge on environmental issues are necessary to raise awareness and spur action at all levels of society and amongst different actors including: individuals, organizations, decision-makers, and so on. Indeed, 'effective climate change education increases the number of informed and engaged citizens, building social will or pressure to shape policy, and building a workforce for a low-carbon economy.'<sup>53</sup>

For example, research suggests that girls' education provides an effective strategy for mitigating the effects of climate change. Investment in girls' education can promote girls' reproductive rights in order to ensure equitable climate action and foster climate participation and female leadership. Education also enables girls to develop life skills for a green economy that are necessary in the fight against climate change.<sup>54</sup>

### 1.4.c The right to education as a blueprint for action

The importance of education to the individual and the wider role of education for society has meant that education has been a preoccupation of thinkers since antiquity. But education is much more than philosophically interesting, it is also a practical activity. This means education issues are also of interest to students, teachers, civil servants, politicians, and others.

There are many questions about education that have been the subject of debate over the centuries: what should the aims of education be, how should education be implemented, how should students be taught, should education

focus on the acquisition of knowledge or skills, such as critical thinking, for example?<sup>55</sup>

Education, its role, delivery, and aims, has evolved over time across societies, shaped by prevailing attitudes and beliefs. In recent times, education has become universalized, that is, open and available to everyone and not just elites. In 1948, states, in proclaiming that: 'everyone has the right to education' in Article 26 of the UDHR, explicitly recognized their role in ensuring that everyone enjoys the right to education. As a result, or perhaps because the UDHR reflected changing attitudes, we now think of education as a matter of public policy and intrinsically linked to the modern functions of the state. For example, in the United Kingdom, it used to be the case that education was largely privately provided by the church. But religious provision is not universal and since the early-to-mid twentieth century, public education systems that have the capacity to provide an education for everyone regardless of background have increasingly become the norm (although private provision is still prevalent; it now tends to be subsumed within the education system, rather than operating outside of it). With this move, states have assumed a role in determining the big questions that have occupied thinkers in respects to education. This means that states, and therefore decision-makers, have a responsibility to think and reflect on the fundamental questions that undergird states' education systems.

Education is not neutral. Decisions of philosophical, moral, and political importance have to be made, which in turn shape the entire education system within a state. The state, as the

53 Ledley, T. S., Rooney-Varga, J. and Niepold, F. 2017. Addressing Climate Change Through Education. *Environmental Issues and Problems, Sustainability and Solutions*.

54 Kwauk, C. and Braga, A. 2017. *3 ways to link girls' education actors to climate change*. Brookings Institution.

55 For an overview of the philosophy of education, including the ideas of prominent thinkers, such as Plato, Jean-Jacques Rousseau, and John Dewey, see Phillips, D.C. and Siegel, Harvey. 2015. Philosophy of Education, *The Stanford Encyclopedia of Philosophy* (Winter 2015 Edition), Edward N. Zalta (ed.) and Siegel, H. 2018. Philosophy of education, *Encyclopaedia Britannica*.

primary unit of organization when it comes to education, must decide the following questions concerning the right to education (as well as number of other education issues):

- what the aims of education are and how competing aims can be balanced
- what is taught as part of the curriculum, including if religious education or comprehensive sexuality education should be taught
- how it is taught, i.e., which pedagogies
- who should teach
- the content of the curriculum, whether there should be any testing and if so, in what form and what should be tested
- how education fits into the wider values and aims of the state
- how the education system should be organized and managed
- what the role of private actors should be

It is the case that there are probably no right answers to the above questions. Any decisions taken will depend on the country context, available resources, and the values that shape underlying beliefs about the nature and purpose of education. However, there are certain red lines that states have agreed, through legal commitment to human rights treaties, not to cross. The right to education and human rights in general guides action on these key questions. For example, that the primary aim of all forms of education should be the full development of the human personality.

Human rights also guide the *process* by which answers should be agreed. Human rights principles such as participation, transparency, and accountability are key.

Currently, decision procedures for these types of questions are largely non-existent. Firstly, it is common that state officials themselves do not consider these underlying questions about education and thus the values and direction of the education system is not regularly evaluated or adapted. Education systems are thus largely characterized by inertia or by piecemeal reform.

Secondly, the state must decide education priorities but with the consent and participation of all stakeholders. However, the public are rarely consulted on such matters. Education sector planning, implementing policies, plans, and laws should be subject to inclusive participation by all relevant stakeholders. Whilst education must meet state aims, the state should also seek to have an education system that all stakeholders have participated in shaping.

Everyone bears responsibility as active citizens to shape the education system, through existing processes, from membership of student councils and parent teacher associations to exercising a democratic voice in general, provincial, and local elections. This helps to make better, more rigorous, more principled, more socially relevant, culturally pertinent, and more consistent policy decisions when it comes to education.

## 1.5 Common criticisms of human rights

The weaknesses of human rights should not be ignored. It is clear there is disagreement over the value of human rights, whether it be criticisms about their effectiveness, contention over their moral grounding, whether they go far enough or are too broad, what their normative content consists of, etc. Even for those who wholeheartedly accept human rights, it is important to recognize that they are not a panacea. But this does not mean that we

disregard human rights altogether. Human rights play a distinctive ethical role at the national and international levels, but this role needs to be constantly debated and evaluated.

That being said, human rights are not immune from criticism and have been, at times, the subject of controversy. Though some criticisms of human rights are certainly justified, it is also necessary to distinguish between those that are valid and those that are unjustified. Indeed, consistent criticisms of human rights often rely on misunderstandings about human rights. Examples of common criticisms and misunderstandings, include:

- **Human rights do not exist.**

Human rights exist in law, in both international human rights treaties at the international level and constitutional and legislative frameworks at the national level. They are protected under national and international law. Whether human rights exist beyond the law is a contested and unsettled matter.

- **Human rights are western.**

Human rights treaties are ratified by a broad range of states that voluntarily consent to be bound by human rights treaties, suggesting that many do not consider human rights to be 'western'. For example, every state except the United States has ratified the CRC.

Further, each region, apart from Asia,<sup>56</sup> has its own human rights regime, created by states within the region, with treaties that address the specific values and context of that region, and an enforcement mechanism based in the region.

Much of the criticism of human rights as western stems from the fact that the UDHR, which is the source of the international human rights regime,

was drafted by representatives from western states and therefore reflects western ideas and values. Whilst the drafting committee of the UDHR was small, it did include states not classified as 'western', including China, Chile, Lebanon, and the USSR. Further, a draft was put out for comments to all United Nations Member States, with over 50 states contributing to the final document. Ultimately, the UDHR was adopted by 48 states, many of which are not considered western. These days, the treaty-negotiating process has become much broader and more inclusive, with every state able to participate, as well as civil society organizations.

- **Human rights are not universal.**

Related to the argument that human rights are 'western' is the argument that they do not reflect universal standards that can be applied to all countries.

Human rights are, by definition, universal and human rights treaties are negotiated on the basis that their content is universally applicable. Human rights treaties are meant to codify and set out the content of rights that reflect a political (and perhaps moral) consensus. Although relatively uncommon, it is clear that states do not always share the same perspectives, particularly on issues such as: female genital mutilation, child marriage, child labour, adoption, and corporal punishment. State practice shows that states object to provisions of treaties they disagree with, either throughout the negotiation process or by making a reservation, which basically asserts a state's right to not be bound by certain provisions of a treaty.

On the other hand, some assert that cultural practices do not enjoy a protected status that immunizes the state against legal or moral responsibility. These arguments are largely based on principled objections against the cultural practice in question. Take the example of child marriage. This practice is permitted in many states,

<sup>56</sup> In Asia, there is the ASEAN Human Rights Declaration (2012) but it is not legally binding and has no enforcement mechanism.

yet it is considered a human rights violation under international law. In such situations, human rights privilege human dignity over cultural practices because human dignity is universal and inherent to every human being, and children's dignity is more important than the preservation of harmful practices.

It should be noted that there exist different conceptualizations of what constitutes human dignity and the emergence of diverse multicultural approaches have tended to strengthen, rather than weaken, the field of human rights.

- **Human rights prioritize the individual over communities.**

Human rights are often criticized as individualistic and therefore at odds with cultures that prioritize the collective over the individual.

Whilst it is true that human rights are held by individuals, there are human rights that are exercised collectively, such as the right to freedom of association. Further, the human rights movement has also sought to protect group rights, particularly the rights of indigenous peoples, and common goods shared by all, for example, the right to development and environmental rights.

The notion that individual rights are fundamentally at odds with collective rights is incorrect. Human rights seek to empower the individual so that they can meaningfully participate in culture and the economic, social, and political realms. If ever there is a conflict between the individual and the group, human rights protect that which is fundamental to the individual, for example the right to be free from slavery, the right to freedom of speech, etc. The reason human rights focus on the individual is precisely because there are certain things that are inviolable about the individual that should not be

subsumed by the concerns of the group. However, in most cases, the two are not just compatible but aggregate to protect a full range of interests.

- **Human rights are ideological.**

Human rights are not based on any particular ideology. In drafting human rights documents, states focus on the human rights fundamental to ensuring dignity. The means and methods used to realize those rights are neither prescribed nor proscribed.

- **Human rights erode national sovereignty.**

Considering human rights to be at odds with national sovereignty is inaccurate because states consent to be legally bound by human rights treaties, and therefore to protect and promote the human rights of their citizens. This includes ensuring that accountability mechanisms and avenues for redress are available at the national level. When states do not protect human rights, the international human rights framework and its accompanying mechanisms ensure that people who suffer abuses and who are failed by their national justice system have an additional avenue to seek justice.

- **Human rights are ineffective.**

A common criticism of human rights is that the prevalence of human rights violations means that human rights law is ineffective. Whilst it is certainly true that human rights law has not stopped all human rights violations, this does not mean that human rights are ineffective. Much of the failure of human rights is to do with the lack of enforcement, whether for reasons of lack of resources, capacity, or a lack of political will, rather than a problem with human rights themselves. This is a major source of frustration for all stakeholders and one which this handbook seeks



to address. That being said, human rights remain effective in a number of significant ways:

- human rights law has been incorporated in many states. For instance, the right to education is mentioned in 82% of national constitutions<sup>57</sup>
- in many states, human rights are enforceable by courts allowing people to obtain justice and discouraging further human rights violations. The fact that human rights are not implemented by all states does not diminish the fact that human rights are effective for a great many people
- human rights empower individuals to realize they are rights-holders with certain entitlements. This changes people’s ideas about what they are owed and what power they have
- human rights set normative standards of behaviour for states and other duty-bearers, often times backed-up in law, but when they are not, this still allows for stakeholders to seek accountability, whether through naming and shaming or by using human rights mechanisms at the international level
- human rights law defines the content of rights, ascribes obligations, and gives them concrete substance
- the human rights framework allows for the continuous monitoring of government behaviour and facilitates awareness of human rights throughout society and the international community
- human rights provide a powerful tool for stakeholders, such as civil society, the international community, local actors and so on, to defend individuals and raise awareness on human rights issues

- **Human rights only protect prisoners and terrorists.**

Human rights protect everyone, without exception. This includes prisoners and terrorists. Were this not the case we could easily justify treating people we do not like in an arbitrary and cruel manner, for example, by indefinitely putting them away and torturing them. Human rights denote the minimum standards by which people must be treated to ensure human dignity, no matter who they are and what they have done.

- **Economic, social and cultural rights are not human rights unlike civil and political rights.**

Historically a distinction was made between civil and political rights on the one hand and economic, social and cultural rights on the other, reflected in the bifurcation of the UDHR into separate legal instruments in 1966: the International Covenant on Civil and Political Rights (ICCPR)<sup>58</sup> and the ICESCR. The adoption of two separate instruments, as opposed to a unified International Bill of Rights, was made for a variety of reasons. One of which was the view that economic and social rights are conceptually different to civil and political rights. For some, education, health, work, and other socio-economics interests are not human rights in the same way that voting, speech, and free trials are.

The most common argument against economic, social, and cultural rights (ESCR) being human rights is that they may impose very different obligations on states compared with civil and political rights (CPR). Take, for example, freedom of religion; this right imposes a negative duty on the state to avoid interference with an individual’s right to belong to and practice her religion. Conversely, the right to education may require the establishment of schools, the training of teachers, and access to learning materials, etc.

58 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

57 RTE, op. cit., p. 29.

The nature of the obligations imposed on states is often positive and burdensome. So when judges make decisions concerning ESCR, they are making decisions about the allocation of resources and are therefore effectively making policy decisions, violating the normative principle of the separation of powers. But this is disingenuous, CPR also entail redistributive consequences. For example, the right to a fair trial entails many costs, including—but not limited to—the training of judges, court costs, and the provision of legal aid. In other words, all human rights comprise different types of obligations: to abstain from interference and to take measures to make enjoyment possible. The right to education is a good example of this. Its realization requires states not to interfere in the free choice of education by parents and children, while at the same time it requires states to build schools and pay teachers.

Today, it is generally accepted that all human rights are indivisible, interdependent, and interrelated.<sup>59</sup> This is reflected at the international level through the adoption of treaties that combine civil and political rights and economic and social rights, such as the CRC, and the increasing codification of economic and social rights in national constitutions. It is also recognized conceptually, for example, receiving an education allows individuals to more effectively exercise the right to freedom of speech or the right to vote.

- **Human rights are too expensive.**

In order to qualify as a human right, a right must impose a legitimate burden that an identifiable duty-bearer must be able to fulfil. It is sometimes, but increasingly rarely, claimed that some internationally recognized human rights, in particular, ESCR, impose an illegitimate resource

burden on states and are therefore not human rights, but rather aspiration policy goals.

This argument is not reflected in the legal status of ESCR and CPR. Under international law, both are considered human rights. However, historically ESCR and CPR were treated differently (and are still considered conceptually different by some), which led to the bifurcation of human rights protected in the UDHR into two distinct legally binding treaties. This separation accounts for the perceived difference between CPR and ESCR, particularly as the treaty protecting ESCR imposes different legal obligations on states compared with the obligations under the treaty protecting CPR.

Under international law, CPR must be immediately realized. This is also the case for some ESCR, for example, the right to free and compulsory primary education, but the ESCR treaty allows for some ESCR to be realized over a period of time (or ‘progressively realized’ in legal terminology) because the resources and capacity required, particularly in low and lower-middle income countries, would need to be galvanized and translated into implementation. It would simply be unrealistic and counterproductive to expect states to build and finance fully-functioning healthcare and education systems upon ratifying a treaty.

It should be noted that CPR are also expensive to implement. The right to a free and fair trial requires the maintenance of a justice system. However, systems and measures to implement CPR have already been undertaken by states.

- **There are other more pressing concerns, for instance, development or national security.**

States have a variety of fundamental interests and concerns, for example, national security and economic interests, that they must constantly balance. Human rights are also part of the equation. Human rights are human rights because

59 UNGA *Vienna Declaration and Programme of Action*, 12 July 1993 (Doc. A/CONF.157/23.) para. 5.

they are high priority—they are not easily dismissed. This is why they are protected in law and by institutions of the state.

Under international law, in some instances, it is permitted to temporarily limit the enjoyment of certain human rights (known as ‘derogable’ rights) particularly during a state of emergency.<sup>60</sup> However, for the most part, human rights are deeply connected to other major national interests. For instance, respect for human rights can contribute to political and economic stability within a country.

- **Human rights privilege certain groups, especially minorities.**

Human rights protect everyone, but some people are more marginalized than others. This is particularly true of people of certain social groups, for example, women and girls, people with disabilities, and minorities. Marginalized groups often face discrimination and unequal enjoyment of their human rights, a fact recognized by international law. International law therefore seeks to address the discrimination and inequality faced by these groups through specific provisions in treaties or entire treaties dedicated to them. For example, girls and women are protected by the Convention on the Elimination of All Forms of Discrimination against Women. In this sense, human rights law does focus on certain groups, not because they are privileging them over other groups, but because in order for everyone to enjoy their human rights on an equal basis, more protections are required to make that a reality.

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60 International Covenant on Civil and Political Rights Article 4; European Convention on Human Rights Article 15.

## Summary

Human rights are guaranteed in international law.

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Education also benefits the state and wider society.

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Education is a human right grounded in the concept of human dignity.

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Education is a public good.

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The primary beneficiary of the right to education is the individual.

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The right to education is comprehensive and holistic.

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Education also has social benefits.

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States are primary duty-bearers when it comes to the right to education.

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## Ask yourself

- ➔ Why do you think the right to education is a human right?
- ➔ Do you think human rights are more than just legal rights? Do they have a moral dimension?
- ➔ How can education help solve economic and social issues occurring in your country?

## Chapter 2:

International legal

recognition of the right to

education

## Key questions

What is *hard law*?

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What are *human rights treaties*?

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What is *customary international law*?

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What is *soft law*?

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What are *general comments/recommendations*?

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What are the sources of conventional human rights law guaranteeing the right to education?

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What do key human rights instruments say on the right to education?

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What is regional human rights law?

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Before 1948, human rights protections existed primarily at the national level (in national constitutions, for instance). That all changed in the aftermath of World War II where the United Nations was explicitly established to: ‘maintain international peace and security’ and to promote and encourage: ‘respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.’<sup>61</sup> As part of its mission, in 1948, the international community adopted the Universal Declaration of Human Rights (UDHR).<sup>62</sup> The UDHR is a milestone document declaring, for the first time, that the human rights contained therein are a: ‘common standard of achievement for all peoples and all nations’, and committing the international community to promote, secure, recognize, and observe those rights.

Among its 30 articles, the right to education is recognized as a human right. It reads:

Article 26

*(1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.*

*(2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall*

*further the activities of the United Nations for the maintenance of peace.*

*(3) Parents have a prior right to choose the kind of education that shall be given to their children.*

The UDHR, although not legally-binding in the sense of being a treaty, carries great political and normative weight. Its normative value is reflected in the fact that it has inspired hundreds of international, regional, and national human rights laws and instruments. As of 2018, the right to education is guaranteed in at least 48 international and regional instruments.

## 2.1 The right to education in international law

The international human rights regime comprises mainly of human rights treaties. Human rights treaties make up what is known as *conventional human rights law*. Treaties are multilateral agreements concluded by international organizations and then opened up for ratification, accession, approval, or acceptance by states.<sup>63</sup> This process signals states’ consent to be legally bound by the treaty.

International human rights law has the following purposes to:

- set internationally agreed normative standards of conduct of states towards those living in their jurisdiction
- delimit the normative content of each human right (owed to rights-holders) and the legal obligations attached to implementing the

61 Charter of the United Nations (adopted 24 October 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter) Article 1.

62 Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR).

63 Ratification is a two-step procedure: first an authorised representative of the state signs the treaty, signalling its intention to become legally bound by the treaty (this intention is not itself binding). The state then concludes the process by ratifying the treaty. Acceptance and approval are synonymous with ratification. Accession has the same legal effect as ratification but is concluded directly, without signing. For further information see Chapter 6, section 6.1.

normative content (the corresponding obligations of duty-bearers)

- legally commit states to implementing their obligations at the national level, making human rights a reality for all

Strictly speaking, human rights treaties (also known as *covenants*, *conventions*, *protocols*, or *charters*) are legally-binding multilateral agreements between states (horizontal application). However, the normative content of a human rights treaty is directed and owed to the people living in the jurisdiction of the state party (vertical application). This means that under international law, only states can be in breach of a treaty (not non-state actors such as individuals or business enterprises) and only states can be held accountable for violations at the international level.<sup>64</sup> Human rights treaties therefore require domestication, that is, they must be incorporated into the domestic legal order of the state party in order to ensure enjoyment by rights-holders.<sup>65</sup>

At the international level, there are nine core UN human rights treaties.<sup>66</sup> Some of these treaties are generic, for example, the International Covenant on Economic, Social and Cultural Rights (1966)<sup>67</sup> and the International Covenant on Civil and Political Rights (1966)<sup>68</sup> which apply to everyone, whilst other treaties are thematic and apply to

specific groups, for example, the Convention on the Elimination of All Forms of Discrimination against Women (1979)<sup>69</sup> applies to women and the Convention on the Rights of Persons with Disabilities (2006)<sup>70</sup> applies to people with disabilities. In addition, instruments are adopted by UN agencies, such as the International Labour Organization and UNESCO.

Human rights, aspects of human rights, and issues concerning human rights are also dealt with in other areas of international law, for instance, labour law, humanitarian law, refugee law, and criminal law.

Region-specific human rights legal instruments also exist to strengthen the protection and enjoyment of human rights by adapting human rights standards to regional contexts, taking into account shared customs, values, cultures, and practices.

Although the primary source of international human rights law is human rights treaties, other sources of international law known as *soft law*,<sup>71</sup> which are material sources (legal instruments or other documents) that do not give rise to binding legal obligations, have become increasingly important in the practice of international human rights law. Soft law is often legal or quasi-legal in its content, however, it cannot be legally enforced. Acceptance of and compliance with such instruments and documents by a state is entirely up to the state in question. If a state chooses to be bound by soft law, it is only bound in a *moral* or *political* sense. This may sound like a downside to soft law but sometimes, its non-legally binding nature means that states may be more likely to

64 See Chapter 4.

65 See Chapter 6.

66 International Convention on the Elimination of All Forms of Racial Discrimination (1965); International Covenant on Civil and Political Rights (1966); International Covenant on Economic, Social and Cultural Rights (1966); Convention on the Elimination of All Forms of Discrimination against Women (1979); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984); Convention on the Rights of the Child (1989); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990); International Convention for the Protection of All Persons from Enforced Disappearance (2006); Convention on the Rights of Persons with Disabilities (2006).

67 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

68 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

69 Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW).

70 Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (CRPD).

71 For further information, see for example, Fajardo, T. 2014. Soft law. *Oxford Bibliographies*. Oxford University Press.



engage knowing that no hard obligations will follow, and it may also allow for more innovative content.

Soft law comprises *instruments*, that are legal in character but do not impose legal obligations, and *documents* (any document that is quasi-legal in character), such as: declarations, frameworks for action, general comments and recommendations, guidelines, resolutions, recommendations, advisory opinions, decisions of international and national bodies, and guiding principles. The most famous example of soft law is the UDHR. Soft law has several functions, it:

- clarifies and interprets existing human rights law, for example, exegesis by United Nations treaty bodies through general comments/recommendations, and decisions by treaty bodies, courts, and tribunals. These documents, although not legally binding, offer authoritative interpretations of human rights treaties and its provisions
- offers guidance for best practice on the implementation of hard law, for example, guidelines, recommendations, frameworks for action, and general comments/recommendations
- adjusts the normative scope of human rights to cover emerging human rights issues, contexts, or gaps in extant law, for example, guiding principles and declarations. This allows human rights law to be applicable to changing contexts and circumstances so that human rights may be meaningfully enjoyed
- norm emergence, setting, and acceptance through, for example, recognizing and elaborating the human rights of marginalized groups, for example, the United Nations

Declaration on the Rights of Indigenous Peoples<sup>72</sup>

- signals belief in what states believe to be the law (*opinio juris*), for example, UN General Assembly resolutions and declarations



**Box 2.1 Further information:  
The importance of general comments  
and general recommendations**

Treaty bodies, which are committees established by the core UN human rights treaties, provide authoritative interpretations of the normative content and obligations relating to human rights standards, through general comments/recommendations.

General comments/recommendations usually focus on substantive rights, for instance, the right to education; states' obligations and domestic implementation; and particular issues, for example business and human rights.

The primary purpose of general comments/recommendations is to ensure that states are provided with the necessary guidance to fully comply with a human rights treaty. This is done through: clarifying the content of provisions in light of changing contexts, giving examples of best practice, providing frameworks for understanding the normative content and obligations of human rights, and identifying what constitutes a violation.

The value of these interpretations, however, goes beyond guidance for states (decision-makers and judges, for example). They also contribute to the international understanding of human rights standards which means they can also be used by civil society.

An example of a general comment is the Committee on Economic, Social and Cultural Rights' general comment on the right to education<sup>73</sup> which:

72 UNGA. Resolution 61/295. United Nations Declaration on the Rights of Indigenous Peoples (adopted 2 October 2007) (Doc. A/RES/61/295.)

73 UN Committee on Economic Social and Cultural Rights (CESCR). 1999. *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)* (Doc. E/C.12/1999/10.) (CESCR General Comment 13).

- elaborates the normative content of the right to education, including how non-discrimination and equality interact with the right to education
- elaborates states' legal obligations and lists potential violations

### Example 2.1: The use of general comments in interpreting the right to education at the national level

In Canada, in a case concerning the right to education of a boy with Down's Syndrome, the Human Rights Tribunal found that the legal requirement of integration established by the Education Act together with the prohibition of disability-based discrimination requires that reasonable accommodation measures be taken at each stage of a student's integration.<sup>74</sup> In supporting this view, the Tribunal reiterated the three accessibility dimensions expounded in General Comment 13 of the Committee on Economic, Social and Cultural Rights as well as General Comment 5 which recognizes that persons with disabilities are best educated within integrated settings. The consideration of general comments highlights their normative value in interpreting and applying human rights standards. This *cross-fertilization* indicates an approach used by courts to ensure that domestic implementation of the right to education aligns with international human rights standards.

The distinction between soft and hard law (legally-binding law, or *lex ferenda*) is not always clear cut. Soft law can also, in some instances, become hard law. This occurs because soft law instruments may embody emerging norms (in whole or in part)

which may eventually become or influence hard law. This 'hardening' happens via two processes:

1. Soft law can inspire states and international and regional organizations to embark on a treaty-making process. This is the most common way in which soft law can become legally binding law.

### Example 2.2: The United Nations Convention on the Rights of the Child

The Convention on the Rights of the Child (1989, CRC)<sup>75</sup> has its roots in a declaration originally adopted by the League of Nations (the precursor to the United Nations) in 1924. The Geneva Declaration on the Rights of the Child marked the first international acknowledgement of children's rights. Based on the Geneva Declaration and the Universal Declaration of Human Rights (1948), the United Nations later adopted the Declaration of the Rights of the Child in 1959 which sought to address the shortcomings of the Geneva Declaration and set out the specific rights of the child.

Later on, in 1978, seizing on the anniversary of the Geneva Declaration, the government of Poland presented the idea of a treaty on the rights of the child which unlike the Geneva Declaration and the Declaration of the Rights of the Child would be legally binding on states. After 10 years of negotiations between states and other actors, including multilateral and non-governmental organizations, states finally approved and adopted the final text of the CRC in 1989. Today, the CRC is the most widely ratified human rights treaty in the world.

2. Soft law can play a part in establishing a norm of a specific form of international law: *customary international law* (CIL). CIL is a primary source of international law<sup>76</sup> that has

74 Commission des droits de la personne et des droits de la jeunesse v Commission scolaire des Phares [Commission on the rights of the person and the rights of young Phares school commission], 2004 CanLII 46172 (QC TDP).

75 Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC).

76 Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993 (ICJ Statute) Article 38 (1) (b).

the same status as conventional law, i.e. it is hard law. Unlike conventional law, however, CIL is binding on all states, provided the state in question has not persistently objected to it. CIL can also exist in specific geographic regions.

However, CIL is formed in a completely different way to convention law, which is negotiated and ratified by states. According to the Statute of the International Court of Justice, CIL requires two elements: 1. general practice 2. acceptance as law.<sup>77</sup> Both elements have been clarified, to an extent, by judgments and advisory opinions of the International Court of Justice (ICJ). The first element, state practice (also known as the *objective element*), requires identifiable consistent and general state practice that occurs over a long period of time. The second element, acceptance as law (known as the *subjective element* or *opinio juris*), requires that state practice is: 'evidence of a belief that the practice is rendered obligatory by the existence of a rule of law requiring it. The need for such belief, the subjective element, is implicit in the very notion of *opinio juris sive necessitatis*.' Soft law documents, such as United Nations General Assembly resolutions and judicial decisions, are considered by the ICJ as both evidence of state practice and *opinio juris*.<sup>78</sup>

## 2.2 International human rights instruments

The right to education is guaranteed in at least 48 international (including regional) legal instruments and 23 soft law instruments (not documents). This section summarizes the

normative content of the most important legal instruments, both hard and soft law.

Legally binding treaties are indicated in purple. Non-legally binding instruments are indicated in red.

Please note that the following chapter explains the normative content as set out in these instruments.

### 2.2.a United Nations core human rights treaties

The [International Covenant on Economic, Social and Cultural Rights \(1966, ICESCR\)](#)<sup>79</sup> is of special importance within the UN human rights legal framework. Together with the International Covenant on Civil and Political Rights (1966, ICCPR) and the UDHR, it comprises the International Bill of Rights. Between them the ICESCR and ICCPR guarantee the full range of human rights recognized in the UDHR, in treaty form.

Article 13 is the single most comprehensive provision on the right to education in international law. It is also the most textually elaborated provision of ICESCR, reflecting its importance and the expansive normative scope of the right to education. Article 13 reads:

1. *The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations*

<sup>77</sup> Ibid.

<sup>78</sup> Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (8 July) (Nuclear Weapons Case).

<sup>79</sup> International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:
  - (a) Primary education shall be compulsory and available free to all;
  - (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
  - (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;
  - (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;
  - (e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.
3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Furthermore, Article 14 reads:

*Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.*

Article 2 (2) of ICESCR guarantees non-discrimination with respect to the human rights contained with the treaty. This means that Article 13 read with Article 2 (2) places obligations on States parties to guarantee the right to education free from discrimination.

The right to education contained in ICESCR has been interpreted by the Committee on Economic, Social and Cultural Rights (CESCR) in various general comments, most importantly:

- **General Comment 13: The Right to Education**<sup>80</sup>
- **General Comment 11: Plans of Action for Primary Education**<sup>81</sup>

Other General Comments relevant to the right to education under ICESCR:

<sup>80</sup> CESCR. 1999. *General Comment No. 13*. op. cit.

<sup>81</sup> CESCR. 1999. *General Comment No. 11: Plans of Action for Primary Education (Article 14 of the Covenant)* (Doc. E/C.12/1999/4.)

- **General Comment 1: Reporting by States Parties**<sup>82</sup>
- **General Comment 3: The Nature of States Parties' Obligations**<sup>83</sup>
- **General Comment 5: Persons with Disabilities**<sup>84</sup>
- **General Comment 6: The Economic, Social and Cultural rights of Older Persons**<sup>85</sup>
- **General Comment 9: The Domestic Application of the Covenant**<sup>86</sup>
- **General Comment 14: The Right to the Highest Attainable Standard of Health**<sup>87</sup>
- **General Comment 16: The Equal Right of Men and Women to the Enjoyment of all Economic, Social and Cultural Rights**<sup>88</sup>
- **General Comment 18: The Right to Work**<sup>89</sup>
- **General Comment 20: Non-discrimination in Economic, Social and Cultural Rights**<sup>90</sup>
- **General Comment 21: Right of Everyone to Take Part in Cultural Life**<sup>91</sup>

82 CESCR. 1989. *General Comment No. 1: Reporting by States Parties* (Doc. E/1989/22.) para. 4.

83 CESCR. 1990. *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, para. 1, of the Covenant)* (Doc. E/1991/23.) paras. 3, 7, and 10.

84 CESCR. 1995. *General Comment 5: Persons with Disabilities* (Doc. E/1995/22.) paras. 1, 13, 15, 16, 23 and 35.

85 CESCR. 1995. *General Comment 6: The Economic, Social and Cultural Rights of Older Persons* (Doc. E/1996/22.) paras. 5, 12, 24, 36-39, and 41.

86 CESCR. 1998. *General Comment No. 9: The Domestic Application of the Covenant* (Doc. E/C.12/1998/24.)

87 CESCR. 2000. *General Comment No. 14: The Right to the Highest Attainable Standard of Health* (Doc. E/C.12/2000/4.) paras. 3, 11, 16, 17, 21, and 34.

88 CESCR. 2005. *General Comment 16: The Equal Right of Men and Women to the Enjoyment of all Economic, Social and Cultural Rights (Article 3 of the Covenant)* (Doc E/C.12/2005/4.) paras. 4, 21, 30 and 31.

89 CESCR. 2005. *General Comment No. 18: The Right to Work (Article 6 of the Covenant)* (Doc. E/C.12/GC/18.) paras. 13-14.

90 CESCR. 2009. *General Comment 20: Non-discrimination in Economic, Social and Cultural Rights (Art. 2, para. 2 of the Covenant)* (Doc. E/C.12/GC/20.) paras. 3-5, 10 (a), 21, 28, 30, 33, 35, and 38.

91 CESCR. 2009. *General Comment 21: Right of everyone to take part in cultural life (Art. 15, para. 1a of the Covenant)* (Doc. E/C.12/GC/21.) paras. 2, 15 (b), 16, 25-27, 29, 32, 35, 52 (i), 53, 54 (c), and 55 (c).

The **Convention on the Rights of the Child (1989, CRC)** is one of the most widely ratified treaties of all time (every state has ratified it except the United States). It applies to children, which the CRC defines as everyone under the age of 18.

Article 28 of the CRC recognizes education as a legal right for every child on the basis of equal opportunity. The content of Article 28 largely corresponds to the content of Article 13 of ICESCR with respects to obligations related to levels of education:

- free compulsory primary education for all (Article 28 (1) (a))
- progressive free secondary education, including vocational and technical education, that should in any case be available and accessible to all (Article 28 (1) (b))
- accessibility to higher education on the basis of capacity (Article 28 (1) (c))
- available and accessible educational and vocational information and guidance (Article 28 (1) (d))

However, as the CRC applies the right to education specifically to children, it contains additional important content:

- an obligation on the state to take measures regarding school attendance and the reduction of drop-out rates (Article 28 (1) (e))
- the administering of school discipline shall be in conformity with the dignity of the child (Article 28 (2))
- the encouragement of international cooperation in matters related to education, in particular, the elimination of ignorance and illiteracy and access to scientific and technical knowledge (Article 28 (3))

Article 29 of the CRC comprehensively defines the aims of education and recognizes the liberty

of parents to choose the kind of education they want to give to their children and the liberty to establish and direct educational institutions, in conformity with minimum standards laid down by the state.

Additionally, the CRC prohibits discrimination in education (Article 2 (1) read with Articles 28 and 29).

Article 29 of the CRC has been interpreted by the Committee on the Rights of the Child in its [General Comment 1: The Aims of Education](#).<sup>92</sup> Other relevant general comments, include:

- [General Comment 3: HIV/AIDS and the Rights of the Children](#)<sup>93</sup>
- [General Comment 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child](#)<sup>94</sup>
- [General Comment 5: General Measures of Implementation of the Convention on the Rights of the Child](#)
- [General Comment 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin](#)<sup>95</sup>
- [General Comment 7: Implementing Child Rights in Early Childhood](#)<sup>96</sup>
- [General Comment 8: The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment](#)<sup>97</sup>

- [General Comment 9: The Rights of Children with Disabilities](#)<sup>98</sup>
- [General Comment 10: Children's Rights in Juvenile Justice](#)<sup>99</sup>
- [General Comment 11: Indigenous Children and Their Rights Under the Convention](#)<sup>100</sup>
- [General Comment 12: The Right of the Child to be Heard](#)<sup>101</sup>
- [General Comment 14: The Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration](#)<sup>102</sup>
- [General Comment 17: The Right of the Child to Rest, Leisure, Play, Recreational Activities, Cultural Life and the Arts](#)<sup>103</sup>

The [Convention on the Elimination of All Forms of Discrimination against Women \(1979, CEDAW\)](#) interprets and applies the right to education in a way that considers the specific needs and circumstances of women and girls.

Article 10 of CEDAW is the most comprehensive provision on women's and girls' right to education in international law. It sets forth the normative content in relation to the elimination of discrimination against women and the ensuring of equal rights with men in the field of education, including:

- the same conditions for career and vocational guidance, access to studies, and achievement of

92 UN Committee on the Rights of the Child (CRC). 2001. *General Comment No. 1: The Aims of Education* (Doc. CRC/GC/2001/1.)

93 CRC. 2003. *General Comment 3: HIV/AIDS and the Rights of the Children* (Doc. CRC/GC/2003/3.) paras. 6-7, 18-19, and 31.

94 CRC. 2003. *General Comment 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child* (Doc. CRC/GC/2003/4.) para. 14.

95 CRC. 2003. *General Comment 5: General Measures of Implementation of the Convention on the Rights of the Child* (Doc. CRC/GC/2003/5.) paras. 41-43.

96 CRC. 2005. *General Comment 7: Implementing Child Rights in Early Childhood* (Doc. CRC/C/GC/7.) paras. 28-30, and 33.

97 CRC. 2006. *General Comment 8: The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment* (Doc. CRC/C/GC/8.)

98 CRC. 2006. *General Comment 9: The Rights of Children with Disabilities* (Doc. CRC/C/GC/9.) paras. 62-69.

99 CRC. 2007. *General Comment 10: Children's Rights in Juvenile Justice* (Doc. CRC/C/GC/10.) paras. 18 and 89.

100 CRC. 2009. *General Comment 11: Indigenous Children and their Rights under the Convention* (Doc. CRC/C/GC/11.) paras. 56-63.

101 CRC. 2009. *General Comment 12: The Right of the Child to be Heard* (Doc. CRC/C/GC/12.) paras. 105-114.

102 CRC. 2013. *General Comment 14: The Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration* (Art. 3, Para. 1 of the Covenant) (Doc. CRC/C/GC/14.) para. 79.

103 CRC. 2013. *General Comment 17: The Right of the Child to Rest, Leisure, Play, Recreational Activities, Cultural Life and the Arts* (Article 31 of the Covenant) (Doc. CRC/C/GC/17.) paras. 27, 41 and 58 (g).

diplomas at all educational levels, both in urban and rural areas (Article 10(a))

- the same quality of education, including: access to the same curricula, examinations, school premises and equipment, and teaching staff with qualifications of the same standard (Article 10 (b))
- the elimination of any stereotyped concept of the roles of men and women by encouraging coeducation, the revision of textbooks and school programmes, and the adaptation of teaching methods (Article 10(c))
- the same opportunities to benefit from scholarships and other study grants (Article 10(d))
- the same access to programmes of continuing education, including literacy programmes, particularly those aimed at reducing the gender gap in education (Article 10(e))
- the reduction of female student drop-out rates and programmes for girls and women who have left school prematurely (Article 10(f))
- the same opportunity to participate in sports and physical education (Article 10(g))
- access to educational information on health including advice on family planning (Article 10(h))

The Committee on the Elimination of Discrimination against Women has issued an authoritative interpretation of Article 10 in [General Recommendation 36 on women's and girls' right to education](#),<sup>104</sup> which elaborates the legal obligations of states under CEDAW to eradicate the discriminatory barriers preventing girls from enjoying their right to education and implement measures to bring about equality in

practice, and makes concrete and actionable legal and policy recommendations which would bring states into compliance with CEDAW.

The [Convention on the Rights of Persons with Disabilities \(2006, CRPD\)](#) interprets existing human rights law in a manner that takes account of the specific situation of people with disabilities. It clarifies and qualifies how all categories of rights apply to persons with disabilities and identifies areas where adaptations have to be made in order that persons with disabilities can effectively exercise their rights, as well as areas where their rights have been violated, and where protection of rights must be reinforced.

Article 24 of the CRPD recognizes the right of people with disabilities to education, without discrimination and on the basis of equal opportunity, the state having the obligation to ensure an inclusive education system at all levels, and lifelong learning.

The first part of Article 24 sets out the aims of an inclusive education system:

- full development of human potential and sense of dignity and self-worth, strengthening respect for human rights, fundamental freedoms, and diversity
- development of the personality, talents and creativity of people with disabilities, as well as their mental and physical abilities, to their fullest potential
- enable persons with disabilities to participate effectively in society

The second part addresses the various forms of discrimination that people with disabilities often face. It:

- prohibits exclusion from the general education system and from free and compulsory education

<sup>104</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW). 2017. *General Recommendation 36 on women's and girls' right to education* (Doc. CEDAW/C/GC/36.)

- provides that people with disabilities must be able to access inclusive, quality, free primary and secondary education in the communities in which they live
- requires that states provide reasonable accommodation and individualized support measures

The third part requires states to take appropriate measures to provide the learning of life and social development skills to facilitate their full and equal participation in education, for instance, the learning of Braille and sign language.

The fourth part requires states to employ qualified and trained teachers at all levels of education.

The fifth part requires states to ensure that people with disabilities are able to access general tertiary education, vocational training, adult education and lifelong learning without discrimination and on an equal basis with others.

Article 24 has been interpreted by the Committee on the Rights of Persons with Disabilities in **General Comment 4—Article 24: Right to inclusive education**.<sup>105</sup>

The **International Covenant on Civil and Political Rights (1966, ICCPR)**,<sup>106</sup> although it does not have a comprehensive right to education clause, guarantees educational freedom (Article 18 (4)) and has an autonomous non-discrimination clause (Article 26) which applies to: 'any field regulated and protected by public authorities.'<sup>107</sup> The Human Rights Committee has explained that: '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.'<sup>108</sup> On this interpretation, under the ICCPR, there is an obligation to ensure that education laws and regulations are not discriminatory.

The **International Convention on the Elimination of All Forms of Racial Discrimination (1965, ICERD)**<sup>109</sup> prohibits racial discrimination in the enjoyment of human rights, including economic, social and cultural rights.

Article 5 guarantees the right to education of everyone, without distinction as to race, colour or national or ethnic origin.

Article 7 encourages states to take measures to combat prejudices, which lead to racial discrimination in the field of teaching and education and to promote understanding, tolerance and friendship among nations and racial or ethnic groups.

The **International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990, ICRMW)**<sup>110</sup> seeks to prevent and eliminate the exploitation of migrant workers throughout the entire migration process by providing binding international standards to address the treatment, welfare and human rights of both documented and undocumented migrants, as well as the obligations and responsibilities on the part of sending and receiving states.

105 UN Committee on the Rights of Persons with Disabilities (CRPD). *General Comment—Article 24: Right to inclusive education* (Doc. CRPD/C/GC/4.)

106 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

107 UN Human Rights Committee (CCPR). 1989. *General Comment 18: Non-discrimination* (Doc. HRI/GEN/1/Rev.1 at 26 (1994.)) (CCPR General Comment 18) para. 12.

108 Ibid.

109 International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (ICERD).

110 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3 (ICRMW).



Under Articles 12 (4), 30, 43, and 45, the ICRMW guarantees for each child of a migrant worker the basic right of access to education on the basis of equality of treatment with nationals of the state even in cases of irregular migrant situations. It provides other rules for migrants and their families, in the field of education, and assures parental freedom in the moral and religious education of their children.

### 2.2.a.i United Nations: Declarations

The **United Nations Declaration on Human Rights Education and Training (2011)**<sup>111</sup> recognizes the importance of receiving and providing education and training on human rights in contributing to the promotion, protection and effective realization of all human rights. Article 1 states that: ‘Everyone has the right to know, seek and receive information about all human rights and fundamental freedoms and should have access to human rights education and training.’ The enjoyment of the right to education is what enables enjoyment of human rights education and training. Article 2 specifies the elements encompassed in human rights education. Articles 7-13 contain provisions on states and other actors’ responsibilities in implementing human rights education.

The **United Nations Declaration on the Rights of Indigenous Peoples (2007)**<sup>112</sup> establishes a universal framework of minimum standards for the survival, dignity, and well-being of indigenous peoples. It elaborates on existing human rights standards as they apply to the specific situation of indigenous peoples. Article 14 guarantees the right of indigenous peoples to all levels and

forms of education without discrimination as well as the right to establish their own educational institutions and systems providing education in their own languages.

The **United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992)**<sup>113</sup> sets essential standards to ensure the rights of persons belonging to minorities. Article 4 (3) provides that: ‘States should take appropriate measures to allow persons belonging to minorities to have adequate opportunities to learn their mother tongue or to receive instruction in their mother tongue.’ Article 4 (4) further states that the history, traditions, and cultures of minorities should be reflected in education.

### 2.2.b UNESCO normative instruments

The **Convention against Discrimination in Education (1960, CADE)**<sup>114</sup> is the first instrument to be dedicated, in its entirety, to the right to education. Unlike most human rights treaties, CADE does not permit reservations.<sup>115</sup>

Articles 1 and 2 define discrimination, understood as: ‘any distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education.’

Article 3 lists the measures a state must undertake in order to eliminate and prevent discrimination:

(a) *To abrogate any statutory provisions and any administrative instructions and to discontinue*

111 HRC. Resolution 16/1. United Nations Declaration on Human Rights Education and Training (adopted 8 April 2011) (Doc. A/HRC/RES/16/1.) and UNGA. Resolution 66/137. United Nations Declaration on Human Rights Education and Training (adopted 16 February 2012) (Doc. A/RES/66/137.)

112 United Nations Declaration on the Rights of Indigenous Peoples (adopted 13 September 2007) (Doc. A/RES/61/295.)

113 United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (adopted 18 December 1992) (Doc. A/RES/47/135.)

114 Convention against Discrimination in Education (adopted 14 December 1960, entered into force 22 May 1962) 429 UNTS 93 (CADE).

115 Reservations may limit the legal effect of a treaty. See Chapter 6, Box 6.1 for further information.

*any administrative practices which involve discrimination in education;*

- (b) *To ensure, by legislation where necessary, that there is no discrimination in the admission of pupils to educational institutions;*
- (c) *Not to allow any differences of treatment by the public authorities between nationals, except on the basis of merit or need, in the matter of school fees and the grant of scholarships or other forms of assistance to pupils and necessary permits and facilities for the pursuit of studies in foreign countries;*
- (d) *Not to allow, in any form of assistance granted by the public authorities to educational institutions, any restrictions or preference based solely on the ground that pupils belong to a particular group;*
- (e) *To give foreign nationals resident within their territory the same access to education as that given to their own nationals.*
- (d) *Not to allow, in any form of assistance granted by the public authorities to educational institutions, any restrictions or preference based solely on the ground that pupils belong to a particular group;*
- (e) *To give foreign nationals resident within their territory the same access to education as that given to their own nationals.*

Articles 4 and 5 sets out specific state obligations in terms of full realization of the right to education without discrimination. These largely echo the provisions of Article 13 of ICESCR and Articles 28 and 29 of the CRC, but specifies obligations to ensure that: ‘the standards of education are equivalent in all public educational institutions of the same level, and that the conditions relating to the quality of the education provided are also equivalent’, and also to: ‘provide training for the teaching profession without discrimination’.

In addition to CADE, there is the **Recommendation against Discrimination in Education (1960)**,<sup>116</sup> which provides for the same guarantees. The Recommendation, however, seeks to take into account the difficulties that certain states might experience, for various reasons and in particular on account of their federal structure, in ratifying CADE.

The **Convention on Technical and Vocational Education (1989)**<sup>117</sup> enshrines the ‘right of equal access to technical and vocational education’.

Article 1 defines technical and vocational education as: ‘all forms and levels of the educational process involving, in addition to general knowledge, the study of technologies and related sciences and the acquisition of practical skills, know-how, attitudes and understanding relating to occupations in the various sectors of economic and social life’.

Article 2 provides that states: ‘shall guarantee that no individual who has attained the educational level for admission into technical and vocational education shall be discriminated against’ and ‘shall take appropriate measures’ to enable people with disabilities and other marginalized groups to benefit from technical and vocational education.

Article 3 provides the basic content requirements as well as a list of elements to be taken into account when providing and developing technical and vocational education programmes.

Article 5 refers to teachers’ training and employment conditions in the field of technical and vocational education, amongst other implementing provisions.

<sup>116</sup> Recommendation against Discrimination in Education (adopted 14 December 1960).

<sup>117</sup> Convention on Technical and Vocational Education (adopted 10 November 1989, entered into for 29 August 1991) 1649 UNTS 143.

Under Article 4, states agree to periodically review the structure of technical and vocational education.

Other UNESCO instruments at the international level:

- ILO/UNESCO Recommendation concerning the Status of Teachers (1966)<sup>118</sup>
- Recommendation concerning Education for International Understanding, Cooperation and Peace and Education relating to Human Rights and Fundamental Freedoms (1974)<sup>119</sup>
- Recommendation on the Recognition of Studies and Qualifications in Higher Education (1993)<sup>120</sup>
- Salamanca Statement and Framework for Action on Special Needs Education (1994)<sup>121</sup>
- Recommendation concerning the status of Higher-Education Teaching Personnel (1997)<sup>122</sup>
- Hamburg Declaration on Adult Learning (1997)<sup>123</sup>
- World Declaration on Higher Education for the 21st Century (1998)<sup>124</sup>
- Dakar Framework for Action – Education for All: Meeting our Collective Commitment (2000)<sup>125</sup>
- Declaration of Amsterdam (2004)<sup>126</sup>

- Jakarta Declaration (2005)<sup>127</sup>
- Recommendation concerning Technical and Vocational Education and Training (TVET) (2015)<sup>128</sup>
- Recommendation on Adult Learning and Education (2015)<sup>129</sup>
- Incheon Declaration and Education 2030 Framework for Action (2015)<sup>130</sup>

Other UNESCO instruments at the regional level:

- Regional Convention on the Recognition of Studies, Diplomas and Degrees in Higher Education in Latin America and the Caribbean (1974)<sup>131</sup>
- Convention on the Recognition of Studies, Diplomas and Degrees in Higher Education in the Arab and European States Bordering on the Mediterranean (1976)<sup>132</sup>
- Convention on the Recognition of Studies, Diplomas and Degrees in Higher Education in the Arab States (1978)<sup>133</sup>
- Convention on the Recognition of Studies, Diplomas and Degrees concerning Higher

118 ILO/UNESCO Recommendation concerning the Status of Teacher (adopted 5 October 1966).

119 Recommendation concerning Education for International Understanding, Cooperation and Peace and Education relating to Human Rights and Fundamental Freedoms (adopted 19 November 1974).

120 Recommendation on the Recognition of Studies and Qualifications in Higher Education (adopted 13 November 1993).

121 Salamanca Statement and Framework for Action on Special Needs Education (adopted 7-10 June 1994).

122 Recommendation concerning the status of Higher-Education Teaching Personnel (adopted 11 November 1997).

123 Hamburg Declaration on Adult Learning (adopted 14-18 July 1997).

124 World Declaration on Higher Education for the 21st Century (adopter 9 October 1998).

125 Dakar Framework for Action – Education for All: Meeting our Collective Commitment (adopted 26-28 April 2000).

126 Declaration of Amsterdam (adopted 25-30 November 2004).

127 Incheon Declaration (adopted 19-22 May 2015) and Education 2030 Framework for Action (adopted 4 November 2015).

128 Recommendation concerning Technical and Vocational Education and Training (TVET) (adopted November 2015).

129 Recommendation on Adult Learning and Education (adopted November 2015).

130 Incheon Declaration (adopted 19-22 May 2015) and Education 2030 Framework for Action (adopted 4 November 2015).

131 Regional Convention on the Recognition of Studies, Diplomas and Degrees in Higher Education in Latin America and the Caribbean (adopted 19 July 1974, entered into force 14 June 1975) 980 UNTS 245.

132 Convention on the Recognition of Studies, Diplomas and Degrees in Higher Education in the Arab and European States Bordering on the Mediterranean (adopted 7 December 1976, entered into force 6 March 1978) 1098 UNTS 191.

133 Convention on the Recognition of Studies, Diplomas and Degrees in Higher Education in the Arab States (adopted 22 December 1978, entered into force 7 August 1981) 1098 UNTS 191.

### Education in the States belonging to the Europe Region (1979)<sup>134</sup>

- Regional Convention on the Recognition of Studies, Certificates, Diplomas, Degrees and other Academic Qualifications in Higher Education in the African States (1981)<sup>135</sup>
- Regional Convention on the Recognition of Studies, Diplomas and Degrees in Higher Education in Asia and the Pacific (1983)<sup>136</sup>
- Convention on the Recognition of Qualifications concerning Higher Education in the European Region (1997)<sup>137</sup>
- Asia-Pacific Regional Convention on the Recognition of Qualifications in Higher Education (2011)<sup>138</sup>
- Revised Convention on the Recognition of Studies, Certificates, Diplomas, Degrees and Other Academic Qualifications in Higher Education in African States (2014)<sup>139</sup>

## 2.2.c International labour law

International labour law is the area of international law that governs labour standards, including workers' human rights. The main source of

international labour standards is the International Labour Organization (ILO). The ILO is a tripartite organization comprised of representatives of governments, employers, and trade unions.

The ILO has adopted an impressive array of conventions including some related to: vocational training, teachers' rights, child labour and the minimum age of employment, and indigenous peoples' right to education. ILO conventions are not subject to reservations by states parties, however, conventions do contain various provisions ensuring flexibility, including some that specifically enable ratifying states to limit or qualify the obligations assumed on ratification. However, no limitations on the obligations of a convention other than those specifically provided for are possible.

The ILO also produces soft law in the form of recommendations, which provide guidelines for action.

The **C138 - Minimum Age Convention, 1973 (No. 138) Convention concerning Minimum Age for Admission to Employment**<sup>140</sup> is considered a fundamental convention of the ILO and seeks to protect against the practice of child labour.

Article 2 (3) sets minimum age for employment to not be less than the age of completion of compulsory schooling, but in any case, no less than 15 years. However, Article 2 (4) permits low and lower-middle income states whose education systems have yet to be fully developed, to specify an initial age of 14 for the minimum age of employment, if organizations of employers and workers have been consulted.

The **C140 - Paid Educational Leave Convention, 1974 (No. 140) Convention Concerning Paid**

<sup>134</sup> Convention on the Recognition of Studies, Diplomas and Degrees concerning Higher Education in the States belonging to the Europe Region (adopted 21 December 1979, entered into force 3 November 1961) 1272 UNTS 3.

<sup>135</sup> Regional Convention on the Recognition of Studies, Certificates, Diplomas, Degrees and other Academic Qualifications in Higher Education in the African State (adopted 5 December 1981, entered into force 1 January 1983) 1297 UNTS 101.

<sup>136</sup> Regional Convention on the Recognition of Studies, Diplomas and Degrees in Higher Education in Asia and the Pacific (16 December 1983, entered into force 3 October 1985) 1417 UNTS 21.

<sup>137</sup> Convention on the Recognition of Qualifications concerning Higher Education in the European Region (adopted 11 April 1997, entered into force 1 January 1999) ETS 165.

<sup>138</sup> Asia-Pacific Regional Convention on the Recognition of Qualifications in Higher Education (adopted 26 November 2011, entered into force 1st February 2018) 2136 UNTS 3.

<sup>139</sup> Revised Convention on the Recognition of Studies, Certificates, Diplomas, Degrees and Other Academic Qualifications in Higher Education in African States (adopted 12 December 2014, not yet entered into force).

<sup>140</sup> Convention (No. 138) concerning Minimum Age for Admission to Employment (adopted on 26 June 1973, entered into force 19 June 1976) 1015 UNTS 297.

**Education Leave**<sup>141</sup> recognizes the need for paid educational leave as part of a policy of continuing education and training, to be implemented progressively. Articles 1-3 provide the definition and purpose of paid educational leave. Article 8 guarantees non-discrimination with respect to paid educational leave.

The **C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169) Convention concerning Indigenous and Tribal Peoples in Independent Countries**<sup>142</sup> is the only legally binding treaty dedicated exclusively to the human rights of indigenous and tribal peoples.

According to Article 7, high priority shall be given to the level of education of the population concerned.

Articles 21 and 22 refer to vocational training. Articles 26-31 refer to education. It states that indigenous peoples have the same opportunity to acquire education at all levels on an equal footing with the rest of the national community. Education programmes should be adapted to their needs and they should be taught in their mother tongue.

The **C182 - Worst Forms of Child Labour Convention, 1999 (No. 182) Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour**<sup>143</sup> is a fundamental convention and requires states to ensure access to free basic education, and, wherever possible and appropriate, vocational training for all children removed from the worst forms of child labour (Article 7 (2) (c)).

## 2.2.d International refugee law

Refugee law governs the treatment of refugees. It intersects with both international human rights law and international humanitarian law. It is important to note that refugees are also rights-holders and as such, they retain their right to education even when they cross borders.<sup>144</sup>

The **Convention relating to the Status of Refugees (1951, Refugee Convention)**,<sup>145</sup> which is only applicable if the state in question has ratified the **Protocol relating to the Status of Refugees (1967)**,<sup>146</sup> which removes the temporal and geographic restrictions of the Refugee Convention, guarantees the right to 'public education' of refugees in Article 22. It provides that states shall accord refugees the same treatment as is accorded to nationals with respect to 'elementary education'.<sup>147</sup>

Regarding education other than elementary education, the Refugee Convention stipulates that refugees shall be treated as favourably as possible. This means there is no ceiling to the preferential treatment refugees can receive. The lower threshold for the treatment of refugees regarding their education beyond the elementary stage, is that states should treat refugees the same as other non-nationals 'generally in the same circumstances'. This means that whatever requirements non-nationals must fulfil in order to qualify for access to the same rights and benefits (in this case, education), refugees are held to the same criteria, except where, by nature of being a refugee, he or she cannot fulfil those requirements

141 Convention (No. 140) concerning Paid Education Leave (adopted 24 June 1974, entered into force 23 September 1976) 1023 UNTS 243.

142 Convention (No. 169) concerning indigenous and tribal people in independent countries (adopted 27 June 1989, entered into force 5 September 1991) 1650 UNTS 383.

143 Geneva Convention (III) relative to the Treatment of Prisoners of War (adopted 2 August 1949, entered into force 21 October 1950) 75 UNTS 135.

144 The right to education of refugees is explained in Chapter 3, section 3.3.c.iii.

145 Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).

146 Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267.

147 The term 'elementary education' reflects usage under Article 26(1) the Universal Declaration of Human Rights (1948) and refers to primary education.

(Article 6), for example, to show identity papers in order to register for school or to prove completion of education beyond the primary level. Given the well-founded fear of persecution, refugees often have to leave their home country without these documents. In these cases, the requirements must be waived or at least adapted.

Article 22 (2) then lays out a non-exhaustive list of measures from which refugees should benefit preferentially or at least not benefit any less from compared to other non-nationals in access to their studies, beyond the elementary level, including: ‘the recognition of foreign school certificates, diplomas and degrees, the remission of fees and charges and the award of scholarships.’

With respect to education-related fees and charges, Article 29 (1) when read together with Article 22 (2), requires that refugees shall benefit from the lowest fees any public educational institution may levy, so when non-nationals benefit from lower fees and charges, the same applies to refugees.

Article 4 of the Convention guarantees the religious freedom of refugees and specifically ‘freedom as regards the religious education of their children.’ In practical terms, Article 4 places no obligations on the state to provide religious education, but rather allows refugee parents to refuse religious education (either entire institutions or religious classes that form part of the curriculum in a given school) if it conflicts with their own, and to choose between existing alternatives, provided by either the state or private institutions.

The [Convention Relating to the Status of Stateless Persons \(1954\)](#)<sup>148</sup> strengthens the protection of stateless individuals.

Article 22 (1) provides that states ‘shall accord to stateless persons the same treatment as is accorded to nationals with respect to elementary education’ (paragraph 1). Subsection (2) provides that the treatment of stateless persons should be as favourable as possible with respect to education other than elementary education and ‘access to studies, the recognition of foreign school certificates, diplomas and degrees, the remission of fees and charges and the award of scholarships’.

The [New York Declaration for Refugees and Migrants \(2016\)](#)<sup>149</sup> contains a wide range of commitments to protect people on the move, and to strengthen and enhance existing protection mechanisms.

Under paragraphs 33 and 81, states commit to ensure that all refugee children receive quality primary and secondary education in safe learning environments within a few months of arrival in host countries.

Under paragraph 82, states commit to support early childhood education and tertiary education skills, training and vocational education. Paragraph 39 reaffirms the importance of improving integration and inclusion in education for displaced people. Paragraph 79 enshrines states’ commitments to consider the expansion of existing humanitarian programmes in education through, for example, scholarships and visa delivery.

The New York Declaration also paved the way for the adoption of two new global compacts in 2018: a global compact on refugees and a global compact for safe, orderly, and regular migration.

148 Convention Relating to the Status of Stateless Persons (adopted 28 September 1954, entered into force 6 June 1960) 360 UNTS 117.

149 UN General Assembly, Resolution 71/1. New York Declaration for Refugees and Migrants (Doc. A/RES/71/1.)

## 2.2.e International humanitarian law

International humanitarian law, also known as the law on armed conflict, regulates the conduct of parties in armed conflicts and includes provisions on the right to education and education more generally, for example, the protection of students, education staff, and educational facilities.

Education is principally protected in international humanitarian law by the Geneva Conventions and their Additional Protocols.



### Box 2.2 Further reading: International law and the right to education in emergencies

Hausler, K. *et al.* 2012. Education Above All & British Institute of International and Comparative Law. *Protecting Education in Insecurity and Armed Conflict: An International Law Handbook*.

See Chapter 4, section 4.6 for further information on education in emergencies.

The [Geneva Convention \(III\) relative to the Treatment of Prisoners of War \(1949, Third Geneva Convention\)](#)<sup>150</sup> is one of the four treaties of the Geneva Conventions and applies to international armed conflicts (except Article 3).

Article 38 provides that the practice of intellectual, educational, and recreational pursuits, sports and games amongst prisoners be encouraged by the Detaining Power, responsible for providing adequate and necessary equipment towards this end.

Article 72 states that:

*prisoners of wars shall be allowed to receive by post or by any other means individual parcels or collective shipment containing, in particular...*

*articles of a religious, educational or recreational character which may meet their needs, including books, devotional articles, scientific equipment, examination papers, musical instruments, sports outfits and materials allowing prisoners of war to pursue their studies or their cultural activities.*

Article 125 guarantees that organizations assisting prisoners of war receive the necessary facilities 'for visiting the prisoners, for distributing relief supplies and material, from any source, intended for...educational or recreative purposes, and for assisting them in organizing their leisure time within the camps.'

The [Geneva Convention \(IV\) relative to the Protection of Civilian Persons in Time of War \(1949, Fourth Geneva Convention\)](#)<sup>151</sup> applies to international armed conflicts (except Article 3) including occupation.

Article 24 provides for the protection of orphans and children separated from their families. This includes providing education to all those aged fifteen and below.

During civilian internment, detaining powers shall ensure the education of children and young people either within internment or outside. Also, internees shall be granted the opportunity - through granting all possible facilities - to receive education, continue their studies, and take up new subjects, participate in sports and recreational activities (Article 94).

In times of belligerent occupation, occupying powers shall facilitate the working of educational institutions and ensure, where possible, that education is provided by persons of the learner's own nationality, language, and religion (Article 50).

<sup>150</sup> Geneva Convention (III) relative to the Treatment of Prisoners of Wars (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135.

<sup>151</sup> Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287.

Article 108 provides that ‘internees shall be allowed to receive, by post or by any other means, individual parcels or collective shipments containing in particular...books and objects of a[n]...educational...character which may meet their needs.’

The **Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (1977, Protocol I)**<sup>152</sup> adds clarifications and provisions relevant to the developments of contemporary warfare in international armed conflicts.

Article 77 includes the obligation of parties to the conflict to provide children with the care and aid they require, whether because of their age or for any other reason. This can be construed to include appropriate education.

Under Articles 48, 51, and 52, Protocol I guarantees the protection of civilian persons and objects including schools, teachers and students. This is underpinned by the ‘principle of distinction’, that is, there is a fundamental difference between civilian and military persons and objects, and only military persons and objects may be subject to direct attack. (Hospitals may never be used as military bases but in certain circumstance schools can.)

Article 78 provides that: ‘whenever an evacuation occurs pursuant to paragraph 1, each child’s education, including his religious and moral education as his parents desire, shall be provided while he is away with the greatest possible continuity.’

The **Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed**

**Conflicts (1977, Protocol II)**<sup>153</sup> also adds provisions relevant to the developments of warfare in the context of non-international armed conflicts.

In civil conflicts, children shall receive an education, including religious and moral education consistent with the religious and moral convictions of their parents or guardians (Article 4 (3) (a)).

Article 13 protects civilian persons and objects including schools, teachers and students. As guaranteed in Protocol I, this is underpinned by the ‘principle of distinction’ (defined above).

The **Safe Schools Declaration (2015)**<sup>154</sup> is a soft law instrument that aims to conduce states’ political support for the protection of students, teachers, schools, and universities from attack during times of armed conflict; the importance of the continuation of education during armed conflict; and the implementation of concrete measures to deter the military use of schools.

## 2.2.f International criminal law

International criminal law is based upon the principle of individual responsibility for international crimes, including war crimes, crimes against humanity, crimes of aggression, and genocide. Unlike human rights, labour, refugee, and humanitarian law, criminal law applies to individuals rather than states, although states still ratify the relevant treaties.

The **Rome Statute of the International Criminal Court (1998)**<sup>155</sup> is the treaty that established the International Criminal Court (ICC).

<sup>152</sup> Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) [1125 UNTS 3 (Protocol I)].

<sup>153</sup> Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (Protocol II).

<sup>154</sup> Safe Schools Declaration (adopted 29 May 2015).

<sup>155</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3.



Education as such is not protected in international criminal law. However, the targeting and destruction of educational property may constitute a war crime (Articles 8 (2) (a) (iv) and 8 (2) (b) (ii) of the Rome Statute of the International Criminal Court).

International criminal law is relatively underdeveloped and untested in relation to education but there is scope to protect education in two ways:

Firstly, if certain groups are deliberately deprived of education and if other criteria are met, it may constitute persecution, which the Rome Statute deems a crime against humanity (Articles 7 (1) (h) and 7 (2) (g)).

Secondly, there is the possibility that if educational content such as curricula, textbooks and lessons is used to incite genocide, this may constitute an international crime (Article 25 (3) (e)).

## 2.3 The right to education in regional human rights law

Regional human rights law is a form of international human rights law. Region-specific human rights legal instruments strengthen the protection and enjoyment of human rights by adapting international human rights standards to regional contexts, taking into account shared histories, customs, traditions, values, cultures, and practices. Regional human rights law also seeks to tackle region-specific issues that impede the realization of human rights.

Regional human rights law is created by regional intergovernmental bodies, made up of states, with a mandate for the protection and promotion of human rights in the region. Like international human rights law, regional human rights law applies to states.

There are 28 legally-binding treaties guaranteeing some aspect of the right to education at the regional level.

### 2.3.a Africa

The African human rights framework emanates mainly from the African Union (AU), formerly the Organisation of African Unity.

The *African Charter on Human and Peoples' Rights (1981, Banjul Charter)*<sup>156</sup> contains a brief right to education provision (Article 17), together with an overarching prohibition on discrimination (Article 2). Article 25 provides for human rights education.

The *African Charter on the Rights and Welfare of the Child (1990)*<sup>157</sup> sets out a much broader and more comprehensive right to education than that provided for in the African Charter on Human and Peoples' Rights. Article 11 states that every child shall have the right to an education and prescribes measures that States must undertake as part of their efforts to achieve the full realization of this right, including regarding school discipline and pregnant girls. It defines the aims of education and recognizes the right of parents to choose the kind of education they want for their children in conformity with their religious and moral convictions.

The *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003)*<sup>158</sup> aims to eliminate discrimination against women and to ensure the protection of the rights of women as stipulated in international declarations and conventions. Article 12 provides for their right to education and training on the

<sup>156</sup> African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (Doc. CAB/LEG/67/3.)

<sup>157</sup> African Charter on the Rights and Welfare of the Child (adopted 1 July 1990, entered into force 29 November 1999) (Doc. CAB/LEG/24.9/49.)

<sup>158</sup> Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted 11 July 2003, entered into force 25 November 2005) (Doc. CAB/LEG/66.6.)

basis of the principles of non-discrimination and equal opportunity. It calls for the elimination of all stereotypes and the integration of gender sensitisation at all levels of education curricula. It refers to their protection against sexual harassment. It also provides for the promotion of literacy and education among women and recognizes the specific needs of certain groups of women including women with disabilities and women who have left school prematurely (Article 12 & 23).

The *African Youth Charter (2006)*<sup>159</sup> is the first legal framework in Africa to support national policies, programmes and action in favour of youth development. It refers to the rights, freedoms and duties of young people in Africa, including the right to education. Article 13 recognizes the right of every young person to education of good quality. It refers to multiple forms of education including non-formal and informal. It defines the aims of education and establishes states' obligations. It also provides for gender equality and the use of African languages in teaching (Article 20).

The *Convention for the Protection and Assistance of Internally Displaced Persons in Africa (2009, Kampala Convention)*<sup>160</sup> guarantees, under Article 9 (2) (b), that internally displaced persons be provided with adequate humanitarian assistance including education.

### 2.3.b Americas

The Americas framework is established under the auspices of the Organization of American States (OAS).

The *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (1988, Protocol of San Salvador)*<sup>161</sup> is the foremost treaty in the Americas protecting the right to education.

Article 13 (1) recognizes that: 'everyone has the right to education.' Article 13 also refers to the aims of education and provides for compulsory and free primary education, the progressive introduction of free secondary education, greater accessibility and availability of higher and basic education. Article 13 (e) recognizes the need to establish special education programmes for handicapped people. Article 16 reaffirms that: 'every child has the right to free and compulsory education, at least in the elementary phase, and to continue his training at higher levels of the educational system.'

The *American Convention on Human Rights (1969, Pact of San José, Costa Rica)*<sup>162</sup> is the principal human rights treaty in the Americas. Its focus is largely on civil and political rights but Article 12 (4) provides that 'parents or guardians, as the case may be, have the right to provide for the religious and moral education of their children or wards that is in accord with their own convictions.'

The *Charter of the Organization of American States (1948, as amended)*<sup>163</sup> is the treaty that establishes the OAS. Under Article 34 (h) states commit to devote their utmost efforts to eradicate illiteracy and expand educational opportunities for all in order to achieve the basic objectives of integral development including equality of opportunity, the elimination of extreme poverty,

159 African Youth Charter (adopted 2 July 2006, entered into force 8 August 2009).

160 Convention for the Protection and Assistance of Internally Displaced Persons in Africa (adopted 23 October 2009, entered into force 6 December 2012).

161 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (adopted 17 November 1988, entered into force 16 November 1999) OAS TS 69 (Protocol of San Salvador).

162 American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) OAS TS 36.

163 Charter of the Organisation of American States (as amended) (adopted 30 April 1948, entered into force 13 December 1951) OAS TS 1-C and 61.

equitable distribution of wealth and income. Article 49 provides for the effective exercise of the right to education through compulsory elementary education for all that is free of charge when provided by the state, and the extension of middle-level and higher education. Article 50 refers to the special attention given to the eradication of illiteracy and the strengthening of adult and vocational education systems.

The **Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities (1999)**<sup>164</sup> is the first international treaty dedicated to the rights of people with disabilities, predating the UN Convention on the Rights of Persons with Disabilities (2006). Article 3 refers to the commitments of states to achieve the objectives of the Convention, which should include the adoption of educational measures (including greater access and adequate infrastructures in education) to eliminate discrimination against persons with disabilities and promote their full integration into society. The **Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (1994, Convention of Belém do Pará)**<sup>165</sup> is the first international treaty to address the issue of violence against women. It states that all women have the right to be free from violence, which according to Article 6, includes the right to freedom from all forms of discrimination and the right to be 'educated free of stereotyped patterns of behaviour and social and cultural practices based on concepts of inferiority or subordination'.

The **Inter-American Democratic Charter (2001)**<sup>166</sup> aims at strengthening and upholding democratic institutions in the Americas. Article 16 provides that:

*education is key to strengthening democratic institutions, promoting the development of human potential, and alleviating poverty and fostering greater understanding among our peoples. To achieve these ends, it is essential that a quality education be available to all, including girls and women, rural inhabitants, and minorities.*

The **American Declaration on the Rights and Duties of Man (1948, Bogota Declaration)**<sup>167</sup> predates the UDHR. Article XII guarantees the right to education, including that education: 'should be based on the principles of liberty, morality and human solidarity', will prepare a person: 'to attain a decent life, to raise his standard of living, and to be a useful member of society', should include the: 'right to equality of opportunity in every case, in accordance with natural talents, merit and the desire to utilize the resources that the state or the community is in a position to provide', and finally that everyone has the: 'right to receive, free, at least a primary education.'

### 2.3.c Arab States

In Arab States and the Middle East, the League of Arab States (LAS) and the Organisation of Islamic Cooperation (OIC) have concluded human rights instruments which recognize the right to education.

164 Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities (adopted 7 June 1999, entered into force 14 September 2001) AG/RES. 1608 (XXIX-O/99).

165 Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (adopted June 9 1994, entered into force 5 March 1995) 33 ILM 1429 (1994) (Convention of Belém do Pará).

166 Inter-American Democratic Charter (adopted 11 September 2001) 40 ILM. 1289 (2001).

167 *American Declaration of the Rights and Duties of Man* (adopted 2 May 1948) A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser. L. V/II.82 doc.6 rev.1 at 17 (1992).

The **Revised Arab Charter on Human Rights (2004)**<sup>168</sup> was first adopted by the League of Arab States in 1994. However, due to no Member States ratifying it, the Charter was revised in 2004. Article 41 of the Revised Arab Charter on Human Rights guarantees the right to education and obliges states to eradicate illiteracy. It provides for free and compulsory primary education. It defines the aims of education and refers to human rights education. It also guarantees ongoing education and adult education. Article 40 is specifically on the right to education of persons with disabilities.

The **Cairo Declaration on Human Rights in Islam (1990)**<sup>169</sup> is an instrument of the Organisation of Islamic Cooperation. The document aims to set out internationally recognized human rights in light of the shariah. Article 7 (a) provides that every child has the right to be accorded 'proper education'. Subsection (b) provides that parents have the right to choose for their children's education as long as it is in line with the interest of the child, ethical values and the principles of the shariah. Article 9 covers the aims of education along religious lines and recognizes that the provision of education is the duty of society and the state. Article 17 (c) guarantees: 'the right of the individual to a decent living that may enable him to meet his requirements and those of his dependents, including...education'.

### 2.3.d Asia and Pacific

Unlike other regions, Asia and the Pacific does not have a legally binding instrument that guarantees human rights. However, in 2012, the Association of Southeast Asian Nations (ASEAN) adopted a declaration that contains the right to education.

The **ASEAN Human Rights Declaration (2012)**<sup>170</sup> is a controversial instrument. Article 27 prohibits social and economic exploitation of children and Article 31 guarantees the right to education. However, the level of protection of Article 31 of the right to education fails to meet the standards of international human rights law. For example, Article 31 prescribes that primary education shall be free and compulsory, but does not provide that secondary, technical and vocational, and higher education shall be made progressively free, as does almost every other international and regional human rights instrument.

### 2.3.e Europe

The European human rights framework emanates primarily from the Council of Europe (CoE). However, the European Union (EU) has increasingly become concerned with the protection and promotion of human rights, particularly with the entry into force of the Charter of Fundamental Rights of the European Union in 2009.

The **Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (1952, Protocol 1)**<sup>171</sup> is the first protocol to the **European Convention for the Protection of Human Rights and Fundamental Freedoms (1950, ECHR)**,<sup>172</sup> Protocol 1 must be ratified separately to the ECHR. Article 2 of Protocol 1 reads: 'No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such

168 Revised Arab Charter on Human Rights (adopted 24 May 2004, entered into force 15 March 2008).

169 Cairo Declaration on Human Rights in Islam (adopted 5 August 1990).

170 Association of Southeast Asian Nations (ASEAN) Human Rights Declaration (adopted 18 November 2012).

171 Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 20 March 1952, entered into force 18 May 1954) ETS 9.

172 European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS 5.

education and teaching in conformity with their own religious and philosophical convictions.’

The **Revised European Social Charter (1996)**<sup>173</sup> is the sister treaty to the ECHR and specifically protects economic and social rights, even though the ECHR also protects certain economic and social rights, including aspects of the right to education.

Article 7 refers to provisions that ensure the exercise of the right of children and young persons to protection. They include references to the minimum age of admission to employment (15 years old) and to limitations of working hours of persons under 18 years of age. Article 10 covers provisions related to the right to vocational training. Article 15 guarantees the right of persons with disabilities to independence, social integration and participation in the life of the community through educational measures. Article 17 provides for free primary and secondary education to children and young persons, greater attendance at schools, the establishment and maintenance of educational institutions and services.

The **European Charter for Regional or Minority Languages (1992)**<sup>174</sup> aims to protect and promote the historical regional or minority languages of Europe. Article 8 (1) covers the integration and availability of education at all levels in the relevant regional or minority languages within the territory in which such languages are used. It also provides for ‘the teaching of the history and the culture which is reflected by the regional or minority language’ and for adequate training of teachers. Article 8 (2) refers to education other than the national language in respect of territories other

than those in which the regional and minority languages are used.

The **Framework Convention for the Protection of National Minorities (1995)**<sup>175</sup> is the first legally binding multilateral instrument concerned with the protection of national minorities in general. Article 12 refers to provisions to foster education about a state’s national minorities and its majority. Article 13 recognizes that national minorities have ‘the right to set up and to manage their own private educational and training establishments.’ Article 14 recognizes: ‘that every person belonging to a national minority has the right to learn his or her minority language.’

The **European Convention on the Legal Status of Migrant Workers (1977)**<sup>176</sup> is concerned with the principal aspects of the legal situation of migrant workers. Article 14 (1) provides that migrant workers and members of their families officially admitted to the territory of a Contracting Party be entitled to education ‘on the same basis and under the same conditions as national workers.’ Paragraph 2 of the Article covers the need for the receiving state to facilitate the teaching of its language to migrant workers. Paragraphs 3 and 4 cover the issue of scholarships and previous qualifications.

The **Convention on Preventing and Combating Violence against Women and Domestic Violence (2011, Istanbul Convention)**<sup>177</sup> identifies education as a key area in which to take measures to eliminate gender-based violence and its causes. Article 14 requires states to take:

173 Revised European Social Charter (adopted 3 April 1996, entered into force 1 July 1999) ETS 163.

174 European Charter for Regional or Minority Languages (adopted 5 November 1992, entered into force 1 March 1998) ETS 148.

175 Framework Convention for the Protection of National Minorities (adopted 1 February 1995, entered into force 1 February 1998) ETS 157.

176 European Convention on the Legal Status of Migrant Workers (adopted 24 November 1977, entered into force 1 May 1983) ETS 93.

177 Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (adopted 11 May 2011, entered into force 1 August 2014) CETS No.210 (Istanbul Convention).

*the necessary steps to include teaching material on issues such as equality between women and men, non-stereotyped gender roles, mutual respect, non-violent conflict resolution in interpersonal relationships, gender-based violence against women and the right to personal integrity, adapted to the evolving capacity of learners, in formal curricula and at all levels of education.*

The **Charter of Fundamental Rights of the European Union (2000, EU Charter)**<sup>178</sup> brings together the human rights protected by the European Union (EU), including by: case law of the Court of Justice of the European Union; the human rights found in the European Convention on Human Rights; and other rights and principles resulting from the common constitutional traditions of EU countries and other international instruments.

The EU Charter applies only when Member States are implementing EU law.

Article 14 enshrines the right to education and the right to have access to vocational and continuing training. It adds that: 'this right includes the possibility to receive free compulsory education' and provides for the freedom of parents to choose for their children's education in conformity with their convictions. Academic freedom is guaranteed under Article 13.

Article 32 prohibits the employment of children and forbids the minimum age of admission to employment to be lower than the minimum school-leaving age (except in limited cases). It also provides for the protection of young people 'against economic exploitation or any work likely... to interfere with their education.'

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<sup>178</sup> Charter of Fundamental Rights of the European Union (adopted 7 December 2000, entered into force 1 December 2009) 2000 O.J. C 364.

## Summary

The right to education is guaranteed under international law, specifically in human rights treaties.

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Soft law is an important form of non-binding law.

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Human rights treaties are concluded by a variety of different bodies: the United Nations and its agencies and regional bodies such as the African Union.

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The right to education, in whole or in part, is guaranteed in at least 48 legally binding instruments, 28 of which are regional, and 23 soft law instruments.

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# Chapter 3:

Normative content of  
the right to education



## Key questions

What is the normative content of the right to education owed to rights-holders?

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Where does the normative content of the right to education come from?

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What are the 4As?

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How does the right to non-discrimination and equality apply to the right to education?

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Who can access education?

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What levels and types of education does it cover?

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What is meant by *quality education*?

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What is *educational freedom*?

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What is *academic freedom*?

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**The normative content of the right to education is what all rights-holders are entitled to according to the various sources of international law, as outlined in Chapter 2. The right to education is comprehensive in its scope, covering just about every aspect of education.**

The right to education, although universal and codified in hard and soft international and regional law, should not be thought of as static in its normative content. How the right to education applies to various groups and in emerging or changing contexts is constantly being evaluated and developed. This is usually done through the treaty-making process which elaborates existing human rights, or through elaboration by those with the authority to interpret relevant provisions, for instance, United Nations (UN) treaty bodies in their general comments and recommendations,<sup>179</sup> international and regional courts in the cases they hear and in advisory opinions, and national mechanisms, such as legislatures and courts in their legislation and cases, respectively.

International quasi-judicial mechanisms<sup>180</sup> and regional quasi-judicial and judicial mechanisms<sup>181</sup> are also sources of interpretation of the normative content of the right to education. For instance, the European Court of Human Rights has interpreted the right to education to include the right to not be subject to corporal punishment.<sup>182</sup>

Interpretations made by national courts on the various aspects of the right to education contribute to a better understanding of its normative content and related states' obligations, adapted to the national context and in light of changing societal values, particularly in fora where judges adopt a 'living instrument' approach as opposed to a strict 'textualist' approach to interpretation.<sup>183</sup> For instance, the Constitutional Court of Colombia adopted a progressive decision regarding the freedom of expression of a transgender student within the school. The Court reasoned that the school was obliged to treat the student according to his gender identity. The decision also included a general measure to promote inclusion, equality, and the free development of the person in school.<sup>184</sup>

This chapter starts by explaining the 4As framework which is the most common analytical framework for understanding the normative content of the right to education. It then goes on to explain the various elements of the right to education drawing on codified hard and soft law, as well as interpretations.

179 See Chapter 2, section 2.1 for further information on general comments and recommendations.

180 See Chapter 8, section 8.4 for further information on international accountability mechanisms.

181 See Chapter 8, section 8.5 for further information on regional accountability mechanisms.

182 *Campbell and Cosans v UK* [1982] ECHR 1.

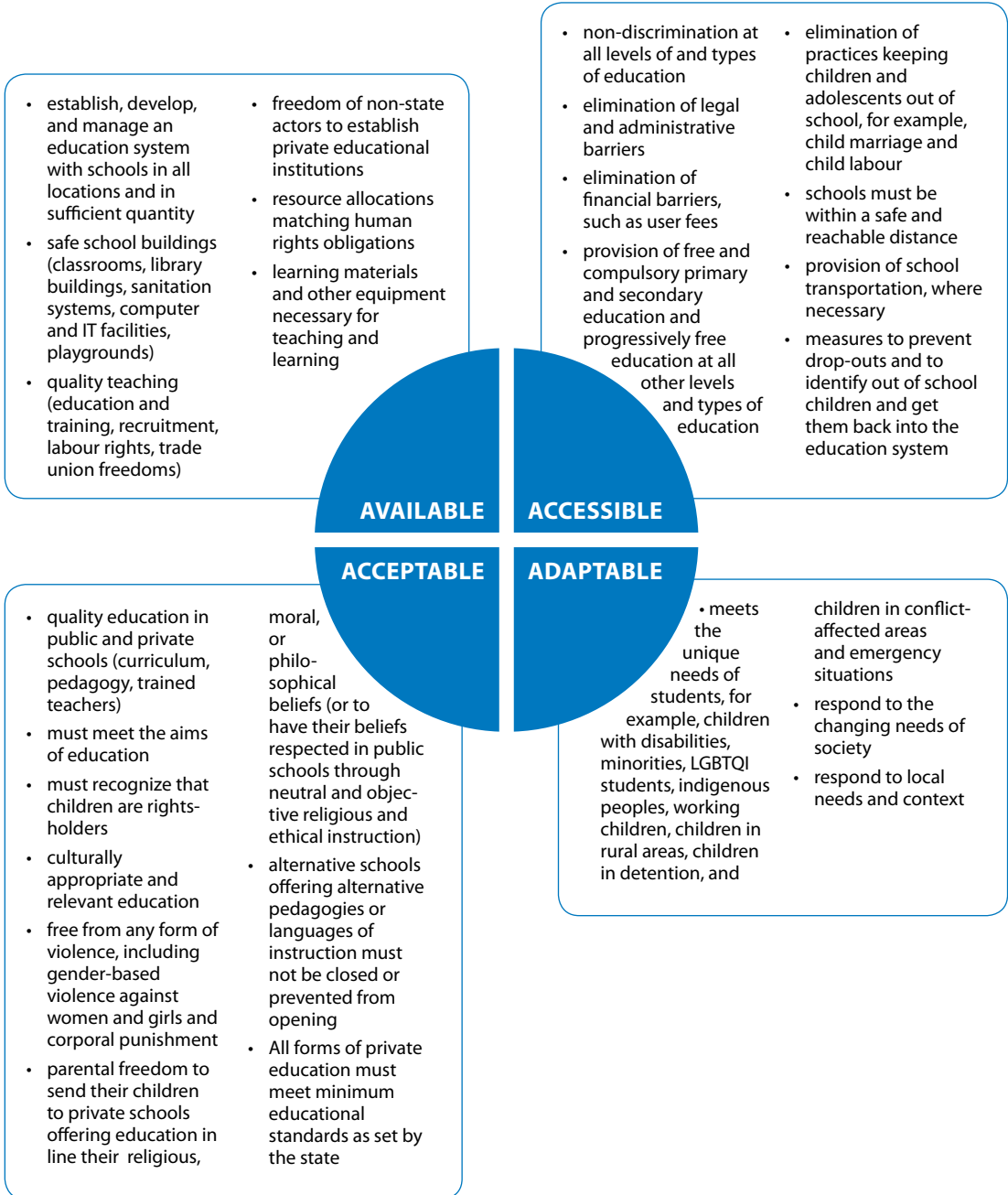
183 See, for example, the Icelandic Human Rights Centre's page *Interpretation of Human Rights Treaties* [www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/part-i-the-concept-of-human-rights/interpretation-of-human-rights-treaties](http://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/part-i-the-concept-of-human-rights/interpretation-of-human-rights-treaties) (Accessed 1 October 2018.)

184 *Sentencia T-363/16*.

### 3.1 The 4As

**Figure 3.1: The 4As**

The 4As explains the ‘essential features’ of all types and levels of education. Education must be:



The normative content of the right to education is interpreted by the body responsible for the authoritative interpretation of a given treaty, such as courts and commissions (in the case of regional instruments) or UN treaty bodies. These fora use various schema to interpret right to education provisions, the most widely used being the 4As framework,<sup>185</sup> developed by Katarina Tomaševski, the former UN Special Rapporteur on the right to education and founder of the Right to Education Initiative. The Committee on Economic, Social and Cultural Rights (CESCR), in General Comment 13 on the right to education, uses the 4As to elaborate the ‘essential features’ of all types and levels of education. Education must be:

**Available:** States must establish, develop and manage an education system with schools in all locations and in sufficient quantity so as to ensure all levels of education are available; immediately and universally in the case of compulsory primary education (see sections 3.4.a.i and 3.5.b), progressively and universally for secondary education (see section 3.5.c), and on the basis of capacity for higher education (see section 3.5.d). Availability equally relates to the physical infrastructure required to deliver any system of education. As highlighted by CESCR, this encompasses school and library buildings, sanitation systems for both sexes, competitively salaried teachers, teaching materials, computer and other IT facilities, and so on.<sup>186</sup> From a civil and political perspective, *available* also requires governments to not interfere with the freedom of non-state actors to establish private or independent educational institutions, on

condition they meet the standards for education as set out by the state.

**Accessible:** This is defined differently depending on the level of education, however, the common unifying thread at all levels of education is the principle of non-discrimination. Marginalized groups for whom the principle of non-discrimination is especially relevant include migrants, refugees and internally displaced persons, people living in rural areas, minorities and indigenous peoples, persons in detention, persons with disabilities, and in particular women and girls, especially as there are areas of the world where the economic and social advantages of investing in girls’ education are still not widely accepted. Notwithstanding, for all children in the compulsory education age range, there are a further two overlapping dimensions to accessible education, *viz.* physical accessibility and economic accessibility. In short, there must be a primary school within safe physical reach, and compulsory primary education must be free of charge to all, and all other levels and types of education must be made progressively free of charge. See section 3.4 for further information on accessibility.

**Acceptable:** Which closely corresponds to the concept of quality education and applies to both the form and substance of education. For example, curricula and pedagogy must be appropriate and of good quality. In this regard, states parties are required to regulate the education sector—both public and private—to ensure that establishments at all levels and of all types meet the minimum standards as set out by the state. Education must likewise be relevant and culturally appropriate for the students being served. And, while children are the primary beneficiaries of the right to education, the notion of acceptability extends to parental freedoms such that they must be able to send their children to schools that conform to their religious, moral, or philosophical beliefs. Within the state school system itself, parental freedom

185 See Right to Education Initiative (RTE). 2001. Right to Education Primer No. 3: *Human Rights Obligations: Making Education Available, Accessible, Acceptable and Available* and UN Committee on Economic Social and Cultural Rights (CESCR). 1999. *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)* (Doc. E/C.12/1999/10.) (CESCR General Comment 13) para. 6.

186 CESCR General Comment 13 para 6 (a).

also extends to offering children religious or ethical instruction in a way that is both neutral and objective, and which incorporates non-discriminatory exemptions.<sup>187</sup> Similarly, while there is no right to education in a specific language of choice, indigenous peoples and minorities enjoy the freedom to establish schools and in the case of Indigenous peoples, school systems. Further, it recognizes that children are also rights-holders in so far as they must be allowed to pursue education with dignity and free from any form of violence, including corporal punishment. Finally, an acceptable education is one into which all of the aims of education—as set out in section 3.2—are integrated.

**Adaptable:** That is, able to meet the unique needs of individual students, including children with disabilities, indigenous peoples, minorities, and in some cases, working children. It is not for children to do their best to cope with whatever education may be available, or otherwise face rejection. Rather, teachers and schools must adapt to children with diverse capabilities and support needs. This also places the onus on the state to bring education to where children are, for example, if they live in very rural communities, are in juvenile detention, or are affected by conflict or other emergencies. Any education system also needs to be flexible, as too rigid a system will not be adaptable ‘to the needs of changing societies and communities.’<sup>188</sup> This corresponds with the social aims of education in terms of promoting a tolerant society and socialising children to a diverse variety of social and cultural conditions.

### 3.2 Aims of education

Under international human rights law (IHRL), the aims of education from a human rights perspective are clearly defined across various treaties and in subsequent general comments and recommendations, capturing both the individual and social benefits of what constitutes a good quality education.

The Universal Declaration of Human Rights (1948, UDHR)<sup>189</sup> was the first instrument to set out the aims of education, followed by the UNESCO Convention against Discrimination in Education (1960, CADE),<sup>190</sup> and then the International Covenant on Economic, Social and Cultural Rights (1966, ICESCR)<sup>191</sup>. However, the aims of education are most comprehensively set out in Article 29 (1) of the Convention on the Rights of the Child (1989, CRC)<sup>192</sup> which reads:

1. *States Parties agree that the education of the child shall be directed to:*
  - (a) *The development of the child's personality, talents and mental and physical abilities to their fullest potential;*
  - (b) *The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;*
  - (c) *The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate,*

187 UN Human Rights Committee (CCPR). 1993. *General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)* (Doc. CCPR/C/21/Rev.1/Add.4.) (CCPR General Comment 22) para. 6.

188 CESCR General Comment 13 para. 6 (d).

189 Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) Article 26 (2).

190 UNESCO Convention against Discrimination in Education (adopted 14 December 1960, entered into force 14 December 1960) 429 UNTS 93 (CADE) Article 5 (1) (a).

191 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

192 Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

*and for civilizations different from his or her own;*

*(d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;*

*(e) The development of respect for the natural environment.*

The Committee on the Rights of the Child further stipulates that: ‘these aims...are all linked directly to the realization of the child’s human dignity and rights, taking into account the child’s special developmental needs and diverse evolving capacities.’<sup>193</sup>

In its first General Comment, drafted subsequent to the entry into force of the CRC, the Committee on the Rights of the Child focused on the aims of education. It expanded on the provisions as set out in Article 29 of the CRC, emphasizing that the overarching aim of education for all states should be: ‘ensuring that essential life skills are learnt by every child and that no child leaves school without being equipped to face the challenges that he or she can expect to be confronted with in life.’<sup>194</sup> Thus, there is a necessary ‘qualitative dimension’<sup>195</sup> of education in that it must be child-centred and empowering, via the development of ‘his or her skills, learning and other capacities, human dignity, self-esteem and self-confidence.’<sup>196</sup>

As a result, the philosophical foundations underpinning all five aims of education, as set out in Article 29 (1) of the CRC, must not only pave the way for ‘the realization of the child’s human

dignity and rights’<sup>197</sup> but also be implemented in such a way as to cover all the component parts of education, including, for example, the physical, intellectual, emotional, social and practical elements in a balanced way.<sup>198</sup> This may require a multidisciplinary approach, involving schools, the family and the community, especially in relation to promoting such ethical values as peace, tolerance and respect for the environment.<sup>199</sup> Hence, the function of the aims of education is not only to ensure states provide an education system that is simply accessible, especially at primary and secondary levels, but also one which guarantees enjoyment of ‘the individual and subjective right to a specific quality of education’<sup>200</sup> as required to fulfil the specified aims.

The above aims reflect the importance of education to both the individual and the state. As stipulated by international law, they do not exclude others, and additional aims of education may be determined by the state, so long as those aims do not contradict or contravene international standards. Further, simply recognizing the importance of the aims of education is not sufficient without focusing on how their implementation should underpin all aspects of state education systems, from the curriculum, to teacher training, pedagogies, and so on.

It is important to note that states are not free to pick and choose one or more of the stated aims of education, they must *all* be incorporated into the state education system. However, a state may prioritize certain aims over others, depending on context. For example, a state may prioritize economic development as a primary aim of education, however, an education system focused solely on this aim would run afoul of IHRL. The Committee on the Rights of the Child further

193 *General Comment No. 1: The Aims of Education* (Doc. CRC/GC/2001/1.) (CRC General Comment 1) para. 1.

194 *Ibid.*, para. 9.

195 *Ibid.*, para. 2.

196 *Ibid.*, para. 2.

197 *Ibid.*, para. 1.

198 *Ibid.*, para. 12.

199 *Ibid.*, para. 13.

200 *Ibid.*, para. 9.

specifies that the sole aim of education should not be simply to teach such basic skills as 'only literacy and numeracy'<sup>201</sup> but also such skills as would empower a child to grow into a well-rounded person capable of creativity, maintaining healthy relationships, positively resolving conflict and a host of other attributes needed to successfully pursue life goals.<sup>202</sup>

This means, for example, that a state's education policy cannot foreground an education system that renders schools as little more than exam factories, narrowly focused on literacy and numeracy at the expense of developing aspects such as students' cultural identity, critical thinking, and understanding of human rights.

However, it is important to remember that the aims of education also depend on other perspectives and contexts than simply state priorities. For example, parents' perspectives and priorities for their children's education may conflict with the state, and international law seeks to balance these perspectives such that parents may enjoy their parental freedoms, as set out under international law, in tandem with the aims of education prioritized by the state (for further information on this, see section 3.7).

Lastly, the aims of education will, in all likelihood, change as a child progresses through the system. For example, at the primary levels the aims will be based around mastering foundational reading, writing and mathematics, whereas at the secondary and tertiary levels of education, education may become more skills-based in order to prepare for the transition to the working world.



### Box 3.1 Further information: The four pillars of learning

In 1996, the International Commission on Education for the Twenty-first Century, chaired by former European Commission President Jacques Delors, proposed in *Learning: The Treasure Within*<sup>203</sup> the four pillars that are the foundations of education: learning to be, learning to know, learning to do, and learning to live together. The four pillars of learning set out a vision of educational goals and are related to the aims of education as set out in international law.

**Learning to know**, by combining a sufficiently broad general knowledge with the opportunity to work in depth on a small number of subjects. This also means learning to learn, so as to benefit from the opportunities education provides throughout life.

**Learning to do**, in order to acquire not only an occupational skill but also, more broadly, the competence to deal with many situations and work in teams. It also means learning to do in the context of young peoples' various social and work experiences which may be informal, as a result of the local or national context, or formal, involving courses, alternating study and work.

**Learning to live together**, by developing an understanding of other people and an appreciation of interdependence - carrying out joint projects and learning to manage conflicts - in a spirit of respect for the values of pluralism, mutual understanding and peace.

**Learning to be**, so as better to develop one's personality and be able to act with ever greater autonomy, judgement and personal responsibility. In that connection, education must not disregard any aspect of a person's potential: memory, reasoning, aesthetic sense, physical capacities and communication skills.<sup>204</sup>

For more information on the four pillars of learning, see: Zhou Nanzhao. 2000. *Four 'Pillars of Learning' for the Reorientation and Reorganization of Curriculum: Reflections and Discussions*

201 Ibid., para. 9.

202 Ibid.

203 Delors, J. 1996. *Learning: the treasure within: report to UNESCO of the International Commission on Education for the Twenty-first Century*. Paris. UNESCO.

204 Ibid., p. 37.

### 3.3 Non-discrimination and equality in education

*'All human beings are born free and equal in dignity and rights'*

— Article 1, Universal Declaration of Human Rights

Human rights are universal rights and as such apply to everyone equally and without discrimination. The stark reality is, however, that a significant number of children miss out on education due to discrimination. Discrimination occurs most obviously in terms of accessing education (see section 3.4). For example, girls can face gender-based barriers such as child marriage, pregnancy, and gender-based violence which often prevent them from going to school or contribute to them dropping-out of school. People with disabilities often face literal accessibility issues, such as a lack of ramps or appropriate school transportation, making it incredibly difficult to get to school. Migrants often face administrative barriers that prevent them from enrolling, effectively barring them from education systems. However, discrimination also occurs *within* education systems. This may manifest as certain groups receiving an inferior quality of education compared with others, for instance, the quality of education in urban schools tends to be higher than that found in rural areas. Discrimination also occurs *after* education where different groups of people are not able to draw the same benefits from their schooling, for instance, educated boys tend to leave school with higher wage potential than equivalently educated girls.

Non-discrimination and equality provisions found in IHRL exist to ensure that the principle that human rights are universal is applied in practice. Non-discrimination and equality are not abstract concepts under IHRL. They are fully elaborated

human rights that have been developed over decades to address the discrimination that people face on a day-to-basis, including the issues briefly outlined above. This is especially true of education where the rights to non-discrimination and equality have been applied to the right to education across numerous human rights treaties, including an entire treaty dedicated to the issue: the UNESCO CADE. This section explains what the rights to non-discrimination and equality are and how they apply to the right to education, including with respect to specific marginalized groups. It is this normative content that is subject to states' legal obligations to eliminate discrimination and bring about substantive equality in education as outlined in Chapter 4, section 4.2.b.i.

It should be said that despite the strength of non-discrimination and equality law, eliminating discrimination and inequalities is one of the biggest challenges that individual states and the international community face. This was acknowledged in 2015 when the international community vowed to 'leave no one behind'. Discrimination and inequality in education can and must be addressed by measures directed at education, however, discrimination and inequality are often deeply ingrained within societies and states must also address their root causes. Discrimination and inequality are cross-cutting issues—those who are discriminated against in education also tend to be discriminated against when it comes to the enjoyment of other human rights. States must therefore, apply the totality of IHRL as well as achieve their commitments to the Sustainable Development Agenda in order to eradicate discrimination and inequality once and for all.



**Box 3.2 Further reading: Non-discrimination and equality law**

Interights. 2011. *Non-Discrimination in International Law: A Handbook for Practitioners*.

### 3.3.a The rights to non-discrimination and equality

The rights to non-discrimination and equality exist across various human rights treaties.

First and foremost, the rights to non-discrimination and equality are guaranteed by the International Bill of Rights, the foundation of IHRL, which consists of: the UDHR,<sup>205</sup> the International Covenant on Civil and Political Rights (1966, ICCPR),<sup>206</sup> and the ICESCR.

The UDHR proclaims in its first article that: 'All human beings are born free and equal in dignity and rights' and goes on to state that: 'Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind.'<sup>207</sup> Article 7 provides for both equality before the law and equal protection of the law.

ICCPR includes both a non-discrimination and equality clause that applies across the entire convention<sup>208</sup> ('accessory' or 'dependent' provisions) and a free-standing (or 'autonomous') non-discrimination clause that prohibits discrimination across all rights guaranteed in law, not just the ones contained within ICCPR). It reads:

*All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*<sup>209</sup>

ICESCR guarantees equality and non-discrimination in relation to all economic, social, and cultural rights,<sup>210</sup> including the right to education. CESCR defines discrimination as:

*any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of Covenant rights.*<sup>211</sup>

CESCR has interpreted non-discrimination to include a prohibition of both *direct* and *indirect* discrimination:<sup>212</sup>

- *direct discrimination* is when a person, on account of one or more of the prohibited grounds, is treated less favourably than someone else in comparable circumstances
- *indirect discrimination* is when a practice, rule, policy, or requirement is outwardly neutral but has a disproportionate impact upon a particular group

205 UDHR Article 1.

206 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

207 UDHR Article 2.

208 ICCPR Article 2 (2).

209 ICCPR Article 26.

210 ICESCR Article 2 (3).

211 CESCR. 2009. *General Comment 20: Non-discrimination in Economic, Social and Cultural Rights (Art. 2, Para. 2 of the Covenant)* (Doc. E/C.12/GC/20.) (CESCR General Comment 20) para. 7.

212 CESCR General Comment 20 para. 10.

A distinction is also made between *formal or de jure discrimination*, that is discrimination that exists in states' legal and policy frameworks, and *substantive or de facto discrimination*, which is discrimination experienced in practice, usually by groups who have suffered from historical or persistent prejudice.<sup>213</sup> States have obligations to eliminate both, including through the use of positive discrimination measures (or 'affirmative action').

In addition to the International Bill of Rights which applies to everyone, there are human rights treaties that apply to specific groups of people. These are known as 'thematic' treaties. These treaties are important because they deal with the specific forms of discrimination that marginalized groups often face. Their normative content is therefore highly specific. Two of these thematic treaties focus exclusively on eliminating discrimination against specific groups:

- Convention on the Elimination of All Forms of Discrimination against Women (1979, CEDAW)<sup>214</sup>
- International Convention on the Elimination of All Forms of Racial Discrimination (1965, ICERD)<sup>215</sup>

The other relevant thematic treaties deal with the human rights of specific groups, including how non-discrimination and equality applies to each group, but tend to have a wider normative scope. A common feature of these treaties is to provide for non-discrimination and equality clauses that apply across all substantive provisions of a treaty (as ICESCR and ICCPR do) where the substantive

provisions are adapted to the specific challenges the subject group faces. These treaties include:

- Convention on the Rights of the Child (1989, CRC)<sup>216</sup>
- Convention on the Rights of Persons with Disabilities (2006, CRPD)<sup>217</sup>
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990, ICRMW)<sup>218</sup>
- Convention relating to the Status of Refugees (1951, Refugee Convention)<sup>219</sup>

Regional human rights treaties also guarantee the rights to non-discrimination and equality.<sup>220</sup>

213 CESCR General Comment 20 para. 9.

214 Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW) Articles 1-5. See Chapter 2, section 2.2.a for further information.

215 International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (ICERD) Articles 1-3.

216 CRC Article 2.

217 Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (CRPD) Articles 4-6 and 12.

218 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3 (ICRMW) Article 1 (1).

219 Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) Article 3.

220 Articles 2 African (Banjul) Charter on Human and Peoples' Rights; Articles 3 African Charter on the Rights and Welfare of the Child; Articles 2 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa; Articles 2 African Youth Charter; Article 3 Arab Charter on Human Rights; Article 2 ASEAN Human Rights Declaration; Article 14, European Convention on Human Rights; Article 21, Charter of Fundamental Rights of the European Union; Article 3 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights.

**Box 3.3 Further information: Who is protected under non-discrimination and equality law?**

IHRL expressly prohibits discrimination on the basis of various grounds (or ‘classes’).<sup>221</sup> These are: race, colour, sex, language, religion, political or other opinion, national, ethnic, or social origin, property, birth, disability, and other status.

However, as CESCR point out, this list is non-exhaustive, noting: ‘The nature of discrimination varies according to context and evolves over time.’<sup>222</sup> The inclusion of ‘other status’ allows for flexibility in identifying and capturing discrimination that is akin to discrimination based on express grounds.

According to CESCR, other statuses may also include: age, nationality, marital and family status, sexual orientation and gender identity, health status, place of residence, and economic and social situation.<sup>223</sup>

### 3.3.b The equal right to education

The interaction of equality and non-discrimination and right to education clauses in human rights treaties<sup>224</sup> mean that non-discrimination and equality apply across the entirety of the normative scope of the right to education. This includes in relation to access to all levels and types of education as well as the quality of education (see sections 3.4, 3.5 and 3.6 respectively for further information on both topics).

The application of non-discrimination and equality is evident in the wording of many right to education provisions. For instance, the right to primary education reads: ‘Primary education shall be *compulsory* and *available free to all*’ [emphasis added]. The elements of *compulsory* and *free to all* underscore that cost and practices such

as child marriage and child labour, are known discriminatory barriers that prevent children from participating in education. IHRL also provides for *fundamental education* (see section 3.5.f), which is education for those who have missed the whole or part of their primary education, further reflecting concerns about who gets left out of education and how to ameliorate the negative effects of discrimination.

Another example of the cross-cutting effect of non-discrimination and equality on the right to education is that, under IHRL, education is conceptualized as a key means to eliminate discrimination, not just through ‘educational measures’<sup>225</sup> but that non-discrimination and equality should undergird education. ICESCR states that one of the aims of education is to: ‘enable all persons to participate effectively in a free society,’ and to, ‘promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups.’<sup>226</sup> For further information on how education can be used to tackle discrimination and inequality, see sections on the aims of education (3.2) and human rights education (3.6.b.i).

However, even when the wording of a provision does not explicitly or implicitly reflect concerns about discrimination and inequality, each provision must be read as if non-discrimination and equality apply. In practice this means that states must consider the potential discriminatory effects of any measures they may take to implement the right to education.<sup>227</sup>

Despite the clear prohibition of discrimination under IHRL, it remains one of the biggest challenges in ensuring that everyone enjoys the right to education. Given the enduring

221 See CESCR General Comment 20 paras. 15–35.

222 Ibid., para. 27.

223 Ibid., paras. 27–35.

224 See Chapter 2 for a list of right to education provisions.

225 See Chapter 6, section 6.4.c on educational measures required for the domestic implementation of the right to education.

226 ICESCR Article 13 (1).

227 See Chapter 4, section 4.2.b.ii for further information on states’ legal obligations related to non-discrimination.

pervasiveness of the problem, there is an entire treaty dedicated to the issue: the UNESCO CADE. CADE sets out what constitutes discrimination in education, including the following practices:<sup>228</sup>

- depriving access to education
- providing education of inferior quality
- establishing or maintaining segregated educational systems or institutions, unless they are gender segregated, for linguistic or religious groups, and are non-exclusionary and are of the same quality as comparable institutions, and conform to minimum education standards
- inflicting undignified conditions

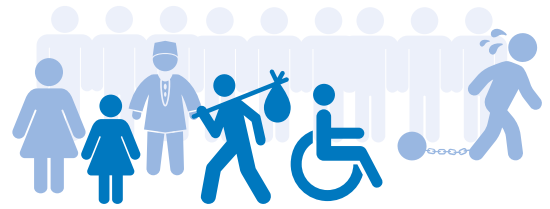
It also clarifies the unequal treatment that does not amount to unlawful discrimination:

- the establishment and maintenance of gender segregated education systems or institutions provided that the equivalent access is guaranteed, that qualified teaching staff are of the same standard, that school buildings and classrooms and equipment are of the same quality, and that there is opportunity to study the same subjects
- the establishment and maintenance of separate education systems or institutions for religious or linguistic reasons, provided that participation is optional, and that the institution meets standards set by the state
- the establishment and maintenance of any private school so long as they are not set-up to exclude any group and that such schools are complementary to public ones and meet standards set by the state

The rest of CADE elaborates the legal obligations of states to eliminate discrimination in education and are set out in the Chapter 4, section 4.2.b.ii.

### 3.3.c Special protections of the right to education of marginalized groups

**Figure 3.2: Examples of marginalized groups**



- girls and women
- national, ethnic, and linguistic minorities
- people with disabilities
- indigenous people
- migrants
- refugees
- asylum-seekers
- stateless persons
- IDPs
- persons in detention / persons deprived of liberty
- people living in poverty
- people living in rural areas
- people affected by HIV
- people affected by albinism
- LGBTQI
- older people
- and others

International and regional human rights treaties apply the rights to non-discrimination and equality to the right to education of specific

228 CADE Article 1.

marginalized groups. Marginalized groups are those who have suffered prolonged and historical discrimination, usually, but not exclusively, on the basis of identity (gender, for example), characteristics (ethnicity, race), or circumstance (refugees, migrants, IDPs). A feature of marginalisation is that those it affects are very likely to be subject to multiple, compound, or intersectional forms of discrimination (see box 3.4). Human rights treaties seek to address the entrenched marginalisation that occurs as a result of ‘systemic’ discrimination:

*discrimination against some groups is pervasive and persistent and deeply entrenched in social behaviour and organization, often involving unchallenged or indirect discrimination. Such systemic discrimination can be understood as legal rules, policies, practices or predominant cultural attitudes in either the public or private sector which create relative disadvantages for some groups, and privileges for other groups.*<sup>229</sup>

Thematic human rights treaties that apply to marginalized groups address discrimination regarding the subject group of the treaty. All such treaties prohibit discrimination and require states to eliminate discrimination, identify the most common barriers, and set out states obligations to eliminate these barriers and bring about *de jure* and *de facto* equality.

In order to bring about *de jure* equality, states must eliminate discrimination that exists in law and policy. However, in order to bring about *de facto* equality, states must eliminate discrimination that exists in practice. This can require the use of special temporary measures, which the CCPR describes as those measures necessary to ‘diminish or eliminate conditions which cause or help to perpetuate discrimination

prohibited by the [ICCPR].<sup>230</sup> Such activities must be discontinued once the intended equality outcomes are achieved.

The following sections cover some examples of how thematic treaties address the right to education of commonly discriminated against marginalized groups: girls and women, people with disabilities, and migrants. This list is non-exhaustive.



### Box 3.4 Definition: Types of discrimination

**Multiple discrimination** occurs when a person is discriminated against on one ground in a certain situation and a different ground in another context. For example, an Indigenous girl may face discrimination on the basis of her gender in one context and in another situation she may be subject to racial discrimination.

**Compound discrimination** is discrimination on two or more grounds occurring at the same time. For example, an indigenous girl may suffer discrimination on the basis of her gender and race simultaneously. As a result, she suffers an exacerbated and distinct form of discrimination.

**Intersectional discrimination** refers to a situation where several grounds operate and interact with each other at the same time in such a way that they are inseparable.



### Box 3.5 Further information: The heterogeneity of groups

Although thinking about ‘groups’ can be helpful, groups are often heterogeneous. For instance, the group ‘women and girls’, composed of half the world’s population, is highly diverse. It includes women and girls from low and high-income backgrounds, girls with impairments, Indigenous girls, girls living in rural and urban areas, etc.

<sup>230</sup> UN Human Rights Committee (CCPR). 1989. *General Comment 18: Non-discrimination* (Doc. HRI/GEN/1/Rev.1 at 26 (1994).) (CCPR General Comment 18) para. 10.

<sup>229</sup> CESCR General Comment 20 para. 12.

and any combination thereof. Each girl therefore experiences discrimination and inequality in a unique way depending on her identities and other environmental factors.

Furthermore, having a group or multiple identities must not hide the fact that everyone has an equal right to education. This requires all stakeholders to ensure that the entire education system is inclusive.



### Box 3.6 Definition: Inclusive education

Article 24 of the Convention on the Rights of Persons with Disabilities (2006) enshrines in law the right to ‘inclusive education’. Although inclusive education is commonly associated with the education of people with disabilities, it is in fact, applicable to all learners. The Committee on the Rights of Persons with Disabilities in General Comment 4<sup>231</sup> has clearly defined inclusive education as a human right of every learner and elaborates the model of inclusive education.

Inclusive education is based on the principle that all children should learn together, regardless of difference. Inclusive education recognizes the capacity of every person to learn and acknowledges that each person has different strengths, requirements, and learning styles. Inclusion, therefore, takes an individualized approach with curricula, teaching, and learning methods that are flexible and adaptable. By taking into account differences among learners, inclusive education promotes respect for, and the value of, diversity and seeks to combat discriminatory attitudes both in the classroom and society.

Inclusive education addresses the specific barriers people face in enjoyment of their right to education, through supports and accommodations, and ensures their effective access to education and the fulfilment of their individual potential on equal terms with other students within a participatory learning environment.



### Box 3.7 Further reading: Inclusive education

UNESCO. 2017. *A Guide for ensuring inclusion and equity in education*.

UNESCO. 2008. *Inclusive Dimensions of the Right to Education: Normative Bases*, Concept Paper

### 3.3.c. i Women and girls

The human rights of women and girls are protected by the Convention on the Elimination of All Forms of Discrimination against Women (1979, CEDAW) which has several provisions related to eliminating discrimination and achieving substantive equality:

Article 2 sets out the legal and policy measures states should undertake to eliminate discrimination against women.

Article 3 requires states to take all appropriate measures in the political, social, economic, and cultural fields to ensure that women can exercise and enjoy their human rights and fundamental freedoms on a basis of equality with men.

Article 4 permits temporary special measures to accelerate *de facto* equality between men and women, as long as these measures do not maintain unequal or separate standards, and are discontinued when the objectives of equality of opportunity and treatment have been achieved.

Article 5 requires states to take appropriate measures to eliminate gender stereotyping, prejudices, discriminatory cultural practices, and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women. It also requires states to ensure that family education includes a proper understanding of maternity as a social function and the recognition of the roles of men and women in the upbringing of their children.

231 UN Committee on the Rights of Persons with Disabilities (CRPD). *General Comment—Article 24: Right to inclusive education* (Doc. CRPD/C/GC/4.) (CRPD General Comment 4).

Article 10 sets forth the normative content in relation to the elimination of discrimination against women and ensuring equal rights with men in the field of education, which includes: the same conditions for career and vocational guidance, access to studies, and achievement of diplomas at all educational levels, both in urban and rural areas which includes:

- the same conditions for career and vocational guidance, access to studies, and achievement of diplomas at all educational levels, both in urban and rural areas
- the same quality of education, including: access to the same curricula, examinations, school premises and equipment, and teaching staff with qualifications of the same standard
- the elimination of any stereotyped concept of the roles of men and women by encouraging

coeducation, the revision of textbooks and school programmes, and the adaptation of teaching methods

- the same opportunities to benefit from scholarships and other study grants
- the same access to programmes of continuing education, including literacy programmes, particularly those aimed at reducing the gender gap in education
- the reduction of female student drop-out rates and programmes for girls and women who have left school prematurely
- the same opportunity to participate in sports and physical education
- access to educational information on health, including advice on family planning



### **Box 3.8 Further information: Common barriers women and girls face in enjoying the right to education and the measures states can take to eliminate them**

Despite significant progress in recent years, women and girls continue to face multiple barriers based on gender and its intersections with other factors, such as age, ethnicity, poverty, and disability, in the equal enjoyment of the right to quality education. This includes barriers, at all levels, to access quality education and within education systems, institutions, and classrooms, such as, among others:

#### ***Harmful gender stereotypes and wrongful gender stereotyping***

•gender stereotype: generalized view or preconception about attributes or characteristics that are or ought to be possessed by, or the roles that are or should be performed by women and men.<sup>232</sup> A gender stereotype is 'harmful' when it limits women's and men's capacity to develop their personal abilities, pursue their professional careers and make choices about their lives and life plans.<sup>233</sup>

•gender stereotyping: practice of ascribing to an individual woman or man specific attributes, characteristics or roles by reason only of her/his membership in the social group of women or men. Gender stereotyping is wrongful when it results in a violation of human rights and fundamental freedoms.

Harmful gender stereotypes and wrongful gender stereotyping affects girls before they step into a classroom and even prevent them from going to school. For example, stereotypical views that girls are domestic, homemakers, and caregivers may lead families to question the point of sending their daughters to school if they are to become wives and mothers.

They can also affect girls within the school environment and can prevent them from accessing equal learning outcomes and career opportunities. For example, stereotypes about the different physical and cognitive abilities of girls and boys, lead to certain school subjects and teaching methods being gendered. Boys are considered better suited to sciences, technology, engineering, maths (STEM) as well as sports, whereas girls are considered better suited to the

232 R. J. Cook and S. Cusack, 2010. *Gender Stereotyping. Transnational Legal Perspectives*, p. 9.

233 United Nations Office of the High Commissioner for Human Rights (OHCHR). 2013. *Gender stereotyping as a human rights violation*, p. 18.

arts and humanities. Women are under-represented in the STEM fields and account for only 30% of researchers in the world today.<sup>234</sup> This has the effect of excluding girls and boys from certain subjects (sometimes certain subjects are not even offered to female students) but also has a detrimental effect on girls' further educational and employment opportunities, as girls and boys go on to study different subjects at university, where 'male' subjects tend to lead to more lucrative and influential careers. Gender inequality is then perpetuated through hiring practices that further disadvantage women.

### **Child marriage and early and unintended pregnancy**

Child marriage is a discriminatory practice often rooted in the notion that girls and women are inferior to men and should conform to traditional gender stereotypes. Child marriage violates multiple human rights, including the right to education. Children who get married are more likely to drop-out of school and children who are not in school are more likely to get married.

Closely linked to child marriage, pregnancy and motherhood often have profound impacts on girls' education. Indeed, pregnant girls are often banned from attending school and sitting exams, and mothers often lack access to bridging programmes, which allow girls to resume their missed education, even though international law requires states to provide fundamental education for those who have left school prematurely. Pregnancy and motherhood can also occur independently from child marriage because of rape, which is particularly common during conflict and other emergencies.

#### **Did you know?**

According to Girls Not Brides,<sup>235</sup> every year 15 million underage girls get married. Globally, it is estimated that there are 720 million women alive today who were married before the age of 18—it represents 10% of the world's population. Child marriage happens everywhere but is most prevalent in south Asia, sub-Saharan Africa and Latin America and the Caribbean.

Statistics from the World Bank and International Center for Research on Women reveal that 10-30% of parents, depending on country, reported that their child dropped out of secondary school due to child marriage and/or pregnancy.<sup>236</sup>

### **Lack of inclusive and quality learning environments and inadequate and unsafe education infrastructure, including sanitation**

The learning environment has a great influence on girls' attendance in school. If it is unsafe or not conducive for learning, it can have a negative impact on the quality of education girls receive. Among the common barriers related to the learning environment:

- curricula, learning materials and teaching methods (pedagogies) can sometimes be discriminatory against girls
- a culture of bullying
- school regulations and sexist dress codes
- lack of toilets, gender-segregated toilets, changing facilities, and access to safe drinking water may discourage girls from attending school
- the lack of female teachers, which itself is a manifestation of the historical lack of access to education for women, can create a learning environment that does not support girls' retention in schools. Female teachers are more

234 Statistics on women in science from UNESCO Institute for Statistics (UIS).

235 See Girls Not Brides' website <http://www.girlsnotbrides.org/about-child-marriage/> (Accessed 25 September 2018).

236 Wodon, Q., Nguyen, M. C., Yedan, A and Edmeades, J. 2017. *Economic Impacts of Child Marriage: Educational Attainment Brief*. Washington, DC: The World Bank and International Center for Research on Women, p. 3.



likely, for instance, to promote more girl-friendly learning, act as role models or to provide new and different role models for girls.

### **Poverty**

Poverty is the main factor determining whether a girl accesses education. Girls from poor families in sub-Saharan Africa, Northern Africa, Western Asia, and Southern Asia are less likely than their male peers to attend school.<sup>237</sup> Indeed, not all families can afford to pay school fees (whenever direct or indirect), which represent an added financial burden. Consequently, some families might be forced to select which of their children to send to school, and in such cases, they are more likely to favour boys because of the low social and economic value placed on the education of girls.

### **Gender-based violence against women and girls**

Gender-based violence (GBV) against women and girls, is a form of discrimination and a human rights violation. GBV can keep girls out of school temporarily or indefinitely, as well as leading to underperformance. See section 3.6.c.ii for more information.

### **Recommendations to overcome barriers for girls and women:**

- integrate gender equality in education laws, education sector policies and throughout the planning processes
- expand girls' and women's literacy and access to formal and non-formal education and skills development opportunities, including in science, technology, engineering and mathematics (STEM) as well as TVET
- ensure teachers are trained to transform teaching, learning and classroom practices to create safe and inclusive learning environments that are gender-responsive
- improve the quality of education content by developing curricula and textbooks that are free from stereotypes and bias and promote gender equality

For further information see:

RTE's page *Women and girls* <http://www.right-to-education.org/girlswomen>

UNESCO's page *Education and gender equality* <https://en.unesco.org/themes/education-and-gender-equality>

237 Global Education Monitoring Report. 2016. Policy Paper 27/Fact sheet 3: *Leaving no one behind: How far on the way to universal primary and secondary education?*, p. 10.

### **3.3.c.ii People with disabilities**

The human rights of people with disabilities are enshrined in the Convention on the Rights of Persons with Disabilities (2006, CRPD), which includes a comprehensive free-standing non-discrimination and equality clause,<sup>238</sup> and which requires states to provide for reasonable

accommodation and allows for the use of measures that are, 'necessary to accelerate or achieve de facto equality of persons with disabilities'. The CRPD also separately protects the rights of women and children with disabilities, recognizing the intersectional nature of the discrimination faced by people with disabilities.

238 CRPD Article 5.



### Box 3.9 Definition: Reasonable accommodation

The CRPD defines reasonable accommodation (sometimes also referred to as ‘reasonable adjustments’) as: ‘necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.’<sup>239</sup>

Reasonable accommodation might include such things as ensuring classrooms and libraries are accessible to people with impaired mobility, allowing students with dyslexia extra time to complete coursework and exams, or ensuring appropriate policies and procedures are in place and actionable to guarantee the same access for students with mental health support needs.

Reasonable accommodation should not be understood as the only measure through which states can ensure that people with disabilities are not discriminated against. States must also ensure that education systems are *accessible to all*. Accessibility is a general duty to groups, whereas reasonable accommodation is a specific obligation to an individual.

For more information see: RTE’s page *Persons with disabilities* <http://www.right-to-education.org/issue-page/marginalised-groups/persons-disabilities>

Article 24 of the CRPD recognizes the right of people with disabilities to education, without discrimination and on the basis of equal opportunity, the state having the obligation to ensure an inclusive education system at all levels, and lifelong learning. The right to education of people with disabilities cannot be understood without reference to ‘inclusive education’ (see box 3.6). Inclusive education takes on particular features in its application to people with disabilities. It seeks to address the

specific barriers people with disabilities face in enjoyment of their right to education, through supports and accommodations, and ensures their effective access to education and fulfilment of their individual potential on equal terms with other students within a participatory learning environment.



### Box 3.10 Definition: Differences between inclusion, integration, and special education

*Inclusion: a process that helps to overcome barriers limiting the presence, participation and achievement of learners*

...

*Integration: learners labelled as having ‘special educational needs’ are placed in mainstream education settings with some adaptations and resources, but on condition that they can fit in with pre-existing structures, attitudes and an unaltered environment*

...

*Special education: classes or instruction designed for students categorized as having special educational needs*<sup>240</sup>

The first part of Article 24 sets out the aims of an inclusive education system:

- full development of human potential and sense of dignity and self-worth, strengthening respect for human rights, fundamental freedoms, and diversity
- development of the personality, talents and creativity of people with disabilities, as well as their mental and physical abilities, to their fullest potential
- enable persons with disabilities to participate effectively in society

239 CRPD Article 2.

240 UNESCO. 2017. *A Guide for ensuring inclusion and equity in education*, p. 7.

The second part addresses the various forms of discrimination that people with disabilities often face. It:

- prohibits exclusion from the general education system and from free and compulsory education
- provides that people with disabilities must be able to access inclusive, quality, free primary and secondary education in the communities in which they live
- requires that states provide reasonable accommodations and individualized support measures

The third part requires states to take appropriate measures to provide the learning of life and social development skills to facilitate their full and equal participation in education, for instance, facilitating the learning of Braille and sign language.

The fourth part requires states to employ qualified and trained teachers at all levels of education.

The fifth part requires states to ensure that people with disabilities are able to access general tertiary education, vocational training, adult education and lifelong learning without discrimination and on an equal basis with others.



**Box 3.11 Further information: Common barriers people with disabilities face in enjoying the right to education and the measures states can take to eliminate them**

People with disabilities often face significant ongoing barriers to education, which include:

- lack of accessibility, both in terms of physically inaccessible school buildings and unsuitable learning materials
- discrimination and prejudice which prevents people with disabilities from accessing education on equal terms to others

- exclusion or segregation from mainstream school settings (also referred to as 'regular schools'), particularly when students with disabilities are effectively segregated in 'special schools'
- inferior quality of education, including in mainstream settings where children with disabilities have been 'integrated' into the existing non-inclusive system

For further information see:

RTE's page *Persons with disabilities* <http://www.right-to-education.org/issue-page/marginalised-groups/persons-disabilities>

UNESCO. 2015. Monitoring of the Implementation of the Convention and Recommendation against Discrimination in Education (8th Consultation). *The Right to Education for Persons with Disabilities: Overview of the Measures Supporting the Right to Education for Persons with Disabilities reported on by Member States*

### 3.3.c.iii Refugees, migrants, and other displaced persons

The right to education should be provided irrespectively of the origin, nationality, or legal status of learners.



**Box 3.12 Definitions: The different categories of migrants**

**Migrant:** 'any person who is moving or has moved across an international border or within a State away from his/her habitual place of residence, regardless of 1. the person's legal status (i.e. documented or undocumented); 2. whether the movement is voluntary or involuntary; 3. what the causes for the movement are; 4. what the length of the stay is.'<sup>241</sup>

**Refugee:** a person who, 'owing to a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinions, is outside the country and is unable or,

<sup>241</sup> International Organization for Migration. 2011. *Key Migration Terms*. <https://www.iom.int/key-migration-terms> (Accessed on 7 November 2018).

owing to such fear, is unwilling to avail himself of the protection of that country.<sup>242</sup>

**Asylum-seeker:** a person who has moved across borders in search of protection, is seeking protection as a refugee, but is still waiting to have his/her claim assessed.

**Stateless person:** 'a person who is not considered as a national by any State under the operation of its law.'<sup>243</sup> Even though statelessness might arise in migratory situations, most stateless persons 'have never crossed borders and find themselves in their "own country"'.<sup>244</sup>

**Internally displaced persons:** 'persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an international recognized State border.'<sup>245</sup>

Although legal and immigration status is not explicitly listed as a prohibited ground of discrimination, several UN Human Rights treaty bodies, such as the CESCR,<sup>246</sup> the Committee on the Rights of the Child<sup>247</sup> have affirmed that the rights under the right to education apply to everyone, including non-nationals such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, including in situations of return or

deportation to the country of origin, regardless of legal status and documentation.



### Box 3.13 Further information: Rights of children in the context of international migration

In their Joint General Comment on state obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination, and return, the CRC and the Committee on Migrant Workers (CMW) states:

*The principle of equality of treatment requires States to eliminate any discrimination against migrant children and to adopt appropriate and gender-sensitive provisions to overcome educational barriers. This means that, where necessary, targeted measures are needed, including additional language education, additional staff and other intercultural support, without discrimination of any kind. States are encouraged to dedicate staff to facilitating access to education for migrant children and to promoting the integration of migrant children into schools. In addition, States should take measures aimed at prohibiting and preventing any kind of educational segregation, to ensure that migrant children learn the new language as a means for effective integration. State efforts should include early childhood education as well as psychosocial support. States should also provide formal and non-formal learning opportunities, teacher training and life skills classes.*

*States should develop concrete measures to foster intercultural dialogue between migrant and host communities and to address and prevent xenophobia or any type of discrimination or related intolerance against migrant children. In addition, integrating human rights education, including on non-discrimination, as well as migration and migrants' rights and children's rights, within education curricula would contribute to preventing...xenophobic or any form of discriminatory attitudes that could affect migrants' integration in the long term.*<sup>248</sup>

242 Refugee Convention (as applied through the Protocol relating to the Status of Refugees).

243 Convention Relating to the Status of Stateless Persons (adopted 28 September 1954, entered into force 6 June 1960) 360 UNTS 117 (Statelessness Convention).

244 United Nations High Commissioner for Refugees (UNHCR). 2014. *Handbook on Protection of Stateless Persons*, p. 3.

245 UNHCR. 1998. *Guiding Principles on Internal Displacement and Kampala Convention*. 2009.

246 CESCR. 2009. *General Comment No. 20* para. 30.

247 CMW and CRC. 2017. *Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the CRC on the general principles regarding the human rights of children in the context of international migration* (Docs. CMW/C/GC/3-CRC/C/GC/22). paras. 9 and 22.

248 CMW and CRC. 2017b. *Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the CRC on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return* (Doc. CMW/C/GC/4-CRC/C/GC/23). paras. 62-63.

In addition, migration-specific instruments also contain provisions regarding the right to education of certain categories of migrants (see chapter 2).



### Box 3.14 Further reading on refugees, migrants, and other displaced persons

RTE's background report for the 2019 Global Education Monitoring Report on Migration and Education. 2018. *The status of the right to education of migrants: International legal framework, remaining barriers at national level and good examples of states' implementation.*

## Refugees

The Convention relating to the Status of Refugees (1951, Refugee Convention) and its Protocol relating to the Status of Refugees (1967),<sup>249</sup> contain specific provisions related to the right to education of refugees and, to a certain extent, asylum-seekers. Article 22 states that refugees and their children should have the same treatment as nationals with respect to elementary ('primary') education.

With respect to other education levels, Article 22 (2) lays out a non-exhaustive list of measures from which refugees should benefit preferentially or at least not benefit any less than other non-nationals in access to their studies, including the recognition of foreign school certificates, diplomas and degrees, the remission of fees and charges, and the award of scholarships. As far as education-related fees and charges are concerned, Article 29 (1) lays out a specific legal obligation to treat refugees the same as nationals. This means that when read together with Article 22 (2), refugees shall benefit from the lowest fees any

249 Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267. The Protocol removes the temporal and geographic restrictions of the Refugee Convention.

public educational institution may levy. Therefore, when non-nationals benefit from lower fees and charges, the same applies to refugees.

Mirroring the content of international refugee law, Article 22 of the CRC protects the right to education of refugee children and requires that governments adopt appropriate efforts to cater for the special needs of these children.<sup>250</sup>



### Box 3.15 Further reading: Right to education of refugees

UNHCR. 2018. *Left Behind Refugee Education in Crisis.* <http://www.unhcr.org/59b696f44.pdf>

UNESCO. 2017. Working papers on Education Policy: *Protecting the right to education for refugees.* <http://unesdoc.unesco.org/images/0025/002510/251076E.pdf>

UNGA. 2018. *Report of the Special Rapporteur on the right to education (Doc. A/73/262).* <http://undocs.org/A/73/262>

## Asylum-seekers

Pending the examination of their application for international protection, asylum-seekers and their children are protected under internal refugee law. As applicants for international protection, they are entitled to the protection of Article 22 and Article 29 of the Refugee Convention and should thus have the same treatment as nationals with respect to elementary education. Article 22 of the CRC is also relevant as it refers to both refugee and asylum-seeking children.

If their application for international protection succeeds – that means, if they are recognized as refugees or granted international protection under other humanitarian grounds – asylum-seekers and their children will enjoy the same protection as refugees. If their application for

250 CRC Article 22.

asylum is rejected, they will be placed in the same situation as undocumented migrants - unless permission to stay is provided on whatever grounds. In any case, rejected asylum-seekers still enjoy the core content of the right to education, as enshrined in international human rights treaties; such rights being guaranteed to everyone and not just those lawfully residing within the territory of the state.

### Stateless persons

The Convention relating to the Status of Stateless Persons (1954) is based on the core principle that no stateless person should be treated worse than any foreigner who possesses a nationality. This Convention stipulates that stateless persons must be treated like nationals of the state with regards to primary education. Article 22 affirms that the states: 'shall accord to stateless persons the same treatment as is accorded to nationals with respect to elementary education', and they also:

*shall accord to stateless persons treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, with respect to education other than elementary education and, in particular, as regards access to studies, the recognition of foreign school certificates, diplomas and degrees, the remission of fees and charges and the award of scholarships.<sup>251</sup>*

### Migrant workers and members of their families

Articles 12 (4), 30, 43 and 45 of the ICRMW protect the right to education of migrant workers and members of their families. In this regard, the CMW affirmed, in its General Comment 2 on the rights of migrant workers in an irregular situation and members of their families, that:

*Article 30 of the Convention protects the "basic right of access to education" of all children of migrant workers "on the basis of equality of treatment with nationals of the State concerned." Article 30 also provides that access to public pre-school educational institutions or schools shall be without prejudice to the migration status of the child concerned or parents of the child. The Committee, in accordance with Article 13 of the International Covenant on Economic, Social and Cultural Rights, is of the view that States parties must provide free and compulsory primary education for all, including children of migrant workers, regardless of their migration status... Access to secondary education by children of migrant workers must be ensured on the basis of equality of treatment with nationals. Accordingly, whenever children who are nationals have access to free secondary education, States parties must ensure equal access by children of migrant workers, irrespective of their migration status.<sup>252</sup>*

At the regional level, Article 14 of the European Convention on the Legal Status of Migrant Workers (1997) is also worth mentioning, as it protects the right to education of migrant workers and their children.<sup>253</sup>

### Internally displaced persons

The UN Guiding Principles on Internal Displacement<sup>254</sup> identify the rights relevant to the needs and protection of internally displaced persons (IDPs). Principle 23 emphasizes the fact that all persons have the right to education and

<sup>251</sup> Statelessness Convention Article 22.

<sup>252</sup> CMW. 2013. *General Comment No. 2: The rights of migrant workers in an irregular situation and members of their families* (Doc. CMW/C/GC/2.) paras. 5-11 and 75-79.

<sup>253</sup> European Convention on the Legal Status of Migrant Workers (adopted 24 November 1977, entered into force 1 May 1983) ETS 93.

<sup>254</sup> OHCHR. 1998. *Internally displaced persons: report of the Representative of the Secretary-General, Francis M. Deng, submitted pursuant to Commission on Human Rights resolution 1997/39, 11 February 1998.*

that: 'the authorities concerned shall ensure that such persons, in particular displaced children, receive education which shall be free and compulsory at the primary level. Education should respect their cultural identity, language and religion'. It also states that special efforts should be

made to ensure the full and equal participation of women and girls in educational programmes.

At the regional level, the 2009 Kampala Convention for the protection and assistance of IDPs recognizes their right to education in its Article 9 (2) (b).



### Box 3.16 Further information: The 'refugee crisis'

The expression 'refugee crisis' or 'migrant crisis' is often used in European countries to refer to the increase in the number of migrants and refugees arriving in Europe. This phenomenon, however, is a global issue, affecting all continents. According to the United Nations High Commissioner for Refugees (UNHCR), 85 per cent of the world's displaced people are from developing regions, while Turkey, Pakistan, Uganda, Lebanon and the Islamic Republic of Iran are the top refugee-hosting countries.<sup>255</sup>

As of 2017, the number of forcibly displaced people worldwide was estimated at 68.5 million by UNHCR, including 40 million internally displaced persons, 25.4 million refugees and 3.1 million asylum-seekers.<sup>256</sup> More than half of the 25.4 million refugees were children (below 18 years of age).<sup>257</sup> Refugee children are five times more likely to be out of school compared to their global peers.<sup>258</sup> The higher the level of education, the less likely refugees are to attend. In 2017:

- 61% of refugee children were enrolled in primary school, compared to 92% globally<sup>259</sup>
- 23% of refugee adolescents were enrolled at secondary level, compared to 84% globally<sup>260</sup>

In 2016:

- 1% of refugee youth were enrolled at tertiary level, compared to 34% globally<sup>261</sup>

According to data from the school year 2015-2016, more than half the world's refugees live in towns and cities rather than camps.<sup>262</sup> Historically, international donor support to education of refugees was channelled through UNHCR and international NGOs and focused on education service provision within camps. However, it is now widely acknowledged that donor-supported camp schools running outside of national education systems do not provide a sustainable solution and that refugees should be included in national education systems.

#### Challenges faced by education systems in ensuring refugees' and migrants' right to education

Major barriers to education for refugees and migrants include:

Contextual and system level barriers:

- explicit policy to exclude refugees and migrants from national education systems (in some countries)
- administrative barriers, such as lack of identity papers or birth certificates required to enrol (see also the Section 3.4.c on administrative accessibility)

255 UNHCR. 2018. *Global Trends: Forced Displacement in 2017*, pp. 2-3.

256 Ibid., p. 2.

257 Ibid., p. 3.

258 UNHCR. 2018. *Turn the Tide. Refugee Education in Crisis*, p. 14.

259 Ibid.

260 Ibid.

261 UNHCR. 2017. *Left Behind: Refugee Education in Crisis*, p. 5.

262 UNHCR. 2016. *Missing Out: Refugee Education in Crisis*, p. 13.

- limited school capacities, especially at secondary level, which requires more public expense and specialized infrastructure and equipment
- the quality of education and its relevance for refugees

Household and school-level barriers:

- indirect and direct schooling costs, such as tuition fees, operational fees, exam fees, stationary, uniform and transport costs
- distance to school and the lack of affordable and/or available transportation options, especially in remote areas
- security, xenophobia and intolerance, creating inhospitable or dangerous environments for children
- linguistic barriers and the need to learn a new language of instruction
- trauma and the lack of mental health resources to face extremely stressful events experienced by refugees

### **Recommendations for ensuring the right to education of refugees**

Ensuring the right to education of refugees is a huge challenge, which can be nevertheless addressed by adopting specific targeted policy measures:

- augmenting the supply of formal and accredited primary and secondary education, including through the construction of school buildings. *Increasing the number of schools* also contributes to reducing distance to school and has a dramatic effect on enrolments<sup>263</sup>
- providing *available and free school transport* to reduce distance to school
- using *double shifts*. This can expand the provision of education quickly and works by doubling the number of pupils that can attend by splitting them into morning and afternoon shifts. However, this system, especially in the evenings, has to ensure that children are safe on their way to school otherwise it could limit the participation of refugees. Furthermore, double shifts imply doubling the number of teachers<sup>264</sup> or placing an extra burden on existing teachers which can have a negative impact on quality<sup>265</sup>
- providing *non-formal education*, if accredited, in order to expand access to education where formal alternatives are not available.<sup>266</sup> This includes distance learning and online courses.
- providing *accelerated learning programmes (ALPs)*, in order to ensure a viable pathway towards formal learning opportunities, for both children and adults<sup>267</sup>
- providing *financial support* to refugee students and their families, including through conditional or unconditional cash transfers
- developing *alternative administrative procedures* (e.g. placement testing and/or background paper supported with a portfolio of evidence, which the individual is able to submit to the relevant authorities in case he/she cannot provide the relevant documents).
- developing *accreditation* to determine where to place a refugee student in a new education system.
- providing specific and intensive *language courses*.
- increasing *teacher training*.

For further information see: RTE's page *Migrants, refugees and internally displaced persons* <http://www.right-to-education.org/migrants-refugees-IDP>

263 Burde, D. et al. 2015. *What works to promote children's educational access, quality of learning, and wellbeing in crisis-affected contexts*, pp. 17-18.

264 Save the Children, UNHCR, and Pearson. 2017. *Promising practices in refugee education: Synthesis Report*, p. 19.

265 Ibid.

266 Ibid., p. 16.

267 Burde, D. et al., op. cit., pp. 26-27.



### 3.4 Access to education

The right to education requires that everyone should be able to access quality education on an equal basis with others and completely free from discrimination (see section 3.3). Yet, out-of-school and drop-out rates have remained stubbornly high with marginalized groups being disproportionately excluded from education.

International human rights law (IHRL) identifies three components of accessibility: *economic*, *physical*, and *administrative* accessibility. Each are dealt with subsequently along with the measures IHRL prescribes to for each component.

It should be noted that some accessibility issues are related to the quality, acceptability, or adaptability of education, for instance, when the language of instruction differs from the child's mother tongue. These issues are dealt with in the section concerning quality education at 3.6.

#### 3.4.a Economic accessibility

Poverty, which disproportionately affects marginalized groups, is the biggest barrier to accessing education. In many countries, particularly low and lower-middle income countries, families often cannot afford to send their children to school, leaving millions of school-age children deprived of education. This lack of education continues to disadvantage children into adulthood, further perpetuating the poverty cycle. As the CESCR has stated:

*education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment,*

*and controlling population growth. Increasingly, education is recognized as one of the best financial investments States can make.*<sup>268</sup>

IHRL requires states to ensure that the right to education is economically accessible, through two primary measures: the introduction of free and compulsory education and the reduction of drop-out rates.

#### Did you know?

'In low-income countries, out-of-school rates are systematically higher than in lower-middle-income, upper-middle-income and high-income countries... For example, the primary out-of-school rate is 19% in low-income countries and 3% in high-income countries.<sup>269</sup> The gap grows as the level of education increases—the upper secondary out-of-school rate is 62% and 7% respectively.<sup>270</sup>

#### 3.4.a.i Free and compulsory education

According to IHRL, primary education shall be compulsory and free of charge.<sup>271</sup> Secondary, technical and vocational education and training, and higher education shall be made progressively free of charge. 'Progressively free of charge' means that while states must prioritize the provision of free primary education, they also have an obligation to take concrete steps towards achieving free secondary and higher education.<sup>272</sup>

268 CESCR General Comment 13 para. 1.

269 UNESCO. 2017. Policy paper 32/ Fact sheet 44: *Reducing global poverty through universal primary and secondary education*, p. 9.

270 Ibid.

271 ICESCR Article 13 (2) (a); CRC Article 28 (1) (a); CADE Article 4 (a).

272 CESCR General Comment 13 para. 14. See Chapter 4, section 4.2.a for further information on progressive realization.



**Box 3.17 Further information: States commit to free and compulsory primary and secondary education**

States have gone beyond their legal obligations to provide free and compulsory education and have committed, through the Sustainable Development Goals (SDGs) to: ‘ensure that all girls and boys complete free, equitable and quality primary and secondary education’. The SDG4-Education 2030 Framework for Action<sup>273</sup> further clarifies that this means to ‘ensure access to and completion of quality education for all children and youth to at least 12 years of free, publicly funded, inclusive and equitable quality primary and secondary education, of which at least nine years are compulsory.’<sup>274</sup> Further, states are also encouraged to provide ‘at least one year of free and compulsory pre-primary education of good quality.’<sup>275</sup>

Removing the economic barrier to education by making it free is fundamental in guaranteeing universal access. Lack of free education results in an added financial burden on families, which may come in the form of school fees (or other direct fees) or indirect fees (whether voluntary or not) such as for expensive school uniforms, exam fees, security, school transportation, etc. Such fees, ‘constitute disincentives to the enjoyment of the right and may jeopardize its realization. They are also often highly regressive in effect.’<sup>276</sup>

Economic barriers often interact with social and cultural barriers to keep children out of school. This is especially pronounced for girls where fees are a direct barrier to school attendance, either because families cannot afford these costs or the costs may force families to select which of their children to send to school. In such instances, it

is usually boys who are favoured because of the low social and economic value placed on the education of girls. Girls who do not go to school are more likely to be child brides and have early or unwanted pregnancies.

In terms of the *compulsory* nature of primary education, CESCR has elaborated that:

*The element of compulsion serves to highlight the fact that neither parents, nor guardians, nor the State are entitled to treat as optional the decision as to whether the child should have access to primary education. Similarly, the prohibition of gender discrimination in access to education, required also by articles 2 and 3 of the Covenant, is further underlined by this requirement. It should be emphasized, however, that the education offered must be adequate in quality, relevant to the child and must promote the realization of the child’s other rights.’<sup>277</sup>*

The connection between these elements should also be noted. If primary education is to be compulsory then it has to be free, otherwise parents, particularly low-income parents, are put in a situation where they are obliged to ensure that their children attend school despite being unable to pay for that schooling.<sup>278</sup>

Free and compulsory education is complemented in IHRL by standards related to minimum age requirements, notably in the areas of marriage and employment. The ILO Minimum Age Convention (1973)<sup>279</sup> stipulates that the minimum age for employment shall be no lower than the age at which compulsory education ends and, in any case, no lower than fifteen. CEDAW and the

273 See Chapter 5 for further information on the SDGs and Education 2030.

274 Education 2030 Framework for Action (adopted 4 November 2015) para. 12.

275 Ibid.

276 CESCR. 1999. *General Comment No. 11: Plans of Action for Primary Education (Article 14 of the Covenant)* (Doc. E/C.12/1999/4.) (CESCR General Comment 11) para. 7.

277 Ibid., para. 6.

278 For further information on free and compulsory primary education, see Tomaševski, K. 2001. *Right to Education Primers No. 2: Free and compulsory education for all children: the gap between promise and performance.*

279 Convention (No. 138) concerning Minimum Age for Admission to Employment (adopted on 26 June 1973, entered into force 19 June 1976) 1015 UNTS 297.

CRC provide that the minimum age of marriage should be 18. This principle of alignment should be applied to other practices, such as underage conscription, and being subject to criminal liability (and therefore possible imprisonment), as they can also exclude children from the education system. In many countries, minimum age legislation is inconsistent with the obligation to ensure free and compulsory education, too low, or worse, inexistent.<sup>280</sup>



**Box 3.18 Further information: Global challenges: Making the right to free and compulsory education a reality for all**

Expanding the duration of free and compulsory education in national legislation and aligning legal frameworks with the legal requirements of the right to education and the commitments of SDG4-Education 2030 is one of the most important challenges towards the full realization of the right to education.

Statistics show that despite significant progress, as of 2018, the right to free and compulsory primary and secondary education is far from universal.<sup>281</sup>

The right to free education:

- 190 countries have legal provisions for free primary education
- 161 countries have legal provisions for free primary and secondary education
- the shortest legal duration of free education is just five years
- the longest legal duration of free education is more than 15 years of free education

The right to compulsory education:

- 191 countries have legal provisions for compulsory education

- the shortest legal duration of compulsory education is also five years
- the longest legal duration of compulsory education is 15 years

Public education is the most efficient way to guarantee free and compulsory education. States should therefore provide education, as a public good, by ensuring investment and sufficient resources. While IHRL recognizes the role of private providers in education, such provision should supplement public education and not supplant it, particularly due to the adverse impact they can have on the right to education.<sup>282</sup>

### 3.4.a.ii Measures to prevent children dropping out of education and getting children back into school

Access to education is not just a matter of getting children into school, it is about keeping them there so that they can benefit from education. As well as providing for access through the provision of free education, states must also institute targeted measures to keep at-risk students from dropping out of education. The CRC, for example, requires states to: '[t]ake measures to encourage regular attendance at schools and the reduction of drop-out rates.'<sup>283</sup> Likewise CADE permits states to reduce or forgive school fees and provide scholarships or other forms of assistance to those who may need them.<sup>284</sup> CEDAW also requires states to reduce the female student drop-out rate.<sup>285</sup>

States must ensure student retention through a number of means but the first step is to make sure that there are no barriers impeding access to education. Different groups will face different accessibility challenges and so states will have to

<sup>280</sup> For more information, see for example, the RTE's page *Minimum Age* <http://www.right-to-education.org/issue-page/minimum-age> (Accessed 25 September 2018).

<sup>281</sup> Statistics from UNESCO Institute for Statistics (UIS) and UNESCO Observatory on the Right to Education.

<sup>282</sup> Singh, K. 2014. *Report of the Special Rapporteur on the right to education on State responsibility in the face of the explosive growth of private education providers, from a right to education perspective* (Doc. A/69/402.) para. 96.

<sup>283</sup> CRC Article 21 (1) (e).

<sup>284</sup> CADE Article 3 (c).

<sup>285</sup> CEDAW 10 (f) (f).


monitor and identify both out-of-school children and students at risk of dropping out, to analyze and understand the barriers that they face, and then determine the appropriate measures required to get these students to stay in school.<sup>286</sup> Such measures should take into consideration the views, concerns, and experiences of relevant stakeholders, including students, parents, teachers, and the local community.

Along with economic accessibility issues, physical accessibility issues (dealt with in section 3.4.b), and administrative barriers (see section 3.4.c), another common factor for students dropping out of school is the lack of quality education. This may include issues such as a lack of qualified teachers, unsafe classrooms, lack of sanitation facilities, among others. States must therefore ensure that the education system is of acceptable quality and that each school meets minimum quality standards. See section 3.6 for further information on quality education.

Targeted measures for groups at risk of dropping out include:

- the provision of free school transportation
- grants and scholarships to address permissible indirect fees that nonetheless constitute a financial barrier to accessing education, for example, stipends for school uniforms
- free school breakfasts and lunches, or feeding programmes
- providing free textbooks and other learning materials
- ensuring teachers are qualified
- banning child marriage and child labour in law and in practice
- de-stigmatisation programmes

- anti-bullying and anti-violence measures
- psychosocial support and social and emotional learning, particularly for children affected by conflict or other emergencies

 **Did you know?**

Reducing the indirect costs of education through cash transfers to families, scholarships or incentives to students is of key importance. In fact, '[a] meta-analysis of 42 impact evaluation studies for 19 conditional cash transfer programmes in 15 countries showed that attendance increased by 2.5% in primary schools and by 8% in secondary schools.'<sup>287</sup>

IHRL also requires states to provide education for those who have dropped-out of education, particularly primary education. This is known as 'fundamental education' or 'second chance education' and is generally delivered to adolescent and adults (explained in section 3.5.f). However, in addition to providing fundamental education, states must also ensure that students can re-enter the general education system or access programmes designed specifically for them. CEDAW, for example, requires states to organize programmes for girls and women who have left school prematurely.<sup>288</sup> Examples of measures to ensure that children who have dropped-out can re-enter education include:

- re-entry programmes for girls who have given birth
- provision of creche facilities for mothers who go to school
- programmes for former child soldiers to reintegrate back into education

<sup>287</sup> UNESCO Institute for Statistics (UIS) and the Global Education Monitoring (GEM) Report. 2017. *Reducing global poverty through universal primary and secondary education*, p. 14.

<sup>288</sup> CEDAW 10 (f).

<sup>286</sup> See Chapter 7 on monitoring for further information.

- informal education programmes
- remedial or catch-up classes
- waiving entry requirements

A final way states can increase access to education for students from disadvantaged backgrounds is to provide fellowships. ICESCR requires that: 'an adequate system of fellowships shall be established', which CESCR has stated: 'should be read with the Covenant's non-discrimination and equality provisions', and: 'should enhance equality of educational access for individuals from disadvantaged groups'.<sup>289</sup> CADE also permits such an approach.<sup>290</sup> It should be noted, however, that scholarships and fellowships should form part of a multipronged approach to tackle accessibility issues and not be the sole means. This is because such an approach does nothing to improve the general quality of schools, rather it moves (often relatively advantaged) children from low quality schools to higher quality schools.

### 3.4.b Physical accessibility

CESCR states that physical accessibility is an important element of making education accessible, which it clarifies as meaning: 'within safe physical reach, either by attendance at some reasonably convenient geographic location (e.g. a neighbourhood school) or via modern technology (e.g. access to a 'distance learning' programme).'<sup>291</sup>

Lack of physical accessibility is a particular problem for those who live in rural areas where schools may not be generally available. This can lead to children having to walk, often unsupervised, long distances, in sometimes difficult conditions, to attend school or having to take public transport. Both can expose children to safety issues and can result in children being tired when they get to school, because of having to get

up early and walk for some distance. These effects are disincentives to attend school. States must, therefore, address this by ensuring that schools are available and accessible at all levels, and in cases where they cannot, they must provide free or subsidized, safe school transportation.

In some instances, schools may become temporarily physically inaccessible, for instance, during emergencies, particularly conflicts and insecurity and natural disasters. States must evaluate the best measures to ensure that students can still access education, for instance, by setting up temporary schools and ensuring that hazards such as landmines are cleared or obviously marked.

Perhaps the group most affected by the physical inaccessibility of schools is people with disabilities, particularly those with physical impairments, reduced mobility, and visual impairments. People with physical impairments may not be able to get to schools, for instance, because those schools that are adapted may be far away, roads may be bumpy, and school and public transportation may not be adapted for use. It may also be the case that schools themselves are not designed for universal access. For instance, they may not be wheelchair-friendly or corridors may not be wide enough.

The CRPD requires states to ensure that people with disabilities can access an *inclusive, quality, and free* primary education and secondary education on an equal basis with others. Students must be able to access education *within the community* in which they live, which means the educational environment must be reachable for people with disabilities, including through safe transport.<sup>292</sup>

The Committee on the Rights of Persons with Disabilities asserts that states should prevent the building of future education facilities that are inaccessible and should establish a monitoring mechanism and timeframe for already existing

289 CESCR General Comment 13 para. 26.

290 CADE Article 3 (c).

291 CESCR General Comment 13 para. 6 (b) (i).

292 CRPD Article 24 (2) (b).

education environments to be made accessible. The Committee calls for states to commit to the introduction of Universal Design. *Universal Design* is defined in the CRPD<sup>293</sup> and means the design of products, environments, programmes, and services to be usable by all people, to the greatest extent possible, without the need for adaptation.

The Committee on the Rights of Persons with Disabilities makes clear that it is not just the school building that must be accessible, but the *entire education system* including: information and communication, assistive systems, curriculum, education materials, teaching methods, assessment and language and support services. The *whole environment* must be designed in a way that fosters inclusion of students with disabilities and guarantees their equality throughout their education.<sup>294</sup>

### 3.4.c Administrative accessibility

Administrative requirements for students to enrol in schools, such as having to show birth certificates, passports, or residency permits, although not inherently discriminatory, may nevertheless have indirect discriminatory effects. This is because for some groups, notably refugees, asylum-seekers, and other types of migrants (see section 3.3.c.iii), such requirements are impossible to fulfil, given that they have had to leave their homes, leaving behind documents with no chance of retrieval. Further, where migrants are not disbarred from enrolling in education, states should recognize the qualifications and certificates of enrolling students such as they can enter education at the appropriate level.

CADE prohibits any discrimination that may result from administrative barriers, requiring states: 'To abrogate any statutory provisions and any administrative instructions and to discontinue

any administrative practices which involve discrimination in education.'<sup>295</sup>

## 3.5 Levels and types of education

The right to education is universal and as such applies to all, irrespective of age. Education, as conceptualized under international human rights law (IHRL), is viewed as an ongoing, lifelong process. However, under IHRL, rights-holders' entitlements are different depending on the level and type of education. IHRL prioritizes primary education given its importance as the start of the education process and for child development. However, other levels and types of education are not neglected by IHRL, which guarantees specific entitlements at other levels, from secondary to higher education, and other types of education, including technical and vocational education and adult education.

This section describes the normative content of the right to education at each level and type of education.

### 3.5.a Early childhood education

Early childhood education refers to the education a child receives before entering primary school and is generally split into two categories: early childhood educational development (aged 0-2) and pre-primary education (aged three until reaching primary school age). Early education programmes are focused on a 'holistic approach to support children's early cognitive, physical, social and emotional development and introduce young children to organized instruction outside of the family context'.<sup>296</sup> These programmes also 'aim to develop socio-emotional skills necessary for participation in school and society'.<sup>297</sup> Pre-

293 CRPD Article 2.

294 See CRPD General Comment 4 for further information.

295 CADE Article 3 (a).

296 UNESCO and UNESCO Institute for Statistics, op. cit., para. 100.

297 Ibid.

primary education additionally aims to ‘develop some of the skills needed for academic readiness and prepare children for entry into primary education.’<sup>298</sup>

Early childhood education is not an explicit right under international law. However, the Committee on the Rights of the Child has stated that it interprets the right to education during early childhood as beginning at birth and closely linked to young children’s maximum development, which is guaranteed in Articles 6 (2) and 29 (1) (a) of the CRC.<sup>299</sup>

The Committee on the Rights of the Child also highlights the importance of early childhood education in terms of transition to primary education and beyond: ‘evidence demonstrates the potential for quality education programmes to have a positive impact on young children’s successful transition to primary school, their educational progress and their long-term social adjustment.’<sup>300</sup>

International law does, however, explicitly prohibit discrimination in access to all levels of education, including early childhood education.<sup>301</sup> This is important because disparities in child development due to factors such as poverty, which can lead to inequalities and discrimination in education and other outcomes later in life, can be significantly ameliorated through non-discriminatory access to good quality early childhood education. Special attention is therefore to be given to vulnerable groups in order to guarantee access and equal opportunities to benefit from appropriate and effective services, including programmes of education.<sup>302</sup>

298 Ibid.

299 CRC. 2005. *General Comment 7: Implementing Child Rights in Early Childhood* (Doc. CRC/C/GC/7.) (CRC General Comment 7) para. 28.

300 CRC General Comment 7 para. 30.

301 CADE Article 2 (1); Convention on the Elimination of All Forms of Discrimination against Women Article 1 (a).

302 CRC General Comment 7 paras.12 and 24.

In contrast, the entitlement to early childhood care has been recognized in international law. Article 18 (3) of the CRC states: ‘children of working parents have the right to benefit from child-care services and facilities for which they are eligible.’ The Committee on the Rights of the Child acknowledges that the traditional division between ‘care’ and ‘education’ has not always been in the best interest of the child, and the need for a ‘coordinated, holistic, multisectoral approach to early childhood’ is required.<sup>303</sup>

It should also be noted that state practice with respects to early childhood education goes considerably beyond legal requirements under IHRL. This signifies that states themselves view early childhood education as paramount and as part of their obligations to provide education. This trend is further evidenced by states’ commitment to ‘ensure that all girls and boys have access to quality early childhood development, care and pre-primary education so that they are ready for primary education’ (target 4.2). This is particularly true for pre-primary education in high income countries where, according to the OECD, there is near universal participation for at least one year in early childhood education signalling progress towards target 4.2. The OECD, however, notes that ‘significant inequities persist’ in the participation in early childhood education of children from disadvantaged socioeconomic backgrounds.<sup>304</sup>



### Box 3.19 Further information: Early childhood care and education

UNESCO’s page *Early childhood care and education*  
<https://en.unesco.org/themes/early-childhood-care-and-education>

303 Ibid., para. 30.

304 OECD. 2018. *Education at a Glance*, p. 162.

### 3.5.b Free and compulsory primary education

Primary (or elementary) education is defined as that:

*typically designed to provide students with fundamental skills in reading, writing and mathematics (i.e. literacy and numeracy) and establish a solid foundation for learning and understanding core areas of knowledge, personal and social development, in preparation for lower secondary education. It focuses on learning at a basic level of complexity with little, if any, specialisation.*<sup>305</sup>

Children typically attend primary education from ages 5-7 until the ages of 10-12, depending on the national education system.

International law is strongest with respect to primary education.<sup>306</sup> ICESCR states that: 'Primary education shall be compulsory and available free to all'.<sup>307</sup> Similarly, the CRC requires states: 'Make primary education compulsory and available free to all'.<sup>308</sup> CESCR has stated 'the nature of this requirement is unequivocal. The right is expressly formulated so as to ensure the availability of primary education without charge to the child, parents or guardians'.<sup>309</sup>

305 UNESCO and UNESCO Institute for Statistics., op. cit., para. 120.

306 International Covenant on Economic, Social and Cultural Rights Article 13 (2) (a); Convention on the Rights of the Child Article 28 (1) (a); Convention on the Rights of Persons with Disabilities Article 24 (2) (a) (b); Convention relating to the Status of Refugees (as applied through the Protocol relating to the Status of Refugees) Article 22 (1); UNESCO Convention against Discrimination in Education Article 4 (a) (c); African Charter on the Rights and Welfare of the Child Article 11 (3) (a); African Youth Charter Article 13 (4) (a); Arab Charter on Human Rights Article 41 (2); ASEAN Human Rights Declaration Article 31 (2); European Social Charter (revised) Article 17 (2); Charter of Fundamental Rights of the European Union Article 14 (2); Charter of the Organization of American States Article 49 (a); Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights 'Protocol of San Salvador' Article 13 (3) (a).

307 ICESCR Article 13 (2) (a).

308 CRC Article 28 (2) (a).

309 CESCR General Comment 13 para. 7.

The unequivocal assertion that primary education shall be *free* and *compulsory* makes it distinct from states' legal obligations with respect to all other levels and types of education (see section 3.4.a.i). For all other levels and types of education there is no requirement that it must be compulsory and while all other levels and types of education should also be free, states are permitted to make them progressively free,<sup>310</sup> whereas for primary education the expectation is that free primary education shall be immediately implemented. These requirements are a reflection of the primacy afforded to primary education under IHRL.

The importance of free and compulsory primary education is further underlined by the fact that ICESCR devotes an entire provision to those states parties that have not been able to guarantee free and compulsory primary education. Article 14 reads:

*Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.*

CESCR has provided guidance on formulating national plans of action for the provision of free and compulsory primary education in its General Comment 11.<sup>311</sup>

310 See Chapter 4, section 4.2.a for further information on progressive realization.

311 CESCR General Comment 11.



### 3.5.c Generally available and accessible secondary education

Secondary education is composed of two levels: lower secondary and upper secondary. The aim of lower secondary (also known as junior high, middle school, or simply secondary school), is to 'lay the foundation for lifelong learning and human development upon which education systems may then expand further educational opportunities.'<sup>312</sup> Students typically enter lower secondary from the ages of 10-13, with 12 being the most common, and leave from ages 14-16. The distinction between primary and lower secondary education 'coincides with the transition point in the education system at which subject-oriented instruction is emphasized.'<sup>313</sup>

Upper secondary (also known as senior high school or high school) education is 'typically designed to complete secondary education in preparation for tertiary education or provide skills relevant to employment, or both.'<sup>314</sup> Further upper secondary education offers students 'more varied, specialized and in-depth instruction'<sup>315</sup> than at lower secondary level. 'They are more differentiated, with an increased range of options and streams available. Teachers are often highly qualified in the subjects or fields of specialisation they teach, particularly in the higher grades.'<sup>316</sup> Upper secondary typically commences around ages 14-16 and finishes ages 17-18.

Under IHRL no distinction is made between lower and secondary education and no distinction is made in terms of states' obligations regarding

each level.<sup>317</sup> ICESCR provides that: 'Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education.'<sup>318</sup>

CESCR clarifies the specific elements of this provision in its General Comment 13. 'Generally available' means that secondary education is: 'not dependent on a student's apparent capacity or ability and...will be distributed throughout the State in such a way that it is available on the same basis to all.'<sup>319</sup> The requirement that secondary be 'accessible' requires states parties to ensure that it is accessible to all on a non-discriminatory basis, and that it is physically and economically accessible. (See section 3.4 for further information on accessibility.) 'Every appropriate means' requires states parties to 'adopt varied and innovative approaches to the delivery of secondary education in different social and cultural contexts.'<sup>320</sup>

Unlike primary education, secondary education is to be made progressively free. States must therefore prioritize free primary education and once it is achieved are obliged to take concrete steps<sup>321</sup> to make secondary education free for all. The wording of CRC's provision on secondary education differs slightly to that of ICESCR,

317 International Covenant on Economic, Social and Cultural Rights Article 13 (2) (b); Convention on the Rights of the Child Article 28 (1) (b); Convention on the Rights of Persons with Disabilities Article 24 (2); UNESCO Convention against Discrimination in Education Article 4 (a); African Charter on the Rights and Welfare of the Child Article 11 (3) (b); African Youth Charter Article 13 (4) (b); ASEAN Human Rights Declaration Article 31 (2); European Social Charter (revised) Article 17 (2); Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights 'Protocol of San Salvador' Article 13 (3) (b).

318 ICESCR Article 13 (2) (b).

319 CESCR General Comment 13 para. 13.

320 Ibid.

321 For further information on states' legal obligations to take steps, see Chapter 4, section 4.2.b.i.

312 UNESCO and UNESCO Institute for Statistics., op. cit., para. 139.

313 Ibid., para. 144.

314 Ibid., para. 162.

315 Ibid., para. 163.

316 Ibid.

requiring states parties to additionally offer 'financial assistance in case of need'.<sup>322</sup>

It should be noted that state practice seems to be shifting towards providing for compulsory and free secondary education, going beyond what is required of states under IHRL. This is reflected in the fact that states have agreed to strive towards ensuring by 2030 'that all girls and boys complete free, equitable and quality primary and secondary education' under SDG4 of the Sustainable Development Goals.

### 3.5.d Generally available and accessible technical and vocational education

Technical and vocational education and training (TVET) includes formal, non-formal, and informal learning concerning 'those aspects of the educational process involving, in addition to general education, the study of technologies and related sciences, and the acquisition of practical skills, attitudes, understanding and knowledge relating to occupations in various sectors of economic and social life'.<sup>323</sup>

TVET is part of both the right to education and the right to work.<sup>324</sup> Thus, Article 6 of the ICESCR concerning the right to work states:

*The steps to be taken by a State Party to the present Covenant to achieve the full realisation of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under*

*conditions safeguarding fundamental political and economic freedoms to the individual.*

TVET, an important element of adult education, lifelong learning, and integral to all levels of education, can be an alternative to, or form part of, secondary education: 'Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education'.<sup>325</sup>

According to CESCR General Comment 13, the right to TVET:<sup>326</sup>

- enables students to acquire knowledge and skills which contribute to their personal development, self-reliance, and employability and enhances the productivity of their families and communities, including the state's economic and social development
- takes account of the educational, cultural and social background of the population concerned; the skills, knowledge and levels of qualification needed in the various sectors of the economy; and occupational health, safety, and welfare
- provides retraining for adults whose current knowledge and skills have become obsolete owing to technological, economic, employment, social, or other changes
- consists of programmes which give students, especially those from developing countries, the opportunity to receive TVET in other states, with a view to the appropriate transfer and adaptation of technology
- consists, in the context of ICESCR's non-discrimination and equality provisions, of programmes which promote the TVET of women, girls, out-of-school youth, unemployed

322 CRC Article 28 (1) (b).

323 UNESCO Revised recommendation concerning Technical and Vocational Education and Training (adopted November 2001) para. 2.

324 UNESCO Recommendation concerning Technical and Vocational Education and Training (adopted November 2015); CESCR General Comment 13 para. 15.

325 ICESCR Article 13 (2) (b).

326 General Comment 13 para. 16.

youth, the children of migrant workers, refugees, persons with disabilities, and other disadvantaged groups



### Box 3.20 Further information: TVET

UNESCO's page *Skills for work and life* <https://en.unesco.org/themes/skills-work-and-life>

## 3.5.e Equally accessible higher education

Higher education encompasses 'all types of education (academic, professional, technical, artistic, pedagogical, long distance learning, etc.) provided by universities, technological institutes, teacher training colleges, etc., which are normally intended for students having completed a secondary education, and whose educational objective is the acquisition of a title, a grade, certificate, or diploma of higher education.'<sup>327</sup>



### Box 3.21 Definition: Higher education

Higher education is sometimes also referred to as tertiary education, however there is a conceptual distinction. Tertiary education encompasses all post-secondary education, including some technical and vocational education and training (TVET) as well as higher education. UNESCO provides the following definition: 'Tertiary education builds on secondary education, providing learning activities in specialised fields of education. It aims at learning at a high level of complexity and specialisation. Tertiary education includes what is commonly understood as academic education but also includes advanced vocational or professional education.'<sup>328</sup> Accordingly, tertiary education is an umbrella term that covers all post-secondary education, including TVET and higher

education. However, as TVET covers all levels of education, it is not exclusively tertiary. However, within international human rights law, the term tertiary education is generally not used. Rather, the instruments refer to technical and vocational education and training, and higher education.

As higher education is generally reserved for those who have completed secondary education, a majority of students at this level are adults. Higher education programmes are often specialized and aim to prepare students for specific professional occupations. Such programmes may include short courses as well as bachelor's, master's, and doctoral degrees and are generally taught in or by institutions such as universities and colleges.

The ICESCR provides that higher education 'shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education.'<sup>329</sup> CESCR explains in their General Comment 13 that 'the "capacity" of individuals [is] assessed by reference to all their relevant expertise and experience.'<sup>330</sup>

The stipulation that access to higher education should be available on the grounds of capacity takes into account that education at the higher level may not be the pathway everyone wishes to pursue post-secondary education, if they wish to continue in education at all. It must be the choice of the individual to continue on to higher education, or to follow other forms of education, e.g. technical education, apprenticeships or vocational training, or to enter employment, as they feel is best suited to their aims and ambitions.

<sup>327</sup> World Declaration on Higher Education for the 21st Century (adopted 9 October 1998) para. 2.

<sup>328</sup> UNESCO and UNESCO Institute for Statistics, op. cit., para. 200.

<sup>329</sup> ICESCR Article 13 (2) (c).

<sup>330</sup> General Comment 13 para. 19.

**Box 3.22 Further information:  
Higher education**

UNESCO's page *Higher education*  
<https://en.unesco.org/themes/higher-education>

### 3.5.f Fundamental education

Around the world, countless people have been—and continue to be—denied their right to free and compulsory primary education.

The right to free and compulsory primary education is considered a 'minimum core obligation' of the right to education. Effectively, primary education is prioritized given its importance to the individual. Obligations to realize primary education extend beyond provision to primary school-aged students. Under international law, states must also provide education for all those who have missed all or part of their primary education.

The UNESCO CADE<sup>331</sup> obliges states parties: 'To encourage and intensify by appropriate methods the education of persons who have not received any primary education or who have not completed the entire primary education course and the continuation of their education'.

The ICESCR goes further: 'Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education.'<sup>332</sup>

'Fundamental education' (also known as 'second chance education') replaces primary education. However, the right to fundamental education is far broader in scope. The CESCR provides the following interpretation of fundamental education:

*It should be emphasised that enjoyment of the right to fundamental education is not limited by age or gender; it extends to children, youth and adults, including older persons. Fundamental education, therefore, is an integral component of adult education and lifelong learning. Because fundamental education is a right of all age groups, curricula and delivery systems must be devised which are suitable for students of all ages.<sup>333</sup>*

The last point is crucial. As is the case for the right to education more broadly, the elements of availability, accessibility, acceptability, and adaptability also apply to fundamental education.<sup>334</sup> This means that traditional methods and practices of teaching child learners (pedagogies) may need to be substituted for methods and practices that are more appropriate and respectful of adult learners and their already accumulated knowledge and experience.

Both fundamental education and primary education are intended to satisfy 'basic learning needs'. However, it is important that the distinction is clear. Primary education is delivered to primary school-aged children, usually in formal settings. Fundamental education, on the other hand, is not age specific and therefore its delivery must be adapted to the recipient, and is usually delivered outside of the primary school system, for example through non-formal educational programmes. It should be emphasized that fundamental education, as understood to ensure the satisfaction of basic learning needs, is not just confined to those who have missed primary education, but to anyone whose basic learning needs have not been satisfied.<sup>335</sup>

The term 'fundamental education' has fallen out of use in recent times and has been replaced by the

331 CADE Article 4 (c).

332 ICESCR Article 13 (2) (d).

333 CESCR General Comment 13 para. 24.

334 *Ibid.*, para. 21.

335 CESCR General Comment 13 para. 23.

nomenclature 'basic education'. CESCR has noted that fundamental education in general terms corresponds to 'basic education', as outlined in the World Declaration on Education for All (Jomtien Declaration, 1990).<sup>336</sup>

### 3.5.g Adult education and learning and lifelong learning

Adult learning and education are an integral part of lifelong learning. Adult education:

*comprises all forms of education and learning that aim to ensure that all adults participate in their societies and the world of work. It denotes the entire body of learning processes, formal, non-formal and informal, whereby those regarded as adults by the society in which they live, develop and enrich their capabilities for living and working, both in their own interests and those of their communities, organizations and societies.*<sup>337</sup>

Adult education includes many of the types of education discussed above: fundamental education, basic education, adult literacy programmes, technical and vocational education and training, and higher education.

Adult education also forms an important element of lifelong learning.<sup>338</sup> While 'lifelong learning' is not strictly part of the right to education, it is a concept that represents the continuity of the learning and educational process, and this is reflected in the right to education by the fact that it begins at birth and continues throughout life.

The UNESCO Institute for Lifelong Learning provides the following definition:

<sup>336</sup> Ibid., para. 22.

<sup>337</sup> UNESCO Recommendation on Adult Learning and Education (adopted November 2015) para. 1.

<sup>338</sup> For more information, see for example, Singh, K. 2016. *Report of the UN Special Rapporteur on the right to education: Lifelong learning* (Doc. A/71/358).

*In essence, lifelong learning is founded in the integration of learning and living, covering learning activities for people of all ages (children, young people, adults and elderly, whether girls or boys, women or men), in all life-wide contexts (family, school, community, workplace and so on) and through a variety of modalities (formal, non-formal and informal) that together meet a wide range of learning needs and demands.*<sup>339</sup>

### 3.6 Quality education

*'Quality is at the heart of education.'*

— Education for All Global Monitoring Report 2005.

The right to education includes not only the right to access education but also the right to *quality education*. These two aspects should be understood as complementary and interdependent. Rights-holders must have access to quality education—there is not much point in having a right to access poor quality education. That being said, while access to education is generally well-defined in international human rights law (IHRL), what constitutes quality education is a little less clear. As noted by UNESCO: 'Quality education is a dynamic concept that changes and evolves with time as well as the social, economic, and environmental context.'<sup>340</sup> Quality education can therefore mean different things in different contexts, at different times, and for different people. It is right that there be a degree of subjectivity regarding what constitutes quality education. It would be impossible to prescribe universal quality standards for all states to implement. Unfortunately, this means there is a lack of precision regarding the full normative content of the right to quality education. However, this fact

<sup>339</sup> UNESCO Institute for Lifelong Learning. 2014. *UNESCO Education Sector Technical Note on lifelong learning*, p. 2.

<sup>340</sup> UNESCO. 2005. *Contributing to a More Sustainable Future: Quality Education, Life Skills and Education for Sustainable Development*.

should not be taken to mean that the right to quality education has no identifiable normative content, on the contrary, international human rights law (IHRL) clearly identifies the *objective* elements of the right to quality education that are universally applicable and leaves the rest up to states to decide.

The term 'quality education' makes its first appearance in IHRL in 1960 with the adoption of UNESCO CADE. CADE defines 'education' as referring to 'all types and levels of education, and includes access to education, the standard and quality of education, and the conditions under which it is given.'<sup>341</sup> CADE further specifies that discrimination with respect to quality education is prohibited in gender-segregated education systems<sup>342</sup> and then goes on to set out states' legal obligations to ensure 'equality of opportunity and treatment' throughout the entire public education system, including by ensuring that the 'standards of education are equivalent in all public educational institutions of the same level, and that the conditions relating to the quality of the education provided are also equivalent.'<sup>343</sup> Subsequent international and regional human rights treaties, in particular the ICESCR and CRC, reaffirm that ensuring non-discrimination and equality across the *entirety* of the right to education is the legal duty of states.<sup>344</sup>

IHRL also identifies various other components of quality education, captured most succinctly by the Committee on the Rights of the Child in the following statement: 'Every child has the right to receive an education of good quality which in turn requires a focus on the quality of the learning

environment, of teaching and learning processes and materials, and of learning outputs.'<sup>345</sup>

Perhaps the most obvious normative content in terms of quality education in IHRL concerns the aims of education, described in section 3.2, which states must ensure are diffused throughout the entire education system, but which relate most directly to the content of education. As the Committee on the Rights of the Child have stated, the aims of education underline 'the individual and subjective right to a specific quality of education.'<sup>346</sup>

Teachers are also a key aspect of the right to quality education, this includes the way they deliver education and the conditions under which they work.

The normative content of quality education is also derived from other human rights that apply to education, notably, the right to water and sanitation and the right to be free from violence. These apply in schools and mean that schools must have adequate sanitation and that education be delivered in a safe and non-violent environment.

There are also further provisions of IHRL that relate to quality education but are not explicitly stated. For instance, CESCR has interpreted the right to education as having to be 'acceptable' which means:

*the form and substance of education, including curricula teaching methods have to be acceptable (e.g. relevant, culturally appropriate and of good quality) to students and, in appropriate cases, parents; this is subject to the educational objectives required by article 13 (1) and such minimum educational standards as may be approved by the State.'*<sup>347</sup>

Further, in addition to their legal commitments to the right to quality education, states have committed to focus on quality education through

341 CADE Article 1 (2).

342 CADE Article 2 (a) reads: 'The establishment or maintenance of separate educational systems or institutions for pupils of the two sexes, if these systems or institutions offer equivalent access to education, provide a teaching staff with qualifications of the same standard as well as school premises and equipment of the same quality, and afford the opportunity to take the same or equivalent courses of study.'

343 CADE Article 4 (b).

344 See Chapter 4, section 4.2.b.ii for states' legal obligations related to non-discrimination and equality.

345 CRC General Comment 1 para. 22.

346 CRC General Comment 1 para. 9.

347 CESCR General Comment 13 para. 6

their political commitment to SDG4-Education 2030.<sup>348</sup>



**Box 3.23 Further information:  
The right to quality education in  
international human rights law**

Quality education is also reaffirmed as a human right by the Convention on the Rights of Persons with Disabilities which requires that states ensure that: ‘Persons with disabilities can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live.’<sup>349</sup>

Regional human rights instruments also reaffirm the right to quality education. The African Youth Charter (2006) states: ‘Every young person shall have the right to education of good quality,’<sup>350</sup> and requires states, among other means, to: ‘Allocate resources to upgrade the quality of education delivered and ensure that it is relevant to the needs of contemporary society and engenders critical thinking rather than rote learning.’<sup>351</sup> The Inter-American Democratic Charter (2001) states that: ‘it is essential that a quality education be available to all.’<sup>352</sup> In Europe, there is a Council of Europe recommendation dedicated entirely to quality education.<sup>353</sup>

### 3.6.a Teachers and the learning process

Education is not just about what is taught, but also about how it is taught, and by whom. The right to quality education cannot be achieved without trained and qualified teachers who provide effective quality teaching. CESCR notes that states parties have an obligation to fulfil (provide)

the availability of education by, among others, providing in sufficient quantity, trained teachers receiving domestically competitive salaries and teaching materials.<sup>354</sup>

Teachers, at all levels of education, are the primary means through which the curriculum is delivered and one of the key ways in which the aims of education (see section 3.2) are imparted, thereby they have a crucial role in the educational process. The Committee on the Rights of the Child explains:

*efforts to promote the enjoyment of other rights must not be undermined, and should be reinforced, by the values imparted in the educational process. This includes not only the content of the curriculum but also the educational processes, the pedagogical methods and the environment within which education takes place.*<sup>355</sup>

The Committee on the Rights of the Child further states that it is: ‘important that the teaching methods used in schools reflect the spirit and educational philosophy of the CRC and the aims of education laid down in article 29 (1),’<sup>356</sup> and, ‘teaching methods should be tailored to the different needs of different children.’<sup>357</sup>

In order for teachers to deliver quality education, they must be qualified and trained. CADE was the first treaty to mention the training of teachers, by requiring states to: ‘provide training for the teaching profession without discrimination.’<sup>358</sup>

The UNESCO/ILO Recommendation concerning the Status of Teachers (1966 Recommendation)<sup>359</sup> and the Recommendation concerning the Status of Higher-Education Teaching Personnel

348 See Chapter 5 for further information.

349 CRPD Article 24 (b).

350 African Youth Charter (adopted 2 July 2006, entered into force 8 August 2009) Article 13 (1). Ibid., Article 13 (3) (i).

351 Ibid., Article 13 (3) (i).

352 The Inter-American Democratic Charter.

353 Recommendation CM/Rec (2012)13 of the Committee of Ministers to Member States on ensuring quality education (Adopted by the Committee of Ministers on 12 December 2012 at the 1158th meeting of the Ministers’ Deputies).

354 CESCR General Comment 13 para. 6 (a).

355 CRC General Comment 1, para. 8.

356 Ibid., para. 18.

357 Ibid., para. 9.

358 1960 Convention against Discrimination in Education, Article IV (d).

359 UNESCO/ILO Recommendation concerning the Status of Teachers (adopted 5 October 1966).

(1997 Recommendation)<sup>360</sup> set the international standards for their initial training and continued professional development. They also provide the most comprehensive normative framework on the responsibilities and rights of teachers at all levels of the education system.

A qualified teacher is one who receives an academic qualification, while a trained teacher is one who has completed the minimum organized teacher training requirements, which can include pedagogical, professional and content knowledge.<sup>361</sup> Such factors, along with years of experience, have been shown to impact the learning outcomes of students.<sup>362</sup>

Teacher training must include elements of non-discrimination and human rights. The Committee on the Rights of the Child, states:

*The relevant values cannot be effectively integrated into, and thus be rendered consistent with, a broader curriculum unless those who are expected to transmit, promote, teach and, as far as possible, exemplify the values have themselves been convinced of their importance. Pre-service and in-service training schemes which promote the principles reflected in article 29 (1) are thus essential for teachers, educational administrators and others involved in child education.*<sup>363</sup>

In addition, seeing education as a public good implies that teacher education should be at least accessible and affordable.

While qualifications and training prior to practicing the teaching profession are perhaps more of a focus for states, in-service training is of equal importance, as it enables teachers to keep pace with the latest developments in their subject and skill areas and new trends in education.

National and local education authorities should prioritize the continuing professional training of teachers through such measures as granting paid leave and having teacher training days.

For teachers to practice their profession in a manner consistent with norms and standards of quality education, their status and working conditions need to enable this. Teachers who are underpaid, overworked, and work under difficult conditions are less likely to be able to deliver quality education, although many of them do. Article 13 (2) (e) of the ICESCR provides for states parties to recognize that with a view to achieving the full realization of the right to education, 'the material conditions of teaching staff shall be continuously improved'.<sup>364</sup> The CESCR elaborates on this in its General Comment 13, stating that working conditions are actually deteriorating and this is an obstacle to the realization of the right to education. The CESCR notes the close relationship between the right to quality education and teachers' rights:

- states parties shall guarantee that teachers are free from discrimination (Article 2(2))
- both male and female teachers have equal economic and social rights (Article 3)
- teachers have the right to work (Article 6)
- the right to favourable conditions of work (Article 7)
- the right to form and join trade unions (Article 8).

#### Did you know?

To reach the 2030 Education goals of universal primary and secondary education, the world needs to recruit almost 69 million new teachers: 24.4 million primary school teachers and 44.4 million secondary school teachers

360 Recommendation concerning the Status of Higher-Education Teaching Personnel (adopted 11 November 1997).

361 UIS. *Glossary*.

362 UNESCO. 2018. *World Teachers' Day 2018, Concept note*, p. 2.

363 CRC General comment 1 para. 18.

364 ICESCR Article 13 2 (e).



teachers.<sup>365</sup> This ‘teacher gap’ is more pronounced among vulnerable populations, such as girls, children with disabilities, refugee and migrant children, or poor children living in rural or remote areas.

Despite widespread recognition of the importance of teachers in shaping the success of future generations, teaching, in far too many contexts, is not regarded as a valued profession, and many countries face challenges in recruiting and retaining teachers. This is because wages for teachers in many countries are not comparable to professionals with similar education and training levels, workloads have increased, working conditions are deteriorating, and teachers are increasingly employed under precarious contracts.<sup>366</sup> The 1966 Recommendation urges states parties to ensure that all teaching staff enjoy the status commensurate with their role and places particular importance on the salary of teachers as ‘the standing or regard accorded them, as evidenced by the level of appreciation of the importance of their function, are largely dependent, as in other comparable professions, on the economic position in which they are placed.’<sup>367</sup>

Finally, the Education 2030 Framework for Action reaffirms the essential role of teachers in the realization of the right to education stating: ‘As teachers are a fundamental condition for guaranteeing quality education, teachers and educators should be empowered, adequately recruited and remunerated, professionally qualified and supported within well-resourced, efficient and effectively governed systems.’<sup>368</sup>



### Box 3.24 Further information: Recommendations to overcome challenges related to teachers

- Help fill the teacher gap by implementing education policies to attract teachers, improving their status and working conditions and retaining them in their profession including through innovative approaches.
- Set common standards and minimum benchmarks for teacher qualifications.
- Train teachers to deliver quality inclusive education in formal and non-formal settings and strengthen pre-service and in-service teacher training.
- Engage in consultation and negotiation with teachers’ organizations to ensure effective teacher policies are being designed and implemented.



### Box 3.25 Further reading: Teachers

ILO. 2016. *The ILO/UNESCO Recommendation concerning the Status of Teachers (1966) and the UNESCO Recommendation concerning the Status of Higher Education (1997) – Revised edition*

Stromquist., N. P. 2018. *The Global Status of Teachers and the Teaching Profession* (Education International Research)

UNESCO. 2015. Monitoring of the Implementation of the Convention and Recommendation against Discrimination in Education (8th Consultation). *The Right to Education and the Teaching Profession: Overview of the Measures Supporting the Rights, Status and Working Conditions of the Teaching Profession reported on by Member States*

UNESCO’s page *Teachers* <https://en.unesco.org/themes/teachers>

365 UIS. 2016. Factsheet 39: *The World Needs Almost 69 Million New Teachers to Reach the 2030 Education Goals*, p. 1.

366 UNESCO. 2017/8. *Global Education Monitoring Report 2017/8: Accountability in education - Meeting Our Commitments*. Paris, UNESCO, Chapter 4.

367 UNESCO/ILO Recommendation concerning the Status of Teachers (adopted 5 October 1966) para. 114.

368 Education 2030 Framework for Action, para. 70.

### 3.6.b Content of education

IHRL requires that the content of education be rights-based. This means it must be person-centred, non-discriminatory, and conform to the aims of education (see section 3.2). The content of education should facilitate learning, both of knowledge and skills, and should be directed to both cognitive development and 'nurturing the creative and emotional growth of learners and in helping them to acquire values and attitudes for responsible citizenship.'<sup>369</sup>

The content of education is usually set out in the curriculum. A curriculum usually includes: what teachers are expected to teach, what students are expected to learn, and how learning outcomes are assessed. Curricula are usually based on level of education and divided by subject.

IHRL informs all three aspects of what a curriculum should include. According to the aims of education, the primary objective of education is the 'full development of the human personality' as well as 'talents and mental and physical abilities.'<sup>370</sup> The other aims of education include: an enhanced sense of identity and affiliation, and his or her socialization and interaction with others and with the environment, and development of respect for human rights (dealt with in section 3.6.b.i). This means that the content of education and therefore the curriculum must also reflect these aims.

The Committee on the Rights of the Child has clarified that the aims of education are meant to: 'empower the child by developing his or her skills, learning and other capacities, human dignity, self-esteem and self-confidence.'<sup>371</sup> In order for this aim to be met, the curriculum must provide for a flexible and individualized approach given, 'every

child has unique characteristics, interests, abilities, and learning needs.'<sup>372</sup> The curriculum must also be relevant to 'child's social, cultural, environmental and economic context and to his or her present and future needs and take full account of the child's evolving capacities.'<sup>373</sup> This also requires that teaching methods are appropriate for the child and their unique needs.

The curriculum must also enable students to acquire core academic knowledge (subject knowledge) and basic skills, including literacy and numeracy. Literacy and numeracy are vital to the realization of the right to education because they are foundational for the acquisition of other skills, without which the continuation of education is impossible. Further, literacy and numeracy are necessary for finding gainful and decent employment or navigating knowledge and information-intensive societies. Without literacy, the right to education and other human rights are impossible to realize.

That being said education should not only focus on academic knowledge and basic skills, but should also impart 'essential life skills', so that 'no child leaves school without being equipped to face the challenges that he or she can expect to be confronted with in life.'<sup>374</sup> This includes such skills as: 'the ability to make well-balanced decisions; to resolve conflicts in a non-violent manner; and to develop a healthy lifestyle, good social relationships and responsibility, critical thinking, creative talents, and other abilities which give children the tools needed to pursue their options in life.'<sup>375</sup>

369 Education for All Global Monitoring Report 2015. *Education for All: The Quality Imperative*, foreword.

370 CRC Article 29 (1); ICESCR Article 13 (1).

371 CRC General Comment 1 para. 2.

372 Ibid., para. 9.

373 Ibid.

374 Ibid.

375 Ibid.

### ✓ Did you know?

'Across the world, 200 million young people leave school without the skills they need to thrive plus an estimated 775 million adults – 64 per cent of whom are women – still lack the most basic reading and writing skills.'<sup>376</sup>

## Level of education

States must also ensure that the content of education be relevant to the level of education and to whom and in what context it is taught. So, at primary and secondary level, education has to be 'child-centred, child-friendly and empowering'. 'Education must be provided in a way that respects the inherent dignity of the child and enables the child to express his or her view... and to participate in school life.'<sup>377</sup>

At the secondary level the content of education includes the: 'completion of basic education and consolidation of the foundations for life-long learning and human development.'<sup>378</sup> It should also prepare students for vocational and higher education.

For technical and vocational education and training the content of education should allow students 'to acquire knowledge and skills which contribute to their personal development, self-reliance and employability and enhances the productivity of their families and communities, including the State party's economic and social development',<sup>379</sup> as well as taking account of the: 'educational, cultural and social background of the population concerned; the skills, knowledge and levels of qualification needed in the various

sectors of the economy; and occupational health, safety and welfare.'<sup>380</sup>

At the higher level, education content 'must have flexible curricula and varied delivery systems, such as distance learning.'<sup>381</sup>

## States' legal obligations

In terms of states obligations to ensure the content of education is rights-based, the Committee on the Rights of the Child stresses that states should incorporate the aims of education in their national laws and policies<sup>382</sup> and rework the curricula to include the aims of education, in addition to revising textbooks and teaching materials, and school policies if necessary.<sup>383</sup>

## Minimum educational standards

States must make sure that the curricula, all levels and types of education, are directed to the aims of education, by setting or approving minimum educational standards.<sup>384</sup> These are essentially standards that both public and private schools must meet in order to ensure quality never falls below what is set by international law. States can and should set standards that go beyond international law and that are adapted to the national context. States are also obliged to establish and maintain a transparent and effective system which monitors whether or not education is, in fact, directed to the educational objectives set out in the aims of education (see section 3.2) as well as other quality standards they may set.<sup>385</sup>

376 UNESCO. 2013. *The Global Learning Crisis*. p. 2.

377 CRC General Comment 1 paras. 2 & 8.

378 *Ibid.*, para. 12.

379 *Ibid.*, para. 16.

380 *Ibid.*

381 *Ibid.*, para. 18.

382 CRC General Comment 1 para. 17.

383 *Ibid.*, para. 18.

384 ICESCR Article 13 (3).

385 CESCR General Comment 13 para. 49.

## Learning assessments

As part of states' obligations to monitor the quality of education, as determined by minimum educational standards, states should assess students' learning. This can be done in the form of tests or by teachers. The primary purpose of learning assessments should be to identify students' learning needs, including any areas where the student needs support. Learning assessments can also be used to assess the performance of schools and teachers to identify whether any interventions need to be made. In the aggregate they can also be used to assess the quality of the education system as a whole and whether the government is meeting the targets it has set for itself in law and policy documents.



### Box 3.26 Further reading: Learning assessments

RTE. 2013. *Learning Outcomes Assessments: A Human Rights Perspective*.

UNESCO. 2017/8. *Global Education Monitoring Report 2017/8: Accountability in education - Meeting Our Commitments*, Chapter 4.

## Learning materials

States must ensure that learning materials, such as textbooks, are aligned with the curriculum. Importantly, learning materials such as textbooks must not contain any stereotyped concept of the role of men and women.<sup>386</sup>

## Marginalized groups

In addition to being flexible at different levels, the content of education should be adapted for different groups based on their learning needs. For example, education has to be adapted to

children with disabilities. See sections 3.3.c.ii and 3.4.b for further information on accessibility for people with disabilities.

## Culturally relevant education

Special attention must also be given to the education of indigenous peoples and minorities. The CESCR requires states to take 'positive measures to ensure that education is culturally appropriate for minorities and indigenous peoples'.<sup>387</sup> This includes ensuring culturally relevant education. Some states may operate a policy of assimilation by teaching students only in the majority or dominant language and omitting the teaching of alternative cultures, histories, traditions, and languages. These policies may contribute to the process of making minority and indigenous culture and identity invisible, which may in turn reinforce and perpetuate experiences of exclusion, dispossession, and loss of identity. They also negatively impact the academic performance of minority and indigenous students, particularly on standardized tests, which often presuppose that students are embedded in a particular culture and have knowledge of the mainstream language.

For example, education has historically been used as a means to assimilate indigenous peoples, whereby the colonial state promoted the culture of the dominant society while at the same time it prohibited indigenous peoples from speaking their traditional language or practising their traditional culture. This reinforced the experience of colonisation, as it was not only indigenous peoples' lands which were being taken away, but also their languages and cultures.

<sup>386</sup> CEDAW Article 10.

<sup>387</sup> CESCR General Comment 13 para. 50.

**Box 3.27 Further reading:  
Indigenous peoples**

UNESCO. 2018. *UNESCO policy on Engaging with Indigenous Peoples*

UNESCO's page *Education for indigenous peoples*  
<https://en.unesco.org/themes/inclusion-in-education/indigenous>

**Language of instruction**

Minorities and indigenous peoples often speak languages that differ from that of the majority or official language. As such, when minority and indigenous students are taught in a language that is not their mother tongue, evidence suggests that they are disadvantaged and their educational development is adversely affected.<sup>388</sup>

There is also evidence to suggest that minority and indigenous children may be deterred from enrolling in schools and are more likely to drop out because the minority language is not used as a vehicle of teaching. It is therefore unsurprising that illiteracy is typically much more prevalent among minority and indigenous communities than the majority population.

The right to learn one's mother tongue (whether it is the language of instruction or as a subject) is not just an issue affecting individuals, it affects whole groups. Language serves as the primary medium through which customs, values, culture as well as the language itself are transmitted from generation to generation.

It is important to note that mother tongue instruction does not necessarily mean that minority and indigenous students should not have the opportunity to learn and attain fluency in the dominant language. In fact, it is desirable that students become multilingual, enabling them to

388 See, for example, Magga *et al.* (n.d.) *Indigenous Children's Education and Indigenous Languages*.

enjoy the benefits of mainstream education, and access to work, as well as maintain their linguistic heritage.

**3.6.b.i Human rights education**

HRE can be understood as a right in itself and also as integral to the right to education. Human rights education is provided for as part of the aims of education (see section 3.2) and found, *inter alia*, in the UDHR, UNESCO CADE, ICESCR and the CRC. States are therefore duty-bound under international human rights law to ensure that education is aimed at strengthening respect for human rights and fundamental freedoms.

For example, ICESCR states:

*education shall strengthen the respect for human rights and fundamental freedoms... enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.*<sup>389</sup>

In addition, the CRC emphasizes that: 'education of the child shall be directed to...the development of respect for human rights and fundamental freedoms.'<sup>390</sup>

Article 1 of the United Nations Declaration on Human Rights Education and Training (2011, HRET)<sup>391</sup> states that: 'Everyone has the right to know, seek and receive information about all human rights and fundamental freedoms'. Human rights education (HRE) is defined by the same declaration as:

389 ICESCR Article 13 (1).

390 CRC Article 29 (1).

391 HRC. Resolution 16/1. *United Nations Declaration on Human Rights Education and Training* (adopted 8 April 2011) (Doc. A/HRC/RES/16/1.) and UNGA. Resolution 66/137. *United Nations Declaration on Human Rights Education and Training* (adopted 16 February 2012) (Doc. A/RES/66/137.) (HRET).

*all educational, training, information, awareness-raising and learning activities aimed at promoting universal respect for and observance of all human rights and fundamental freedoms and thus contributing to, inter alia, the prevention of human rights violations and abuses by providing persons with knowledge, skills and understanding and developing their attitudes and behaviours, to empower them to contribute to the building and promotion of a universal culture of human rights.*<sup>392</sup>

In short, human rights education is not only about building knowledge on human rights standards and instruments. Through the human rights education process, learners must also be able to act upon the knowledge, acquire the confidence to exercise their rights, and have the attitude to respect the rights of others. Human rights education is an important contribution to the effective realization of all human rights. People need to know their rights, the norms and values that underpin them, and the mechanisms for their protection in order to enjoy and exercise them and respect and uphold those of others.

Although the HRE has a strong basis in international human rights law and in particular as part of the right to quality education, the normative content of HRE is most comprehensively set out in the HRET. In terms of learning process, content, and environment, HRET stipulates that HRE encompasses education *about, through, and for* human rights:<sup>393</sup>

1. *Education about human rights* includes providing knowledge and understanding of human rights norms and principles, the values that underpin them and the mechanisms for their protection.

2. *Education through human rights* includes learning and teaching in a way that respects the rights of both educators and learners.
3. *Education for human rights* includes empowering persons to enjoy and exercise their rights and to respect and uphold the rights of others.

HRET also underlines that human rights education is a lifelong process. It covers all levels and forms of education and includes the training of trainers, teachers, and state officials. Methods and languages used must also be appropriate to the target group and take into account their specific needs and conditions. The Committee on the Rights of the Child has also stressed that states should mainstream human rights education through the entire education system, not just as ‘formal human rights education’, but rather through, ‘the promotion of values and policies conducive to human rights not only within schools and universities but also within the broader community.’<sup>394</sup>

HRET further sets out the aims of HRE as a fundamental means for the protection and promotion of *all* human rights.<sup>395</sup>

1. *Raising awareness, understanding and acceptance of universal human rights standards and principles, as well as guarantees at the international, regional and national levels for the protection of human rights and fundamental freedoms.*
2. *Developing a universal culture of human rights, in which everyone is aware of their own rights and responsibilities in respect of the rights of others, and promoting the development of the individual as a responsible member of a free, peaceful, pluralist and inclusive society.*

392 Ibid., Article (2) (1).

393 HRET Article 2.

394 CRC General Comment 1 para. 19.

395 HRET Article 4.

3. *Pursuing the effective realization of all human rights and promoting tolerance, non-discrimination and equality.*
4. *Ensuring equal opportunities for all through access to quality human rights education and training, without any discrimination.*
5. *Contributing to the prevention of human rights violations and abuses and to the combating and eradication of all forms of discrimination, racism, stereotyping and incitement to hatred, and the harmful attitudes and prejudices that underlie them.*

In terms of what states must do to implement HRE, the HRET prescribes a number of measures, including:

- adoption of legislative and administrative measures<sup>396</sup>
- adequate training in human rights for teachers, trainers and other educators<sup>397</sup>
- development of strategies and policies and, where appropriate, action plans and programmes to implement human rights education and training, such as through its integration into school and training curricula<sup>398</sup>
- enabling and empowering national human rights institutions to play a role in promoting HRE<sup>399</sup>



**Box 3.28 Further information: Human rights education is also part of the Agenda for Sustainable Development**

Sustainable Development Goal 4 (SDG4) on education defines human rights education as an aspect of quality education. Target 4.7 commits

states to ensuring that all learners acquire the knowledge and skills needed to promote sustainable development through human rights education, as well as education on global citizenship and sustainable lifestyles, among others. This target is measured by the extent to which human rights education is mainstreamed in:

- education policies
- curricula
- teacher education
- student assessments

There are several documents to guide the implementation of SDG Target 4.7. These include the United Nations Declaration on Human Rights Education and Training, UNESCO's Recommendation concerning Education for International Understanding, Cooperation and Peace and Education relating to Human Rights and Fundamental Freedoms (1974)<sup>400</sup> and global frameworks for action such as the UN World Programme for Human Rights Education.

See Chapter 5 for further information on SDG4.



**Box 3.29 Further information: NHRIs' role in promoting human rights education**

Article 9 of the United Nations Declaration on Human Rights Education and Training calls on states to: 'promote the establishment, development and strengthening of effective and independent national human rights institutions...recognizing that national human rights institutions can play an important role, including, where necessary, a coordinating role, in promoting human rights education and training by, *inter alia*, raising awareness and mobilizing relevant public and private actors.'

To this end the NHRI Network on Human Rights Education was established to: 'strengthen a systematic and sustainable approach of the global

396 Ibid., Article 7 (3).

397 Ibid., Article 7 (4).

398 Ibid., Article 8 (1).

399 Ibid., Article 9.

400 Recommendation concerning Education for International Understanding, Cooperation and Peace and Education relating to Human Rights and Fundamental Freedoms (adopted 19 November 1974).

community of NHRIs to increase their overall impact and effectiveness on HRE. As part of the its activities, the NHRI Network on Human Rights Education has developed common standards to guide NHRI work on human rights education.<sup>401</sup>

For further information, visit The Danish Institute for Human Rights' page *The NHRI Network on Human Rights Education* <https://www.humanrights.dk/projects/nhri-network-human-rights-education>



### Box 3.30 Further reading: Human rights

HRC. Resolution 35/6. *Panel discussion on the implementation of the United Nations Declaration on Human Rights Education and Training: good practices and challenges* (adopted 27 March 2017) (Doc. A/HRC/35/6.)

OHCHR's page *World Programme for Human Rights* <https://www.ohchr.org/en/issues/education/training/pages/programme.aspx>

## 3.6.c Learning environment

The learning environment refers not just to the physical infrastructure of the school premises but also the wider learning environment. According to international human rights law, the school environment must not impair the right to education, it must support the full development of the child, and it must also contribute to the aims of education and the right to a quality education by creating an inclusive and quality learning environment.<sup>402</sup>

### 3.6.c.i Violence and bullying<sup>403</sup>

Violence is defined by the CRC in Article 19 (1) as: 'all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse.'<sup>404</sup> Acts of violence, which includes bullying, towards children constitute a violation of their human rights, including the right to the highest attainable standard of health,<sup>405</sup> freedom from all forms of sexual exploitation and sexual abuse,<sup>406</sup> and freedom from inhuman and degrading treatment and punishment.<sup>407</sup> It can also have negative impacts on the enjoyment of other human rights, in particular the right to education.

Violence and bullying have adverse impacts on the mental, physical, and emotional health of the victim, which can, in turn, affect a child's concentration at school, their ability to participate in lessons and other educational activities, their academic performance, and even their school attendance, whether the violence takes place in schools or in the home. However, violence and bullying occurring in schools renders the learning environment unsafe and un conducive for learning, 'creating an atmosphere of anxiety, fear and insecurity that is incompatible with learning.'<sup>408</sup>



#### Did you know?

'It is estimated that 246 million children and adolescents experience school violence in some form every year.'<sup>409</sup>

401 For further information see Danish Institute for Human Rights. 2017. *Guide to a Strategic Approach to Human Rights Education*.

402 CRC General Comment 1 paras 10, 19, and 22.

403 This section is based on UNESCO. 2017. *School Violence and Bullying, Global Status Report* and RTE's page *Women and girls*. [www.right-to-education.org/girlswomen](http://www.right-to-education.org/girlswomen) (Accessed 19 October 2018.)

404 CRC Article 19.

405 Ibid., Article 24.

406 Ibid., Article 34.

407 Ibid., Article 37.

408 UNESCO. 2017. *School Violence and Bullying, Global Status Report*, p. 12.

409 Ibid., p. 9.



Violence and bullying can be perpetrated by students, teachers and other school staff, and sometimes by members of the community. It occurs not only in the physical infrastructure of schools, but also on the journey to and from school, during extracurricular activities, at home, and through the use of technology (cyberbullying, for example). When violence and bullying take place in schools, it is usually done in unsupervised places such as: toilets, changing rooms, corridors, and playgrounds.<sup>410</sup>

IHRL requires states to take all appropriate legislative, administrative, social, and educational measures to protect the child from all forms of violence while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.<sup>411</sup> Under Article 19 (1), caregivers are any person with clear legal professional-ethical and/or cultural responsibility for the safety, health,

development and well-being of the child.<sup>412</sup> As such, adults in educational settings have an important duty to protect children from all forms of violence and to provide safe environments that support and promote children's dignity and development. Moreover, under the CRC, states have the obligation to prevent all forms of violence against children.<sup>413</sup>

The Committee on the Rights of the Child also highlights that states have obligations to ensure the 'school environment...reflect[s] the freedom and the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin called for in article 29 (1) (b) and (d). A school which allows bullying or other violent and exclusionary practices to occur is not one which meets the requirements of [the aims of education].'<sup>414</sup>

410 Ibid., p. 8.

411 CRC Article 19 (1).

412 CRC. 2011. *General comment No. 13: The right of the child to freedom from all forms of violence* (Doc. CRC/C/GC/13.) (CRC General Comment 13) para. 33.

413 See CRC General Comment 13 for further information.

414 CRC General Comment 1 para. 19.



### Box 3.31 Definition: Forms of violence

The Committee on the Rights of the Child<sup>415</sup> identifies several forms of violence, which often occur together, including:

*Physical violence* is any form of physical aggression produced with the intention to cause pain. It can be both fatal and non-fatal physical violence such as physical bullying and corporal punishment.

*Psychological or mental violence* includes any form of psychological maltreatment, mental abuse, verbal abuse and emotional abuse or neglect. Violence through the use of information technology and communication, such as mobile phones and cyberbullying, also pertains to this category which can involve humiliation and harassment.

*Sexual violence* includes the inducement or coercion of a child to engage in any unlawful or psychologically harmful sexual activity. Intimidation of a sexual nature, sexual harassment, and unwanted touching is also a form of sexual violence and affects both girls and boys.<sup>416</sup>

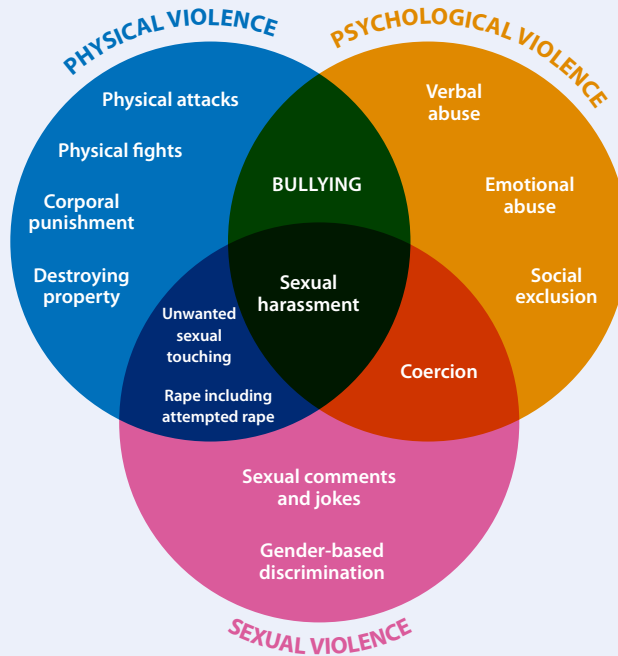
*Bullying* is a form of violence which UNESCO defines as: 'a pattern of behaviour rather than an isolated event, and it has an adverse impact on the victim, the bully and bystanders.'<sup>417</sup> It includes both physical and psychological violence.

415 CRC General Comment 13 paras. 19-32.

416 UNESCO. 2017. *School Violence and Bullying, Global Status Report*, p. 15.

417 Ibid., p. 8.

**Figure 3.3: Conceptual framework of school violence and bullying**



Source: UNESCO. 2019. *Behind the numbers: Ending school violence and bullying*, p. 11.

Children who are vulnerable for reasons such as ethnicity, linguistic or cultural differences, poverty, migration or displacement, disability, gender identity, sexual orientation, being orphans or from households affected by HIV, are often at a greater risk of school violence and bullying.<sup>418</sup> IHRL therefore requires states to address violence and bullying perpetrated against these groups. The Convention on the Rights of Persons with Disabilities, for example, has a provision on freedom from exploitation, violence, and abuse including gender-based violence aspects, for persons with disabilities.<sup>419</sup>

The gender dimensions of violence and bullying must also be addressed by states. While boys and girls are at risk of all forms of violence,

UNESCO suggests that sexual violence is more likely to be perpetrated against girls than boys and that boys are more likely to experience corporal punishment, or more severe corporal punishment, in school than girls, although girls are not exempt.<sup>420</sup> See section 3.6.c.i for further information on corporal punishment.

Gender-based violence (GBV) against women, under the meaning provided in Article 1 of the CEDAW, is a form of discrimination and under Article 2 states have the obligation to eliminate such discrimination. The Committee on the Elimination of Discrimination against Women specifically defines GBV as violence that is: 'directed against a woman because she is a woman or that affects women

418 Ibid., p. 16.

419 CRPD Article 16.

420 UNESCO. 2017, op. cit., p. 8.

disproportionately'.<sup>421</sup> Such violence, be it sexual abuse (rape, domestic violence, sexual harassment and assault) and harmful practices such as child marriage (see section 3.3.c.i) can keep girls out of school temporarily or indefinitely. The Committee on the Elimination of Discrimination against Women clearly sets out the responsibilities of the state under human rights law for acts or omissions of state actors such as public authorities and officials, and non-state actors such as family members, teachers, etc.<sup>422</sup> Moreover, states have obligations to take positive measures to ensure equality between sexes, notably in Article 3-5 of CEDAW in all contexts in order to effectively address root causes of GBV.

GBV that takes place within the education environment is referred to as gender-based violence against women (SRGBV) and is defined by UNESCO as: 'acts or threats of sexual, physical or psychological violence occurring in and around schools, perpetrated as a result of gender norms and stereotypes, and enforced by unequal power dynamics'.<sup>423</sup> SRGBV also includes attacks on girls for accessing education motivated by 'fears surrounding the potential role of education as a catalyst for social, cultural, economic and political transformation'.<sup>424</sup>

International human rights law prohibits GBV in all settings, including in education. This includes acts or omissions by state actors and bodies, such as public authorities and officials, as well as by non-state actors, for example, partners, family members, teachers, etc. States have specific responsibilities under human rights law

dependent on the perpetrator which are well explained by the Committee on the Elimination of Discrimination against Women.<sup>425</sup>



### Box 3.32 Further reading: Violence and bullying

UNESCO's page *School violence and bullying* <https://en.unesco.org/themes/school-violence-and-bullying>

RTEI. 2017. *Legal factsheet on Gender-based violence against women and girls* [http://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/RTE\\_Gender-based\\_violence\\_against\\_women\\_and\\_girls\\_2017\\_En.pdf](http://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/RTE_Gender-based_violence_against_women_and_girls_2017_En.pdf)

UNESCO. 2017. *Global Guidance on School-Related Gender-Based Violence*

### 3.6.c.ii Corporal punishment<sup>426</sup>

Human rights law is unequivocal in banning corporal punishment in all public settings, including schools and other educational settings. Corporal or physical punishment is defined by the Committee on the Rights of the Child as 'any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light'.<sup>427</sup> It considers corporal punishment to be a form of violence, this includes 'smacking', 'slapping', and 'spanking'.

The CRC requires states to: 'take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention'.<sup>428</sup> The Committee on

421 CEDAW. 1992. *General Recommendation No. 19: Violence against women*, para. 6.

422 CEDAW. 2017. *General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19* (Doc. CEDAW/C/GC/35.) (CEDAW General Recommendation 35.) paras. 21-26.

423 UNESCO and UN Women. 2016. *Global Guidance on Addressing School-Related Gender-Based Violence*, p. 13.

424 OHCHR, 2015, *Background paper on Attacks against girls seeking to access education*, p. 4.

425 CEDAW General Recommendation 35 paras. 21-26.

426 This section is based on RTE's page *Corporal punishment and the right to education* <http://www.right-to-education.org/news/corporal-punishment-and-right-education> (Accessed 8 November 2018.)

427 CRC. 2006. *General Comment No. 8: The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment* (Doc. CRC/C/GC/8.) (CRC General Comment 8.) para. 11.

428 CRC Article 28 (2).

the Rights of the Child clarifies this by saying that corporal punishment is a form of violence against children which is prohibited under Article 16 of the CRC<sup>429</sup> and is ‘invariably degrading.’<sup>430</sup> The Committee against Torture agrees and considers that corporal punishment could in some instances amount to cruel, inhuman or degrading punishment<sup>431</sup> and regularly calls on states to ban its use in all settings, as does the Human Rights Committee. And in General Comment 13 on the right to education, the CESCR reiterates that the use of corporal punishment in schools is inconsistent with human dignity and ‘welcomes initiatives taken by some States parties which actively encourage schools to introduce “positive”, non-violent approaches to school discipline.’<sup>432</sup>

Thus, corporal punishment is antithetical to the dignity of the child and to the promotion of non-violence in schools. Further, corporal punishment would amount to state violence against children that would be very difficult to justify under international law. However, corporal punishment against children remains prevalent in the private realm, that is, in the family home. This is largely because, under human rights law, parents are rightly considered best placed to make decisions about their children’s upbringing and are therefore given the primary responsibility and freedom to do so, and states have traditionally stayed out of family matters, where possible.

However, states may legitimately intervene under very narrow circumstances, in fact they have a legal obligation to *protect* rights-holders from rights abuses made by third parties.<sup>433</sup> For instance, states must protect children from

physical and emotional abuse and other forms of violence. Corporal punishment has traditionally not been considered a form of violence, hence its wide social acceptance, with the law in many countries reflecting this belief.



### Did you know?

According to latest figures compiled by the Global Initiative to End all Corporal Punishment of Children,<sup>434</sup> 131 states have imposed a full ban on corporal punishment in schools which in practice means that 732 million school children worldwide are still left not legally protected from corporal punishment when they enter the school gates.<sup>435</sup> Legal protections are even worse in the home, with only 54 states banning corporal punishment in both public and private settings. This is because states have traditionally eschewed interfering with parents’ freedom to bring up and discipline their children as they see fit.

But corporal punishment is becoming less and less socially acceptable and governments have increasingly crossed the public-private divide to legally protect children from violence, due in large part to the recognition of children as rights-holders, but also to a growing body of empirical evidence that shows that corporal punishment has deleterious effects on children’s wellbeing and development and that questions the efficacy of corporal punishment as a form of discipline which encourages long-term good behaviour. As such, the Committee on the Rights of Child in General Comments 8 on corporal punishment and 13 on the right of the child to freedom from all forms of violence, states that there are no exceptions to the prohibition of violence, which ‘does not leave

429 CRC General Comment 8 para. 1.

430 *Ibid.*, para. 11.

431 UNGA. 1998. *Status of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report of the Secretary-General* (Doc. A/53/253.) para. 4.

432 CESCR General Comment 13 para. 41.

433 For further information on states’ legal obligation to *protect*, see Chapter 4, section 4.3.

434 See Global Initiative to End all Corporal Punishment of Children <https://endcorporalpunishment.org> (Accessed 24 October 2018.)

435 Lieberman, A. 2012. *US pushes caveats at UN on condemning violence against women, children*. Devex.

room for any level of legalised violence against children<sup>436</sup> including corporal punishment.

That is not to say that the Committee rejects the notion that discipline can have a positive effect on a child's development.<sup>437</sup> The Committee recognizes that some physical intervention may be necessary when caring for children. However, a clear distinction is drawn by the Committee between a 'protective physical action and a punitive assault'<sup>438</sup> with corporal punishment falling squarely into the category of 'punitive assault'. For this reason, the Committee calls on all states to 'enact or repeal, as a matter of urgency, their legislation in order to prohibit all forms of violence, however light, within the family.'<sup>439</sup>

Lastly, the Committee argues that corporal punishment can violate other substantive rights under the CRC, notably the rights to health and education. The impact of these rights violations can be significant and devastating, for example, the 'disruption or discontinuation of education'<sup>440</sup> and lasting physical or psychological injuries and 'other impacts on a victim's quality of life.'<sup>441</sup>

### 3.6.c.iii Infrastructure

It is of paramount importance that the physical learning environment in which education is delivered also be available, structurally safe, and conducive to a quality and inclusive learning environment. With this in mind, states have a legal obligation to set standards for minimum requirements relating to infrastructure, to the extent that they must 'fulfil (provide) the availability of education by actively developing a system of schools, including building classrooms.'<sup>442</sup>

The importance to good quality education of school infrastructure that is safe and structurally adequate is reiterated by the Committee on the Rights of the Child in its General Comment 1, on the aims of education, when it sets out that quality education also relates to: 'the environment within which education takes place, whether it be the home, school, or elsewhere.'<sup>443</sup>

Further, when thinking about the physical infrastructure of an education system, states also need to take into consideration the needs of marginalized groups. For example, the Committee on the Rights of the Child states: 'gender discrimination can be reinforced by practices such as...unsafe or unfriendly environments which discourage girls' participation.'<sup>444</sup>

The marginalized group which faces perhaps the most marked challenges in terms of accessing education infrastructure are those people with a physical disability resulting in reduced mobility. The Convention on the Rights of Persons with Disabilities recognizes that there can be 'environmental barriers'<sup>445</sup> to persons with disabilities being able to fully and effectively participate in society, and as a multiplier right, the right to education is fundamentally important to participation. As such, states must take into consideration the needs of people with a physical disability resulting in reduced mobility and pursue all reasonable measures to ensure school buildings, classrooms, libraries and other physical infrastructure are equally accessible to them, without discrimination.

In its General Comment 4, on the right to inclusive education, the Committee on the Rights of Persons with Disabilities is unequivocal in stating that:

436 CRC General Comment 8 para. 18.

437 Ibid., para. 13.

438 Ibid., para. 14.

439 Ibid., para. 8.

440 CRC General Comment No 13 para. 16.

441 Ibid.

442 CESCR General Comment 13 para. 50.

443 CRC General Comment 1 para. 8.

444 Ibid., para. 10.

445 CRPD Preamble.

*The environment of students with disabilities must be designed to foster inclusion and guarantee their equality throughout their education, [and] States parties should prohibit and sanction the building of any future education infrastructures that are inaccessible, together with establishing an efficient monitoring mechanism and time frame for all existing education environments to be rendered accessible.*<sup>446</sup>

Armed conflict also significantly impacts the safety and accessibility of school infrastructure. For example, school buildings that are located within conflict or crises-affected areas are often damaged or destroyed in whole or in part and are then difficult to subsequently repair or rebuild due to ongoing attacks, a lack of materials or labour for the task, or simply due to the risk of injury or death from being in or around the school building. This renders such infrastructure unsuitable as an educational environment.

During conflict, schools may also be used for military purposes such as barracks or as munitions stores. When this happens, they effectively become targets of attack by armed forces, and wholly unsuitable for use as educational institutions. The importance of school safety in times of conflict is foregrounded by the Safe Schools Declaration,<sup>447</sup> which, at the time of writing, 81 States have endorsed in order to demonstrate their commitment to ensuring students, teachers, and their schools are protected from the effects of conflict.

### 3.6.c.iv Sanitation

With respect to the physical environment of all schools and educational establishments, adequate and well-maintained sanitation is essential. Sanitation encompasses both infrastructure and behaviours, such as properly designed and

constructed toilets or latrines, a reliable supply of potable water, and not having to engage in open defecation. Their intended purpose is to reduce exposure to disease and poor health by separating and disposing of human and other organic waste in a hygienic environment.<sup>448</sup> The essential nature of sanitation is highlighted by the Committee for Social, Economic and Cultural Rights in its General Comment 13, on the right to education, in which the Committee sets out that: ‘all institutions and programmes are likely to require...sanitation facilities for both sexes, safe drinking water’ and so on.<sup>449</sup>

A lack of toilets, in particular both male and female toilets, changing facilities and safe drinking water is also a gender-sensitive issue because the ways girls use toilets is different to boys and any lack may discourage girls from attending school, thereby having a disproportionate effect on their education. For example, girls require toilets for menstrual hygiene purposes including access to sanitary products. Without such privacy and products girls often miss school because of social stigma or, when in school, may have their concentration disrupted.

The particular impact on girls of a lack of adequate and appropriate sanitation is highlighted by the Committee on the Rights of the Child in its General Comment 1, on the aims of education, in which the Committee notes that ‘gender discrimination can be reinforced... by arrangements which limit the benefits girls can obtain from the educational opportunities offered, and by unsafe or unfriendly environments which discourage girls’ participation.’<sup>450</sup> A lack of appropriate, gender-segregated toilets is an example of an unfriendly environment. Further, a

446 CRPD General Comment 4 para. 21.

447 Safe Schools Declaration (adopted 29 May 2015).

448 See for example the UNICEF definition of sanitation [https://www.unicef.org/wash/3942\\_43084.html](https://www.unicef.org/wash/3942_43084.html) (Accessed 23 October 2018.) and the WHO definition of sanitation <http://www.who.int/topics/sanitation/en/> (Accessed 23 October 2018.)

449 CESCR General Comment 13 para. 6.

450 CRC General Comment 1 para. 10.

high proportion of gender-based abuse of girls in schools occurs in non-sex-segregated toilets, thus the lack of such facilities for girls renders a school an unsafe environment (see section 3.3.c.i).

Further, in respect to people with disabilities, even where gender-segregated toilets may be available, if they are not accessible by people with disabilities, this hinders their participation in education and their enjoyment of the right to education. In a broad sense, people with disabilities may be disproportionately impacted by a lack of accessible changing facilities, hygiene facilities or drinking water, among other things, which may have a greater negative impact on their health and therefore their ability to access education. The Committee on the Rights of Persons with Disabilities makes clear in their General Comment 4, on the right to inclusive education, that '[t]he ability to attend educational environments and learn effectively is seriously compromised by lack of access to health and to appropriate treatment and care. States parties should establish health, hygiene and nutrition programmes with a gender perspective that are integrated with education services'.<sup>451</sup>

### 3.7 Educational freedom

Educational freedom is the liberty of parents to ensure the religious and moral education of their children in conformity with their own convictions, which includes the liberty to choose schools other than public schools for their children. The state also has an obligation to respect this liberty within public education.

Educational freedom is a key way in which the right to freedom of religion and conscience is exercised and is critically important for democratic, tolerant, and plural societies. International human rights law (IHRL) recognizes

that parents (and legal guardians) have the right to exercise freedom of religion and conscience, which includes freedom from unnecessary state interference in how they choose to bring up their children.<sup>452</sup> Thus, states must not interfere with how parents educate their children at home (i.e., outside of school)<sup>453</sup> or force children to attend mandatory religious classes without the possibility of exceptions in public schools. There are, however, limits to the extent to which parents can assert their parental liberties, which would include when the rights of the child are at risk or have been breached.

As part of parental liberty, states must allow parents the freedom to choose alternative forms of education which conform to their religious and moral beliefs, including those not set up by public authorities (i.e., private schools).<sup>454</sup> Hence, international law also allows for the liberty of non-state actors (both individuals and organizations) to establish and direct private schools, as long as these schools conform to minimum education standards established by the state.<sup>455</sup> As interpreted by the CESCR, the state has an obligation to ensure that this liberty does not lead to extreme disparities of educational opportunity for some groups in society.<sup>456</sup> Although intimately connected with freedom of religion and conscience and a key means to protect it, this is a freedom that extends to everyone meaning that anyone can establish and operate any type of school.

For example, schools that cater for indigenous peoples and minorities, particularly linguistic minorities, are common and are a key means of protecting culture and transmitting cultural values, practices and languages from one generation to the next. For indigenous peoples,

452 ICCPR Article 18 (4).

453 ICCPR Article 18 (4).

454 ICESCR Article 13 (3).

455 ICESCR Article 13 (4); CRC Article 29 (2).

456 CESCR General Comment 13 para. 30.

451 CRPD General Comment 4 para. 21.

this means that the right to education must be formulated in a way that protects the group as a whole. Educational freedom therefore, takes on an additional collective dimension, namely the right to control, or have a say, in how education is delivered: its content, methods, values, objectives, and language of instruction. Schools that employ alternative pedagogies, for example, self-directed and hands-on learning, and schools that allow children to focus on their passions and non-academic talents, such as the performing arts or sports, are also permissible under IHRL.

While the liberty of non-state actors to establish and direct private schools is an important element of the right to education, the liberty is not unrestricted. IHRL is clear that all such schools must conform to minimum education standards established or approved by the state. States therefore have an obligation to protect the right to education from third party interference by setting regulations.<sup>457</sup> CESCR notes that: 'These minimum standards may relate to issues such as admission, curricula and the recognition of certificates.'<sup>458</sup> Further, these standards must be consistent with the aims of education,<sup>459</sup> therefore states cannot set standards that would allow non-state actors to undermine the right to education.

CADE sets out the additional criteria that attendance at a private school must be 'optional' and that private schools must not exist: 'to secure the exclusion of any group but to provide educational facilities in addition to those provided by the public authorities.'<sup>460</sup>

### 3.8 Academic freedom and institutional autonomy

'The right to education can only be enjoyed if accompanied by the academic freedom of staff and students', states the CESCR.<sup>461</sup> Academic freedom is the liberty of members of the academic community, individually or collectively, to pursue, develop, and transmit knowledge and ideas, through research, teaching, study, discussion, documentation, production, creation or writing.<sup>462</sup> Academic freedom is particularly pertinent to staff and students in higher education because they are particularly susceptible: 'to political and other pressures which undermine academic freedom.'<sup>463</sup> However, CESCR notes that academic freedom applies to students and staff throughout the education system.

Academic freedom is not explicitly guaranteed as part of the right to education under IHRL, however, it is specifically guaranteed in two regional treaties: the Arab Charter on Human Rights<sup>464</sup> and the Charter of Fundamental Rights of the European Union.<sup>465</sup> However, academic freedom is closely linked with a number of human rights that interact with the right to education in such a way as to render academic freedom necessary for the enjoyment of multiple rights, notably:

- the right to freedom of expression which includes the right to hold opinions without interference and the 'freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice'<sup>466</sup>

457 See Chapter 4, section 4.5 on states' obligations to protect the right to education from breaches by non-state actors.

458 CESCR General Comment 13 para. 28.

459 Ibid.

460 CADE Article 2 (b) (c).

461 CESCR General Comment 13 para. 38.

462 Ibid., para. 39.

463 Ibid., para. 38.

464 Article 42 (2).

465 Article 13.

466 ICCPR Article 19.



- the right to freedom of thought<sup>467</sup>
- the right to take part in cultural life, including the right to benefit from scientific progress and its applications; the right of everyone to benefit from the protection of moral and material interests resulting from any scientific, literary or artistic production of which they are the author; and the right to freedom indispensable for scientific research and creative activity<sup>468</sup>

CESCR also highlights that the enjoyment of academic freedom requires the autonomy of institutions of higher education. Autonomy is defined by the 'degree of self-governance necessary for effective decision making by institutions of higher education regarding their academic work, standards, management and related activities.'<sup>469</sup> CESCR, however, notes that: 'Given the substantial public investments made in higher education, an appropriate balance has

to be struck between institutional autonomy and accountability. While there is no single model, institutional arrangements should be fair, just and equitable, and as transparent and participatory as possible.'<sup>470</sup>

Academic freedom and institutional autonomy are also dealt with extensively in two non-binding recommendations:

- the UNESCO Recommendation concerning the Status of Higher-Education Teaching Personnel (1997)
- the ILO/UNESCO Recommendation concerning the Status of Teachers (1966)



**Box 3.33 Further information: Academic freedom**

Academic Freedom Monitor's website <http://monitoring.academicfreedom.info/>

467 Ibid., Article 18.

468 ICESCR Article 15.

469 Recommendation concerning the status of Higher-Education Teaching Personnel (adopted 11 November 1997), para. 17.

470 Ibid.

## Summary

The normative content of the right to education is what all rights-holders are entitled to according to the various sources of international law.

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The right to education is comprehensive in its scope and covers just about every aspect of education, from the aims of education to who can access education to the quality of education each person is entitled to.

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The right to education is not static in its normative content, but constantly evaluated and developed, usually through the treaty-making process or through elaboration by those with authority to interpret provisions.

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According to the 4As framework, education must be *available, accessible, acceptable and adaptable*.

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Universality is a key feature underpinning the right to education.

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Equality and non-discrimination are fundamental principles that apply across the entirety of the right to education.

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Primary education shall be compulsory and free of charge under international law. Secondary and higher education shall be made progressively free of charge.

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The right to education is not only the right to access education but also the right to receive an education of good quality.

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## Ask yourself

- ➔ Does the right to education in your country cover all the dimensions of the normative content of the right to education as laid out in international law?
- ➔ What are the different challenges in terms of availability, accessibility, acceptability and adaptability faced at each level of education in your country?

# Chapter 4:

## States' legal obligations

## Key questions

What are states' legal obligations?

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What are treaty obligations?

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What is *progressive realization*?

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What are *minimum core obligations*?

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What are obligations of *immediate effect*?

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What are obligations of *international assistance and cooperation*?

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What are the responsibilities of non-state actors?

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What are human rights violations?

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**Human rights form part of international law. As states are the subject of international law and human rights treaties are concluded by states, states are the primary duty-bearer of human rights and therefore the right to education. This means that states have legal obligations to ensure the full enjoyment of the right to education and related human rights. These legal obligations arise from a variety of different sources.**

Firstly, states have legal obligations arising from the fact that human rights treaties are treaties. Treaties are governed, under international law, by the law of treaties.

Secondly, human rights treaties themselves specify legal obligations related to the content of the right to education. This means that attached to each provision of the right to education are specific legal obligations. For example, states' obligations in relation to primary, secondary, and higher education are not identical. They are obliged to prioritize the introduction of compulsory and free primary education. The obligation to provide free primary education for all is an *immediate obligation* for all states. In addition, states have an immediate obligation 'to take steps' towards the *progressive realization* of free secondary and higher education for all those within their jurisdiction.<sup>471</sup> Human rights treaties also describe legal obligations related to international cooperation and assistance.

Thirdly, there are also frameworks for understanding and clarifying states' legal obligations produced by the treaty supervisory bodies. The most important and widely used obligations are to *respect, protect, and fulfil*, used

by the UN Committee on Economic, Social and Cultural Rights (CESCR).<sup>472</sup> This framework has been widely endorsed by other treaty bodies, special procedures mandate-holders, and Member States in standard-setting fora.

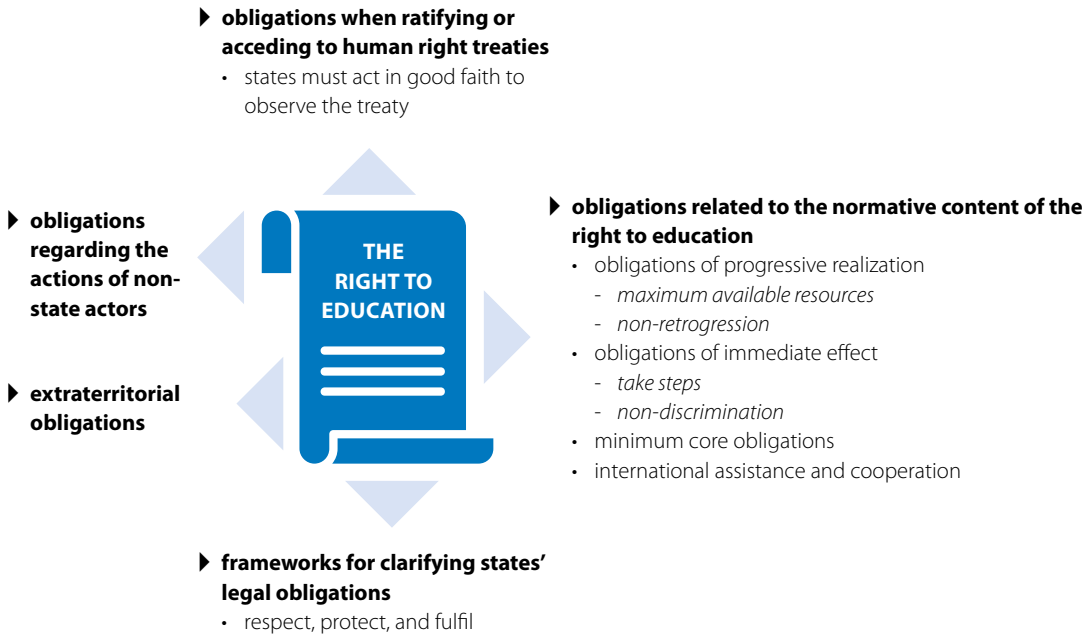
Fourthly, international law also acknowledges the roles non-state actors, such as private companies, civil society, intergovernmental organizations, donors, etc. have in the enjoyment of the right to education. This means that states have legal obligations to ensure that the actions of non-state actors do not infringe on the right to education and that non-state actors have corresponding responsibilities to respect the right to education.

Lastly, states should not only protect, respect, and fulfil human rights within their territory, but also abroad. The universality of human rights would be meaningless if states' obligations did not apply outside of their borders. Extraterritorial obligations (ETOs) are therefore crucial to safeguard human rights worldwide.

Understanding legal obligations is important in order to clarify the specific steps states must or must not take. This helps states properly implement their obligations under international law and allows stakeholders, such as civil society, to identify violations and hold states accountable when they fail to act as directed by international law.

471 UN Committee on Economic, Social and Cultural Rights (CESCR). 1999. *General Comment 13: The right to education. Article 13.* (Doc. E/C.12/1999/10.) (CESCR General Comment 13) paras. 51-52.

472 *Ibid.*, paras. 46-48 & 50.

**Figure 4.1: States' legal obligations under international law**

A violation is when a state fails to comply with its human rights obligations. According to the CESCR, the normative content of the right to education (outlined in Chapter 3) attaches to specific legal obligations, and a violation can be identified through a 'dynamic process' which involves a careful assessment of the relevant facts.<sup>473</sup> Human rights violations may be the result of action (act of commission) or a failure to take action (omission).

The following sections explain the different legal obligations (outlined above) that states are subject to, what states must do to comply with their legal obligations, and examples of what may constitute a violation.

## 4.1 Obligations under the law of treaties

Obligations under the law on treaties basically require states to respect their legal commitments to treaties, including human rights treaties.

Once a treaty enters into force, states parties are legally bound to the provisions of that treaty and must act in good faith in observing the treaty (*'pacta sunt servanda'* or 'agreements must be kept').<sup>474</sup> The object and purpose of every human rights treaty is the full realization of the human rights contained therein. Ratification without subsequent action is highly unlikely to result in the full realization of the right to education. This is because the national legal and institutional framework of states are likely to require alteration in order to align with international human rights

<sup>473</sup> Ibid., para. 58.

<sup>474</sup> Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) Article 26.

law. An important point here is that treaties create obligations independent from domestic law and in order to act in good faith, states cannot invoke extant national law as an excuse for noncompliance with a treaty.<sup>475</sup> Ratification, therefore, requires that all relevant laws be amended if in conflict with the provisions of the treaty. See Chapter 6 for further information on the domestic implementation of the right to education.

## 4.2 General obligations under conventional law

Article 2 of the International Covenant on Economic, Social and Cultural Rights (1966, ICESCR)<sup>476</sup> sets out states' legal obligations in relation to the realization of all economic, social, and cultural rights including the right to education<sup>477</sup>. It reads:

1. *Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.*
2. *The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as*

*to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

Further human rights treaties also clarify states' legal obligations regarding the implementation of human rights, including:

Article 4 of the Convention on the Rights of the Child (1989, CRC):<sup>478</sup>

*States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.*

Article 4 (2) of the Convention on the Rights of Persons with Disabilities (2006, CRPD):<sup>479</sup>

*With regard to economic, social and cultural rights, each State Party undertakes to take measures to the maximum of its available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively the full realization of these rights, without prejudice to those obligations contained in the present Convention that are immediately applicable according to international law.*

Article 2 (2) of the International Covenant on Civil and Political Rights (1966, ICCPR):<sup>480</sup>

*[E]ach State Party to the present Covenant undertakes to take the necessary steps, in*

475 Ibid., Article 27.

476 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

477 Others instruments also set out states' legal obligations with respect to the right to education, notably the Convention on the Rights of the Child (1989) and the UNESCO Convention against Discrimination in Education (1966). Where these treaties provide for stronger or more specific legal obligations they are referred to in relevant sections.

478 Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC).

479 Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (CRPD).

480 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

*accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.*

The following subsections describe how these articles relate to the right to education and the key legal obligations they entail.

## 4.2.a Progressive realization

Article 2 (1) of ICESCR places an obligation on states to *progressively realize* the right to education. Progressive realization recognizes that certain aspects of the right to education can only realistically be achieved over a period of time, particularly for states with fewer resources. If ICESCR imposed immediate obligations to realize the right to free education for all at all education levels and types of education (pre-primary, primary, secondary, technical and vocational, higher, and fundamental) on states without consideration of the availability of adequate resources, expertise, infrastructure, etc., many states simply would not be able to comply, which would seriously weaken the protection of all human rights.

The CESCR, which oversees the compliance of states to ICESCR, has stated in guidance to states parties in its General Comment 3 on the nature of states parties' obligations, that progressive realization 'should not be misinterpreted as depriving the obligation of all meaningful content' as this would defeat the object and purpose of ICESCR, which is to, 'establish clear obligations for States parties in respect of the full realization of the rights in question.'<sup>481</sup>

Progressive realization therefore means that states have to 'move as expeditiously and effectively as possible'<sup>482</sup> towards the full realization of the right to education.

Elements of the right to education that are subject to progressive realization include:

- free secondary education
- free technical and vocational education and training (TVET)
- free higher education
- free fundamental education for all those who have missed the whole or part of their primary education
- improvement of the quality of education

Violations include the failure to take 'deliberate, concrete and targeted' measures towards the progressive realization of the above.

### 4.2.a.i Maximum available resources

Progressive realization cannot be understood without reference to *maximum available resources*. Article 2 (1) of ICESCR requires states to 'take steps...to the maximum of its available resources'. Maximum available resources include both domestic and international resources.

Where resources are inadequate states must 'strive to ensure the widest possible enjoyment of... [the right to education]...under the prevailing conditions.'<sup>483</sup> This requires states to prioritize its minimum core obligations (see section 4.2.c). However, CESCR makes clear that some obligations are not subject to resource constraints. These are related to the immediate obligations (see section 4.2.b) to *take steps*. CESCR also specifies that, under immediate obligations to ensure *non-discrimination*, there is a special

481 UN Committee on Economic, Social and Cultural Rights (CESCR). 1990. *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)* (Doc. E/1991/23.) (CESCR General Comment 3) para. 9.

482 *Ibid.*, para. 9.

483 CESCR General Comment 3 para. 11.



duty to protect the most vulnerable members of society through the adoption of 'relatively low-cost targeted programmes'.<sup>484</sup>

An example of a violation of the obligation to take steps to the maximum of a state's available resources would be a failure to seek resources from the international community if such resources are required, particularly for minimum core obligations.



#### Box 4.1 Further reading: Maximum available resources

International Bar Association's Human Rights Institute. 2017. *The Obligation to Mobilise Resources: Bridging Human Rights, Sustainable Development Goals, and Economic and Fiscal Policies*.

#### 4.2.a.ii Non-retrogression

The presumption that states will progressively realize the right to education implies that states should not take deliberate backward steps by adopting measures that will repeal or restrict existing guarantees of the right to education. For instance, ending adult fundamental education programmes that provide those who have never received or completed primary education with a good quality substitute, or the unjustified year-on-year reduction of resources allocated to education, would both constitute retrogressive measures.

CESCR states that any deliberate retrogressive measures require the 'most careful consideration', implying that states must look for credible alternative measures and cannot arbitrarily decide to limit enjoyment of human rights; 'would need to be fully justified by reference to the totality of the rights provided for in the Covenant', that is the measure is intended to increase enjoyment of other human rights; and that such a decision

is taken in the 'context of the full use of the maximum available resources'. This means that states cannot invoke a lack of resources if maximum resources have not been mobilized. CESCR assesses whether a state lacks resources on the basis of the following objective criteria:

- a. *the country's level of development*
- b. *the severity of the alleged breach, in particular whether the situation concerned the enjoyment of the minimum core content of the Covenant*
- c. *the country's current economic situation, in particular whether the country was undergoing a period of economic recession*
- d. *the existence of other serious claims on the state party's limited resources; for example, resulting from a recent natural disaster or from recent internal or international armed conflict*
- e. *whether the state party had sought to identify low-cost options*
- f. *whether the state party had sought cooperation and assistance or rejected offers of resources from the international community for the purposes of implementing the provisions of the Covenant without sufficient reason*<sup>485</sup>

#### 4.2.b Obligations of immediate effect

Certain aspects of the right to education are subject to obligations of immediate effect which require states to take immediate action. However, this does not necessarily mean that the right will be immediately realized. Obligations of immediate effect require *full* action to make the right in question a reality whereas obligations related to progressive realization permit states to take *incremental* action towards the full realization

484 *Ibid.*, para. 12.

485 CESCR. 2007. *An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" Under an Optional Protocol to The Covenant* (Doc. E/C.12/2007/1.) para. 10.

of the right in question. *Vis-à-vis* the right to education, obligations of immediate effect, include *general* obligations to:

- ensure the right to education is exercised free from discrimination of any kind
- take 'deliberate, concrete and targeted' steps towards the full realization of the right to education

CESCR also identifies immediate obligations in relation to *specific* content of the right to education:

- provide free and compulsory primary education. If this had not already been secured when becoming a party to the ICESCR, states must, within two year, work out and adopt a plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all
- ensure parental freedom of education without interference from the state or non-state actors and the liberty of non-state actors to establish and direct educational institutions, both being subject to conformity with 'minimum educational standards'

Violations of *specific* obligations of immediate effect, include:

- the failure to introduce, as a matter of priority, primary education which is compulsory and available free to all for states that are demonstrably able to provide it. For instance, if a state guarantees free higher education but not free primary education this constitutes a violation of the right to education
- the failure to formulate and adopt a plan of action, within a reasonable number of years, to provide free and compulsory primary education
- the prohibition of private educational institutions

- the failure to ensure private educational institutions conform to the 'minimum educational standards'

#### 4.2.b.i Take steps

While states are permitted to progressively realize certain aspects of the right to education, they have an *immediate* obligation to 'take steps...by all appropriate means, including particularly the adoption of legislative measures' towards the full realization of the right to education. Such steps should be taken within a 'reasonably short time' and must be 'deliberate, concrete and targeted'. This prevents states from inaction, or invoking a lack of resources.

Article 2 (1) specifies that steps must be taken 'by all appropriate means' but highlights the particular importance of legislative measures.<sup>486</sup> CESCR notes that legal measures are 'indispensable' to fully realize the right to education.

CESCR also highlights that such legislative measures should include ensuring that the right to education is appropriately recognized within the domestic legal order so that it is justiciable, that is amenable to adjudication, and therefore 'appropriate means of redress, or remedies' are 'available to any aggrieved individual or group'.<sup>487</sup>

Nevertheless, legislative measures, while supremely important, are one example of an appropriate mean that states may employ. Other means include: administrative, financial, policy, economic, social, and education measures.<sup>488</sup> It

486 For further information on domestic implementation and the various measures states should take, see Chapter 6.

487 CESCR. 1998. *General Comment No. 9: The Domestic Application of the Covenant*. (Doc. E/C.12/1998/24.) para. 2. See Chapter 6 for further information on domestic implementation and recognition of the right to education in the domestic legal order; see Chapter 8, section 8.3.a.ii for further information on justiciability.

488 For an in-depth look at how states can domestically implement their obligations, see Chapter 6.

is highly likely that a state will have to employ multiple means to fully realize the right to education. This is because laws do not instantly change behaviour, particularly when cultural, economic, and social factors are at play. For instance, legislating compulsory primary education is often not enough to get all children in schools because factors, such as poverty, rurality, and harmful gender stereotypes may act as barriers for many children. A state will have to address all barriers (identified through monitoring) in tandem with the introduction of legislation to discharge its obligation to ensure the right to free and compulsory primary education is a concrete reality.

CESCR asserts that the immediate obligation to *take steps* requires, at a minimum, that states 'monitor the extent of the realization, or more especially of the non-realization, of economic, social and cultural rights, and devise strategies and programmes for their promotion.'<sup>489</sup> With regards to the right to education specifically CESCR states:

*At a minimum, the State party is required to adopt and implement a national educational strategy which includes the provision of secondary, higher and fundamental education in accordance with the Covenant. This strategy should include mechanisms, such as indicators and benchmarks on the right to education, by which progress can be closely monitored.*<sup>490</sup>

This requirement is buttressed by the legal requirement under the UNESCO Convention against Discrimination in Education (1960, CADE) for: 'States Parties to...undertake...to formulate, develop and apply a national policy which, by methods appropriate to the circumstances and to national usage, will tend to promote equality

of opportunity and of treatment in the matter of education.'<sup>491</sup>

Other examples of steps states can take include:

- assessing the state of enjoyment of the right to education, including ensuring adequate mechanisms to collect and assess relevant and suitably disaggregated data
- mapping out major barriers to access education and factors that lead to school drop-outs and failure, and formulating strategies and plans to tackle them
- incorporating into strategies and plans indicators, benchmarks and time-bound targets, which are achievable and designed to assess progress in the realization of the right to education
- making the necessary budget allocations to ensure the adequate performance of the educational system, and gradually expanding budget allocations to allow for improved accessibility and quality at all levels
- establishing institutional mechanisms necessary for coordinating multi-sectoral efforts to realize the right to education

Determining whether a failure to take steps is a violation is highly contextual given the difference in states' resources and existing levels of right to education enjoyment. However, ICESCR does outline one clear example of failure to take steps: According to Article 14, each state party which, at the time of ratifying or acceding to ICESCR, has not yet been able to secure free compulsory primary education for all, undertakes to work out and adopt, within two years, a detailed plan of action for the progressive implementation of compulsory and free education. CESCR also provides guidance

489 CESCR General Comment 3 para. 11.

490 CESCR General Comment 13 para. 52.

491 Convention against Discrimination in Education (adopted 14 December 1960, entered into force 22 May 1962) 429 UNTS 93 (CADE) Article 4.

on the factors it considers when assessing the 'adequacy' or 'reasonableness' of any measure:

- a. *the extent to which the measures taken were deliberate, concrete and targeted towards the fulfilment of economic, social and cultural rights*
- b. *whether the state party exercised its discretion in a non-discriminatory and non-arbitrary manner*
- c. *whether the state party's decision (not) to allocate available resources is in accordance with international human rights standards*
- d. *where several policy options are available, whether the state party adopts the option that least restricts Covenant rights*
- e. *the time frame in which the steps were taken*
- f. *whether the steps had taken into account the precarious situation of disadvantaged and marginalized individuals or groups and, whether they were non-discriminatory, and whether they prioritized grave situations or situations of risk*<sup>492</sup>

#### 4.2.b.ii Non-discrimination

Article 2 (2) of ICESCR, as well as numerous provisions of international human rights law,<sup>493</sup> notably Article 26 of the ICCPR and the entirety of the UNESCO CADE, prohibit discrimination in education and oblige states to act immediately to eliminate it, regardless of available resources. In its General Comment 20 on non-discrimination, CESCR defines discrimination as:

*any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the*

*recognition, enjoyment or exercise, on an equal footing, of Covenant rights.*<sup>494</sup>

CADE identifies common discriminatory practices in education:<sup>495</sup>

- depriving access to education
- providing education of inferior quality
- establishing or maintaining segregated educational systems or institutions, unless they are gender segregated, for linguistic or religious groups, and are non-exclusionary and are of the same quality as comparable institutions, and conform to minimum education standards
- inflicting undignified conditions

CESCR sets out the scope of states' legal obligations in relation to Article 2 (2). It requires that states eliminate both *formal or de jure discrimination*, that is discrimination that exists in states' legal and policy frameworks, and *substantive or de facto discrimination*, which is discrimination suffered in practice, usually by groups who have suffered from historical or persistent prejudice. This would include the immediate adoption of 'necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or de facto discrimination.'<sup>496</sup>

CADE details specific measures to eliminate and prevent discrimination in education:

- (a) *To abrogate any statutory provisions and any administrative instructions and to discontinue any administrative practices which involve discrimination in education;*

492 CESCR. 2007. *An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" Under an Optional Protocol to The Covenant* (Doc. E/C.12/2007/1.) para. 8.

493 See Chapter 3, section 3.3 for further information about the normative content of the rights to non-discrimination and equality and how they relate to the right to education.

494 CESCR. 2009. *General Comment 20: Non-discrimination in Economic, Social and Cultural Rights (Art. 2, Para. 2 of the Covenant)* (Doc. E/C.12/GC/20.) (CESCR General Comment 20) para. 7.

495 CADE Article 1.

496 CESCR General Comment 20 para. 8.

- (b) To ensure, by legislation where necessary, that there is no discrimination in the admission of pupils to educational institutions;
- (c) Not to allow any differences of treatment by the public authorities between nationals, except on the basis of merit or need, in the matter of school fees and the grant of scholarships or other forms of assistance to pupils and necessary permits and facilities for the pursuit of studies in foreign countries;
- (d) Not to allow, in any form of assistance granted by the public authorities to educational institutions, any restrictions or preference based solely on the ground that pupils belong to a particular group;
- (e) To give foreign nationals resident within their territory the same access to education as that given to their own nationals.<sup>497</sup>

International human rights law also requires states to adopt temporary special measures to bring about substantive equality in education, provided such measures are 'reasonable, objective and proportional'.<sup>498</sup>

States must also monitor education, including the legal and policy framework, education institutions, and spending patterns, in order to identify *de facto* and *de jure* discrimination and remedy it.<sup>499</sup>

States' legal obligations extend to *protecting* the right to education from discrimination committed by non-state actors, such as the private sector (see section 4.5).

Examples of violations of the right to education on a non-discriminatory basis include:

- the introduction or failure to repeal legislation which discriminates against individuals or

groups, on any of the prohibited grounds, in the field of education<sup>500</sup>

- the failure to take measures which address *de facto* educational discrimination<sup>501</sup>
- the failure of states to adopt measures to ensure that parents send their girls to school<sup>502</sup>
- sharp disparities in spending policies that lead to differing qualities of education for people in different regions<sup>503</sup>

### 4.2.c Minimum core obligations

Minimum core obligations (MCOs) are not explicitly mentioned in the text of ICESCR, however CESCR has elaborated in its authoritative guidance to states, that: 'a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party.'<sup>504</sup>

MCOs prioritize certain content of the right to education, without which rights-holders are considered to be deprived of the right to education. According to the CESCR, there are five minimum core obligations:

- ensure the right of access to public educational institutions and programmes on a non-discriminatory basis
- ensure that education conforms to the aims of education
- provide universal, free, and compulsory primary education
- adopt and implement a national educational strategy that includes provision for secondary, higher, and fundamental education (youth or adult basic education, or education that

497 CADE Article 3.

498 CESCR General Comment 20 para. 9.

499 CESCR General Comment 13 para. 35.

500 Ibid.

501 Ibid.

502 CESCR General Comment 20 para. 11.

503 CESCR General Comment 13 para. 35.

504 CESCR General Comment 3 para. 10.

replaces missed or incomplete primary education)

- ensure parental freedom of education without interference from the state or non-state actors and the liberty of non-state actors to establish and direct educational institutions, both being subject to conformity with 'minimum educational standards'

These elements of the right to education are so essential that a state that attributes its failure to meet its minimum core obligations mentioned above to a lack of available resources, must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum core obligations.<sup>505</sup>

An example of a failure to comply with MCOs is the use of curricula inconsistent with the aims of education and the failure to maintain a transparent and effective system to monitor conformity of the education system with the aims of education.

#### 4.2.d International assistance and cooperation

Article 2 (1) of the ICESCR<sup>506</sup> requires states to 'take steps, individually and through *international assistance and co-operation*, especially economic and technical.' [Emphasis added.]

This means that states' legal obligations require that steps are taken at both the domestic and international levels. In order to fully realize the right to education, states have an obligation to seek international assistance and cooperation and states in a position to do so, have a duty to provide it.

It should be made clear that international cooperation is not a substitute for domestic action. Rather, if a state is not able to give effect to the right to education on its own, it should actively seek the necessary assistance, particularly economic and technical assistance, from other states or multilaterals donors.

The CESCR makes clear that maximum available resources includes domestic and international resources.<sup>507</sup> So a state that is progressively realizing the right to education must, in order to discharge its obligations to progressively realize the right to education, seek resources elsewhere.

The corollary of the obligation to seek assistance is that states that have realized the right to education and have the means to support other states (both in terms of economic and technical assistance) should provide it on a bilateral or multilateral basis.

CESCR makes clear that the full realization of the right to education worldwide is incumbent on states that are able to do so to have an 'active programme of international assistance and cooperation.'<sup>508</sup>

Likewise, Article 28 (3) of the CRC requires states to promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods.

Lastly, states that provide international assistance should take measures to enable recipient states to meet their obligations in relation to the right to education. This means they must refrain from taking measures which undermine the enjoyment of the right to education in other jurisdictions.

<sup>505</sup> Ibid., para. 10

<sup>506</sup> In addition to Articles 55-56 of the Charter of the United Nations and Article 4 of the CRC which also refer to obligations related to international assistance and cooperation.

<sup>507</sup> CESCR General Comment 3 para. 13.

<sup>508</sup> Ibid., para. 14.

Further, when they are *fulfilling* the right to education in recipient states, donor states must respect the following principles and priorities, which are based on states' domestic legal obligations as provided for by the CESCR, and laid out in the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (2011):<sup>509</sup>

- a) *prioritize the realisation of the rights of disadvantaged, marginalized and vulnerable groups;*<sup>510</sup>
- b) *prioritize core obligations to realize minimum essential levels of economic, social and cultural rights, and move as expeditiously and effectively as possible towards the full realization of economic, social and cultural rights;*<sup>511</sup>
- c) *observe international human rights standards, including the right to self-determination and the right to participate in decision-making, as well as the principles of non-discrimination and equality, including gender equality, transparency, and accountability; and*
- d) *avoid any retrogressive measures or else discharge their burden to demonstrate that such measures are duly justified by reference to the full range of human rights obligations and are only taken after a comprehensive examination of alternatives.*<sup>512</sup>

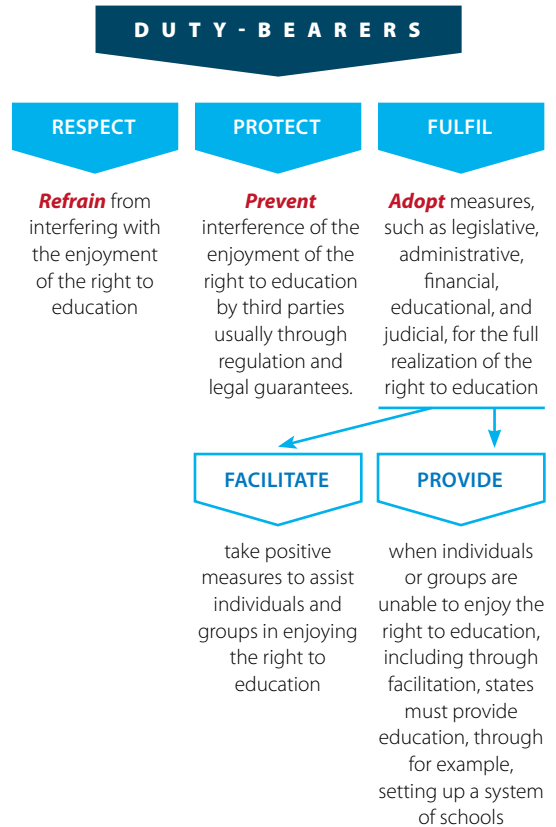
See section 4.4 for further information on extraterritorial obligations.

### 4.3 Respect, protect, fulfil

One commonly used analytical tool for clarifying human rights obligations is the 'tripartite

typology' consisting of the obligations to respect, protect, and fulfil.<sup>513</sup>

**Figure 4.2: The tripartite typology: Respect, protect, fulfil**



The obligation to *respect* requires states to refrain from interfering with the enjoyment of the right to education. For example, states shall not introduce legislation which discriminates against individuals or groups, on any of the prohibited grounds, in the field of education. They should not interfere unduly with the exercise of educational freedoms, such as the right to establish educational facilities different from those run by the state, given that they comply with minimum educational

509 Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights Principle 32.

510 CESCR General Comment 3 para. 12.

511 Ibid., para. 10.

512 Ibid., para. 9.

513 For further information on the tripartite typology see, CESCR General Comment 13 paras. 46-48 & 50.

standards. This includes the rights of indigenous peoples and ethnic, religious, and linguistic minorities to establish their own education systems. States should not affect negatively on the people's existing access to education, by adopting retrogressive measures such as closing down schools or abrogating the legislation which is necessary to enjoy the right to education. Likewise, states may violate the right to education by infringing through their action on other human rights in the area of education, for example, by authorising corporal punishment as a means of discipline in schools.

The obligation to *protect* requires state to prevent interference of the enjoyment of the right to education by third parties (e.g. other individuals, groups, private schools and educational facilities, private companies, donors, and other non-state actors) usually through regulation and legal guarantees. For example, the state must ensure that third parties, including parents, do not prevent girls from going to school. States should also regulate and monitor private schools, to ensure that they do not discriminate against students, for example, by expelling pregnant girls, and that they comply with minimum educational standards, including consistency of their curricula to the aims of education as required by human rights law, teachers' qualifications and the prohibition of corporal punishment.

The obligation to *fulfil* requires state to adopt legislative, administrative, budgetary, judicial, and other appropriate measures towards the full realization of the right to education. It is generally understood to include obligations to *facilitate* and an obligation to *provide*. The obligation to *facilitate* requires states to take positive measures that enable and assist individuals and communities to enjoy the right to education. For example, the state can facilitate the establishment of educational facilities by indigenous and minority communities through subsidies and

the accommodation of formal requisites for their specific cultural background—i.e. accreditation of bilingual teachers.

As a general rule, the obligation to *provide* is triggered when an individual or group is unable, for reasons beyond their control, to realize the right themselves by the means at their disposal. The parameters of the state's obligation to provide are not the same for all levels of education. The right to education specifically requires that the provision of primary education shall be universal, compulsory and free, while measures to provide other levels of education shall be appropriate to make education gradually accessible for all. The state may typically comply with the obligation to provide by actively developing a system of schools, including building classrooms, delivering programmes, providing teaching materials, training teachers, paying them adequate salaries, and improving their material conditions.

## 4.4 Extraterritorial obligations

Extraterritorial obligations (ETOs) are the human rights obligations states have beyond their national borders towards people living in other countries. These obligations are crucial to safeguard human rights worldwide given the transnational nature of many of today's human rights challenges, including the realization of right to education for all. This would include, for instance, international assistance in the form of development aid supporting private education rather than public education and the growth of private schools in low and lower-middle income countries with headquarters or investors based in high-income countries.

ETOs regarding economic, social, and cultural rights are grounded in ICESCR's international cooperation and assistance clause (see section 4.2.d) and the fact that, unlike its sister covenant



the ICCPR, ICESCR does not have a territorial limitation clause. Seizing on these premises the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights (2011) were developed and constitute the most authoritative statement of states' ETOs. The Maastricht Principles, which were drafted by international law experts, provide a concise restatement of existing international obligations regarding states' ETOs. General Principle 3 of the Maastricht Principles states that: 'All States have obligations to respect, protect and fulfil human rights...both within their territories and extraterritorially.'

- *Obligations to respect human rights abroad:*<sup>514</sup> States must ensure that their policies and actions do not harm the enjoyment of human rights in other countries. For instance, states should ensure that the protection and promotion of the right to education is given due attention when concluding international agreements or adopting domestic measures that have extraterritorial impacts.
- *Obligations to protect human rights abroad:*<sup>515</sup> States must put in place regulations and mechanisms to ensure that non-state actors, including business enterprises, do not impair the enjoyment of human rights in other countries, and that they can be held accountable if they do. For example, states should ensure that international agreements protecting copyrights do not impinge on access to textbooks in low and lower middle-income states.
- *Obligations to contribute to the fulfilment of human rights abroad:*<sup>516</sup> States must cooperate with each other and contribute to the creation of an international environment

that is conducive to the universal fulfilment of human rights. For example, states must prioritize programmes for the realization of free primary education in recipient states, if primary education has yet to be realized.

## 4.5 States' obligations regarding non-state actors and the responsibilities of non-state actors

Under international human rights law, the state is the subject of international law and thus the primary duty-bearer. However, recognition that the enjoyment of human rights can be affected by actors other than the state (e.g. civil society, the private sector, private educational institutions, intergovernmental organizations, armed groups, and even parents and teachers, among others) is found in the well-established obligation of states to *protect* the right to education from undue interference.

States' obligations to *protect* the right to education include setting minimum educational standards below which private schools can fall<sup>517</sup> and monitoring adherence to these standards.<sup>518</sup> Other protection measures include due diligence measures such as: conducting human rights impact assessments on any proposed measures likely to affect the right to education, setting regulation in line with human rights obligations, informing the public about such regulations, monitoring adherence to that regulation, and providing for avenues of redress for rights-holders should the right to education be violated by non-state actors.

Under international law, states can be held accountable for the actions of non-state actors

514 Maastricht Principles paras. 19-22.

515 *Ibid.*, paras. 23-27.

516 *Ibid.*, paras. 28-35.

517 ICESCR Article 13 (4).

518 CESCR General Comment 13 para. 49.

in cases where such actions are *attributable* to the state. Attribution is the 'acts or omissions of private actors empowered by the law of that State to exercise elements of the governmental authority.'<sup>519</sup> McCorquodale and Simons give the following example: 'A State is responsible where it is complicit in the activity of the non-State actor. This could occur where a State encourages a corporate body to manage a school knowing that it had a record of abuse of children.'<sup>520</sup>

Whether non-state actors have obligations is a controversial, contested, and evolving debate. In any case, international law requires states to impose obligations on private parties. Moreover, this does not mean that non-state actors have no *responsibilities* under international law. If states have an obligation to protect the right to education from deleterious actions of non-state actors, then it makes sense that non-state actors should not act in a way that negatively impacts on the right to education. Non-state actors therefore have responsibilities to *respect* the right to education. These responsibilities entail different actions depending on the type of non-state actor. There are three main non-state actors relevant to the right to education: intergovernmental organizations, civil society, and business enterprises.

### 4.5.a Intergovernmental organizations

Intergovernmental organizations (IOs) include the United Nations, its agencies and bodies, and regional bodies, such as the European Union, the African Union, and the Organization of American

States. IOs usually have specific mandates in relation to human rights. In fact, these bodies are largely responsible for the drafting, negotiation, and adoption of human rights treaties.

Despite their role in treaty-making, IOs are not themselves generally bound by international law, except perhaps in exceptional circumstances where they have ratified human rights treaties (as the European Union has with the CRPD), they act like states and therefore assume the obligations of states, or have prior knowledge of human rights risks that they do not act on ('attribution'). Some also argue that states' legal obligations also extend to states when they act through intergovernmental organizations.<sup>521</sup> However, it should be emphasized that these instances are by no means universally applicable nor necessarily agreed upon.

However, IOs are of special importance in the realization of the right to education because of 1. the obligation of states to seek international assistance and cooperation and provide it, if possible, and 2. their specific mandates to facilitate the enjoyment of the right to education through international assistance and cooperation. When IOs take on responsibilities to contribute to the realization of the right to education, they must ensure that their actions are directed to that aim, and that their actions do not undermine the right to education in recipient countries. They must also ensure that the conduct of their staff or others contracted by the IO complies with applicable human rights law, by putting in place appropriate

519 UN Committee on the Elimination of Discrimination against Women. 2017. *General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19*. (Doc. CEDAW/C/GC/35.) para. 24.

520 McCorquodale, R. and P. Simons, P. 2007. Responsibility beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law, *70 Modern Law Review* 598.

521 See, for example, Principle 15 of the Maastricht Principles, which states: 'As a member of an international organization, the State remains responsible for its own conduct in relation to its human rights obligations within its territory and extraterritorially. A State that transfers competences to, or participates in, an international organization must take all reasonable steps to ensure that the relevant organization acts consistently with the international human rights obligations of that State.' And CESCR General Comment 13 para. 56 which states: 'States parties have an obligation to ensure that their actions as members of international organizations, including international financial institutions, take due account of the right to education.'

policies and mechanisms. So while IOs do not have legal obligations akin to the state, it would be contrary to their mandate if they infringed on the right to education.



**Box 4.2 Further information:  
UNESCO's principal role and  
responsibility in the realization of  
the right to education**

UNESCO has a unique role to play in the realization of the right to education. As an integral part of its constitutional mission to ensure 'full and equal opportunities for education for all', the realization of the right to education is among its high priorities.

In the constellation of the United Nations system, UNESCO is the only UN agency with a mandate to cover *all aspects* of education and has a worldwide network of specialized institutes and offices. As such, it has been entrusted to lead the Global Education 2030 Agenda through Sustainable Development Goal 4.

UNESCO works to ensure the right to education by:

- monitoring the implementation of the right to education worldwide at country level
- supporting states to establish solid national frameworks creating the legal foundation and conditions for sustainable quality education for all
- advocating on the right to education principals and legal obligations through research and studies on key issues
- maintaining an Observatory on the right to education
- enhancing capacities, reporting mechanisms and raising awareness on key challenges
- developing partnerships and networks on key issues and challenges in relation to the right to education

For more information visit UNESCO's page *Right to Education* <https://en.unesco.org/themes/right-to-education>

## 4.5.b Civil society

According to the Oxford Living Dictionary, civil society is a community of citizens linked by common interests and collective activity. Civil society comprises a wide range of actors, including, but not limited to: non-governmental organizations (NGOs), international non-governmental organizations (INGOs), community-based organizations, faith-based organizations, social movements, academia, parent groups, students' unions and groups, and other trade unions and associations. Civil society organizations (CSOs) therefore do not have a single mission and take on different roles in different societies. CSOs also vary in size and power.

As with IOs, CSOs do not have specific legal obligations with regards to human rights law, other than the responsibility to respect the right to education and refrain from taking action that would result in the infringement of the right to education. However, civil society has an important role in helping states comply with their legal obligations, including:

- reminding states of their legal obligations
- bringing concerning situations to the attention of the state
- monitoring the right to education
- exposing violations
- holding states to account

In some instances, CSOs take on education provision roles; this is particularly common of community-based organizations, faith-based organizations, and NGOs and INGOs, in areas where states fail to provide public education. In these instances, states have legal obligations to *protect* the right to education and CSOs have responsibilities to *respect* the right to education.

**Box 4.3 Further information: Right to Education Initiative (RTE)**

Right to Education Initiative (RTE) is an INGO working to promote the right to education as a human right, by making international and national law accessible to everybody.

RTE conducts research and legal analysis and develops tools and guides (such as this one) to help people to understand and effectively use human rights mechanisms to claim and enforce the right to education.

RTE aims to build bridges between disciplines (human rights, education and development), actors (CSOs, international organizations, academics), and language communities, linking international, national and local advocacy with practical engagements leading to positive changes on the ground.

For further information visit RTE's website: [www.right-to-education.org](http://www.right-to-education.org)

### 4.5.c Business enterprises

The last two decades have seen an increase of business enterprises in education including low-cost profit-making schools, large-scale commercial investments in private school chains, private tutoring or education services such as testing. Their rapid expansion has raised concerns from a human rights perspective, as highlighted by numerous United Nations bodies, such as the UN Special Rapporteur on the right to education,<sup>522</sup> UN human rights monitoring bodies,<sup>523</sup> and the Human Rights Council (HRC).<sup>524</sup>

Under their obligations to *protect*, states have the obligation to regulate and to monitor private

educational institutions. Among other things, states must ensure that private providers meet minimum educational standards, regarding, for example, admission, curricula, and the recognition of certificates.<sup>525</sup> In addition, UN treaty bodies have published an authoritative interpretation of states' obligations regarding business. In 2013, the Committee on the Rights of the Child published General Comment 16 on state obligation regarding the impact of the business sector on children's rights.<sup>526</sup> In 2017, the CESCR published General comment 24 on state obligations under the ICESCR in the context of business activities.<sup>527</sup>

Moreover, although the primary obligation to protect human rights remains with states, businesses have a responsibility to *respect* human rights in their operation. In 2011, the HRC adopted the Guiding Principles on Business and Human Rights<sup>528</sup> recognizing the responsibilities of businesses. Guiding Principle 11 states: 'Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.' The official commentaries to the Guiding Principles on Business and Human Rights, endorsed by the HRC, state: 'The responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate...[It] exists over and above compliance with national laws and regulations protecting human rights.'

Guiding Principle 13 expands on what the responsibility to respect entails:

522 Singh, K. 2015. *Report of the UN Special Rapporteur on the right to education on protecting the right to education against commercialisation* (Doc. A/HRC/29/30.)

523 GI-ESCR. 2016. *Human rights bodies statements on private education September 2014 – November 2017*. Synthesis paper, version 9.

524 See, for example, UN Human Rights Council. 2018. Resolution 8/4. *The right to education: follow-up to Human Rights Council* (Doc. A/HRC/38/L.13.)

525 CESCR General Comment 13 para.29.

526 CRC. 2013. *General Comment 16: State obligation regarding the impact of business sector on children's rights* (Doc. CRC/C/GC/16.).

527 CESCR. 2017. *General comment 24: State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities* (Doc. E/C.12/GC/24.)

528 UN Human Rights Council. 2011. *UN Guiding Principles on Business and Human rights*. OHCHR. (HR/PUB/11/04.)

*The responsibility to respect human rights requires that business enterprises*

- (a) *Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;*
- (b) *Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.*

Guiding Principle 15 sets out the policies and processes that businesses should adopt in order to respect human rights:

*In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including:*

- (a) *A policy commitment to meet their responsibility to respect human rights;*
- (b) *A human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;*
- (c) *Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.*



**Box 4.4 Further information:  
The challenge of private actor  
involvement in education**

The last twenty years have witnessed an unprecedented increase in private providers of education. Countries like Kenya have gone from a 3% share of private schools in 1999 to over 30% in 2011,<sup>529</sup> while in Morocco the share of private schools has tripled between 2000 and 2012.<sup>530</sup>

529 Global Initiative for Economic, Social and Cultural Rights (GIESCR). 2015. *Kenya's support to privatisation in education and its impact on discrimination and segregation.*

530 GIESCR. 2018. *Private Actors in Education: Morocco.*

- Private actor involvement in education comes in many different forms, including:
- traditional private schools catering to the elite
- low-cost, profit-making schools targeting low-income households
- large-scale commercial investments in private school chains
- privatization of education services, such as testing, textbooks, and school lunches
- the adoption of private sector management techniques in the public education sector
- community and faith-based schools
- private tutoring
- home schooling

While private involvement in education is permissible under international human rights law, there is a growing body of evidence suggesting that it can have detrimental impacts on the enjoyment of the right to education, including concerns about: discrimination and segregation, the quality of education being provided, lack of transparency and accountability, and misuse of resources.

There are particular concerns about low-cost private schools which often exist because of government failure to ensure a free and quality public education system, itself a serious human rights issue, leaving parents little choice but to send their children to such schools, irrespective of the quality offered or financial impact on the family.

Profound changes to how education is delivered have shifted it from being predominantly a public service to an increasingly commodified one bringing with it the need to ensure that private actor involvement does not breach the right to education.

Since 2015, various education stakeholders have been working together to facilitate the development by experts of human rights guiding principles (referred to as the 'Guiding Principles'). These would compile and clarify states' existing obligations as they relate to private actors in education and provide guidance on how to implement the right to education in the context of

the rapid expansion of private sector involvement in education. The intention is for the text to be the normative reference point and policy tool on the issue of private involvement in education.

The Guiding Principles are expected to be adopted in 2019.

For further information see RTE's page *FAQs on the 'Human rights guiding principles on states' obligations regarding private schools'* <http://bit.ly/FAQPrivateSchools>



#### Box 4.5 Further reading: Privatization of education

UNESCO. 2015. Working papers on Education Policy: *Overview of the role of private providers in education in light of the existing international legal framework: investments in private education: undermining or contributing to the full development of the human right to education?* <https://unesdoc.unesco.org/ark:/48223/pf0000243823>

UNESCO. 2015. Working Papers on Education Policy: *The Privatization of education in developing countries: evidence and policy implications* <https://unesdoc.unesco.org/ark:/48223/pf0000243824>

Singh, K. 2015. *Report of the UN Special Rapporteur on the right to education on protecting the right to education against commercialisation* (Doc. A/HRC/29/30.)

Singh, K. 2015. *Report of the Special Rapporteur on the right to education on public-private partnerships and the right to education* (Doc. A/70/342.)

Alston, P. 2018. *Report of the Special Rapporteur on extreme poverty and human rights on privatisation* (Doc. A/73/396.)

RTE's page *Privatisation of education* <http://www.right-to-education.org/privatisation>

GIESCR's page *Private actors and education* <https://www.gi-escr.org/private-actors-social-services/education/>

## 4.6 Education in emergencies<sup>531</sup>



### Box 4.6 Definition: Emergencies

*Emergency situations affecting education are defined as all situations in which man-made or natural disasters destroy, within a short period of time, the usual conditions of life, care and education facilities for children and therefore disrupt, deny, hinder progress or delay the realization of the right to education. Such situations can be caused by, inter alia, armed conflicts both international, including military occupation, and non-international, post-conflict situations, and all types of natural disasters.*<sup>532</sup>

Education is a human right to which everyone is entitled, at all times. However, in emergencies states often encounter difficulties in guaranteeing and protecting the right to education, particularly for already marginalized vulnerable groups, for instance, persons with disabilities. This may be due to loss of power and the lawlessness that ensues, the destruction of infrastructure or because of the redirection of resources. In any case, emergencies lead to an increased likelihood that the right to education will be violated. It is therefore important that international law and the international community act to minimize and ameliorate the harmful effects of emergency situations.

In emergencies, human rights law applies across all contexts; people do not lose their human rights because of conflict, famine, or natural disasters. Formally, the right to education is non-derogable, which means states are not permitted to temporarily limit its enjoyment during a state

<sup>531</sup> This section is based on RTE's page *Education in emergencies* <http://www.right-to-education.org/education-emergencies> (Accessed 8 November 2018.)

<sup>532</sup> Committee on the Rights of the Child. 2008. *Day of General Discussions on "The Right of the child to education in emergency situations" Recommendations*, para. 2.

of emergency. However, ICESCR does have a limitations clause, which reads:

*The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.*<sup>533</sup>

In practice, states may limit the enjoyment of the right to education, but CESCR states any derogation would place the burden on the state to justify any such limitations.<sup>534</sup> Nevertheless, states would still be bound by their minimum core obligations (see section 4.2.c).

In addition, depending on the nature of the emergency, different areas of international law may also apply. *Vis-à-vis* the right to education these are: international human rights law, international humanitarian law (or the law of armed conflict), international refugee law and international criminal law.<sup>535</sup> In addition 'soft law' instruments such as the Safe Schools Declaration (2015)<sup>536</sup> would also apply.

Additionally, during emergencies, a state's ability to guarantee the right to education may be compromised and other actors (the UN, NGOs, other states, etc.) are obliged to offer international assistance and cooperation (see section 4.2.d).

During emergencies education is not generally seen as being immediately life-saving, yet the value of education to those affected by emergency situations should not be underestimated and is consistently highlighted by parents and learners themselves as crucial

in bringing stability, emotional and physical protection, and continuity.<sup>537</sup> In the medium-term, education can help child soldiers, internally displaced persons, migrants, and refugees and all those affected by emergencies to reintegrate back into society. In the long-term, education may play a role in preventing emergencies.



#### **Box 4.7 Further reading: The right to education in emergencies**

Inter-Agency Network for Education in Emergencies (INEE). 2010. *Minimum Standards for Education: Preparedness, Response, Recovery*.

The *INEE Minimum Standards Handbook* is a global tool that articulates the minimum level of educational quality and access in emergencies through to recovery. It contains 19 standards derived from right to education provisions as expressed in human rights, humanitarian and refugee law. Key actions and guidance notes accompany each standard.

RTE's page *Education in emergencies* <http://www.right-to-education.org/education-emergencies>

533 ICESCR Article 4.

534 CESCR General Comment 13, para. 42.

535 See Chapter 2 for information on these areas of law.

536 Safe Schools Declaration (adopted 29 May 2015).

537 For more information on the importance of education in emergencies, see: Save the Children. 2015. *What do children want in times of emergency and crisis? They want an education.*

## Summary

States are the primary duty-bearer of the right to education. This means states have legal obligations to ensure the full enjoyment of the right to education.

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Legal obligations arise from a variety of sources.

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Obligations under the law on treaties require states to respect their legal commitments to treaties.

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Under conventional law, obligations on states include the progressive realization of the right to education, the resorting to maximum available resources to realize the right to education, the principles of retrogression and non-discrimination.

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Certain aspects of the right to education are subject to obligations of immediate effect which require states to take immediate action.

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Minimum core obligations prioritize certain content of the right to education without which right-holders are considered to be deprived of the right to education.

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Legal obligations require that steps are taken by states at both domestic and international levels.

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The 'tripartite typology' to *respect, protect, and fulfil* provides the most important and widely used framework for understanding and clarifying states' legal obligations.

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Non-state actors, including intergovernmental organizations, civil society, and business enterprises, have responsibilities to respect the right to education.

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A violation arises when a state fails to comply with its human rights obligations.

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States still have legal obligations to implement the right to education during emergencies.

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## Ask yourself

- ➔ Does your country allocate the maximum available resources towards the realization of the right to education?
  
- ➔ Is your country aware of its minimum core obligations such as respect for the principle of non-discrimination and providing free and compulsory primary education. How are they implemented?
  
- ➔ How does your country regulate and monitor non-state actors and ensure they respect the right to education?
  
- ➔ Has your country developed credible, time-bound, and fully costed national plans of education for ensuring free and compulsory primary education and progressively free secondary and higher education?
  
- ➔ Is your country affected by conflict? If so, what measures have been taken to ensure the right to education is implemented and that education continues?

# Chapter 5:

The right to education and

SDG4-Education 2030

## Key questions

What is SDG4-Education 2030?

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What is the relationship between the right to education and SDG4-Education 2030?

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How do states commit to SDG4-Education 2030?

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How can the right to education be used to ensure the concrete implementation of SDG4-Education 2030 and vice versa?

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**The importance of education and its multifaceted nature is demonstrated by the fact that states commit to it in a number of ways and for a number of purposes. In addition to states' legal commitment to the right to education, they have also politically committed to education as an integral part of achieving sustainable development through the 2030 Agenda for Sustainable Development (2030 Agenda),<sup>538</sup> an ambitious and universal agenda aimed at: 'eradicating poverty in all its forms and dimensions, combating inequality within and among countries, preserving the planet, creating sustained, inclusive and sustainable economic growth and fostering social inclusion'.<sup>539</sup>**

The 2030 Agenda is broad and holistic in nature, covering systemic issues such as hunger, poverty, and inequality, as well as the broader governance issues of accountability, financing, and corruption. These issues are captured in the 2030 Agenda by seventeen Sustainable Development Goals (SDGs)<sup>540</sup> which every state has committed to achieving by 2030. Sustainable Development Goal 4 (SDG4) of the 2030 Agenda defines a new global education agenda:



**'Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all.'**

By committing all countries to ensure equal access to quality education at all levels SDG4 is

emphatically rights-based, unlike its predecessor the Millennium Development Goal<sup>541</sup> (MDG) on education, which narrowly focused on universal access to primary education (MDG2) and gender equality in primary, secondary, and tertiary education, (MDG3) and the Education for All (EFA) goal to ensure the right to basic education for all—neither of which were met by the 2015 deadline.<sup>542</sup>

The scope of SDG4-Education 2030 captures the multidimensional nature of the right to education. Notably it includes reference to the quality of education, focusing on enhancing effective and relevant learning. Further, SDG4 is a universal agenda applicable to all countries rather than just low-income and conflict-affected countries as the MDGs or mostly countries with high rates of out-of-school children as was the EFA goal.

As well as SDG4, the education community has committed to the Incheon Declaration,<sup>543</sup> adopted at the World Education Forum in May 2015, affirming their support to SDG4 and the 2030 Agenda. This led to the adoption of the Education 2030 Framework for Action,<sup>544</sup> which provides guidance on how countries, working with UNESCO and global partners, can implement SDG4. The term SDG4-Education 2030 encompasses both SDG4, as well as education-related targets across the other SDGs.<sup>545</sup>

SDG4-Education 2030 and the right to education must be seen as complementary and mutually

538 United Nations General Assembly (UNGA). 2015. *Transforming our world: the 2030 Agenda for Sustainable Development*. New York, UNGA (Doc. A/RES/70/1.)

539 Ibid., para. 13.

540 For more on the SDGs see the UN page *About the Sustainable Development Goals* <https://www.un.org/sustainabledevelopment/sustainable-development-goals/> (Accessed on 15 October 2018).

541 UNGA. 2000. Resolution 55/2. *United Nations Millennium Declaration* (Doc. A/RES/55/2.)

542 For more information on the achievements and shortcomings of the MDGs see for example: Global Education Monitoring Report/UNESCO. 2015. *Education for All 2000-2015: Achievements and Challenges*.

543 UNESCO. 2015. *Education 2030: Incheon Declaration and Framework for Action for the implementation of Sustainable Development Goal 4*.

544 Ibid.

545 UNESCO. 2017. *Unpacking Sustainable Development Goal 4 Education 2030*, Appendix 2.

reinforcing. Quality education is the foundation of sustainable development because it:

- facilitates the lifting of people out of poverty and prevents the perpetuation of poverty from generation to generation
- empowers marginalized groups
- enables the realization of other human rights
- reduces social, economic, and power inequality
- drives sustainable and inclusive economic growth
- facilitates peace, tolerance, and respect for human rights

Equally, the right to education cannot be fully realized without sustainable development because poverty—as well as being unjust, unnecessary, and a cause and consequence of human rights violations—is one of the biggest barriers for many people to exercise their right to education.

Efforts to realize sustainable development and the right to education must therefore be synchronized. Human rights can offer guidance for the implementation of the 2030 Agenda and, in turn, the 2030 Agenda can contribute to the realization of human rights.

This chapter explains the content of SDG4 and then shows how education can help meet the other SDGs. It explains the difference between the right to education and SDG4-Education in terms of type of commitment, and then makes the link between the two in terms of normative content.<sup>546</sup>

## 5.1 Targets and implementing measures

SDG4 has ten associated ‘targets’ at the global level that are universally applicable, of which the last three are called ‘means of implementation’. A full understanding of each of the seven targets and three means of implementation requires reference to the Incheon Declaration and the indicative strategies of the Education 2030 Framework for Action. The targets are to:



4.1 Ensure universal, free, equitable, and quality primary and secondary education



4.2 Ensure universal access to quality pre-primary education



4.3 Ensure equal access to quality technical, vocational, and tertiary education



4.4 Increase the number of youth and adults who have relevant skills, including technical and vocational skills, for employment, decent jobs and entrepreneurship



4.5 Ensure equal access to all levels of education particularly of marginalized groups



4.6 Achieve full literacy of youths and substantially increase literacy of adults

<sup>546</sup> This Chapter is based on the RTE's page *Education 2030* <http://www.right-to-education.org/issue-page/education-2030> (Accessed 25 October 2018.)



4.7 Ensure that all learners acquire the knowledge and skills needed to promote sustainable development, including, among others, through education for sustainable development and sustainable lifestyles, human rights, gender equality, promotion of a culture of peace and non-violence, global citizenship and appreciation of cultural diversity and of culture's contribution to sustainable development

The means of implementation are to:



4.a Build and upgrade education facilities that are child, disability and gender-sensitive and provide safe, nonviolent, inclusive and effective learning environments for all



4.b Substantially expand globally the number of scholarships available to developing countries, in particular least developed countries, small island developing states and African countries, for enrolment in higher education, including vocational training and information and communications technology, technical, engineering and scientific programmes, in developed countries and other developing countries



4.c Substantially increase the supply of qualified teachers, including through international cooperation for teacher training in developing countries, especially least developed countries and small island developing states

## 5.2 Education and sustainable development

Education is also central to the realization of the 2030 Agenda. While SDGs are 'integrated and indivisible and balance the three dimensions of sustainable development: the economic, social and environmental',<sup>547</sup> education, as a development multiplier, is recognized as essential to achieve the other SDGs. The Global Education Monitoring Summary Report<sup>548</sup> provides the following list linking education with other SDGs:

- *education is critical to lifting people out of poverty (SDG1)*
- *education plays a key role in helping people move towards more sustainable farming methods, and in understanding nutrition (SDG2)*
- *education can make a critical difference to a range of health issues, including early mortality, reproductive health, spread of disease, healthy lifestyles and well-being (SDG3)*
- *education for women and girls is particularly important to achieve basic literacy, improve participative skills and abilities, and improve life chances (SDG5)*
- *education and training increases skills and the capacity to use natural resources more sustainably and can promote hygiene (SDG6)*
- *educational programmes, particularly non-formal and informal, can promote better energy conservation and uptake of renewable energy sources (SDG7)*
- *there is a direct link among such areas as economic vitality, entrepreneurship, job market skills and levels of education (SDG8)*

547 UNGA. 2015., op. cit., Preamble.

548 UNESCO. 2016. *Global Education Monitoring Summary Report*, p. 8.

- education is necessary to develop the skills required to build more resilient infrastructure and more sustainable industrialization (SDG9)
- where equally accessible, education makes a proven difference to social and economic inequality (SDG10)
- education can give people the skills to participate in shaping and maintaining more sustainable cities, and to achieve resilience in disaster situations (SDG11)
- education can make a critical difference to production patterns (e.g. with regard to the circular economy) and to consumer understanding of more sustainably produced goods and prevention of waste (SDG12)
- education is key to mass understanding of the impact of climate change and to adaptation and mitigation, particularly at the local level (SDG13)
- education is important in developing awareness of the marine environment and building proactive consensus regarding wise and sustainable use (SDG14)
- education and training increase skills and capacity to underpin sustainable livelihoods and to conserve natural resources and biodiversity, particularly in threatened environments (SDG15)
- education is vital to facilitate and ensure participative, inclusive and just societies, as well as social coherence (SDG16)
- lifelong learning builds capacity to understand and promote sustainable development policies and practices (SDG17)

Explicit education-related targets can further be found in other SDGs such as those devoted to health, gender equality, sustainable consumption

and production, economic growth and decent work, as well as climate change mitigation.<sup>549</sup>



### Box 5.1 Further reading: Sustainable Development Goal 4

UNESCO. 2015. *Education 2030: Incheon Declaration and Framework for Action for the implementation of Sustainable Development Goal 4*.

UNESCO. 2017. *Unpacking Sustainable Development Goal 4 Education 2030*.

UNESCO. 2017/8. *Global Education Monitoring Report 2017/8: Accountability in education - Meeting Our Commitments*.

UIS/UNESCO. 2018. *Quick Guide to Education Indicators for SDG 4*.

UNESCO's page *Leading Education 2030* <https://en.unesco.org/education2030-sdg4>

RTE's page *Education 2030* <http://www.right-to-education.org/issue-page/education-2030>

## 5.3 Political versus legal commitment

Whilst the SDG4-Education 2030 commitment is laudable and expected to drive significant change, it is not legally binding for Member States, in contrast to states' extant legal obligations under international human rights law to implement the right to education.

The right to education is a human right guaranteed by international law. When states commit to the right to education they do so legally, through the ratification of human rights instruments.<sup>550</sup> SDG4-Education 2030, however,

<sup>549</sup> Hinzen, H and Schmitt, S. 2016. *Agenda 2030 - Education and Lifelong Learning in the Sustainable Development Goals*. International Perspectives in Adult Education / N° 75, DVV International.

<sup>550</sup> See Chapter 2 for further information on human rights instruments related to education.

does not create legal obligations. Rather states, through their political commitment, are expected to take ownership and establish a national framework, including: laws, policies, plans, and programmes for the effective implementation of SDG4-Education 2030. The form of commitment is not an issue as such and does not belie the importance of the 2030 Agenda. In fact, political commitment allows the SDGs to be highly ambitious, comprehensive, and to address issues that can only be tackled through collective action, such as climate change.

However, given that states have extant legal obligations under international human rights law,<sup>551</sup> the national frameworks established by states to guide the implementation of SDG4-Education 2030 must be in compliance with the right to education. See Chapter 2 on the sources of law guaranteeing the right to education and Chapter 3 on the normative content of the right to education.

States, in implementing their political commitments to SDG4-Education 2030, should do so in a manner which respects their obligations of immediate effect and progressive realization, and minimum core obligations. For example, the obligation to ensure free education at the primary level (target 4.1) and the obligation to ensure equal access to education in a non-discriminatory manner (targets 4.1-4.3, 4.5-4.6, 4.a-4.b) are both minimum core obligations and obligations of immediate effect, meaning these aspects of SDG4-Education 2030 must be prioritized in development policies. For content subject to progressive realization, such as target 4.1 which requires the completion of free secondary education, SDG4-Education 2030 effectively creates a 15-year time limit. See Chapter 4 on the legal obligations of states for further information.

551 The 2030 Agenda reaffirm states' commitment to and the importance of international law. UNGA. 2015., op. cit., paras. 18-19.



### Box 5.2 Further information: The Convention against Discrimination in Education as the cornerstone of SDG4-Education 2030

The UNESCO Convention against Discrimination in Education (1960, CADE)<sup>552</sup> has been recognized as the cornerstone of SDG4-Education 2030.<sup>553</sup> Other instruments elaborated by UNESCO further provide for the right to education in its various dimensions in addition to instruments adopted by the United Nations and its agencies and regional bodies. See chapter 2 for further information.

The UNESCO Strategy on standard-setting instruments in the field of education (2015-2021) aims at mainstreaming normative work and ensuring better articulation between normative and operational work in order to implement SDG4-Education 2030. In this respect, the UNESCO Strategy encourages Member States to use normative instruments as a strategic tool to achieve SDG4-Education 2030 objectives. Indeed, education-related instruments are powerful tools for promoting, advocating for and supporting the development of resilient future education and lifelong learning policies and systems.

The fact that states commit both politically and legally to education does not mean that measures taken to comply with the realization of either are mutually exclusive. Rather, these commitments aggregate and interact with each other, requiring states to ensure that efforts taken to achieve SDG4-Education 2030 and the broader 2030 Agenda are human rights compliant. This applies to both the normative content of such measures and the processes that underpin their formulation and implementation. The 2030 Agenda recognizes this and is a political reaffirmation of states' legal commitments to human rights.<sup>554</sup>

552 UNESCO Convention against Discrimination in Education (adopted 14 December 1960, entered into force 14 December 1960) 429 UNTS 93 (CADE).

553 For more information see: UNESCO. 2015. Decisions adopted by the Executive Board at its 197th session (Doc. 197 EX/Decisions) para. 5.

554 UNGA. 2015., op. cit., Chapter 8.



**Box 5.3 Further information:  
Sustainable development  
frameworks and economic and  
social rights**

It is important to note that while there is a connection between economic and social rights and sustainable development, they are not the same thing. State efforts to realize SDG4 are not automatically synonymous with compliance with the right to education under international law. In fact, as Philip Alston points out in his report on economic and social rights: 'States often invoke development and welfare initiatives when challenged to explain how they respect economic and social rights, however such initiatives may not protect and/or promote rights, in fact they may end up promoting the special interests of a targeted group.'<sup>555</sup>

**Box 5.4 Further reading:  
Operationalizing Sustainable  
Development Goal 4**

UNESCO has published an analytical synthesis reviewing the national laws in 11 countries and suggesting areas of legal reforms to support progress towards SDG4, see: UNESCO. 2017. *Operationalizing Sustainable Development Goal 4 - A review of national legislations on the right to education.*

## 5.4 Linking the right to education to SDG4

An important feature of SDG4-Education 2030 is that it is rights-based and seeks to ensure the full enjoyment of human rights as fundamental to achieving sustainable development. SDG4-Education 2030 largely aligns with the right to education and while it does not in itself

establish legal obligations, it articulates clear commitments which may require reforming national legislations in line with the right to education. This provides an opportunity to further link policy and legal reforms and ensure that practice adapts accordingly. Legal gaps resulting from incomplete national legal frameworks can be detrimental to the efforts made towards achieving SDG4-Education 2030 and securing the right to education, a lifelong right.<sup>556</sup>

**Box 5.5 Further information:  
UNESCO's advisory services**

In accordance with UNESCO's mission to support Member States in meeting their international commitments regarding the right to education and SDG4-Education 2030, UNESCO provides advisory services for law reform or development to Member States that are willing to engage in a review process of their legal frameworks to effectively enforce the right to education. See box 6.7 *Engaging with UNESCO* in Chapter 6, section 6.3.b for further information.

SDG4-Education 2030 gives particular emphasis to quality education and learning.<sup>557</sup> Often, states concentrate their efforts on expanding access to education, neglecting the need to improve learning outcomes through strengthening inputs, processes and evaluation of outcomes and mechanisms to measure progress.<sup>558</sup> As such, an increase in enrolment rates requires additional investment in learning materials, teachers, infrastructure, among others. Indeed, according to the Framework for Action, states should allocate to education at least 4%-6% of their GDP and 15%-20% of public expenditure.<sup>559</sup>

555 Alston, P. 2016. *Report of the Special Rapporteur on extreme poverty and human rights* (Doc. A/HRC/32/31.) para. 6.

556 UNESCO. 2017. *Operationalizing Sustainable Development Goal 4: A review of national education legislations.*

557 See Chapter 3, section 3.6 for more information on quality education.

558 Incheon Declaration, para. 9.

559 Framework for Action, para. 105.

The target to ensure free primary and secondary education (Target 4.1) is another example of mutual reinforcement. According to international law, states have the immediate obligation to provide free primary education but can progressively realize secondary education. With this new education agenda, states have effectively created a fifteen-year time limit to achieve twelve years of public and free primary and secondary education, of which at least nine years are to be compulsory.<sup>560</sup>

By including a commitment to equal access to quality early childhood development, care, and pre-primary education, SDG4-Education 2030 also reinforces the existing content of the right to education. The right to education applies to all stages of life, from early childhood through to adult education. However, while international human rights law does not clearly enshrine the right to early childhood care and education (ECCE), interpretations acknowledge its importance and recognize the ‘right to education during early childhood as beginning at birth and closely linked to young children’s right to maximum development’<sup>561</sup>. Furthermore, states when applying the right to education to their national contexts have increasingly committed to and implemented ECCE. The legal implications of SDG4-Education 2030 are clear when it calls for the introduction of at least one year of free and compulsory quality pre-primary education.

On the other hand, it should also be noted that human rights law states that technical, vocational and tertiary education should be made progressively free, while target 4.3 aims at ensuring that they are ‘affordable’. In this case, the right to education is more ambitious. However, if it cannot be made free due to resource constraints, states should at least ensure its affordability.



#### **Box 5.6 Further reading: Normative alignment of the right to education and SDG4**

RTE has mapped out the alignments and misalignments of the normative content of the right to education and SDG4 in its paper: RTE’s background papers for the Global Education Monitoring Report 2017/8: RTE. 2017. *Accountability from a human rights perspective: The incorporation and enforcement of the right to education in the domestic legal order*, paper commissioned for the 2017/8 Global Education Monitoring Report, *Accountability in education: Meeting our commitments*, pp. 10-18.

<sup>560</sup> Framework for Action, para. 30.

<sup>561</sup> See UN Committee on the Rights of the Child. 2005. *General Comment No. 7: Implementing child rights in early childhood* (Doc. CRC/C/GC/7/Rev.1.) (CRC General Comment 7) paras. 6 and 28. Though General Comments are not of themselves legally binding documents, they are widely regarded as useful contributions to the understanding of human rights instruments.

## Summary

The 2030 Agenda is a human rights-based political commitment to education with a 15-year time limit.

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The right to education is a legal commitment, enshrined in international law, with no time limit.

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The right to education and SDG4-Education 2030 mutually reinforce each other in order to ensure the concrete implementation of both.

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While there are no accountability mechanisms for SDG4-Education 2030, legal obligations owed to the content of SDG4-Education 2030 render the possibility for legal accountability through the enforcement of the right to education.

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# Chapter 6:

Domestic implementation  
of the right to education

## Key questions

What is *domestic implementation* and what does it mean?

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Why is it essential that states implement the right to education?

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How do states ratify or accede to a treaty?

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What is a *reservation*?

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What is *monism* and *dualism*?

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What are the different levels of protection within domestic legal order?

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How do constitutions and legislation protect the right to education?

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What are financial, administrative, and educational measures?

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**Under international human rights law (IHRL), states bear the legal obligation to make the right to education a reality for everyone living under its jurisdiction. States do this through the process of domestic implementation.**

Domestic implementation is the process whereby states turn their international legal (and political and moral) commitment to the right to education into enjoyment at the national level, through a variety of means, for instance, the introduction of legislation or allocating financial resources.

Under IHRL, states are accorded considerable freedom (or a wide 'margin of discretion') to determine how the right to education is to be most effectively implemented at the domestic level. IHRL, therefore, allows for a diversity of methods and means of implementation to fully realize the right to education. Notably, the International Covenant on Economic, Social and Cultural Rights (1966, ICESCR) requires states to implement the right to education 'by all appropriate means',<sup>562</sup> explicitly prescribing only one measure, the 'adoption of legislative measures',<sup>563</sup> which the Committee on Economic, Social and Cultural Rights (CESCR) has made clear is 'highly desirable' and in some cases 'indispensable' for the domestic implementation of the right to education.

The obligation to implement the right to education 'by all appropriate means' takes account of the fact that for each state what is appropriate will depend on a multitude of factors, for instance, the national education context, the state's resources and technical capacity, and the structures that will enforce any measures it takes.

Notwithstanding the wide margin of discretion accorded to states under IHRL, CESCR, in its authoritative guidance to states, sets out a clear vision of the objectives of domestic implementation and what that process should look like. This vision is based on a holistic reading of IHRL, and in particular on the right to an effective remedy enshrined in various human rights treaties.<sup>564</sup> According to CESCR, the right to education: 'must be recognized in appropriate ways within the domestic legal order, appropriate means of redress, or remedies, must be available to any aggrieved individual or group, and appropriate means of ensuring governmental accountability must be put in place.'<sup>565</sup> The reason for this is that for CESCR, there is a presumption that judicial and/or other effective remedies are 'appropriate means' in part because other means that states may employ 'could be rendered ineffective if they are not reinforced or complemented by judicial remedies.'<sup>566</sup> Here, it should be noted that the right to an effective remedy contributes enormously to the realization of the right to education.

In order for states to achieve the right to access justice and an effective remedy for the right to education, CESCR is of the view that it is 'desirable' for states to incorporate the right to education within their domestic law. States do this through the process of treaty incorporation, which is entirely determined by states' constitutional or legal arrangements. Again, given the variation in states' internal

562 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) Article 2 (1).

563 Ibid.

564 International Covenant on Civil and Political Rights Article 2 (3); International Convention on the Elimination of All Forms of Racial Discrimination Article 6; and Universal Declaration of Human Rights Article 8. In addition, see, UN Committee on Economic, Social and Cultural Rights (CESCR). 1998. *General Comment No. 9: The Domestic Application of the Covenant*. (Doc. E/C.12/1998/24.) (CESCR General Comment 9) para. 9.

565 CESCR General Comment 9 para. 2.

566 CESCR. 1990. *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)* (Doc. E/1991/23.) (CESCR General Comment 3) para. 3.

arrangements, IHRL does not prescribe any definite method of incorporation.

The right to education can be incorporated within states' domestic legal orders through a variety of different methods, each affecting the status of the right to education within the domestic legal order. The right to education can also be incorporated as different forms of law, affecting the level of legal protection.

The highest legal protection states can afford the right to education within the domestic legal order is constitutional protection. This allows, given certain other conditions and in particular, additional judicial measures (see Chapter 8, section 8.3.a), that the right to education is justiciable and fully enforceable in courts. These are prerequisites for securing the right to an effective remedy for violations of the right to education.

Constitution status however is, by itself, insufficient to fully implement the right to education; states should further implement by additional means, including legislation, which gives meaning and adapts the right to education to domestic conditions, and which is the second highest legal protection of the right to education.

There is also a vast array of other measures available to the state in order to domestically implement the right to education and that supplement legal measures, including: administrative, financial, policy, economic, social, and education measures.

This chapter first focuses on how states incorporate and translate their international commitments into national law, starting with the ratification and accession process.

The chapter then looks at the specific methods of treaty incorporation. That is, how a state might incorporate a human rights treaty into its

domestic legal order, taking into account the constitutional arrangements of the state.

The chapter then goes on to describe the specific means by which states may give effect to the right to education in the domestic legal order: constitutional, legislative, policy, and other means.

## 6.1 Ratification and accession

**Figure 6.1: Processes for becoming a state party to a treaty**



Before domestic implementation of a human rights treaty, a state must first 'consent to be bound by a treaty'.<sup>567</sup> There are two main processes by which a state becomes party<sup>568</sup> to a human rights treaty: ratification or accession.<sup>569</sup>

Ratification is a two-step procedure: first an authorized representative of the state signs the treaty, signalling its intent to become legally bound by the treaty (this intent is not in itself binding). At this stage states should refrain from acts that go against the object and purpose of the treaty. However, in some circumstances, signing may also create an obligation to take positive measures to guarantee the object and purpose of the treaty, such as amending domestic legislative provisions that conflict with the object and

567 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT).

568 Party to a treaty indicates that the treaty has entered into force, before entry into force States can only be 'contracting States' (Article 2 (1) (f) VCLT).

569 Defined by the VCLT as: 'the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty'.

purpose of the treaty.<sup>570</sup> The state then concludes the process by ratifying the treaty. Accession has the same legal effect as ratification but is concluded directly, without signing.

Formal procedures for accession and ratification vary according to the constitutional procedures of the state, but usually involve a formal decision made by the legislature, head of state, and/or government—adding democratic legitimacy to the process. The instrument of ratification or accession (usually a formal sealed letter) is then deposited with the relevant body, in the case of UN human rights treaties, the UN Secretary General. The treaty then enters into force immediately or according to the terms of the treaty.<sup>571</sup>

Once a treaty enters into force, states parties are legally bound to the provisions of that treaty and must act in good faith in observing the treaty ('*pacta sunt servanda*' or 'agreements must be kept').<sup>572</sup> The object and purpose of every human rights treaty is the full realization of the human rights contained therein. Ratification without subsequent action is highly unlikely to result in the full realization of the right to education. This is because the internal legal (education legal and policy framework) and institutional arrangements of states are likely to require alteration in order to align with IHRL. An important point here is that treaties create obligations independent from domestic law and in order to act in good faith, states cannot invoke extant national law as an excuse for noncompliance with a treaty.<sup>573</sup> Ratification, therefore, requires at a minimum, the modification of incompatible laws. For maximum protection conducive to the full realization of the

right to education, states must give effect to the relevant treaties 'by all appropriate means'.<sup>574</sup>



### Box 6.1 Further information: Reservations to treaties

When a state ratifies or accedes to a treaty, if the treaty permits, it may enter a reservation. The Vienna Convention on the Law of Treaties (1969, VCLT) defines a reservation as: 'a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State'.<sup>575</sup>

An example is Ireland's reservation to the International Covenant on Economic, Social and Cultural Rights, which reads:

*Ireland recognises the inalienable right and duty of parents to provide for the education of children, and, while recognising the State's obligations to provide for free primary education and requiring that children receive a certain minimum education, nevertheless reserves the right to allow parents to provide for the education of their children in their homes provided that these minimum standards are observed.*

Reservations enable states to accept a human rights treaty as a whole while being able to opt-out of applying certain provisions with which it does not want to or cannot comply. However, no reservation may go against the 'object and purpose' of the treaty. Further, a treaty may prohibit reservations or only allow for certain reservations to be made, for example, the UNESCO Convention against Discrimination in Education (1960)<sup>576</sup> does not permit reservations.

Reservations to the right to education or other relevant provisions (the non-discrimination clause, for example) are problematic as they can be evidence of a diminished commitment to the right to education because they signal a

570 See Corten, O. and Klein, P. (eds). 2011. *The Vienna Conventions on the Law of Treaties: A commentary*. Oxford, Oxford University Press.

571 VCLT Article 24.

572 Ibid., Article 26.

573 Ibid., Article 27.

574 ICESCR Article 2 (1).

575 Ibid., Article 2 (1) (d).

576 Convention against Discrimination in Education (adopted 14 December 1960, entered into force 22 May 1962) 429 UNTS 93 (CADE).



state's unwillingness to be bound by provisions that oblige them to take action on the right to education or provisions potentially affecting it.

Reservations should not be viewed as permanent. States should regularly review the reservations it has made to key human rights treaties guaranteeing the right to education and where possible withdraw them in order to ensure full legal commitment to the right to education.



### Box 6.2 Further information: Where to find the ratification status of major human rights treaties

For the core UN human rights treaties, the Office of the High Commissioner for Human Rights has developed a dashboard where you can search by treaty or by country and which includes any reservations that have been entered <http://indicators.ohchr.org>

For UNESCO instruments, a list of states parties is available for each convention under the relevant section [http://portal.unesco.org/en/ev.php-URL\\_ID=13648&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=-471.html](http://portal.unesco.org/en/ev.php-URL_ID=13648&URL_DO=DO_TOPIC&URL_SECTION=-471.html)

For instruments on refugees and stateless person, including reservations, see the UN treaty series [https://treaties.un.org/pages/Treaties.aspx?id=5&subid=A&clang=\\_en](https://treaties.un.org/pages/Treaties.aspx?id=5&subid=A&clang=_en)

For ILO instruments, NORMLEX allows users to search ratification status by country and convention <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:1:>

## 6.2 Methods of incorporation of the right to education within the domestic legal order<sup>577</sup>

The purpose of incorporating the right to education within the domestic legal order is to give effect to the right to education at the national level. CESCR states that: 'In general, legally binding international human rights standards should operate directly and immediately within the domestic legal system of each State party, thereby enabling individuals to seek enforcement of their rights before national courts and tribunals.'<sup>578</sup> However, in practice, states' internal arrangements mean that this is not always possible. For this reason, under IHRL, states can choose the specific methods by which a human rights treaty is incorporated within their domestic legal system, as well as the status of the treaty within their national law.

The method of incorporation can vary widely between states and is influenced by multiple factors relating to the historical, political, and legal culture of the country, often depending significantly on the approach the individual state has taken generally to incorporate treaties in its domestic legal order.<sup>579</sup> These include 'dualist', 'monist, and 'hybrid' approaches.

It is important to understand a state's approach to treaty incorporation for a number of reasons, including to:

- ascertain how the right to education may be domestically incorporated in the future
- identify whether the right to education is part of national law

<sup>577</sup> The following section is based on RTE. 2017. *Accountability from a human rights perspective: The incorporation and enforcement of the right to education in the domestic legal order*, paper commissioned for the 2017/8 Global Education Monitoring Report, *Accountability in education: Meeting our commitments*, pp. 22-29

<sup>578</sup> CESCR General Comment 9 para. 4.

<sup>579</sup> *Ibid.*, para. 6.

- Identify the status of the right to education in national law
- identify gaps in the protection of the right to education
- determine whether the right to education is enforceable in national courts



**Box 6.3 Tip: Identifying whether a treaty has been incorporated into domestic law**

State reports to UN treaty monitoring bodies (particularly the Committee on Economic, Social and Cultural Rights and the Committee on the Rights of the Child) and their corresponding concluding observations can be a useful means by which to identify whether a treaty has been incorporated. For example, in its reports to the Committee on the Rights of the Child, Ghana confirmed that, as a dualist state, it had enacted the Children’s Act 1998 (Act 560) to domesticate the Convention on the Rights of the Child (1989, CRC).<sup>580</sup> The Committee has acknowledged that the Children’s Act conforms to the CRC.<sup>581</sup>

## 6.2.a Dualism

States that follow the dualist approach consider national law and international law as two separate sources of law and, therefore, international treaties do not apply directly within the domestic legal order. In order for a treaty’s provisions to have effect domestically, it must first be implemented through legislation.

Historically, common law countries such as the United Kingdom, Australia, Canada, and India have adhered to the dualist system. For example, the adoption of the Human Rights Act

in 1998 incorporated almost all of the European Convention on Human Rights, including the right to not be denied an education, into English and Welsh law, and as a result is enforceable in national courts.

There are a variety of legal techniques (for example, transformation, adaptation, and adoption)<sup>582</sup> that dualist states use to incorporate treaties into national law which can sometimes make it difficult to clearly identify whether a treaty has been implemented. In reviewing states’ incorporation of the Convention on the Rights of the Child (1989, CRC),<sup>583</sup> CRIN have observed that the overwhelming majority of dualist countries have failed to recognize the CRC as part of the national law, instead developing piecemeal legislation on the various areas that the CRC addresses. CESCR has also noted this problem with dualist systems, ‘some states have transformed [ICESCR] into domestic law by supplementing or amending existing legislation, without invoking the specific terms of [ICESCR].’<sup>584</sup>



**Example 6.1: The Constitution of Ghana, 1992 (as amended)**

Ghana is a dualist state and has incorporated the right to education within its domestic legal order by the legal technique of ‘transformation’, that is the right to education, as guaranteed by ICESCR and the CRC is almost word for word incorporated into the national constitution.

Article 25

*(1) All persons shall have the right to equal educational opportunities and facilities and with a view to achieving the full realisation of that right -*

580 Committee on the Rights of the Child (CRC) *Third, Fourth, and Fifth Periodic Report of Ghana to the UN Committee on the Rights of the Child*, 9 June 2015 (Doc. CRC/C/GHA/35.) para. 6.

581 CRC Second Periodic Reports of States Parties Due in 1997, *Ghana*, 14 July 2005 (Doc. CRC/C/65/Add.34.) para. 1.

582 Venice Commission. 2014. *Report on the Implementation of International Human Rights Treaties in Domestic Law and the Role of the Courts* (CDL-AD (2014)036), p. 23. See also Sloss, D. 2011. *Domestic Application of Treaties*, pp. 4-5.

583 Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC).

584 General Comment 9 para. 6.

- (a) *basic education shall be free, compulsory and available to all;*
- (b) *secondary education in its different forms, including technical and vocational education, shall be made generally available and accessible to all by every appropriate means, and in particular, by the progressive introduction of free education;*
- (c) *higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular, by progressive introduction of free education;*
- (d) *functional literacy shall be encouraged or intensified as far as possible;*
- (e) *the development of a system of schools with adequate facilities at all levels shall be actively pursued.*

(2) *Every person shall have the right, at his own expense, to establish and maintain a private school or schools at all levels and of such categories and in accordance with such conditions as may be provided by law.*

## 6.2.b Monism

States that follow the monist approach consider that international law and national law form part of the same legal system and this means that when a treaty is ratified or acceded to it automatically becomes part of national law without the need for implementing legal instruments. States that generally follow the monist approach include: the Netherlands, the Czech Republic, Argentina, Austria, and Sweden.<sup>585</sup>

In relation to ICESCR, CESCR has indicated that a monist approach of direct incorporation was 'desirable', as it avoids the danger with dualism that rights may be modified to the detriment of rights-holders through the translation and legal drafting process.<sup>586</sup>

585 Weissbrodt, D and de La Vega, C. 2007. *International Human Rights Law: An Introduction*, University of Pennsylvania Press, p. 344.

586 CESCR General Comment 9 para. 8.

## 6.2.c Hybrid/mixed

Some states, known as 'hybrid' or 'mixed' systems, take both a monist and dualist approach, depending on the type of treaty and/or the source of international law. In South Africa such an approach is taken, with monism applied in relation to customary international law and dualism followed in respect of treaties.<sup>587</sup>

The Venice Commission has found that most states today belong to what could be described as a 'mixed' type.<sup>588</sup> Several other commentators suggest that no state perfectly conforms to either model<sup>589</sup> and most states fall somewhere in between monist and dualist systems.<sup>590</sup>



### Box 6.4 Tip: How to identify whether a ratified treaty has been incorporated directly or indirectly

Although identifying whether a state's general approach to treaties is monist or dualist can be a helpful starting point for understanding whether and how a human rights treaty has been incorporated, the utility of the monist/dualist dichotomy is limited due to the number of mixed systems and increasingly blurred lines of state practice. In many instances it will be necessary to carry out an analysis of the state's constitutional provisions to identify whether a treaty has been formally incorporated or informally implemented and, therefore, whether the provisions have legal effect at the national level.<sup>591</sup>

587 Barnard, M. 2015. *Legal Reception in the AU Against the Backdrop of the Monist/Dualist Dichotomy*, p.161.

588 Venice Commission. 2014. *Report on the Implementation of International Human Rights Treaties in Domestic Law and the Role of the Courts*, p. 7.

589 Weissbrodt, D and de La Vega, C. 2007. *International Human Rights Law: An Introduction*, University of Pennsylvania Press, p. 343.

590 Moore, J. 2012. *Humanitarian Law in Action within Africa*. Oxford: Oxford University Press, p. 30.

591 CRIN has found that less than half of all states (48%) that have ratified the CRC have fully incorporated it into national law. See CRIN. 2016. *Rights, Remedies & Representation: Global Report on Access to Justice for Children*, p. 7.

The simplest starting point for such an analysis is to check whether the state's constitution has an 'incorporation clause'.<sup>592</sup> This is one of the most common legal techniques for incorporation in monist systems and the wording of the clauses is quite standardized.<sup>593</sup> For example, in the Constitution of Albania<sup>594</sup> Article 122 states:

1. *Any international agreement that has been ratified constitutes part of the internal juridical system after it is published in the Official Journal of the Republic of Albania. It is implemented directly, except for cases when it is not self-executing and its implementation requires issuance of a law*

Another legal technique for incorporation is for national laws or other domestic legal acts to include concrete references to the specific international treaty, giving legal force to the treaty within the domestic legal order. Less commonly, the incorporation of international treaties may be based on case law.<sup>595</sup>

As the wording of Albania's incorporation clause suggests, even if a state is ostensibly 'monist' it does not follow that a particular treaty can be automatically directly applied by national courts. It may be necessary for the court to first establish whether the treaty, or the relevant provisions of the treaty, are self-executing, which can depend upon whether the court considers the provisions to be 'specific' enough to be applied without national implementing legislation. On this issue CESCR has stressed that:

*It is especially important [for courts] to avoid any a priori assumption that...[ICESCR] norms should be considered to be non-self-executing. In fact, many of them are stated in terms which are at least as clear and specific as those in other human rights treaties, the provisions of which are regularly deemed by courts to be self-executing.*<sup>596</sup>

592 The Toronto Initiative for Economic and Social Rights' Constitution Reports are a useful resource for identifying whether a country's constitution has an incorporation clause.

593 Venice Commission, *op. cit.*, p. 8.

594 Constitution of Albania (1998, amended 2015).

595 For example, the Swiss Federal Court has declared that international treaties constitute part of the national legal order (see the leading case of Frigerio BGE 94 I 669, S. 678 E. 6a. [1968]).

596 CESCR General Comment 9 para. 11.

In its authoritative guidance, CESCR explicitly states that many aspects of the right to education are 'capable of immediate application by judicial and other organs in many national legal systems. Any suggestion that the provisions indicated are inherently non-self-executing would seem to be difficult to sustain'.<sup>597</sup>

A further practical point is whether the state requires the ratified treaty to have been published before it can be considered officially incorporated. In Benin, for example, after the Convention of the Rights of the Child had been ratified but before it had been published, the Constitutional Court found that it was not part of Benin's positive law as it had not been published and was not, therefore, directly enforceable. Benin subsequently published the CRC in the Official Gazette in 2006.<sup>598</sup>

There are also other, more informal, methods of treaty incorporation.<sup>599</sup> For instance, a number of commentators have noted an apparently growing trend in some traditionally dualist systems of domestic courts utilising unincorporated international treaties to interpret domestic statutes or constitutional provisions.<sup>600</sup>

## 6.2.d Status of the treaty in the domestic legal order

Once the right to education is recognized as part of the domestic legal order, the next question to ask is what status it holds in the domestic legal hierarchy. The importance of incorporating the right to education is that it ensures it is applicable at the national level and allows it to override conflicting law, making it an effective way of enforcing the right. However, the adherence of a state to monism does not automatically signify superiority of international law over national law. Again, in some instances the constitution will explicitly stipulate the status of international

597 CESCR General Comment 3 para. 5.

598 CRIN. 2014. *Access to Justice for Children: Benin*.

599 See RTE., *op. cit.*, p. 28.

600 See, for example, Waters, A. 2007. *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*; Sloss, D. 2011. *Domestic Application of Treaties*; and *Ibid.*, p. 14.

treaties, sometimes by affording them the same status as the constitution itself or by stating that international treaties prevail over domestic law. The Constitution of Argentina,<sup>601</sup> for example, explicitly lists those treaties on which it confers constitutional status, while the Constitution of the Plurinational State of Bolivia<sup>602</sup> explicitly states that international human rights treaties shall prevail in the internal legal order. However, in some instances the constitution may be silent or unclear on the status of international treaties in which case the issue may have been the subject of judicial interpretation. For example, the Peruvian Constitutional Court has clarified that human rights treaties have constitutional ranking.<sup>603</sup>

### 6.3 Means of incorporating the right to education within the domestic legal order

States can incorporate the right to education within the domestic legal order by according it the status of constitutional law or inferior forms law, such as legislation or statutory law.



#### Box 6.5 Further reading: Implementing the right to education

UNESCO. 2016. *Implementing the Right to Education: A Compendium of Practical Examples Based on the 8th Consultation of Member States on the Implementation of the Convention and Recommendation against Discrimination in Education (2011-2013)*.

### 6.3.a. Constitutional protection

The highest legal protection a state can afford the right to education within its domestic legal order is constitutional recognition. Currently 82% of national constitutions contain a provision on the right to education, varying in scope and enforceability.<sup>604</sup>

Constitutional protection is important because it offers the possibility, if supplemented by judicial measures,<sup>605</sup> for the highest domestic court (constitutional court or supreme court) to adjudicate on potential violations regarding the right to education. This means that judicial mechanisms can, if the right to education is *justiciable*, make a determination as to whether the state (or other duty-bearer) has complied with its human rights legal obligations (see Chapter 4), hold them to account by assigning responsibility and imposing sanctions for violations and transgressions, and ensure that appropriate corrective and remedial action is taken when required.<sup>606</sup>

An important characteristic of constitutional law is that it takes primacy within the domestic legal order, meaning that, in general, all other laws, policies, and state actions must be compatible. Laws and policies found contrary to the constitution ('unconstitutional') can be declared incompatible or struck down by courts.

Constitutional protection is also more enduring than legislation which ensures robust protection from changing political whims.

601 Constitution of Argentina (1853, amended 1994) Section 75.22.

602 Constitution of the Plurinational State of Bolivia (2009) Article 13.

603 Micus, A. 2015. *Inter-American Human Rights Systems as a Safeguard for Justice in National Transitions*. Boston. Brill Nijhoff, p. 197.

604 See Chapter 8, section 8.3.a.ii for a complete list of states where the right to education is incorporated into the national constitution.

605 See Chapter 8, section 8.3.a for further information.

606 United Nations Office of the High Commission for Human Rights and Center for Economic and Social Rights. 2013. *Who will be accountable - Human Rights and the post-2015 Development Agenda*. New York and Geneva (DOC. HR/PUB/13/1.) p. 10.

The constitution should in ideal circumstances incorporate the right to education in a way that secures the same scope of protection as guaranteed under IHRL. In some instances, however, states choose to expand the normative content of the right to education, this is particularly true with respects to pre-primary education, which is unfortunately not afforded the prominence that it should be under IHRL, and free education. For instance, in the Russian Federation, the constitution stipulates that all levels of education are free.

 **Example 6.2: The Constitution of the Russian Federation, 1993**


Article 43

1. *Everyone shall have the right to education.*
2. *General access and free pre-school, secondary and secondary vocational education in State and municipal educational institutions and at enterprises shall be guaranteed.*
3. *Everyone shall have the right to receive on a competitive basis free higher education in State and municipal educational institutions and at enterprises.*
4. *Basic general education shall be compulsory. Parents or guardians shall ensure that children receive a basic general education.*
5. *The Russian Federation shall establish federal State educational standards and shall support various forms of education and self-education.*

### 6.3.b Legislative protection

The next highest legal protection of the right to education is the enactment of legislation, typically, an Education Act. The importance of legislation is that it implements the constitutional provision, or in the absence of a right to education provision, is the primary legal means by which the right is recognized, if it is recognized as a legally enforceable right.

Laws are also enforceable in courts, however, laws are more easily repealed than constitutional provisions, offering less certainty, and therefore less legal protection.

 **Example 6.3: The Right of Children to Free and Compulsory Education (RTE) Act of India, 2009**

Following the landmark decision of the Indian Supreme Court in *Mohini Jain v Karnataka*,<sup>607</sup> which decided that the right to education was part of the constitutional right to life, a constitutional amendment was passed in 2002 guaranteeing the right to education as a standalone constitutional right in Article 21-A.

In 2009, in order to give effect to the newly codified right to education, the Indian parliament passed the RTE Act. The Act came into force in 2010 and provides that every child aged 6-14 is entitled to free and compulsory education in a neighbourhood school. The Act is a federal statute setting out the obligations of both the federal and state governments.

As a result of the RTE Act, India is one of the most receptive jurisdictions to right to education litigation. For further information on the status of domestic implementation, see: Right to Education Platform's website <http://righttoeducation.in>

Education legislation also ensures that the right to education is given full effect at the domestic level.<sup>608</sup> Constitutional provisions are usually brief, generally setting normative standards and ensuring that rights are codified. However, how these standards are met is normally elaborated through primary legislation which itself is further fleshed out by a particular form of legislation called 'regulation', or 'subordinate' or 'secondary' legislation. Effectively primary education

<sup>607</sup> *Miss Mohini Jain v State of Karnataka and Others* 1992 AIR 1858.

<sup>608</sup> In federal systems, such as the United States and Canada, where education lies within the powers of regional governments, there is likely to be some degree of variation in education laws and policies between the regions.

legislation adapts the right to education to the specific circumstances of the state, taking account of the legal, political, economic, social, and cultural factors, and regulation sets out the requirements, principles, and procedures of how to achieve the aims embodied in primary legislation.



#### Example 6.4: Ensuring national education laws are culturally relevant

In 2009, Bolivia amended its constitutional provision on the right to education to refocus education on being intracultural, intercultural, and plurilingual.<sup>609</sup> Following this, in 2010 Bolivia introduced the Avelino Siñani-Elizardo Pérez Education Law which mandates a new education model that is decolonising and ‘oriented towards cultural reaffirmation’ of all nations and peoples.<sup>610</sup> It emphasizes the importance of productive training, community involvement, and legitimising the knowledge and culture of indigenous peoples. These changes represent an attempt to adapt and implement the right to education in a culturally relevant way that recognizes the unique demographic characteristics of Bolivia, where indigenous peoples represent approximately 62% of the population.

Education Acts should reflect and align with the right to education guaranteed at the international level. States are not permitted, under the Vienna Convention on the Law of Treaties (1969, VCLT), to invoke their national law as a reason for noncompliance with their obligations under a treaty that they have ratified or acceded to. This means that states cannot enact laws that diminish the right to education and if their laws are incompatible, they must modify them.

609 The (Plurinational State of) Bolivia Constitution (2009) Chapter VI, Section 1, Articles 77-90.

610 Ley de la educación N° 070 ‘Avelino Siñani-Elizardo Pérez’ Artículo 3(2) [Education Law No. 070 ‘Avelino Siñani-Elizardo Pérez’ Article 3(2)].



#### Box 6.6 Tip: Reviewing education legislation and policies

To assist Member States in reviewing their legal and policy frameworks in view of strengthening the foundations of the right to education in national legal systems, UNESCO developed *The Right to Education - Law and Policy Review Guidelines*.<sup>611</sup>

These *Guidelines* focus on assessing the alignment of national constitutions, legislations, regulations and policies with international standards and provisions while identifying gaps, in order to pave the way for law reform. Special emphasis is given to the provisions for gender equality and inclusive education. The guidelines are intended for ministries of education in the review of the education legal and policy frameworks at country level. The review is to be participatory and conducted by experts who have a deep understanding and knowledge of the national educational system.



#### Box 6.7 Further information: Engaging with UNESCO: Legal review and technical assistance

UNESCO sets, develops and monitors education norms and standards in order to foster the implementation of the right to education at country level. Under its mandate, UNESCO supports Member States in meeting their international commitments regarding the right to education and Sustainable Development Goal 4 (SDG4) by ensuring that national legislation not only enforces the right to education but also creates an enabling environment for the realization of SDG4.

A law review exercise at regional scale was launched for the first time during 2010-2011, with a particular focus on the provisions for gender equality. This was done in an effort to sensitize countries about the importance of having rights-based, inclusive, gender sensitive education laws and to offer evidence-based advice and recommendations in an effort to generate demand for law reform. This led to the development of

611 UNESCO. 2014. *The Right to Education - Law and Policy Review Guidelines*. Paris, UNESCO.

*The Right to Education - Law and Policy Review Guidelines* (see the box 6.6).

In this context and in accordance with its strategy on standard-setting instruments in the field of education (2015–2021), UNESCO provides advisory services for law reform or development to Member States that are willing to engage in a review process of their legal frameworks to effectively enforce the right to education, capitalizing on its technical expertise and the tools and resources developed over the past years.

Upon the demand of the Member States, the advisory services are designed to:

- Provide a *legal review*, based on the *Guidelines*, which presents an overall assessment of the right to education at country level, and its compatibility with international and regional human rights instruments. The areas of compliance as well as differences and gaps in education norms, remaining challenges, and future priorities within the country's legal and policy framework and educational system as a whole, are identified under a rights-based approach. Based on the findings, advice and recommendations to improve the country's compliance with international standards are provided. These recommendations can stimulate national debates on legal reform and development.
- Provide *technical assistance* for the development of new, or a review of specific legislations. On the basis of national priorities, a proposal for legal reform is made in accordance to the international normative framework and SDG4 commitments.

In light of international commitments and state legal obligations under standard-setting instruments, UNESCO can support Member States to pave the way towards achieving the SDG4 targets and realizing the right to education for all.

## 6.4 Supplementary measures for the domestic implementation of the right to education

A robust and comprehensive legal framework guaranteeing the right to education is an indispensable part of the domestic implementation process, but is, by itself, unlikely to bring about the full enjoyment of the right to education at the national level. It is therefore likely that a state will have to employ multiple means to fully realize the right to education. This is because laws, while important, do not instantly change behaviour, particularly when cultural, economic, and social factors are at play. For instance, legislating compulsory primary education is often not enough to get all children in schools because factors such as poverty, rurality, and harmful gender stereotypes may act as barriers for many children. A state will have to address all barriers (identified through monitoring) in tandem with the introduction of legislation, augmented by policies and enforced by administrative and/or judicial mechanisms, to discharge its obligation to ensure the right to free and compulsory primary education is a concrete reality. This will also most likely require allocating sufficient financial resources and educational and administrative measures.

### 6.4.a Education policies and strategies

States should also implement the right to education through policies, strategies, plans, and programmes for action. Policies are informal (that is, not law) and set out a government's major objectives, defining the government's priorities and strategies to achieve its goals or the issues it wishes to address. As such, policies and strategies are changeable and have a limited lifespan. They are not enforceable in courts and are an unsuitable means to give legal effect to the right



to education. However, if they do not align with the constitution or national laws, they can be subject to review by a court.



### Example 6.5: Education policy in Nepal

In 2016, as a continuation of the School Sector Reform Plan (SSRP) 2009-2016, the government of Nepal developed the School Sector Development Plan (SSDP) 2016-2023 with a view to strengthening its efforts to ensure equitable access to quality education for all.<sup>612</sup> SSDP defines Nepal's priorities and goals in relation to education. It encompasses three key components for which different objectives are identified. These components include: basic education, secondary education, and literacy and lifelong learning. In addition, SSDP covers a number of cross-cutting themes related to the realization of the right to education including, among others, teacher and professional development and management, governance and management, institutional capacity development, examination and assessment, and ICT in education.

Education strategies to implement certain aspects of the right to education are required under IHRL. If states cannot guarantee free and compulsory primary education, they are obliged to 'work out and adopt a plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.'<sup>613</sup> In many countries the document in which such plans are laid out is the 'Education Sector Plan' or 'Education Strategy'.

612 Ministry of Education. 2016. School Sector Development Plan, 2016-2023. Kathmandu: Ministry of Education, Government of Nepal, v.

613 ICESCR Article 14; see also CESCR. 1999. *General Comment No. 11: Plans of Action for Primary Education (Article 14 of the Covenant)* (Doc. E/C.12/1999/4.) (CESCR General Comment 11.)

In order to comply with their obligations to progressively realize the right to free education at other levels, states are required to:

*At a minimum...adopt and implement a national educational strategy which includes the provision of secondary, higher and fundamental education in accordance with the Covenant. This strategy should include mechanisms, such as indicators and benchmarks on the right to education, by which progress can be closely monitored.*<sup>614</sup>



### Box 6.8 Tip: What national education strategies or sector plans should include

According to CESCR, national education strategies should meet the following criteria:<sup>615</sup>

- the process of formulation and implementation of the strategy should comply with human rights principles, such as participation, accountability and transparency
- the strategy should be based on a systematic identification of policy measures and activities as derived from the normative content of the right to education and corresponding state's obligations, including compliance with the aims of education according to human rights standards
- the strategy should give particular attention to the prevention and eradication of discrimination in access to education for girls, people with disabilities, indigenous peoples and national, ethnic and linguistic minorities, and other marginalized groups
- the strategy should also identify positive measures including a fellowship system to support people from marginalized groups, taking account of their specific educational and cultural needs and the obstacles they may experience in accessing and benefiting from education. This

614 CESCR General Comment 13 para. 52.

615 See CESCR General Comment 11; CESCR General Comment 13 paras. 49-54.

requires systematic analysis of disaggregated data on education outcomes and inputs

- the strategy should pursue the development of a system of schools at all levels, considering the role of educational facilities different from those provided by the state such as schools established and run by indigenous peoples and minority communities, as well as the private sector
- the strategy should define standards of educational quality, and transparent and effective mechanisms to monitor educational quality and results
- the strategy should set out a clear allocation of the responsibilities and a precise time-frame for the implementation of necessary measures
- the strategy should define institutional mechanisms including the coordination between relevant ministries and between the national and sub-national levels of government
- the strategy should also identify the resources available to meet the agreed objectives including building classrooms, delivering programmes, providing teaching materials, training teachers and paying them adequately. Budget allocations are crucial for the implementation of the right to education, and the public budget can be a powerful instrument for monitoring the implementation of the national strategy

Extensive guidance is available for countries seeking to develop education sector plans both from UNESCO's International Institute for Education Planning (IIEP)<sup>616</sup> and from the Global Partnership for Education (GPE).<sup>617</sup>

### 6.4.b Financial

A common problem with the domestic implementation of the right to education is not necessarily the absence of an effective legal and policy framework but insufficient resources to

properly fund its implementation. For instance, education laws and policies that address lack of access and improving education quality often require the building and subsequent inspection of schools, the training of teachers, and the distribution of textbooks. These measures all require sufficient resources. The fact is that all human rights require resources in order to be domestically implemented and the right to education is no exception. IHRL, therefore, obliges states to 'take steps...to the maximum of its available resources' in order to realize the right to education.<sup>618</sup> For some aspects of the right to education, notably ensuring non-discrimination and providing free and compulsory primary education, states cannot invoke a lack of resources, as these are considered 'minimum core obligations' and must be implemented immediately by states. International benchmarks suggest that states should commit at least 4% to 6% of gross domestic product and/or at least 15% to 20% of total public expenditure.<sup>619</sup>



#### Example 6.6: The Constitution of the Republic of Indonesia of 1945 (as amended in 2002)

##### Article 31

1. *Each citizen has the right to an education.*
2. *Each citizen is obliged to follow elementary education and the government has the duty to fund this.*
4. *The state shall give priority to the education budget by allocating at least twenty per cent of the state's as well as of regional budgets to meet the requirements of implementing national education.*

616 UNESCO International Institute for Education Planning (IIEP) <http://www.iiep.unesco.org/en> (Accessed 7 November 2018.)

617 The Global Partnership for Education (GPE) <https://www.globalpartnership.org> (Accessed 7 November 2018.)

618 See Chapter 4 on states' legal obligations for further information.

619 UNESCO. 2015. *Education 2030: Incheon Declaration and Framework for Action for the implementation of Sustainable Development Goal 4*, para. 14.

However, states reaching these benchmarks may still not be allocating sufficient resources so there is growing recognition of the need to look at the tax base of a country (for example, using tax-to-GDP ratio) and the macroeconomic (monetary and fiscal) policies pursued to ensure these are facilitating the delivery of the maximum of available resources.<sup>620</sup> This includes ensuring that austerity measures do not negatively impact on the right to education.<sup>621</sup>

Furthermore, there are also some international benchmarks for the reasonable allocation of budgets. (e.g. GPE's benchmark that basic education [primary and lower secondary education] should receive at least 45% of education spending) to prevent situations where the bulk of the education budget benefits a small elite in higher education and thus discriminates against the majority. It is also important to ensure that resources allocated to education are shared equitably to redress inequalities and discrimination and ensure the right to education of everyone, including marginalized groups. Ensuring that spending actually arrives in practice in disadvantaged areas is also important and may require investment in budget tracking and independent scrutiny.

States also have obligations to seek international assistance from other states in a position to provide resources, this includes multilateral institutions.<sup>622</sup> CESCR makes clear that maximum available resources include both domestic and international resources.<sup>623</sup> This means there is a corresponding responsibility for donors to provide international assistance to states

in order to implement the right to education. UNESCO statistics reveal that 2016 saw aid to education reach its highest level since records on disbursement were established in 2002. Although this is to be celebrated, UNESCO notes that: 'more remains to be done to ensure that aid goes where it is most needed.'<sup>624</sup>

In some states, governments are opening up the education sector to private involvement as a way to drive down its own costs. However, policies such as these can have a detrimental impact on the right to education, particularly where states fail to regulate private actor involvement (see Chapter 4, section 4.5.c).

### 6.4.c Educational

Education measures are important to change attitudes, break down cultural norms and prejudices that underlie discrimination, make key stakeholders aware of the right to education and relevant laws and policies, and empower rights-holders. Examples of education measures include: public awareness-raising campaigns; community outreach; human rights education in schools; and capacity-building of civil servants, teachers, school management, etc.

Education measures should support other measures, particularly administrative and legal measures. This is to make people aware of laws, regulations, administrative procedures and rules, and policies, and to support people's deeper acceptance of them. For example, the Convention on the Elimination of All Forms of Discrimination against Women (1979)<sup>625</sup> requires states to take all appropriate measures.<sup>626</sup>

620 See Chapter 4, section 4.2.a.i for further information on maximum available resources.

621 Sepulveda, M. C. 2011. *Report of the Independent Expert on the question of human rights and extreme poverty* (Doc. A/HRC/17/34.)

622 See Chapter 4, section 4.2.d for further information international assistance and cooperation.

623 CESCR General Comment 3 para. 13.

624 Global Education Monitoring Report. 2018. *Policy Paper 36: Aid to education: a return to growth?*, p. 11.

625 Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW).

626 Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13, Article 5.

- (a) *To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;*
- (b) *To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.*

For many, perhaps all, states, simply changing the law to eliminate discrimination against women and girls would not be enough to bring about compliance with the above provision. Education measures, directed at both men and women, would be required to change attitudes and dismantle persistent harmful stereotypes.

Other examples of educational measures can be found in:

The International Covenant on the Elimination of All Forms of Racial Discrimination (1965) which requires states to: ‘undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups.’<sup>627</sup>

The Convention on the Rights of Persons with Disabilities (2006) which requires states to adopt awareness-raising measures, which includes: ‘fostering at all levels of the education system,

including in all children from an early age, an attitude of respect for the rights of persons with disabilities.’<sup>628</sup>

See Chapter 3, section 3.6.b.i for information on human rights education.

## 6.4.d Judicial

Judicial measures complement legal measures and together they are vital for the legal enforcement of the right to education. This includes measures to ensure that cases concerning the right to education can be brought to courts and tribunals and heard by judges. This, in turn, requires states to put in place the necessary legal arrangements to make the right to education *justiciable*, that is capable of being adjudicated on, in both law and practice. Recognition in the domestic legal order is the first step (explained in the sections above), however, a whole range of measures also have to be instituted to create the enabling juridical culture that allows for right to education claims to be brought. See Chapter 8, section 8.3.a for further information.

## 6.4.e Administrative

Guidance on administrative measures for the domestic implementation of the right to education is the least developed by the various human rights bodies at the international and regional levels. However, administrative measures can refer to both administrative law measures and measures related to the administration of the state.

Administrative law is concerned with the organization, powers, duties, and functions of public authorities of all kinds engaged in administration; their relations with one another and with citizens and non-governmental

627 International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195, Article 7.

628 Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3, Article 8.

bodies; legal methods of controlling public administration; and the rights and liabilities of officials.<sup>629</sup> An important administrative measure is the judicial review of the lawfulness of acts and decisions made by public authorities, including on education matters.

Administrative remedies are also part of administrative law, and are non-judicial mechanisms that can provide relief, including: ombudspersons and national human rights institutions, and mechanisms provided by school boards/school management committees, district education offices, local education board, provincial education boards, and the ministry of education. Often administrative remedies must be exhausted before legal mechanisms are engaged. CESCR highlights the importance of administrative mechanisms:

*Administrative remedies will, in many cases, be adequate and those living within the jurisdiction of a State party have a legitimate expectation, based on the principle of good faith, that all administrative authorities will take account of the requirements of the Covenant in their decision-making. Any such administrative remedies should be accessible, affordable, timely and effective. An ultimate right of judicial appeal from administrative procedures of this type would also often be appropriate.*<sup>630</sup>

Administrative measures can also include those related to the administration of the state. In this case the ministry of education is the most relevant as it generally administers the education system (although this might not be the case in federal systems), however administrative measures may also be taken by the executive, for example, decrees, executive orders, and other inferior, non-legislative forms of law.

Administrative measures include: the monitoring of education and the collection of administrative data, regulations regarding teacher qualifications and deployment, codes of conduct for teachers, the means and mechanisms for parents to participate in school governance, and the inspection of the education system.

An example of an administrative measure is how Croatia provides teacher training:<sup>631</sup>

*Professional training programmes are conducted and organized by the Agency for Teacher Training and Education but may also be implemented by higher education institutions and entities from the civil sector. Sub-regulative provisions provide for the methods and procedure of the professional training of teachers, professors, teacher associates and principals.*

*Competent agencies conduct free professional training for all educational workers (educators, teachers, expert associates and principals). Training enables advancement in the profession by giving teachers higher credit points for the calculation of their wages at a certain rate of percentage. In 2011 a total of 1789 educational workers were promoted into the position of mentors and advisers.*

629 Page, E.C. and Robson, W.A. 2018. 'Administrative law', Encyclopædia Britannica.

630 CESCR General Comment 9 para. 9.

631 UNESCO. 2016. *Implementing the Right to Education: A Compendium of Practical Examples Based on the 8th Consultation of Member States on the Implementation of the Convention and Recommendation against Discrimination in Education (2011-2013)*. Paris, UNESCO, p. 126.

## Summary

Domestic implementation of the right to education is the process by which states turn their legal commitment to the right to education into actual enjoyment of the right to education by all.

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States must recognize the right to education within their domestic legal orders by incorporating human rights treaties.

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States should guarantee the right to education as a constitutional right and/or by enacting legislation.

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States can domestically implement the right to education through a variety of complementary measures, including policy, administrative, financial, judicial, and educational.

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## Ask yourself

- ➔ What international human rights instruments have been ratified by your country? Are there any barriers hindering completion of the ratification process of human rights instruments and how are these being addressed?
- ➔ Are measures, particularly legislative and policy, subject to public consultation?
- ➔ Is the right to education enshrined in constitutional law or in primary legislation? If so, to what extent?
- ➔ What proportion of GDP does your government allocate to education? What proportion of public expenditure does your government allocate to education? Do these figures meet international benchmarks?
- ➔ What policies does your government have in place? Do policy documents include a timeline and budget?
- ➔ How do national laws related to education translate into practice through policy frameworks, administrative measures, etc?

# Chapter 7:

Monitoring the right  
to education

## Key questions

What is human rights monitoring?

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What is the purpose of monitoring?

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What is the legal basis of state monitoring?

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What are human rights indicators?

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How should data be collected and analysed?

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Who should monitor?

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What are the monitoring obligations of states and which organs of government should monitor the right to education?

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Why should civil society monitor?

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What monitoring mechanisms exist at the national level?

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What monitoring mechanisms exist at the international level?

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What monitoring mechanisms exist at the regional level?

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How do human rights mechanisms monitor and what is the process?

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How is SDG4–Education 2030 monitored?

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**Human rights monitoring is not optional for states. States have legal obligations to monitor the right to education, firstly, as part of their obligation to domestically implement the right to education but also as part of their obligations to report on the measures they have taken to comply with their human rights' legal obligations to the relevant human rights bodies at the international and regional levels.**

The Office of the High Commissioner for Human Rights (OHCHR) defines monitoring as the process of systematically tracking and assessing a state's performance against its human rights obligations.<sup>632</sup> Monitoring is therefore the process that elucidates whether states are complying with their legal obligations, including whether progress has been made or stalled. However, monitoring is about more than just checking the implementation status of the right to education in any given state; it is a key activity for states to facilitate the domestic implementation of the right to education (see Chapter 6). Without this information states cannot move forward towards the full realization of the right to education and thus cannot be held accountable. Monitoring is therefore crucial for the realization of the right to education. This is particularly true for human rights like the right to education that require time and resources for their full domestic implementation, and where monitoring plays an enhanced role.

Other actors also undertake monitoring of the right to education. Civil society has a complementary human rights monitoring role, representing marginalized constituencies and alternative perspectives that states may otherwise neglect or be unaware of.

At the international level there are various mechanisms mandated to monitor the right to education, for instance, UN treaty bodies that assess states' compliance with core UN human rights treaties and likewise regional bodies that oversee implementation of regional human rights treaties. These processes additionally engage civil society.

Lastly, there are various other bodies that have responsibilities to monitor in order to ensure they contribute to the realization of the right to education and at a very minimum do not negatively impact the enjoyment of this right, principally, non-state actors, such as business enterprises and donors, and multilateral institutions that work together with states and civil society to solve specific education problems and will usually monitor the right to education in order to uncover where states most need support.

This chapter starts by looking at the process of monitoring the right to education, from using indicators to collecting and interpreting data.

The chapter then examines the roles of various actors in human rights monitoring (the state and its various organs, international mechanisms, such as UN treaty bodies, and regional monitoring mechanisms) and gives practical information on how to engage for both states and civil society.

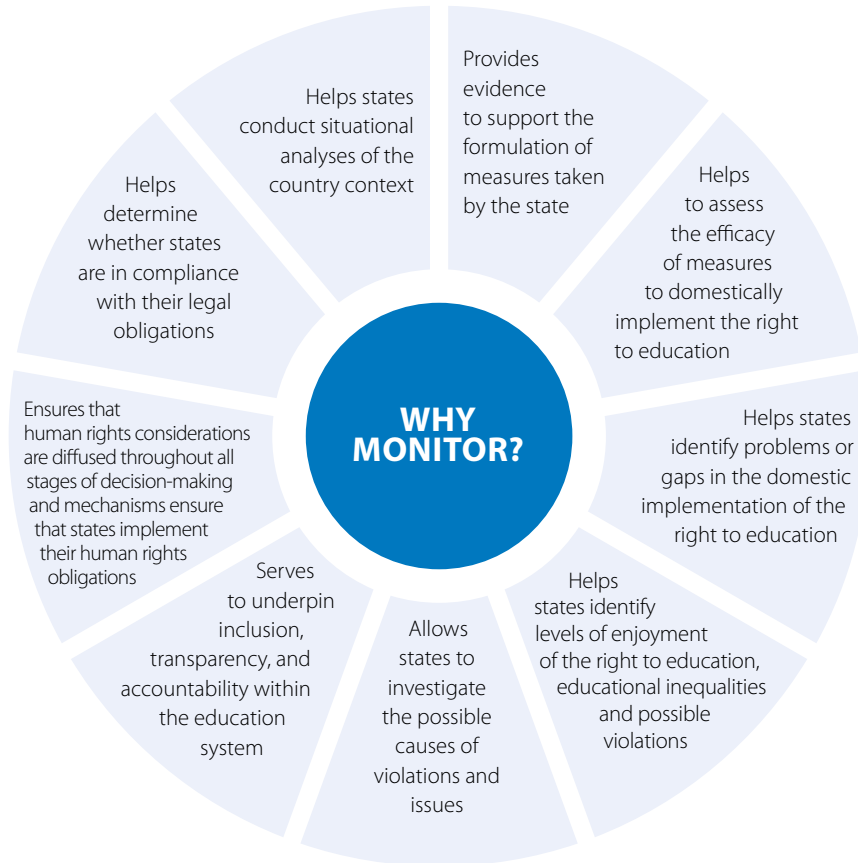
## **7.1 The main purposes of monitoring the right to education**

The ultimate purpose of all monitoring activities is to contribute to the realization of the right to education. However, monitoring is also good practice and serves to strengthen education systems by making them more responsive, efficient, and effective.

632 Office of the High Commissioner for Human Rights (OHCHR). 2005. *Economic, Social and Cultural Rights: Handbook for National Human Rights Institutions*. United Nations, New York and Geneva, p. 57.

Monitoring contributes to the realization of the right to education in the following ways:

**Figure 7.1: The purposes of monitoring**



**Monitoring shows whether states are complying with their legal obligations**, both international and national, including whether progress has been made or stalled, whether states are spending to the maximum available resources, whether immediate and minimum core obligations are being met, and whether discrimination in education has been eliminated.

**Monitoring helps states conduct situational analyses of the country context**, taking into account the unique political, social, economic, and

historical factors that may help or hinder domestic implementation.

**Monitoring provides evidence to support the formulation of measures taken by the state**, for example, in developing legislation, education sector planning, and the allocation of resources. At a minimum, states must make sure to assess any potential negative impacts of any proposed laws, policies, or measures through, for example, human rights impact assessments and cumulative human rights impact assessments.

**Monitoring helps to assess the efficacy of measures to domestically implement the right to education**, including if in fact they have the desired effect, if they positively affect the enjoyment of the right to education, what the shortfalls might be, and just as importantly, what works, why, and how solutions can be scaled-up.

**Monitoring helps states identify problems or gaps in the domestic implementation of the right to education** both in law (*de jure*) and in fact (*de facto*). For example, if a state does not prohibit discrimination in access to and through education, it is likely that many children will be denied their right to education. However, if a state does prohibit discrimination but a significant proportion of children remain out of school, the problem is not with the law but with the state's failure to properly implement the right to education through adequate policies and programmes. It is only by identifying problems—through human rights monitoring—that they can be addressed with suitable, targeted, and effective solutions.

**Monitoring helps identify levels of enjoyment of the right to education over time and uncover educational inequalities and possible violations**, including the scale and impact of the lack of enjoyment, in order to decide priority areas for action.

**Monitoring allows states to investigate the possible causes of violations and issues**, whether this be legal, policy failures, cultural or social issues, or lack of financial and resources, etc.

**Monitoring also serves to underpin inclusion, transparency, and accountability within the education system.** Monitoring processes should be open to interested and affected stakeholders, including teachers, parents, children, and civil society organizations. This allows for measures to address real issues experienced by those on the

ground and ensures that solutions come from the bottom-up.

**Monitoring has a broader focus: to ensure that human rights considerations are diffused throughout all stages of decision-making and mechanisms ensuring that states implement their human rights obligations.** Through monitoring, states can lay the institutional foundations to ensure compliance with human rights law before decisions that could adversely affect those rights are made.

## 7.2 The legal basis for monitoring the right to education

States are legally obligated to monitor the right to education. The first basis is as part of their obligations to domestically implement the right to education when they ratify or accede to a human rights treaty guaranteeing the right to education, where implementation is understood as an ongoing and iterative process. Under the International Covenant on Economic, Social and Cultural Rights (1966, ICESCR)<sup>633</sup> states are required, as part of their immediate obligations to eliminate discrimination,<sup>634</sup> to 'closely monitor education—including all relevant policies, institutions, programmes, spending patterns and other practices—so as to identify and take measures to redress any de facto discrimination. Educational data should be disaggregated by the prohibited grounds of discrimination.'<sup>635</sup>

633 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

634 See Chapter 4, section 4.2.b.ii for further information on states legal obligations regarding non-discrimination and Chapter 3, section 3.3 on the normative content of the right to education free from discrimination.

635 UN Committee on Economic, Social and Cultural Rights (CESCR). 1999. *General Comment 13: The Right to Education (Art. 13 of the Covenant)* para. 37. (Doc. E/C.12/1999/10.) (CESCR General Comment 13).

In addition, states are required to monitor as part of their immediate obligation to *take steps*<sup>636</sup> towards the full realization of the right to education. The Committee on Economic, Social and Cultural Rights (CESCR) clarifies that, at a minimum, states must ‘monitor the extent of the realization, or more especially of the non-realization, of economic, social and cultural rights, and to devise strategies and programmes for their promotion.’<sup>637</sup> With regards to the right to education specifically CESCR states:

*At a minimum, the State party is required to adopt and implement a national educational strategy which includes the provision of secondary, higher and fundamental education in accordance with the Covenant. This strategy should include mechanisms, such as indicators and benchmarks on the right to education, by which progress can be closely monitored.*

Further CESCR specifies that states’ immediate and minimum core obligations require them to maintain a transparent and effective system to monitor conformity with the aims of education, as set out in international law (see Chapter 3, section 3.2), throughout the entire education system, including in both public and private schools.<sup>638</sup>

Lastly, although not explicitly mentioned, Articles 13 (3) and (4) of ICESCR which provides for the freedom of individuals and bodies to establish and direct private educational institutions so long as these institutions conform to minimum education standards set or approved by the state, implicitly require that states monitor private schools in order to ensure that they meet the state’s minimum education standards.

The second legal basis for state monitoring is that international human rights treaties are generally monitored by a body or mechanism empowered or established to oversee compliance with that treaty. This typically creates mandatory obligations on states to submit reports on the measures they have taken to implement the right to education. This requires states to undertake initial and periodic reviews of the right to education at the national level through monitoring. Here, obligations to monitor for reporting purposes should not be seen as distinct from states’ obligations to monitor in order to domestically implement and fully realize the right to education. The *Compilation of Guidelines on the form and content of reports to be submitted by States parties to the International Human Rights Treaties* points out that states should take the: ‘opportunity to take stock of the state of human rights protection within their jurisdiction for the purpose of policy planning and implementation’<sup>639</sup> and sets out the following ways in which periodic reporting can support the full realization of the right to education:<sup>640</sup>

- (a) *Conduct a comprehensive review of the measures it has taken to harmonize national law and policy with the provisions of the relevant international human rights treaties to which it is a party;*
- (b) *Monitor progress made in promoting the enjoyment of the rights set forth in the treaties in the context of the promotion of human rights in general;*
- (c) *Identify problems and shortcomings in its approach to the implementation of the treaties; and*
- (d) *Plan and develop appropriate policies to achieve these goals.*

636 See Chapter 4, section 4.2.b.i for further information on the obligation to take steps.

637 CESCR. 1990. *General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the Covenant) (Doc. E/1991/23.) (CESCR General Comment 3), para. 11.*

638 CESCR General Comment 13 para. 59.

639 UN. 2008. *Compilation of Guidelines on the form and content of reports to be submitted by States parties to the International Human Rights Treaties (Doc. HRI/GEN/2/Rev.6.) para. 9.*

640 *Ibid.*, para. 10.

The *Compilation of Guidelines* also highlights that the process of reporting should be inclusive of alternative perspectives:

*The reporting process should encourage and facilitate, at the national level, public scrutiny of government policies and constructive engagement with relevant actors of civil society conducted in a spirit of cooperation and mutual respect, with the aim of advancing the enjoyment by all of the rights protected by the relevant convention.*<sup>641</sup>

Despite states' legal obligations to monitor the right to education, it is fair to say that systems and processes for monitoring human rights are generally not well-integrated into existing state apparatus. This is a huge barrier to ensuring states comply with their legal obligations under international law.

In the sections 7.7 and 7.8 is a list of human rights monitoring bodies to which states must report on a regular basis.

### 7.3 How to monitor the right to education

Monitoring the right to education should not be an *ad hoc* process but rather systematic and based on states' legal obligations under human rights law.

Monitoring requires the production or collection of data, based on human rights indicators. This means a wide breadth of data should be collected covering the education-related laws and policies in place; education outcomes or education enjoyment rates (such as enrolment rates); and indicators to assess education inputs, such as the resources allocated to education, the size of classrooms, and the number of pupils per teacher.

This data should then be analysed from a human rights perspective and used to support evidence-based decision-making.

The way human rights monitoring is conducted is also important. This is because, from a human rights perspective, the process is as important as the outcome. Monitoring should therefore align with the human rights principles of equality and non-discrimination, transparency and accountability, and inclusion and participation.

In terms of equality and non-discrimination, disaggregated data is required to capture information about the unequal enjoyment of the right to education.

Monitoring should be transparent, particularly when performed by the states, so it can be scrutinized. A transparent monitoring process lends itself to an accountable monitoring system.

In terms of participation and inclusion, monitoring should serve rights-holders and affected stakeholders must be able to meaningfully engage in the monitoring process.

<sup>641</sup> Ibid., para. 10.

**➔ Box 7.1 Further information: The Right to Education Monitoring Guide**

In 2016, the RTE launched the *Right to Education Monitoring Guide*, which provides a framework for monitoring the right to education broken down into six easy-to-follow steps, and the accompanying *Right to Education Indicators Selection Tool*, which allows users to select only the most relevant out of a bank of over 150 indicators that RTE has developed to measure every aspect of the right to education.



Source: RTE's page *Welcome to the right to education monitoring guide*. Right to Education Initiative © 2017. Retrieved 8 November 2018 from <http://www.right-to-education.org/monitoring/>. Screenshot by author.

The *Guide* and *Tool* allow users to systematically monitor education issues from a human rights perspective in a user-friendly, coherent, and systematic way. Together they offer users an unrivalled understanding of the monitoring process from research design, gathering credible and relevant evidence using right to education indicators, interpreting that data, and making strong policy recommendations, to successful action. More than that they are practical in their nature. The *Guide* and *Tool* enable users, including the state, civil society, and other non-state actors, to effect the changes necessary for the full enjoyment of the right to education.

**INDICATORS SELECTION TOOL**

Welcome to the *Right to Education Indicators Selection Tool*. This *Tool* will help you select, from our bank of over 150 indicators, the most relevant right to education indicators for your monitoring project. For further guidance, please refer to: [Introduction – Indicators Selection Tool](#) and the help icons in the top right-hand corner of each criteria. The *Tool* works best when you make a single query. If you are monitoring more than one issue, please enter the criteria separately.

SEARCH ALL INDICATORS

Disclaimer! This *Tool* is a work in progress. If you have any feedback on the way the *Tool* functions or the list of indicators, [Contact Us](#)

<p><b>1. Levels and Types of Education</b></p> <ul style="list-style-type: none"> <li>Pre-Primary (21)</li> <li>Primary (36)</li> <li>Secondary (36)</li> <li>Vocational Education (20)</li> <li>Higher Education (16)</li> <li>Adult Education (3)</li> </ul>	<p><b>2. Types of Indicator</b></p> <ul style="list-style-type: none"> <li>Outcome Indicators (17)</li> <li>Structural Indicators (10)</li> <li>Process Indicators (116)</li> </ul>	<p><b>3. Areas of Focus</b></p> <ul style="list-style-type: none"> <li>Quality of Education (64)</li> <li>School Safety and Violence (10)</li> <li>Learning Outcomes (7)</li> <li>School Infrastructure (10)</li> <li>Teachers (24)</li> <li>Learning Material (6)</li> <li>Content of Education (7)</li> <li>Access to Education (55)                     <ul style="list-style-type: none"> <li>Administrative Accessibility (4)</li> <li>Economic Accessibility (1)</li> <li>Physical Accessibility (4)</li> </ul> </li> <li>Free Education (17)</li> <li>Educational Freedom/Private Education (34)</li> </ul>	<p><b>4. Marginalised groups</b></p> <ul style="list-style-type: none"> <li>Women and Girls (41)</li> <li>Indigenous Peoples and Minorities (39)</li> <li>Persons with Disabilities (39)</li> <li>Persons with HIV/AIDS (29)</li> <li>Migrants, Refugees and IDPs (33)</li> <li>Persons in Detention (29)</li> <li>Persons Living in Poverty (36)</li> <li>Child Labourers (23)</li> </ul>	<p><b>5. Contexts</b></p> <ul style="list-style-type: none"> <li>Armed Conflict (Including Child Soldiers) (33)</li> <li>Natural Disasters (18)</li> </ul> <p><b>Policy Processes and Governance</b></p> <ul style="list-style-type: none"> <li>Transparency (8)</li> <li>Participation (7)</li> <li>Accountability (25)</li> <li>Decentralisation (4)</li> <li>Education Financing (13)</li> </ul>
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Source: RTE's page *Indicator Selection Tool*. Right to Education Initiative © 2017. Retrieved 8 November 2018 from <http://www.right-to-education.org/monitoring/tool>. Screenshot by author.

The *Right to Education Monitoring Guide* is organized around a monitoring framework based on international human rights law (IHRL), states' legal obligations regarding the domestic implementation of the right to education, as well as key guides on how to monitor human rights.<sup>642</sup>

The *Guide* comprises guidance on how to plan a monitoring project, followed by the four substantive steps outlined below, and lastly guidance for civil society organizations on human rights advocacy.

The four substantive steps which form the basis of the monitoring framework are:

1. identify deprivations and inequalities in the enjoyment of the right to education
2. analyse education laws and policies and their implementation
3. analyse the use and misuse of financial resources allocated to implementing education laws and policies
4. examine whether the domestic implementation of the right to education is conducted in line with the key human rights principles of transparency, participation, and accountability

642 Center for Economic and Social Rights (CESR). 2012. *The OPERA Framework: Assessing compliance with the obligation to fulfil economic, social and cultural rights*; United Nations Office of the High Commissioner for Human Rights (OHCHR). 2012. *Human Rights Indicators: A Guide to Measurement and Implementation* (Doc. HR/PUB/12/5.)

### 7.3.a Right to education indicators

*The range and complexity of what governments and other education stakeholders must do to achieve education progress is impossible without good data.*<sup>643</sup>

In order to monitor the right to education, data is required. According to the Asia Pacific Forum of National Human Rights Institutions and Center for Economic and Social Rights: 'Data is discrete pieces of information, such as age, ethnicity and income level. Evidence is when data is used to establish facts, test hypotheses or support arguments. The key to effective monitoring is to find the relevant data, analyse it and turn it into evidence.'<sup>644</sup> Good data forms the basis of good decisions.

Human rights indicators allow for the collection of data in order to measure various aspects of

human rights and are a vital tool to monitor domestic implementation, inform public policy, manage programmes, monitor progress and compliance with human rights, and measure overall performance and outcomes. The OHCHR highlights further uses of human rights indicators:

*indicators can help us make our communications more concrete and effective. Compiling indicators helps to record information efficiently and this, in turn, makes it easier to monitor and follow up issues and outcomes. Well-articulated indicators can improve public understanding of the constraints and policy trade-offs and help in creating broader consensus on social priorities. More importantly, when used properly, information and statistics can be powerful tools for creating a culture of accountability and transparency in the pursuit of socially valued progress.*<sup>645</sup>

In 2012, in response to a growing need, the OHCHR developed a framework for monitoring human rights that can be applied to different issues across a variety of contexts in its key

643 UNESCO Institute for Statistics. 2017. *The Data Revolution in Education*. UIS Information Paper No. 39, p. 13.

644 Asia Pacific Forum of National Human Rights Institutions and CESR. 2015 (updated 2018). *Defending Dignity: A Manual for National Human Rights Institutions on Monitoring Economic, Social and Cultural Rights*, p. 54.

645 OHCHR. 2012., op. cit., p. 1.

publication *Human Rights Indicators: A Guide to Measurement and Implementation*.

The framework recommends the development of *structural*, *process*, and *outcome* indicators. This configuration of indicators helps to assess the steps being taken by states in addressing their obligations, from commitments and acceptance of international human rights standards (*structural indicators*) to efforts being made to meet the obligations that flow from the standards (*process indicators*) and on to the results of those efforts (*outcome indicators*).

The framework focuses primarily on indicators that are, or can be, compiled by official statistical systems using administrative records and statistical surveys and includes quantitative and qualitative indicators.



### Box 7.2 Definitions: Qualitative and quantitative indicators

Human rights indicators can be both quantitative and qualitative.

Quantitative indicators capture information that can be measured and expressed numerically, for example, the literacy rate, out-of-school children rate, and teacher/pupil ratio. Typically, quantitative indicators are used to give a sense of the extent of the issue being monitored or the degree to which the state is complying with its legal obligations. It can also reveal patterns and trends in right to education enjoyment.

Qualitative indicators capture information that describes something that is not measurable, for example, categories or yes/no answers, such as whether a state has ratified a human rights treaty and whether discrimination is prohibited by law. Qualitative indicators can also capture information that is perception-based, for example, the perspectives of rights-holders and duty-bearers. Qualitative information includes non-written forms of evidence such as audio-visual materials, like photographs and videos. Qualitative indicators generate more nuanced information and are

therefore vital to understanding why a violation has taken place and its impact on people.

It is preferable that both types of indicators are used to give as clear a picture as possible. In some instances, where the project is narrow in scope and does not aim to be comprehensive, it may be acceptable to use either qualitative or quantitative indicators, depending on the type of information sought.



### Box 7.3 Further information: Monitoring the right to education using outcome-structural-process indicators

The *Right to Education Monitoring Guide* is based on Office of the High Commissioner for Human Rights' framework but inverts the order of the indicators to *outcome-structural-process* to facilitate the monitoring process (rather than simply identifying indicators).

Users are first introduced to *outcome indicators*. Outcome indicators measure enjoyment of the right to education, including the scope and magnitude of various forms of deprivations and inequalities in the field of education. For example, looking at primary completion rates (a measure of the obligation to guarantee free and compulsory primary education) in the United Republic of Tanzania, 2015, data shows that living in urban areas (compared to rural areas) increased the chances of completing primary education by just over 19% and that belonging to the richest subset of the population meant you were over a third more likely as the poorest subsection to complete primary education.<sup>646</sup> The data clearly shows there is an inequality, the extent of the inequality, and the direction of the inequality.

However, unequal levels of enjoyment do not tell us much about the reasons why the inequality exists. The next step, then, is to ascertain reasons that may explain the inequalities identified. For example, are they a result of absent, inadequate or ineffective law and policies, or a lack of implementation? To do this, users are shown how to assess a state's legal commitment to the right to education and examine the measures taken to make that commitment a reality.

646 UNESCO and the Global Education Monitoring report. *World Inequality Database on Education* (WIDE).



Commitment to the right to education is measured using *structural indicators*. Commitment requires the adoption of laws and policies and the existence of basic institutions. For example, incorporating the right to education as a constitutionally justiciable right demonstrates a clear commitment to the right to education. An absence of commitment means that there is no will or endeavour to implement the right to education, which is entirely the problem. However, in some instances states are committed to the right to education but gaps in commitment may be the cause of observed inequalities. For example, a state may have ratified relevant human rights treaties which have yet to be fully domesticated within the legal system.

For many, if not most, states, however, there is no problem in commitment to the right to education but rather difficulties in implementing it. To make an assessment of the gaps between commitment and implementation, the efforts states actually take to make the right to education a reality must also be assessed. This effort is measured using *process indicators*. Process indicators measure a state's efforts to transform its commitments into greater enjoyment of the right to education. They can be used to assess the quality, appropriateness, effectiveness, and efficiency of education laws and policies and their domestic implementation, as well as education inputs, such as teachers, learning materials, and school infrastructure. By linking an assessment of a state's efforts to the previously observed inequalities, the reasons why some people do not enjoy their right to education should become apparent.

The next step is to assess the sufficiency of the resources allocated to the implementation of education laws and policies identified as contributing to the unequal enjoyment of the right to education. This is done using a particular type of *process indicator*. Oftentimes, there is no fault with the laws and policies themselves but the resources needed to ensure the full implementation of laws and policies are not made available.

Finally, the last step is to determine whether the manner in which laws and policies are developed and implemented are in line with the principles of participation, transparency, and accountability—all important elements of a human rights-based approach. This is also done using both *structural* and *process indicators*.

### 7.3.b Collect data

Effective human rights monitoring is based on reliable and credible data (whether it is collected by the state, civil society, or other actors) and an analysis of this data using international human rights standards. Data collected in a methodologically unsound or unclear manner risks being easily dismissed. That being said, no data collection method is neutral, and reflects a political choice about whose perspectives are heard, what kind of analysis should be carried out, who the intended audience is, etc.

Data can either be collected from primary or secondary sources. Primary data is data collected through primary research, that is, from direct, first-hand experience, for example through interviews or questionnaires. Secondary data is data that has been previously collected and is not specifically for the project in question.

Most monitoring projects will rely on existing data (secondary data) and this comes with many benefits, for instance, it will be cheaper and the data might be more reliable. However, when relying on existing data, caution should be exercised as those who originally collected the data may have had reasons to distort it. For instance, if resource allocation from the government to public schools is tied to enrolment, schools may report higher enrolment figures in order to obtain greater resources, producing distortions in the estimates of student enrolments and the number of teachers or classrooms. Likewise, private schools may under-report income and expenditure in order to derive greater benefits or lower their tax liability. Therefore, whenever possible you should use a standard data source that is internationally accepted, for example, from the UNESCO Institute of Statistics,<sup>647</sup> and whenever doubts have been

647 See UIS's page <http://uis.unesco.org> (Accessed 8 November 2018.)

raised about the veracity of the data, you should assess its reliability.

It may also be worth considering alternative sources of data, such as academic data sets or monitoring projects conducted by civil society organizations.



#### **Box 7.4 Further information: States as data producers**

States, as part of their monitoring duties, should produce primary data on the right to education, which can be used by states, civil society, and other actors. However, caution must be exercised because official data is not always reliable. Relevant sources include:

- administrative data
- census data
- student assessment tests
- population surveys
- legal and policy documents

If secondary data is unavailable or only partially available, old, or not of very good quality it may be worth considering collecting primary data. This may be particularly necessary with regard to qualitative dimensions of the right to education, as it is crucial to learn about the perceived experience of those using the education system (i.e. children and parents). This type of information is typically unavailable and primary data may need to be collected. Methods for collecting primary data include:

#### *Population surveys*

Governments commonly use population surveys to gather information on various aspects of a population, including information related to education. However, it is also possible to produce your own survey to obtain data that is not gathered by the government surveys.

There are two types of population surveys that are particularly useful for monitoring the right to education: household surveys and children's surveys. These surveys can be carried out at national, provincial or local level.

Surveys allow for the collection of qualitative information and are particularly suitable when it is necessary to gather specific information from many individuals or households in a consistent way. It enables the gathering of evidence that can be readily counted and categorized and analysed statistically, helping to assess the scope of a problem (e.g. 47% of children who dropped out of school mentioned the cost of schooling as the key obstacle for access to education).

Population surveys also allow researchers to monitor actual practices. For example, child marriage is illegal in a number of jurisdictions and yet the practice continues to affect girls' access to education. Another common example is the charging of illicit fees despite the law guaranteeing free primary education.

A population survey may combine different types of questions, for instance on factual information (e.g. gender, income, ethnicity, etc), experiences in the education system (e.g. have you encountered any situations of discrimination because of your gender, ethnicity?), and behavioural motives (e.g. the reasons you dropped out of school). By combining these types of questions, you can gather data about specific marginalized groups. For example, you can show that a certain percentage of an ethnic minority reports that they dropped out of school because they experienced discrimination in school.

Bear in mind that although population surveys can be very useful, conducting such surveys requires a considerable level of technical expertise on survey methodologies (such as question design and sampling), time and resources.

### School surveys

Field visits to schools can help you gather data on a range of education inputs that affect the realization of the right to education, such as:

- school infrastructure (including level of reasonable accommodation for children with disabilities)
- learning environment, including language of instruction (and related difficulties encountered by children of language minorities)
- teaching/learning activities
- status of positive discrimination schemes (e.g. scholarships or specific incentives)
- teacher working conditions
- ancillary services delivered in the school (e.g. health check-up and school meals)
- the nature of the relationship between the school and the community overall

### Interviews/focus group discussions

Interviews with children, parents, teachers, head teachers and statutory bodies for community participation (e.g. Parent Teacher Associations) can help in identifying obstacles to educational attainment and strategies for overcoming these obstacles, and in making appropriate policy recommendations to governments. They are particularly helpful for obtaining more in-depth, qualitative information about a certain issue or to get a variety of perspectives on the same issue. Although interviews often lack the representativeness that population surveys can offer, it is possible to use interviews with a range of stakeholders as a primary source for a critical analysis from a human rights perspective of specific policies on education.

Conducting interviews with affected communities can also provide you with the personal stories of

an individual or family to use in your report. These testimonials or stories are very powerful tools in human rights monitoring and advocacy, showing the real impact of deprivations and inequalities in education.

When conducting interviews with rights-holders, such as children or parents, certain ethical and child protection considerations should be observed.



#### Box 7.5 Further information: The importance of disaggregated data

From a human rights perspective, collecting (and analysing) disaggregated data is crucial. Disaggregated data is that which has been broken down by sub-categories, for example, by gender, type of disability, region, or level of education. Disaggregated data can often reveal inequalities and form the basis for identifying patterns of discrimination. Inequalities across various segments of a population on various education outcome indicators often reveal that the chances people have to enjoy their basic rights to education are heavily shaped by the circumstances in which they are born and not by factors over which they have control. For instance, in many countries, being a girl, living in poverty, having an impairment, belonging to an ethnic minority or living in rural areas radically reduces the chances of obtaining a quality education—even more so when someone falls into multiple groups and experiences multiple forms of inequality.

For example, if a country's literacy rate is 90%, it may well be the case that the literacy rate is 80% for women and 100% for men. States cannot address this issue without addressing the gender inequality that underpins this statistic. It is imperative, therefore, that disaggregated data be collected for monitoring projects focused on discrimination against various groups. Even for projects where inequality and discrimination are not the primary focus, disaggregated data should be collected and analysed because it is good practice and because inequality and discrimination are often underlying factors in many situations, even when unexpected.

The nature of inequality and discrimination is that they often fly beneath the radar.

States are required to collect disaggregated data based on various relevant grounds of discrimination,<sup>648</sup> which will largely depend on the national context and the scope of the project. However, disaggregated data should be collected with extreme care to ensure it does not put certain groups at risk. In some instances, collecting data on people with sensitive characteristics, such as those belonging to a persecuted ethnic minority or people living with HIV can expose them to unnecessary risk. Such data should still be collected; HIV rates, for example, can yield important information on areas that are particularly affected and can help to shape more effective interventions. However, such data must be anonymized to protect the right to privacy of HIV-affected people. This means identifying information such as names, addresses and ages, particularly in contexts where stigma, persecution, and discrimination are a real threat, should not be shared. Ideally governments should put in place regulations to protect vulnerable groups when sensitive data is collected, used, and disseminated.

Another important consideration is considering whether the levels of disaggregation may contribute to discriminatory attitudes. For example, collecting data on the grounds of gender, where gender is understood as binary, may in some instances, contribute to the marginalization of people who identify as non-binary.



#### **Box 7.6 Further reading: Data collecting**

For further guidance on collecting data, see the *Right to Education Monitoring Guide* at sections 2.2 and 3.2.

For a compilation of data sources, see the RTE's page *Where to find information* <http://www.right-to-education.org/page/where-find-information>

### 7.3.c Interpret data and take action

Once data for right to education indicators have been collected and disaggregated, they must be analysed to identify whether states are meeting their legal obligations. This process requires identifying suitable benchmarks and comparing data to those benchmarks to reveal shortfalls in performance. Relevant benchmarks include:

- international human rights standards and other relevant areas of law
- legal and policy commitments by states to the right to education and education more generally
- nationally determined benchmarks
- past performance
- performance by a country of comparable level of development
- performance by comparator group, for disaggregated data

Any analysis will depend on many factors, such as the type of data and the aims of monitoring project. However, it is important that interpretation always takes into account the normative content of the right to education (Chapter 3) and what states' legal obligations are (Chapter 4).

Once an analysis has been made findings and recommendations should feed into existing state processes for education policy and sector planning.

If monitoring is conducted by civil society organizations (CSOs) then any analysis made should support wider advocacy aims. Here are a few questions to think about in terms of aligning evidence with advocacy:

- what is the problem I am trying to address?

<sup>648</sup> See Chapter 3, section 3.3.c and Chapter 4, section 4.2.b.ii for further information.

- who is involved in this problem (mapping stakeholders)?
- who has the power to change/influence this problem?
- what might your advocacy target want to hear and what will they find compelling?
- what do you want them to do/act on with this data?
- which monitoring or accountability mechanisms can you engage with, for example, UN treaty bodies? What kind of information or evidence do they require?



#### **Box 7.7 Further reading: Interpreting data**

For further guidance on interpreting data, see the *Right to Education Monitoring Guide* at sections 2.3-4 and 3.3-4.

## 7.4 Who monitors the right to education

Multiple actors monitor the right to education for different reasons. Some mechanisms, for instance states, civil society, and intergovernmental organizations (IOs), such as UNESCO and the World Bank all produce data. Some mechanisms scrutinize and assess the data produced, for instance, UN treaty bodies, the Universal Periodic Review, and regional mechanisms. However, some actors do both: the state, civil society, and IOs being the main examples.

In addition, most actors that monitor provide for mechanisms that affected and interested stakeholders can engage with. The next sections explain the monitoring roles of key right to education actors as well as what mechanisms are available.

## 7.5 State monitoring

States are the primary duty-bearer when it comes to the right to education. They are therefore the principal actor when it comes to the monitoring of the right to education.

Human rights monitoring should be embedded within states' existing monitoring systems, for example, the national statistical office or the ministry of education.

The following sections discuss the monitoring responsibilities of the various organs of the state as well as how they can contribute to the effective monitoring of the right to education.

### 7.5.a Executive

The executive is responsible for the execution of laws within a state. It must also ensure that laws are supported by policies and programmes, and that budgets are correctly prepared and executed, and their use is audited.

The most significant organ of the executive in terms of monitoring the right to education is the ministry of education (MoE). MoEs have various monitoring functions that serve to underpin accountability and provide the MoE with the necessary information to administer and improve the national education system.

The MoE usually has a significant input into the drafting of education legislation, as well as supplementary legislation, such as regulations. The MoE is also usually responsible for the implementation of education legislation and must monitor its implementation in order to ensure it is having the desired effect. This would include monitoring compliance with education laws and regulations, such as whether private schools are registered and follow relevant regulations regarding quality standards and evaluating the impact and efficacy of education laws.

MoEs must also formulate education policies and education sector plans to respond to the education issues they wish to address. The Global Education Monitoring (GEM) Report 2017/18 notes that:

*Education planning documents and processes are important tools for coordinating administrative entities responsible for education. They are also necessary for accountability. They set strategic priorities and targets, and they clarify the activities for which ministries, departments, agencies and institutions at different levels are responsible.*<sup>649</sup>

These plans should be developed in consultation with affected and interested stakeholders. The GEM Report 2017/8 notes that: 'Institutional mechanisms that grant more formal powers to stakeholders in the preparation process can strengthen accountability'.<sup>650</sup>

In order to formulate policies and plans, states must undertake regular reviews of the education sector. This should include the collection of data. Education policies themselves should also contain targets and benchmarks in order to track progress.

MoEs must also formulate and implement administrative measures as well as regulatory measures, for example, teacher codes of conduct, national curriculum guidance, teacher deployment policies, school governance regulations, student evaluation and assessments. Regulatory compliance is assessed by the vast majority of states, through school inspections. The GEM Report 2017/18 identifies school inspections as a, 'key part of country monitoring systems,' that, '[t]raditionally...liaised between decision-makers and school-level actors and monitored regulatory compliance.' However, 'Increasingly, inspectorates

function to improve school processes or outcomes.'<sup>651</sup>

MoEs, in their oversight of the education system, and to assess the performance of policies and the implementation of legislation, diagnose issues and compliance with regulation, should also collect education data such as enrolment rates, out-of-school children rates, student assessment results, etc. They should analyse this data using a human rights-based approach to determine, for example, whether there are patterns of discrimination.

MoEs, or other relevant bodies, should also produce national education monitoring reports. The GEM Report 2017/18 notes that: '[s]uch a document can demonstrate the executive's commitment to transparency and to communicating government expenditure, activities and results to citizens in an accessible manner.'<sup>652</sup>

Other executive organs also have a role to play in monitoring the right to education:

- the relevant ministry, usually the ministry of justice, must prepare national periodic reports to international and regional mechanisms, this includes collecting information from relevant ministries, drafting the report in consultation with civil society, and widely sharing the report
- national statistical offices, which collect, analyse, and share official statistics, including education-related statistics and SDG statistics
- the finance ministry which is responsible for overseeing the spending and execution of budgets by ministries of education, through audits

649 UNESCO. 2017/8. *Global Education Monitoring Report 2017/8: Accountability in education - Meeting Our Commitments*. Paris, UNESCO, p. 26.

650 Ibid., p. 28.

651 Ibid., p. 45.

652 Ibid., p. 35.

## 7.5.b Legislature

Legislatures (also known as ‘parliament’ or ‘congress’) have a crucial role to play in the promotion and protection of human rights.

The Inter-Parliamentary Union and the OHCHR puts it well when it says: ‘As the State institution which represents the people and through which they participate in the conduct of public affairs, parliament is indeed a guardian of human rights.’<sup>653</sup>

Legislatures generally have three functions: legislating, scrutiny of the executive, and representing the people. The first two functions are the most apposite in terms of state monitoring of the right to education, notwithstanding that of course legislatures are diverse and perform each function to greater or lesser degrees.

Firstly, legislatures are responsible for approving the ratification or accession to international human rights treaties guaranteeing the right to education and have a pivotal role in the domestic implementation of human rights treaties, for example, ensuring the right to education is incorporated into law. In this regard, legislatures can ensure that monitoring is a key part of human rights legislation, for instance, ensuring that legislation establishes a monitoring mechanism.

Legislatures also usually have responsibilities regarding the setting and/or approving of the budget. Legislatures should ensure that maximum available resources are allocated to the realization of the right to education. Further legislatures are usually empowered to monitor government spending, usually through public accounts committees. The GEM Report 2017/8 notes that:

*scrutiny by an independent legislature is the primary accountability mechanism to ensure that spending decisions are in line with national*

*priorities. Effective oversight requires legislatures having sufficient time to debate and scrutinize proposals and the political will, analytical capacity and power to veto or amend them.*<sup>654</sup>

When monitoring budgets and their execution, legislators should use human rights indicators. A good tool to monitor government expenditure is Step 4 of the Right to Education Monitoring Guide on analysing the use of resources for education.

Legislatures also have an important legislative scrutiny role. This allows legislators to monitor whether, and to ensure that, legislation is compliant with the state’s international human rights obligations. This role is usually performed by parliamentary committees. For instance, the UK Parliament’s Joint Committee on Human Rights and Finland’s Constitutional Law Committee both have as part of their mandate the responsibility to scrutinize legislation to ensure it conforms to international human rights law, including through reference to UN human rights bodies’ general comments and concluding observations and recommendations. Likewise, parliamentary education committees review education legislation and budgets.

As part of their oversight of the executive branch, legislatures can conduct enquiries or hearings into legal and policy failures of the executive.

Lastly, legislatures can play a role in ensuring that the executive takes its human rights commitments seriously, through, for example, following-up on UN human rights treaty body and other human rights mechanisms’ concluding observations and recommendations, monitoring the implementation of judgments from regional courts, ensuring that the executive submits national periodic reports on time and with the relevant information on the right to education.

653 Inter-Parliamentary Union and OHCHR. 2016. *Human Rights: Handbook for Parliamentarians No. 26* (Doc. HR/PUB/16/4.) p. 89.

654 UNESCO. 2017/8., op. cit., p. 28.

One way to strengthen parliaments' monitoring functions, and indeed general human rights protection and promotion functions, is to ensure that legislators and parliamentarians can understand and apply human rights in their everyday work. A useful handbook for this is the Inter-Parliamentary Union and OHCHR's 2016 *Human Rights Handbook for Parliamentarians*.

### 7.5.c National Human Rights Institutions

National Human Rights Institutions (NHRIs) are: 'State bodies with a constitutional and/or legislative mandate to protect and promote human rights.'<sup>655</sup> NHRIs, despite their official status and state funding, have a degree of independence from the legislature, executive, and judiciary, in order for them to work effectively to fulfil their mandate. NHRIs therefore occupy a unique position in the human rights system within a state: they are neither controlled by the state nor operate completely outside of it, as say, non-NGOs do. They are therefore well positioned to bridge the gaps between the state, civil society, and the wider international and regional human rights systems. As the OHCHR puts it: 'they link the responsibilities of the State to the rights of citizens and they connect national laws to regional and international human rights systems.'<sup>656</sup> A good example would be for NHRIs to work with governments, particularly the national statistical office and the ministry of education and civil society, to ensure that human rights indicators are used to collect data, in order to properly monitor the implementation of the right to education.

655 OHCHR. 2010. *National Human Rights Institutions: History, Principles, Roles and Responsibilities* (Doc. HR/P/PT/4/Rev.1.) p. 13.

656 *Ibid.*, p. 13.



#### Box 7.8 Definition: National Human Rights Institutions (NHRIs)

NHRIs are: 'State bodies with a constitutional and/or legislative mandate to protect and promote human rights'<sup>657</sup> and are defined by their mandate but have different nomenclature, including:

- civil rights protector or commissioner
- human rights commission
- human rights institute or centre
- ombudsperson
- parliamentary ombudsperson or commissioner for human rights
- public defender/protector
- parliamentary advocate
- defensor del pueblo

One of the key ways NHRIs link national human rights protection to international human rights law is through monitoring. The CESCR points out one of the key functions of NHRIs is: 'Monitoring compliance with specific rights recognized under the Covenant and providing reports thereon to the public authorities and civil society.'<sup>658</sup> CESCR also goes on to describe activities apposite to the monitoring of the right to education:<sup>659</sup>

- scrutinising existing laws and administrative acts, as well as draft bills and other proposals, to ensure that they are consistent with states' legal obligations under human rights law

657 *Ibid.*

658 CESCR. 1998. *General Comment 10: The Role of National Human Rights Institutions in the Protection of Economic, Social and Cultural Rights* (Doc. E/C.12/1998/25.) (CESCR General Comment 10) para. 3.

659 CESCR. 1989. *General Comment No. 1: Reporting by States Parties* (Doc. E/1989/22.) (CESCR General Comment 1) para. 3.



- providing technical advice, or undertaking surveys in relation to the right to education, including at the request of the public authorities or other appropriate agencies
- identifying of national-level benchmarks against which the realization of the right to education can be measured
- conducting inquiries and investigations designed to ascertain the extent to which the right to education is being realized, either within the state as a whole or in areas or in relation to communities of particular vulnerability
- examining education-related complaints by individuals, groups, and civil society

On investigating complaints or conducting inquiries and investigations, OHCHR provides the following useful advice:

*In investigating violations...[NHRIs] might need to identify benchmarks for the observance of these rights and for the performance of State obligations. It may also need to collect data about situations within the State at the national and regional levels. Comparative data may be important in determining whether rights have been violated.*<sup>660</sup>



### **Box 7.9 Further information: South African Human Rights Commission's monitoring of the right to education**

The South African Human Rights Commission (SAHRC) has a constitutional mandate to 'monitor and assess the observance of human rights in the Republic.'<sup>661</sup> In order to carry out its mandate it has the following powers:<sup>662</sup>

- a. to investigate and to report on the observance of human rights*
- b. to take steps to secure appropriate redress where human rights have been violated*
- c. to carry out research*
- d. to educate*

One of the key areas of focus to which the SAHRC applies its mandate is the right to basic education, guaranteed in the Constitution of South Africa under Article 29. The SAHRC has undertaken a number of activities to ensure the full implementation of the right to education through monitoring, including:

In 2012, after identifying that a major challenge to the realization of the right to basic education was clarity on the scope and content of the right, the SAHRC, in consultation with various stakeholders, developed the Charter on Children's Basic Education Rights.<sup>663</sup> The Charter provides a statement of what is required in law (internationally, regionally, and nationally) of the state to give effect to the right to all children in South Africa to basic education.

The Charter also provides a framework for monitoring the various aspects of the right to basic education and includes an indicator framework to assess compliance with the right to education as guaranteed under international law, based on the indicators developed by the Right to Education Initiative.

In 2014, the SAHRC concluded a nationwide investigation<sup>664</sup> into the failure of provincial governments to properly procure and deliver textbooks to schools in time for the start of the school term. The investigation examined the extent and impact of the problem through the collection of data, the causes of the problems by consulting with various stakeholders, and recommendations to the government on actions it should take to come into compliance with the Constitution.

660 OHCHR. 2005. *Economic, Social and Cultural Rights: Handbook for National Human Rights Institutions*. United Nations, New York and Geneva, p. 51. See also pp. 54-56 for further information on investigating systemic violations.

661 The Constitution of South Africa (1994) Section 184 (1) (c).

662 Ibid., Section 184 (2).

663 South African Human Rights Commission (SAHRC). 2012. *Charter on Children's Basic Education Rights*.

664 SAHRC. 2014. *Monitoring and Investigating the Delivery of Primary Learning Materials to Schools Country-Wide*.

However, despite the enormous potential of NHRIs to assist in the monitoring of the right to education there are a number of factors preventing this from happening. Firstly, not all NHRIs are mandated to focus on the right to education, and secondly not all NHRIs have the mandate, capacity, resources, or will to undertake the monitoring of the right to education.



**Box 7.10 Further reading:  
Information and guidance on  
and for NHRIs**

The Principles relating to the Status of National Institutions (Paris Principles)<sup>665</sup> define the minimum conditions that an NHRI must meet if it is to be considered legitimate.

Office of the High Commissioner for Human Rights. 2005. *Economic, Social and Cultural Rights: Handbook for National Human Rights Institutions*. United Nations, New York and Geneva. See in particular pp. 57-73 on monitoring economic and social rights.

Office of the High Commissioner for Human Rights. 2010. *National Human Rights Institutions: History, Principles, Roles and Responsibilities*.

Asia Pacific Forum of National Human Rights Institutions and Center for Economic and Social Rights. 2015 (updated 2018). *Defending Dignity: A Manual for National Human Rights Institutions on Monitoring Economic, Social and Cultural Rights*.

Center for Economic and Social Rights (nd.) *National Human Rights Institutions as Monitors of Economic, Social and Cultural Rights*.

Center for Economic and Social Rights. 2016. *Realizing Rights Through the Sustainable Development Goals: The Role of National Human Rights Institutions*.

## 7.5.d District and school level

In many contexts, MoEs have devolved some responsibilities to district level education offices or even down to school level governance bodies or school management committees. Decentralisation comes in many forms but usually entails the transfer of political power, decision-making, and resources, allowing increased autonomy and capacity to determine policy and use of resources at that level. This is usually justified based on the idea of subsidiarity: that the lowest level of government that can perform functions efficiently and effectively should be the one to do so and that the administration of public resources should be brought as close to the people using the public service as possible. With this devolution of powers there is inevitably a devolution of responsibilities for monitoring. However, national or federal authorities must still monitor the activities of sub-national authorities.

District Education Offices will often have a strong connection with school inspection bodies, having a responsibility to ensure they are operating effectively and following-up on the recommendations that they make following a school inspection. They may also play a key role in teacher deployment and monitoring of professional performance. To perform these roles they require adequate budgets to visit schools on a reasonably regular basis, something which has been a particular challenge in many rural areas of low-income countries. It is vital that education is monitored not only from the perspective of end-users, but also that 'service providers' and more broadly the capacity of lower level government officials are monitored to adequately supervise the fulfilment of legal obligations.

There are many different terms used for school level governance bodies such as management committees/councils or boards. These have a statutory responsibility for overseeing schools

665 United Nations General Assembly (UNGA). Resolution 48/131. Principles relating to the Status of National Institutions (Paris Principles).

and should be clearly distinguished from the more informal Parent Teachers' Associations or community committees that sometimes play roles in deepening relations between schools and the communities they serve. The powers and responsibilities attributed to school governing bodies vary widely according to national legislation and can include hiring and firing of head-teachers/teachers, monitoring school performance, managing devolved budgets, developing school improvement plans and liaising with local government and district authorities.

It is important to have clarity on the relative monitoring responsibilities allocated to different actors within an education system so that there is clarity and connections between levels. This is normally laid out either in national legislation, policies, or guidelines and can be reviewed for its coherence so that local, district, and national actors know what is expected of them in monitoring progress and what they can expect of others. Attention may be needed to ensure devolution of powers and budgets does not bring disparity of provision and discrimination against particular regions or communities. Monitoring for equality across the system will always remain a function for central authorities.

## 7.6 Non-state actor monitoring

Although the state is principally responsible for implementing the right to education, it is not desirable for the state to be the only actor engaged in monitoring. The state's responsibility to monitor serves a particular role—to ensure that laws, policies and programmes adequately address real problems. Non-states actors have different reasons and motivations to monitor the right to education.

### 7.6.a Civil society

Civil society plays an important and specific role in monitoring the right to education. Civil society provides an alternative view and insight into education problems that the state may not be aware of. This is because civil society organizations (CSOs) are usually embedded in specific areas and have specialist knowledge of the problems that their constituents (often students, teachers, the community) face. They may also have the time and skills that states lack to examine issues more rigorously and comprehensively.

CSOs that may engage in monitoring include NGOs, INGOs, community-based organizations (see box 7.12, faith-based organizations, social movements, academia, journalists (see box 7.11), parent groups, students' unions and groups, and other trade unions and associations. Oftentimes CSOs work in coalitions and networks in order to broaden their representation, increase their legitimacy, have a louder voice, and be more effective.

In most instances, civil society monitoring complements state monitoring. Like states, civil society monitors *de jure* and *de facto* enjoyment of the right to education. However, in certain situations the state itself may be responsible for certain problems. In these instances, civil society monitors in order to uncover states' failure to domestically implement the right to education, by identifying where the failures are, why they are happening, the extent of the issue, and what can be done to fix them in line with states' human rights obligations.

Unlike states, however, CSOs cannot effect direct change. So, in order for CSO monitoring to be effective, CSOs must influence duty-bearers through advocacy. This process is usually amicable where states are responsive. However, in some instances CSOs may need to put pressure on

states to fully implement the right to education. CSOs may do this through a number of different channels. At the national level, CSOs may try to get media attention, campaign and mobilize, or access various domestic mechanisms and processes outlined in section 7.5. CSOs may also need to engage with the various human rights monitoring mechanisms at regional and international levels outlined in sections 7.7 and 7.8, respectively, if domestic advocacy is unsuccessful. If accessing international and regional monitoring mechanisms fails then CSOs can avail the various accountability mechanisms outlined in Chapter 8, and monitoring serves as the process by which civil society can gather the relevant evidence to pursue those remedies and hold duty-bearers to account.



### Box 7.11 Further information: Working with the media

One of the key advocacy channels for civil society monitoring of the right to education is working with the media. The media can help amplify key messages, raise awareness of critical and neglected issues, tell stories that convey the impact of education challenges on the lives of rights-holders, stimulate informed dialogue, and put pressure on right to education duty-bearers to address a situation.

Although the media and journalists do not have obligations to monitor the right to education *per se*, they are part of civil society and can contribute to monitoring the right to education, for instance, by exposing corruption in education, instances of girls being expelled from school for being pregnant, and any number of issues that are often ignored.

There are many good examples of education coalitions working with the media to raise awareness and strengthen monitoring and public scrutiny. For example, as documented in Transparency International's Global Corruption Report on education, the Coalition for Clean Universities (CCU) was established in 2007 to combat corruption in the higher education sector

in Romania. The CCU was formed by the Romanian Academic Society, an education think tank, which built a coalition of stakeholders comprised of students and teachers together with professional associations and education journalists. The goal was to:

*develop an exercise in public sector oversight and benchmarking with the purpose of assessing and promoting integrity in the public higher education system. In plain language, the coalition proposed a ranking of integrity in universities: by naming and shaming on the one hand, and by encouraging and disseminating good practice on the other, a competition in terms of integrity would ensue that would promote reforms.*<sup>666</sup>



### Box 7.12 Further information: Community-based monitoring

Important civil society actors in terms of monitoring are community-based organizations (CBOs). This is because when it comes to monitoring the right to education, it matters greatly *who* is monitoring. The nature of state monitoring means that the issues faced by communities are often ignored or hidden by traditional forms of large-scale data collection. And if the state is not collecting relevant data then education issues are unlikely to be adequately addressed.

It is desirable that those most affected be able to monitor because they have an unrivalled knowledge of the problems with education as they live and experience them every day. For example, even if a state has ostensibly guaranteed the right to free education in law and policy, informal barriers such as fees for taking exams in individual schools, may mean that the right to free education for many students is not fully realized. The state may not know about such fees but parents and children do and are well-positioned to bring this to the attention of the relevant authorities.

Monitoring is also supposed to be empowering. This requires that communities are able to frame

<sup>666</sup> Transparency International. 2013. *Global Corruption Report: Education*. Routledge, Abingdon and Oxon. p. 240.

research questions, gather their own data, make sense of it collectively, and use it to support their visions for the appropriate implementation of the right to education.

A good example of a community-based monitoring initiative is the Annual Status of Education Report (ASER),<sup>667</sup> conducted by ASER Action, in India. ASER aims to provide reliable estimates of children's enrolment and basic learning levels for each district and state in India. ASER has been conducted every year since 2005 in all rural districts of India and is the largest citizen-led survey in the country. It is also the only annual source of information on children's learning outcomes available in India. Unlike most other large-scale learning assessments, ASER is a household-based rather than school-based survey. This design enables all children to be included – those who have never been to school or have dropped out, as well as those who are in government schools, private schools, religious schools or anywhere else.

For further information on community-based monitoring see ESCR-Net's page *Community-led monitoring* <https://www.escr-net.org/monitoring/communityledmonitoring>



### **Box 7.13 Further information: The Right to Education Initiative and ActionAid: Promoting Rights in Schools**

Promoting Rights in Schools (PRS) is a collaborative initiative between the Right to Education Initiative and ActionAid that aims to secure free, compulsory, quality public education for all through community-based monitoring.

The PRS is based on a charter of ten key aspects of the right to education all of which are accompanied by a set of simple indicators that enable users to collect information on their local school in a systematic manner. The information collected is then consolidated into local, district, and national 'citizens reports' that are used as a basis for further

action including mobilization, advocacy, and campaigning.

The PRS is based on the idea that the process is as important as the outcome. It is only through engaging all stakeholders, from children to parents, from community leaders to NGOs and teachers' unions in the entire effort, from developing the charter to collecting and analysing the data and debating the findings, that it is possible to promote greater awareness of what needs to change and how.

For example, in Cambodia, teachers' low salaries were identified as an obstacle to quality education. Together with the teachers' union (CITA) and the national education coalition (NEP), civil society members were able to get a meeting with the ministry of education on the basis of evidence collected using the PRS, and then successfully campaign for an increase in teachers' salaries.

The PRS operates across 25 countries.

For more information see:

ActionAid's page *Promoting rights in schools* <http://www.actionaid.org/what-we-do/education/promoting-rights-schools>

RTE's page *Promoting Rights in Schools: Providing Quality Public Education* <http://www.right-to-education.org/resource/promoting-rights-schools-providing-quality-public-education>

## **7.6.b Donor agencies and intergovernmental organizations**

Donors include multilateral banks, such as the World Bank and the IMF; harmonized funds, such as the Global Partnership for Education and Education Cannot Wait; regional development banks, such as the African Development Bank (AfDB), the Asian Development Bank (ADB), the European Bank for Reconstruction and Development (EBRD), and the Inter-American Development Bank (IDB); and bilateral donors, principally national development agencies, such as DfID, USAID, and NORAD.

667 For further information, see ASER Action's website <http://www.asercentre.org/#9otgx> (Accessed 26 September 2018.)

Intergovernmental organizations (IOs) include the United Nations, its agencies and bodies, and regional bodies, such as the European Union, the African Union, League of Arab States, and the Organization of American States.

Donors, as well as IOs, in collaboration with states and civil society, as part of their obligations to provide international assistance and cooperation,<sup>668</sup> work together to solve specific education problems and will usually monitor the right to education in order to uncover where states most need support, usually in the form of financial aid and technical support.

Donors and IOs should conduct human rights impact assessments of any project it undertakes in line with their responsibilities to respect human rights abroad.<sup>669</sup> This is to ensure that, at a minimum, projects and investments do not negatively impact on the right to education.

Donors and IOs should also, when monitoring their projects and investments, ensure that human rights are not being and have not been negatively impacted.

Donors and IOs should also make provision for monitoring and accountability mechanisms that are accessible to affected stakeholders.



**Example 7.1: The UN Committee on Economic, Social and Cultural Rights' Concluding Observations on the United Kingdom's obligations related to international development cooperation**

The UN Committee on Economic, Social and Cultural Rights considered the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland on the implementation of the International Covenant on Economic, Social

<sup>668</sup> See Chapter 4, section 4.2.d for further information.

<sup>669</sup> See Chapter 4 section 4.5.a for further information on the responsibility of IOs to respect the right to education.

and Cultural Rights and adopted the following concluding observation and recommendations<sup>670</sup> in relation to the UK government's financial support and investment in private education overseas.

14. *While welcoming the achievement by the State party of the international target of allocating 0.7 per cent of gross national product for official development assistance in the framework of international cooperation, the Committee is concerned that in some cases the assistance provided has reportedly been used for activities in contravention of economic, social and cultural rights in the receiving countries. The Committee is particularly concerned about the financial support provided by the State party to private actors for low-cost and private education projects in developing countries, which may have contributed to undermining the quality of free public education and created segregation and discrimination among pupils and students (arts. 2, 13 and 14).*

**15. The Committee calls upon the State party to adopt a human rights-based approach in its international development cooperation by:**

- (a) *Undertaking a systematic and independent human rights impact assessment prior to decision-making on development cooperation projects;*
- (b) *Establishing an effective monitoring mechanism to regularly assess the human rights impact of its policies and projects in the receiving countries and to take remedial measures when required;*
- (c) *Ensuring that there is an accessible complaint mechanism for violations of economic, social and cultural rights in the receiving countries embedded in the framework for development cooperation projects.*

## 7.6.c Business enterprises

The activities of business enterprises, including both national and transnational, can often affect

<sup>670</sup> CESCR. 2016. *Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland* (Doc. E/C.12/GBR/CO/6) paras. 14-15.

the right to education, particularly when they take on provision roles, for instance, by operating chains of private schools, but also when they are involved in public education, through for instance, government outsourcing of the production of learning materials, the provision of school meals and school transportation, and the setting of exams.

As explained in Chapter 4, states have legal obligations to ensure that third parties do not interfere with the right to education, that is, they must *protect* the right to education from third parties, including by setting regulations, which business enterprises must adhere to. This requires states to adopt legislation to ensure effective protection against rights violations linked to business activities, and to provide victims of such corporate abuses with access to effective remedies. The corollary of the obligation to protect is that third parties must ensure that they *respect* the right to education. According to the UN Guiding Principles on Business and Human Rights<sup>671</sup> part of the responsibility to respect is to carry out due diligence. Guiding Principle 17 provides:

*In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include **assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed** [emphasis added].*

From the above it is clear that due diligence requires monitoring on the part of business enterprises, including through measures such as human rights impact assessments. States must also monitor the operations and practices

of business enterprises and encourage them to monitor and report in an open and transparent manner.



#### **Box 7.14 Further reading: Human rights impact assessments**

Danish Institute for Human Rights. 2014. *Human Rights and Impact Assessment: Conceptual and Practical Considerations in the Private Sector Context*.

Columbia Center on Sustainable Investment, Danish Institute for Human Rights, and Sciences Po Law School Clinic. 2017. *A Collaborative Approach to Human Rights Impact Assessments*.

## **7.7 United Nations monitoring mechanisms**

The United Nations is the foremost human rights organization at the international level. As such, a range of different bodies are mandated to monitor the domestic implementation of the right to education, as defined by international human rights treaties.

671 UNGA. 2012. *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (Doc. HR/PUB/11/04.)

**Table 7.1: United Nations human rights monitoring mechanisms**

Forum	Reporting cycle	Simplified reporting procedure	Follow-up procedure	Civil society participation
<b>UN treaty bodies</b>				
CESCR	Initial report within 2 years and every 5 years thereafter	No	Yes	Yes
CRC	Initial report within 2 years and every 5 years thereafter	Yes	No	Yes
CEDAW	Initial report within 1 year and every 4 years thereafter	Yes	Yes	Yes
CRPD	Initial report within 2 years and every 4 years thereafter	Yes	Yes	Yes
CCPR	Initial report within 1 year and every 4 years thereafter	Yes	Yes	Yes
CERD	Initial report within 1 year and every 2 years thereafter	No	Yes	Yes
CMW	Initial report within one year and every 5 years thereafter	Yes	Yes	Yes
<b>UNESCO</b>				
Committee on Conventions and Recommendations	Every 4 years	N/A	N/A	Yes - although guidelines for CSO participation are absent
<b>International Labour Organization</b>				
Committee of Experts on the Application of Conventions and Recommendations	Every 3 years for fundamental conventions, 5 for others	N/A	N/A	Yes-workers' and employers' organizations are able to comment on states' reports
<b>Human Rights Council</b>				
Universal Periodic Review	Every 4 and a half years	N/A	N/A	Yes
Special procedures	N/A	N/A	N/A	Yes



### 7.7.a UN treaty bodies

UN treaty bodies are committees of independent experts (ranging from 10-18 members) established under each of the core UN human rights treaty.<sup>672</sup> They are mandated to monitor how states that have ratified the treaty in question comply with their obligations to implement the human rights guaranteed by the treaty. They do

this by periodically examining State party reports on the measures they have taken to implement the treaty, as well as civil society reports ('parallel', 'alternative', or 'shadow' reports).

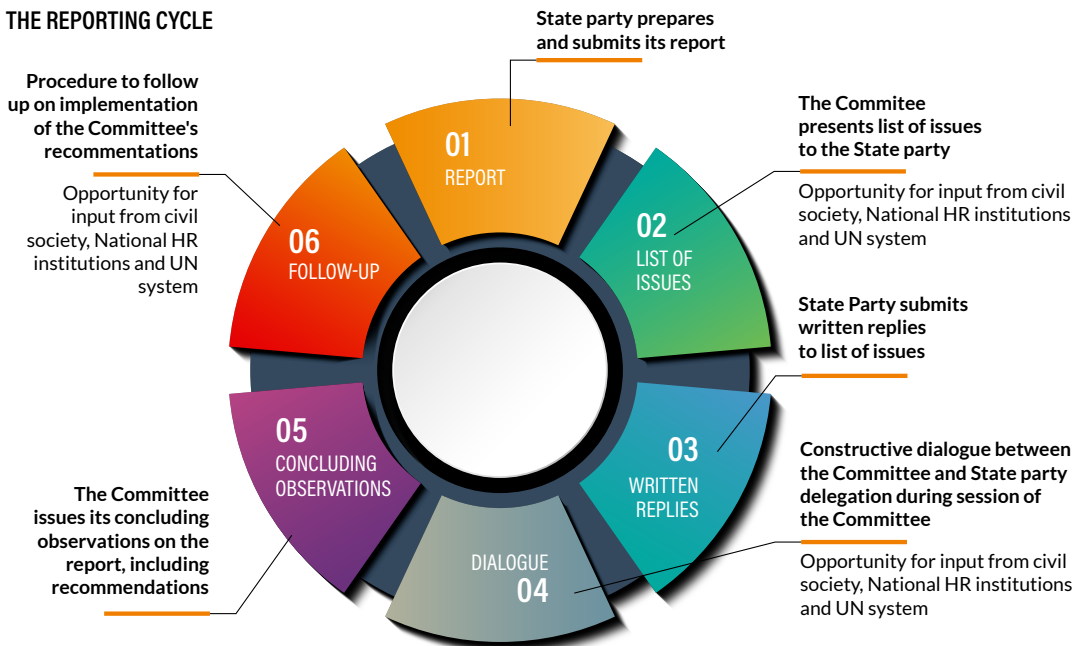
There are ten human rights treaty bodies composed of independent experts of recognized competence in human rights, who are nominated and elected for fixed renewable terms of four years by states parties. Seven of these treaty bodies are competent to monitor the right to education or key aspects of the right to education.

672 Article 18, CEDAW; Article 17, ICESCR; Article 44, CRC; Article 35, CRPD; Article 9, ICERD; Article 4, ICCPR; Article 73, ICRMW.

**Figure 7.2: UN treaty bodies: The reporting process**

The figure below represents the reporting cycle for the Committee against Torture, however it equally applies to other UN treaty bodies.

#### THE REPORTING CYCLE



Source: Convention against Torture Initiative. 2017. *CTI/UNCAT Implementation Tool 3/2017, Reporting to the UN Committee against Torture*, p.1. Reproduced with the permission of the CTI.

Once a state is party to a core human rights treaty, it has the legal obligation to report to the UN treaty body that is established by that

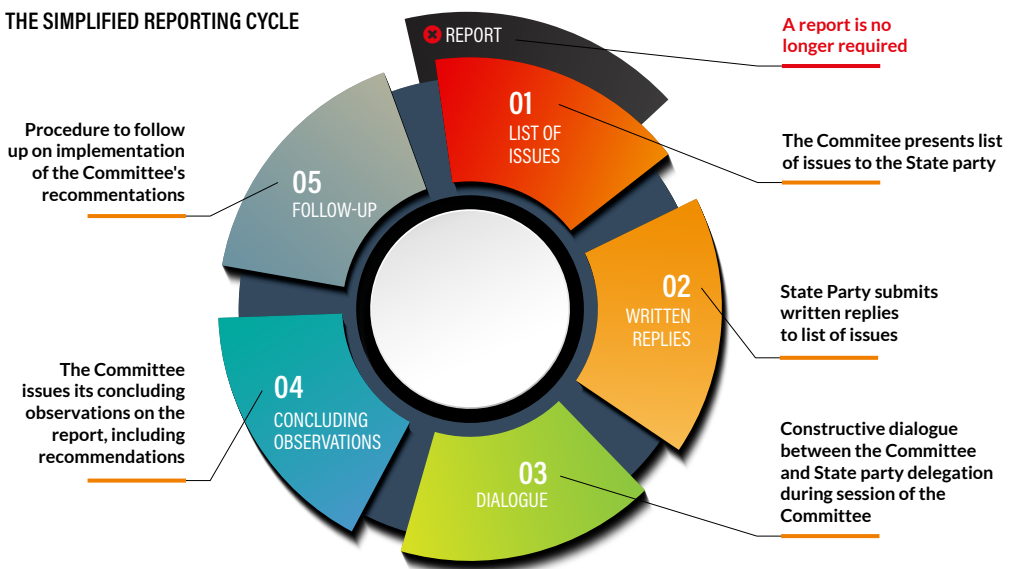
treaty. The process differs depending on the treaty body in questions, but can be generalized as follows:

1. The state must present a treaty-specific periodic report to the treaty body. This report must include information about what the state has done to address the human rights issues relevant to the treaty
2. About a year after submission and after the report has been made public, civil society organizations are then able to submit parallel reports. This gives the treaty body a balanced overview of the state of human rights in the country. It then decides on a list of issues which is the issues most concerning to the treaty bodies, and asks for written answers from the state.
3. The state provides the relevant information required to the treaty body.
4. The state, civil society, and treaty bodies then engage in what is known as a 'constructive dialogue'.
5. On the basis of the reports and constructive dialogue the treaty body then issues its concluding observations to the state and makes recommendations on what the state should do to comply with the treaty.
6. The state is expected to address the issues raised in the concluding observations and implement the treaty body's recommendations. Some treaty bodies select certain recommendations which they follow-up with. This basically means after the review is over the state must provide additional information to the treaty body on what it has done to implement the recommendation. Civil society organizations can also submit evidence at this stage.

For states that opt to report to the treaty bodies that have a simplified reporting procedure, the first three steps are condensed. See box 7.15 for further information.

**Figure 7.3: UN treaty bodies: The simplified reporting process**

The figure below represents the reporting cycle for the Committee against Torture, however it equally applies to other UN treaty bodies.



Source: Convention against Torture Initiative. 2017. CTI/UNCAT Implementation Tool 3/2017, Reporting to the UN Committee against Torture, p.2. Reproduced with the permission of the CTI.

After the process is complete, the reporting cycle begins again with the state additionally reporting on what has been done to comply with the treaty body's previous concluding observations and recommendations.



### Box 7.15 Further information: State reporting to UN treaty bodies

#### What to submit

States must submit reports based on the relevant guidelines. For the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of Discrimination against Women, the Committee on the Elimination of Racial Discrimination, and the Committee on Migrant Workers states should use *Compilation of Guidelines on the form and content of reports to be submitted by States parties to the International Human Rights Treaties*<sup>673</sup> and submit both common core and treaty-specific documents.

The common core document should contain general information about the reporting state, the general framework for the protection and promotion of human rights, as well as information on non-discrimination and equality, and effective remedies. This document should be regularly updated and must be available in one of the official UN languages: Arabic, Chinese, English, French, Russian, or Spanish.

The treaty-specific document should include the information requested by the relevant committee in its most current treaty-specific guidelines.

For treaties that do not adhere to the harmonized guidelines, states should adhere to the treaty-specific reporting guidelines produced by the relevant treaty body.

Some treaty bodies also allow states to opt in to a simplified reporting procedure, usually if a state has submitted an initial report and provided an updated common core document. Simplified reporting procedures do not require states to submit treaty-specific periodic national reports, rather the treaty body requests specific information

from the state in the form of a List of Issues Prior to Reporting (LOIPR). The state's written response constitutes the state's treaty-specific periodic national report.

Treaty-specific reports, whether submitted under the simplified or harmonized procedures, must be submitted in the one of the working languages of the treaty body in question (dependent on the composition of the treaty body but usually at least English, French, and Spanish).

States are also encouraged to refer to treaty bodies' general comments and recommendations in their reports.

On the substance of the report, it is not only imperative that states submit their reports according to the relevant guidelines of the treaty body, but also in line with human rights principles. This means that states should provide for the participation of civil society and affected stakeholders in the development of the report, through, for example holding public consultations on what information should be included.

#### When to submit

States submit their reports at the beginning of the reporting cycle or at the request of the treaty body. States must ensure that they submit their reports on time. However, if states do not submit reports they can still be reviewed in their absence.

#### How to submit

States must transmit their reports to the relevant treaty body, usually in both digital and hard copy. States should also ensure that their reports are made publicly available.

673 UNGA. 2008., op. cit.



### Box 7.16 Tips: Civil society reporting to UN treaty bodies

#### **Benefits**

1. Raise awareness of an issue. It's a way to get international recognition of a situation by the UN and states. This in turn can garner media attention. Having the UN criticising a state often gets column inches.
2. Give a voice to those whose rights have been violated. The Committee on the Right of the Child and Committee on the Elimination of Discrimination Against Women want to hear directly from rights-holders. They are not just mechanisms for presenting data but also highlight the human impacts of violations.
3. Engaging with treaty bodies can greatly help you in your advocacy work, for instance, it can help to bring an issue to the attention of key advocacy targets and leverage UN and media attention to get meetings with decision-makers and parliamentarians.

#### **Tips for writing parallel reports**

Most treaty bodies have produced guidance for NGOs on what to include in parallel reports. These are mentioned below for each treaty body. However, here are some generic tips for reporting to UN treaty bodies:

- start planning well in advance to have time to submit the report on time
- connect with other organizations to consolidate information and consider reporting jointly. This will make it easier for the treaty body and avoids multiple organizations saying the same thing. This will also help you to build together a strong social mobilisation on the issue
- make your ideas clear. In your report each paragraph should contain only one idea.
- read and respond to the state's report
- references should be as precise as possible.
- make sure to provide a one-page summary of your report so that treaty body members have an overview of the issue(s) you raise
- make sure that the report is organized around the specific articles of the treaty and explains how the article engaged is affected
- propose questions to be asked to the states' representative by the experts and suggest recommendations
- if, in your monitoring, you have found that data and information is unavailable, you should highlight this in your report, so that the treaty body can request that the government provides it

#### **Tips on the logistics of engaging with UN treaty bodies**

- Participating in pre-sessions will allow you to respond to any questions treaty body members may have regarding your issue and make it more visible. Here are some tips on logistics:
- make sure you have gone through all the formalities needed to participate in the pre-session, such as requesting accreditation. Each treaty body's website should have relevant information
- plan a budget to participate in the pre-session. Participation is free but staying in and getting to Geneva can be expensive
- some treaties body offer remote participation
- if you are unable to participate, try linking with other organizations that could represent you

#### **Tips on raising awareness about your issue**

The pre-session and session are a great moment to raise awareness about your issue:

- if you can travel to Geneva either at the pre-session or session of the treaty body, try to organize a briefing with treaty body members covering your issue. Generally, a group of three or four experts are in charge of specific rights
- engage with journalists to cover the issue during the session
- publish a press release to inform about the concerns and recommendations made by the experts in their concluding observations.

#### **Tips for getting states to address UN treaty body recommendations**

- incorporate the concluding observations and recommendations within ongoing advocacy efforts, this works best when advocacy is concerted
- raise awareness of the treaty body system with civil society organizations and encourage them to use the concluding observations and recommendations in their advocacy
- ensure that the concluding observations and recommendations are ‘translated’ into concrete steps
- write to or meet with state representatives in charge of the issue to discuss with them the measures they plan to take to respond to the issue
- engage with parliamentarians and encourage to them to question the government and relevant government organs
- raise awareness in the media by contacting journalists and making them aware of developments

For further information on the UN human rights bodies and advocacy, see: OHCHR. 2016. *How to Follow Up on United Nations Human Rights Recommendations - A Practical Guide for Civil Society*.

In the following sections are details for each of the UN treaty bodies monitoring implementation and compliance with human rights treaties that include provisions on the right to education, or provisions closely related to the right to education.

### **United Nations Committee on Economic, Social and Cultural Rights**

The Committee on Economic, Social and Cultural Rights (CESCR), established in 1985,<sup>674</sup> monitors implementation and compliance with the ICESCR which guarantees the right to education under Articles 13 and 14.<sup>675</sup> CESCR is the foremost treaty

body monitoring compliance with the right to education.

Under Articles 16 and 17 of ICESCR, states are required to submit periodic reports to CESCR on how ICESCR rights are being implemented. States must report initially within two years of ratifying ICESCR and every five years thereafter. CESCR meets in Geneva and normally holds two sessions per year, consisting of a three-week plenary and a one-week pre-sessional working group, and examines roughly ten state reports each session.

State reports to CESCR should be submitted in accordance with the *Compilation of Guidelines on the form and content of reports to be submitted by States parties to the International Human Rights Treaties*.<sup>676</sup> These guidelines require states to submit a common core and a treaty-specific

<sup>674</sup> ICESCR was initially monitored by the Economic and Social Council before transferring to the Committee on Economic, Social and Cultural Rights following ECOSOC Resolution 1985/17 of 28 May 1985.

<sup>675</sup> See Chapter 2 for further information on ICESCR.

<sup>676</sup> UNGA. 2008., op. cit.

document, including information on the right to education.

From 2017-2021 CESCR is piloting a follow-up procedure<sup>677</sup> whereby it selects up to three recommendations from its concluding observations made to states, based on the urgency of the matter and whether the recommendation is attainable within 18 months. These recommendations are subject to heightened scrutiny by CESCR and states are required to respond to the selected recommendations within 18 months by submitting follow-up reports. These reports should detail the measures the state has taken to address the recommendation. Civil society is also able to submit relevant information. Once CESCR has all the necessary information, it makes a determination as to whether the state has made sufficient progress, and the issue is integrated into the reporting process.



### Box 7.17 Further reading: Guides on reporting to CESCR

Amnesty International. 2014. *Holding government to account: A guide to shadow reporting on economic, social and cultural rights*.

Economic and Social Council. 2000. *NGO participation in the activities of the Committee on Economic, Social and Cultural Rights*.

## United Nations Committee on the Rights of the Child

The Committee on the Rights of the Child, established in 1991, monitors implementation and compliance with the Convention on the Rights

of the Child (1989, CRC)<sup>678</sup> which guarantees the right to education under Articles 28 and 29.<sup>679</sup> As the Convention has near-universal ratification, almost all states must report to the Committee on the Rights of the Child.

Under Article 44 of the CRC, states are required to submit periodic reports to the Committee on the Rights of the Child on how Convention rights are being implemented. States must initially report within two years after acceding to the CRC and every five years thereafter. The first initial reports were due in September 1992. The Committee on the Rights of the Child meets in Geneva and normally holds three sessions per year consisting of a three-week plenary and a one-week pre-session working group.

Up until September 2019 initial and periodic state reports to the Committee on the Rights of the Child should be submitted in accordance with the *Compilation of Guidelines on the form and content of reports to be submitted by States parties to the International Human Rights Treaties*.<sup>680</sup> These guidelines require states to submit a common core and a treaty-specific document. The latter should be submitted in accordance with the updated *Treaty-specific guidelines regarding the form and content of periodic reports to be submitted by States parties under article 44, paragraph 1 (b), of the Convention on the Rights of the Child*.<sup>681</sup>

After September 2019, the Committee on the Rights of the Child allows states to opt in to the simplified reporting procedure, whereby the Committee on the Rights of the Child sends the State party a request for specific information,

678 Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC).

679 See Chapter 2 for further information on the Convention on the Rights of the Child.

680 UNGA. 2008., op. cit., pp. 82-110.

681 CRC. 2014. *Treaty-specific guidelines regarding the form and content of periodic reports to be submitted by States parties under article 44, paragraph 1 (b), of the Convention on the Rights of the Child* (Doc. CRC/C/58/Rev.3.)

677 CESCR. 2017. *Working methods concerning the Committee's follow-up to Views under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*.

known as a List of Issues Prior to Reporting (LOIPR) containing up to 30 questions. The LOIPR asks the state party about measures and developments relating to the implementation of the Convention. The state party's replies to the LOIPR constitute the state party's report to the Committee on the Rights of the Child. Accordingly, information provided by states on the right to education will depend on whether it is included in LOIPR, although this does not preclude the right to education being reviewed at a later stage.

The Committee on the Rights of the Child does not have a follow-up procedure.



### Box 7.18 Further reading: Guide on reporting to the CRC

Child Rights Connect (nd.) *The Reporting Cycle of the Committee on the Rights of the Child: A guide for NGOs and NHRIs.*

CRC. (nd.) *Simplified Reporting Procedure: Information note for stakeholders.*

## United Nations Committee on the Elimination of Discrimination against Women

The Committee on the Elimination of Discrimination against Women, established in 1981, monitors the implementation of and compliance with the Convention on the Elimination of All Forms of Discrimination against Women (1979, CEDAW)<sup>682</sup> which guarantees the right to education of women and girls in Article 10.<sup>683</sup> CEDAW is the foremost treaty body dealing with gender discrimination in education.

Under Article 18 of the CEDAW, states are required to submit periodic reports to Committee on the

Elimination of Discrimination against Women on how CEDAW rights are being implemented. States must report initially within one year after acceding to the Convention and every four years thereafter. Committee on the Elimination of Discrimination against Women meets in Geneva or at the UN headquarters in New York and normally holds three sessions per year, consisting of regular and special sessions, as well as pre-sessional working groups.

As of March 2018, Committee on the Elimination of Discrimination against Women has reinstated the optional simplified reporting procedure. The simplified reporting procedure is available to states that have submitted an initial report and an updated common core document under the *Compilation of Guidelines on the form and content of reports to be submitted by States parties to the International Human Rights Treaties*.<sup>684</sup>

Under the simplified reporting procedure, the Committee on the Elimination of Discrimination against Women's pre-sessional working group prepares a list of issues to be approved by the Committee on the Elimination of Discrimination against Women at its next regular session, to be transmitted to the state party concerned prior to the submission of its report (such lists are known as lists of issues prior to reporting - LOIPR). The replies of the State party to the LOIPR constitute its periodic report. Accordingly, information provided by states on the right to education will depend on whether it is included in LOIPR, although this does not preclude the right to education being reviewed at a later stage.

The Committee on the Elimination of Discrimination against Women applies a follow-up procedure<sup>685</sup> whereby State parties are requested, within a period of one or two years, to

682 Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December, 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW).

683 See Chapter 2 for further information on Convention on the Elimination of All Forms of Discrimination against Women.

684 UNGA. 2008., op. cit., pp. 64-70.

685 CEDAW. *Decision 54/IX: Methodology of the follow-up procedure to concluding observations* (Doc. A/68/38.)

report on the steps taken to implement selected recommendations. Up to four recommendations are selected on the basis that their lack of implementation represents a significant obstacle for the implementation of CEDAW and women's enjoyment of their human rights. In addition, the implementation of the recommendations must be considered feasible within the suggested time frame. States are expected to submit a report on the measures it has taken to implement the recommendations. Civil society are also able to submit evidence, up until one month before the consideration of the state's report.

### United Nations Committee on the Rights of Persons with Disabilities

The Committee on the Rights of Persons with Disabilities, established in 2008, monitors the implementation of and compliance with the Convention on the Rights of Persons with Disabilities (2006, CRPD) which guarantees the right to education of people with disabilities under Article 24.<sup>686</sup> The Committee on the Rights of Persons with Disabilities is the foremost treaty body dealing with disability rights, including inclusive education.

Under Article 35 of the CRPD, states are required to submit period reports to the Committee on the Rights of Persons with Disabilities on how the CRPD rights are being implemented. States must report initially within two years of ratifying CRPD and every four years thereafter. The Committee on the Rights of Persons with Disabilities meets in Geneva and holds two sessions per year.

States should submit initial reports according to the *Guidelines on treaty-specific document to be submitted by states parties under article 35, paragraph 1, of the*

*Convention on the Rights of Persons with Disabilities*<sup>687</sup> and periodic reports according to the *Guidelines on periodic reporting to the Committee on the Rights of Persons with Disabilities, including under the simplified reporting procedure*.<sup>688</sup>

As of 2013, the Committee on the Rights of Persons with Disabilities allows states to opt in to the simplified reporting procedure, whereby the Committee on the Rights of Persons with Disabilities requests information (known as List of Issues Prior to Reporting [LOIPR]) from the state under review from the *Guidelines on periodic reporting to the Committee on the Rights of Persons with Disabilities, including under the simplified reporting procedure*. The state party's replies to the LOIPR constitute the state party's report to the Committee on the Rights of Persons with Disabilities. Accordingly, information provided by states on the right to education will depend on whether it is included in LOIPR, although this does not preclude the right to education being reviewed at a later stage.

The Committee on the Rights of Persons with Disabilities has adopted a follow-up procedure<sup>689</sup> whereby it selects up to two recommendations of concern in its concluding observations. State parties are required, within a period of up to one year, to report on the steps taken to implement these recommendations. The Committee on the Rights of Persons with Disabilities has established three categories to assess the replies provided by the state party: satisfactory, partially satisfactory, and unsatisfactory. Civil society is also able to submit relevant information.

687 CRPD. 2009. *Guidelines on treaty-specific document to be submitted by states parties under article 35, paragraph 1, of the Convention on the Rights of Persons* (Doc. CRPD/C/2/3.)

688 CRPD. 2016. *Guidelines on periodic reporting to the Committee on the Rights of Persons with Disabilities, including under the simplified reporting procedure* (Doc. CRPD/C/3\*.)

689 United Nations. 2017. *Procedures of the human rights treaty bodies for following up on concluding observations, decisions and Views* (Doc. HRI/MC/2017/4.) pp. 10-11.

686 See Chapter 2 for further information on the Convention on the Rights of Persons with Disabilities.



## United Nations Human Rights Committee

The Human Rights Committee (CCPR), established in 1977, monitors implementation and compliance with the International Covenant on Civil and Political Rights (1966, ICCPR)<sup>690</sup> which guarantees educational freedom (Article 18 (4)) and has an autonomous non-discrimination clause (Article 26) which applies to all public services, including education.<sup>691</sup>

Under Article 40 of the ICCPR, states are required to submit periodic reports to the CCPR on how ICCPR rights are being implemented. States must report initially within one year after ratifying ICCPR and then whenever the CCPR requests (usually every four years). CCPR meets in Geneva and normally holds three sessions per year for a period of three weeks. The sessions are usually held at the UN Headquarters in New York and at the UN Office in Geneva.

The CCPR has adopted the optional simplified reporting procedure whereby it sends states parties a list of issues (known as the list of issues prior to reporting [LOIPR]) and considers their written replies in lieu of a periodic report. The simplified reporting procedure is governed according to the *Focused reports based on replies to lists of issues prior to reporting (LOIPR): Implementation of the new optional reporting procedure (LOIPR procedure)*.<sup>692</sup>

However, the CCPR can request that states submit a full report under the terms of the *Compilation of Guidelines on the form and content of reports to be submitted by States parties to the International*

*Human Rights Treaties*<sup>693</sup> and the *Guidelines for the treaty-specific document to be submitted by States parties under article 40 of the International Covenant on Civil and Political Rights*,<sup>694</sup> which both also apply to initial reports.

CCPR applies a follow-up procedure<sup>695</sup> through the selection of two to four specific recommendations in its concluding observations that require immediate attention. HRC requires state parties to submit a report on the steps taken to implement these specific recommendations within one year after the adoption of the concluding observations. Civil society is also able to submit reports.

## United Nations Committee on the Elimination of Racial Discrimination

The Committee on the Elimination of Racial Discrimination (CERD), established in 1970, monitors the implementation of and compliance with the International Convention on the Elimination of All Forms of Racial Discrimination (1965, ICERD)<sup>696</sup> which guarantees the right to education free from discrimination based on race in Article 5.

Under Article 9 of ICERD, states are required to submit periodic reports to CERD on how ICERD rights are being implemented. States must report initially within one year of ratifying ICERD and every two years thereafter. CERD meets in Geneva and normally holds three sessions per year consisting of three to four-week sessions.

690 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

691 See Chapter 2 for further information on the International Covenant on Civil and Political Rights.

692 CCPR. 2010. *Focused reports based on replies to lists of issues prior to reporting (LOIPR): Implementation of the new optional reporting procedure (LOIPR procedure)* (Doc. CCPR/C/99/4.)

693 United Nations. 2008. *Compilation of Guidelines on the form and content of reports to be submitted by States parties to the International Human Rights Treaties* (Doc. HRI/GEN/2/Rev.6.) pp. 64-70.

694 CCPR. 2010. *Guidelines for the treaty-specific document to be submitted by States parties under article 40 of the International Covenant on Civil and Political Rights* (Doc. CCPR/C/2009/1.)

695 CCPR. 2013. *Note by the Human Rights Committee on the procedure for follow-up to concluding observations* (Doc. CCPR/C/108/2.) Note, as of 2018 the follow-up procedure is under substantive review.

696 International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (ICERD).

Initial and periodic state reports to CERD should be submitted in accordance with the *Compilation of Guidelines on the form and content of reports to be submitted by States parties to the International Human Rights Treaties*.<sup>697</sup> These guidelines require states to submit a common core and a treaty-specific document. The latter should be submitted in accordance with the updated *Guidelines for the CERD-specific document to be submitted by states parties under article 9, paragraph 1, of the convention*.<sup>698</sup>

CERD applies a follow-up procedure<sup>699</sup> by requiring state parties to provide information within one year concerning measures taken to implement CERD's recommendations. Unlike CESCR, the Committee on the Elimination of Discrimination Against Women, CCPR and the Committee on the Rights of Persons with Disabilities, CERD has not adopted defined categories by which to assess whether the selected recommendations have been sufficiently implemented. Rather, CERD either expresses satisfaction with the responses of the state party or regrets that the state party did not provide information on the implementation of the recommendation.

### United Nations Committee on Migrant Workers

The Committee on Migrant Workers (CMW), established in 2004, monitors the implementation of and compliance with the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990, ICRMW)<sup>700</sup> which guarantees under Articles

12 (4), 30, 43, and 45, that each child of a migrant worker shall have the basic right of access to education on the basis of equality of treatment with nationals of the state.<sup>701</sup>

Under Article 73 of the ICRMW, states are required to submit period reports to CMW on how ICRMW rights are being implemented. States must report initially within one year of ratifying ICMW and every five years thereafter. CMW meets in Geneva and normally holds two sessions per year.

States parties are expected to periodically report to the CMW in accordance with the optional simplified reporting procedure whereby state party reports will only have to submit a report based on the list of issues formulated by the CMW, or according to the *Compilation of Guidelines on the form and content of reports to be submitted by States parties to the International Human Rights Treaties*.<sup>702</sup> These guidelines require states to submit a common core and a treaty-specific document. The latter should be submitted in accordance with the updated *Guidelines for the periodic reports to be submitted by states parties under article 73 of the convention*.<sup>703</sup>

CMW applies a follow-up procedure under which it identifies three to four follow-up recommendations for which state parties must submit a follow-up report on the steps taken to implement the selected recommendations. State parties should submit their reports within two years of the adoption of the concluding observations. Like CERD, CMW has not adopted a grading system for the assessment of follow-up reports.

697 UNGA. 2008., op. cit.

698 CERD. 2008. *Guidelines for the CERD-specific document to be submitted by states parties under article 9, paragraph 1, of the convention* (Doc. CERD/C/2007/1.)

699 CERD. 2006. *Guidelines to follow-up on concluding observations and recommendations* (Doc. CERD/C/68/Misc.5/Rev.1.)

700 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3 (ICRMW).

701 See Chapter 2 for further information on the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

702 UNGA. 2008., op. cit.

703 CMW. 2008. *Guidelines for the periodic reports to be submitted by states parties under article 73 of the convention* (Doc. CMW/C/2008/1.)

## 7.7.b Human Rights Council

The Human Rights Council (HRC)<sup>704</sup> is an inter-governmental body within the UN system responsible for strengthening the promotion and protection of human rights around the globe and for addressing situations of human rights violations. Unlike UN treaty bodies (composed of independent experts) which review state performance according to a specific treaty, the HRC is made up of states (47 United Nations Member States elected by the UN General Assembly) and has the ability to discuss all thematic human rights issues and situations. Its human rights mandate is not restricted by treaty, country, or issue, making it a unique political institution.

### Universal Periodic Review

The Universal Periodic Review (UPR) is the principal monitoring mechanism of the HRC. It is a unique process that involves a review of the human rights records of all UN Member States. The UPR is a state-driven process which provides the opportunity for each state to declare what actions they have taken to improve the human rights situations in their countries and to fulfil their human rights obligations. All UN Member States undergo a review of its human rights performance every four and a half years with 42 states being reviewed each year at three Human Rights Council sessions.

Under this system, states themselves examine other states, which means there is a great degree of 'politics' entering into the process. But it also gives civil society the opportunity to play an influential role by submitting shadow reports with additional information, and to put pressure on either the examined or the examining states to focus on the critical issues.

### What is reviewed

Reviews are based on the legal and political commitments to human rights contained in the United Nations Charter, the Universal Declaration of Human Rights (1948, UDHR),<sup>705</sup> the international human rights instruments to which the states under review are party, and the voluntary commitments made by states.

Three documents form the basis of the review:

1. a national report consisting of information provided by the state under review
2. information contained in the reports of independent human rights experts and groups, known as the Special Procedures, United Nations treaty bodies, and other UN entities
3. information from other stakeholders including national human rights institutions and civil society organizations

### The review process

The three-and-a-half-hour review is composed of three stages:

1. a presentation by the state under review of its national report
2. an interactive dialogue where any UN Member State can praise, criticize, pose questions, comments and/or make recommendations to the state under review. Civil society can also attend these sessions
3. the formulation of final observations by the state under review

This process informs an outcome report that contains a list of recommendations made to the

<sup>704</sup> For further information on the Human Rights Council, see [www.ohchr.org/EN/HRBodies/HRC/Pages/HRCIndex.aspx](http://www.ohchr.org/EN/HRBodies/HRC/Pages/HRCIndex.aspx) (Accessed 17 October 2017.)

<sup>705</sup> Universal Declaration of Human Rights (adopted 10 December 1948) United Nations General Assembly Resolution (UNGA Res) 217 A(III) (UDHR).

state under review in light of improving its human rights situation.

Generally, a few days after the review, the outcome report is adopted following a plenary session. The plenary allows states and civil society to raise further issues. The outcome report signifies whether the state under review accepts or rejects each recommendation made during the reviewing process. States support an average of 75% of recommendations.<sup>706</sup>

The period between each review of a state is referred to as the follow-up period. It is a crucial phrase where the state is expected to implement the recommendations that were made and accepted during the reviewing process. The international community can assist in implementing the recommendations and conclusions regarding capacity-building and technical assistance, in consultation with the state concerned. States are encouraged to submit a mid-term report between each review to provide an update of the follow-up of accepted recommendations. This procedure is not an obligation imposed on states but is purely voluntary.

During the following review the state is expected to provide information on what they have done to implement the recommendations made during the previous review as well as on any developments in the field of human rights. If the HRC sees fit it can take action against non-cooperative states.



### Box 7.19 Further reading: Guides and useful resources on the Universal Periodic Review

CRIN's page *Children's Rights and the Universal Periodic Review (UPR)* <https://www.crin.org/en/library/publications/childrens-rights-and-universal-periodic-review-upr>

FIDH's handbook on the Universal Periodic Review [https://www.fidh.org/IMG/pdf/UPR\\_HANDBOOK.pdf](https://www.fidh.org/IMG/pdf/UPR_HANDBOOK.pdf)

OHCHR and La Francophonie's practical guide to the Human Rights Council [https://www.francophonie.org/IMG/pdf/guide\\_cdh\\_anglais.pdf](https://www.francophonie.org/IMG/pdf/guide_cdh_anglais.pdf)

OHCHR database on UPR documentation, by state <https://www.ohchr.org/EN/HRBodies/UPR/Pages/Documentation.aspx>

## Special procedures

In addition to the Universal Peer Review, the HRC also establishes a range of special procedures with mandates to address a particular thematic issue or country-specific situation. The most important special procedure regarding education is the UN Special Rapporteur on the right to education.<sup>707</sup>

Mandate-holders are appointed by the URC president and report annually to the HRC. Their tasks are defined in the resolutions that create or extend their mandates. Generally speaking, their activities related to monitoring include undertaking country visits, preparing thematic studies and convening expert consultations, and preparing annual reports.

Moreover, the HRC may also establish independent inquiry committees and international fact-finding missions. These are not strictly part of special procedures although they are made up of independent experts. Their aim is to investigate and establish the facts with regard to specific events happening in a particular country.

## 7.7.c UNESCO

UNESCO is responsible for monitoring the implementation of its standard-setting instruments, including the Convention against Discrimination in

706 OHCHR. Human Rights Council booklet. (nd), p. 8. [www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session34/Documents/HRC\\_booklet\\_En.pdf](http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session34/Documents/HRC_booklet_En.pdf) (Accessed 29 September 2017.)

707 For further information on the UN Special Rapporteur on the right to education, see <https://www.ohchr.org/EN/Issues/Education/SREducation/Pages/SREducationIndex.aspx> (Accessed 29 August 2018.)

Education (1960),<sup>708</sup> the Convention on Technical and Vocational Education (1989), and the various recommendations it has adopted.<sup>709</sup>

UNESCO's Executive Board recently adopted a *Strategy concerning standard-setting instruments in the field of education (2016-2021)*, placing an emphasis on monitoring the right to education. The principal body mandated to monitor the right to education is the Committee on Conventions and Recommendations (CR).<sup>710</sup>

The CR is a subsidiary organ of UNESCO's Executive Board established in 1966, and usually meets twice a year during the Executive Board held at UNESCO's headquarters in Paris, France. Extraordinary sessions may also be convened when the Executive Board considers it necessary.

The CR is entrusted to consider all questions entrusted to the Executive Board concerning the implementation of UNESCO's standard-setting instruments. Accordingly, the CR examines reports received from UNESCO's Member States.

Under Article VIII of the UNESCO Constitution, Member States are required to submit periodic reports on actions taken to give effect to standard-setting instruments. Submission of reports occur every four years in the context of a consultation of Member States.

With regard to UNESCO conventions, Member States are requested, through consultative processes, to prepare monitoring reports in accordance with UNESCO's Framework Guidelines composed of the following components:

1. information on the legislative, judicial, administrative, and other measures taken by the state at the national level
2. information on the implementation of the convention (with reference to the text's provisions)
3. methods introduced to draw the attention of the various authorities in the country to the instrument and to remove obstacles encountered

After the submission of states' periodic reports, the UNESCO Secretariat prepares a Synthesis Report presenting the results of the consultation, the national measures adopted by Member States to implement, during the reporting period, the provisions of the texts, the challenges and difficulties encountered and specific recommendations for improvement. These reports are submitted to the Executive Board for consideration which entrusts the task to the CR.

With regard to UNESCO recommendations, UNESCO's Secretariat prepares a consolidated report on their implementation by Member States on the basis of information collected and/or on national reports submitted by Member States, in particular with regard to national legislation.

Once they have been transmitted, the monitoring reports prepared by the Secretariat are examined by the CR, whose debates and work take place in public meetings. The Executive Board then transmits these documents to the General Conference together with its observations and comments. The General Conference ultimately adopts a decision in the format of a resolution on the implementation of the conventions and recommendations for follow-up action by the Secretariat.

In addition to the work conducted by the CR, UNESCO also participates in the work of the various UN human rights bodies also monitoring

708 UNESCO Convention against Discrimination in Education (adopted 14 December 1960, entered into force 14 December 1960) 429 UNTS 93 (CADE).

709 See Chapter 2, section 2.2.b for a list of UNESCO instruments and relevant provisions.

710 Further information on the UNESCO Committee on Conventions and Recommendations can be found in UNESCO. 2018. *Committee on Conventions and Recommendations: 2018 edition*.

the right to education. UNESCO notably cooperates with the UPR and CESCR. Through this collaboration, UNESCO, based on assessments of the situation at country level, addresses recommendations to countries to improve the status of the right to education at national level.



### Box 7.20 Further information: The Observatory on the Right to Education

Through the dedicated online Observatory, UNESCO takes stock of the implementation of the right to education in the 195 UNESCO Member States. For each country, legal frameworks and educational policies adopted are identified. Besides, the Observatory is also a unique source of over 1300 national documents including constitutions, laws, and policies.

Thus, UNESCO's Observatory helps monitor the right to education in Member States. It collects and disseminates information on how states are ensuring the right to education to strengthen transparency and accountability. It also facilitates research and policy evaluation, informs citizens and governments of their rights and duties concerning education, and fosters regional and international cooperation.

The Observatory is a key tool for various stakeholders including United Nations specialized agencies, programmes and human rights bodies, government officials, ministries of education, civil society and non-governmental organizations, legal experts, educationalists, students and researchers, journalists, and the international community at large.

For further information see: UNESCO's page *Observatory on the Right to Education* <http://www.unesco.org/education/edurights/index.php?action=home&lng=en>

### Committee of Experts on the Application of the Recommendations concerning Teaching Personnel

The joint ILO-UNESCO Committee of Experts on the Application of the Recommendations concerning Teaching Personnel (CEART) monitors

the implementation of the two international normative instruments concerning teachers: the ILO/UNESCO Recommendation concerning the Status of Teachers (1966) and the UNESCO Recommendation concerning the Status of Higher-Education Teaching Personnel (1997).

This monitoring mechanism does not require states to submit periodic reports. However, the CEART meets every three years to examine studies, reports and information concerning the application of the two Recommendations. These are provided by governments, teachers' organizations, international organizations with a strong stake in education, as well as those being commissioned by UNESCO and ILO.

Based on this examination, CEART issues its own report summarizing the status of teachers worldwide and proposing concrete actions for governments, social partners, ILO and UNESCO. The recommendations of the Joint Committee are nonbinding, being intended to guide the actions of national authorities, employers' and workers' organizations, and other education stakeholders on how to improve the condition of the teaching profession within their respective mandates, using the two Recommendations as guidelines.

### 7.7.d International Labour Organization

International labour standards are backed by the supervisory system of the International Labour Organization (ILO) that helps to ensure that states implement the conventions they ratify. The reporting obligations of states are found in the ILO Constitution.<sup>711</sup>

The ILO regularly examines the application of standards in Member States and points out areas where they could be better applied. If there are any problems in the application of standards,

<sup>711</sup> ILO Constitution Articles 19, 22, and 23.

the ILO seeks to assist countries through social dialogue and technical assistance.

The ILO has developed what is known as the 'regular system of supervision' to monitor the application of Conventions and Recommendations both in law and practice through the submission of periodic reports by Member States on the measures they have taken to implement the provisions of the ratified Conventions, as well as complementary information provided by workers' organizations and employers' organizations.

The regular system of supervision comprises two ILO bodies: the Committee of Experts on the Application of Conventions and Recommendations (CEACR), established in 1926, and the International Labour Conference's Committee on the Application of Standards (CCAS).

States must report to CEACR every three years detailing the steps they have taken in law and practice to apply any of the eight fundamental conventions they may have ratified. Regarding the right to education the relevant fundamental conventions are C138 - Minimum Age Convention, 1973 (No. 138) and C182 - Worst Forms of Child Labour Convention, 1999 (No. 182). Fundamental conventions that apply to workers' rights and workers' unions are also important insofar as they apply to teachers, without whom the right to education is unattainable. For all other Conventions, reports must be submitted every five years. Reports on the application of Conventions may also be requested at shorter intervals. States are required to submit copies of their reports to employers' and workers' organizations. These organizations may comment on the governments' reports; they may also send comments on the application of Conventions directly to the ILO.

When examining the application of international labour standards, CEACR makes two kinds of comments: observations and direct requests. Observations contain comments on fundamental questions raised by the application of a particular Convention by a state. These observations are published in the CEACR's annual report. Direct requests relate to more technical questions or requests for further information. They are not published in the report but are communicated directly to the governments concerned.

The annual report produced by CEACR is then submitted to the Conference Committee on the Application of Standards in June every year. CCAS is a tripartite body comprised of representatives of governments, employers and workers. CCAS examines the report produced by CEACR and selects a number of observations for discussion that draw attention to difficulties encountered in the fulfilment of states' obligations.

States referred to in CCAS are invited to respond and provide information on the situation in question. Then CCAS usually formulates recommendations to that government to take specific steps to address the situation including, in some cases, by accepting a technical assistance mission by ILO. It may also request that states submit additional information or address specific concerns in its next report to the CEACR.

## 7.8 Regional bodies

Regional intergovernmental bodies in Europe, Africa, the Americas, and the Middle East and North Africa have human rights systems that monitor state compliance with regional human rights treaties. These mechanisms are underutilized compared with their international counterparts.

**Table 7.2: Regional human rights monitoring mechanisms**

Region	Forum	Monitoring mechanism	Reporting cycle	Civil society participation
Africa	African Commission on Human and Peoples' Rights	Yes	Every 2 years	Yes
	African Committee of Experts on the Rights and Welfare of the Child	Yes	Initial report within 2 years and every 3 years thereafter	Yes
Americas	Inter-American Commission on Human Rights	Yes	N/A	Yes
Arab States	Arab Human Rights Committee	Yes	Initial report within 1 year and every 3 years thereafter	Yes
Asia-Pacific	ASEAN Intergovernmental Commission on Human Rights	No	N/A	N/A
Europe	European Committee on Social Rights	Yes	Every year on one of the thematic groups, covering all four groups every 4 years	Yes

## 7.8.a Africa

### African Commission on Human and Peoples' Rights

The African Commission on Human and Peoples' Rights (ACHPR), established in 1987, was established by the African Charter on Human and Peoples' Rights (1981, Banjul Charter)<sup>712</sup> to which all African Union Member States except South Sudan are party. It is mandated to monitor implementation of and compliance with the Banjul Charter under Articles 45 and 46, and its additional protocols, including the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003).<sup>713</sup>

The ACHPR usually meets in Banjul, The Gambia, but may also meet in the territory of any state party that invites the Commission to hold meetings there. As standard the ACHPR holds

two ordinary sessions per year, usually lasting a fortnight each, with extraordinary sessions also held as required.

Under Article 62 of the Banjul Charter, each state party is required to submit biennial periodic reports detailing all measures undertaken to implement the Banjul Charter. The ACHPR's *Guidelines for national periodic reports*<sup>714</sup> detail the type of information to be provided in states' reports.

The state review process is governed by the *Rules of Procedure of the African Commission on Human and Peoples' Rights*.<sup>715</sup> The ACHPR considers each periodic report, as well as the parallel reports of civil society, and returns concluding observations, including any recommended measures to ensure greater state compliance with the Banjul Charter, and the date by which that state must submit their next periodic report. The follow-up is done by members of the ACHPR in their work with the state in question.

712 African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (Doc. CAB/LEG/67/3.) Article 30.

713 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted 11 July 2003, entered into force 25 November 2005) (Doc. CAB/LEG/66.6.)

714 African Commission on Human and Peoples' Rights (ACHR). *Guidelines for national periodic reports*.

715 ACHR. 2010. *Rules of Procedure of the African Commission on Human and Peoples' Rights*, chapter 2 part 2.



The ACHPR's mandate also includes a monitoring function where it considers reports from members of the ACHPR and its special mechanisms (rapporteurs, committees, and working groups).

### African Committee of Experts on the Rights and Welfare of the Child

The African Committee of Experts on the Rights and Welfare of the Child (ACERWC), inaugurated in 2001, was established by the African Charter on the Rights and Welfare of the Child (1990, ACRWC)<sup>716</sup> and as stipulated under Article 42, part of the mandate of the ACERWC relates to monitoring the implementation by states parties of the ACRWC.

The ACERWC usually meets at least twice a year, in March or April, and November, to hold ordinary sessions. Sessions are commonly held at the ACERWC's headquarters Addis Ababa, Ethiopia. States are initially required to report within two years of ratifying the ACRWC, and every three years for each subsequent periodic review. The submission date for reporting by a given state party is stipulated in the concluding observations to that state party's previous periodic review.

Article 43 of the ACRWC and the rules of procedure<sup>717</sup> set out the reporting procedures for states parties. These include submission of periodic reports to the ACERWC detailing the ways in which states are working to ensure the measures contained within the ACRWC are brought into effect. Civil society is also able to submit parallel reports.

Where recommendations are made to states parties as a result of a periodic review, ACERWC follows-up with the state party to monitor its

adherence to its recommendations. ACERWC can also request additional or interim reporting from states parties, and additional evaluations by the ACERWC of state compliance with its recommendations.

ACERWC can also undertake fact-finding missions.

## 7.8.b Americas

### Inter-American Commission on Human Rights

The Inter-American Commission on Human Rights (IACHR) was established in 1959 under the Organization of American States (OAS) Charter<sup>718</sup> and whose mandate is further defined in the American Convention on Human Rights (1969, Pact of San José, Costa Rica).<sup>719</sup> One of the IACHR's functions is to monitor both the protection of human rights in the region and the implementation of and compliance with OAS instruments.<sup>720</sup>

Unlike other regional monitoring mechanisms, the IACHR does not require states to submit periodic reports. Under its Rules of Procedure, the IACHR has the following monitoring functions:

- prepare an annual report that gives an overview of the human rights situation in the Americas, derived from its monitoring work, which shall identify the main tendencies, problems, challenges, progress and best practices of civil and political rights, and social, economic and cultural rights. It derives its information from a variety of sources, including country visits, reports of other human rights monitoring bodies, and civil society reports

716 African Charter on the Rights and Welfare of the Child (adopted 1 July 1990, entered into force 29 November 1999) (Doc. CAB/LEG/24.9/49.) Articles 32-46.

717 African Committee of Experts on the Rights and Welfare of the Child. *Revised Rules of Procedure of The African Committee of Experts on the Rights and Welfare of the Child*, rules 65-74.

718 Charter of the Organisation of American States (as amended) (adopted 30 April 1948, entered into force 13 December 1951) OAS TS 1-C and 61 Article 106.

719 American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) OAS TS 36.

720 See Chapter 2, section 2.3.b for further information on the instruments of the Organization of American States.

- conduct country visits and publish general or special reports on the status of human rights in that state
- conduct thematic reports on specific issues relevant to the Americas
- hold hearings to gather information from states
- establish rapporteurships on specific issues

### 7.8.c Arab States

#### Arab Human Rights Committee

The Arab Human Rights Committee (AHRC) was established in 2009 under the revised Arab Charter on Human Rights (2008, Charter)<sup>721</sup> to monitor implementation of and compliance with the Charter (2008), which guarantees the right to education under Articles 40 and 41. The ACHR meets in Cairo, Egypt.

Under Article 48 of the Charter, states are required to submit periodic reports to the ACHR on the implementation of the rights as set out in the Charter, initially within one year of its entry into force and every three years thereafter.

The Rules of Procedure govern the format of state reports.<sup>722</sup> After consideration of the reports, the AHRC discusses the content of the report with representatives of the state, and any conclusions and recommendations are published by the AHRC. These detail how improvements can be made in the implementation of the Charter. The AHRC may also ask for additional information to be provided by states parties on the content of their report. All conclusions and recommendations by the ACHR

are included in its annual report submitted to the Arab League Council, but the AHRC itself has not adopted any procedures to follow up on the progress made by states parties.

Regarding the participation of civil society, CSOs are invited to review state reports, take part in discussions and attend certain sessions held by the AHRC. This is not limited to CSOs with observer status with the Arab League. CSOs are also able to submit parallel reports prior to the consideration of state reports. After the submission of state reports, the AHRC holds a dialogue with the state party whose report is under review. The session normally last two days. Part of this process includes a dialogue between the Committee and CSOs that have submitted parallel reports, without participation of representatives of the state.

### 7.8.d Asia and Pacific

The ASEAN Intergovernmental Commission on Human Rights is not competent to monitor human rights in the Asia-Pacific region. States and civil society should instead report to the international mechanisms available at the UN, UNESCO, and the ILO.

### 7.8.e Europe

The European Committee on Social Rights (ECSR) was established in 1965, under the European Social Charter (1961, Charter)<sup>723</sup> as amended by the Protocol amending the European Social Charter (1991, Turin Protocol).<sup>724</sup> The ECSR monitors compliance with the ESC and the Revised European Social Charter (1996, Revised Charter),<sup>725</sup> under which various aspects of, but

721 Revised Arab Charter on Human Rights (adopted 24 May 2004, entered into force 15 March 2008) Article 45.

722 The Open Society Foundations has published a useful guide to engaging with the AHRC, including information on the reporting process, a breakdown of the rules of procedure, and tips for civil society to engage with the ACHR. See Rishmawi, M. 2015. *The League of Arab States Human Rights Standards and Mechanisms Towards Further Civil Society Engagement: A Manual for Practitioners*, pp. 40-47.

723 European Social Charter (adopted 18 October 1961, entered into force 26 February 1965) ETS No.035 Article 25.

724 Protocol amending the European Social Charter (adopted 21 October 1991) ETS No.142.

725 Revised European Social Charter (adopted 3 April 1996, entered into force 1 July 1999) ETS 163.

not the totality of, the right to education are enshrined. The ECSR meets in Strasbourg, France.

Each year, states parties submit a national report describing how they have implemented specific provisions of the Charters. The Charters' provisions are divided into four thematic groups and states report on one group each year, with the result being that a review of all of the provisions is accomplished for each state every four years. The Committee of Ministers, the statutory decision-making body of the Council of Europe, has adopted forms for each Charter for the purposes of national reporting.

Following an evaluation of the national reports, the ECSR publishes conclusions about whether each state is in conformity with the Charter. Following the conclusion of the national reporting procedure, the Committee of Ministers adopts resolutions to close the supervision cycle and issues recommendations to the states calling on them to conform their activities to the Charters. Since the Committee of Ministers comprises government representatives from all Council of Europe Member States, this practice forms a method of enforcement. If the state takes no action, the Committee of Ministers may address a *Recommendation* to that state, asking it to change the situation in law and/or in practice.

In April 2014, the Committee of Ministers altered the national reporting system so that it is easier for states that have accepted the collective complaints procedure to participate in the national reporting system. Since states that have accepted the collective complaints procedure have additional compliance and reporting obligations, the Committee of Ministers deemed the new reporting system necessary to create a more manageable system over time. This new arrangement is also intended to streamline and improve the ECSR's reporting and monitoring efforts.

Under the new reporting system, states that have accepted the collective complaints procedure will submit a simplified report every two years on average, rather than every year. States that have not accepted the collective complaints procedure submit normal reports regularly. The simplified reports should focus on the ECSR's conclusions of non-conformity from the previous reporting cycle and comment on any questions that were raised.

Civil society is able to submit alternative reports.

## 7.9 Monitoring SDG4-Education 2030

The process for monitoring the SDGs are founded in a country-owned process. The architecture of the 2030 Agenda provides for voluntary, state-led 'follow-up and review' mechanisms at the national, regional, and international levels. In reporting national progress against regional strategies and monitoring frameworks, countries prepare Voluntary National Reviews (VNRs) of their progress towards the implementation of the SDGs to be presented at the annual High Level Political Forum (HLPF) under the auspices of the UN Economic and Social Council (ECOSOC) in New York. These VNRs are voluntary, undertaken by both developed and developing countries, and involve multiple stakeholders. States are expected to establish formal processes at the national level for civil society participation, although practices vary across states. As of the time of writing, 111 VNRs have been submitted.<sup>726</sup>

At the regional level, follow-up and review mechanisms focus on peer learning and exchange of best practices, with the involvement of UN Regional Economic Commissions and regional organizations, political and technical bodies,

<sup>726</sup> For further information on VNRs, see: <https://sustainabledevelopment.un.org/vnrs/> (Accessed 6 November 2018.)

as well as civil society. For example, SDG4 regional Education 2030 consultations were held throughout 2018 as part of the preparation for the 2019 HLPF Review.

As the primary UN platform on Sustainable Development, the HLPF has a central role in the follow-up and review processes of the SDGs at the global level. The HLPF meets annually to track global progress on implementation, provide political leadership and guidance, and address new and emerging issues, especially those of an international nature. At the HLPF, civil society can engage through formal processes, principally through the Major Group and Other Stakeholders Coordination Mechanism (MGoS-CM)<sup>727</sup> and the submission of shadow reports/spotlight reports to the HLPF process. Each year, the HLPF focuses on selected SDGs, which means that not all SDGs are reviewed every session. The 2019 HLPF Review is devoted to the theme ‘Empowering people and ensuring inclusiveness and equality’ and includes an in-depth review of SDG4. This marks the first four-year cycle against which SDG4 and its interlinkages with other SDGs are comprehensively reviewed.

Specifically with regard to SDG4, the Incheon Declaration calls for strong global and regional monitoring of the implementation of the education agenda.<sup>728</sup> UNESCO, mandated to lead and coordinate SDG4-Education 2030, monitors progress towards the education goals and targets.<sup>729</sup>

### SDG-Education 2030 Steering Committee

Convened by UNESCO, the SDG-Education 2030 Steering Committee (SC)<sup>730</sup> was established in 2016 as the main global multi-stakeholder mechanism for the consultation and coordination for SDG4. It proposes recommendations on the monitoring and indicator framework at the global, regional, and national levels; harmonizes perspectives across partners, monitoring and reporting on SDG4 targets; and facilitates the endorsement of indicator frameworks as elaborated by the Technical Cooperation Group.<sup>731</sup> The SDG-Education 2030 SC submits inputs to the annual HLPF providing an assessment of progress on SDG4.

### UNESCO Institute for Statistics

UNESCO Institute for Statistics (UIS), which is the official data source for SDG4, works with partners to develop indicators, statistical approaches, and monitoring tools to better assess progress across the targets related to UNESCO’s mandate, working in coordination with the SDG-Education 2030 SC. UIS and UNESCO jointly convened the Technical Cooperation Group to lead the methodological development and implementation of the thematic indicator framework, designed to monitor comprehensively the global education targets. These consist of 11 global indicators<sup>732</sup> which correspond to the targets of SDG4<sup>733</sup> and

727 For further information, see for example, the *SDG Knowledge Platform*. <https://sustainabledevelopment.un.org/hlpf/2018> (Accessed 5 November 2018.)

728 Incheon Declaration paras. 17–18.

729 *Ibid.*, para. 17.

730 For further information on the SDG-Education 2030 Steering Committee see: SDG4-Education 2030’s page <https://www.sdg4education2030.org/who-we-are> (Accessed 15 October 2018.)

731 For more information on the Technical Cooperation group, see: <http://tcg.uis.unesco.org/> (Accessed 15 October 2018.)

732 For more information on the global indicators, see: UNESCO and UIS. 2018. *SDG 4 Data Book Global Education Indicators 2018* and for a guide to education indicators on SDG4 see: UNESCO and UIS. 2018. *A Quick Guide to Education Indicators for SDG 4*.

733 See chapter 5, section 5.1.

in addition there are thematic indicators<sup>734</sup> which cover the full scope of the education agenda.

### **Global Education Monitoring Report**

The Global Education Monitoring (GEM) Report is an editorially independent, authoritative, and evidence-based annual report published by UNESCO.<sup>735</sup> Its mandate is to monitor progress towards the education targets in the Sustainable Development Goals (SDGs) framework. The annual GEM Report includes both quantitative and qualitative information and thematic monitoring and policy analysis across countries related to states educational system, providing insights for governments and policy makers to monitor and accelerate progress towards SDG4.

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734 For more information on thematic indicators, see: <http://tcg.uis.unesco.org/sdg-4-global-and-thematic-indicator-lists/> (Accessed 5 November 2018.)

735 For further information on the GEM reports, see the GEM report website: <https://en.unesco.org/gem-report/allreports> (Accessed 15 October 2018.)

## Summary

Monitoring is the process of systematically tracking and assessing a state's performance against its human rights obligations. It enables the elucidation of whether states comply with their legal obligations.

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The ultimate purpose of all monitoring activities is to contribute to the realization of the right to education.

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The way monitoring is conducted is important. Human rights indicators, good and reliable data and accurate analysis of this data are required to monitor the right to education and measure its implementation status.

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States are legally obligated to monitor the right to education, first, as part of their obligations to domestically implement the right to education, second, as part of their immediate obligations to *take steps* towards the full realization of the right to education.

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At the national level, the most significant organ of the executive in terms of monitoring the right to education is the ministry of education (MoE). The legislature and National Human Rights Institutions also play important roles in state monitoring.

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At the international level, various UN bodies, including UN treaty bodies, the Human Rights Council, UNESCO and ILO, are mandated to monitor the right to education.

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Regional intergovernmental bodies in Europe, Africa, the Americas, and the Middle East and North Africa have human rights systems that monitor state compliance with regional human rights treaties.

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Non-state actors also have different reasons and motivations to monitor the right to education. For example, civil society has a complementary human rights monitoring role, representing alternative perspectives that states may otherwise neglect or be unaware of.

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## Ask yourself

- ➔ How does the state monitor the right to education through, for example, data collection, use of human rights indicators?
- ➔ Are civil society organizations aware of their opportunity to submit reports to monitoring mechanisms?
- ➔ Is there a NHRI in your country that monitors the right to education?

# Chapter 8:

Accountability and

the right to education

## Key questions

What is human rights accountability?

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How can states be held accountable?

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What is legal enforcement?

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What is access to justice?

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What is meant by a *justiciable* right to education?

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In which states is there a constitutional right to education?

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How have court decisions contributed to the realization of the right to education?

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What accountability mechanisms exist at the international and regional levels?

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**The Global Education Monitoring (GEM) Report defines accountability as: ‘a process aimed at helping individuals or institutions meet their responsibilities and reach their goals. Actors have an obligation, based on legal, political, social or moral justifications, to provide an account of how they met clearly defined responsibilities.’<sup>736</sup>**

In recent years accountability has been identified by the international community as a major global governance issue that needs to be addressed in order to provide the necessary enabling conditions for sustainable development and the realization of human rights.<sup>737</sup> And more recently, accountability has been lauded as a key means to improve education systems around the world. The GEM Report,<sup>738</sup> for example, devoted its entire thematic report for the period 2017/8 to analysing the ways in which accountability can feasibly contribute to the achievement of the Sustainable Development Goal on education (SDG4), Education 2030, and the right to education more generally.

The GEM Report succinctly summarizes the instrumental value of accountability: ‘Faced with education challenges, the public wants to know who is responsible and policy-makers look for urgent solutions. Increased accountability tops the list. When systems fail, people call for someone to be held responsible and for mechanisms to be in place that ensure corrective action.’<sup>739</sup>

International human rights law (IHRL), if properly implemented, provides a key means for increasing accountability, and therefore contributing to the improvement of education. Accountability is itself a key feature of IHRL whereby duty-bearers accept that they have mandatory legal obligations<sup>740</sup> in relation to specific entitlements of rights-holders,<sup>741</sup> for which they can be held accountable.

Under IHRL, states must ensure that rights-holders can hold them accountable by ensuring that they can access justice and enjoy the right to a fair hearing and the right to an effective remedy when necessary. Without accountability people cannot fully enjoy their rights because they can so easily be violated or limited without consequences or remedy, and this is why it is such an integral part of IHRL. As such states must, through the process of domestic implementation, give full effect to the right to education, as set out in Chapter 6, in order for accountability mechanisms to operate.

IHRL also prescribes a number of methods and mechanisms through which states can be held accountable at international and regional levels.

States accept that they can be held accountable by various external bodies, such as United Nations (UN) treaty bodies that oversee the implementation of the core UN human rights treaties and regional courts that enforce regional human rights treaties. These mechanisms are secondary to domestic processes because IHRL is based on the principle of subsidiarity whereby states have the primary responsibility to secure human rights and international human rights mechanisms should only have a supervisory function, unless the state has not provided effective remedies at the national level, and international and regional mechanisms are the only means of redress.

736 UNESCO. 2017/8. *Global Education Monitoring Report 2017/8: Accountability in education - Meeting Our Commitments*. Paris, UNESCO, p. 2.

737 For example, Goal 16 of the Sustainable Development Goals directs states to: ‘Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.’

738 UNESCO. 2017/8., op. cit.

739 Ibid., p. xii.

740 See Chapter 4.

741 See Chapter 3.

This chapter firstly explores the concept of human rights accountability, before explaining the various right to education accountability mechanisms and processes available at national, international, and regional levels.



### Box 8.1 Further reading: Accountability

UNESCO. 2017/8. *Global Education Monitoring Report 2017/8: Accountability in education - Meeting Our Commitments*.

See Chapter 7, section 7.9 for more information on the GEM report.

This chapter is based on the Right to Education Initiative's (RTE) background papers for the Global Education Monitoring Report 2017/8:

RTE. 2017. *Accountability from a human rights perspective: The incorporation and enforcement of the right to education in the domestic legal order*, paper commissioned for the 2017/8 Global Education Monitoring Report, *Accountability in education: Meeting our commitments*.

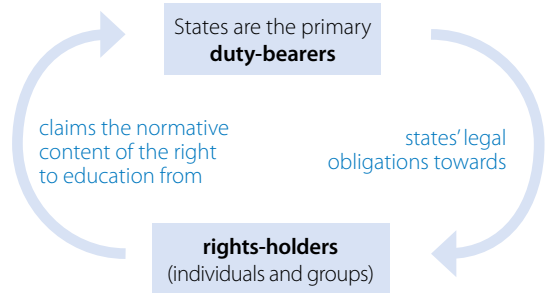
RTE. 2018. *Country commitments to gender equality in education*. Background paper prepared for the 2018 Global Education Monitoring Report Gender Review Meeting our commitments to gender equality in education.

## 8.1 Human rights accountability

Human rights accountability is concerned with rights-holders' ability to hold duty-bearers (usually the state but not always: see box 8.4) to account according to their legal obligations and should be understood as continuously underpinning this relationship. Duty-bearers must, therefore, act *before* taking any action to mitigate possible negative human rights impacts; duty-bearers must ensure that decision-making on matters affecting rights-holders complies with human rights principles, such as transparency and participation; and rights-holders must have the opportunity

to have violations and grievances addressed and remedied *after* a violation or breach has occurred.

Figure 8.1: Human rights accountability



According to the Office of the High Commissioner for Human Rights (OHCHR) and the Center for Economic and Social Rights (CESR), accountability from a public policy perspective requires that those in authority have defined *responsibilities*, are *answerable* for actions regarding those responsibilities, and must be subject to forms of *enforceable* sanctions or remedial action for failures to carry out those responsibilities.<sup>742</sup> Human rights strengthen all three of these dimensions.

Human rights designate and delineate substantive *responsibilities* under IHRL. They identify the duty-bearers and the rights-holders, the relationship between them, including the normative content owed to rights-holders and the nature of the obligations of duty-bearers regarding that content.<sup>743</sup>

Human rights principles, such as transparency, participation, and inclusion, inform the mechanisms, processes, and conditions under which decisions affecting rights-holders are made

742 United Nations Office of the High Commissioner for Human Rights (OHCHR) and Center for Economic and Social Rights (CESR). 2013. *Who will be accountable - Human Rights and the post-2015 Development Agenda*. New York and Geneva (Doc. HR/PUB/13/1.) p. 15.

743 *Ibid.*, p. ix.

such that duty-bearers are *answerable* for these decisions.

Importantly, IHRL provides a framework that specifies the rights (access to justice, right to a fair hearing and an effective remedy) and mechanisms (judicial and administrative) that provide for avenues of redress for victims of violations to have their right to education and related rights enforced.



### Box 8.2 Further reading: Human rights accountability

United Nations Office of the High Commissioner for Human Rights (OHCHR) and Center for Economic and Social Rights (CESR). 2013. *Who will be accountable - Human Rights and the post-2015 Development Agenda*. New York and Geneva (Doc. HR/PUB/13/1.) p. 15.



### Box 8.3 Further information: The link between monitoring and accountability

Monitoring and accountability are closely related, and both contribute to the realization of the right to education, although they are often elided.

Monitoring, which you can read about in more detail in Chapter 7, is concerned with systematically tracking and assessing states' performance against their human rights obligations.

Accountability is about how to hold states responsible when there are observed gaps between performance and human rights obligations.

Monitoring is therefore the basis of accountability.



### Box 8.4 Further information: Which actors are responsible for the implementation of the right to education?

Many actors are responsible for the right to education, but the level of responsibility is different depending on the institution or actor in question.

Under international law, states are the primary duty-bearer when it comes to the right to education. This is because it is states that legally commit to the right to education and the government of the day that therefore delivers and administers the national education systems. The state should be understood as including institutions and actors at the national and federal levels, for instance: ministries of education, ministers, government officials, legislators, civil servants. It also includes institutions and actors operating at the sub-national level, including provincial, regional, municipal, and local levels, such as: local governments, boards of education, local education authorities, principals and headteachers, and teachers.

Non-state actors, such as: intergovernmental organizations, parents, NGOs, the private sector, and even students themselves, all have a role to play in realizing the right to education, indeed they are also duty-bearers, however, at the international level they are not deemed to have legal obligations, rather *responsibilities* as defined or expected in national legislation, the human rights framework, and/or other avenues.

That being said, globalisation and the dislocation of education authority to certain non-state actors, in particular powerful international non-governmental organizations, donors, and business enterprises, has meant that a considerable amount of decision-making about education within a state has moved outside of the state. This has the potential to leave accountability gaps, particularly where states have little choice but to accept the decisions of powerful non-state actors.

## 8.2 Leveraging human rights accountability for SDG4-Education 2030

Despite SDG16 encouraging states to: ‘develop effective, accountable and transparent institutions at all levels’, there is a lack of in-built robust and effective accountability mechanisms in the architecture of the 2030 Agenda. Although there is no formal obligation, states are expected to establish effective, participatory, and transparent accountability mechanisms at the local and national levels.

The lack of accountability is problematic from a human rights perspective as it may lead to negative human rights impacts, for instance, it may disincentivize states from taking concrete action and allowing states to implement development policies without input and scrutiny from key stakeholders.

Nevertheless, when the state in question has legally committed to the right to education and incorporated it in their domestic legal orders and/or ratified the relevant human rights treaties, elements of SDG4-Education 2030 can be susceptible to adjudication by competent mechanisms, offering the possibility of legal accountability through legal enforcement at the national level and the possibility of engaging accountability mechanisms at the international and regional levels, thereby mitigating the lack of such mechanisms for SDG4-Education 2030.

## 8.3 Accountability at the national level

IHRL recognizes states as the main duty-bearers when it comes to the right to education, which means that ultimately the strongest and most appropriate protection of human rights is at the national level. As such, under IHRL, states must

domestically implement the right to education. This includes ensuring that accountability mechanisms are put in place and are accessible to everyone. In this regard, states are strongly encouraged to recognize the right to education, ‘in appropriate ways within the domestic legal order, appropriate means of redress, or remedies, must be available to any aggrieved individual or group, and appropriate means of ensuring governmental accountability must be put in place.’<sup>744</sup> Here, ‘appropriate means of ensuring governmental accountability’ should not be construed as limited to judicial mechanisms, although there is a presumption that judicial and/or other effective remedies are ‘appropriate means’ in part because other means that states may employ ‘could be rendered ineffective if they are not reinforced or complemented by judicial remedies.’<sup>745</sup>

According to Philip Alston: ‘all three branches of government offer potential accountability mechanisms for economic and social rights claims.’<sup>746</sup> Legislatures often establish human rights committees that can review draft legislation to ensure compliance with the state’s human rights obligations as well as hear evidence on human rights issues in their oversight duties. Executives can monitor the implementation of the right to education in order to improve policy-making and provide participatory mechanisms through which stakeholders can engage in policy-making decisions. In addition, quasi-judicial and administrative bodies, such as national human rights institutions provide alternative avenues for seeking enforcement of the right to education.<sup>747</sup>

744 UN Committee on Economic Social and Cultural Rights (CESCR). 1998. *General Comment No. 9: The Domestic Application of the Covenant*. (Doc. E/C.12/1998/24.) (General Comment 9) para. 2.

745 CESCR. 1990. *General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the Covenant)* (Doc. E/1991/23.) (CESCR General Comment 3) para. 3.

746 Alston, P. 2016. *Report of the Special Rapporteur on extreme poverty and human rights*. (Doc. A/HRC/32/31.) para. 41.

747 Ibid.

However, the salient feature of the right to education in respect to accountability is that it can be legally enforced by judicial mechanisms, provided the state in question has domestically implemented the right to education by incorporating it within the domestic legal order. Guaranteeing the right to education in law means that it firstly competes with other concerns of the state and cannot easily be ignored, and that, if all else fails, the state can be compelled to act in instances of right to education violations by the state or abuses by non-state actors.

### 8.3.a Judicial enforcement

Judicial mechanisms, for example, courts and tribunals, play an important role in enforcing the right to education. Once the right to education is given legal effect within domestic legal orders (see Chapter 6) in a way that renders it justiciable as a legal right (see section 8.3.a.ii), courts are able to adjudicate on issues and violations regarding the right to education. This means that judicial mechanisms can make a determination as to whether a state (or other duty-bearer) has complied with its human rights obligations, hold them to account by assigning responsibility and imposing sanctions for violations and transgressions, and ensure that appropriate corrective and remedial action is taken when required.<sup>748</sup> In this way, courts play a crucial role in enforcing the right to education, ensuring legal accountability, and therefore contributing to the practical realization of the right to education.

One of the ways courts hold states to account is by compelling the state to correct the actions, or lack thereof, that led to the violation, and granting remedies to address the harms done to the complainant, for example, through injunctions, preventative measures, recommending policy measures, striking down of laws, administrative

penalties, compensation, and criminal punishment. In some instances, these remedies benefit more than just the claimant but also all those affected or likely to be affected by the actions (or inactions) that led to the case being brought.

An important function of courts is to give persons belonging to marginalized groups, particularly those living in poverty, a ‘voice’ in democratic systems that may otherwise neglect their interests, especially through judicial review proceedings. As Iain Byrne points out: ‘in the face of executive and legislative inaction and an inability of the poor and marginalized to exert political pressure, courts are often their last hope.’<sup>749</sup>

Judicial and quasi-judicial bodies also play a pivotal role in clarifying the normative content and scope of the right to education; progressively identifying its justiciable elements; as well as finding innovative ways to adjudicate on issues concerning economic and social rights. Judicial enforcement of the right to education in other jurisdictions can help courts to understand how economic and social rights can be adjudicated to better hold states to account in accordance with their obligations under international law.

Lastly, if right to education matters can be adjudicated before courts, it means that civil society can be more effective in campaigning, advocating, and mobilising for accountability and change. Litigation, or even just the threat of it, offers an important avenue to publicize human rights violations and attract media attention, which may lead to accountability and change in the future.

#### 8.3.a.i Access to justice

Access to justice is important because it:

- provides an opportunity to hold violators to account

748 OHCHR and CESR, op. cit., p. 10.

749 Byrne, I., op.cit., p. 297.

- provides an alternative avenue to ensure change in a way that respects people's rights
- deters others from violating fundamental human rights
- encourages respect for human rights
- discourages impunity
- can be a means of highlighting structural or systemic issues as demonstrated in a particular situation

Ultimately, access to justice means that courts can ensure that the state is held accountable for its actions, in accordance with its international, regional, and domestic human rights obligations.

Access to justice is underpinned by a variety of rights recognized under international law, which have implications for how the right to education should be implemented.

Article 8 of the Universal Declaration of Human Rights (1948, UDHR)<sup>750</sup> states that: 'Everyone has the right to an effective remedy by the competent *national* tribunals for acts violating the fundamental rights granted...by the *constitution or by law*.'

Article 2 (3) of the International Covenant on Civil and Political Rights (1966, ICCPR)<sup>751</sup> on the administration of justice guarantees the right to a fair hearing which includes the right to an effective remedy.

The Committee on Economic, Social and Cultural Rights (CESCR) has stated:

*(a) State party seeking to justify its failure to provide any domestic legal remedies for violations of economic, social and cultural rights would*

750 Universal Declaration of Human Rights (adopted 10 December 1948) United Nations General Assembly Resolution (UNGA Res) 217 A(III) (UDHR).

751 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

*need to show either that such remedies are not "appropriate means"...or that, in view of the other means used, they are unnecessary. It will be difficult to show this and the Committee considers that, in many cases, the other "means" used could be rendered ineffective if they are not reinforced or complemented by judicial remedies.*<sup>752</sup>

What the above provisions mean in practice is that states are required to domestically implement the right to education in a manner that creates *justiciable* rights.

### 8.3.a.ii A justiciable right to education

Justiciability refers to the amenability of an issue to be adjudicated upon in judicial or quasi-judicial fora. A justiciable right to education means that when this right is violated, the right-holder can take her claim before an independent and impartial body, and if the claim is upheld, be granted a remedy, which can then be enforced.<sup>753</sup>

According to RTE's research, based on data from the Toronto Initiative on Economic and Social Rights (TIESR), a dataset on the constitutional status of economic and social rights, and the Comparative Constitutions Project,<sup>754</sup> as of 2014, 160 states mention the right to education<sup>755</sup> explicitly in their constitutions (82% of the 196 States surveyed). Of those, 107 states provide for a formally justiciable right to education and 53 States constitutionally guarantee the right to education as a directive principle of state policy.

752 CESCR Comment 9 para. 3.

753 International Commission of Jurists (ICJ). 2008. Courts and the Legal Enforcement of Economic, Social and Cultural Rights. Comparative Experiences of Justiciability. *Human Rights and Rule of Law Series*, No. 2, p. 1.

754 Comparative Constitutions Project <http://comparativeconstitutionsproject.org/> (Accessed 4 October 2018.)

755 According to the coding manual this includes explicit reference to the right to education and/or the mention that the state will provide education (sometimes free and/or compulsory education), para. 29.

**Table 8.1: States' constitutional status of the right to education, distinguished by justiciability**

Justiciable right to education		Directive principle/aspirational right to education	No right to education
Albania	Kyrgyzstan	Afghanistan	Antigua and Barbuda
Andorra	Latvia	Algeria	Australia
Argentina	Libya	Angola	Bahamas
Armenia	Lithuania	Bahrain	Barbados
Austria	Madagascar	Bangladesh	Botswana
Azerbaijan	Malawi	Belize	Brunei Darussalam
Belarus	Maldives	Bhutan	Cook Islands
Belgium	Marshall Islands	Bosnia and Herzegovina	Côte d'Ivoire
Benin	Mexico	Bulgaria	Djibouti
Bolivia	Monaco	Burkina Faso	Dominica
Brazil	Mongolia	Cameroon	France
Burundi	Montenegro	Chile	Germany
Cabo Verde	Mozambique	China	Granada
Cambodia	Myanmar	Cuba	Israel
Canada	Namibia	Czech Republic	Kiribati
Central African Republic	Nepal	Democratic People's Republic of Korea	Lebanon
Chad	Nicaragua	Denmark	Liechtenstein
Colombia	Niger	Ethiopia	Malaysia
Comoros	Pakistan	Guyana	Mauritania
Congo	Panama	Iceland	Mauritius
Costa Rica	Paraguay	Iraq	Nauru
Croatia	Peru	Kuwait	New Zealand
Cyprus	Poland	Lao People's Democratic Republic	Niue
Democratic Republic of the Congo	Portugal	Lesotho	Papua New Guinea
Dominican Republic	Republic of Moldova	Liberia	Saint Kitts and Nevis
Ecuador	Romania	Luxembourg	Saint Lucia
Egypt	Russian Federation	Mali	Saint Vincent and the Grenadines
El Salvador	Rwanda	Malta	Samoa
Equatorial Guinea	San Marino	Micronesia (Federated States of)	Singapore
Eritrea	Sao Tome and Principe	Morocco	Solomon Islands
Estonia	Serbia	Netherlands	Tonga
Fiji	Seychelles	Nigeria	Trinidad and Tobago
Finland	Slovenia	Norway	Tunisia
Gabon	South Africa	Oman	Tuvalu
Gambia	South Sudan	Palau	United States of America
Georgia	Spain	Philippines	Vanuatu
Ghana	State of Palestine	Qatar	
Greece	Sudan	Republic of Korea	
Guatemala	Sweden	Saudi Arabia	
Guinea	Switzerland	Senegal	
Guinea-Bissau	Syrian Arab Republic	Sierra Leone	
Haiti	Tajikistan	Slovakia	
Honduras	Thailand	Somalia	
Hungary	The former Yugoslav Republic of Macedonia	Sri Lanka	
India	Timor-Leste	Suriname	
Indonesia	Turkey	Swaziland	
Iran (Islamic Republic of)	Turkmenistan	Togo	
Ireland	Uganda	United Arab Emirates	
Italy	Ukraine	United Kingdom of Great Britain and Northern Ireland	
Jamaica	Uruguay	United Republic of Tanzania	
Japan	Uzbekistan	Viet Nam	
Jordan	Venezuela (Bolivarian Republic of)	Zambia	
Kazakhstan	Yemen	Zimbabwe	
Kenya			
<b>Total: 107 (55 per cent)</b>		<b>Total: 53 (27 per cent)</b>	<b>Total: 36 (18 per cent)</b>

Source: RTE. 2017. *Accountability from a human rights perspective: The incorporation and enforcement of the right to education in the domestic legal order*, paper commissioned for the 2017/8 Global Education Monitoring Report, *Accountability in education: Meeting our commitments*, pp. 32-34.

The above table is a useful starting point in identifying formal constitutional status regarding the justiciability of the right to education. However, in practice, justiciability requires the absence of certain barriers (see section 8.3.a.iii) and extra-constitutional enabling conditions (see section 8.3.a.iv). This means that although the right to education may be formally justiciable according to the constitution, it may not be justiciable in practice.

Also, the above table does not code for instances where the right to education may be justiciable through other means other than constitutional protection, for instance, through primary legislation<sup>756</sup> or court decision.<sup>757</sup>

It is also worth noting that various parts of the right to education may be justiciable through other areas of law. While this avenue does not necessarily reinforce a state's human rights obligations *per se*, it may nonetheless provide effective redress for those whose rights have been violated.

If the state you are looking at falls within either of the last two columns, there may be other mechanisms that can provide an effective remedy if the right to education is not formally justiciable. In order to identify whether the right to education or aspects of the right to education are directly

or indirectly justiciable the following factors are relevant:

**Table 8.2: Identifying a justiciable right to education/justiciable components of the right to education**

#### Domestic application of human rights

The right to education is given legal effect in domestic legal order [see Chapter 6]

#### National constitutional and legislative guarantees

- constitutional provision provides for an effective remedy for all human rights enshrined in the constitution, either explicitly or implicitly, or certain rights including the right to education. For example, most Latin American countries (and Spain) have a constitutional provision on *amparo*, a mechanism which allows citizens to apply to the courts for relief of a violation of a right protected in the constitution. In other jurisdictions a provision on the enforcement of codified rights (e.g. South Africa, Canada) or a provision on judicial jurisdiction of matters concerning the constitution (e.g. Indonesia) may specify that the right to education is justiciable
- legislation provides access to a judicial remedy for a violation of human rights
- legislation guarantees access to judicial review for administrative decisions relating to education

#### Equality and non-discrimination provisions

Certain aspects of the right to education may be justiciable under other human rights provisions, for instance non-discrimination and equality provisions. The United States (US) case *Brown v Board of Education*<sup>758</sup> is an example of the application of an equality provision to the right to education.

In many education cases, multiple human rights are engaged, not just the right to education, so it may be worth making arguments about all human rights that are relevant to a situation, which also highlights and emphasizes the interdependence and indivisibility of all human rights.

#### Civil and political rights

Even where the constitutional and legislative framework does not provide for the remedies for violations of the right to education, proactive courts may nonetheless render the right justiciable through innovative interpretations of civil and political rights which are guaranteed. For example, in *Mohini Jain v Karnataka*<sup>759</sup> which concerned the charging of a 'capitation fee' by the private educational institutions, the Supreme Court of India held that although

756 For example, the United Kingdom, having an uncodified constitution, gives effect to the right to education through the Human Rights Act (1998) which implements the European Convention on Human Rights. See Chapter 6, section 6.3.b for further information on incorporating the right to education through legislation.

757 For example, in France, where the 1958 constitution does not explicitly guarantee the right to education, it nevertheless states in its preamble: 'The French people solemnly proclaim their attachment to the Rights of Man and the principles of national sovereignty as defined by the Declaration of 1789, confirmed and complemented by the Preamble to the Constitution of 1946'. Section 13 of the Preamble of 1946 provides for a right to education and was recognized by the French Constitutional Court as having constitutional value in its decision *n°11-44 DC* of 16 July 1971. Therefore, although the French Constitution does not expressly provide for a justiciable right to education, the right to education is justiciable in practice.

758 *Brown v Board of Education of Topeka* 347 U.S. 483 (1954).

759 *Miss Mohini Jain v State of Karnataka and Others* 1992 AIR 1858.



the right to education was not explicitly guaranteed by the Constitution, it is essential to the realization of the fundamental right to life and human dignity guaranteed by the Constitution

### Federal systems: State constitutional and legislative guarantees

In federal systems where the national constitutional and legislative framework does not guarantee the right to education or provide for an effective remedy, it may instead be guaranteed under state constitutional or legislative frameworks, such as in the US (see, for example, *Edgewood Independent School District v Kirby*<sup>760</sup> and *Campaign for Fiscal Equity et al. v State of New York et al.*)<sup>761</sup>

### Other laws

Other areas of law may provide an effective remedy where the main issue in question intersects with the right to education:

- criminal law applies to issues such as corporal punishment (e.g. in the Bangladesh case *Blast v Secretary of the Ministry of Education and Others*),<sup>762</sup> child marriage, and truancy
- tort and negligence law (e.g. *Gower v London Borough of Bromley*)<sup>763</sup>
- labour law (see the Canada case of *British Columbia Teachers' Federation v British Columbia*)<sup>764</sup>

Source: RTE. 2017. *Accountability from a human rights perspective: The incorporation and enforcement of the right to education in the domestic legal order*, paper commissioned for the 2017/8 Global Education Monitoring Report, *Accountability in education: Meeting our commitments*, pp. 34-35.

### 8.3.a.iii Barriers to the justiciable right to education

In some jurisdictions, barriers to achieving the justiciability of the right to education still persist, even in states that guarantee a formally justiciable right to education. These barriers must be removed in order to enable the conditions required for the justiciability and enforcement of the right to education.

The existence of legal structures that make the right to education capable of being adjudicated is likely reflective of a genuine commitment to the right to education, human rights more generally, respect for the rule of law, and the political will that is necessary to drive structural changes to the legal system and wider conditions that may be needed to ensure its justiciability.

Common barriers to the justiciability of the right to education include a lack or absence of:

- respect for the rule of law. A key component of the rule of law is equality before the law, that is, non-discrimination in the access and administration of justice, as well as open justice, underscored by the principle of transparency
- an independent judiciary to uphold the rule of law
- impartial judges. Relevant factors include: the process of judicial appointment, the qualifications and experience required to become a judge, and the duration of terms of office
- a constitutional right to have a case concerning human rights heard
- enjoyment of civil and political rights, such as the right to a fair hearing
- judges competent to adjudicate on right to education cases
- a judicial culture amenable to scrutinising the sort of issues raised by economic and social rights, for instance, having an understanding of the legal obligations related to progressive realization<sup>765</sup>

760 *Edgewood Independent School District v Kirby* 777 S.W. 2d 391 (Tex. 1989).

761 *Campaign for Fiscal Equity et al. v State of New York et al.* 719 N.Y.S.2d 475.

762 *Bangladesh Writ Petition No. 5684 of 2010*.

763 *Gower v London Borough of Bromley* [1999] EWCA Civ 2012.

764 *Columbia Teachers' Federation v British Columbia* 2016 SCC 49.

765 For instance, efforts by the South African Constitutional Court to define reasonableness standards for economic and social rights.

- lawyers who are trained in human rights law and are competent in bringing cases on the right to education
- legal aid provision

Procedural barriers that may impede the justiciability of the right to education include:

- admissibility criteria
- rules of standing may prevent children,<sup>766</sup> third party, and anonymous applications, as well as prohibit class actions or public interest litigation which limits the available means of addressing collective or group violations, and the potential for remedies that address systemic issues
- human rights law may not allow for proceedings to be directly initiated against non-state actors who are increasingly taking on the role of education provider —while an argument can still be made regarding the state obligation to ensure that human rights are not abused by non-state actors, this is not a direct claim against the company or other entity providing the education

- high standards of proof to show violations

However, even when the right to education is justiciable there remain barriers to accessing justice. In a report on the justiciability of the right to education, Kishore Singh, former Special Rapporteur on the right to education, highlights the challenges facing those (particularly members of marginalized groups) who want to bring allegations of violations to court.<sup>767</sup> They include:

- lack of awareness, particularly of persons belonging to marginalized groups of their human rights and existing enforcement

<sup>766</sup> For further information, see CRIN. 2016. *Rights, Remedies & Representation: Global Report on Access to Justice for Children*. pp. 17-18.

<sup>767</sup> Singh, K. 2013. *Report of the UN Special Rapporteur on the right to education: Justiciability of the Right to Education* (Doc. A/HRC/23/35.) paras. 74-80.

mechanisms that can be accessed in cases of violations. This may be due to a lack of human rights education or a lack of awareness of legal processes, or socio-economic barriers such as a general low level of education. Here it is important to note the instrumental value of education in empowering rights-holders to consider violations of their rights as actionable rather than something they have no control over

- violations tend to disproportionately affect children, given that they are most likely to be in education. Children may be less aware of their human rights or may be unwilling to report violations
- cultural barriers, including poor languages skills, may deter linguistic minorities from accessing justice, despite the right to a fair trial requiring that those who cannot speak the language be entitled to free assistance from an interpreter<sup>768</sup>
- the right of women to represent themselves
- high financial cost of pursuing legal remedies particularly in the absence of legal aid provision
- difficulty finding legal advice and adequate representation
- fear of reprisals
- the formality of court procedures which may deter people from bringing claims



#### Box 8.5 Further reading: Justiciability

UNESCO/CESCR. 2006. *Report of the fourth meeting of the Joint Expert Group UNESCO (CR)/ECOSOC (CESCR) on the monitoring of the right to education* (Doc. ED/CONF./2003/610/WD1/E.)

Singh, K. 2013. *Report of the UN Special Rapporteur on the right to education: Justiciability of the Right to Education* (Doc. A/HRC/23/35.) paras. 74-80.

<sup>768</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) Article 14 (3) (f).

### 8.3.a.iv Enabling conditions for the legal enforcement of the right to education

The absence of the formal, procedural, and informal barriers listed in the above section is a prerequisite for the justiciability of the right to education. In such cases the right to education is formally justiciable, perhaps resulting in *ad hoc* cases. However, for the *effective* legal enforcement of the right to education, that is, where the justice system is accessible and considered a viable avenue for redress,<sup>769</sup> there are additional *necessary* and *beneficial* enabling conditions, identified on the basis of an analysis of the cases cited in section 8.3.a.v and relevant literature:

1. **The right to education is fully incorporated – covering claims related to each of the substantive components of availability, accessibility, acceptability and adaptability – into the domestic legal order, protected, and guaranteed by the constitution and national laws.**<sup>770</sup> This is the case, for example, in South Africa and Colombia where the right to education is guaranteed by the constitution. In the US, some aspects of the right to education are protected at the state level (namely public education, equity, and adequacy) while others (equal protection, for example) at the federal.
2. **The existence of an accessible, independent, and efficient judicial system,** which includes access to quasi-judicial mechanisms such as national human rights institutions, or other administrative mediators.
3. **Progressive and proactive judges.** Judges who understand economic and social rights in practice and recognize that economic and
4. **Active civil society organizations providing strong legal and other support.**<sup>773</sup> This is particularly the case in South Africa and Colombia. The former UN Special Rapporteur on the right to education, Kishore Singh, emphasized, 'the important role of civil society in disseminating information regarding the right to education to parents, teachers and school administrators, and also in identifying and publicising violations of the right to education.'<sup>774</sup> Civil society organizations with legal expertise can also contribute to the enforcement of the right to education by submitting third party interventions and bringing cases themselves. Civil society also

social rights are human rights on a par with civil and political rights, particularly in less developed countries, are likely to reflect this in their reasonings, leading to innovative interpretations that generally advance the realization of the right to education. In South Africa and Colombia for instance, the composition of courts has played a key role in enforcing the right to education. Siri Gloppen notes that in South Africa the composition and nature of the Constitutional Court was remarkable and included judges deeply committed to social rights.<sup>771</sup> In Brazil, Rupert Skilbeck reports that there are many problems with the realization of the right to education, particularly in rural areas. Litigation has been used to confront the failure of the authorities to provide sufficient school places, and judges have been proactive in ensuring their decisions are implemented.<sup>772</sup>

769 A very high number of cases may also be indicative of serious problems in the education system itself. However, the fact that litigation is used to enforce the right to education, shows that it is seen as a viable avenue for redress.

770 Singh, K. op. cit., para. 82; OHCHR and CESR, op. cit., p. 16.

771 Gloppen, S. 2009. Legal Enforcement of Social Rights: Enabling Conditions and Impact Assessment. *Erasmus Law Review*, Vol. 2, No. 4, p. 477.

772 Skilbeck, R. 18 November 2015. *Litigating the Right to Education*. Oxford Human Rights Hub.

773 Byrne, I., op. cit., p. 282.

774 Singh, K. op. cit., para. 82.

plays a key role in ensuring the enforcement of court orders.

**5. The litigation of the right to education is complemented by other strategies.**<sup>775</sup>

As underlined by CESR and OHCHR: 'litigation is most effective when legal claims are associated with social and political mobilisation on the same issue. In some cases, the possibility of judicial enforcement has

a deterrent effect and has provided social movements with leverage.<sup>776</sup> This is the case in South Africa,<sup>777</sup> the United States,<sup>778</sup> and Colombia for instance. Wider advocacy strategies may involve a mixture of, as relevant to the situation, public awareness-raising and mobilisation, media outreach, political negotiation, campaigning, and other tactics.

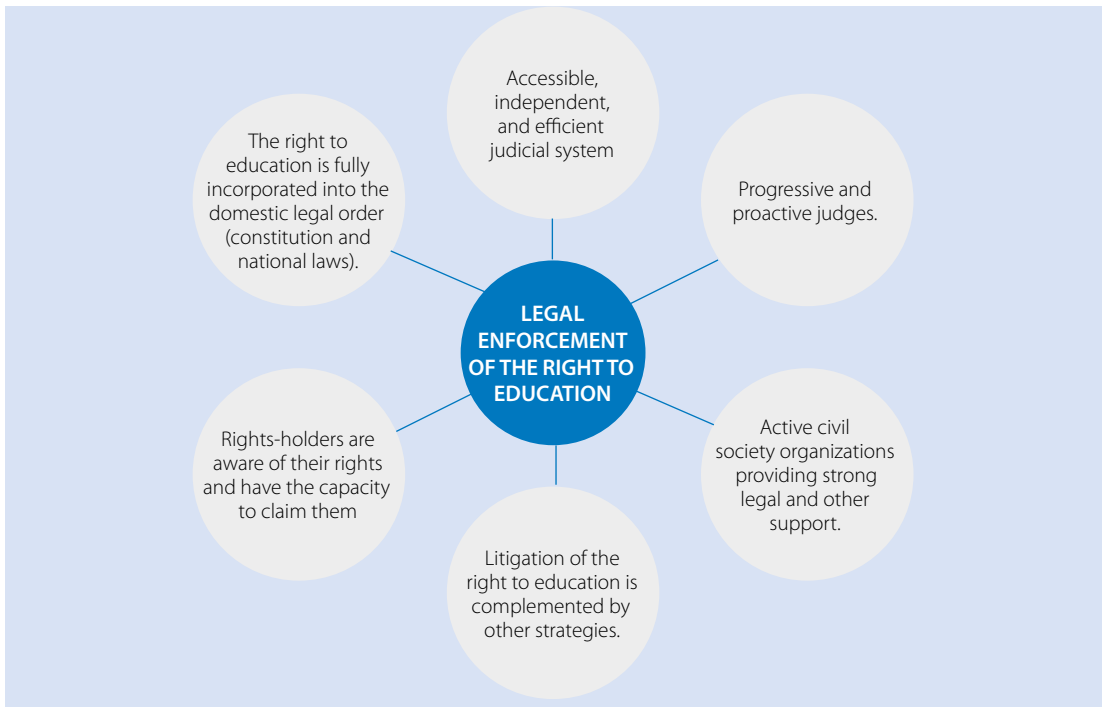
775 See, for instance, Abramovich, V. 2005. *Fostering Dialogue: The Role of the Judiciary and Litigation*. Squires, J. et al (eds), *The Road To A Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights*. The University of New South Wales and Australian Human Rights Centre, pp. 167-176.

776 OHCHR and CESR, op. cit., p. 10.

777 See, for instance, RTE / SECTION27. 2014. *The Limpopo Textbook Crisis in South Africa - How SECTION27 used rights-based strategies to hold the government accountable*.

778 See, for instance, Rebell, M. 11 December 2015. *Litigating the Right to Education in the United States*.

**Figure 8.2: The enabling conditions for the legal enforcement of the right to education**



**6. Rights-holders are aware of their rights and have the capacity to claim them.** Katarina Tomasevski, the first UN Special Rapporteur on the right to education observes that:

'There is an inverse proportion between the availability of education and access to remedy for its denial or violation, namely litigation tends to be confined to those parts of the

world where education is both available and accessible.<sup>779</sup> This seems to still be the case today, for example, UNESCO and the CESCR have also noted that legal and political processes enabling rights-holders to seek effective enforcement is 'possible only if these beneficiaries are conversant with the legal processes and ways and means of seeking remedies in case of the violation of the right to education,' adding that for this purpose, they must be able to receive minimum basic education which empowers them to do so.<sup>780</sup>

In addition, there are a number of beneficial enabling conditions that make legal enforcement of the right to education even more effective. These, in addition to the above conditions, represent the ideal conditions under which the right to education is effectively enforced. They may also mitigate certain barriers and weaknesses of the justice system.

**1. Innovative informal procedures and court orders.** Iain Byrne highlights the need to legally empower people living in poverty and points out as a good example the recognition, by the Constitutional Court of Colombia, of the validity of indigenous peoples' community justice decisions. Innovative court orders can, for instance, include the participation of civil society organizations in the enforcement of the decisions.<sup>781</sup> In Brazil, in a recent case on the lack of childcare facilities and elementary schools, the Sao Paulo Court of Appeal ordered the municipality itself to draft a plan for the provision of 150,000 additional school places and ruled that the Court's section on children's

rights would be responsible for monitoring the implementation of the plan, along with civil society organizations, the public Prosecutor's Office, the Public Attorney's Office, among others, 'in relation to the opening of new school vacancies, or in relation to the provision of quality education.'<sup>782</sup> In *Linkside II*, the Eastern Cape High Court ordered, as requested by the Legal Resources Center, that a 'claims administrator' be appointed to monitor the disbursement of payments to claimant schools for failure to secure the timely appointment and funding of teachers at all public schools.<sup>783</sup>

- 2. Progressive changes within society, as part of wider advocacy strategies also facilitate progressive decision-making of judges,** for instance in the LGBTQI case in Colombia where the Constitutional Court judged that the school has an obligation to treat the student according to his gender identity.<sup>784</sup> For Siri Gloppen an 'effective social mobilisation campaign meant that the case was basically 'won in the street' before it came to the Constitutional Court.'<sup>785</sup>
- 3. Cross-fertilisation of jurisprudence between jurisdictions.** The use of international and regional international human rights law and soft law instruments, such as General Comments, as well as the citing of cases from foreign jurisdictions to inform decisions can lead to more favourable outcomes from a human rights perspective. In addition, jurisdictions that allow civil society organizations to bring and intervene in cases may potentially prove beneficial, as civil society, particularly human rights organizations, are adept at highlighting

779 Tomasevski, K. 2011. *Annual Report of the Special Rapporteur on the right to education submitted in accordance with the commission on human rights resolution 2000/9* (Doc. E/CN.4/2001/52.) para. 65.

780 UNESCO. 2006. *Report of the fourth meeting of the Joint Expert Group UNESCO (CR)/ECOSOC (CESCR) on the monitoring of the right to education focusing on the justiciability of the right to education, Annex, 175 EX/28*, para. 19.

781 Byrne, I., op. cit., p. 293.

782 See Vilhena Viera, O. August 2014. *Judicial Experimentation and Public Policy: a New Approach to the Right to education in Brazil*.

783 *Linkside and Others v Minister of Basic Education and Others* (3844/2013) [2015] ZAECGHC 36 (26 January 2015).

784 *Sentencia T-363/16*.

785 Gloppen, S., op. cit., p. 471.

comparative case-law and international law.

For instance, the Legal Resources Center (LRC) has been granted leave by the European Court of Human Rights to intervene in a case on school transport in Hungary<sup>786</sup>—an issue they themselves have litigated in South Africa.<sup>787</sup>

### 8.3.a.v The impact of court decisions on the realization of the right to education

The right to education has been adjudicated in many jurisdictions around the world.<sup>788</sup> Having undertaken a cursory global survey, decisions on some aspect of the right to education have been found in at least 80 countries.

Interpretations made by courts on the various aspects of the right to education contribute to a better understanding of its normative content and related states' obligations, adapted to the national context and in light of changing societal values, particularly in fora where judges adopt a 'living instrument approach' as opposed to a strict 'textualist' approach to interpretation.<sup>789</sup> For instance, in a recent case, the Constitutional Court of Colombia adopted a progressive decision regarding the freedom of expression of a transgender student within the school. The Court reasoned that the school is obliged to treat the student according to his gender identity. The decision also included a general measure to promote inclusion, equality, and the free development of the person in school.<sup>790</sup>

Courts often play an important role in realizing the right to education by providing a forum for people to hold their governments to account by granting enforceable remedies. Court decisions can have an impact on the specific circumstances of those bringing the case and/or lead to structural and policy changes. The LRC in South Africa states that they 'litigate always with the view of systemic challenges,' seeking 'to leverage individual victories into systemic relief for all schools and learners that face similar challenges.' Their cases 'often run in stages, with the first stage securing immediate relief for client schools and the subsequent stages broadening that relief to all schools in the province and addressing systemic blockages.'<sup>791</sup>

Remedies for violation of the right to education can take different forms (see section 8.3.a). For instance, in a recent Argentinian case brought to the Administrative Court of Buenos Aires by a student with Down's Syndrome because the school he attended for three years refused to give him his degree, the Court ordered that the school and ministry of education issue and legalize his degree.<sup>792</sup> In another case, the Buenos Aires Court of Appeals forced the government to build a school, because the local authorities had, for several years, failed to implement a law ordering the construction of the school.<sup>793</sup> In a case in India after a fire had killed 93 children in a private school, the Supreme Court of India ordered state governments to file affidavits on schools' adherence to basic safety standards to ensure that their buildings were safe and secure in order

786 See LRC. 2016. *European Court of Human Rights to Consider Right to Education*.

787 *Tripartite Steering Committee and Another v Minister of Basic Education and Others* (1830/2015) [2015] ZACEGHC 67; 2015 (5) SA 107 (ECG); [2015] 3 All SA 718 (ECG) (25 June 2015).

788 See for instance Coomans, F. 2009. *Justiciability of the Right to education*. *Erasmus Law Review*, Vol. 2, No. 4, pp. 427-443; Singh, K., op. cit.

789 See, for example, Icelandic Human Rights Centre's page *Interpretation of Human Rights Treaties* [www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/part-i-the-concept-of-human-rights/interpretation-of-human-rights-treaties](http://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/part-i-the-concept-of-human-rights/interpretation-of-human-rights-treaties) (Accessed 14 January 2017).

790 *Sentencia T-363/16*.

791 LRC. 2015. *Fighting to Learn: A Legal Resource for Realising the Right to Education*, p. 87.

792 See César Alan Rodríguez.

793 See *Asesoría Tutelar Justicia Contencioso Administrativo y Tributario de la C.A.B.A. c. s/Amparo*, discussed by Christian Courtis in Courtis, C. 2006. *Socio-Economic Rights before the Courts in Argentina*. Coomans, F. (ed), *Justiciability of Economic and Social Rights – Experiences from Domestic Systems*. Antwerp and Oxford, Intersentia, p. 309.

to prevent another such tragedy.<sup>794</sup> Sometimes, courts impose financial sanctions as a means to compel implementation of court orders. For instance, the Washington Supreme Court ordered the Washington State Legislature to pay a daily fine of \$100,000, to be reserved for education funding, for non-compliance with the court order to adopt and fully implement a programme of basic education for each school year until 2018.<sup>795</sup>

Court decisions recognizing a violation of the right to education are important<sup>796</sup> whether they concern individual cases (e.g. in the case of pregnant girls excluded from schools) or society in general (e.g. *Brown* in the US).<sup>797</sup> However, court decisions have a stronger impact when they bring structural and policy changes that create the condition for the full enjoyment of the right to education.<sup>798</sup> As underlined by Siri Gløppen: ‘enforcement resulting in policy change—if implemented—can easily outweigh the impact of thousands of individual cases.’<sup>799</sup> For instance, it has been estimated that 350,000 additional girls are now going to school in India thanks to the midday school meal scheme implemented as a result of right to food litigation brought before the Indian Supreme Court.<sup>800</sup>

Court decisions can lead to constitutional, legislative, and policy changes. In India, for instance, in a historic decision, the Supreme

Court of India ruled that the right to education (even when not expressly provided for in India’s Constitution as such) was an integral part of the right to life,<sup>801</sup> and was therefore indirectly justiciable. Pursuant to this and other Supreme Court decisions, the Constitution of India was amended, establishing the right of children aged 6-14 to free and compulsory education.

In Colombia, following a decision of the Constitutional Court<sup>802</sup> that found that the Education Act, which allowed the government to impose fees for primary education, was unconstitutional, the Colombian government issued a national decree establishing that education shall be free in public institutions at the primary and secondary levels. In other examples, courts have ordered governments to adopt a method for evaluating whether the quality of education is adequate for the education of persons with disabilities,<sup>803</sup> and to provide data about their education.<sup>804</sup>

In the United States, the Supreme Court of Washington ruled that an act establishing and funding charter schools (a type of private school) using public money was unconstitutional and as a result charter schools in Washington are no longer funded through public money.<sup>805</sup>

Court decisions have a real impact when they order for the fulfilment (rather than protection or respect) of the right to education. As underlined by Iain Byrne: ‘because of the significant resource implications that flow from such cases, courts have often proved reluctant to address fulfilment issues,’ even if ‘there is a gradual but steady trend

794 *Avinash Mehrotra Writ Petition (Civil) No.483 of 2004*, (2009) 6 SCC 398.

795 *McCleary v State* 269 P.3d 227 (Wash. 2012).

796 Rupert Skilbeck highlights: ‘the power of courts to declare that something is wrong should not be underestimated. Court proceedings force governments to address political problems that have been ignored, which are unpopular, or have no champions, requiring the authorities to make an official response to the claim, on the record, and to be held to an account.’ See Skilbeck, R. 2015. *Litigating the Right to Education. Oxford Human Rights Hub*.

797 In *Brown*, the US Supreme Court decided that the existence of schools segregated according to racial criteria amounted to a breach of the equal protection clause and ordered that the school system be overhauled in accordance with the ruling.

798 OHCHR and CESR., op. cit., p. 16.

799 Gløppen, S., op. cit., p. 475.

800 OHCHR and CESR., op. cit.

801 *Unni Krishnan, J.P. v State of A.P.* 1993 I. SCC 645.

802 *Demanda de inconstitucionalidad contra el artículo 183 de la Ley 115 de 1994* Sentencia C-376/10.

803 *Sentencia T-523/16*.

804 See CLADE. 2016. *Argentina: Se ordena que informen a la situación educativa de las personas con discapacidad*.

805 *League of Women Voters of Wash. v State* 355 P.3d 1131 (Wash. 2015).

of judges being prepared to make decisions which do require positive fulfilment by the State.<sup>806</sup>

Regarding the right to education, a decision from the Court of Appeal of the State of Sao Paulo in Brazil ruled that the city of Sao Paulo should provide at least 150,000 new places in childcare facilities and elementary schools by 2016, for children aged five years old and under. In its decision, the Court kept open the possibility of penalising the failure of the executive to produce a consistent plan, and even warned that it would adopt its own plan in the case of an unsatisfactory proposal from the executive.<sup>807</sup>

Another recent decision from the US shows how courts can compel states to fulfil their obligations. In February 2016, the Kansas Supreme Court ruled in *Gannon v Kansas II* that the legislature had failed to cure inequities between rich and poor school districts and was therefore in violation of the Kansas Constitution. The legislature had been given until 30 June 2016 to find a way to constitutionally (i.e. equitably) fund schools or risk the closing of public schools. On 27 June 2016 after a special session in the Kansas Legislature, the Governor of Kansas signed a bill that restored \$38 million in funding to the Kansas public education system.<sup>808</sup>

In Indonesia, following a decision of the Constitutional Court of 2008,<sup>809</sup> the government had to increase the national budget for education in line with the constitution, which stipulates that the state shall provide 20 per cent of national and regional budgets for education. Following this decision, the parliament allocated 19.31 per cent of the national budget to education for the

year 2009. Then the budget went up and down between 16.65 per cent in 2010 to 20.52 per cent in 2015.<sup>810</sup> However, this decision is important, and shows that judges can pressure parliament to conform to constitutional provisions providing a specific budget for education.

Sometimes, litigation gets the attention of the executive even without a judgment having been entered. In the 'mud schools' case in South Africa (so-called because of the deteriorating mud buildings and lack of water and sanitation facilities), litigation became necessary because repeated requests from seven schools to address severe infrastructure problems were ignored. Once faced with a legal challenge, the government saw fit to enter into a significant memorandum of agreement. Ann Skelton notes that: 'whilst litigation is often seen as adversarial it can open the door to appropriate exchange with the executive, which results in improved access to the right to a basic education.'<sup>811</sup>

It is important to note that even if a case fails, this does not mean that there is no discernible effect. In some instances, dissenting opinions are published which may have an effect in the future as interpretation evolves. Further, an unfavourable decision may attract the attention of decision-makers, the media, civil society, and other stakeholders, raising awareness of the issue and spurring political mobilisation

### 8.3.a.vi The limits and challenges of legal enforcement

The main challenge of judicial accountability is the enforcement of court decisions into concrete changes in practice. Even when they are favourable outcomes, there are not always guarantees that redress will be obtained.<sup>812</sup> In

806 Byrne, I., op. cit., p. 293.

807 See Vilhena Viera, O., op. cit.

808 *Gannon v State* 298 Kan. 1107 (Kan. 2014) (*Gannon I*); *Gannon v State* 303 Kan. 682 (Kan. 2016) (*Gannon II*); *Gannon v State* 304 Kan. 490 (Kan. 2016) (*Gannon III*).

809 *Decision Number 13/PUU-VI/2008* cited in Singh, K. 2013. *Justiciability of the Right to Education* (Doc. A/HRC/23/35).

810 UNESCO UIS.

811 Skelton, A., op.cit., p. 1.

812 Byrne, I., op. cit., pp. 269-297.



these instances, follow-up litigation may be required as well as sustained monitoring and campaigning.

Siri Gloppen has criticized the weakness of legal accountability noting:

*Litigation, even when it succeeds and is implemented, may still have very limited or even a negative overall impact on the ground, either because it affects few people, because the measures taken to implement it are ineffective or because it skews resource allocation so that other rights are jeopardised. Litigation that is positive for particular individuals and groups and helps to secure their social rights may at the same time have a detrimental effect on the broader advancement of social rights in society.*<sup>813</sup>

An example is the US *Brown* case in which the Supreme Court found that racial segregation in public education violated the constitutional right of African-American children to equality before the law - a decision that was enforced through military means. Fifty years after the decision, although some progress has been made, equal access to quality education is still an unfulfilled promise:

*These disparities are not a matter of happenstance. They are the result of a systematic disregard for sustained remediation of past intentional government supported racial discrimination in public schools across the nation. The declaration by the Supreme Court in 1954 in the *Brown* case that segregated schools were inherently unequal promised a remedy that has never been fully realised in any state.*<sup>814</sup>

Ellen Wiles highlights that litigation as a means to enforce economic and social rights favours the wealthy and educated who are far likelier to

a bring a case than victims of violations who are marginalized and may not be unaware of their legal rights and that a remedy can be sought through judicial or quasi-judicial means. Further, she points out that cases brought by the wealthy may actually be decided in a manner detrimental to the rights of the marginalized, particularly through the diversion of resources.<sup>815</sup>

The length of the legal process makes legal action unsuitable for those seeking immediate relief. Education cases generally involve children and adolescents in education for a limited time, and these people grow-up and move out of the relevant systems before the case can be concluded, meaning that no remedies will be able to address the harm done to that child.

Lastly, failed cases, particularly in common law systems where court decisions are a source of law ('case-law' or 'judge made law') but also in civil systems where unfavourable precedents are set, can impede the realization of the right to education.

813 Gloppen, S., op. cit., p. 473.

814 US Racial Discrimination Program. 2004. *The Justiciability of Economic, Social, and Cultural Rights in the US - Domestic Implementation of the Right to Equal Education*. Global Rights.

815 Wiles, E. 2006. Aspirational principles or enforceable rights? The future of socio-economic rights in national law. *American University International Law Review*. Vol. 22, No. 1, p. 56.

### Example 8.1: South Africa

In 1996, South Africa adopted a progressive constitution that explicitly incorporates socio-economic rights that can be challenged through courts if they are not met.<sup>816</sup> Section 29 provides that 'everyone has the right to basic education', which has been recognized by the Constitutional Court as 'immediately realisable'.<sup>817</sup>

In this country, affected by huge inequalities,<sup>818</sup> 'the delivery of basic education, particularly in the context of the legacy of the apartheid history is a gargantuan challenge. There are huge backlogs in infrastructure, there is an ever-increasing demand for more schools and classrooms amongst a socially and geographically mobile population, there are acute concerns about quality'.<sup>819</sup>

Due to the scale of the education crisis, in excess of 25 cases have been brought to courts.<sup>820</sup> In recent years, supported by a well-organized social movement, civil society organizations have actively submitted cases to court and ensured the enforcement of the court decisions on issues such as school infrastructures, textbooks delivery,<sup>821</sup> free transport, and inclusive education.<sup>822</sup>

Litigation and court decisions have had a positive impact on the enforcement of the right to education. In the 'mud schools' case for instance, the LRC instituted proceedings to replace unsafe school structures with classrooms that are safe and functional. The litigation resulted in concrete relief for the individual client schools which had new classrooms built. However, more importantly, it secured a binding commitment by the state to

eradicate all 'mud schools' across the Eastern Cape and the rest of the country, including a financial commitment of over R8 billion (\$1.15bn) and a plan of action.<sup>823</sup>

Beyond the submission of cases to courts, civil society organizations have played an active role in monitoring the implementation of judgments checking the practical measures taken and going back to courts when the court orders were not respected.<sup>824</sup> They have also pushed for the adoption of norms and standards in 2013 to ensure that learners receive an education in a safe and functional school environment.

In South Africa, quasi-judicial mechanisms also play a relevant role. Following the Limpopo textbook case for instance, the South African Human Rights Commission undertook an investigation into the issue of the broader problems relating to textbook procurement and delivery to make recommendations to improve these systems.<sup>825</sup>

The adjudication of the right to education 'has undoubtedly improved education for children in South Africa and has obliged the government to invest in education when it otherwise would have delayed or failed to have done so'.<sup>826</sup>

Enabling conditions that have made the enforcement of the right to education possible in South Africa include: the recognition of the right to education in the constitution, with mechanisms to claim it in cases of violation, the important role of the society, using various strategies (litigation with social and political mobilisation) and the competency and engagement of judges producing innovative jurisprudence and remedies, as well as a degree of political will.

It should be noted that the right to education in South Africa remains largely unrealized, a fact reflected in the plethora of right to education cases that have and continue to be brought. Legal action, although there have been real positive impacts, has not yet been enough to reverse the legacy of decades of apartheid.

816 Constitution of South Africa Section 38.

817 *The Governing Body of the Juma Masjid Primary School v Essay No 7* BCLR 651, CC.

818 In South Africa, the government has faced huge, deep seated inequalities of segregation, where the apartheid government spent five times more on white learners than black learners, leaving immense challenges for the poorest children. See Open Society Justice Initiative. 2015. *Conference Report: The Impacts of Strategic Litigation on Equal Access to Quality Education, New Delhi, 16 September 2015*.

819 Skelton, A., op. cit., p. 4.

820 Open Society Justice Initiative., op. cit.

821 *Minister of Basic Education v Basic Education for All (20793/2014)* [2015] ZASCA 198; [2016] 1 All SA 369 (SCA); 2016 (4) SA 63 (SCA) (2 December 2015).

822 LRC 2015. *Fighting to Learn: A Legal Resource for Realising the Right to Education*; Ibid., RTE and Section 27.

823 Ibid.

824 Ibid.

825 Ibid.

826 Ibid.

### 8.3.b Other national accountability mechanisms

Although judicial mechanisms are a key avenue by which to pursue legal redress and remedies for human rights violations, they are not the only means of enforcing the right to education. In its General Comment on the domestic application of the International Covenant on Economic, Social and Cultural Rights (1966, ICESCR),<sup>827</sup> the CESCR highlights that: ‘The right to an effective remedy need not be interpreted as always requiring a judicial remedy.’<sup>828</sup> Accountability mechanisms should also exist across various state and government organs, including the executive; legislature; administrative bodies, such as national human rights institutions; regional and local governmental bodies; and even at the district and school level. Examples of accountability mechanisms include:

- the production of national educational reports by the executive
- ensuring compliance with legislation and regulation by the executive
- quasi-judicial and administrative complaints procedures of administrative bodies, such as national human rights institutions and ombudspersons
- investigations by parliamentary committees
- scrutiny by parliamentary committees to ensure legislation complies with a state’s international human rights legal obligations
- school management committees that oversee the governance of individual schools

However, given the significant overlap between monitoring and accountability at the national

level, relevant information can be found in Chapter 7, section 7.5.

### 8.4 Accountability at the international level

At the international level numerous accountability mechanisms exist. These accountability mechanisms should be thought of as supplementary to national mechanisms, because as primary duty-bearers when it comes to the right to education, states are best placed to enforce the right to education through their own legal and administrative structures. However, in some instances, domestic accountability mechanisms will not be sufficient to ensure justice for victims of human rights violations, whether it be because domestic courts have failed to or incorrectly applied international human rights law or because they are simply not available. In these cases, international determination and acknowledgment of a violation, important in itself for the victim, can spur states to remedy the situation. International accountability mechanisms should therefore be thought of as a last resort in terms of holding states accountable.

It should be noted that accountability mechanisms at the international level have limited authority to enforce their findings and hold states accountable, if the state in question has not instituted mechanisms which implement international decisions or is not otherwise willing to be held accountable. These function as effective accountability mechanisms when the state has the political will to comply with its human rights obligations. However, if a state is unwilling to comply, the international human rights system is unable to compel compliance, perhaps with the exception of regional courts. This is a major accountability weakness of the international human rights system.

827 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

828 CESCR General Comment 9 para. 9.

### **Example 8.2: Supreme Court of Spain rules that treaty body decisions are legally binding**

On 17 July 2018, the Supreme Court of Spain established, in the first decision of its kind, that the state must comply with decisions of treaty bodies, in a case brought by Ángela González, the mother of a girl who was murdered by her father during a court-ordered unsupervised visit. Ms González submitted a communication to the Committee on the Elimination of Discrimination Against Women, alleging a violation of her human rights guaranteed under the Convention on the Elimination of All Forms of Discrimination Against Women (1979).<sup>829</sup> The communication was decided in 2014 and Ms González sought to have the Committee's decision upheld by the Supreme Court. The Court accepted Ms González's argument, noting the, 'inexistence of a specific procedure to execute the views of the CEDAW Committee...constitutes a breach of a legal and constitutional mandate by Spain'<sup>830</sup>.

For more information see: Blog entry to EJIL: Talk! *Supreme Court of Spain: UN Treaty Body individual decisions are legally binding*. <https://www.ejiltalk.org/supreme-court-of-spain-un-treaty-body-individual-decisions-are-legally-binding/>

Nevertheless, even if an international mechanism cannot compel action or grant the necessary remedy in a particular case, international decisions may still have an impact in other jurisdictions, particularly if the court or mechanism in question uses the decision to decide similar right to education cases.

Outlined in the following sections are the various accountability mechanisms available at the international level.

<sup>829</sup> Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW).

<sup>830</sup> Blog entry to EJIL: Talk! *Supreme Court of Spain: UN Treaty Body individual decisions are legally binding*. <https://www.ejiltalk.org/supreme-court-of-spain-un-treaty-body-individual-decisions-are-legally-binding/> (Accessed 21 September 2018.)

### **Box 8.6 Further reading: Guides on United Nations accountability mechanisms**

Equal Rights Trust and Ashurst. 2018. *Navigating Human Rights Complaints mechanisms: Rules, Tools and Resources*.

OHCHR. 2016. *How to Follow Up on United Nations Human Rights Recommendations - A Practical Guide for Civil Society*.

OHCHR. 2013. *Individual Complaint Procedures under the United Nations Human Rights Treaties, Factsheet 7 Rev. 2*. New York and Geneva, OHCHR.

## 8.4.a UN treaty bodies

UN treaty bodies are committees of independent experts established under each of the core UN human rights treaties (see Chapter 2, section 2.2.a). In addition to their monitoring functions outlined in Chapter 7, section 7.7, UN treaty bodies generally have three procedures through which they can hold states accountable for alleged violations of the treaty that they are mandated to monitor:

- individual complaints (also known as 'communications')
- inter-state complaints
- confidential inquiries on serious, grave, or systematic violations.

These procedures are quasi-judicial in nature which means that the treaty body adjudicates and comes to a decision on whether a state has violated a victim's human rights, much like a domestic court does. Unlike courts, however, treaty bodies do not have the legal authority to enforce their decisions under complaints procedures. Rather UN treaty bodies tend to enter into dialogue and work with states in order to conduce compliance through propitiatory rather than contentious means.

In order for a treaty body to hear a complaint or communication, an inter-state complaint, or conduct an inquiry against a state, the state(s) in question has to have accepted the competence of the treaty body to hear complaints against it. This typically requires the ratification of an optional protocol or the making of a declaration to that effect.



**Box 8.7 Further information:  
Optional protocols to core  
UN human rights treaties**

Optional protocols are treaties that either elaborate substantive areas related to the treaty<sup>831</sup> to which they are protocols or establish procedures related to the treaty, usually communications and inquiry procedures. They are separate treaties from their associated treaty and have to be ratified, acceded to, and signed separately. For optional protocols that establish a communications procedure, the state must ratify both the optional protocol and the human rights treaty in question. In doing so, states effectively confer, through means of a treaty, the right of individuals and groups to submit complaints on alleged violations of whichever treaty to the relevant treaty body.

Third party interventions are also possible under these procedures, via various formal and informal mechanisms, providing civil society with an international avenue for highlighting violations at the national level and providing the relevant committee with international, comparative, or other supplementary material to encourage progressive interpretation of the human rights

framework and to generally support a proper determination of the case.

**Individual communications procedure<sup>832</sup>**

Treaty bodies can receive and consider communications brought by individuals (or groups of individuals) who claim to be victims of violations of the rights contained within the treaty they oversee. Communications on behalf of victims can also be brought, provided the victim gives written consent.

In terms of the process of considering a communication, the treaty body in question will decide whether the case should be registered, that is, formally listed for consideration. The complainant(s) will be informed accordingly, at which point, the case is transmitted to the state concerned to give it an opportunity to comment on within a set timeframe. The complainant is also able to comment on any observations made by the state party.

The communication is then assessed against admissibility criteria. Admissibility refers to the formal and procedural requirements that the complaint must satisfy before the relevant treaty body can consider its substance. Each treaty body sets its own admissibility criteria, which are briefly outlined for each relevant treaty body, in the following section.<sup>833</sup> However, one requirement common to all procedures across all treaty bodies is that the complainants must have exhausted all domestic remedies (unless the complainants are able to clearly demonstrate that such remedies are unnecessarily prolonged or otherwise ineffective).

831 See, for example, the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography and Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict. States can ratify, accede, or sign optional protocols on substantive areas, without having had ratified, acceded, or signed the treaty to which it is a protocol. This is the case for the United States which has ratified both substantive protocols to the CRC but has yet to ratify the CRC itself.

832 This section is based on OHCHR. 2013. *Individual Complaint Procedures under the United Nations Human Rights Treaties*, Human Rights Factsheet 7/Rev.2. New York and Geneva, OHCHR.

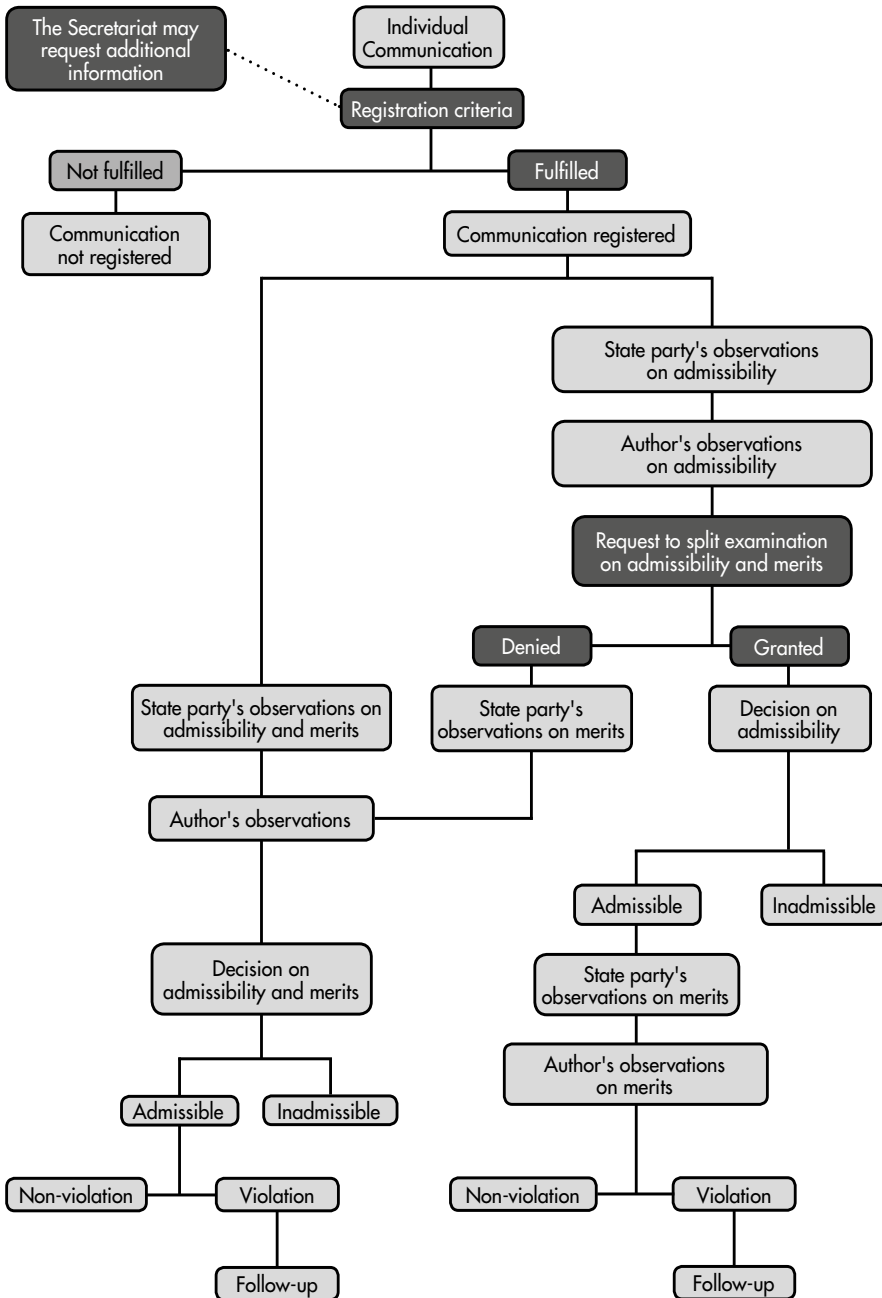
833 For a comprehensive overview of the procedural and admissibility requirements of all international and regional human rights mechanisms, see Equal Rights Trust and Ashurst. 2018. *Navigating Human Rights Complaints mechanisms: Rules, Tools and Resources*.

If a communication is admissible, it moves to the merits stage. Merits refers to the substance of the complaint, on the basis of which the treaty body decides whether or not the alleged victim's rights under the treaty have been violated. At this stage, both the state and the complainant are asked for their observations. If the state fails to respond, the treaty body still decides the case on its merits, but without information provided by the state. After determining whether the complainant has been a victim of a violation, the treaty body requires the state to provide information, normally within a period of six months, on the steps it has taken to give effect to the decision of the treaty body. The state's reply is then transmitted to the complainant(s), who may provide observations on the state's submission.

Some treaty bodies have instituted procedures to monitor the implementation of the treaty bodies'

decisions, known as a 'follow-up procedure'. Such procedures consist in the appointment of a rapporteur tasked with follow-up to the implementation of decisions. They are appointed for a period of time, or for a particular case, to follow up on specific cases. When the state's replies on steps taken to implement decisions are either unsatisfactory or not forthcoming, the rapporteur may hold consultations with diplomatic representatives of the state, usually of the permanent missions in Geneva or New York. Significantly, the follow-up procedures provide for participation by NHRIs and civil society in terms of providing relevant information to the committees regarding the state's compliance with the recommendations in practice.

**Figure 8.3: Individual communications procedure**



Source: Fact Sheet 7/Rev. 2, *Individual Complaint Procedures under the United Nations Human Rights Treaties*, by OHCHR, p. 12. ©2013 United Nations. Available at <https://www.ohchr.org/Documents/Publications/FactSheet7Rev.2.pdf>. Reproduced with permission.

As of 2018, there have been ten complaints submitted to treaty bodies on different aspects of the right to education, three of them finding a violation of the right to education.<sup>834</sup> This number is expected to increase, as the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (2008, OP-ICESCR)<sup>835</sup> and Optional Protocol to the Convention on the Rights of the Child on a communications procedure (2011, OP3-CRC)<sup>836</sup> which both establish communications procedures, have only recently entered into force.

### Inter-state complaints procedure

Many of the treaty bodies allow states to lodge complaints against other states parties alleging violations. This procedure is relatively untested and until 2018 no complaints had ever been made until three inter-state complaints were submitted to the United Nations Committee on the Elimination of Racial Discrimination (CERD).

### Confidential inquiries on serious, grave, or systematic violations (inquiry procedure)

Many of the treaties' bodies can also initiate inquiries *suo motu*, that is inquiries of its own motion, subject to consent by the state party in question. The procedure is as follows:<sup>837</sup>

1. the procedure may be initiated if the treaty body receives reliable information indicating that the rights contained in the human rights

treaty it monitors are being systematically violated by a state

2. the treaty body invites the state to co-operate in the examination of the information by submitting observations
3. the treaty body may, on the basis of the state's observations and other relevant information available to it, decide to designate one or more of its members to conduct an inquiry and report urgently to the treaty body. Where warranted, and with the consent of the state concerned, an inquiry may include a visit to its territory
4. the findings of the member(s) are then examined by the treaty body and transmitted to the state together with any comments and recommendations
5. the state is requested to submit its own observations on the treaty body's findings, comments and recommendations within a specific timeframe (usually six months) and, where invited by the treaty body, to inform it of the measures taken in response to the inquiry
6. the inquiry procedure is confidential, but treaty bodies do generally report a summary account of the results of the inquiry in their annual reports.

834 CERD/C/71/D/40/2007 violation of Article 5 (e) (v); CCPR/C/82/D/1155/2003 violation of Article 18(4); CEDAW/C/36/D/4/2004 violation of Article 10 (h).

835 Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (adopted 10 December 2008, entered into force 5 May 2013) (Doc. A/63/435.) (OP-ICESCR).

836 Optional Protocol to the Convention on the Rights of the Child on a communications procedure (adopted 14 July 2011, entered into force 14 April 2014) (Doc. A/HRC/RES/17/18.) (OP3-CRC).

837 Based on information provided by OHCHR's page *Human Rights Bodies - Complaints Procedures*. <https://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx#interstate> (Accessed 19 September 2018.)



**Table 8.3: Overview of available procedures, by treaty body**

	Communications procedure	Inter-state complaints procedure	Inquiry procedure
CESCR	Yes	Yes	Yes
CRC	Yes	Yes	Yes
CEDAW	Yes	No	Yes
CRPD	Yes	No	Yes
CCPR	Yes	Yes	No
CERD	Yes	Yes	No
CMW	Yes-but not yet entered into force	Yes-but not yet entered into force	No

### United Nations Committee on Economic, Social and Cultural Rights

The Committee on Economic, Social and Cultural Rights (CESCR) is competent to hear individual complaints, inter-state communications, and conduct inquiries against states that have ratified the ICESCR and the OP-ICESCR<sup>838</sup> and made the necessary declarations to OP-ICESCR.<sup>839</sup> Article 3 of OP-ICESCR sets out the following admissibility criteria:

- the complainant must have exhausted all available domestic remedies unless the application of such remedies is unreasonably prolonged

838 Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (adopted 10 December 2008, entered into force 5 May 2013) (Doc. A/63/435.) (OP-ICESCR).

839 A declaration to Article 10 must be made for the inter-state procedure to be applicable to the state in question and a declaration to Article 11 for the inquiry procedure. This means a state must ratify ICESCR and OP-ICESCR and make the necessary two declarations for all three procedures to apply to the state party.

- the communication must be submitted within one year of exhausting all domestic remedies, unless the complainant can demonstrate it has not been possible to do so
- the communication must concern events that took place after the entry into force of OP-ICESCR (non-retroactivity), unless the alleged violation continued after OP-ICESCR's entry into force
- the same matter cannot have already been examined by CESCR or any other international or regional accountability mechanism, or be in the process of being examined (non-duplication)
- the communication must be compatible with the provisions of ICESCR
- the complaint cannot be manifestly ill-founded, nor sufficiently substantiated, or exclusively based on media reports
- The communication cannot be an abuse of the right to submit a communication
- The communication cannot be anonymous and must be submitted in writing

Article 4 of OP-ICESCR further states that CESCR, 'may, if necessary, decline to consider a communication where it does not reveal that the author has suffered a clear disadvantage, unless the Committee considers that the communication raises a serious issue of general importance.'

Article 5 of OP-ICESCR allows CESCR to grant interim measures, without prejudice to its final decision, during the consideration of a communication, 'as may be necessary in exceptional circumstances to avoid possible irreparable damage to the victim or victims of the alleged violations.'

A feature of CESCR's communications procedure, which is true of other treaty bodies' procedures, is that instead of determining a case on its merits, it

can pursue a friendly settlement between willing parties.<sup>840</sup> This opens up dialogue between the state and the petitioner, and they negotiate a settlement which may include acknowledgement of the role of the state in the violation and measures to remedy the violation.

CESCR uses the standard of ‘reasonableness’ as set out in Article 8 (4) of OP-ICESCR article 8 (4) which supports CESCR in analysing and making appropriate recommendations in relation to the progressive realization of the right to education (rather than just being in a position to assess explicit violations).<sup>841</sup>

### United Nations Committee on the Rights of the Child

The Committee on the Rights of the Child which monitors the Convention on the Rights of the Child (1989, CRC)<sup>842</sup> and its substantive optional protocols, has the most recent complaints procedure, established under the OP3-CRC.

OP3-CRC has near identical admissibility criteria to OP-ICESCR and the two procedures operate in a similar manner except that OP3-CRC is underpinned by the principle of the best interests of the child, for instance, it makes provision to ensure children are not manipulated into making complaints<sup>843</sup> and that all complainants shall not be subject to ‘human rights violation, ill-treatment or intimidation as a consequence of communications or cooperation with the Committee.’<sup>844</sup>

OP3-CRC also provides for procedures on inter-state complaints and inquiries for grave or systematic violations, provided the relevant declarations are

made. The inter-state complaints procedure is a little more elaborate than that of CESCR as disputes are resolved through the establishment of an *ad hoc* Conciliation Commission.

OP3-CRC allows for claims to be raised across the spectrum of human rights, so for example, communications can be brought with regard to alleged violations of economic and social, cultural, civil, and political rights.

### United Nations Committee on the Elimination of Discrimination against Women

The most relevant UN treaty body to submit a complaint to on the issue of gender inequality in education is the Committee on the Elimination of Discrimination against Women which monitors the implementation of the Convention on the Elimination of All Forms of Discrimination Against Women (1979, CEDAW). The Committee on the Elimination of Discrimination against Women is competent to hear individual and collective complaints and conduct inquiries into grave or systematic violations by a state, provided the state has ratified CEDAW and the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (1999, OP-CEDAW)<sup>845</sup> and made the necessary declaration. OP-CEDAW provides for similar admissibility criteria to OP-ICESCR and OP3-CRC.

840 OP-ICESCR Article 7.

841 See, for example, Porter, B. 2014. ‘Reasonableness and Article 8(4)’ in *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A Commentary*. (Langford, M., Porter, B., Brown, and Rossi, J. eds.).

842 Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC).

843 *Ibid.*, Article 3 (2).

844 *Ibid.*, Article 4 (1).

845 Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women (adopted 6 October 1999, entered into force 22 December 2000) 2131 UNTS 83 (OP-CEDAW).

### **Example 8.3: Communications on gender inequality in education to the Committee on the Elimination of Discrimination against Women**

The Committee on the Elimination of Discrimination against Women has dealt with two cases engaging Article 10 (h). In a 2004 communication<sup>846</sup> in which a Hungarian Roma woman was subjected to coerced sterilisation, it found that her Article 10 (h) right, which is part of CEDAW's right to education clause, and guarantees the right to 'access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning' was violated.

Similarly, on the basis of a communication alleging that an executive order that sought to regulate access to contraception in Manila violated several provisions of CEDAW, the Committee on the Elimination of Discrimination against Women conducted an inquiry into grave and systematic violations of CEDAW.<sup>847</sup> The Committee on the Elimination of Discrimination against Women found violations of Article 12 (right to health), read alone; Article 12, read in conjunction with Articles 2 (c), 2 (d), 2 (f) (legislative and policy measures to eliminate gender-based discrimination), 5 (on gender stereotypes and family education), and 10 (h) (access to reproductive health educational information); and Article 16 (1) (e) (right to decide the number and spacing of children and access to education in order to exercise this right), read alone. On finding a violation of Article 10 (h), the Committee on the Elimination of Discrimination against Women recommended the Philippine government integrate age-appropriate education on reproductive and sexual health into school curricula.

### **United Nations Committee on the Rights of Persons with Disabilities**

If a complaint concerns a person with disabilities, the most relevant treaty body to submit a communication to is the Committee on the Rights of Persons with Disabilities, which oversees the Convention on the Rights Of Persons with Disabilities (2006, CRPD), provided the victim of a violation of the CRPD falls within the jurisdiction of a state party to the CRPD and the Optional Protocol to the Convention on the Rights of Persons with Disabilities (2008, OP-CRPD).<sup>848</sup> The OP-CRPD also provides for an inquiry procedure.

### **Example 8.4: CRPD inquiry finds that Spain violates the right to inclusive education**

After receiving credible information from an organization representing people with disabilities, the Committee on the Rights of Persons with Disabilities initiated an inquiry into whether Spain's segregation and exclusion of students with disabilities from mainstream education, on grounds of their impairments, amounted to a grave and systematic violation of the right to education of people with disabilities.

In its decision,<sup>849</sup> the Committee on the Rights of Persons with Disabilities found that Spain had contributed to a discriminatory system that in effect uses legal provisions to maintain two educational systems and divert students with disabilities outside mainstream education. Additionally, it was found that the lack of safeguards in place for independent monitoring mechanisms meant that once a student leaves the mainstream education system, he or she will likely remain excluded.

846 Committee on the Elimination of Discrimination against Women Communication No. 4/2004 (Doc. CEDAW/C/36/D/4/2004.)

847 Committee on the Elimination of Discrimination against Women. 2015. Summary of the inquiry concerning the Philippines under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (Doc. CEDAW/C/OP8/PHL/1.)

848 Optional Protocol to the Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2518 UNTS 283.

849 Committee on the Rights of Persons with Disabilities. 2018. Inquiry concerning Spain carried out by the Committee under article 6 of the Optional Protocol to the Convention (Doc. CRPD/C/20/1.)

## United Nations Human Rights Committee

The Human Rights Committee (CCPR), which oversees the ICCPR, can receive complaints on issues of discrimination and educational freedom, provided the state in question is state party to the Optional Protocol to the International Covenant on Civil and Political Rights (1966, OP-ICCPR).<sup>850</sup> CCPR has well developed *Rules of Procedure*<sup>851</sup> that elaborate on Article 5 of the OP-ICCPR and set out the procedure for the consideration of individual communications.

The inter-state complaints procedure is identical to that established by the Committee on the Rights of the Child which resolves state-to-state complaints through the establishment of an *ad hoc* Conciliation Commission.



### Example 8.5: Treaty body enforcement of the right to education

In the 2003 case of *Leirvåg and ors v Norway*, Norway had introduced a mandatory Christian religion subject that only provided limited exemptions from certain parts of the teaching.<sup>852</sup> The Human Rights Committee, which oversees the implementation of the International Covenant on Civil and Political Rights (1966, ICCPR), found that the system of partial exemptions did not protect the right of parents to ensure the religious and moral education of their children is in conformity with their own convictions. The Committee concluded that Norway had violated Article 18 (4) of the ICCPR. Following the decision, Norway

introduced amendments to education laws and the curriculum, including a system of exemptions.<sup>853</sup>

## United Nations Committee on the Elimination of Racial Discrimination

The Committee on the Elimination of Racial Discrimination (CERD) monitors the implementation of the International Convention on the Elimination of All Forms of Racial Discrimination (1965, ICERD)<sup>854</sup> under which individuals can submit individual communications to CERD provided the state in question has made the necessary declaration under Article 14 of ICERD. CERD also has an inter-state complaints procedure, provided for under Articles 11-13 of ICERD, that is similar to that of the Committee on the Rights of the Child and the Human Rights Committee, except that it applies to all state parties. Further, unlike any other treaty body, CERD has established an early warning system aimed at preventing existing situations escalating into conflicts and urgent procedures to respond to problems requiring immediate attention to prevent or limit the scale or number of serious violations of ICERD. Under this procedure CERD adopts decisions, issues statement, or sends letters to the relevant state party.

## United Nations Committee on Migrant Workers

The Committee on Migrant Workers (CMW) oversees the implementation of International

850 Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 December 1966 entered into force 23 March 1976) 999 UNTS 171.

851 Human Rights Committee. 2012. *Rules of procedure of the Human Rights Committee* (Doc. CCPR/C/3/Rev.10.)

852 CCPR *Leirvåg and ors v Norway* (2004) Communication No. 1155/2003 (Doc. CCPR/C/82/D/1155/2003.)

853 In 2007 the European Court of Human Rights made a similar finding in a case brought by different applicants. The Court found that there had been a violation of Article 2, Protocol 1 to the European Convention on Human Rights. By the time of this decision Norway had already introduced legislative amendments in response to the decision of the Human Rights Committee. In light of criticisms from an NGO that the measures taken were insufficient in practice to prevent future violations, the Council of Europe Committee of Ministers continued to assess the measures taken and was communicating with Norwegian authorities to clarify outstanding issues. See Folgerø and *Others v Norway* [GC] (2008) 46 EHRR 47.

854 International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (ICERD).

Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990, ICMW)<sup>855</sup> and is competent to hear communications under Article 77, provided the state has made a declaration consenting to be subject to the procedure. This procedure has not yet entered into force and will become active once 10 states parties have made the necessary declaration. ICMW also provides, under Article 76, for an inter-state complaints procedure, which has also yet to enter into force.

### 8.4.b Human Rights Council

The Human Rights Council (HRC)<sup>856</sup> also has a number of charter-based bodies with procedures allowing for access to justice at the international level, including: a complaints procedure; a range of special procedures with either a thematic or country-specific mandate, including the right to education and extreme poverty and human rights, that can receive and investigate complaints.

The Human Rights Complaint Procedure<sup>857</sup> is confidential and non-treaty-based, and applies to all UN Member States—making it the only universal complaint procedure. It deals with complaints that: ‘[address] consistent patterns of gross and reliably attested violations of all human rights and all fundamental freedoms occurring in any part of the world and under any circumstances.’<sup>858</sup> The complaint procedure addresses communications submitted by individuals, groups, or non-governmental organizations that claim to be

victims of human rights violations or that have direct, reliable knowledge of such violations. OHCHR claims that an average of 3400 complaints are made each year.<sup>859</sup>

Two distinct working groups—the Working Group on Communications (WGC) and the Working Group on Situations (WGS)—are responsible for examining complaints. The WGC examines if the complaint fulfils the admissibility criteria. If so, it transfers the complaint to the WGS. The WGS meets twice a year to consider new complaints as well as the progress made on complaints submitted in the previous years. After receiving advice of the WGC, it presents the Human Rights Council with a report on the case and makes recommendations on the course of action to take.

A range of special procedures with either a thematic or country-specific mandate can receive and investigate communications on violations that have, may or are likely to occur, and that fall within the mandate of the procedure. Communications to special procedures, however, do not need to meet the strict criteria of judicial and quasi-judicial mechanisms, for instance, domestic remedies do not need to be exhausted and other mechanisms can deal with the matter. Regarding the right to education, the most relevant special procedures are the:

- Special Rapporteur on the right to education<sup>860</sup>
- Special Rapporteur on extreme poverty and human rights<sup>861</sup>

855 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3 (ICRMW).

856 See Chapter 7, section 7.7.b for further information on the Human Rights Council.

857 For a description of the UN Human Rights Bodies complaints procedure [www.ohchr.org/EN/HRBodies/HRC/ComplaintProcedure/Pages/HRCComplaintProcedureIndex.aspx](http://www.ohchr.org/EN/HRBodies/HRC/ComplaintProcedure/Pages/HRCComplaintProcedureIndex.aspx) (Accessed 4 October 2018.)

858 OHCHR. Human Rights Council. (nd) p. 15. [www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session34/Documents/HRC\\_booklet\\_En.pdf](http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session34/Documents/HRC_booklet_En.pdf) (Accessed 29 September 2017.)

859 Ibid.

860 For further information on submission of information and individual complaints to the UN Special Rapporteur on the right to education [www.ohchr.org/EN/Issues/Education/SREducation/Pages/IndividualComplaints.aspx](http://www.ohchr.org/EN/Issues/Education/SREducation/Pages/IndividualComplaints.aspx) (Accessed 4 October 2018.)

861 For further information on submission of information and individual complaints to the UN Special Rapporteur on Extreme Poverty and Human Rights <https://www.ohchr.org/EN/Issues/Poverty/Pages/Individualcomplaints.aspx> (Accessed 21 September 2018.)

- Special Rapporteur on violence against women, its causes and consequences<sup>862</sup>
- Working group on the issue of discrimination against women in law and in practice<sup>863</sup>

## 8.4.c UNESCO

UNESCO discusses and resolves complaints of breaches of the right to education through two principal ways:

### 104 EX/Decision 3.3

In accordance with UNESCO's Constitution, in 1978, the Executive Board laid down a procedure for the examination of complaints (called communications) received by the Organization concerning alleged violations of human rights in its field of competence, including the right to education. This procedure is set out in 104 EX/Decision 3.3 of the Executive Board and forms the second aspect of the Committee on Conventions and Recommendations (CR) mandate—see Chapter 7, section 7.7.c for further information.

The purpose of the procedure is to seek a friendly solution to cases brought to UNESCO's attention, by establishing a dialogue with governments concerned to examine with them in complete confidentiality what could be done to settle this case. Therefore, UNESCO acts here in a spirit of international cooperation, conciliation and mutual understanding and not as an international judicial body. As this procedure is confidential, communications are not made public for 20 years after their resolution.

In the first instance, the CR examines the admissibility of the communications, under ten conditions (similar to those of OP-ICESCR). They must:

- not be anonymous
- originate from a person, group of persons or NGOs who are victims of an alleged violation or have reliable knowledge of such violations (individual nature of the procedure)
- concern violations of human rights falling within UNESCO's fields of competence
- be compatible with the principles of UNESCO, the UN Charter, the UDHR, the international covenants on human rights and other international instruments
- not be manifestly ill-founded and appearing to contain relevant evidence
- be neither offensive nor an abuse of the right to submit communications
- be based exclusively on information disseminated through mass media
- be submitted within a reasonable time limit following the facts
- indicate whether an attempt has been made to exhaust available domestic remedies
- not relate to matters already settled by the states concerned in accordance with the human rights principles

If all requirements are met, the CR proceeds to examine the communication on its merits. For this purpose, the representatives of the governments concerned are invited to provide information or answer questions asked by members of the CR on either the admissibility or the merits of the communication.

Following the session during which a communication has been examined by the CR,

862 For further information on individual complaints to the Special Rapporteur on violence against women, its causes and consequences [www.ohchr.org/EN/Issues/Women/SRWomen/Pages/Complaints.aspx](http://www.ohchr.org/EN/Issues/Women/SRWomen/Pages/Complaints.aspx) (Accessed 4 October 2018.)

863 For information on submitting information to the Working Group on discrimination against women in law and in practice [www.ohchr.org/EN/Issues/Women/WGWomen/Pages/SubmissionInformation.aspx](http://www.ohchr.org/EN/Issues/Women/WGWomen/Pages/SubmissionInformation.aspx) (Accessed 4 October 2018.)

its author and the government concerned by it are informed of the CR's decisions, which are not subject to appeal. However, the CR may agree to re-examine a communication if it receives additional information or new facts.

### Did you know?

From 1978 to 2017, 602 communications were considered by the CR.<sup>864</sup> Among the achievements, 21 individuals were authorized to leave their country to go study or teach; 16 were able to benefit from changes in certain education laws which were discriminatory towards ethnic or religious minorities; 12 were able to obtain passports and/or grants or receive diplomas; 9 were able to resume studies.<sup>865</sup>

## Committee of Experts on the Application of the Recommendation concerning Teaching Personnel (CEART)

The Committee of Experts on the Application of the Recommendation concerning Teaching Personnel (CEART) is a Joint Committee under the auspices of UNESCO and the International Labour Organization (ILO) for promoting and monitoring<sup>866</sup> the implementation of the two UNESCO/ILO international normative instruments concerning teachers.<sup>867</sup> This Joint Committee consists of independent experts who meet every three years and is the foremost world body concerned with international standards for teachers. Among its activities, the CEART has a unique mechanism to review allegations received from national and international teachers' organizations on the non-application of provisions

of the Recommendations in Member States. After several rounds of information between the teachers' organization and the national educational authorities, the CEART issues findings and makes suggestions for the resolution of the problem or conflict.<sup>868</sup> In recent years, allegations covered issues of remuneration and delays in salary payments, arbitrary and illegal termination or discrimination in teachers' employment/career, the introduction of teacher evaluation systems and merit pay without due consultation, or restrictions on professional rights.

## 8.5 Accountability at the regional level

Regional legal frameworks give violated rights-holders the possibility of bringing their case to a regional mechanism, provided the state in question is party to the relevant regional instrument, and that all domestic remedies have either been exhausted or deemed insufficient.

Regional legal frameworks give rights-holders the possibility of bringing their complaints to regional mechanisms, provided the state in question is party to the relevant regional instrument, that all domestic remedies have either been exhausted or deemed insufficient, and that the case is not being dealt with by another mechanism (non-duplication). Regional mechanisms, specifically courts, are the strongest accountability mechanisms at the international level, able to issue legally binding decisions. However, courts, with the exception of the European Court of Human Rights, have heard very few cases on the right to education. It should be stressed though that, although there are relatively few

864 UNESCO. 2018. Committee on Conventions and Recommendations (Doc. 204 EX/CR/2) para. 59.

865 Ibid.

866 See Chapter 7, section 7.7.c for more information on CEART's role in monitoring.

867 Namely the 1966 Recommendation concerning the Status of Teachers and the 1997 Recommendation concerning the Status of Higher-Education Teaching Personnel.

868 For further information on the procedure for raising an issue to the CEART on nonadherence to the Recommendations, see: ILO/UNESCO. 2008. The ILO/UNESCO Recommendation concerning the Status of Teachers (1966) and The UNESCO Recommendation concerning the Status of Higher-education Teaching Personnel (1997) with a user's guide, p.16.

cases, regional mechanisms do offer viable and important avenues for redress.

**Table 8.4: Regional human rights mechanisms**

Region	Forum	Complaints
Africa	African Court on Human and Peoples' Rights	Yes—issues binding judgments and advisory opinions
	ECOWAS Court of Justice	Yes—issues binding judgments
	African Commission on Human and Peoples' Rights	Yes—non-binding
	African Committee of Experts on the Rights and Welfare of the Child	Yes—non-binding
Arab	Arab Human Rights Committee	No
Asia	ASEAN Intergovernmental Commission on Human Rights	No
Europe	European Court of Human Rights	Yes—issues binding judgments and advisory opinions
	European Committee on Social Rights	Yes—competent to receive collective complaints and issue declaratory decisions
Inter-America	Inter-American Commission on Human Rights	Yes—if states fail to comply with its recommendations it can refer the matter to the Inter-American Court of Human Rights
	Inter-American Court of Human Rights	Yes—issues binding judgments and advisory opinions

### 8.5.a Africa

In Africa, there are four human rights mechanisms competent to hear cases on the right to education.

The African Court on Human and Peoples' Rights (ACTHPR)<sup>869</sup> can adjudicate on the African Charter on Human and Peoples' Rights, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003), the African Charter on the Rights and Welfare of the Child (1990), and 'any other relevant human rights treaty ratified by the state concerned.'<sup>870</sup>

Consequently there is hardly a single right at the international level that cannot be subject to protection in the African system. It has advisory and contentious jurisdiction, and any decision it renders is legally binding.<sup>871</sup> It can also order remedies, including: declaratory relief, orders for legislative change, and compensation. Execution of its decisions is overseen by the Assembly and Council of Ministers of the African Union in order to guarantee compliance.<sup>872</sup>

The ACTHPR's jurisdiction is accepted by 30 African Union Member States<sup>873</sup> which means complaints can be brought against those 30 states by the

869 On 18 July 2008 the Protocol on the Statute of the African Court of Justice and Human Rights was adopted. The Protocol merges the African Court on Human and Peoples' Rights and the Court of Justice of the African Union. The Protocol has not yet entered into force.

870 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (adopted 10 June 1998, entered into force 25 January 2004) OAU/LEG/MIN/AFCHPR/PROT.1 rev.2 (1997) Article 7.

871 Article 30, Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights states: 'The States Parties to the present Protocol undertake to comply with the judgement [sic] in any case to which they are parties within the time stipulated by the Court and to guarantee its execution.'

872 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights Articles 29 and 31.

873 A list correct as of 16 January 2017 can be accessed at [www.african-court.org/en/images/Basic%20Documents/Ratification\\_and\\_Deposit\\_of\\_the\\_Declaration\\_final-jan\\_2017.pdf](http://www.african-court.org/en/images/Basic%20Documents/Ratification_and_Deposit_of_the_Declaration_final-jan_2017.pdf) (Accessed 4 October 2018.)



African Commission on Human and Peoples' Rights (see next section), states parties to the Court's Protocol, and African intergovernmental organizations. However, only eight states<sup>874</sup> have recognized its jurisdiction to hear complaints brought by individuals or NGOs. As of 30 August 2017, the ACtHPR has received 147 applications and finalized 32 cases.<sup>875</sup>

There are also two sub-regional courts both of which do not require claimants to exhaust domestic remedies. The Economic Community of West African States Community Court of Justice has the power to issue binding decisions on human rights violations brought by individuals in 15 West African states.<sup>876</sup> The remedies available include declaratory relief, compensation, and specific orders. The Court has handed down around 150 human rights decisions so far, including on the right to education<sup>877</sup> and on violations of CEDAW.<sup>878</sup> The East African Court of Justice may also in the future have its jurisdiction extended to cover human rights violations.<sup>879</sup>

There are also two quasi-judicial mechanisms operating in Africa. Like UN treaty bodies, their decisions are not legally binding and work on the basis of persuasion and dialogue with states.

The African Commission on Human and Peoples' Rights (ACHPR) was established by the African Charter on Human and Peoples' Rights (1981,

Banjul Charter)<sup>880</sup> to which all African Union Member States except South Sudan are party.<sup>881</sup> Like the ACtHPR it can deal with complaints arising from African and international human rights instruments.<sup>882</sup> The ACHPR accepts communications<sup>883</sup> from individuals, groups of individuals, non-governmental organizations,<sup>884</sup> and states, and has made a number of decisions on the right to education and freedom from discrimination.<sup>885</sup>

 **Example 8.6: The African Commission denounces the closure of schools and universities in the Democratic Republic of the Congo**

In 1995, the African Commission on Human and Peoples' Rights considered a communication<sup>886</sup> brought against Zaire (now Democratic Republic of Congo) denouncing the closure of universities and secondary schools for a period of two years. The African Commission decided that such closure amounted to a serious and massive violation of the right to education under the African Charter on Human and Peoples' Rights.

The African Committee of Experts on the Rights and Welfare of the Child (ACERWC) was established by the African Charter on the Rights and Welfare of the Child (1990, ACRWC)<sup>887</sup> which has 41 states parties.<sup>888</sup> It is empowered to hear

874 Benin, Burkina Faso, Cote d'Ivoire, Ghana, Malawi, Mali, Tanzania, and Tunisia.

875 Cases can be found at [www.african-court.org/en/index.php/cases/2016-10-17-16-18-21#finalised-cases](http://www.african-court.org/en/index.php/cases/2016-10-17-16-18-21#finalised-cases) (Accessed 4 October 2018.)

876 Benin, Burkina Faso, Cape Verde, Ivory Coast, The Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Sierra Leone, Senegal, and Togo.

877 *Socio-Economic Rights and Accountability Project (SERAP) v Nigeria and Another* (2010) AHRLR 145 (ECOWAS 2010).

878 See, for example, the recent case *Dorothy Njemanze & 3 Others v Nigeria* ECW/CJ/APP/17/14.

879 For more details, see [www.ijrcenter.org/regional-communities/east-african-court-of-justice/](http://www.ijrcenter.org/regional-communities/east-african-court-of-justice/) (Accessed 4 October 2018.)

880 African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (ACHPR) Article 30.

881 An up-to-date list of States parties to the ACHPR can be found at [www.achpr.org/instruments/achpr/ratification/](http://www.achpr.org/instruments/achpr/ratification/) (Accessed 4 October 2018.)

882 ACHPR Article 60.

883 *Ibid.*, Articles 55-56.

884 Including *amicus curiae*.

885 For a list of finalized decisions, see [www.achpr.org/communications/decisions/?a=873](http://www.achpr.org/communications/decisions/?a=873) (Accessed 29 September 2017.)

886 *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interfrancaine des Droits de l'Homme, Les Témoins de Jehovah v Zaire* 25/89-47/90-56/91-100/93.

887 ACRWC Articles 32-46.

888 An up-to-date list of States parties can be found at [www.achpr.org/instruments/child/](http://www.achpr.org/instruments/child/) (Accessed 4 October 2018.)

communications from individuals, groups of individuals, and NGOs alleging violations of the ACERWC. The communications procedure of the ACERWC and the Committee on the Rights of the Child are unique in that they deal exclusively with communications regarding children's rights, giving voice to a group that are particularly vulnerable and one often denied access to justice at the national level.<sup>889</sup> They are also both relatively new human rights mechanisms with the potential to make a real impact in the protection of the rights of the child.

Under Article 44 of the ACERWC, the ACERWC must respond to the concerns of non-state actors, where violations of human rights pertaining to the African Children's Charter are alleged to have been perpetrated by a state party. The Revised Guidelines for the Consideration of Communications<sup>890</sup> by the ACERWC sets out, in sections one and two, how individuals, including children, civil society organizations, states parties, amongst others, may communicate with the ACERWC. These sections also set out the criteria against which the ACERWC considers a complaint or communication to be acceptable.

 **Example 8.7: African Committee of Experts on the Rights and Welfare of the Child finds Senegal in violation of the right to education in *Talibés* case**

On 31 May 2015, the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) published its decision in the *Talibés* children case.<sup>891</sup>

The communication, submitted by organizations in South Africa and Senegal against the

government of Senegal, highlighted that as many as 100,000 children aged 4–12 years (known as *talibés*) are sent by their parents to study in private Qur'anic schools (*daaras*) in Senegal, which provide 'free' religious education to students who lack access to public schooling. However, to fund their education, *talibés* are often forced by their teachers (*marabouts*) to beg in the streets of Senegal's urban areas.

According to the communication, *talibés* spend on average more time begging to fulfil daily quotas than they do receiving classroom instruction. And despite the passing of laws criminalising forced begging of children, the Senegalese government has made little effort to enforce these laws against offending *marabouts*. The government has also failed to monitor or regulate educational instruction in the *daaras*.

The ACERWC concluded that the government's failure to protect the rights of *talibés* constituted a violation of the right to education, amongst other rights protected by the African Charter on the Rights and Welfare of the Child.

Of interest is the ACERWC's finding that Senegal is in violation of Article 11 of the African Charter due to its failure to provide free and compulsory education to all children—one of the primary reasons that *talibés* are sent by their parents to the *daaras*. According to the decision: 'the government must enforce its own laws to protect *talibés* from this abuse and ensure that the education received in *daaras* equips these children with a rounded education and does not allow forced begging'.

## 8.5.b Americas

The Inter-American Commission on Human Rights (IACHR) is mandated to protect and promote human rights in the 35 Member States of the Organization of American States (OAS).<sup>892</sup> The IACHR can receive petitions from individual, groups of individuals, and NGOs<sup>893</sup> regarding

889 For further information on access to justice of children see CRIN's page *Access to justice: Challenging violations of children's rights*, which includes country reports for each country [www.crin.org/en/home/law/access](http://www.crin.org/en/home/law/access) (Accessed 4 October 2018.)

890 The African Committee of Experts on the Rights and Welfare of the Child. 2014. *Revised Guidelines for the Consideration of communications*.

891 Decision No 003/Com/001/2012.

892 Charter of the Organization of American States Article 106.

893 American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) OAS Treaty Series No. 36 (ACHR) Article 44.

violations by OAS Member States of rights guaranteed in OAS instruments, including the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (1988, Protocol of San Salvador), the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (1994, Convention of Belém do Pará), and American Convention on Human Rights (1969, 'Pact of San José, Costa Rica'), if ratified by the state in question.

A petition may result in a friendly settlement or the IACHR may make recommendations.<sup>894</sup> If the state refuses to comply with the IACHR's recommendations then the IACHR may refer the case to the Inter-American Court of Human Rights.

Further, Article 44 of the Pact of San José, Costa Rica provides that 'any person or group of persons, or any non-governmental entity legally recognized in one or more Member States of the Organization (*of American States*), may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party'. And Article 23 specifies that complaints may also address violations of human rights guaranteed in various human rights.

Requirements for petitions to be admissible are set forth in Article 28 of the Rules of Procedure.<sup>895</sup> The IACHR considers the petitions that are lodged within a period of six months and may investigate the situation and formulate recommendations for the state in question to ensure restoration of the enjoyment of rights whenever possible and prevent the recurrence of similar events.

The IACHR will deliberate the merits of the petition and establish whether a violation has

occurred. Should that be the case the IACHR will draft a preliminary report for the state party concerned containing the IACHR's findings and initial recommendations. Three months after the transmission of the preliminary report, if the issue has not been satisfactorily resolved, the IACHR will draft and issue a report including requirements for compliance by the state party.

Under Article 48 of its Rules of Procedure, the IACHR has the scope to adopt whatever follow-up measures it deems necessary. These can take the form of requesting information from the parties and holding hearings to verify compliance with eventual agreements and recommendations. Once the measures are adopted, the IACHR shall evaluate periodically whether to maintain, modify or lift the measures.

### Example 8.8: Communications heard before the Inter-American Commission on Human Rights

The Inter-American Commission on Human Rights, in a case concerning a student, Mónica Carabantes Galleguillos, who was expelled from a private school for being pregnant,<sup>896</sup> facilitated a friendly settlement, whereby Chile agreed to award Mónica Carabantes a special scholarship while she was enrolled in higher education, as well as publicize a then recent amendment to the Education Act, which contains provisions on the rights of pregnant students or nursing mothers to have access to educational establishments.

The Inter-American Court of Human Rights (IACtHR) was established by the American Convention on Human Rights (1969).<sup>897</sup> It has both adjudicatory and advisory jurisdiction. The IACtHR's advisory function involves issuing advisory opinions on interpretation and

894 Cases of the IACHR can be found at [www.oas.org/en/iachr/decisions/merits.asp](http://www.oas.org/en/iachr/decisions/merits.asp) (Accessed 4 October 2018.)

895 IACHR. 2013. *Rules of Procedure of the Inter-American Commission on Human Rights*.

896 IACHR. Report No. 33/02 (Friendly Settlement), Mónica Carabantes Galleguillos, Petition 12, 046, Chile, March 12 2002.

897 ACHR Article 33.

conformity of national laws and policies with OAS instruments. In relation to its adjudicatory jurisdiction, it is entitled to consider cases submitted to it by the IACHR or by OAS States parties (there is no individual right of petition), that have accepted the jurisdiction of the IACtHR. The IACtHR can order remedies, including fair compensation, as well as interim measures.<sup>898</sup> Decisions of the IACtHR have binding force<sup>899</sup> but there is no enforcement mechanism, as such, rather in cases of non-compliance the matter is referred to the General Assembly of the OAS which then issues recommendations to the state.<sup>900</sup>

### **Example 8.9: Cases heard before the Inter-American Court of Human Rights**

In various cases and advisory opinions, the Inter-American Court of Human Rights (IACtHR) decided that the provision of education is included within the measures of protection that every child has, according to article 19 of the American Convention on Human Rights and can also make part of the positive obligations stemming from the right to life. The IACtHR considered the compliance of this State obligations in cases regarding street children,<sup>901</sup> children in custody,<sup>902</sup> indigenous children,<sup>903</sup> and children of migrant descent.<sup>904</sup>

898 Ibid., Article 63.

899 Ibid., Article 68.

900 Ibid., Article 65.

901 Villagrán Morales et al. v. Guatemala, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 63, 78 (Nov. 19, 1999).

902 Juvenile Reeducation Institute v. Paraguay, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 112, ¶¶ 134.3–134.4 (Sept. 2, 2004).

903 Yakye Axa Indigenous Community v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶¶ 50.1, 50.10 (June 17, 2005); Sawhoyamaya Indigenous Community v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 73(1) (Mar. 29, 2006).

904 Girls Yean and Bosico v. Dominican Republic, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 130, ¶ 85(a)(1) (Sept. 8, 2005).

## 8.5.c Arab States

The Arab Human Rights Committee has a monitoring mechanism, overseeing states' compliance with the Arab Charter on Human Rights (2004), but does not have a complaints mechanism. For further information on the Arab Human Rights Committee's monitoring mechanism, see Chapter 7, section 7.8.c.

## 8.5.d Asia and Pacific

In Asia, there is the ASEAN Intergovernmental Commission on Human Rights but it is neither competent to receive complaints nor monitor state compliance with the ASEAN Human Rights Declaration (2012).

## 8.5.e Europe

The European Court of Human Rights (ECtHR) is competent to accept complaints from any person, non-governmental organization, or group of individuals claiming to be the victim of a violation by any one of the 47 States parties<sup>905</sup> to the European Convention on Human Rights (1950, ECHR). As the right to education is provided for in the first Protocol (1952, Protocol 1) to the ECHR, a state must ratify both the ECHR and Protocol in order for the ECtHR to accept complaints relating to the right to education. The ECtHR has built up a body of cases on the right to education (see below).

On finding a violation of the ECHR, the ECtHR can order a range of remedies, including: awarding just satisfaction (monetary compensation for the damages suffered),<sup>906</sup> recommending the state enact, amend, or repeal legislation, as well as

905 An up-to-date list of States parties can be found at [www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures?p\\_auth=8nz1vUq4](http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures?p_auth=8nz1vUq4) (Accessed 4 October 2018.)

906 The state is also required to cover the cost of bringing the case. If the ECtHR finds that there has been no violation, then the applicant is not liable for the state's legal expenses.

specific remedies, such as ordering the state to readmit a student. However, it should be stressed that although states are bound by the decisions of the ECtHR and must execute them accordingly,<sup>907</sup> the ECtHR is not competent to quash any national law or judgment. The Committee of Ministers of the Council of Europe is responsible for enforcing ECtHR judgments.<sup>908</sup>

The ECtHR can also issue advisory opinions subject to a request from a court or tribunal of a State party that has ratified Protocol 16.<sup>909</sup>

### Example 8.10: Cases heard before the European Court of Human Rights

The European Court of Human Rights (ECtHR) has a well-developed body of case law regarding various aspects of the right to education, notably: discrimination, schools fees, language of instruction, and educational freedom.

In the case of *Campbell and Cosans v UK*,<sup>910</sup> the ECtHR held that national provisions allowing for corporal punishment in schools failed to respect parents' philosophical convictions.

In the case of *DH and others v Czech Republic*<sup>911</sup> the ECtHR decided that the placement of Romani children into 'special' schools amounted to discrimination in relation with the right to education.

More recently in 2017, the ECtHR ruled<sup>912</sup> that Swiss authorities acted in line with the European Convention on Human Rights, when it prevented two Muslim parents from removing their daughters from mixed swimming classes as mandated by the

school curriculum. The ECtHR emphasized that inclusive schooling played a special role in the process of social integration, particularly where children of foreign origin were concerned, and took precedence over the parents' religious or philosophical convictions.

For further information on the case law of the ECtHR, see the Council of Europe's case law guide on Article 2 of Protocol 1 of the European Convention on Human Rights.<sup>913</sup>

The European Committee of Social Rights (ECSR) is competent to receive collective (not individual) complaints and monitor compliance with the Revised European Social Charter (1996, ESC). The ECSR can only receive collective complaints against the 15 states that have ratified the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints (1995).<sup>914</sup> The ECSR only allows collective complaints from a restricted list of organizations.<sup>915</sup> Only Finland has recognized the right of national NGOs to lodge collective complaints against it. On reviewing a collective complaint, the ECSR issues a declaratory decision, this decision however cannot be enforced at the national level. Decisions are overseen by the Committee of Ministers of the Council of Europe, which may make recommendations to the state concerned. The ECSR has decided a number of complaints on education.

907 ECHR Article 46 (1): 'The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.'

908 ECHR Article 46 (2): 'The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.'

909 Protocol No. 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms (adopted 2 October 2013, entered into force 1 August 2018) CETS 214.

910 *Campbell and Cosans v UK* (1982) 4 EHRR 293.

911 *DH and others v Czech Republic* (2008) 47 EHRR 3.

912 *Osmanoğlu and Kocabaş v Switzerland* App no 29086/12 (ECtHR, 10 January 2017).

913 Council of Europe. 2018. *Guide on Article 2 of Protocol No. 1 to the European Convention on Human Rights: Right to education*.

914 Additional Protocol to the European Social Charter Providing for a System of Collective Complaints ETS 158. An up-to-date list of States parties can be found at [www.coe.int/en/web/conventions/full-list/-/conventions/treaty/158/signatures?p\\_auth=2f4kclfp](http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/158/signatures?p_auth=2f4kclfp) (Accessed 4 October 2018.)

915 European Trade Union Confederation (ETUC), for employees; Business Europe and International Organisation of Employers (OIE), for employers; certain international non-governmental organizations (INGOs) holding participatory status with the Council of Europe; social partners at national level; employers' organizations and trade unions in the country concerned.

### **Example 8.11: Communications heard before the European Committee on Social Rights**

The European Committee on Social Rights (ECSR) has found several breaches of the educational provisions of the European Social Charter under its collective complaints system. In the case of *Autism-Europe v France*,<sup>916</sup> ECSR found that France had failed to achieve sufficient progress in advancing the provision of education for persons with autism. Likewise, in *Mental Disability Advocacy Center v Bulgaria*,<sup>917</sup> the ECSR decided that failure to provide education to children in homes for mentally disabled children amounted to a discriminatory violation of the right to education. In the case of *Interights v Croatia*,<sup>918</sup> the ECSR decided that the educational material used in the ordinary curriculum were biased, discriminatory, and demeaning, in how persons of non-heterosexual orientation are described and depicted, thus finding that the provision of advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health was discriminatory.

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916 No. 13/2002 *International Association Autism-Europe (IAAE) v. France*.

917 No. 41/2007 *Mental Disability Advocacy Center (MDAC) v. Bulgaria*.

918 No. 45/2007 *International Centre for the Legal Protection of Human Rights (INTERIGHTS) v. Croatia*.

## Summary

Accountability is about how to hold states responsible when there are observed gaps between performance and human rights obligations.

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Accountability is beneficial for both rights-holders and duty-bearers. From a rights-holder perspective, accountability is a key process that ensures that everyone can enjoy their right to education. From a duty-bearer perspective, accountability helps to meet the content of human rights

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Domestic fora are best placed to apply national laws, grant redress and remedies, and ensure the enforcement of the right to education.

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At national level, judicial mechanisms and access to justice play a crucial role in enforcing the right to education and ensuring legal accountability.

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A justiciable right to education means that when this right is violated, the right-holder can take her or his claim before an independent and impartial body, and if the claim is upheld, be granted a remedy, which can then be enforced.

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Barriers to justiciability exist and must be removed in order to enable the conditions required for the justiciability and enforcement of the right to education.

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Accountability mechanisms also exist across various state and government organs, including the executive, legislature, administrative bodies, and regional and local government bodies.

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Numerous accountability mechanisms exist at the international level. As states are the primary duty bearers when it comes to the realization of the right to education, international accountability mechanisms should be thought of as a last resort in terms of holding states accountable.

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Regional legal frameworks give violated rights-holders the possibility of bringing their case to a regional mechanism, provided the state in question is party to the relevant regional instrument and that all domestic remedies have been exhausted or deemed insufficient.

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## Ask yourself

- ➔ Do citizens have access to justice when their right to education is violated?
- ➔ What are the barriers to justiciability in your country?
- ➔ Have there been any court decisions on the right to education and what impact have they had?





United Nations  
Educational, Scientific and  
Cultural Organization

## Education Sector

# Right to education handbook

Education is a fundamental human right of every woman, man and child. In states' efforts to meet their commitments to making the right to education a reality for all, most have made impressive progress in recent decades. With new laws and policies that remove fees in basic education, significant progress has been made in advancing free education. This has led to tens of millions of children enrolling for the first time and the number of out of school children and adolescents falling by almost half since 2000. Important steps have also been taken with regard to gender parity and states have made efforts to raise the quality of education through improved teacher policies and a growing emphasis on learning outcomes.

Despite these efforts, breaches of the right to education persist worldwide, illustrated perhaps most starkly by the fact that 262 million primary and secondary-aged children and youth are still out of school. Girls, persons with disabilities, those from disadvantaged backgrounds or rural areas, indigenous persons, migrants and national minorities are among those who face the worst discrimination, affecting both their right to go to school and their rights within schools.

To respond to the challenges, UNESCO and the Right to Education Initiative (RTE) have developed this handbook to guide action on ensuring full compliance with the right to education. Its objective is not to present the right to education as an abstract, conceptual, or purely legal concept, but rather to be action-oriented. The handbook will also be an important reference for those working towards the achievement of SDG4, by offering guidance on how to leverage legal commitment to the right to education as a strategic way to achieve this goal.

