

THE RIGHT TO (COMPULSORY) PRIMARY EDUCATION – SECOND REPORT

(Presented by Dr. Eric P. Rudge)

Table of Contents

THE RESEARCH	3
PART I THE RIGHT TO EDUCATION AND HUMAN DEVELOPMENT	3
I.1. EDUCATION AND POVERTY	3
I.2. EDUCATION AND CRIME	3
I.3. EDUCATION AND CHILD LABOR	4
I.4. EDUCATION AND STREET CHILDREN	5
I.5. EDUCATION A FUNDAMENTAL HUMAN RIGHT?	5
Part II: LEGAL INSTRUMENTS	6
II.A. International law on the Right to Compulsory Primary Education	7
II.A.1 Universal Declaration (UDHR) and the Convention against Discrimination in Education ...	10
II.A.2 The International Covenant on Economic Social and Cultural Rights (ICESCR)	12
II.A.3 Convention on the Rights of the Child (CRC)	17
II.A.4 The Sustainable Development Goal 4 target 4.1	19
II.A.5 Self-Executing, Ranking and Enforceability of International Law	22
II.A.6 The Right to Compulsory Primary Education during COVID-19 pandemic	23
II.A.7 Landmark Case Law on the Right to Education	29
II.A.8 Relevance of presented landmark Case Law	35
II.A.9 Interim conclusions	35
II. A.10 The right to education in the Americas	36
II.B. Regional law on the Right to Compulsory Primary Education	36
II.B.1 The Right to Compulsory Primary Education in regional instruments	36
II.B.1.1 Hard law instruments	37
II.B.1.2 Soft law instruments	38
II.B.2 Immediate and progressive obligations under Regional Law.....	39
II.B.2.1 Immediate obligations	39
II.B.2.2 Progressive obligations	39
II.B.3 The importance of the Right to Compulsory Primary Education	40
II.B.3.1 Fulfilment of the right to education facilitates realization of the fundamental rights to non-discrimination and equality.	40

II.B.3.2 Realizing the right to education enhances other rights and freedoms, while restricting or violating the right to education jeopardizes those rights and freedoms.	41
II.B.5 Landmark Regional Case Law on the Right to Compulsory Primary Education.....	43
II.B.6 Relevance of presented landmark Case Law	46
II.B.7 The Right to Compulsory Primary Education during COVID-19 pandemic.....	46
II.B.8 Interim conclusions	50
PART III: COMPULSORY PRIMARY EDUCATION IN O.A.S. MEMBER STATES	50
SDG Linkages with Applicable Treaty Law	53
PART IV CONCLUSIONS & RECOMMENDATIONS.....	60

* * *

INTRODUCTION

It is necessary to determine if the right to education in OAS Member states is implemented in a way that children are able to enjoy this right to the fullest extent.

Based on recent observations in several OAS Member states, doubts arise. Moreover, the numbers of children living in the streets of big cities in Latin America and the Caribbean (?)¹ are shocking. These children do not attend school, some have never attended school; they engage in a wide range of crimes, are targeted and are also frequently victims of crime groups.

The lack of (proper) education is an obstacle to the development of a human being.

There obviously is a correlation between the lack of (proper) education and poverty. Without education it is impossible to break through the cycle of poverty.

Both the Millennium Development Goals (MDGs) en de Sustainable Development Goals (SDGs) underline the importance of education to achieve the necessary human development and to create a just and better global and regional environment.

Bestowing this right in an early stage on children, enriches every human being with the necessary tools to achieve its own development and gives him/her the opportunity to be able to reach other goals in life.

Compulsory primary education refers to the most crucial period of formal education required by law of all children between certain ages in a given country. The period of compulsory attendance is usually determined by the government for the children, specifying the beginning and the end of obligatory primary education. Compulsory primary education is the duty of the State and should therefore be provided for and/or inspected by the State²

Compulsory education laws require children to attend a public or state-accredited private school for a certain period of time. There are a few exceptions, most notably homeschooling, but virtually all States have mandates stating at what age children must start their education, and till what age they are obligated to maintain in the education system.³

Compulsory Learning: Modern compulsory learning required by formal schooling, covers the shaping of the citizen with the skills and knowledge necessary to prepare him/her to live in an economic and political system.⁴

¹ I do not have data/numbers with regard to children living in the streets in the Caribbean.

² https://link.springer.com/referenceworkentry/10.1007/978-1-4419-1428-6_1765

³ <https://www.findlaw.com/education/education-options/compulsory-education.html>

⁴ https://link.springer.com/referenceworkentry/10.1007/978-1-4419-1428-6_1765.

THE RESEARCH

Part I of the research deals with general issues expressing the importance of the right to education as a human right in the perspective of among others: human development, to combat illiteracy, poverty, crime, child labor, street children, etc.

Part II will deal with the several legal instruments with regard to the right to education, more specifically compulsory primary education, that are applicable globally and within the hemisphere.

Part III will deal with the current situation and the effectiveness of the right to education, more specifically compulsory primary education, in O.A.S. Member states.

Part IV is reserved for the conclusions and recommendations.

PART I THE RIGHT TO EDUCATION AND HUMAN DEVELOPMENT

I.1. EDUCATION AND POVERTY

It is a well-documented fact that children from low-income households are significantly less likely to be successful than their middle and upper class counterparts. Studies have repeatedly shown a link between [poverty and education](#). Family income is one of the strongest predictors available for measuring success, both in the classroom and later in life.

Laws regarding compulsory education mandate the minimum length of time children and youth must spend in school before having the option to leave. A possible motivation for introducing these, often relates to the assumption that society benefits collectively from the rise of a country's overall education attainment, because doing so promotes good citizenship and economic development.⁵

With fewer resources and less focus on education at home, children growing up in poverty are behind from the very beginning. Coming from a broken home, with single parenting, not knowing if and where the next meal will come from, has its effects on a child living in these circumstances. This makes it extremely difficult for a child to concentrate on education, under these circumstances.

Even if they are going to school regularly, children in poverty often have problems to fully absorb all benefits of an adequate education that is offered to them, due to the stress of destitution. Facing the several aspects of poverty, they often have a difficult time in the classroom and often get stuck in the poverty trap. In return their lack of education prevents any rise on the social ladder.

Recent studies have pointed towards working memory as the key psychological factor linking poverty and education, specifically in academic achievement.

A system of compulsory primary education in the Member State, will afford each child, despite the social classification and living conditions of his parents, the opportunity to break through the cycle they were born in or were placed within by circumstances. Children of lower-income households will be afforded the opportunity to break through the cycle of illiteracy, poverty, crime and will be able to create their own destiny. That is the main reason that the right to compulsory primary education must be viewed as a fundamental human right.⁶

I.2. EDUCATION AND CRIME

A quote from the Ontario Teachers Association

“Society has suffered so cruelly from ignorance, that its riddance is a matter of necessity, and by the universal diffusion of knowledge alone can ignorance and crime be banished from our midst; in no other way can the best interests of society be conserved and improved than by this one remedy – the compulsory enforcement of this great boon – the right of every Canadian child to receive that education that will make him a good, loyal

⁵ The Compelling Effects of Compulsory Schooling, Phillip Oreopoulos, Department of Economics University of Toronto.

⁶ <https://www.sciencedirect.com/science/article/pii/B9780128153918000215>

subject, prepared to serve his country in the various social functions which he may be called on to fill during his life; and prepare him, through grace, for the life to come".⁷

Empirically, an increase in educational attainment significantly reduces subsequent violent and property crime yielding sizable social benefits. Evidence on the effects of school quality improvements on crime are less conclusive; however, a few studies find important crime-reducing impacts. School attendance reduces contemporaneous property crime but, in some cases, increases contemporaneous violent crime among juveniles. Incarceration during late adolescence appears to reduce educational attainment.⁸

If one is educated, the possibility to engage in violent crimes will reduce significantly, because the lack of education to engage in the work force, is no longer an issue at hand. One will be able to, along the lines of the education it enjoyed, work and strive to achieve other goals in life.

I.3. EDUCATION AND CHILD LABOR

Child labour is a kind of crime where children are forced to work at a very young age and mostly under very bad working conditions. The International Labour Organization (ILO), established a rule according to which children up to the age limit of fifteen years should not engage in child labour. Child Labour denies children of their childhood, of proper literacy, of their mental, physical, and social well being. In some countries, child labour is forbidden. It has become an international matter in most States, as it ruins the future of children extensively.⁹

There are several reasons for child labour in a country. Some of the grounds of child labour are similar, however, they might differ from State to State. The reason that is widely cited is poverty, but also the need to survive leads to the disregard of child rights, as well as an inadequate education system and the inadequate implementation of the rules and laws pertaining to the right to education, moreover the right to compulsory primary education.

In the U.S.A.

With regard to compulsory primary education, several US states introduced legislation against child labour, near the beginning of the twentieth century. Employment certificates, for example, could exempt children from the minimum age to leave school. Some certificates can be obtained by passing a grade seven or eight equivalence test. Others required only evidence of reading and writing skills. For certain occupations, employment certificates were required for children over the minimum age to leave school: mostly in the area of mining. Another type of labour law allowed children below the minimum age to leave school, to work, if doing so is necessary for the subsistence of the family. By 1933, almost all US states removed the exemptions. In certain jurisdictions employers were also not allowed to hire children during school hours. This condition is incorporated into compulsory school legislation.¹⁰

To combat child labour, it is required to look for effective solutions in an effort to safeguard the rights of children in a State. There are some factors to achieve that children are abstained from child labour.

1. The general acceptance that children have rights and most notably the right to be a child. Children must not be burdened to engage into the workforce on behalf of anyone. *"The working children of today are the illiterate unemployed adults of tomorrow"*.
2. The State must guarantee a minimum income for every employer to survive and will prevent child labour, to assist in making the ends meet in the family. This will also decrease the level of poverty.

⁷ Annual Report of the Ontario Teachers' Association, 1875, as cited in Prentice and Houston, 1975, pp. 175-176.

⁸ The economics of education, Steve Bradley and Collin Green. Chapter 9.

⁹ <https://journals.sagepub.com/doi/abs/10.1177/088840649401700306>.

¹⁰ Details of the other provincial laws are provided by Oreopoulos (2002).

3. Every family need to play a role in the education of a child within the family. After the formal education system a proper continuation of the education of the child serves the purpose and will prevent child labour.
4. There is a need for more efficient and stringent government laws against child labour to prevent children from working and offers them the opportunity to be a child.

I.4. EDUCATION AND STREET CHILDREN

Street life is a challenge for survival, even for adults, and is yet thus more difficult for children. They live within the city but are unable to take advantage of the comforts of urban life. Lack of awareness among illiterate parents regarding educational opportunities kept most children away from school attendance. Factors such as lack of an educational ambience at home made it difficult for the children to work on their lessons outside the premises of the institution. Homelessness represents deprivations from basic human needs. However, while other types of deprivations, such as hunger, mainly occur as a result of poverty and economic insecurity, factors that contribute to homelessness are multi-faceted. The factors also vary by the type of homelessness experienced by children and youth. These factors include lack of affordable housing, economic insecurity, violence at home, behavioral health, lack of social support, and involvement in the child welfare system.¹¹

I.5. EDUCATION A FUNDAMENTAL HUMAN RIGHT?

The right to education is a human right and indispensable for the exercise of other human rights.

- Quality education aims to ensure the development of a fully-rounded human being.
- It is one of the most powerful tools in lifting socially excluded children and adults out of poverty and into society. UNESCO data shows that if all adults completed secondary education, globally the number of poor people could be reduced by more than half.
- It narrows the gender gap for girls and women. A UN study showed that each year of schooling reduces the probability of infant mortality by 5 to 10 per cent.
- For this human right to work there must be equality of opportunity, universal access, and enforceable and monitored quality standards.¹²

The right to education entail

- Primary education that is free, compulsory and universal
- Secondary education, including technical and vocational, that is generally available, accessible to all and progressively free
- Higher education, accessible to all on the basis of individual capacity and progressively free
- Fundamental education for individuals who have not completed education
- Professional training opportunities
- Equal quality of education through minimum standards
- Quality teaching and supplies for teachers
- Adequate fellowship system and material condition for teaching staff
- Freedom of choice

¹¹ Joint Center for Housing Studies of Harvard University. America's Rental Housing: Homes for a Diverse Nation. 2006. Accessed June 8, 2009 from

http://www.jchs.harvard.edu/publications/rental/rh06_american_rental_housing.pdf.

¹² <https://en.unesco.org/news/what-you-need-know-about-right-education>

The current situation is:

- About 258 million children and youth are out of school, according to UIS data for the school year ending in 2018. The total includes 59 million children of primary school age, 62 million of lower secondary school age and 138 million of upper secondary age.
- 155 countries legally guarantee 9 years or more of compulsory education
- Only 99 countries legally guarantee at least 12 years of free education
- 8.2% of primary school age children does not go to primary school Only six in ten young people will be finishing secondary school in 2030 The youth literacy rate (15-24) is of 91.73%, meaning 102 million youth lack basic literacy skills.

The right to education is ensured

The right to education is established by two means - normative international instruments and political commitments by governments. A solid international framework of conventions and treaties exist to protect the right to education and States that are a part of this framework, agree to respect, protect and fulfil this right.

UNESCO work to ensure the right to education

UNESCO develops, monitors and promotes education norms and standards to guarantee the right to education at country level and advance the aims of the Education 2030 Agenda. It works to ensure States' legal obligations, which are reflected in the national legal framework and is translated into concrete policies.

- Monitoring the implementation of the right to education 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 principles and legal obligations through research and studies on key issues
- Maintaining global online tools on the right to education
- Enhancing capacities, reporting mechanisms and awareness on key challenges
- Developing partnerships and networks around key issues

The right to education monitored and enforced by UNESCO

- UNESCO's Constitution requires Member States to regularly report on measures to implement standard-setting instruments at country level through regular consultations.
- Through collaboration with UN human rights bodies, UNESCO addresses recommendations to countries to improve the situation of the right to education at national level.
- Through the dedicated online **Observatory**, UNESCO takes stock of the implementation of the right to education in 195 States.
- Through its interactive **Atlas**, UNESCO monitors the implementation of the right to education, particularly of girls and women.
- Based on its monitoring work, UNESCO provides technical assistance and policy advice to Member States that seek to review, develop, improve and reform their legal and policy frameworks with regard to the right to education.

Part II: LEGAL INSTRUMENTS

Key international hard and soft law instruments: treaties, declarations, resolutions, general comments, general recommendations, guidelines, official records, authoritative submissions, principles, Plan of Actions, case law.

II.A. International law on the Right to Compulsory Primary Education

1. International law, which comprises hard law and soft law, has a normative objective. To meet the normative objective, international law also includes secondary norms that prescribe how primary rules are to be made, interpreted, and applied. Furthermore, secondary law prescribes the institutions through which both kinds of rules are implemented. Secondary law forms the background legal system that shapes many international interactions and contributes to defining the very notion of an international actor.¹³

2. Following the primary and secondary rules, Abbott and Snidal define hard law as legally binding obligations that are precise (or can be made precise through adjudication or the issuance of detailed regulations) and that delegate authority for interpreting and implementing the law.¹⁴ Examples are contracts, covenants, and treaties. Soft law on the other hand, is comprised of weakened legal arrangements along one or more of the dimensions of obligation, precision, and delegation. This weakening can occur in varying degrees along each dimension and in different combinations across dimensions. This implies that the soft law encompasses a wide variety of deviations from hard law. Examples are political arrangements in which legalization is largely absent, principles, recommendations, general comments, guidelines, and declarations.¹⁵

3. An additional aspect to the perspective on hard and soft law of Abbott and Snidal is found in the view which Pronto provides on hard and soft law. Pronto cautions for overlooking the aspect of co-existence of the two types of law. He argues that where hard rules provide the context or the limits (boundaries, ceilings, and floors), soft rules fill-out the details.¹⁶ Therefore, the usefulness of the hard/soft dichotomy should be distinguished from the advantages of adopting international law texts in nonbinding form. Pronto also points out that while the International Court has on occasion referred to texts that are, strictly speaking, “non-binding,” it has not formally endorsed the distinction. This circumstance indicates that the hard/soft distinction does not carry with it any substantive implications.¹⁷

4. In this context present study/research gives special attention to the importance of the international (soft) law instrument referred to as ‘General Comments’ or ‘General Recommendations’.¹⁸ All treaty bodies publish authoritative comprehensive interpretations of substantive provisions contained in the articles and provisions of their respective Human Rights Treaty via a General Comment or General Recommendation.¹⁹ The main purpose of this instrument is to promote implementation of their respective treaty and assist States Parties in fulfilling their reporting obligations related to specific Articles of their treaty. Additionally, the instrument contributes to the development and application of international law, through analysis and explanation of treaty obligations, provision of guidance on issues, dealing with wider, cross-cutting, issues and reinforcing links between international law instruments. Also, courts, including national courts, refer to the General Comments and or General Recommendations to clarify legislative provisions. In some cases, national courts have based judgments on treaty jurisprudence, including General Comments/Recommendations.²⁰

5. The Right to Education has been adopted in both hard and soft law instruments. Examples of soft law instruments that address the right to education are the 1990 World Declaration on Education for All; the Beijing Platform for Action; the 1994 International Conference on Population and

¹³ K.W. Abbott and D. ‘Snidal, *Hard and Soft Law in International Governance*’, eastlaw.net, 2000, p. 422.

¹⁴ *Ibid.*, p. 421.

¹⁵ *Supra*, note 1.

¹⁶ A.N. Pronto, ‘*Understanding the Hard/Soft Distinction in International Law*’, researchgate.net, 2016, p. 941.

¹⁷ *Ibid.*, p. 945.

¹⁸ <https://www.ohchr.org/en/hrbodies/pages/tbgeneralcomments.aspx>

¹⁹ HRI/GEN/1/Rev.9 (Vol. I) & HRI/GEN/1/Rev.9 (Vol. II).

²⁰ <https://www.childrightsconnect.org/wp-content/uploads/2013/10/Fact-sheet-CRC-GC-EN.pdf>

Development; the Millennium Development Goals; the Post-2015 Agenda, and the General Comment on the Right to Education of the Committee on Economic, Social and Cultural Rights.

6. This section of the study/research will follow the perspective of the child as a rights holder and the State as a duty bearer. An attempt will be made to put forward in a persuasive manner how the interpretation of the Right to Compulsory Primary Education, due to its importance, is evolving towards a directly invocable self-executing fundamental right and enabling right.

7. The Right to Education was first recognized in Article 26 of the Universal Declaration of Human Rights (UDHR)²¹, proclaimed by the United Nations General Assembly in Paris on December 10, 1948 (General Assembly resolution 217A). The aim of the Declaration was to set common standard of achievements for all peoples and all nations, in the form of fundamental human rights to be universally protected.²²

8. Article 26 UDHR is divided in three paragraphs, each of them clearly stipulating important aspects of the Right to Education.

*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.

9. U.N. Member States realized that education is an essential mechanism for a human being to be able to develop its personality. States also realize the necessity to make education available for all, particularly primary or elementary education. As stated in article 26 UDHR education must be free, at least in the elementary and fundamental stages.

10. In using the UDHR as source, the right to education or at least elements of it have been consistently recognized in different contexts and forms in various international binding and non-binding instruments. At the global level reference could be made to, among others, Article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966²³, Article 10 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) of 1979²⁴, Article 28 and 29 of the Convention on the Rights of the Child (CRC) of 1989²⁵, Article 5 of the International Convention on the Elimination of All forms of Racial Discrimination (ICERD) of 1965²⁶, Article 30 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) of 1990²⁷, Article 24 of the Convention on the Rights of Persons with Disabilities (CRPD) of 2006²⁸, the Convention against Discrimination in Education of 1960²⁹, the Convention on Technical and Vocational Education of 1989³⁰, Article 1 of the International

²¹ Resolution 217 A (III).

²² <https://www.un.org/about-us/universal-declaration-of-human-rights>

²³ United Nations, Treaty Series, vol. 993, No. 14531.

²⁴ Ibid., vol. 1249, No. 20378.

²⁵ Ibid., vol. 1577, No. 27531.

²⁶ Ibid., vol. 660, No. 9464.

²⁷ Ibid., vol. 2220, No. 39481.

²⁸ Ibid., vol. 2515, No. 44910.

²⁹ Ibid., vol. 429, No. 6193.

³⁰ Ibid., vol. 1649, No. 28352.

Charter of Physical Education and Sport of 1978³¹ and Article 4 of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities of 1992³².

11. For a more comprehensive overview of existing international hard and soft law on the right of education, a differentiation by region is made. The Right to Education as recognized by the UDHR or at least elements of it are also enshrined in binding and non-binding regional instruments. The Department for General Assembly and Conference Management of the United Nations has divided the U.N.-Member States in six main regional groups. In alphabetical order the regional groups are: African States, Asia-Pacific States, Eastern European States, Latin American and Caribbean States and Western European and other States.³³ It must be noted that the composition of the U.N.-regional groups is not per se congruent with existing region-wide inter-governmental systems to protect and promote human rights.

12. The Latin American and Caribbean States regional group of the UN does not include the United States of America (USA) and Canada). That composition is in discordance with the composition of the regional organization, the Organization of American States (OAS), which encompasses all independent Latin American and Caribbean States, including Canada and the USA.³⁴

13. In the context of the OAS, the Right to Education is acknowledged in for example Article 49 of the Charter of the Organization of American States of 1948³⁵, Article 12 of the American Declaration of Rights and Duties of Man of 1948³⁶, Article 26 and 42 of the American Convention on Human Rights “Pact of San Jose, Costa Rica” of 1969³⁷ and Article 13 of the Additional Protocol to the American Declaration of Rights and Duties of Man, Article 13 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights of 1988³⁸.

14. Examples of regional instruments from the African regional group are Article 17 of the African Charter on Human and Peoples’ Rights of 1981³⁹, Article 11 of the Charter on the Rights and Welfare of the Child of 1990⁴⁰, the Regional Convention on the Recognition of Studies, Certificates, Diplomas, Degrees and other Academic Qualifications in Higher Education in the African States of 2014⁴¹ and Article 12 of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa of 2003⁴².

15. Like the Latin American and Caribbean group, the UN composition of the Eastern and the Western European group of States and the Asia/Pacific States is also discordant with the existing regional organizations. Examples of regional instruments from the European region are Article 2 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1952⁴³ and Article 14 of the European Convention on the Legal Status of Migrant Workers of 1977⁴⁴.

16. To-date the Asia-Pacific region, compared to the European, African and Americas regions, has no region-wide inter-governmental system to protect and promote human rights, which include

³¹ UNESCO SHS/2015/PI/H/14 REV.

³² Resolution 47/135.

³³ <https://www.un.org/dgacm/en/content/regional-groups>

³⁴ http://www.oas.org/en/about/who_we_are.asp

³⁵ O.A.S., Treaty Series, NOS. 1-C AND 61.

³⁶ O.A.S. Res. XXX.

³⁷ O.A.S., Treaty Series, No. 36.

³⁸ Ibid., No. 69.

³⁹ 1520 UNTS 217; 21 ILM 58.

⁴⁰ OAU Doc. CAB/LEG/24.9/49

⁴¹ http://portal.unesco.org/en/ev.php-URL_ID=49282&URL_DO=DO_TOPIC&URL_SECTION=201.html

⁴² <https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-women-africa>

⁴³ European Treaty Series, ETS No. 5: 009.

⁴⁴ Ibid., No. 093.

treaties, courts, commissions, or other institutions.⁴⁵ Adhanisa and Rothman reviewed the effect and effectiveness of human rights treaties in the Southeast Asian sub-region of the Asia-Pacific region.⁴⁶ Adhanisa and Rothman noted that Southeast Asia established the ASEAN Intergovernmental Commission on Human Rights (AICHR) in 2009. The objective of the AICHR is to promote and protect human rights in Southeast Asia and in 2012 it adopted the ASEAN Human Rights Declaration. The Declaration recognizes the Right to Education in Article 31, starting with granting the right to every person in its first paragraph. Additionally, Article 27 paragraph 3, grants all children and young persons the entitlement to be protected against economic and social exploitation. Children and young persons are also entitled to legal protection against employers who engage them in work that could be harmful to them or hamper their normal development including their education. In this light the ASEAN Member States declared that they should set age limits below which the paid employment of child labour should be prohibited and punished by law.⁴⁷

II.A.1 Universal Declaration (UDHR) and the Convention against Discrimination in Education

17. The UDHR and thus Article 26 UDHR is an international soft law instrument that proclaims a normative framework. The assumption would be that the provisions are not legally binding, they grant no legal rights and or entitlements and are therefore not enforceable. However, perceived in line with Pronto, it is argued that the fact that the UDHR is a soft law instrument does not make every provision non-binding. That the UDHR falls on the soft law side of the *'hard/soft divide'*, says primarily something about the "form". But argued from a substantive perspective, would reveal that the "form" in which provisions are incapsulated is at most suggestive but not per se determinative of the legal value of the provisions.⁴⁸ For example, if the provision enjoys the status of customary international law, it will have a legally binding nature. This view also finds support in *Part II: 'Ways and Means of Making the Evidence of Customary International Law More Readily Available'* of the report of the International Law Commission on its Second Session, 5 June to 29 July 1950, Official Records of the General Assembly, Fifth session, Supplement No. 12 (A/1316).⁴⁹ Pronto summarizes the aforementioned as that the intrinsic legal nature of the rule is of equal importance, if not more relevance, to the form of the instrument in which it is to be found.⁵⁰

18. It is important to note that the right to education was conceived from the beginning as having a qualitative as well as a quantitative aspect. Part 2 of Article 26 indicates disputable requirements to the quality of education: *"Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms"*, as it is not clear and unambiguous who decides whether, and according to what standards, education *"develops the human personality"* or *"promotes understanding, tolerance and friendship"*. The Universal Declaration implied that there can be different approaches to the purposes and contents of education.⁵¹

19. For the articulated rule in Article 26 UDHR to be considered customary international law it must be derived from the consistent conduct of States acting out of the belief that the law required them to act that way.⁵² Evidence of customary international law is found in the widespread repetition by States of similar international acts over time (State practice), the requirement that the acts must occur out of a

⁴⁵ <https://www.asiapacificforum.net/support/international-regional-advocacy/regional-mechanisms/>

⁴⁶ D.S. Ahdanisa and S. B. Rothman, *'Revisiting international human rights treaties: comparing Asian and Western efforts to improve human rights'*, link.springer.com, 2020, p. 25.

⁴⁷ <https://asean.org/asean-human-rights-declaration/>

⁴⁸ Supra, note 4, p. 948.

⁴⁹ A/CN.4/34.

⁵⁰ Supra, note 33.

⁵¹ B. Pranevičienė and A. Pūraitė, *Right to Education in International Legal Documents*, mruni.eu, 2010, p. 137.

⁵² S. Rosenne, *Practice and Methods of International Law*, Dobbs Ferry, New York: Ocean Publications 1984, p. 55.

sense of obligation (*opinio juris*), and that the acts are taken by a significant number of States and not rejected by a significant number of States.⁵³

20. Sources of international law may be inferred from those available to the International Court of Justice, the main judicial organ of the United Nations.⁵⁴ The report of the International Law Commission on its Seventieth session, 30 April to 1 June and 2 July to 10 August 2018⁵⁵ and the memorandum by its Secretariat: '*Identification of customary international law*'. *Ways and means for making the evidence of customary international law more readily available*' of 2018⁵⁶, indicate that the treaties, decisions of national and international courts, national legislation, opinions of national legal advisors, diplomatic correspondence, and practice of international organizations, are recognized as sources that can be consulted as evidence of customary international law.

21. Based on Article 38, paragraph 1, under sub b and c, of the Statute of the International Court of Justice (ICJ) the legitimate claim can be made that the Right to Education has evolved to the status of customary international law. This right is found in numerous treaties and declarations that have been ratified and adopted by a vast majority of nations. Equally, a vast majority of countries have recognized this right in their national laws. This circumstance could be equated with the requirement of "*the general principles of law recognized by civilized nations*". The legal consequence for establishing that the Right to Education must be treated as customary international law, is that it is binding and thus justiciable.⁵⁷

22. With Article 26 of the Universal Declaration on Human Rights, the United Nations recognized the Right to Education from its inception. The recognition of the right includes the requirements that in at least in the primary and secondary stages it must be free, compulsory, equal, available, and accessible for all. By doing so, the U.N. emphasized the importance of this right. Additionally, Article 26 outlines four basic objectives of education, which are, (1) developing the human personality, (2) strengthening of respect for human rights and fundamental freedoms, (3) promoting "understanding, tolerance and friendship among all nations, racial or religious groups", and (4) maintaining the peace.

23. Following the UDHR, the Convention against Discrimination in Education was adopted in 1960. The Convention provides a solid normative framework and covers as one of the first U.N. instruments the essential elements of the Right to Education, along with international obligations for States Parties. Illustrative is Article 4, under sub a, that among others imposes on States Parties to make primary education free and compulsory.

(4) The States Parties to this Convention undertake furthermore 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 and in particular:

(a) To make primary education free and compulsory; make secondary education in its different forms generally available and accessible to all; make higher education equally accessible to all on the basis of individual capacity; assure compliance by all with the obligation to attend school prescribed by law;

(b) 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;

⁵³ Article 38 paragraph 1 sub b and c of the Statute of the International Court of Justice of 1945. <https://www.icj-cij.org/en/statute>

⁵⁴ *Ibid.*

⁵⁵ A/73/10, pp. 12–116.

⁵⁶ A/CN.4/710.

⁵⁷ C. de la Vega, *The right to Equal Education: Merely a Guiding Principle or Customary International Legal Right?*, papers.ssrn.com, 1994, p. 44.

(c) *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 on the basis of individual capacity;*

(d) *To provide training for the teaching profession without discrimination.*

II.A.2 The International Covenant on Economic Social and Cultural Rights (ICESCR)

24. The International Covenant on Economic Social and Cultural Rights (ICESCR) is a hard law instrument. **The ICESCR was adopted in 1966 and entered into force on January 3, 1976. The covenant recognizes the Right to Education in Articles 13 and 14.** But also in this case where the chosen “form” of the instrument is a hard law, it is only suggestive that the Articles 13 and or 14 would most likely be binding. However, it has to be established if for instance the respective articles have a recommendatory nature, because in that case they will not have the anticipated binding force. This shows that also in the case of hard law the intrinsic legal nature of the rule has equal importance or more relevance than the form of the instrument in which it is to be found.⁵⁸

25. **Article 13 of the ICESCR states the following:**

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 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 his 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.*

26. Expressed for the first time in The International Covenant on Economic, Social and Cultural Rights (1966), and then reaffirmed almost in all treaties or other documents related to human rights,

⁵⁸ Supra, note 33.

the quantitative and qualitative scope of the right to education consists of four “A’s” Availability, Accessibility, Acceptability and Adaptability. This conceptual framework is the minimum standard and, at the same time, the goal implementing the right to education throughout the world.⁵⁹

27. To ensure a correct interpretation of the normative content related to the Right to Compulsory Primary Education of Article 13 ICESCR reference is made to *General Comment No. 13: The Right to Education (Art. 13)* of 1999.⁶⁰ Unlike the Covenant, General Comment No. 13 is a soft law instrument that explains the content of a respective provision of the Covenant. In this case Article 13, with the focus on primary education.

28. Before addressing the Right to Compulsory Primary Education, it is important to pay attention to the aspect of evolvement of the objectives of the Right to Education as initially formulated in Article 26, paragraph 2, UDHR and Article 13, paragraph 1, ICESCR. Via widespread endorsement given by Member States to various international instruments that add, among other elements, gender equality and respect for the environment to the objectives to be served by education, contemporary interpretation is given to Article 13, paragraph 1, ICESCR and Article 26 UDHR. In this context reference is made to paragraph 5 of General Comment No. 13 that states:

(5) The Committee notes that since the General Assembly adopted the Covenant in 1966, other international instruments have further elaborated the objectives to which education should be directed. Accordingly, the Committee takes the view that States parties are required to ensure that education conforms to the aims and objectives identified in article 13 (1), as interpreted in the light of the World Declaration on Education for All (Jomtien, Thailand, 1990) (art. 1), the Convention on the Rights of the Child (art. 29 (1)), the Vienna Declaration and Programme of Action (Part I, para. 33 and Part II, para. 80), and the Plan of Action for the United Nations Decade for Human Rights Education (para. 2). While all these texts closely correspond to article 13 (1) of the Covenant, they also include elements which are not expressly provided for in article 13 (1), such as specific references to gender equality and respect for the environment. These new elements are implicit in and reflect a contemporary interpretation of article 13 (1). The Committee obtains support for this point of view from the widespread endorsement that the previously mentioned texts have received from all regions of the world.⁶¹

29. The right to Compulsory Primary Education is provided for in Article 13, paragraph 2, under sub a. Important to note is that this provision articulates that **primary education shall be compulsory and available free to all**. This indicates that Member states agreed on the importance of education particularly in the early stages of the development of a human being. This observation is consistent with paragraphs 8, 9 and 10 of General Comment No. 13, which elaborate and explain the element of ‘primary’ of the right to primary education. The paragraphs read as follow:

(8) Primary education includes the elements of availability, accessibility, acceptability and adaptability which are common to education in all its forms and at all levels.⁶²

(9) The Committee obtains guidance on the proper interpretation of the term “primary education” from the World Declaration on Education for All which states: “The main delivery system for the basic education of children outside the family is primary

⁵⁹ The concept of these four “As” was developed by the former UN Special Rapporteur on the Right to Education, Katarina Tomaševski, and it is one of the best ways to assess and act upon the situation.

⁶⁰ E/C.12/1999/10.

⁶¹ The World Declaration on Education for All was adopted by 155 governmental delegations; the Vienna Declaration and Programme of Action was adopted by 171 governmental delegations; the Convention on the Rights of the Child has been ratified or acceded to by 191 States parties; the Plan of Action of the United Nations Decade for Human Rights Education was adopted by a consensus resolution of the General Assembly (49/184).

⁶² See paragraph 6 of General Comment No. 13.

schooling. Primary education must be universal, ensure that the basic learning needs of all children are satisfied, and take into account the culture, needs and opportunities of the community” (art. 5). “[B]asic learning needs” are defined in article 1 of the World Declaration.⁶³ While primary education is not synonymous with basic education, there is a close correspondence between the two. In this regard, the Committee endorses the position taken by UNICEF: “Primary education is the most important component of basic education.”⁶⁴

(10) As formulated in article 13 (2) (a), primary education has two distinctive features: it is “compulsory” and “available free to all”. For the Committee’s observations on both terms, see paragraphs 6 and 7 of general comment No. 11 on article 14 of the Covenant.

30. Article 14 is the second Article of the ICESCR that addresses the Right to Education. This article is directed to the progressive implementation of the principle of compulsory education free of charge for all. The Article states:

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.

31. The substantive issues arising in the implementation of the Right to Education as described in Article 14 ICESCR are explained in *CESCR General Comment No. 11: Plans of Action for Primary Education (Art. 14)*. General Comment No. 11 was adopted at the twentieth session of the Committee on Economic, Social and Cultural Rights, on 10 May 1999.⁶⁵ Present study/research will specifically give attention to the element of ‘**compulsory**’ of the Right to Compulsory Primary Education as explained in paragraph 6 of General Comment No. 11. The paragraph reads as follows:

(6) Compulsory. 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.

32. General Comment No. 11 also explains the obligation of the State Party to secure the progressive implementation of the Right to Compulsory Primary Education. This inherent substantive issue in implementing the Right to Education is explained in paragraph 10 and states:

(10) Progressive implementation. The plan of action must be aimed at securing the progressive implementation of the right to compulsory primary education, free of charge, under article 14. Unlike the provision in article 2.1, however, article 14 specifies that the target date must be “within a reasonable number of years” and moreover, that the time-frame must “be fixed in the plan”. In other words, the plan must specifically set out a series of targeted implementation dates for each stage of the progressive implementation

⁶³ The Declaration defines “basic learning needs” as: “essential learning tools (such as literacy, oral expression, numeracy, and problem solving) and the basic learning content (such as knowledge, skills, values, and attitudes) required by human beings to be able to survive, to develop their full capacities, to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decisions, and to continue learning” (article 1).

⁶⁴ Advocacy Kit, Basic Education 1999 (UNICEF), sect. 1, p. 1.

⁶⁵ E/C.12/1999/4.

of the plan. This underscores both the importance and the relative inflexibility of the obligation in question. Moreover, it needs to be stressed in this regard that the State party's other obligations, such as non-discrimination, are required to be implemented fully and immediately.

33. To fully understand the nature of the legal obligations that arise from the ICESCR and how the obliged progressive implementation fits in it, reference is made to *General Comment No. 3: The nature of States parties' obligations Article 2, paragraph 1*, adopted by the Committee on Economic, Social and Cultural Rights at the Fifth Session on 14 December 1990.⁶⁶ To complement, General Comment No. 13 provides further explanation on the distinction between the imposed obligations to be realized progressively and those which are of immediate effect. In this context paragraph 43 of General Comment No. 13 states the following:

(43) While the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes on States parties various obligations which are of immediate effect.⁶⁷ States parties have immediate obligations in relation to the right to education, such as the "guarantee" that the right "will be exercised without discrimination of any kind" (Art. 2 (2)) and the obligation "to take steps" (Art. 2 (1)) towards the full realization of article 13.⁶⁸ Such steps must be "deliberate, concrete and targeted" towards the full realization of the right to education.

34. Also, paragraphs 46, 48, 50, 51, 58 and 59 of General Comment No. 13 provide clarity on the types or levels of legal obligations imposed on the State Party by the ICESCR. The listed paragraphs state, respectively that:

(46) The right to education, like all human rights, imposes three types or levels of obligations on States parties: the obligations to respect, protect and fulfil. In turn, the obligation to fulfil incorporates both an obligation to facilitate and an obligation to provide.

(48) In this respect, two features of article 13 require emphasis. First, it is clear that Article 13 regards States as having principal responsibility for the direct provision of education in most circumstances; States parties recognize, for example, that the "development of a system of schools at all levels shall be actively pursued" (Art. 13 (2) (e)). Secondly, given the differential wording of Article 13 (2) in relation to primary, secondary, higher and fundamental education, the parameters of a State party's obligation to fulfil (provide) are not the same for all levels of education. Accordingly, in light of the text of the Covenant, States parties have an enhanced obligation to fulfil (provide) regarding the right to education, but the extent of this obligation is not uniform for all levels of education. The Committee observes that this interpretation of the obligation to fulfil (provide) in relation to Article 13 coincides with the law and practice of numerous States parties.

(50) In relation to Article 13 (2), States have obligations to respect, protect and fulfil each of the "essential features" (availability, accessibility, acceptability, adaptability) of the right to education. By way of illustration, a State must respect the availability of education by not closing private schools; protect the accessibility of education by ensuring that third parties, including parents and employers, do not stop girls from going to school; fulfil (facilitate) the acceptability of education by taking positive measures to ensure that education is culturally appropriate for minorities and indigenous peoples, and of good quality for all; fulfil (provide) the adaptability of education by designing and

⁶⁶ E/1991/23.

⁶⁷ *Ibid.*, para. 1.

⁶⁸ *Ibid.*, para. 2.

providing resources for curricula which reflect the contemporary needs of students in a changing world; and fulfil (provide) the availability of education by actively developing a system of schools, including building classrooms, delivering programmes, providing teaching materials, training teachers and paying them domestically competitive salaries.

(51) As already observed, the obligations of States parties in relation to primary, secondary, higher and fundamental education are not identical. Given the wording of Article 13 (2), States parties are obliged to prioritize the introduction of compulsory, free primary education.⁶⁹ This interpretation of Article 13 (2) is reinforced by the priority accorded to primary education in Article 14. The obligation to provide primary education for all is an immediate duty of all States parties.

(58) When the normative content of Article 13 (Part I) is applied to the general and specific obligations of States parties (Part II), a dynamic process is set in motion which facilitates identification of violations of the right to education. Violations of article 13 may occur through the direct action of States parties (acts of commission) or through their failure to take steps required by the Covenant (acts of omission).

(59) By way of illustration, violations of Article 13 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; the failure to take measures which address de facto educational discrimination; the use of curricula inconsistent with the educational objectives set out in Article 13 (1); the failure to maintain a transparent and effective system to monitor conformity with Article 13 (1); the failure to introduce, as a matter of priority, primary education which is compulsory and available free to all; the failure to take “deliberate, concrete and targeted” measures towards the progressive realization of secondary, higher and fundamental education in accordance with Article 13 (2) (b)-(d); the prohibition of private educational institutions; the failure to ensure private educational institutions conform to the “minimum educational standards” required by Article 13 (3) and (4); the denial of academic freedom of staff and students; the closure of educational institutions in times of political tension in non-conformity with Article 4.

35. Another source of international law of importance could be found in the reports of the Special Rapporteur on the Right to Education.⁷⁰ The reports are soft law instruments. The Special Rapporteur submitted reports to the Human Rights Council at its thirty-eighth, forty-first and forty-fourth sessions⁷¹ and to the General Assembly at its seventy-second, seventy-third and seventy-fourth sessions⁷².

36. Finally, reference is made to resolutions as sources of international law on the Right to Compulsory Primary Education to be consulted. In this context reference is made to the *Resolution on Human Rights and Extreme Poverty*, adopted by the General Assembly on its sixty-seventh session, on the report of the Third Committee (A/67/457/Add.2 and Corr.1), on 20 December 2012.⁷³ In particular paragraph 14, relates to the Right to Education, by reaffirming its critical role in eradicating poverty.

(14) Reaffirms the critical role of both formal and informal education in the achievement of poverty eradication and other development goals as envisaged in the Millennium Declaration, in particular basic education and training for eradicating illiteracy, and efforts towards expanded secondary and higher education as well as vocational education and technical training, especially for girls and women, the creation of human

⁶⁹ On the meaning of “compulsory” and “free”, see paragraphs 6 and 7 of general comment No. 11 on article 14.

⁷⁰ A/HRC/RES/44/3.

⁷¹ A/HRC/38/32 and Add.1, A/HRC/41/37, and A/HRC/44/39 and Add.1–2.

⁷² A/72/496, A/73/262 and A/74/243.

⁷³ A/RES/67/164.

resources and infrastructure capabilities and the empowerment of those living in poverty, in this context reaffirms the Dakar Framework for Action adopted at the World Education Forum on 28 April 2000,⁷⁴ and recognizes the importance of the United Nations Educational, Scientific and Cultural Organization strategy for the eradication of poverty, especially extreme poverty, in supporting the Education for All programmes as a tool to achieve the Millennium Development Goal of universal primary education by 2015.

II.A.3 Convention on the Rights of the Child (CRC)

37. The Convention on the Rights of a Child (CRC) of 1989 has two Articles that are directed towards the Right to Education, respectively Article 28 and Article 29. The CRC entered into force on 02 September 1990 and is one of the global conventions with the highest number of ratifications: currently 196.⁷⁵ It should be noted that Article 28 and paragraph 2 of Article 29 speak to the obligations of State Parties in relation to the establishment of educational systems and the ensuring of access hereto. Paragraph 1 of Article 29 focuses on the objectives which education should seek to achieve. As a rights holder under the CRC is recognized by Article 1 of the Convention every human being below the age 18 years unless under the law applicable to the child, majority is attained earlier.

Article 28 CRC read as follows:

*1. States Parties recognize **the right of the child to education**, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular: (a) Make **primary education compulsory and available free to all**; (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need; (c) Make higher education accessible to all on the basis of capacity by every appropriate means; (d) Make educational and vocational information and guidance available and accessible to all children; (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.*

2. States Parties shall 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.

3. States Parties shall 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. In this regard, particular account shall be taken of the needs of developing countries.

Article 29 CRC read as follows:

*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, 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***

⁷⁴ See United Nations Educational, Scientific and Cultural Organization, Final Report of the World Education Forum, Dakar, Senegal, 26–28 April 2000 (Paris, 2000).

⁷⁵ https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-11&chapter=4&clang=en retrieved on August 20, 2021.

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.

2. No part of the present article or article 28 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 principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

38. An important body safeguarding the implementation of the rights codified in the CRC is the Committee on the Rights of the Child. Based on the experience of this body in monitoring State Party reports, it provides General Comments. General Comments are produced despite not being explicitly mentioned as a task of by this body by the CRC. This competence is derived from Article 45, under sub d, CRC that empowers the Committee to make suggestions and General Recommendations based on information received pursuant to Articles 44 and 45 CRC.⁷⁶ Additionally, the privilege to prepare General Comments and to include these in reports to the General Assembly was extended to the Committee, under Rule 73, of the Committee's rules of procedure. General Comments can be revised or updated to reflect new developments or clarify issues.⁷⁷ To date the Committee has adopted at least twenty-five General Comments⁷⁸, of which No.1 of 2001⁷⁹ and No. 6 of 2005⁸⁰ relate to the Right to Education.

39. Article 28, paragraph 1, CRC recognizes education as a legal right for every child on the basis of equal opportunity. Under sub a of paragraph 1 of Article 28 CRC, free compulsory primary education for all is guaranteed, while paragraph 2 imposes the obligation on the State Party to take measures regarding school attendance and discipline. With respect to the element of '**equal opportunity**' reference is made to paragraph 33 of the report of the Special Rapporteur on the Right to Education.⁸¹ The Special Rapporteur notes that UNESCO established the first binding obligation relating to education in 1960 in its Convention against Discrimination in Education. This hard law instrument clearly sets out the principle of non-discrimination and equality of opportunity in education, to which all of its States Parties are committed.

40. The element of '**measures**' is explained in General Comment 3 on the nature of States Parties' obligations, Article 2, paragraph 1, of the ICESCR.⁸² In particularly paragraphs 3, 4 and 5, the Committee notes that while Article 2, paragraph 1, states that State Parties' must take all appropriate means, including particularly the adoption of legislative measures in order to satisfy their obligations under the Covenant, the adoption of legislative measures, as specifically foreseen by the Covenant, is by no means exhaustive of the obligations of States parties. The Commission continues to state that among the measures which might be considered appropriate, in addition to legislation, is the provision of judicial remedies with respect to rights which may, in accordance with the national legal system, be considered justiciable. Therefore, the Commission holds the opinion that Article 13, paragraph 2, under sub a, ICESCR (compulsory primary education free for all) seems to be capable of immediate application by judicial and other organs in many national legal systems. Any suggestion that the provision indicated is inherently non-self-executing would seem to be difficult to sustain.

⁷⁶ A.G. Mower, Jr, *The Convention on the Rights of the Child. International Law Support for Children*, Westport, Connecticut, Greenwood Press 1997, p. 75.

⁷⁷ CRC/C/4/Rev.5.

⁷⁸ https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&DocTypeID=11

⁷⁹ CRC/GC/2001/1.

⁸⁰ CRC/GC/2005/6.

⁸¹ A/HRC/38/32, para. 33.

⁸² *Supra*, note 51.

41. Article 29, paragraph 1, 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. General Comment No. 1 on the aims of education,⁸³ increases the understanding of the Article. The paragraphs 1, 2, 3, 16 and 23 of the Comment are of particular relevance to the Right to Compulsory Primary Education. The Committee states in paragraph 1 that the Convention on the Rights of the Child is of far-reaching importance.

“(1) [...] The aims of education that it sets out, which have been agreed to by all States parties, 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. These aims, set out in the five subparagraphs of article 29 (1) 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. [...]”

“(2) Article 29 (1) not only adds to the right to education recognized in article 28 a qualitative dimension which reflects the rights and inherent dignity of the child; it also insists upon the need for education to be child-centred, child-friendly and empowering, and it highlights the need for educational processes to be based upon the very principles it enunciates. [...]”

“(3) The child’s right to education is not only a matter of access (art. 28) but also of content. [...]”

“(23) The Committee calls upon States parties to develop a comprehensive national plan of action to promote and monitor realization of the objectives listed in article 29 (1). If such a plan is drawn up in the larger context of a national action plan for children, a national human rights action plan, or a national human rights education strategy, the Government must ensure that it nonetheless addresses all of the issues dealt with in article 29 (1) and does so from a child-rights perspective. The Committee urges that the United Nations and other international bodies concerned with educational policy and human rights education seek better coordination so as to enhance the effectiveness of the implementation of article 29 (1).”

“(16) The values embodied in article 29 (1) are relevant to children living in zones of peace but they are even more important for those living in situations of conflict or emergency. [...]”

42. Following on from paragraph 16 of Comment No.1, it should be noted that the Committee extends the right to full access to education in general and to compulsory primary education in specific to every unaccompanied and separated child, irrespective of its status during all phases of the displacement cycle. Paragraphs 41 and 42 of General Comment No. 6 on the treatment of unaccompanied and separated children outside their country of origin.⁸⁴

II.A.4 The Sustainable Development Goal 4 target 4.1

43. In November 2015, the international community adopted the 2030 Agenda, which is a Plan of Action for people, planet and prosperity.⁸⁵ The Agenda comprises seventeen indivisible Development Goals that encompass economic, social and environmental dimensions. Of these seventeen Sustainable Development Goals (SDGs), five have a direct reference to education. These are SDG 3, target 3.7; SDG 5, target 5.6; SDG 8, target 8.6; SDG 12, target 12.8, and SDG 13, target 13.3. The educational goal is SDG 4, which has ten targets based on the collective commitment made by the international

⁸³ Supra, note 64.

⁸⁴ Supra, note 65.

⁸⁵ A/RES/70/1.

community to “ensure inclusive and equitable quality education and promote lifelong learning opportunities for all”.

44. Specifically directed to the Right to Compulsory Primary Education is target 4.1 of the educational goal SDG 4.⁸⁶ The aim of target 4.1 is: “By 2030, ensure that all girls and boys complete free, equitable and quality primary and secondary education leading to relevant and effective learning outcomes”. In short, this target is titled ‘free primary and secondary education’ and is directed to the aimed provision of 12 years of free, publicly funded, inclusive, equitable, quality primary and secondary education that should be ensured for all, without discrimination. Of the provisioned twelve years, at least nine has to be compulsory, leading to relevant learning outcomes.

45. The principles informing this Framework of the 2030 Agenda are drawn from international instruments and agreements, including Article 26 of the Universal Declaration of Human Rights, the Convention against Discrimination in Education, the Convention on the Rights of the Child, the International Covenant on Economic, Social and Cultural Rights, the UN Convention on the Rights of Persons with Disabilities, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention relating to the Status of Refugees and the UN General Assembly Resolution on the Right to Education in Emergency Situations.⁸⁷

46. Because the Convention against Discrimination in Education of 1960⁸⁸ is recognized as a cornerstone of the Educational Goal of the 2030 Agenda, it is anticipated that the Convention will gain significance in the process of meeting the education 2030 Agenda goals. In light of the anticipated role of the Convention, the 39th session of the General Conference of the UNESCO held from 30 October-14 November 2017, urged Member States that did not become parties to the Convention to consider doing so, and to make this Convention better known.⁸⁹

47. There are seven indicators against which progress towards achieving SDG 4 target 4.1 (*all girls and boys complete free, equitable and quality primary and secondary education leading to relevant and effective learning outcomes by 2030*) is measured/monitored.⁹⁰ The indicators are:

4.1.1: *Proportion of children and young people (a) in grades 2/3; (b) at the end of primary; and (c) at the end of lower secondary achieving at least a minimum proficiency level in (i) reading and (ii) mathematics, by sex* ;

4.1.2: *Completion rate (primary education, lower secondary education, upper secondary education)* ;

4.1.3: *Gross intake ratio to the last grade (primary education, lower secondary education)* ;

4.1.4: *Out-of-school rate (1 year before primary, primary education, lower secondary education, upper secondary education)* ;

4.1.5: *Percentage of children over-age for grade (primary education, lower secondary education)* ;

4.1.6: *Administration of a nationally representative learning assessment (a) in Grade 2 or 3; (b) at the end of primary education; and (c) at the end of lower secondary education* ;

4.1.7: *Number of years of (a) free and (b) compulsory primary and secondary education guaranteed in legal frameworks.*

⁸⁶ A/RES/71/313.

⁸⁷ ED-2016/WS/28, para. 10, p. 28.

⁸⁸ Supra, note 17.

⁸⁹ 39 C/RESOLUTIONS, see Resolution No. 78, p. 71.

⁹⁰ http://tcf.uis.unesco.org/wp-content/uploads/sites/4/2020/09/SDG4_indicator_list.pdf

48. Another important SDG-related international soft law instrument in the realm of the Right to Compulsory Primary Education is the combined Ministerial Declaration of the high-level segment of the 2016 session of the Economic and Social Council on the annual theme “*Implementing the post-2015 development agenda: moving from commitments to results*” and the Ministerial Declaration of the 2016 High-Level Political Forum (HLPF) on sustainable development, convened under the auspices of the Economic and Social Council, on the theme “*Ensuring that no one is left behind*”.⁹¹ Reference is made particularly to paragraph 15 in which the participation and contributions of major groups and other relevant stakeholders (MGoS) in the HLPF is welcomed and their continued engagement in ensuring that no one is left behind, is encouraged.

(15) Highlight the importance of participatory and inclusive implementation, follow-up and review of the 2030 Agenda at all levels. We acknowledge the primary responsibilities of Governments in this regard. We also acknowledge the contribution of parliaments, subnational governments and all other relevant stakeholders, including the private sector, civil society, academia and philanthropic organizations. Their participation supports accountability to our citizens and enhances the effectiveness of our action, fostering synergies, multi-stakeholder partnerships and international cooperation, and the exchange of best practices and mutual learning. We welcome the participation and contributions of major groups and other relevant stakeholders in the high-level political forum and encourage their continued engagement in ensuring that no one is left behind;

49. The MGoS is referred to as SDG4-Education 2030 Steering Committee and hosted by the United Nations Educational, Scientific and Cultural Organization (UNESCO).⁹² It operates on the basis of a Terms of Reference⁹³ and makes submissions to the HLPF, containing recommendations to the education community on key priorities and catalytic actions to achieve the new agenda; monitor and advocate for adequate financing; and encourage harmonization and coordination of partner activities. The Steering Committee also convenes regional group meetings, such as the ‘*Regional SDG-Education 2030 Latin America and the Caribbean implementation partners group meeting of 12 April 2019*’.⁹⁴

50. The submissions of the SDG4-Education 2030 Steering Committee are also important international soft law instruments. Since its inception the Steering Committee published at least six submissions. The Steering Committee in its submission to the HLPF-2016, based on the principle of “ensuring that no one is left behind”, reiterates that education is both a fundamental human right and an enabling right.⁹⁵ In this context and relevant to the Right to Compulsory Primary Education, the Steering Committee established based on its assessment of SDG4 target 4.1, that:

*While the need to close the gap in access to education is recognized in the Sustainable Development Goals, the focus has moved more towards **a concept of meaningful access** – good quality of education that leads to relevant learning outcomes at all levels of education. To this end, UIS (UNESCO Institute for statistics) is leading partner efforts to better measure learning outcomes globally.*

⁹¹ E/HLS/2016/1.

⁹² ED-2016/ED2030/ME/1.

⁹³ ED-2016/ED2030/SC-TORS.

⁹⁴ <https://www.sdg4education2030.org/regional-sdg-education-2030-latin-america-and-caribbean-implementation-partners-group-meeting-11-12-april-2019>

⁹⁵ Global Education for All – Submission for HLPF 2016.

<https://sustainabledevelopment.un.org/content/documents/10184Global%20Education%20for%20All%20contribution%20recd%202016-May-17.pdf>

51. In the same context reference is made to the synthesis⁹⁶ that summarizes the main recommendations and decisions made at the 4th SDG-Education 2030 Steering Committee meeting of 28 February - 2 March 2018.⁹⁷ In the context of this study/research, it is in particular relevant to note the regional and cross-national recommendations. Reference is made to the recommendation to develop at regional and/or sub-regional level monitoring and reporting frameworks that build on the SDG4 Thematic Indicator Framework, taking into account national priorities. Also referred to is the decision to encourage regional and other cross-national coordination mechanisms and organizations to strengthen their support to countries in their monitoring and reporting efforts.⁹⁸

*Regional and other cross-national coordination mechanisms and organizations with their Member States are encouraged to **develop regional and/or sub-regional monitoring and reporting frameworks**, including the setting of regional benchmarks, as feasible and contextually appropriate. These **frameworks should build on the SDG4 Thematic Indicator Framework, taking into account national priorities**, and working closely with the UNESCO Institute for Statistics and the Global Education Monitoring Report.*

*Regional and other cross-national coordination mechanisms and organizations are encouraged to **strengthen their support to countries in their monitoring and reporting efforts** taking into account national priorities, resources, and capacity and implementation needs through peer learning, sharing of experiences, resource mobilization and capacity development. They are also encouraged to harmonize different initiatives at the regional and sub-regional levels.*

52. Finally, reference is made to Resolutions as international law instrument. Normally this instrument is not attributed with binding force, but there are exceptions. This could be deduced from for example Articles 41, 42, 48 and 49 of Chapter VII of the United Nations Charter.⁹⁹ According to these Articles Resolutions passed by the United Nations Security Council may have binding force on U.N. Member States.¹⁰⁰

II.A.5 Self-Executing, Ranking and Enforceability of International Law

53. The ranking of international law and national law in a given domestic legal system is not a determinant to the self-executing and or direct effect nature of international law but relates to the question if international law prevails over domestic law. The ranking of international law depends almost primarily on whether a State Party has a monist, dualist or hybrid legal system. A monist legal system treats international law as a source of law integrated into and with preeminence over domestic law in the internal legal order of a State. An important consequence of this understanding of the role of international law is that it may be applied and enforced directly in domestic courts without the necessity of domestic implementation. This framework thus creates a single and unitary legal system, with international law at the top of the legal order and local, municipal law subordinate.¹⁰¹ In a civil law regime treaty law becomes effective after being ratified and published, while common law regimes require the consecutive steps of signature, ratification, and statute.¹⁰²

54. Unlike in a monist legal system, in a dualist legal system international law stands apart from national law and must be domesticated through legislative process to have any effect on rights and

⁹⁶ https://en.unesco.org/sites/default/files/sdg-ed_2030_steering_committee_-_recommendations_and_decisions_-_8_march_2018_final_0.pdf

⁹⁷ ED-2018/ME/1, p. 5.

⁹⁸ https://en.unesco.org/sites/default/files/sdg-ed_2030_steering_committee_-_recommendations_and_decisions_-_8_march_2018_final_0.pdf

⁹⁹ <https://treaties.un.org/doc/Publication/CTC/uncharter-all-lang.pdf>

¹⁰⁰ JUSTIA, *What are the sources of international law?*, <https://www.justia.com/international-law/>

¹⁰¹ C.A. Dubay, *General Principles of International Law: Monism and Dualism*, judicialmonitor.org, 2014.

¹⁰² J. Grosdidier de Matons, *A Review of International Legal Instruments. Facilitation of Transport and Trade in Africa*, unohrlls.org, 2014, p. 5.

obligations at the national level. In the dualist system international law is not supreme to domestic law, and the relevance of international law in the domestic legal regime is a question left to the local political processes. Consequently, international law can only have binding legal force at the domestic level, and enforceable in a domestic court, after the treaty is specifically implemented through appropriate legislation at the national or local level. The hybrid system has characteristics of both a monist and dualist system.¹⁰³

55. Self-executing force or direct applicability of a right is deduced from the formulation of the respective right, namely that its purpose is to grant citizens a directly invocable right before their national courts.¹⁰⁴ For national courts to apply self-executing rights, transformation into national law is not necessary. On the other hand, a non-self-executing right can only be invoked before the national courts after it gained effect through adoption of national laws compatible with the non-self-executing right. Failure by the State Party to make national laws compatible with the non-self-executing right would in principle constitute a violation of international law.¹⁰⁵ In response to such a failure, the national court could only convict the State Party repair its omission but cannot invalidate the incompatible national law with the non-self-executing international right. National courts can only declare national law null and void in the instance where it is incompatible with a self-executing international right.

56. Enforceability of international law happens at international and territorial level. International enforceability Signatories. Treaties only bind signatories. Where a State, not a party, accepts its provisions and desires to become a party thereto, it does so by acceding to the treaty, which may be before or after the treaty comes into force.¹⁰⁶ In relation to the Right to Compulsory Primary Education, Articles 62, 63, 64, 65 and 65 of Chapter X and of the United Nations Charter, attributes the enforcement functions and powers to the Economic and Social Council (ECOSOC). This chapter describes to what extent the ECOSOC can undertake actions to give effect to its own recommendations and to recommendations on matters falling within its competence made by the General Assembly.

57. Territorial enforceability is generally a legal consequence of ratification of a treaty. However, treaties could explicitly address the issue of enforceability. Illustrative is Chapter I of the Convention on the Rights of the Child, which sets out the scope of the Convention. Article 1, paragraph 1, under sub d explicitly articulates that the object of the present Convention is to provide for the recognition and enforcement of such measures of protection in all Contracting States. Further, Chapter IV, regulates the recognition and enforcement, as well as Article 47, paragraph 10 of Chapter VI.

II.A.6 The Right to Compulsory Primary Education during COVID-19 pandemic

58. The various restrictions of human rights and freedoms due to the COVID-19 pandemic are well-documented. This status quo makes in-depth elaborations on the impact of COVID-19 on human rights almost redundant. Nonetheless, special attention is given to Article 4 in conjunction with Article 13 of the ICESCR.

Article 4 is the ICESCR limitation clause, and states:

(4) 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

¹⁰³ Supra, note 86.

¹⁰⁴ [Pieter Kooijmans](#), *Internationaal publiekrecht in vogelvlucht*, Wolters-Noordhoff, Groningen, 1994, p. 84-85.

¹⁰⁵ "[T]he general principle of international law is that a state cannot plead a rule or a gap in its own municipal law as a defence to a claim based on international law", M. Akehurst, *A Modern Introduction to International Law*, London: Harper Collins, 1991, p. 43. "The fact that a conflicting domestic provision is contained in the national constitution does not absolve the State Party concerned from international responsibility", A. Rosas, in D. Beetham, *Politics and Human Rights*, Oxford: Blackwell, 1995, p. 67.

¹⁰⁶ Supra, note 85.

may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

59. The Committee on Economic, Social and Cultural Rights explained in paragraph 42 of its General Comment No. 13, how Article 4 should be read conjunction with Article 13. This study/research analyzes the Committee's opinion restrictively on paragraph 2, under sub a of Article 13.

42. The Committee wishes to emphasize that the Covenant's limitations clause, article 4, is primarily intended to be protective of the rights of individuals rather than permissive of the imposition of limitations by the State. Consequently, a State Party which closes a university or other educational institution on grounds such as national security or the preservation of public order has the burden of justifying such a serious measure in relation to each of the elements identified in article 4.

60. The Committee explicitly and indisputably states in paragraph 42 of its General Comment No. 13, that the limitation clause has a protective aim of the Right to Compulsory Primary Education. It is not intent to give a State Party permission to impose limitations on the Right to Compulsory Primary Education. Further, in the instance where a State Party impose limitations on the Right to Compulsory Primary Education, on the grounds of COVID-19, the State Party has the burden of justifying that the limitations are determined by law, compatible with the nature of the impacted rights and solely serve the purpose of promoting the general welfare in a democratic society. Other international law instruments are consistent with the interpretation of the Committee in its General Comment No. 13.

61. In relation to the impact of COVID-19 and/or the response measures on the Right to Compulsory Primary Education reference is made to WHO COVID-19 approach. The Director General (DG) of the World Health Organization (WHO), Dr. Tedros Adhanom Ghebreyesus, referred to this approach in his March 11, 2020, media briefing. Dr. Tedros called on WHO Member States to strike a good balance between protecting health, minimizing economic and social disruption and respecting human rights. He reminded, that in executing its public health mandate, WHO works with many partners across all sectors to mitigate the social and economic consequences of this pandemic. This is necessary because COVID-19 is not just a public health crisis, but one that will touch every sector, reason why every sector and every individual must be involved in the fight. Dr. Tedros emphasized that countries must take a whole-of-government, whole-of-society approach that is built around a comprehensive strategy to prevent infections, save lives and minimize impact.¹⁰⁷

62. Taking into consideration that COVID-19 is still a new challenge to the Right to Compulsory Primary Education, it is understandable that the number of international hard law instruments on this theme is very limited to absent. However, in the area of international soft law, a wide variety of instruments have been developed. One such an instrument is the compilation of recommendations on schooling during COVID-19 from the European Technical Advisory Group (TAG) of the WHO Regional Office for Europe of June 2021.¹⁰⁸

63. The TAG notes that in school settings across the WHO European Region, secondary and high schools reported more outbreaks than primary school settings with children up to 10–12 years of age. Therefore, the TAG claims that transmission in education settings can be limited if effective mitigation and prevention measures are in place. It also recalls the WHO, the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the United Nations Children's Fund (UNICEF), who have all stressed that supporting children's overall well-being, health and safety, the continuity of education should be at the forefront of all relevant considerations and decisions.¹⁰⁹

¹⁰⁷ <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

¹⁰⁸ WHO/EURO:2021-2151-41906-59077.

¹⁰⁹ *Ibid*, p. 2-3.

64. Against that background, the TAG recommends that schools should be among the last places to be closed, as school closures have been shown to be detrimental to child health and well-being and educational outcomes. Furthermore, that in the instance of large outbreaks or transmission in the community that cannot be controlled by any other measures, reactive school closures may be considered as a last resort. And finally, that measures to control transmission of SARS-CoV-2 in school settings should be specific to the needs of different age groups.¹¹⁰

65. The Covid-19 Guidance of the Office of the High Commissioner for Human Rights (OHCHR) of 13 May 2020 recognizes that Covid-19 is a severe test for societies, governments, and individuals. According to the Council, efforts should be made to mitigate the effects of the measures against the spread of COVID-19. Respect for human rights across the spectrum, including economic, social, cultural, and civil and political rights, is fundamental to the success of public health interventions and overcoming the pandemic.¹¹¹

66. Regarding the Right to Education, the Guidance states that the Right to Education needs to be protected in the case of school closures, for example, and where possible, through online accessible and adapted learning, and specialized TV and radio broadcasts. Girls may be disproportionately affected, as many already face significant obstacles to go to school and may now be expected to take on increased care work at home. Limited educational opportunities for those without access to the internet and other remote learning tools risks deepening inequalities and poverty. Girls and boys may also lose access to nutritious food and other services schools often provide, such as mental health and sexual and reproductive health education.¹¹²

67. Furthermore, the Guidance notes that the Right to Education has been disrupted for more than 1.5 billion children around the world, as 188 countries have imposed countrywide school closures. Girls are likely to be hit the hardest, as they will in many cases be expected to balance caregiving responsibilities with education, have unequal access to remote learning opportunities, and are at particular risk of leaving schools entirely, which has had particular long-term impacts on their education, health and economic opportunities.¹¹³

68. In its annual report of May 2021, the Human Rights Council recommended several actions to be taken by Member States. In relation to the Right to Compulsory Primary Education, reference can be made to the recommendation that States should ensure that emergency measures that may result in restrictions on human rights are time-bound and meet the requirements of non-discrimination, legality, necessity and proportionality. During states of emergency, derogations should be avoided when the same effect can be achieved by placing restrictions on rights in a manner permitted under international law. Also applicable is the recommended action that Member States should develop the capacity of rights holders to participate and to claim their rights, including through education, awareness-raising and the narrowing of digital divides, and establish transparent, gender-responsive and accessible mechanisms for enabling stakeholders' meaningful participation and facilitating regular communication between rights holders and duty bearers at the community, subnational and national levels, paying particular attention to those usually excluded and most at risk of being left behind.¹¹⁴

69. In March 2021 the UNESCO communicated that it was exactly a year ago that the COVID-19 pandemic brought learning to a screeching halt worldwide, creating the most severe global education disruption in history. UNESCO data showed that at the peak of the crisis over 1.6 billion learners in more than 190 countries were out of school. Over 100 million teachers and school

¹¹⁰ *Ibid*, p. 3.

¹¹¹ United Nations Human Rights Office of the High Commissioner, *COVID-19 Guidance 13 May 2019*, p. 1. https://www.ohchr.org/Documents/Events/COVID-19_Guidance.pdf

¹¹² *Ibid*, p. 5.

¹¹³ *Ibid*, p. 6.

¹¹⁴ A/HRC/47/23, P. 6-7, Para. 17.

personnel were impacted by the sudden closures of learning institutions. Today, two-thirds of the world's student population is still affected by full or partial school closures. In 29 countries, schools remain fully closed.¹¹⁵

70. Related to the Right to Compulsory Primary Education, the communication also revealed that the pandemic has exposed and deepened pre-existing education inequalities that were never adequately addressed. The pandemic directly affected 63 million primary and secondary teachers. During school closures, they were required to conduct distance teaching with no time to prepare and often with limited guidance and resources. Teachers had to modify curricula and adapt lesson plans to carry on with instruction using high, low and no-tech solutions. They need continued training on remote teaching, available technologies and alternative flexible pedagogies for online, blended and offline learning during future school closures.

71. The communication also recalls the UN estimates that nearly 500 million students from pre-primary to upper-secondary school did not have any access to any remote learning. Three-quarters of those lived in the poorest households or rural areas. This enormous digital divide shows how connectivity has become a key factor to guarantee the Right to Education. Digital skills and learning must be incorporated into education systems in order to address the injustice of the digital divide. This crucial issue is among many currently being debated through UNESCO's Futures of Education initiative, a global conversation to reimagine how knowledge and learning can shape the future of humanity and the planet. The report is due to come out in November 2021.

72. In support of the COVID-19 Global Education Coalition, UNESCO launched the first chapter of the COVID-19 Response Toolkit in Education, titled '*COVID-19 response – health, safety and resurgence protocol*' in January 2021. The whole instrument consists of 9 chapters. Chapter one of this instrument, aims at supporting countries in their basic educational response to COVID-19 by providing practices and examples, concrete steps for intervention, and tactical action checklists to ensure safe school reopening, operation and resurgence planning.¹¹⁶

73. A July 2021 press-release from the United Nations Children's Fund (UNICEF)¹¹⁷ presented that around one in three countries where schools are or have been closed are not yet implementing remedial programmes post-COVID-19 school closures. This data was collected based on a UNESCO, UNICEF, World Bank and OECD global "Survey on National Education Responses to COVID-19 School Closures". At the same time, only one-third of countries are taking steps to measure learning losses in primary and lower secondary levels – mostly among high-income countries.

74. The survey also revealed that a variety of measures were implemented to mitigate potential learning losses from school closures. Furthermore, that 28 per cent of countries cancelled examinations in lower secondary education. That revising access policies especially for girls was uncommon in low- and lower-middle-income countries. Finally, that Low-income countries are lagging in the implementation of even the most basic measures to ensure a return to school.

75. Additionally, most countries took multiple actions to provide remote learning. 73 per cent of countries assessed the effectiveness of at least one distance learning strategy, there is still a need for better evidence on effectiveness in the most difficult contexts, to ensure that no-one is left behind. Andreas Schleicher, Director, OECD Education and Skills expressed the critical need for more and better evidence on remote learning effectiveness, particularly in the most difficult contexts, and to support the development of digital learning policies.

¹¹⁵ <https://en.unesco.org/news/one-year-covid-19-education-disruption-where-do-we-stand>

¹¹⁶ https://en.unesco.org/sites/default/files/unesco-covid-19-health_safety-resurgence-protocols.pdf

¹¹⁷ <https://www.unicef.org/press-releases/1-3-countries-are-not-taking-action-help-students-catch-their-learning-post-covid-19>

76. The findings of the conducted survey reinforce the importance of reopening schools, remedial learning and more effective remote learning systems that can better withstand future crises and reach all students.

77. Subsequently in July 2021, UNICEF addressed the current COVID-19-induced education crisis in its Geneva Palais briefing.¹¹⁸ In the briefing it is noted that more than 600 million children in countries are still affected by school closures. In Asia and the Pacific in nearly half the countries, schools have been closed for more than 200 days during the pandemic. After some of the longest closures ever seen, and despite some returns, in Latin America and the Caribbean, there are 18 countries and territories where schools are either closed or partially closed. And that based on UNICEF's most recent estimates, a staggering 40 per cent of all school-aged children across Eastern and Southern Africa are currently not in school, this accounts for four in ten children.

78. UNICEF reiterates that schools should be the last to close and the first to reopen. This is because there are clear evidence that primary and secondary schools are not among the main drivers of transmission. Also, because the losses that children and young people will incur from not being in school may never be recouped. This shock will have lasting negative impacts; therefore, it must be used as an opportunity to accelerate – to reimagine education.

79. UNICEF implores 5 actions of which emphasis is placed on the action to reopen schools as soon as possible as reopening cannot wait for all teachers and students to be vaccinated. Also emphasized is the call on governments and donors to protect the education budget. The third of the five actions highlighted is the call on governments to, in reopening schools, extend enrolment to all children. This includes those children who were already out of school pre-COVID-19, previously banned pregnant girls and young mothers, and new entrants regardless of age.

80. There is existing Case Law to support aspects of the three actions implored by UNICEF as described above in paragraph 63 to ensure the full enjoyment of the Right to Compulsory Primary Education Right to Education during the COVID-19 pandemic. Randomly reference can be made to a sample of these Court decisions.

81. With respect to UNICEF's call that schools should be the last to close and the first to reopen, reference is made the Argentine Supreme Court ruling of May 4, 2021. Amidst a surging second wave of COVID-19 cases and deaths, the federal government of Argentina attempted to stem the spread of the virus by reducing circulation. With this aim the federal government ordered schools in and around the capital to temporarily close. The government of the city of Buenos Aires argued that there was little evidence that in-person classes increased infection rates and kept elementary schools and kindergartens open while mandating hybrid in-person and virtual classes at the high- school level. Subsequently, it challenged the Presidential Decree to close schools in Buenos Aires before the Supreme Court of Argentina. The Supreme Court ruled by a majority vote of four against one, that the Presidential Decree constituted a violation of the legally enshrined autonomy of Buenos Aires. According to the Supreme Court, "*The City of Buenos Aires and its provinces can manage the opening of classes ... prioritizing the opening and resumption of in-person classes,*" therewith, underscoring that the city government was the authority in charge of deciding whether schools should close. The fifth judge abstained, saying the issue was beyond the court's jurisdiction.¹¹⁹

82. Regarding UNICEF's call on governments to protect the education budget reference can be made to the ruling of the High Court of South Africa, Gauteng Division, Pretoria of Jul 17, 2020. Amidst of the COVID-19 pandemic the South African school system was shut down for twelve weeks during the COVID-19 lockdown. Due to the temporarily closures the delivery of the National School Nutrition Programme (NSNP), which provides a daily meal to all learners in South Africa who qualify

¹¹⁸ <https://www.unicef.org/press-releases/geneva-palais-briefing-note-current-covid-19-induced-education-crisis>

¹¹⁹ CSJ 567/2021.ORIGINARIO, Gobierno de la Ciudad de Buenos Aires c/ Estado Nacional (Poder Ejecutivo Nacional) s/ acción declarativa de inconstitucionalidad.

based on economic need was limited. When schools reopened the Minister of Education announced that the provision of meals would follow a “phased-in approach”, starting with the learners in grades 7 and 12. When it became clear that learners in any other grade were not provided meals, the plaintiffs challenged before the High Court whether the Minister of Education and eight South African provinces had constitutional and statutory duties to provide daily NSNP meals to learners. The court concluded that all qualifying learners are entitled to a daily meal from the NSNP. The High Court held that as the NSNP was explicitly introduced to address both the right to basic education under section 29(1)(a) of the Constitution and the right of children to basic nutrition under section 28(1)(c), the Minister of Basic Education and the MECs have a constitutional duty to provide basic nutrition to learners, that learners have a basic right to nutrition, and that the suspension of the NSNP program has infringed upon that right.¹²⁰

83. Regarding the UNICEF call to extend enrolment to all children when reopening schools, support can be found in the ruling of the Regional Economic Community of West African States’ (ECOWAS) Community Court of Justice of 12 December 2019. This case concerns the challenge by the Sierra Leonean non-profit, Women Against Violence and Exploitation in Society (WAVES), that the 2015 policy banning pregnant girls from mainstream education as a violation of their rights under the African Charter and several other regional and international human rights instruments. The Regional Court of Justice ruled that the contested ban policy barring pregnant schoolgirls from attending mainstream schools amounted to discrimination against pregnant schoolgirls in Sierra Leone, and breached provisions of the African Charter on Human and Peoples’ rights and other international law instruments to which Sierra Leone is a party. It ordered the policy to be revoked with immediate effect and thus without delay. In March 2020, Sierra Leone lifted its ban on pregnant girls attending school.¹²¹ Amnesty International notes that the ban was formally issued in April 2015 during the Ebola crisis. Due to Ebola, there was a sharp increase in teenage pregnancies and government should put measures in place to ensure this doesn’t happen in this time of COVID-19.¹²²

84. Considering UNICEF’s call to accelerate and reimagine education support it should be considered to facilitate private schools in addition to public schools. In this context reference is made to the ruling of the U.S. Court of Appeals in *Brach v. Newman* of July 23, 2021.¹²³ The case concerns the extended prohibition on in-person schooling during the Covid-19 (“Covid”) pandemic for private and public education by the State of California. On the closures of private schools, the Court ruled that California’s COVID-19 orders closing private schools infringed a fundamental federal constitutional right of parents to choose their children’s schools. The state’s orders last year barring in-person instruction at private schools were not narrowly tailored to advance a compelling state interest, the court said. The challenge to California’s closures of public schools was rejected by a divided three-judge panel of the Court. The Court reasoned that because there is no fundamental federal right to a public education, the state’s orders need only be rationally related to abating the pandemic.

85. Consultation of the website ‘COVID-19 Civic Freedom Tracker: Keep Civic Space Healthy’ of the International Center for Non-Profit Law (ICNL) provides an overview of governments emergency laws responses to the pandemic that affect civic freedoms and human rights.¹²⁴ Retrieved general information on August 25, 2021, shows that 109 countries have emergency declarations, 57 have measures that affect expression, 50 have measures that affect assembly and 60 have measures that affect privacy. It goes without saying that the COVID-19 related emergency declarations, and in

¹²⁰ Case Number: 22588/2020. The High Court of South Africa (Gauteng Division, Pretoria), 17 July 2020.

¹²¹ Suit No. ECW/CCJ/APP/22/18. Judgement No. ECW/CCJ/JUD/37/19, The Community Court of Justice of the Economic Community of West African States (ECOWAS), holden in Abuja, Nigeria, on the 12th of December 2019.

¹²² <https://www.amnesty.org/en/latest/news/2020/03/sierra-leone-discriminatory-ban-on-pregnant-girls/>

¹²³ Case No. 20-56291. D.C. No.2:20-cv-06472-SVW-AFM. Central District of California, Los Angeles.

¹²⁴ <https://www.icnl.org/covid19tracker/?issue=5>

particular the measures affecting assembly could impose direct or indirect limitations on the Right to Compulsory Education. To understand the concrete limitations at national level, the respective national instruments that lay at the basis of the declarations and measures can be retrieved from the ICNL website for review.

86. Also, in the context of SDG-4 the analysis of the implications of the COVID-19 pandemic on the Right to Education has led to international law instruments. In this case reference is made to the Declaration of the SDG-E2030 Regional Steering Committee for Latin America and the Caribbean: Prioritizing the right to education will save the present and future of Latin America and the Caribbean¹²⁵.

87. The aforementioned Declaration of the SDG-E2030 Regional Steering Committee for Latin America and the Caribbean of 2021, recognizes that the COVID-19 pandemic has caused the most serious disruption to education systems in history and threatens to cause a learning deficit that could affect more than one generation of students. Consequently, it calls for increased efforts to that end and proposes six strategies and corresponding actions. The six strategies are aimed at safeguarding education funding; reopening school safely and gradually; strengthening and valuing of teachers, administrators, and other education personnel; recovering lessons and decreasing gaps; reducing the digital divide and promoting connectivity as a right, and deepening the cooperation and solidarity among countries, partnership development and regional and inter-sectorial coordination.

II.A.7 Landmark Case Law on the Right to Education

88. Bearing in mind the important elements of the right to free and compulsory primary education for all, as explained by General Comment 11 and SGD 4, attention will be given to some landmark court decisions. The respective court decisions confirm that all girls and boys must have access to compulsory primary education that is complete free, equitable and of adequate quality relevant to the child that promotes the realization of the child's other rights.

89. Recalling the report¹²⁶ and memorandum¹²⁷ of the International Law Commission which indicate that decisions of national and international courts are part of recognized sources that can be consulted as evidence of customary international law, the following paragraphs will highlight some landmark case law on the Right to Compulsory Primary Education. The cases are retrieved from the ESCR-Net Caselaw Database, which is a database on domestic, regional and international decisions regarding Economic, Social and Cultural Rights.¹²⁸

90. It must be noted that opinions issued by international tribunals (including courts and arbitration panels) comprise law to the extent that they are binding upon the states-parties to the proceeding. Such decisions are not binding on non-parties but may serve to reveal the composition of international law to other states and tribunals.¹²⁹

91. *Bandhua Mukti Morcha v. Union of India & Ors. (1997) 10 SCC 549*, is a ruling by the Supreme Court of India of February 21, 1997. It concerns a public interest litigation case, directed to the State of Uttar Pradesh. The case was filed in an effort to abolish the use of child labor in the carpet industry by seeking the issuing of welfare directives prohibiting child labor under the age of 14 and by providing children access to education. In its ruling the Court noted India's obligations under the Universal Declaration of Human Rights (UDHR) and the Convention on the Rights of the Child to provide free primary education for all children in the country, and to protect children against economic

¹²⁵ https://unesdoc.unesco.org/ark:/48223/pf0000375689_eng

¹²⁶ Supra, note 41.

¹²⁷ Supra, note 42.

¹²⁸ https://www.escr-net.org/caselaw/search?search=education&field_country_tid=All&language=%2A%2A%2ACURRENT_LANGUAGE%2A%2A%2A&field_thematic_focus_tid=2415&field_forum_type_value=All&page=1

¹²⁹ Supra, note 85 (JUSTIA).

exploitation. In this light the Court ordered the State of Uttar Pradesh and Bihar to take measures to abolish child labor. In the order the Court referenced, and incorporated measures set out in an earlier case, *M.C. Mehta v. State of Tamil Nadu & Ors.* [(1996) 6 SCC 756]. The orders included, directing the States to take steps to frame policies to progressively eliminate the employment of children below the age of 14; provide compulsory education to all children employed in factories, mining, and other industries; ensure that the children receive nutrient-rich foods; and administer periodic health check-ups.

The relevance of this Court decision is that the Court reaffirmed the right to free and compulsory primary education by all and confirmed that the existence of child labor is incompatible with that right.

92. *The Centre for Human Rights (University of Pretoria) and La Rencontre Africaine pour la Defense des Droits de l'Homme (Senegal) v Government of Senegal, ACERWC, DECISION: N° 003/Com/001/2012*, is a regional court case decision provided by the African Committee of Experts on the Rights and Welfare of the Child on April 15, 2014. This case addresses the plight of as many as 100,000 children (known as *talibés*), who while attending *Qur'anic schools (daaras)* in Senegal, are forced by some instructors to beg in the streets, to secure their own survival and enrich the teachers. The children live away from their families, often in deplorable conditions, and are exposed to brutal physical assaults, malnutrition, illness, sexual abuse, and several other vulnerabilities. The Committee found Senegal accountable for the activities of these schools even though they are non-state entities. It reasoned that the State has an obligation to protect the rights of the child which requires measures by the State to ensure that third parties (such as individuals and institutions) do not deprive children of their rights. The Committee found that Senegal has violated numerous provisions of the African Charter on the Rights and Welfare of the Child including the principle of the best interests of the child (Article 4); the rights to survival and development (Article 5), education and health (Article 11 and 14); the prohibition of child labor (Article 15); and the prohibition of forced child begging (Article 29 under b). The Committee has issued several recommendations, including that Senegal needs to ensure that all *daaras* meet basic human rights standards relating to education and that the State Party provides free and compulsory basic education.

The relevance of this Court decision is that the Court reaffirmed the obligation of the State to ensure that also third parties respect the right to free and compulsory primary education by all. This by meeting all quality standards relevant to enable all children to realize their other rights.

93. *Decision C-376/10 of the Colombian Constitutional Court*, is a ruling by the Colombian Constitutional Court on November 1, 2009. This case concerned a Constitutional claim regarding Law 115 of 1994, which regulates the national education law; Obligation of the Colombian State to guarantee the right to education; Fundamental nature of the right to education of minors; Providing free education as an unequivocal obligation which must be immediately enforced with respect to primary education. The plaintiffs argued that Law 115 of 1994 did not comply with international human rights standards by allowing for the option to charge fees on primary education (sect. 183). The Court found the contested law unenforceable, considering that fees may not be applied to official primary education, but only to secondary and higher education levels. Furthermore, charging fees in the primary education level could become a barrier to accessing the education system. In its review of the case, the Court included a list of the instruments and comments by international human rights treaty bodies establishing Colombia's obligation to guarantee a compulsory, free and accessible education¹³⁰. According to such international instruments and comments, the State has the unequivocal, immediate obligation to guarantee free primary education, while in the case of secondary and higher-level education, the obligation is of a progressive nature. The Court also restated the

¹³⁰ Universal Declaration of Human Rights (art. 26), International Covenant of Economic, Social and Cultural Rights (art. 13), Protocol of San Salvador (art. 13), Committee of Economic, Social and Cultural Rights (General Comments 11 and 13), Committee of Economic, Social and Cultural Rights (Comments for Colombia), UN Human Rights Commission, Office of the High Commissioner for Human Rights.

fundamental nature of the right to education, which applies, according to its own case law, to all persons younger than 18, as well as the hierarchy of children's rights over the rights of others, as established in the Constitution.

The relevance of this Court decision is that the Court reaffirmed that the State has a legal obligation to immediate realization of the right to compulsory primary education. Furthermore, that the right to education must be implemented without access barriers, reasons why it must be offered complete free from fee charges.

94. *R v East Sussex ex parte. Tandy Cited as: [1998] AC 714, [1998] 2 All ER 769, [1998] 2 WLR 884, [1998] 2 FCR 221*, is a ruling by the House of Lords, United Kingdom on May 20, 1998. This case concerns the application for judicial review of the decision to reduce the number of hours of home tuition for financial reasons. Furthermore, the local authority obligations under Education Act 1993, the retrogressive measure, and the issue of resource allocations of local authority. According to Section 298 each local education authority (LEA) was required to make arrangements for the provision of suitable education for those children of compulsory school age who, by reason of, amongst other things, illness, might not otherwise receive it. Furthermore, the Section provides that suitable education,' in relation to a child... means efficient education suitable to his age, ability and aptitude and to any special educational needs he may have....'. In October 1996 the education authority (EA) advised parents of the appellant, a sick child, that, for financial reasons, the maximum number of hours per week of home tuition provided to her would be reduced. The House of Lords held that on a true construction of Section 298, the question of what was suitable education' was to be determined purely with reference to educational considerations and that there was nothing in Section 298 to indicate that the resources available were relevant to that determination. Accordingly, there was no reason to treat the resources of a LEA as a relevant factor in determining what constituted suitable education' for the purposes of Section 298. However, if there was more than one way of providing suitable education,' the EA would be entitled to have regard to its resources in choosing between different ways of making such provision. The Court restored the order of the High Court quashing the EA's decision to reduce the number of hours of home tuition provided.

The relevance of this Court decision is that the Court confirmed that the State has a legal obligation to guarantee the right to compulsory primary education for every child of compulsory school age without discrimination. Furthermore, that the provided education by the State must be suitable in accordance with educational considerations and irrespective of the available resources.

95. *Unni Krishnan, J.P. & Ors. v. State of Andhra Pradesh & Ors. Cited as: 1993 AIR 217, 1993 SCR (1) 594, 1993 SCC (1) 645, JT 1993 (1) 474, 1993 SCALE (1)290*, is a ruling by the Supreme Court of India on February 4, 1993. This case concerns a Constitutional challenge querying whether the "right to life" in Article 21 of the Constitution of India guarantees a fundamental right to education to citizens of India. Furthermore, the role of economic resources in limiting right to education, the interplay between Directive Principles and State Policy in the Constitution and Fundamental Rights, and whether the right to education includes adult professional education. The case involved a challenge by certain private professional educational facilities to the constitutionality of State laws regulating capitation fees charged by such institutions. The Supreme Court held that the right to basic education is implied by the fundamental right to life (Article 21) when read in conjunction with the Directive Principle on Education (Article 41). The Court ruled that there is no fundamental right to education for a professional degree that flows from Article 21. It held, however, that the passage of 44 years since the enactment of the Constitution had effectively converted the non-justiciable right to education of children under 14 into one enforceable under the law. Quoting Article 13 of the International Covenant on Economic, Social and Cultural Rights, the Court stated that the state's obligation to provide higher education requires it to take steps to the maximum of its available resources with a view to achieving progressively the full realization of the right of education by all appropriate means.

The relevance of this Court decision is that the Court confirmed that the right to free and compulsory primary education, as recognized by Article 13 ICESCR, is a fundamental right when read in conjunction with Article 21 of the Indian Constitution and Article 41 of the country's Directive Principle on Education. Furthermore, that the Constitution has converted the right to primary education of children under 14 into justiciable right.

96. ***Settlement agreement between ACIJ and the Autonomous City of Buenos Aires, concerning case 23360/0 of 2008***, is a ruling by the Superior Tribunal of Justice of the City of Buenos Aires on February 9, 2011. This case concerns a settlement agreement reached and signed between ACIJ and the City of Buenos Aires Government to ensure an adequate number of places are available in public schools in order to fulfill the rights to education and equality. In 2006, *Asociación Civil por la Igualdad y la Justicia* (ACIJ), an organization member of the ESCR-Net, filed an amparo action against the Government of the City of Buenos Aires. The purpose of the action was to have the Court order the Government to comply with its existing constitutional obligation to ensure and finance access to early education. The case centered on violations of the right to education and to equality, as well as the principle of personal autonomy. Thousands of children were being left out of the public school system, while the schoolwork's budget was being underspent (as between 2002 and 2005 average spending had been 32.3% below budget). The case was decided favorably in the first and second instances, with the courts acknowledging the rights to education and personal autonomy, and the advantages of early education. The courts recognized that the State had violated its obligations and that the underspending of budget allocations violated the obligation to exhaust all available resources. When the case reached the Superior Tribunal of Justice, the parties reached a settlement agreement. Under the agreement, the Government promised to execute building plans to address the lack of vacant places and to allocate sufficient resources to implement its constitutional obligation regarding early childhood education in each budget plan.

The relevance of this Court decision is that the Court confirmed the right to free, compulsory and quality primary education. Furthermore, that the State has a legal obligation to guarantee full and non-discriminatory enjoyment of the right, by ensuring the availability of public schools through allocation of sufficient resources.

97. ***Luke Gannon by his next friends and guardians, et al., v. State of Kansas, 298 Kan. 1107, 319 P.3d 1196 (2014) [Gannon I]; 303 Kan. 682, 368 P.3d 1024 (2016) [Gannon II], --- Kan. ---, --- P.3d --- (2016) 2016 Kan. LEXIS 300 [Gannon III]***, is a ruling by the Supreme Court of the State of Kansas on March 2, 2017. This case focused on whether school funding by the State of Kansas was equitable and adequate, as required under the relevant state Constitutional provisions regulating the provision of education. Upon finding violations in connection with the equitable distribution of funds and the adequacy of such funds to ensure constitutionally required education, the State of Kansas was required to review and adjust its education funding. This required implementing action by the state legislature, with a continued supervisory role for the state Supreme Court. In 2010, four Kansas school districts, 31 students, and their guardians sued the State of Kansas alleging those cuts in public school budgets beginning in 2009 had left schools inadequately funded and that portions of the funding were inequitably distributed, in violation of Article 6 of the Kansas Constitution (regulating education provision), state statutes, and due process and equal protection clauses of the Kansas and United States Constitutions. Compliance with the *equity* requirement meant "school districts must have reasonably equal access to substantially similar educational opportunity through similar tax effort." In March 2017, the Kansas Supreme Court issued a ruling on the *adequacy* of school funding. Regarding implementation, this was deemed inadequate given the state failure to provide approximately a quarter of K-12 (from kindergarten to 12th grade) students with basic reading and math skills, and the leaving behind of significant groups of harder-to-educate students. The Court found that the evidence showed insufficient tests results to be related to funding levels.

The relevance of this Court decision is that the Court confirmed the right to free, compulsory and quality primary education. Furthermore, that the State has a legal obligation to guarantee full and non-discriminatory enjoyment of the right, by ensuring the availability of public schools through allocation of sufficient resources.

98. *Minister of Basic Education v Basic Education for All (20793/2014) [2015] ZASCA 198; [2016] 1 All SA 369 (SCA)*, is a ruling by the Supreme Court of Appeal of South Africa on December 2, 2015. This case concerns the delayed textbook deliveries that has plagued public schools in Limpopo, South Africa's northernmost province for several years. The Department of Basic Education and Limpopo Department of Education appealed a high court decision holding that their failure to ensure timely delivery of textbooks to learners in Limpopo public schools violated the learners' constitutional rights. The Supreme Court of Appeal held that the government appellants violated the rights to education, equality, and dignity under the Constitution by failing to provide learners in Limpopo with prescribed textbooks before the academic term commenced. In 2012, seeking to standardize education nationwide, the Department of Basic Education (DBE) began the three-year rollout of a new curriculum which entailed staggered introduction of new textbooks. The government respondents appealed to the Supreme Court of Appeal (SCA) where SAHRC (South African Human Rights Commission) joined BEFA (Basic Education for All organization) and the school governing bodies in their cross-appeal. The SCA held that the government appellants violated rights to education (Section 29), equality (Section 9), and dignity (Section 10) of the Constitution by failing – in accordance with its obligation to fulfil human rights (Section 7(2) of the Constitution) – to provide learners in Limpopo with prescribed textbooks before the academic term commenced. The SCA rejected the government appellants' arguments that: (1) their efforts to provide textbooks had been hampered by lack of cooperation from the schools; (2) budgetary constraints justified the delayed delivery; (3) the petitioners were asking the government to meet a "standard of perfection" not required by Section 29(1)(a) of the Constitution (on the right to a basic education); and (4) the order granted by the lower court violated the doctrine of separation of powers. Relying on the case of *Governing Body of the Juma Masjid Primary School & others v Essay NO & others* [2011] ZACC 13; 2011 (8) BCLR 761 (CC), para 37, the SCA confirmed that the right to basic education is "immediately realizable" and not subject to progressive realization. In making this decision, the SCA noted that the right to basic education is both "constitutionally entrenched and statutorily enforced." (para. 40). Thus, rather than holding the government to a "lofty" ideal," as the appellants argued, the petitioners were simply trying to "hold [it] to the standard it set for itself." (para. 42). The DBE had set a policy but had faced an obstacle in the latter stages of implementation. As such, the SCA characterized the government appellants' arguments about budget constraints and separation of powers as "fallacious" and seemingly "contrived."

The relevance of this Court decision is that the Court confirmed the right to free, compulsory and quality primary education. Furthermore, that the right to primary education requires immediate and not progressive realization. The right is constitutionally entrenched and statutorily enforceable.

99. *Governing Body of the Juma Masjid Primary School v. Juma Masjid Trust, [2011] ZACC 13*, is a ruling by the South African Constitutional Court on April 11, 2011. This case concerns the Constitutional Court decision on direct appeal against an order of the High Court authorizing an eviction of a public primary school from private property. The case covered a range of issues, including, the constitutional right to a basic education; application of constitutional rights against private parties; balancing of private interests in property against children's interest in constitutional right to education; and the responsibility of the Municipality to provide a basic education. The Juma Masjid Trust had allowed the Juma Masjid Primary School, a public school, to operate on its private property for an extended period of time. On the received title from the High Court to evict the school, the Constitutional Court held that notwithstanding the constitutional rights at stake, given the history of the dispute and the efforts made by the Trust to secure an agreement acceptable to all, the Trust had acted reasonably in seeking an eviction order from the High Court. Nevertheless, the Constitutional

Court determined that the High Court, in granting that eviction order without considering where the children would go, had failed to take adequate account of the best interests of the children as required by the Constitution and of their constitutional right to basic education.

The relevance of this Court decision is that the Court confirmed that the right to free, compulsory and quality primary education is a Constitutional right of children. Furthermore, that the right to primary education serves the best interests of the child as recognized by the Constitution, reasons why the right supersedes the entitlement to evict a primary school from a private property without a proper alternative.

100. *Jean and Bosico Children v. The Dominican Republic*, is a regional court ruling by the Inter-American Court of Human Rights on September 8, 2005. This case concerns a petition submitted to the Inter-American Commission on Human Rights (IACHR) alleging violation of rights to nationality and education of girls of Haitian descent born in the Dominican Republic. Right to nationality is considered a way to have civil and political rights acknowledged. Therefore, petitioners claimed that the Dominican Republic should respect its obligation to the right to non-discrimination in granting the girls the nationality. Precautionary measures were requested to prevent deportation and to guarantee the Right to Education of a girl in school age. The petitioners claimed that, since their nationality was not acknowledged, the girls were exposed to the imminent threat of being expelled from the country and, lacking an identity document, could not attend school. The IACHR adopted precautionary measures to prevent the girls' deportation and to guarantee that Bosico could continue going to school and referred the case to the Inter-American Court of Human Rights. Finally, the Court requested the State to guarantee access to free elementary education for all children regardless of their background or origin. The Court considered this obligation was a consequence of the special protection children are entitled to.

The relevance of this Court decision is that the Court confirmed the right to free, compulsory and quality primary education, to be implemented without discriminatory access barriers. Furthermore, that the State has a legal obligation to guarantee all children access to free elementary education regardless of their nationality, background, or origin.

101. *Campaign for Fiscal Equity et al. v. State of New York et al.* 719 N.Y.S.2d 475, is a ruling by the Supreme Court of New York on January 9, 2001. This case concerns the challenge of state school funding system on the basis of the Education Article of the New York Constitution (Article XI § 1). The case addressed a range of issues including, the constitutional right to a sound basic education, adequacy of school funding, budgetary allocations, and the nature of remedies. In 1993, the Campaign for Fiscal Equity, as well as several students and their parents, filed a complaint asserting that New York State's educational financing scheme. According to the complaint the educational financing scheme fails to provide public school students in New York City, an opportunity to obtain a sound basic education. This constitutes a violation of the state Constitution. In later proceedings the Court of Appeals clarified that basic education should also cover the skills needed to sustain competitive employment and to acquire higher education. The Court noted that accomplishing this requires minimally adequate physical facilities, and basic learning resources, as well as being taught up-to-date curricula by adequately trained teachers. The decision of the State Supreme Court in relation to the Education Article was subsequently upheld in 2003 by the Court of Appeals which issued a tri-partite remedial order that required the State to determine the cost of providing a sound basic education in New York City, reform the current system to ensure adequacy of funding for all schools and establish a system of accountability to measure whether the reforms actually provide the opportunity for a sound basic education.

The relevance of this Court decision is that the Court confirmed the right to free, compulsory and quality primary education. Furthermore, that the State has a legal obligation to guarantee full and non-discriminatory access to quality education, which requires the allocation of sufficient resources to

minimally ensure the availability of adequate physical facilities, basic learning resources and adequately trained teachers who can provide teaching based on up-to-date curricula.

II.A.8 Relevance of presented landmark Case Law

102. The above presented case law concerns landmark rulings on the agreed objectives of the Right to Compulsory Primary Education and on the elements of compulsory, primary, availability, access, free for all and immediate obligation of the Right to Compulsory Primary Education. Not specifically addressed by the cases is the central principle of equality and non-discrimination in education of the Convention against Discrimination in Education of 1960. Also, on this principle enshrined in the Convention rich jurisprudence exists as the Convention has been cited in landmark decisions by several courts, including the European Court of Human Rights. Illustrative is the Supreme Court of Mauritius ruling that brought into prominence the importance of abiding by the Convention. The Court considered the issues in the light of the provisions of the Convention and held that “it is a well-recognized canon of construction that domestic legislation, including the Constitution, should, if possible, be construed so as to conform to such international instrument as the Convention”. This judgment stated that the overall purpose behind the Convention is to combat all forms of discrimination in education.¹³¹

103. Existing case law contests the quite often classification of the Right to Education as an economic, social and cultural right that lacks remedies and that is accordingly treated as quasi-rights or not-quite rights. This approach would consequently result in not addressing denials and violations of the Right to Education. As shown, different human rights institutions and judicial bodies (such as the UN Human Rights Committee; the Committee on Economic, Social and Cultural Rights; the Committee on the Elimination of Discrimination against Women; the Committee on the Rights of the Child, and the national and regional courts have quite explicitly examined and discussed the scope of the Right to Education and formed a specific framework to state obligations regarding this right. These obligations have often been judicially tested in many domestic and international cases.¹³²

II.A.9 Interim conclusions

104. It is safe to conclude that the Right to Compulsory Primary Education is well addressed by a variety of international hard and soft law instruments. The right is in detailed defined and explained. Subsequent to the evolving objectives of the Right to Compulsory Primary Education, the interpretation of the right is also evolving to a contemporary interpretation. The Right to Compulsory Primary Education has evolved to international customary law and is therefore binding and justiciable. Contrary to the right to other forms and levels of education, where States Parties have the legal obligation to progressive realization, States Parties have the legal obligation to immediate realization of the Right to Compulsory Primary Education.

105. States Parties to the Convention on the Rights of the Child not only recognized the Right to Compulsory Primary Education for every child but also accepted that it must be available and free to all. The main purpose is also stated in the Convention namely: *to give every child the opportunity to develop its personality, talents and mental and physical abilities to their fullest potential, in order to prepare each child for a responsible life in a free society, enjoying its inalienable rights as a human being.*

106. When zooming in on the obligation of immediate realization and the obligation to take measures to ensure the full enjoyment of the Right to Compulsory Primary Education, there seems to be a discrepancy between the comprehensive international law legal landscape and practice. This could be the result of a lack of importance that States Parties give to paragraph 23 of General Comment No. 1 on the aims of education that calls upon them to develop a comprehensive national plan of action to promote and monitor realization of the objectives listed in Article 29, paragraph 1 of the CRC. Similar

¹³¹ <http://unesdoc.unesco.org/images/0015/001537/153765E.pdf>

¹³² *Supra*, note 39, p. 139.

calls for Plans of Action were made by other international and regional instruments, but also ordered by national and regional courts.

II. A.10 The right to education in the Americas

The Americas as a region comprises Latin-America, the Caribbean, Canada and the United States of America. The key regional hard and soft law instruments addressed by this report are treaties, declarations, resolutions, advisory opinions, guidelines, principles, Plan of Actions, case law.

II.B. Regional law on the Right to Compulsory Primary Education

1. As part of international law, also regional law has a normative objective and comprises hard law and soft law.¹³³ To meet the normative objective, regional law also includes secondary norms that prescribe how primary rules are to be made, interpreted, and applied. Furthermore, secondary law prescribes the institutions through which both kinds of rules are implemented. Secondary law forms the background of a legal system that shapes many international interactions and contributes to defining the very notion of an international actor.¹³⁴

2. Legal instruments that could be considered the cornerstone instruments of the Organization of American States (OAS) in acknowledging the Right to Education are: the Charter of the Organization of American States of 1948¹³⁵, the American Declaration of Rights and Duties of Man of 1948¹³⁶, the American Convention on Human Rights “Pact of San Jose, Costa Rica” of 1969¹³⁷, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights of 1988¹³⁸, and the Inter-American Democratic Charter of 2001¹³⁹.

II.B.1 The Right to Compulsory Primary Education in regional instruments

3. Of all applicable regional legal instruments, the OAS Charter of 1948 can be considered to be the ground laying legal instrument. The OAS Charter is the constituting legal instrument of the OAS; therefore, it precedes all other OAS related legal instruments. In different contexts the OAS Charter makes specific reference to the right to education. In Chapter VII on integral development of the OAS Charter, reference is made to the Articles 30, 31, 34 (h), 47, 48, 49, 50, 51, and 52. Also in Chapter XIII on the Inter-American Council for integral development reference is made to the right to education in the Articles 94, 95 (c)(2) and 111.

4. Out of the right to education related articles of the OAS Charter, special attention is given to Article 49 that speaks specifically to compulsory primary education. This article calls on Member States to exert the greatest efforts, in accordance with their constitutional processes, to ensure the effective exercise of the right to education. In sub (a) it calls upon Member States to offer to all others who can benefit from it, elementary education, compulsory for children of school age, free of charge when provided by the State.

5. The OAS Charter, being a constitutive treaty, can be categorized as an international soft law instrument. This nature could give the impression that the Charter provisions are not legally binding, not granting legal rights and or entitlements, and that all the above cited articles are therefore not enforceable. Argued in line with Pronto, this perception is considered inaccurate.¹⁴⁰ According to Pronto, the soft law character of the OAS Charter does not make every provision of the instrument

¹³³ K.W. Abbott and D. Snidal, *‘Hard and Soft Law in International Governance’*, eastlaw.net, 2000, p. 439.

¹³⁴ Ibid., p. 422.

¹³⁵ O.A.S., Treaty Series, NOS. 1-C AND 61.

¹³⁶ O.A.S. Res. XXX.

¹³⁷ O.A.S., Treaty Series, No. 36.

¹³⁸ Ibid., No. 69.

¹³⁹ AG/doc.8 (XXVIII-E/01).

¹⁴⁰ A.N. Pronto, *‘Understanding the Hard/Soft Distinction in International Law’*, researchgate.net, 2016, p. 948.

non-binding. The soft law qualification relates primarily to the “form” of the instrument. But argued from a substantive perspective, would reveal that the “form” in which provisions are incapsulated is at most suggestive but not per se determinative of the legal value of the provisions.

6. Pronto continues by stating that provisions of soft law instruments with the status of customary international law, do have a legally binding nature. This effect, described as the intrinsic legal nature of the rule, is of equal importance, if not more relevance, to the form of the instrument in which it is to be found.¹⁴¹ This view is in line with that of the of the International Law Commission.¹⁴² The observed alignment is retrieved from the Commission’s report of 5 June to 29 July 1950, titled *Part II: ‘Ways and Means of Making the Evidence of Customary International Law More Readily Available’*, Official Records of the General Assembly, Fifth session, Supplement No. 12 (A/1316).

7. Article 49, sub a of the OAS Charter, read in conjunction with Article 38, paragraph 1, sub b and c, of the Statute of the International Court of Justice (ICJ), reveals that the Right to Compulsory Primary Education must be considered customary international law. This flows from the fact that this right is included in numerous treaties and declarations that have been ratified and adopted by a vast majority of nations. Equally, a vast majority of OAS Member States (MS) have recognized this right in their national laws. This circumstance could be equated with the requirement of “*the general principles of law recognized by civilized nations*”. The legal consequence for establishing that the Right to Compulsory Primary Education must be treated as customary international law, is that it is binding and thus justiciable.¹⁴³

8. Reflecting on the previous paragraphs of this sub-section, it becomes clear that to a certain extent the distinction between hard and soft law is irrelevant in the context of the Right to Compulsory Primary Education. Nonetheless for the sake of completeness and clarity, the next two subsections will briefly touch on these two forms of regional legal instruments.

II.B.1.1 Hard law instruments

9. The first hard legislation is the American Convention on Human Rights “Pact of San Jose, Costa Rica” of 1969, which entered into force on July 18, 1978. The final paragraph of the preamble explicitly considers the incorporation of broader standards regarding educational rights in the OAS Charter. Reason why the Convention should determine the structure, competence, and procedure of the organs responsible for educational rights.

10. Article 26 of the Convention on the progressive development requests from State Parties to undertake actions and to adopt measures, with a view of achieving progressively the full realization of the rights implicit in the educational standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.

11. Article 42 requires State Parties to transmit to the Inter-American Commission on Human Rights a copy of each of the reports and studies that they submit annually to the Executive Committees of the Inter-American Economic and Social Council and the Inter-American Council for Education, Science, and Culture, in their respective fields, so that the Commission may watch over the promotion of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.

12. Also relevant is the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights of 1988, which entered into force on November 16, 1999. Article 7 on just, equitable, and satisfactory conditions of work, requires from State Parties to recognize and guarantee the enjoyment of right to work by everyone under just, equitable, and

¹⁴¹ Ibid.

¹⁴² A/CN.4/34.

¹⁴³ C. de la Vega, *The right to Equal Education: Merely a Guiding Principle or Customary International Legal Right?*, papers.ssrn.com, 1994, p. 44.

satisfactory conditions, which the State Parties undertake to guarantee in their internal legislation. This, while respecting as regards to minors under the age of 16, that the workday shall be subordinated to the provisions regarding compulsory education. In no case shall work constitute an impediment to school attendance or a limitation on benefiting from education received. See sub f of Article 7.

13. Also, Article 13 on the Right to Education, grants everyone the Right to Education in its paragraph 1. In its paragraph 3 sub a, State Parties recognize that in order to achieve the full exercise of the right to education, primary education should be compulsory and accessible to all without cost. Article 16 on the rights of children explicitly grants every child 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.

14. With respect to means of protection paragraph 2 Article 19, State Parties should submit periodic reports on the progressive measures they have taken to ensure due respect for the educational rights set forth in this Protocol. These reports shall be submitted to the Secretary General of the OAS, who shall transmit them to the Inter-American Economic and Social Council and the Inter- American Council for Education, Science and Culture so that they may examine them in accordance with the provisions of this article. The Secretary General shall send a copy of such reports to the Inter-American Commission on Human Rights.

15. At the level of regional organizations paragraph 4 Article 19, stipulates that the specialized organizations of the inter-American system, may submit reports to the Inter-American Economic and Social Council and the Inter-American Council for Education, Science and Culture relative to compliance with the provisions of the present Protocol in their fields of activity. Subsequently, paragraph 5 speaks about a requirement of the annual reports to be submitted to the General Assembly by the Inter-American Economic and Social Council and the Inter-American Council for Education, Science and Culture. The requirement entails that the annual reports should contain a summary of the information received from the State Parties concerning the progressive measures adopted in order to ensure respect for the educational rights acknowledged in the Protocol itself and the general recommendations they consider to be appropriate in this respect.

II.B.1.2 Soft law instruments

16. In addition to the OAS Charter, which has been elaborated on in paragraphs 3 to 8 of this chapter, the American Declaration of Rights and Duties of Man of 1948 and the more recent Inter-American Democratic Charter of 2001 are considered the core soft law legal instruments by this study.

17. The American Declaration of Rights and Duties of Man adopted on May 2, 1948, declares in Chapter 1 the rights. Article XII on the Right to Education, declares in paragraph 1 that every person has the right to an education, which should be based on the principles of liberty, morality and human solidarity. Paragraph 4 declares more specifically that every person has the right to receive, free, at least a primary education.

18. With respect to duties, Article XXX on the duties towards children and parents, declares that it is the duty of every person to educate his minor children. Article XXXI on the duty to receive instruction, declares that it is the duty of every person to acquire at least an elementary education.

19. The Inter-American Democratic Charter adopted on September 11, 2001, considers in the tenth paragraph of its preamble that education is an effective way to promote citizens' awareness concerning their own countries. It enables meaningful participation in the decision-making process and reaffirms the importance of human resource development for a sound democratic system.

20. Under chapter III on democracy, integral development, and combating poverty, Article 16 declares 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.

21. Finally, under chapter VI on the promotion of a democratic culture, Article 27 declares that the objectives of the OAS programs and activities, designed to promote democratic principles and practices and strengthen a democratic culture in the Hemisphere, will be to promote good governance, sound administration, democratic values, and the strengthening of political institutions and civil society organizations. Special attention shall be given to the development of programs and activities for the education of children and youth as a means of ensuring the continuance of democratic values, including liberty and social justice.

II.B.2 Immediate and progressive obligations under Regional Law

22. Based on the applicable regional law, OAS Member States must guarantee the provision of compulsory primary education, free of costs, to all without discrimination. This obligation must be seen in the context of the Right to Education as a multiplier right. This right unlocks other rights when guaranteed and precludes the enjoyment of all human rights and perpetuates poverty when denied.¹⁴⁴ For this reason OAS Member States are obliged to realize the Right to Education, depending on the level, either immediately or progressively.

23. In light of these obligations, M.G. Margerin refers to the proposal by the Inter-American Commission to complement the right to education “4-A” framework proposed by the former U.N. Special Rapporteur on the Right to Education, Katarina Tomasevski, with a fifth “A”. This would add the element of accountability to the initial elements of available, accessible, acceptable, and adaptable. According to Margerin these intersecting frameworks assist policymakers and advocates in evaluating whether and how a state is fulfilling the right to education in each of its defining characteristics.¹⁴⁵

II.B.2.1 Immediate obligations

24. In the regional legal systems of the OAS, Member States have the immediate obligations to provide compulsory primary education that is free to all, without discrimination on any basis, and to ensure that all persons within their jurisdictions receive equal protection under the law. This obligation was established by the *Decision C-376/10 of the Colombian Constitutional Court*. Based on Article 13 of the Protocol of San Salvador, the Court found that Colombia has an obligation to guarantee compulsory, free and accessible education. According to the Court this obligation to guarantee free compulsory primary education is unequivocal and immediate. Furthermore, this ruling is consistent with paragraph 51 of General Comment No. 13 on the levels of legal obligations imposed on State Parties to the International Covenant on Economic Social and Cultural Rights (ICESCR).

II.B.2.2 Progressive obligations

25. OAS Member States have the obligation to progressively realize the right to secondary and higher education, within the parameters of the concept of “reasonable time” contemplated by the inter-American human rights system.¹⁴⁶ This means that while the right to free and compulsory primary education is of immediate effect, States must progressively realize the right to secondary and higher education, using the maximum available resources. “Progressive realization means that States parties have a specific and continuing obligation to move as expeditiously and effectively as possible towards the full realization” of the right to education as defined by regional and international law. The progressive nature of the obligation does not mean that economic, social and cultural rights are

¹⁴⁴ Katarina Tomasevski, *Human Rights Obligations in Education: The 4-A Scheme*, Nijmegen: Wolf Legal Publishers (WLP) 2006. p. 47

¹⁴⁵ Marselha Gonçalves Magarin, *The Right to Education: A Multi-Faceted Strategy for Litigating before the inter-American Commission on Human Rights*, The Human rights Brief. Center for Human Rights and Humanitarian Law, Volume 17, Issue 3 (2010), p. 23.

¹⁴⁶ See Suárez Rosero Case, 1997 Inter-Am. Ct. H.R. (ser. C) No. 35, at para. 72 (Nov. 12, 1997), available at http://www.wcl.american.edu/humright/hracademy/corteidh/seriecpdf_ing/seriec_35_ing.pdf?rd=1; see also American Convention, *supra* note 4, at art. 26; Protocol of San Salvador, *supra* note 6, at arts. 13(3)(b)–(c); Convention of Belém do Pará, *supra* note 10, at art. 8(b); OAS Charter, *supra* note 10, at art. 49.

unenforceable. This was also established by the *Decision C-376/10 of the Colombian Constitutional Court*. Also based on Article 13 of the Protocol of San Salvador, the Court reasoned that Colombia has an obligation to guarantee compulsory, free and accessible education. According to the Court this obligation is of a progressive nature in the case of secondary and higher-level education. General Comment No. 13 on the levels of legal obligations imposed on the State Party by the ICESCR also confirms in paragraph 59 that the obligation to progressive realization of the right to education relates to the right to secondary and higher education and not to the right to free compulsory primary education.

II.B.3 The importance of the Right to Compulsory Primary Education

26. The right to education is vitally important because it is a ‘multiplier’ right: Its realization both advances the right to equality and enhances other related rights and freedoms.

II.B.3.1 Fulfilment of the right to education facilitates realization of the fundamental rights to non-discrimination and equality.

27. This sub-section highlights the report of the Robert F. Kennedy Center for Justice & Human rights prepared for the thematic hearing before the Inter-American Commission on Human Rights in 2008.¹⁴⁷ The report provides the following viewpoints on the importance of realizing the right to education for in particular marginalized populations and populations with vulnerabilities, in this case Afro-descendants and Indigenous peoples. According to K. TOMASEVSKI the Right to Education functions as a multiplier, enhancing all rights and freedoms when it is guaranteed while jeopardizing them all when it is violated.¹⁴⁸ States must provide to persons within their jurisdictions the right to education free of discrimination of any kind. As an obligation *erga omnes*, the principle of non-discrimination “binds all States and gives rise to effects with regard to third parties, including individuals.”

28. The report refers to the Advisory opinion of Inter-American Court of Human Rights of September 17, 2003, in which the Court stated that in compliance with the non-discrimination obligation, States must abstain from carrying out any action that, in any way, directly or indirectly, is aimed at creating situations of de jure or de facto discrimination. This translates, for example, into the prohibition to enact laws, in the broadest sense, formulate civil, administrative or any other measures, or encourage acts or practices of their officials, in implementation or interpretation of the law that discriminates against a specific group of persons because of their race, gender, color or other reasons.¹⁴⁹

29. The report continues by stating that non-discrimination is a prerequisite to the enjoyment by all of the right to education.¹⁵⁰ Moreover, the realization of the right to education for marginalized communities has the long-term potential to diminish the discrimination that they routinely face. Education helps develop tolerance, appreciation and respect for difference. A meaningful education, defined as education that is available, accessible, acceptable and adaptable, and for which there are appropriate mechanisms to hold the government accountable, is essential to transcending poverty. It is, moreover, fundamental to the ability of each individual to participate in and contribute to all economic, social, cultural, civil, and political aspects of society.

¹⁴⁷ Robert F. Kennedy Center for Justice & Human Rights, *‘Right to Education of Afro-descendants and Indigenous Peoples in the Americas: Achieving Dignity and Equality for All’*, rfkcenter.org, 2008, p.46.

¹⁴⁸ Supra, note 12.

¹⁴⁹ Advisory Opinion OC-18/03, para. 103.

¹⁵⁰ Supra, note 15, p.47.

II.B.3.2 Realizing the right to education enhances other rights and freedoms, while restricting or violating the right to education jeopardizes those rights and freedoms.

30. The Robert F. Kennedy Center for Justice & Human Rights highlights paragraphs 1 and 13 of General Comment nr. 13 where the Committee on Economic, Social and Cultural Rights confirms that the right to education is both itself a fundamental human right and an essential means to promote a number of other rights and freedoms.¹⁵¹ Education, for example, can directly affect one's income, employment opportunities, access to justice and ability to participate in government. However, the right to education is complicated in the case of Afro-descendant and indigenous peoples because State-provided education is generally constructed through and measured by non-indigenous standards, values and philosophies.¹⁵² When education is used as a means of assimilation, the rights of minority groups are often negatively impacted. For example, States may use the education system for the introduction of a national language "to the detriment of the languages and cultures of ethnic minorities and indigenous groups. For such groups, however, the right to education is an essential means to preserve and strengthen their cultural identity."¹⁵³

31. The report points out that, in line with Article 13 paragraph 2 of the Protocol of San Salvador and Article 23 paragraph 2 of the American Convention, obtaining an education provides otherwise marginalized individuals with the tools needed to rise out of poverty and participate more fully in their communities and governments. Fulfilling the right to education is linked to the realization of the right to food, as granted by Article 12 of the Protocol of San Salvador, and the right to health, as granted by Article 10 of the Protocol of San Salvador, by giving people the economic foundations to access proper nutrition and health care. The right to education, for example, directly enhances the right to health when an educational system incorporates health education into its curriculum, as provided for by Article 10 paragraph 2 of the Protocol of San Salvador.

32. According to Coomans, education "enhances social mobility and helps . . . people to escape from discrimination based on social status".¹⁵⁴ Not only does a lack of education negatively affect, for example, the right to work, as granted by Article 6 of the Protocol of San Salvador, and the right to social security, as granted by Article 9 of the Protocol of San Salvador, but it can also be used as a means to justify excluding individuals from fully participating in their communities and government¹⁵⁵. According to Article 13 paragraph 2 of the Protocol of San Salvador, a central purpose of education is to "enable everyone to participate effectively in a democratic and pluralistic society." However, States may regulate the right to participate in government on the basis of education, as stipulated by Article 23 paragraph 2 of the American Convention; thus, the absence of a meaningful education may effectively prevent participation in government. Similarly, Article 13(1) of the American Convention calls upon the State to ensure freedom of expression within its jurisdiction, including the right to "seek, receive, and impart information and ideas of all kinds." Likewise, with respect to Article 13 paragraph 2 of the Protocol of San Salvador, education should be directed toward the full development of the human personality and human dignity. The development of the human personality is the "most fundamental" educational objective common to both the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights (hereinafter "ICESCR").¹⁵⁶

¹⁵¹ Ibid.

¹⁵² The Coolangatta Statement on Indigenous Peoples' Rights in Education, World Indigenous Peoples' Conference on Education, Hilo, Hawai'i, Aug. 6, 1999.

¹⁵³ Fons Coomans, Content and Scope of the Right to Education as a Human Right and Obstacles to Its Realization, in *Human Rights in Education, Science and Culture: Legal Developments and Challenges* 183, 185 (Yvonne Donders & Vladimir Volodin eds., 2007).

¹⁵⁴ Ibid, p. 185.

¹⁵⁵ General Comment nr. 13, para. 1.

¹⁵⁶ Ibid, para. 4.

33. Furthermore, a lack of education directly affects access to justice. Article 25(2) of the American Convention guarantees that States Parties will “ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the State; develop the possibilities of judicial remedy; and ensure that the competent authorities shall enforce such remedies when granted.” However, a person who lacks a basic education will often be unaware of his/her rights and will be less likely to seek legal recourse. Indigenous peoples often are denied access to justice because, among other things, they do not speak the majority language.¹⁵⁷ States must ensure that indigenous peoples can understand and be understood in legal proceedings, through the provision of interpreters or by other appropriate means.¹⁵⁸

34. Also relevant in the Robert F. Kennedy Center for Justice & Human Rights report is this paragraph in which reference is made to the UNESCO Education for All Global Monitoring Report of 2007 that states that while the right to education must be fulfilled for all persons, it requires special attention with respect to Afro-descendant and indigenous peoples because they are often the most marginalized and impoverished.¹⁵⁹ Indigenous peoples possess “the right to have the dignity and diversity of their cultures, traditions, histories and aspirations, which shall be appropriately reflected in education and public information.”¹⁶⁰ To fulfill the right to education for indigenous peoples, States must provide an education that is adaptable to their needs. This includes providing indigenous peoples access to education in the context of their own cultures and in their language and imbued with non-indigenous standards, philosophies and values. They result in indigenous peoples being assimilated into mainstream culture, while denying their cultural identities.¹⁶¹

35. According to Article 2 on jurisdiction, of the Statute of the Inter-American Court of Human rights, the Court exercises advisory jurisdiction, which is governed by the provisions of Article 64 of the Convention. It must be noted that the Advisory Opinions issued by the Inter-American Court of Human Rights, comprise law to the extent that they are non binding. Advisory Opinions entail the reasoning of the Court on a specific matter of International Law as requested by any OAS member State, or an OAS body or organ. In addition, it provides guidelines for all member States in accordance with the application of international law on that specific matter of International Law.

36. In this light, further notice should be given to paragraph 4 that comments on the terms “international courts and tribunals”, in paragraph 1 of conclusion nr. 13. According to the Commission they refer to a term intended to cover any international body exercising judicial powers that is called upon to consider rules of customary international law. While paragraph 5 comments that the term “decisions” includes judgments and advisory opinions, as well as orders on procedural and interlocutory matters.¹⁶²

37. The Inter-American Court of Human Rights rendered an Advisory Opinion on the interpretation of the Articles 8 and 25 of the American Convention, with the aim of determining whether the special measures set forth in Article 19 of that same Convention establish “limits to the good judgment and

¹⁵⁷ Inter-American Commission on Human Rights, Access to Justice as A Guarantee of Economic, Social and Cultural Rights, A Review of the Standards Adopted by the Inter-American System of Human Rights, OEA/Ser.L/V/II.129, Doc. 4, 7 Sept. 2007, at para. 86.

¹⁵⁸ U.N. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, art. 13(2), U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

¹⁵⁹ U.N. Educational Scientific and Cultural Organization (UNESCO), Education for All Global Monitoring Report 2007 (2007), at p. 214-15.

¹⁶⁰ U.N. Declaration on the Rights of Indigenous Peoples, Article 15 paragraph 1.

¹⁶¹ *Supra*, note 20, Para. 1.3.1.

¹⁶² *Supra* note 31, p. 150.

discretion of the States” with respect to children, and it also requested that the Court express general and valid criteria on this matter in conformance to the framework of the American Convention.¹⁶³

38. The Inter-American Court of Human Rights held in paragraph 1 of its rendered opinion that pursuant to contemporary provisions set forth in International Human Rights Law, including Article 19 of the American Convention on Human Rights, children are subjects entitled to rights, not only objects of protection. Furthermore, in paragraph 2 that the phrase “best interests of the child”, set forth in Article 3 of the Convention on the Rights of the Child, entails that children’s development and full enjoyment of their rights must be considered the guiding principles to establish and apply provisions pertaining to all aspects of children’s lives.

39. Other relevant parts of the Court’s opinion are found in paragraph 7, where the Court held that respect for life, regarding children, encompasses not only prohibitions, including that of arbitrarily depriving a person of this right, as set forth in Article 4 of the American Convention on Human Rights, but also the obligation to adopt the measures required for children’s existence to develop under decent conditions. And in paragraph 8 that true and full protection of children entails their broad enjoyment of all their rights, including their economic, social, and cultural rights, embodied in various international instruments. The States Parties to international human rights treaties have the obligation to take positive steps to ensure protection of all rights of children.

II.B.5 Landmark Regional Case Law on the Right to Compulsory Primary Education

40. The following paragraphs will highlight some landmark regional case law on the Right to Compulsory Primary Education. The cases are retrieved from the ESCR-Net Caselaw Database, which is a database on domestic and regional decisions regarding Economic, Social and Cultural Rights.¹⁶⁴

41. *Decision C-376/10 of the Colombian Constitutional Court*, is a ruling by the Colombian Constitutional Court on November 1, 2009. This case concerned a Constitutional claim regarding Law 115 of 1994, which regulates the national education law; Obligation of the Colombian State to guarantee the right to education; Fundamental nature of the right to education of minors; Providing free education as an unequivocal obligation which must be immediately enforced with respect to primary education. The plaintiffs argued that Law 115 of 1994 did not comply with international human rights standards by allowing for the option to charge fees on primary education (sect. 183). The Court found the contested law unenforceable, considering that fees may not be applied to official primary education, but only to secondary and higher education levels. Furthermore, charging fees in the primary education level could become a barrier to accessing the education system. In its review of the case, the Court included a list of the instruments and comments by international human rights treaty bodies establishing Colombia's obligation to guarantee a compulsory, free and accessible education¹⁶⁵. According to such international instruments and comments, the State has the unequivocal, immediate obligation to guarantee free primary education, while in the case of secondary and higher-level education, the obligation is of a progressive nature. The Court also restated the fundamental nature of the right to education, which applies, according to its own case law, to all persons younger than 18, as well as the hierarchy of children's rights over the rights of others, as established in the Constitution.

¹⁶³ Inter-American Court of Human Rights Advisory Opinion OC-17/2002, of August 28, 2002, requested by the Inter-American Commission on Human Rights. *Juridical Condition and Human Rights of the Child*, para. 1.

¹⁶⁴ https://www.escri-net.org/caselaw/search?search=education&field_country_tid=All&language=%2A%2A%2ACURRENT_LANGUAGE%2A%2A%2A&field_thematic_focus_tid=2415&field_forum_type_value=All&page=1

¹⁶⁵ Universal Declaration of Human Rights (art. 26), International Covenant of Economic, Social and Cultural Rights (art. 13), Protocol of San Salvador (art. 13), Committee of Economic, Social and Cultural Rights (General Comments 11 and 13), Committee of Economic, Social and Cultural Rights (Comments for Colombia), UN Human Rights Commission, Office of the High Commissioner for Human Rights.

The relevance of this Court decision is that the Court reaffirmed that the State has a legal obligation to immediate realization of the right to compulsory primary education. Furthermore, that the right to education must be implemented without access barriers, reasons why it must be offered complete free from charges.

42. ***Settlement agreement between ACIJ and the Autonomous City of Buenos Aires, concerning case 23360/0 of 2008***, is a ruling by the Superior Tribunal of Justice of the City of Buenos Aires on February 9, 2011. This case concerns a settlement agreement reached and signed between ACIJ and the City of Buenos Aires Government to ensure an adequate number of places are available in public schools in order to fulfill the rights to education and equality. In 2006, *Asociación Civil por la Igualdad y la Justicia* (ACIJ), an organization member of the ESCR-Net, filed an amparo action against the Government of the City of Buenos Aires. The purpose of the action was to have the Court order the Government to comply with its existing constitutional obligation to ensure and finance access to early education. The case centered on violations of the right to education and to equality, as well as the principle of personal autonomy. Thousands of children were being left out of the public school system, while the schoolwork's budget was being underspent (as between 2002 and 2005 average spending had been 32.3% below budget). The case was decided favorably in the first and second instances, with the courts acknowledging the rights to education and personal autonomy, and the advantages of early education. The courts recognized that the State had violated its obligations and that the underspending of budget allocations violated the obligation to exhaust all available resources. When the case reached the Superior Tribunal of Justice, the parties reached a settlement agreement. Under the agreement, the Government promised to execute building plans to address the lack of vacant places and to allocate sufficient resources to implement its constitutional obligation regarding early childhood education in each budget plan.

The relevance of this Court decision is that the Court confirmed the right to free, compulsory and quality primary education. Furthermore, that the State has a legal obligation to guarantee full and non-discriminatory enjoyment of the right, by ensuring the availability of public schools through allocation of sufficient resources.

43. ***Luke Gannon by his next friends and guardians, et al., v. State of Kansas, 298 Kan. 1107, 319 P.3d 1196 (2014) [Gannon I]; 303 Kan. 682, 368 P.3d 1024 (2016) [Gannon II], --- Kan. ---, --- P.3d --- (2016) 2016 Kan. LEXIS 300 [Gannon III]***, is a ruling by the Supreme Court of the State of Kansas on March 2, 2017. Kansas is one of the fifty States of the United States of America, an O.A.S. member State. This case focused on whether school funding by the State of Kansas was equitable and adequate, as required under the relevant state Constitutional provisions regulating the provision of education. Upon finding violations in connection with the equitable distribution of funds and the adequacy of such funds to ensure constitutionally required education, the State of Kansas was required to review and adjust its education funding. This required implementing action by the state legislature, with a continued supervisory role for the state Supreme Court. In 2010, four Kansas school districts, 31 students, and their guardians sued the State of Kansas alleging those cuts in public school budgets beginning in 2009 had left schools inadequately funded and that portions of the funding were inequitably distributed, in violation of Article 6 of the Kansas Constitution (regulating education provision), state statutes, and due process and equal protection clauses of the Kansas Constitution and the United States Constitution. Compliance with the *equity* requirement meant "school districts must have reasonably equal access to substantially similar educational opportunity through similar tax effort." In March 2017, the Kansas Supreme Court issued a ruling on the *adequacy* of school funding. Regarding implementation, this was deemed inadequate given the state failure to provide approximately a quarter of K-12 (from kindergarten to 12th grade) students with basic reading and math skills and leaving behind significant groups of harder-to-educate students. The Court found that the evidence showed insufficient tests results to be related to funding levels.

The relevance of this Court decision is that the Court confirmed the right to free, compulsory and quality primary education. Furthermore, that the State has a legal obligation to guarantee full and non-discriminatory enjoyment of the right, by ensuring the availability of public schools through allocation of sufficient resources.

44. *Jean and Bosico Children v. The Dominican Republic*, is a regional court ruling by the Inter-American Court of Human Rights on September 8, 2005. This case concerns a petition submitted to the Inter-American Commission on Human Rights (IACHR) alleging violation of rights to nationality and education of girls of Haitian descent born in the Dominican Republic. The right to nationality is considered a way to have civil and political rights acknowledged. Therefore, petitioners claimed that the Dominican Republic should respect its obligation to the right to non-discrimination in granting the girls the nationality. Precautionary measures were requested to prevent deportation and to guarantee the Right to Education of a girl in school age. The petitioners claimed that, since their nationality was not acknowledged, the girls were exposed to the imminent threat of being expelled from the country and, lacking an identity document, could not attend school. The IACHR adopted precautionary measures to prevent the girls' deportation and to guarantee that Bosico could continue going to school and referred the case to the Inter-American Court of Human Rights. Finally, the Court requested the State to guarantee access to free elementary education for all children regardless of their background or origin. The Court considered this obligation was a consequence of the special protection children are entitled to.

The relevance of this Court decision is that the Court confirmed the right to free, compulsory and quality primary education, to be implemented without discriminatory access barriers. Furthermore, that the State has a legal obligation to guarantee all children access to free elementary education regardless of their nationality, background, or origin.

45. *Campaign for Fiscal Equity et al. v. State of New York et al. 719 N.Y.S.2d 475*, is a ruling by the Supreme Court of New York on January 9, 2001. This case concerns the challenge of state school funding system on the basis of the Education Article of the New York Constitution (Article XI § 1). The case addressed a range of issues including, the constitutional right to a sound basic education, adequacy of school funding, budgetary allocations, and the nature of remedies. In 1993, the Campaign for Fiscal Equity, as well as several students and their parents, filed a complaint asserting that New York State's educational financing scheme [violates their rights](#). According to the complaint the educational financing scheme fails to provide public school students in New York City, an opportunity to obtain a sound basic education. This constitutes a violation of the state Constitution. In later proceedings the Court of Appeals clarified that basic education should also cover the skills needed to sustain competitive employment and to acquire higher education. The Court noted that accomplishing this, requires minimally adequate physical facilities, and basic learning resources, as well as being taught up-to-date curricula by adequately trained teachers. The decision of the State Supreme Court in relation to the Education Article was subsequently upheld in 2003 by the Court of Appeals which issued a tri-partite remedial order that required the State to determine the cost of providing a sound basic education in New York City, reform the current system to ensure adequacy of funding for all schools and establish a system of accountability to measure whether the reforms actually provide the opportunity for a sound basic education.

The relevance of this Court decision is that the Court confirmed the right to free, compulsory and quality primary education. Furthermore, that the State has a legal obligation to guarantee full and non-discriminatory access to quality education, which requires the allocation of sufficient resources to minimally ensure the availability of adequate physical facilities, basic learning resources and adequately trained teachers who can provide teaching based on up-to-date curricula.

II.B.6 Relevance of presented landmark Case Law

46. The above presented case law concerns landmark rulings on the agreed objectives of the Right to Compulsory Primary Education and on the elements of compulsory, primary, availability, access, free for all and immediate obligation of the Right to Compulsory Primary Education.

47. The referred case law contests the quite often classification of the Right to Education as a non-justiciable economic, social and cultural right. As shown, the national and regional courts have quite explicitly examined and discussed the scope of the Right to Education and formed a specific framework to formulate obligations with respect to the realization of this right. These obligations have often been judicially contested (argued over) in many domestic and international cases.¹⁶⁶

II.B.7 The Right to Compulsory Primary Education during COVID-19 pandemic

48. The various restrictions of human rights and freedoms due to the COVID-19 pandemic are well-documented. This status quo makes in-depth elaborations on the impact of COVID-19 on human rights almost redundant. In this subsection special attention is given to the impact of COVID-19 on the enjoyment of educational rights recognized and granted by provisions of applicable regional legal instruments.

49. In this context special attention should be given to the Inter-American Convention on Human Rights, chapter IV on Suspension of Guarantees, Interpretation, and Application. Article 27 on the suspension of guarantees provides in paragraph 1 that in time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin. Paragraph 3 obliges any State Party availing itself of the right of suspension, to immediately inform the other State Parties, through the Secretary General of the Organization of American States, of the provisions the application of which it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension.

50. Read in conjunction with Article 27 paragraph 1, Article 29 on restrictions regarding interpretation explicitly stipulates that no provision of this Convention shall be interpreted as permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein. Nor shall it be interpreted as permission to restrict the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said States is a party. Nor to preclude other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government or to exclude or limit the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.

51. The reading of Article 27 in conjunction with Article 29 of the American Convention is in line with paragraph 42 of General Comment No. 13 of the Committee on Economic, Social and Cultural Rights. Referring to Article 4 in conjunction with Article 13 of the ICESCR, emphasizes that the Covenant's limitations clause, article 4, **is primarily intended to be protective of the rights of individuals rather than permissive of the imposition of limitations by the State.** Consequently, a State Party which closes a university or other educational institution on grounds such as national security or the preservation of public order has the burden of justifying such a serious measure in relation to each of the elements identified in article 4.

52. The limitation clause thus has a protective aim of the Right to Compulsory Primary Education. It is not intended to give a State Party permission to impose limitations on the Right to Compulsory

¹⁶⁶ B. Pranevičienė and A. Pūraitė, *Right to Education in International Legal Documents*, mruni.eu, 2010, p. 139.

Primary Education. Further, in the instance where an OAS Member State imposes limitations on the Right to Compulsory Primary Education, on the grounds of COVID-19, the State Party has the burden of justifying that the limitations are determined by law, compatible with the nature of the impacted rights and solely serve the purpose of promoting the general welfare in a democratic society. This burden derives from paragraph 3 of Article 27 of the American Convention.

53. Taking into consideration that COVID-19 is still a new challenge to the Right to Compulsory Primary Education, the Inter-American Commission on Human rights issued the RIRCU practical guides to COVID-19 nr. 2 on how to ensure access to the right to education for children and adolescents during the COVID-19 pandemic.¹⁶⁷ The guide, which should be considered a soft law international legal instrument, contains 27 recommendations to the OAS Member States. The recommendations are categorized as general, internet and digital divide, support from families and caregivers in children education, and the safe reopening of schools.

54. The 27 recommendations are all cognizant of the principle of non-discrimination and the best interests of children and adolescents. This principle is at the core of the recommendations and must therefore also be at the center of the consideration and the focus of the public administration and its institutions during the pandemic. The Commission emphasizes that the COVID-19 pandemic is a health crisis with effects that reach into education in as much as school closings further exacerbate inequalities in education and disproportionately impact children and adolescents living in vulnerable situations. This is particularly important in light of high rates of illiteracy in the region. The current challenge is for countries to strike a balance between ensuring public health and the right to education.¹⁶⁸

55. Against the above illustrated background, it is key for States to focus on structurally transforming education systems into inclusive and resilient systems. In this context, school re-opening is a paramount objective that must be considered in the context of conditions of the overall health of the region and the best interests of children and adolescents. Therefore, to the extent possible, each State should take appropriate measures to ensure access to the right to education from a holistic point of view. On this score, in terms of implementation of school closures during the pandemic, this measure should not further exacerbate education inequality for reasons of gender, poverty, disability, ethnic origin, religion, geographic location, among others. For its part, the decision to reopen schools should ensure that potential health risks are averted for the people in those settings, providing for safe education opportunities for children and adolescents, as well as their families.¹⁶⁹

56. Also, the Office of the High Commissioner for Human Rights (OHCHR) issued the Covid-19 Guidance of 13 May 2020, which recognizes that Covid-19 is a severe test for societies, governments, and individuals. According to the Council, efforts should be made to mitigate the effects of the measures against the spread of COVID-19. Respect for human rights across the spectrum, including economic, social, cultural, civil and political rights, is fundamental to the success of public health interventions and overcoming the pandemic.¹⁷⁰ The Guidance states that the Right to Education needs to be protected in the case of school closures.

57. Furthermore, the Human Rights Council recommended in its annual report of May 2021, several actions to be taken by Member States. In relation to the Right to Compulsory Primary Education, reference can be made to the recommendation that States should ensure that emergency measures that may result in restrictions on human rights are time-bound and meet the requirements of non-

¹⁶⁷ OAS IACHR RIRCU practical guides to COVID-19 nr. 2: How to ensure access to the right to education for children and adolescents during the COVID-19 pandemic?

https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/sacroi_covid19/guias.asp

¹⁶⁸ Ibid, p. 9.

¹⁶⁹ Supra, note 38, p. 10.

¹⁷⁰ United Nations Human Rights Office of the High Commissioner, *COVID-19 Guidance 13 May 2020*, p. 1. https://www.ohchr.org/Documents/Events/COVID-19_Guidance.pdf

discrimination, legality, necessity and proportionality. During states of emergency, derogations should be avoided when the same effect can be achieved by placing restrictions on rights in a manner permitted under international law. Also applicable is the recommended action that Member States should develop the capacity of rights holders to participate and to claim their rights, including through education, awareness-raising and the narrowing of digital divides, and establish transparent, gender-responsive and accessible mechanisms for enabling stakeholders' meaningful participation and facilitating regular communication between rights holders and duty bearers at the community, subnational and national levels, paying particular attention to those usually excluded and most at risk of being left behind.¹⁷¹

58. In March 2021 the UNESCO communicated that it was exactly a year ago that the COVID-19 pandemic brought learning to a screeching halt worldwide, creating the most severe global education disruption in history. Related to the Right to Compulsory Primary Education, the communication revealed that the pandemic has exposed and deepened pre-existing education inequalities that were never adequately addressed. The pandemic directly affected 63 million primary and secondary teachers. During school closures, they were required to conduct distance teaching with no time to prepare and often with limited guidance and resources. Teachers had to modify curricula and adapt lesson plans to carry on with instruction using high, low and no-tech solutions. They need continued training on remote teaching, available technologies and alternative flexible pedagogies for online, blended and offline learning during future school closures.

59. A July 2021 press-release from the United Nations Children's Fund (UNICEF)¹⁷² presented that around one in three countries where schools are or have been closed, are not yet implementing remedial programs addressing post-COVID-19 school closures. This data was collected based on an UNESCO, UNICEF, World Bank and OECD global "Survey on National Education Responses to COVID-19 School Closures". The survey revealed that a variety of measures were implemented to mitigate potential learning losses from school closures. Furthermore, that revising access policies especially for girls was uncommon in low- and lower-middle-income countries. Finally, that Low-income countries are lagging in the implementation of even the most basic measures to ensure a return to school. The findings of the conducted survey reinforce the importance of reopening schools, remedial learning and more effective remote learning systems that can better withstand future crises and reach all students.

60. Subsequently in July 2021, UNICEF addressed the current COVID-19-induced education crisis in its Geneva Palais briefing.¹⁷³ In the briefing it is noted that more than 600 million children in countries are still affected by school closures. After some of the longest closures ever seen, and despite some returns, in Latin America and the Caribbean, there are 18 countries and territories where schools are either closed or partially closed. UNICEF reiterates that schools should be the last to close and the first to reopen. This is because there are clear evidence that primary and secondary schools are not among the main drivers of transmission. Also, because the losses that children and young people will incur from not being in school may never be recouped. This shock will have lasting negative impacts; therefore, it must be used as an opportunity to accelerate – to reimagine education.

61. UNICEF implores 5 actions of which emphasis is placed on the action to reopen schools as soon as possible as reopening cannot wait for all teachers and students to be vaccinated. Also emphasized is the call on governments and donors to protect the education budget. The third of the five actions highlighted is the call on governments to, in reopening schools, extend enrolment to all children. This includes those children who were already out of school pre-COVID-19, previously banned pregnant girls and young mothers, and new entrants regardless of age.

¹⁷¹ A/HRC/47/23, P. 6-7, Para. 17.

¹⁷² <https://www.unicef.org/press-releases/1-3-countries-are-not-taking-action-help-students-catch-their-learning-post-covid-19>

¹⁷³ <https://www.unicef.org/press-releases/geneva-palais-briefing-note-current-covid-19-induced-education-crisis>

62. There exists regional Case Law to support aspects of the three actions implored by UNICEF as described above in paragraph 61 to ensure the full enjoyment of the Right to Compulsory Primary Education during the COVID-19 pandemic. Randomly reference can be made to a sample of these Court decisions.

63. With respect to UNICEF's call that schools should be the last to close and the first to reopen, reference is made to the Argentine Supreme Court ruling of May 4, 2021. Amidst a surging second wave of COVID-19 cases and deaths, the federal government of Argentina attempted to stem the spread of the virus by reducing circulation. With this aim the federal government ordered schools in and around the capital to temporarily close. The government of the city of Buenos Aires argued that there was little evidence that in-person classes increased infection rates and kept elementary schools and kindergartens open while mandating hybrid in-person and virtual classes at the high-school level. Subsequently, it challenged the Presidential Decree to close schools in Buenos Aires before the Supreme Court of Argentina. The Supreme Court ruled by a majority vote of four against one, that the Presidential Decree constituted a violation of the legally enshrined autonomy of Buenos Aires. According to the Supreme Court, "*The City of Buenos Aires and its provinces can manage the opening of classes ... prioritizing the opening and resumption of in-person classes,*" therewith, underscoring that the city government was the authority in charge of deciding whether schools should close. The fifth judge abstained, saying the issue was beyond the court's jurisdiction.¹⁷⁴

64. Considering UNICEF's call to accelerate and reimagine education support it should be considered to facilitate private schools in addition to public schools. In this context reference is made to the ruling of the U.S. Court of Appeals in *Brach v. Newman* of July 23, 2021.¹⁷⁵ The case concerns the extended prohibition on in-person schooling during the Covid-19 ("Covid") pandemic for private and public education by the State of California. On the closures of private schools, the Court ruled that California's COVID-19 orders closing private schools infringed a fundamental federal constitutional right of parents to choose their children's schools. The state's orders last year barring in-person instruction at private schools were not narrowly tailored to advance a compelling state interest, the court said. The challenge to California's closures of public schools was rejected by a divided three-judge panel of the Court. The Court reasoned that because there is no fundamental federal right to a public education, the state's orders need only be rationally related to abating the pandemic.

65. Consultation of the website 'COVID-19 Civic Freedom Tracker: Keep Civic Space Healthy' of the International Center for Non-Profit Law (ICNL) provides an overview of governments emergency laws responses to the pandemic that affect civic freedoms and human rights.¹⁷⁶ Retrieved general information on August 25, 2021, shows that 109 countries have emergency declarations, 57 have measures that affect expression, 50 have measures that affect assembly and 60 have measures that affect privacy. It goes without saying that the COVID-19 related emergency declarations, and in particular the measures affecting assembly could impose direct or indirect limitations on the Right to Compulsory Education. To understand the concrete limitations at national level, the respective national instruments that lay at the basis of the declarations and measures can be retrieved from the ICNL website for review.

66. Also, in the context of SDG-4 the analysis of the implications of the COVID-19 pandemic on the Right to Education has led to the adoption of international law instruments. In this case reference is made to the Declaration of the SDG-E2030 Regional Steering Committee for Latin America and the

¹⁷⁴ CSJ 567/2021.ORIGINARIO, Gobierno de la Ciudad de Buenos Aires c/ Estado Nacional (Poder Ejecutivo Nacional) s/ acción declarativa de inconstitucionalidad.

¹⁷⁵ Case No. 20-56291. D.C. No.2:20-cv-06472-SVW-AFM. Central District of California, Los Angeles.

¹⁷⁶ <https://www.icnl.org/covid19tracker/?issue=5>

Caribbean: Prioritizing the right to education will save the present and future of Latin America and the Caribbean¹⁷⁷.

67. The aforementioned Declaration of the SDG-E2030 Regional Steering Committee for Latin America and the Caribbean of 2021, recognizes that the COVID-19 pandemic has caused the most serious disruption to education systems in history and threatens to cause a learning deficit that could affect more than one generation of students. Consequently, it calls for increased efforts to that end and proposes six strategies and corresponding actions. The six strategies are aimed at safeguarding education funding; reopening school safely and gradually; strengthening and valuing of teachers, administrators, and other education personnel; recovering lessons and decreasing gaps; reducing the digital divide and promoting connectivity as a right, and deepening the cooperation and solidarity among countries, partnership development and regional and inter-sectorial coordination.

II.B.8 Interim conclusions

68. It is safe to conclude that the Right to Compulsory Primary Education is well addressed by a variety of regional hard and soft law instruments. The right is in detailed defined and explained. Subsequent to the evolving objectives of the Right to Compulsory Primary Education, the interpretation of the right is also evolving to a contemporary interpretation. The Right to Compulsory Primary Education has evolved to international customary law and is therefore binding and justiciable. Contrary to the right to other forms and levels of education, where State Parties have the legal obligation to progressive realization, State Parties have the legal obligation to immediate realization of the Right to Compulsory Primary Education.

70. When zooming in on the obligation of immediate realization and the obligation to take measures to ensure the full enjoyment of the Right to Compulsory Primary Education, there seems to be a discrepancy between the comprehensive regional law legal landscape and practice. This could be the result of a lack of importance that OAS Member States give to Advisory Opinion OC-17/2002 of the Inter-American Court of Human Rights.

71. Advisory Opinion OC-17/2002 reaffirms that children are subjects entitled to rights, not only objects of protection. Furthermore, that children's development and full enjoyment of their rights must be considered the guiding principles to establish and apply provisions pertaining to all aspects of children's lives. Respect for life, regarding children, encompasses not only prohibitions, but also the obligation to adopt the measures required for children's existence to develop under decent conditions. And finally, that true and full protection of children entails their broad enjoyment of all their rights, including their economic, social, and cultural rights, embodied in various international instruments.

PART III: COMPULSORY PRIMARY EDUCATION IN O.A.S. MEMBER STATES

Based on the information submitted by the O.A.S. member States through the questionnaire, it was decided to start this section with a review of the Sustainable Development Goals (SDG's), to point out the importance and connectivity of these standards with the right to education, moreover compulsory primary education.

The SDG's

72. Compulsory primary education free of costs, including in O.A.S. member states, as a fundamental right and developmental issue is comprehensively encapsulated in the Sustainable Development Goal 4 (SDG 4), the education goal of the 2030 Agenda for Sustainable Development. SDG 4 addresses the interrelation between education and human development. Referencing the UN¹⁷⁸, the 2030 Agenda for Sustainable Development was adopted in September 2015¹⁷⁹. Subsequently the

¹⁷⁷ https://unesdoc.unesco.org/ark:/48223/pf0000375689_eng

¹⁷⁸ <https://www.un.org/sustainabledevelopment/development-agenda-retired/>

¹⁷⁹ Resolution adopted by the General Assembly on 25 September 2015. Transforming our world: the 2030 Agenda for Sustainable Development. A/RES/70/1

17 Sustainable Development Goals (SDGs) of the 2030 Agenda for Sustainable Development came into force on 1 January 2016. The central transformative principle of the 2030 Agenda is *Leave No One Behind*¹⁸⁰ that aims at ensuring that all human beings can fulfil their potential in dignity and equality and in a healthy environment¹⁸¹.

73. For an overview of SDG 4, reference is made to the website of the Global Education Cooperation Mechanism (GCM) of the UNESCO.¹⁸² The 2030 Agenda for Sustainable Development is “a plan of action for people, planet and prosperity”. It comprises of 17 Sustainable Development Goals (SDGs). These goals are indivisible and encompass economic, social and environmental dimensions.

74. SDG 4 is the educational goal that aims to “ensure inclusive and equitable quality education and promote lifelong learning opportunities for all” and is made up of ten targets and forty-four indicators.¹⁸³ Referencing the GCM-website on the ten targets of SDG 4 as well as five other SDGs with direct references to education reveals the following information.

75. The first target of SDG 4 is, target 4.1, free primary and secondary education. It reads: ***By 2030, ensure that all girls and boys complete free, equitable and quality primary and secondary education leading to relevant and effective learning outcomes.*** This entails the provision of 12 years of free, publicly funded, inclusive, equitable, quality primary and secondary education ensured for all, without discrimination. Of these 12 years at least nine years are compulsory, leading to relevant learning outcomes.

76. The second target (4.2) is, equal access to quality pre-primary education. It reads: ***By 2030, 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.*** The provision of at least one year of free and compulsory quality pre-primary education is encouraged, to be delivered by well-trained educators, as well as that of early childhood development and care.

77. The third target (4.3) is, equal access to affordable technical, vocational and higher education. It reads: ***By 2030, ensure equal access for all women and men to affordable and quality technical, vocational and tertiary education, including university.*** It is imperative to reduce barriers to skills development and technical and vocational education and training (TVET), starting from the secondary level, as well as to tertiary education, including university, and to provide lifelong learning opportunities for youth and adults. The provision of tertiary education should be made progressively free, in line with existing international agreements.

78. The fourth target (4.4) is, increase the number of people with relevant skills for financial success, and reads: ***By 2030, substantially increase the number of youth and adults who have relevant skills, including technical and vocational skills, for employment, decent jobs and entrepreneurship.*** Access: Equitable access to TVET needs to be expanded while quality is ensured. Learning opportunities should be increased and diversified, using a wide range of education and training modalities, so that all youth and adults, especially girls and women, can acquire relevant knowledge, skills and competencies for decent work and life. (2) Skills acquisition: Beyond work-specific skills, emphasis must be placed on developing high-level cognitive and non-cognitive/transferable skills, such as problem solving, critical thinking, creativity, teamwork, communication skills and conflict resolution, which can be used across a range of occupational fields.

¹⁸⁰ Resolution adopted by the General Assembly on 25 September 2015. Transforming our world: the 2030 Agenda for Sustainable Development. A/RES/70/1, Preambular section paragraph 2; Declarative section paragraphs 4, 26, 48, 72, and 74 sub (e)

¹⁸¹ Resolution adopted by the General Assembly on 25 September 2015. Transforming our world: the 2030 Agenda for Sustainable Development. A/RES/70/1, Preambular section paragraph 5

¹⁸² Inter-Agency Secretariat UNESCO Headquarters, <https://www.sdg4education2030.org/the-goal>

¹⁸³ UNESCO Institute for Statistics, ‘Official list of SDG Indicators, March 2022’, https://tcg.uis.unesco.org/wp-content/uploads/sites/4/2020/09/SDG4_indicator_list.pdf

79. The fifth target (4.5) is, eliminate all discrimination in education, and reads: ***By 2030, eliminate gender disparities in education and ensure equal access to all levels of education and vocational training for the vulnerable, including persons with disabilities, indigenous peoples and children in vulnerable situations.*** Inclusion and equity: All people, irrespective of sex, age, race, colour, ethnicity, language, religion, political or other opinion, national or social origin, property or birth, as well as persons with disabilities, migrants, indigenous peoples, and children and youth, especially those in vulnerable situations or other status, should have access to inclusive, equitable quality education and lifelong learning opportunities. Vulnerable groups that require particular attention and targeted strategies include persons with disabilities, indigenous peoples, ethnic minorities and the poor. (2) Gender equality: All girls and boys, women and men, should have equal opportunity to enjoy education of high quality, achieve at equal levels and enjoy equal benefits from education. Adolescent girls and young women, who may be subject to gender-based violence, child marriage, early pregnancy and a heavy load of household chores, as well as those living in poor and remote rural areas, require special attention. In contexts in which boys are disadvantaged, targeted action should be taken for them. Policies aimed at overcoming gender inequality are more effective when they are part of an overall package that also promotes health, justice, good governance and freedom from child labour.

80. The sixth target (4.6) is, universal literacy and numeracy, and reads: ***By 2030, ensure that all youth and a substantial proportion of adults, both men and women, achieve literacy and numeracy.*** The principles, strategies and actions for this target are underpinned by the contemporary understanding of literacy as a continuum of proficiency levels in a given context. It goes beyond the understanding of a simple dichotomy of ‘literate’ versus ‘illiterate’. Therefore, action for this target aims at ensuring that by 2030, all young people and adults across the world should have achieved relevant and recognized proficiency levels in functional literacy and numeracy skills that are equivalent to levels achieved at successful completion of basic education.

81. The seventh target (4.7) is, education for sustainable development and global citizenship, and reads: ***By 2030, 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 nonviolence, global citizenship and appreciation of cultural diversity and of culture’s contribution to sustainable development.*** It is vital to give a central place to strengthening education’s contribution to the fulfilment of human rights, peace and responsible citizenship from local to global levels, gender equality, sustainable development and health. The content of such education must be relevant, with a focus on both cognitive and non-cognitive aspects of learning. The knowledge, skills, values and attitudes required by citizens to lead productive lives, make informed decisions and assume active roles locally and globally in facing and resolving global challenges can be acquired through education for sustainable development (ESD) and global citizenship education (GCED), which includes peace and human rights education, as well as intercultural education and education for international understanding.

82. The eight target (4.A) is, build and upgrade inclusive and safe schools, and reads: ***Build and upgrade education facilities that are child, disability and gender sensitive and provide safe, non-violent, inclusive and effective learning environments for all.*** This target addresses the need for adequate physical infrastructure and safe, inclusive environments that nurture learning for all, regardless of background or disability status.

83. The ninth target (4.B) is, expand higher education scholarships for developing countries, and reads: ***By 2030, 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 programs, in developed countries and other developing countries.*** Scholarship programs can play a vital role in providing opportunities

for young people and adults who would otherwise not be able to afford to continue their education. Where developed countries offer scholarships to students from developing countries, these should be structured to build the capability of the developing country. While the importance of scholarships is recognized, donor countries are encouraged to increase other forms of support to education. In line with the SDG 4 - Education 2030 focus on equity, inclusion and quality, scholarships should be transparently targeted at young people from disadvantaged backgrounds.

84. The tenth target (4.C) is, increase the supply of qualified teachers in developing countries, and reads: ***By 2030, 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.*** Teachers are the key to achieving all of the SDG 4 targets. It requires urgent attention, with a more immediate deadline, because the equity gap in education is exacerbated by the shortage and uneven distribution of professionally trained teachers, especially in disadvantaged areas. As teachers are a fundamental condition for guaranteeing quality education, teachers and educators should be empowered, adequately recruited and remunerated, motivated, professionally qualified, and supported within well-resourced, efficient and effectively governed systems.

85. There are also five other SDGs with direct reference to education.

The first one is SDG 3 on health and well-being, specifically **target 3.7, that reads: *By 2030, ensure universal access to sexual and reproductive healthcare services, including for family planning, information and education, and the integration of reproductive health into national strategies and programs.***

The second one is SDG 5 on gender equality, specifically **target 5.6, that reads: *Number of countries with laws and regulations that guarantee women aged 15-49 years access to sexual and reproductive health care, information and education.***

The third is SDG 8 on decent work and sustainable growth, specifically **target 8.6, that reads: *By 2030 substantially reduce the proportion of youth not in employment, education or training.***

The fourth is SDG 12 on responsible consumption & production, specifically **target 12.8, that reads: *By 2030 ensure that people everywhere have the relevant information and awareness for sustainable development and lifestyles in harmony with nature.***

And the fifth is SDG 13 on climate change mitigation, specifically **target 13.3, that reads: *Improve education, awareness raising and human and institutional capacity on climate change mitigation, adaptation, impact reduction, and early warning.***

SDG Linkages with Applicable Treaty Law

86. The goals and their targets are linked to obligations under Treaty law of all respective OAS member states. Per member State an overview of the linkages between SDG 4 and treaty obligations can be retrieved from the Human Rights Guide to the Sustainable Development Goals Tool of the Danish Institute for Human Rights.¹⁸⁴

87. For example retrieved for Suriname on *target 4.5*¹⁸⁵ shows that relevant treaties with respect to indicator 4.5.1 of target 4.5 of SDG 4 on Quality Education are, Article 26.1 of the Universal Declaration of Human Rights (UDHR), Articles 2.2, 3 and 13.1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), Articles 2.1, 28.1.d and 28.1.e of the Convention on the Rights of the Child (CRC), Articles 10.c and 10.h of the Convention on the Elimination of All

¹⁸⁴ Danish Institute for Human Rights, [https://sdg.humanrights.dk/en/targets2?goal\[\]=73](https://sdg.humanrights.dk/en/targets2?goal[]=73)

¹⁸⁵ Danish Institute for Human Rights, *Human Rights Guide to SDG 4 – Target 4.5* https://sdg.humanrights.dk/en/targets2?combine_1=xxx&goal=73&target=4.5&instrument=All&title_1=&field_country_tid=216&field_instrument_group_tid=All&combine=

Forms of Discrimination Against Women (CEDAW), Articles 24.1, 24.1.a, 24.2 and 24.2.b of the Convention on the Rights of Persons with Disabilities (CRDP), Articles 14.1 and 14.2 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), Articles II and XII of the American Declaration on the Rights and Duties of Man (ADRDM), Articles 1.1 and 26 of the American Convention on Human Rights (ACHR), and Articles 3, 13.1 and 18 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural rights (Protocol of San Salvador).

88. Relevant treaties with respect to indicator 4.a.1 of target 4.a of SDG 4 on Quality Education¹⁸⁶ are, Articles 13.2 and 13.2.e of the International Covenant on Economic, Social and Cultural Rights (ICESCR), Articles 9.1, 16.1, 16.2 and 16.3 of the Convention on the Rights of Persons with Disabilities (CRDP), Article XII of the American Declaration on the Rights and Duties of Man (ADRDM), Article 26 of the American Convention on Human Rights (ACHR), and Article 1 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural rights (Protocol of San Salvador).

The O.A.S. region and the 2030 Agenda for Sustainable Development

89. The O.A.S. region has various regional mechanisms dealing with fundamental rights and development. One such mechanism is the CEPAL/ECLAC.¹⁸⁷ Important to establish is that all O.A.S. member states are also CEPAL member states.¹⁸⁸ Due to this circumstance these CEPAL publications, are considered valid to be used to inform this study report. One such a publication is the fifth report on regional progress and challenges in relation to the 2030 Agenda for Sustainable Development in Latin America and the Caribbean, of the Forum of the Countries of Latin America and the Caribbean on Sustainable Development¹⁸⁹ reveals the following information.

90. Based on input from CEPAL member states, the Forum addressed education as a catalyst for achieving the Sustainable Development Goals in the context of trends in the sustainable Development Goals indicators.¹⁹⁰

It further identified the need to implement a new development model that can bring progress in building inclusive, sustainable and resilient societies as one of the main messages of the 2030 Agenda.¹⁹¹ Within this framework the Forum expressed that progress towards the education targets, is vital to promote social and labour market inclusion and to reconcile economic growth with equality and participation in society. But it found education also essential for the structural change required in

¹⁸⁶ Danish Institute for Human Rights, *Human Rights Guide to SDG 4 – Target 4.a* https://sdg.humanrights.dk/en/targets2?combine_1=xxx&goal=73&target=4.a&instrument=All&title_1=&field_country_tid=216&field_instrument_group_tid=All&combine=

¹⁸⁷ CEPAL, <https://www.cepal.org/en>

¹⁸⁸ Date of admission of member States (46) and associate members (13) of ECLAC, https://www.cepal.org/sites/default/files/static/files/fecha_de_incorporacion_de_los_estados_miembros_de_la_cepal_eng_0.pdf

¹⁸⁹ Forum of the Countries of Latin America and the Caribbean on Sustainable Development, “*A decade of action for change of era. Fifth report on regional progress and challenges in relation to the 2030 Agenda for Sustainable Development in Latin America and the Caribbean*”, United Nations, ECLAC, San Jose, March 2022. https://repositorio.cepal.org/bitstream/handle/11362/47746/4/S2100984_en.pdf

¹⁹⁰ Forum of the Countries of Latin America and the Caribbean on Sustainable Development, “*A decade of action for change of era. Fifth report on regional progress and challenges in relation to the 2030 Agenda for Sustainable Development in Latin America and the Caribbean*”, United Nations, ECLAC, San Jose, March 2022, p. 46-49

¹⁹¹ Forum of the Countries of Latin America and the Caribbean on Sustainable Development, “*A decade of action for change of era. Fifth report on regional progress and challenges in relation to the 2030 Agenda for Sustainable Development in Latin America and the Caribbean*”, United Nations, ECLAC, San Jose, March 2022, p. 62

Latin America and the Caribbean, which needs to be based on the development of capabilities.¹⁹² This role is considered important, as the Forum highlights that the Latin American and Caribbean region is one of the world's most unequal regions.¹⁹³ Therefore, it identified education among the most powerful instruments for linking economic growth with the reduction of inequality. Furthermore, that gaps in educational access and quality are barriers to the dissemination of skills, and that inadequate accumulation of skills among the active population is a major constraint that has consequences for productivity and social inclusion. In summary, it states that education is closely associated with opportunities to access better social, economic, working, and cultural conditions, insofar as progress in this area is associated with greater opportunities to obtain decent work with sufficient income to ensure an adequate level of consumption and well-being, better health indicators and upward social mobility, dynamics that contribute to the reduction of poverty and inequality and to the full exercise of citizenship.¹⁹⁴

91. The Forum of the Countries of Latin America and the Caribbean on Sustainable Development held its Fifth meeting on Sustainable Development in San Jose, Costa Rica, from March 7-9, 2022. The outcome document of the meeting is entitled '*Concerns conclusions and recommendations on Sustainable Development agreed at intergovernmental level at the Fifth Meeting*'.¹⁹⁵ In the outcome document, the ministers and high-level representatives reaffirmed in paragraph seven their commitment to ensure inclusive and equitable quality education and promote lifelong learning opportunities for all, adapt curricula to the demand from the production system for new skills and foster investments for educational provisions and access, bearing in mind the importance of guaranteeing a life free of poverty. In paragraph seventeen they expressed profound concern that the COVID-19 pandemic is causing a devastating impact on and posing a risk to slow down the progress made in achieving the Sustainable Development Goals and targets, including on equitable quality education made over the past decades.

And in paragraph twenty-two the ministers and high-level representatives urge Member States and other relevant stakeholders to accelerate the catalytic role that digital technologies, internet access, connectivity and digital inclusion play in reducing the impact of the COVID- 19 pandemic on life-long learning and quality education.

The implementation in O.A.S. Member States

92. In addition to the earlier referred to data sources, this study also used a questionnaire as data collection method to specifically approach the O.A.S. member states in an attempt to collect more detailed data on the recognition and implementation of the right to education in O.A. S. member states.

¹⁹² Forum of the Countries of Latin America and the Caribbean on Sustainable Development, "*A decade of action for change of era. Fifth report on regional progress and challenges in relation to the 2030 Agenda for Sustainable Development in Latin America and the Caribbean*", United Nations, ECLAC, San Jose, March 2022, p. 61

¹⁹³ Forum of the Countries of Latin America and the Caribbean on Sustainable Development, "*A decade of action for change of era. Fifth report on regional progress and challenges in relation to the 2030 Agenda for Sustainable Development in Latin America and the Caribbean*", United Nations, ECLAC, San Jose, March 2022, p. 62.

¹⁹⁴ Forum of the Countries of Latin America and the Caribbean on Sustainable Development, "*A decade of action for change of era. Fifth report on regional progress and challenges in relation to the 2030 Agenda for Sustainable Development in Latin America and the Caribbean*", United Nations, ECLAC, San Jose, March 2022, p. 62

¹⁹⁵ Forum of the Countries of Latin America and the Caribbean on Sustainable Development, San Jose, 7-9 March 2022, Intergovernmentally agreed conclusions and recommendations of the fifth meeting of the forum of the countries of Latin America and the Caribbean on sustainable development, Distr. General LC/FDS.5/4, 9 March 2022, https://foroalc2030.cepal.org/2022/sites/foro2022/files/22-00131_fds.5_intergovernmentally_agreed_conclusions_and_recommendations.pdf

Data collection via questionnaire

93. The questionnaire was developed by the research team led by dr. Eric Rudge, the Special Rapporteur of the Inter-American Juridical Committee (IAJC) on the right to (compulsory) primary education in member states of the OAS. A vital parts of the research teams were:

- mr. Milton A. Castelen LL.M. & LL.M. an experience scholar on Surinamese, Dutch EU and International Law¹⁹⁶ and
- mrs Kamenie Bhagoe LL.B. who will pursue her master degree at the Erasmus University in Rotterdam, The Netherlands.¹⁹⁷

The final draft questionnaire was adopted by the Inter-American Juridical Committee at the 99th Session of the Committee, which was held virtually due to the corona pandemic, from 02 August till 06 August 2021, and approved for circulation among member states by the IAJC-Secretariat.¹⁹⁸

94. In general, the questionnaire seeks to collect data on member States level. Sought information is whether member States are party to international and regional instruments safeguarding the right to education and if so to how many. Also sought is information on whether the right to education is guaranteed in the Constitution and to name specific laws regarding (compulsory) primary education in case they are adopted by a member State. Furthermore, the related ages to compulsory education per member State, the availability of special education or inclusive education for children, and whether primary education is equally provided throughout the State. Ultimately what the State's view is on the importance of compulsory primary education.

95. The questionnaire circulated among the Permanent Missions to the OAS with support letter OEA/2.2/174/21 dated August 20, 2021, by the Department of International Law of the Secretariat for Legal Affairs of the General Secretariat of the Organization of American States (OAS), acting as Technical Secretariat of the Inter-American Juridical Committee (IAJC). Member States were requested to submit the duly filled questionnaire by E-mail to the Technical Secretariat of the IAJC before December 31, 2021. After two extensions of the deadline, completed questionnaires were submitted by twelve (12) States: Argentina, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Paraguay, Saint Lucia, and Trinidad and Tobago.

96. It is noteworthy that the respondent States have made tremendous efforts to provide the requested information. Some responses encompass even 10 to 12 pages. The IAJC applauds all member States that submitted the questionnaire and provided key information on this important right. The IAJC hereby is given the opportunity to have an oversight of the developments in this area: education, one that is not only extremely vital to the livelihood of a State, but one that has suffered even more due to the corona pandemic.

General outcome of the questionnaires and comments of the 101st IAJC regular session

97. In response to the results of the questionnaires at the 101st regular session of the IAJC, it was noted that several OAS member states provide financial support to disadvantaged households to enable access to basic education for children belonging to those households. However, in order to realize the intended school attendance, enforcement mechanisms are needed in addition to financial support.

¹⁹⁶ Mr. Milton A. Castelen LL.M. & LL.M., Attorney at Law at the High Court of Justice in Suriname, Surinamese, EU and International Law; Mediator: Civil and Commercial Consultant: Health Law & Policy, Environmental Law & Policy; Human Rights, CELAC, Caricom and EU Cooperation, International Law and Policy. Mr. Castelen has submitted several cases to the recently established Constitutional Court of the Republic of Suriname.

¹⁹⁷ Ms. Kamenie Bhagoe is a young professional with a major in international law. She will pursue her master degree in (international) Commercial and Company law at the Erasmus University in Rotterdam, The Netherlands.

¹⁹⁸ The final text of the questionnaire was adopted on 06 August 2022.

Possible suggestions are among others special national education programs targeting disadvantaged communities. Methods to be used include radio and TV infomercials that inform parents about the need to send their children to school. Another possible aspect that should be emphasized is the comparison between the lack of educational opportunities that the parents had during their childhood and the available educational opportunities that their children currently have. Followed by the advice to seize these available opportunities.

98. The IAJC's 101st Regular Session also noted that teachers are responsible for youth education for a significant portion of the day. They therefore play a key role in shaping and reshaping our children into individuals who can fully participate in society. This education of the youth should also teach them to lead life with respect for, among other things, all life, nature, culture and human rights. For that reason, it is completely understandable that States have expressed the need for appropriate training for teachers. This mainly concerns training in educational curricula development and in new technologies. These trainings should make it possible to achieve the educational goals set out for all children in primary education and beyond.

99. The 101st regular session of the IAJC emphasized that teacher education should be designed with a strong focus on the best interests of the child. Reference was also made to the importance of the position of teachers being at the base of children's primary education. It was therefore emphasized that education should be provided to all children under all circumstances and that no child should be left behind. Against this background, it is necessary that teachers be awarded a respectable remuneration. This also expresses recognition for their contribution to the educational pyramid, with the cognitive and socially formed young person at the top.

100. The IAJC's 101st regular session also expressed the need to ensure that children's native language is encapsulated in education. Because respect for the native languages must be maintained and it must be ensured that these languages do not become extinct.

101. All questionnaire respondents stated that they are party to international and regional instruments safeguarding the right to education. The numbers of legal instruments applicable to the States varies depending from 2 to 12. Five States mentioned 5 instruments; Three States mentioned 9 instruments; and the four mentioned 2,7,8 and 12 instruments. Common denominators are: The International Covenant on Economic, Social and Cultural Rights (ICESCR)¹⁹⁹, the Convention on the Rights of the Child²⁰⁰, the American Convention on Human Rights²⁰¹ and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights of 1988.²⁰²

102. All thirteen questionnaire respondents indicated that their Constitution guarantees the right to education. Furthermore, they all stated that specific laws regarding (compulsory) primary education, have been adopted and that special education or inclusive education is provided for children. Against that backdrop, respondent States listed several laws guaranteeing primary education ranging from kindergarten to high school education.

103. An important fact is that all thirteen questionnaire States answered **yes** to the question: ***Is primary education compulsory in the State?*** This certifies that these members States acknowledge the importance of education to children in the prime stage of their life, hereby acknowledging and accepting the importance of primary education for the State itself.

104. On the matter of primary education compulsory ages, the responses to the questionnaire vary depending on each member State, from the upper age limits of 11, 12, 15, 16, 17, and 18 years. But

¹⁹⁹ See section II.A.2 of this report.

²⁰⁰ See section II.A.3 of this report.

²⁰¹ See section II.B.1.1. Hard law instruments, paragraph 9 – 11.

²⁰² See section II.B. 1.1. Hard law instruments, paragraph 12 – 15.

also, the ranges of lower and upper age limits of 5 to 15 years, 3 to 18 years, 6 to 12 years, and 5 to 16 years. As lower age limit, the ages of 3, 4 and 5 are also reported.

It is worth mentioning that these lower age limits connect seamlessly with Early Childhood Development Programs (ECD P).²⁰³

105. All thirteen questionnaire States stated that the right is implemented by a governmental body. Of those, ten respondents require mandatory school attendance, and 9 respondent States threatens with sanctions in case of non-compliance.

106. A total of eight questionnaire respondents indicated that they offer compulsory primary education completely free of charge. But all thirteen respondent States expressed that primary education is compulsory and equally provided throughout their jurisdictions. This is the result of the view held by all twelve respondent states that compulsory primary education is of great importance. States expressed importance in relation to human development, advancement of all other human rights and the close connectivity with human development and prosperity.

107. All questionnaire respondent States voiced a strong need for assistance from inter-governmental organizations. Respondents alluded to training of teachers; material and financial resources; information and experiences sharing on good teaching practices by OAS member States and to strengthen public policy capacities. But also, seminars on educational research and advise to implement enhancement programs. Other forms of assistance relate to on site mentoring and teacher training specifically to strengthen pedagogical practice in rural areas, technical assistance, exchange of experts, early childhood reading and writing, advice on curricula for primary education, financial collaboration to increase technical assistance and assistance aimed at teachers to develop methodologies for educational services. These responses regarding assistance to improve the quality of the education in member States coincide perfectly with the analysis of the SDG's above, as stated in paragraph 13 and paragraph 14.

108. Furthermore, in response to the questionnaire assistance was considered necessary for education promotion via the implementation of strategies serving children in rural areas and those with limited access to education. Also, assistance in the area of low-income environments with minimal technologies, strengthening of the quality of education and to remove inequalities between boys and girls, and in addressing risk groups in certain sectors, specific initiatives regarding children with multiple forms of vulnerability e.g. dropouts, health issues, parents incarcerated, street children and strategies towards children in rural areas where access to education is limited. This is echoed by among others the first target (see paragraph 4) and the fifth target (see paragraph 8).

109. Finally, questionnaire respondents indicated a need for assistance with regard to access to connectivity and learning devices for all children, monitoring and evaluating the impact of the devices on student performance and achievements, data governance and management, the use of technologies to effectively exchange knowledge, training of technical officers, and assistance in how to compensate for losses due to COVID-19. This is echoed by among others the third target (see paragraph 6) and the fourth target (see paragraph 7).

Right to education and COVID-19 pandemic

110. All thirteen questionnaire respondent States have implemented programs to continue education during the COVID-19-pandemic. In all States schools were closed in the early stages of the pandemic. The programs were in general focused on distance learning models with assistance of family members.

²⁰³ ECD: Healthy development in the early years (particularly birth to three), provides the building foundations for educational achievements, economic productivity, responsible citizenship, lifelong health, strong communities and successful parenting of the next generation. <https://developingchild.harvard.edu/guide/What-is-early-childhood-development-a-guide-to-the-science/> <https://developingchild.harvard.edu/guide/what-is-early-childhood-development-a-guide-to-the-science/>

These models certainly had challenges towards vulnerable groups in States. But all States actively confronted these challenges in respect of the peculiar circumstances of the pandemic and the limitations of each State. States expressed the need for assistance in addressing how to compensate for losses due to the COVID-19-pandemic, to develop learning devices for all children, also in the rural areas, children with special needs and children from targeted groups.

111. All respondent States acknowledged that the COVID-19-pandemic has made a huge impact on the education system in their State and they realize that they need to reform and/or transform and/or adapt their education system to avoid leaving children behind in order to minimize the effects of the pandemic on the State as a whole.

Connectivity

112. On the matter of connectivity between the level of implementation of the right to compulsory primary education and socio-economic developments such as street children, crime rates, illiteracy and poverty, the questionnaire respondent states indicated that they do not have the sought data readily available. One or two states indicated that they are not unaware of a possible connectivity.

Education a fundamental right

113. The IAJC's 101st regular session noted that all OAS member States adhere to various international and regional instruments that recognize the right to education as essential. In addition, Member States have codified this right in their constitutions. With these legislative actions, OAS member states have recognized the right to education as an essential right that belongs to all their citizens, despite it being an economic, social and cultural right.

114. It is important to note that, consistent with the elaborated international, regional and national legal instruments, explanatory instruments and case law, the obligations deriving from right to education should be divided in two clusters. One cluster contains the obligations that require progressive realization. The other cluster consists of obligations that require immediate realization. For this reason, the right to education must be considered a partially fundamental right and partially an economic, social and cultural right.

115. As set out with this study, compulsory primary education, falls in the cluster of immediate realization obligations, due to which this section of the right to education must be recognized as a fundamental right. As seen in various court decisions in the previous chapters, when dealing with the immediate realization obligations, claims of financial constraints are subject to strict scrutiny. Secondary and tertiary education, on the other hand, belong to the cluster of progressive realization obligations, reason why that section of the right to education can be considered an economic, social and cultural right.

Interim conclusions

116. While the SDGs acknowledge a strong connectivity between education and socio-economic developments, and CEPAL data claims this connectivity for the Latin American and Caribbean region, the questionnaire respondent member States had no data readily available on this issue of connectivity.

117. All questionnaire respondent states have compulsory primary education within their jurisdictions, but not all have mandatory attendance and or sanctions for non-compliance. This can be perceived as an inconsistency of the system. Also, not all twelve respondents provide primary education free of costs, while all twelve respondent member States indicated that they provide primary education equally throughout the State. Those are also two colliding facts.

118. Finally, all questionnaire respondent states made strong statements for technical assistance for teachers to use new technologies, to establish curricula, and to improve the overall quality of education particularly in rural areas. Further, for cooperation between member states, the exchange of good practices among member States, the most vulnerable groups or categories of children in each state and for support [e.g. financial] to address the losses due to the COVID-19 pandemic.

PART IV CONCLUSIONS & RECOMMENDATIONS

Conclusions

119. The Right to Compulsory Primary Education is well addressed by a variety of international hard - and soft law instruments. The right is in detailed defined and explained.

120. The right to compulsory primary education is enshrined in various hard law instruments at the international and regional level; it has been codified and accepted in several universal standards and recognized in almost all constitutions of OAS member states.

All legitimate grounds on which the right to compulsory education should be regarded as binding and legally enforceable.

121. States Parties have the legal obligation to immediate realization of the Right to Compulsory Primary Education.

122. States Parties have the legal obligation to progressive realization of the right to other forms and levels of education.

123 States Parties to the Convention on the Rights of the Child not only recognized the Right to Compulsory Primary Education for every child but also accepted that it must be available and free to all.

124. There seems to be a discrepancy between the comprehensive international legal landscape on the fundamental right to compulsory primary education to which the OAS member states have committed themselves and the implementation of that right by the states. Ensuring the full enjoyment of this fundamental right is therefore a crucial issue that needs to be addressed. This issue is closely related to the awareness and acceptance of the importance of the right to compulsory primary education among policy makers of the OAS member states. In this regard, the Advisory Opinion of the Inter-American Court of Human Rights OC-17/2002 should be considered.

125. Compulsory Primary Education must be recognized as a fundamental human right that belongs to all children, and in the O.A.S. region this mean to every child starting at the age of 3 years, irrespective of which part they live in the jurisdiction of each respective State.

126. Within the O.A.S. region States should no longer treat the right to compulsory primary education as an economic, social and cultural right.

127. O.A.S. Member states are in need of assistance from inter-governmental organization to guarantee the provision of quality primary compulsory education free of costs.

Recommendations

128. IAJC should recommend the G.A. to seek modes in which it can provide the sought technical and financial assistance by its member States, to address the issues they are facing in affording this right to Compulsory Primary Education free of costs, to the children.

129. IAJC should recommend the G.A. to establishment of a special fund to assist member states specifically on this issue. In first instance, to the twelve States that submitted their information on this topic. Donors can be requested to submit financial means in this fund.

130. The IAJC should adopt a resolution acknowledging that the right to Compulsory Primary Education is a fundamental human right.

131. The IAJC should recommend the G.A. to adopt a resolution instructing member States to address the issue of Compulsory Primary Education and make sure that this right is afforded to all children throughout the jurisdiction of the member State.

132. The IAJC should recommend the G.A. to adopt a resolution mandating the O.A.S. to facilitate member States with the implementation of compulsory primary education and guaranteeing that this right is afforded to children.

* * *