

## Enhancing Enforcement of Economic, Social and Cultural Rights Using Indicators: A Focus on the Right to Education in the ICESCR

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### ABSTRACT

Nearly fifteen years ago, Audrey Chapman emphasized the importance of ascertaining violations of the International Covenant on Economic, Social and Cultural Rights (ICESCR) as a means to enhance its enforcement. Today, this violations approach is even more salient given the recent adoption of the Optional Protocol to the ICESCR. Indicators are important to enforcing economic, social, and cultural rights because they assist in measuring progressive realization. This article focuses on the right to education in the ICESCR to illustrate how indicators can be employed to ascertain treaty compliance and violations. The methodology that we propose calls for: 1) analyzing the specific language of the treaty that pertains to the right in question; 2) defining the concept and scope of the right; 3) identifying appropriate indicators that correlate with state obligations; 4) setting benchmarks to measure progressive realization; and 5) clearly identifying violations of the right in question.

### I. INTRODUCTION

On 10 December 2008, the world celebrated the 60th anniversary of the Universal Declaration of Human Rights (UDHR).<sup>1</sup> This historic milestone also marked another achievement of the universal human rights system:<sup>2</sup> the UN General Assembly's adoption of an Optional Protocol<sup>3</sup> to the International

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1. U.N., Message of the Secretary-General on Human Rights Day, *available at* <http://www.un.org/events/humanrights/2008/statementssg.shtml>.
  2. Claire Mahon, *Progress at the Front: The Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, 8 HUMAN RIGHTS L. REV. 617, 618 (2008).
  3. Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, *adopted* 10 Dec. 2008, G.A. Res. 63/117, U.N. GAOR, 63d Sess., U.N. Doc. A/RES/63/117 (2009).

Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>4</sup> The Optional Protocol to the ICESCR institutes an individual complaint mechanism to address state violations of economic, social, and cultural rights (ESCRs).<sup>5</sup> This new mechanism for state accountability underscores the role of ESCRs as integral to a “trend towards a greater recognition of the indivisibility and interrelatedness of all human rights.”<sup>6</sup> Today, the challenge that human rights scholars, practitioners, and intergovernmental organizations face is how to fulfill the promises of the UDHR and the ICESCR.

In contrast to civil and political rights (CPRs)—which have been more actively recognized and accepted by the world’s nations—economic, social, and cultural rights have been neglected by certain countries who find them to be anathema to their conception of state obligations in society.<sup>7</sup> This practice of distinguishing between these “first” and “second generation” rights, however, is no longer widely accepted.<sup>8</sup> Indeed, the false distinction between ESCRs and CPRs is collapsing: both types of rights require positive and negative obligations from states responsible for upholding them.<sup>9</sup> For example, the civil and political right to be free from torture and other cruel, inhuman, and degrading treatment or punishment requires states to not only refrain from committing acts of torture against individuals (a negative obligation), but also to ensure effective government oversight by establishing, financing, and training an independent working judicial system (a positive obligation).<sup>10</sup> Similarly, the economic, social, and cultural right to health obligates states to refrain from promulgating discriminatory policies against individuals in the health care system (a negative obligation), while also requiring governments

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4. International Covenant on Economic, Social and Cultural Rights, *adopted* 16 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 (*entered into force* 3 Jan. 1976).
  5. *Id.*
  6. Mahon, *supra* note 2, at 618 (quoting the United Nations High Commissioner for Human Rights).
  7. See HENRY J. STEINER & PHILIP ALSTON, *HUMAN RIGHTS IN CONTEXT* 249 (2d ed. 2000) (noting certain governments’ challenges to economic and social rights, as well as some countries’ ambivalence towards them).
  8. See Tara J. Melish, *Rethinking the “Less as More” Thesis: Supranational Litigation of Economic, Social, and Cultural Rights in the Americas*, 39 N.Y.U. J. INT’L L. & POL. 171, 173 (2006) (“The judicial enforceability of economic, social, and cultural rights has received increasing attention worldwide over the last decade.”).
  9. See Nsongurua J. Udombana, *Social Rights Are Human Rights: Actualizing the Rights to Work and Social Security in Africa*, 39 CORNELL INT’L L.J. 181, 185–86 (2006).  
Civil and political rights have demonstrably been shown to demand positive state action and interference for their realization . . . . In practice, this positive obligation has primarily been limited to inhuman treatment and health conditions in prisons under articles 7 and 10 of the International Covenant on Civil and Political Rights (ICCPR). Among the positive obligations engendered by those two articles is the duty to train appropriate personnel: enforcement personnel, medical personnel, police officers, in short, any other persons involved in the custody or treatment of any individual subjected to any form of arrest, detention, or imprisonment.(Internal citations omitted.)
  10. *Id.* at 286.

to establish and fund effective public health systems (a positive obligation). In fact, ESCRs are now seen by the human rights community and by many states not as aspirational goals, but as essential rights necessary to realize other fundamental human rights and live with dignity.<sup>11</sup>

Despite an increased focus on ESCRs, major obstacles impede their legal application. Some scholars and practitioners have viewed these rights as nonjusticiable.<sup>12</sup> One of the main obstacles to justiciability of ESCRs under the ICESCR, for example, is the challenge involved in measuring and determining whether or not a state party has satisfied its obligations with respect to the rights enumerated in the treaty. The main reason for this measurement challenge is the concept of progressive realization embedded in the ICESCR.<sup>13</sup> States parties are not required to provide many of the obligations set forth in the ICESCR immediately upon ratification of the treaty.<sup>14</sup> Instead, the concept of progressive realization permits states parties to incrementally progress over time in realization of the right, although the Covenant specifies to time period in which the right must be realized.<sup>15</sup> In

11. For example, the right to food, an ESCR, is seen as so essential to the right to participate in a free society that it has even been suggested that it rises to the level of customary international law. See Smita Nrla, *The Right to Food: Holding Global Actors Accountable Under International Law*, 44 COLUM. J. TRANSNAT'L L. 691, 780–91 (2006).

12. See, e.g., Randall P. Peerenboom, *Human Rights and Rule of Law: What's the Relationship?*, 36 GEO. J. INT'L L. 809, 816 (2005) ("There is no accepted understanding of what a right is; whether collective or group rights and nonjusticiable social, economic and cultural rights are really rights; of how rights relate to duties; or whether a discourse of rights is complementary or antithetical to, or better or worse than, a discourse of needs or capabilities.") (internal citations omitted). For a discussion of the need to confront the practical difficulties presented by economic and social rights, see Michael J. Dennis & David P. Stewart, *Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?* 98 AM. J. INT'L L. 462, 464 (2004).

The issue that needs to be confronted, instead, is that these rights present genuinely different and, in many respects, far more difficult challenges than do civil and political rights. . . . [I]t is a much more complex undertaking to ascertain what constitutes an adequate standard of living, or whether a state fully respects and implements its population's right to education or right to work. Vexing questions of content, criteria, and measurement lie at the heart of the debate over "justiciability," yet are seldom raised or addressed with any degree of precision.

13. Article 2(1) declares:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

ICESCR, *supra* note 4 art. 2(1). Progressive realization is a recognition that while states are under an obligation to move as expeditiously as possible to realize economic, social, and cultural rights, the full realization of these rights will take time and resources. *The Nature of States Parties Obligations*, General Comment 3, adopted 13-14 Dec. 1990, U.N. ESCOR, Comm. on Econ., Soc. & Cult. Rts., 5th Sess., at 86, ¶ 9, U.N. Doc. E/1991/23, annex III (1990).

14. See discussion *infra* Part III.A.1. et seq.

15. *Id.*

other words, a state party could be in compliance with the ICESCR even if it did not guarantee 100 percent of the people within its jurisdiction the full enjoyment of treaty rights immediately upon ratification. However, states parties may not deliberately halt progress or regress.<sup>16</sup> Thus, it is important to know what percentage of the population enjoys the right in question and to what extent individuals enjoy that right at any given time.

Although many obligations under the ICESCR can be realized progressively, other obligations are not subject to the same gradual implementation standards. For example, to the extent that a state provides a right, it must do so without discrimination.<sup>17</sup> One way to enhance compliance with the ICESCR is to disaggregate the obligations into those that are progressively realized and those that are immediately realized. States parties cannot delay the implementation of immediately realized obligations.

Human rights indicators offer a promising solution with respect to rights that may be provided incrementally over time.<sup>18</sup> A human rights indicator is essentially a proxy for determining the level of fulfillment of human rights' obligations.<sup>19</sup> Indicators may be qualitative or quantitative. Quantitative indicators provide statistical information about the population of a country

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16. *The Nature of States Parties Obligations*, *supra* note 13, ¶ 9; *The Right to Education*, General Comment No. 13, U.N. ESCOR, Comm. on Econ., Soc. & Cult. Rts., 21st Sess., ¶ 45, U.N. Doc. E/C.12/1999/10 (1999) [hereinafter General Comment No. 13].
  17. See *The Nature of States Parties Obligations*, *supra* note 13, ¶ 1. For a complete look at states parties obligations under Article 2 of the ICESCR (including progressive realization obligations), see Philip Alston, *The International Covenant on Economic, Social and Cultural Rights*, in *MANUAL ON HUMAN RIGHTS REPORTING* 65 (1997).
  18. The UN High Commissioner for Human Rights (UNHCHR) has noted that indicators and benchmarks "have a significant role to play in bringing about positive change in the protection and promotion of economic, social and cultural rights," serving as tools for measuring state compliance with human rights norms. *Report of the United Nations High Commissioner for Human Rights*, U.N. ESCOR, 2006 Substantive Sess., Agenda Item 14(g), ¶ 2, U.N. Doc. E/2006/86 (2006).
  19. The United Nations defines it as "specific information on the state of an event, activity or an outcome that can be related to human rights norms and standards; that address and reflect the human rights concerns and principles; and that are used to assess and monitor promotion and protection of human rights." *Report on Indicators for Monitoring Compliance with International Human Rights Instruments*, ¶ 7, U.N. Doc. HRI/MC/2006/7 (2006) [hereinafter *2006 Report on Indicators*]. Others use different definitions of indicators. See also Maria Green, *What We Talk About When We Talk About Indicators: Current Approaches to Human Rights Measurement* 23 *HUM. RTS. Q.* 1062, 1065 (2001) ("[A] Human Rights Indicator is a piece of information used in measuring the extent to which a legal right is being fulfilled or enjoyed in a given situation"). Additionally, Gauthier de Beco defines human rights indicators as "indicators that are linked to human rights treaty standards, and that measure the extent to which duty-bearers are fulfilling their obligations and rights-holders enjoying their rights." Gauthier de Beco, *Human Rights Indicators for Assessing State Compliance with International Human Rights*, 77 *NORDIC J. INT'L L.* 23, 24 (2008). Rajeev Malhotra and Nicolas Fasel focus largely on a narrower concept of indicator: "the term 'quantitative indicator' is used to designate any kind of indicators that are or can be expressed in quantitative form, such as numbers, percentages or indices." Rajeev Malhotra & Nicolas Fasel, *Quantitative Human Rights Indicators—A Survey of Major Initiatives* 2 (3 Mar. 2005).

or specific state efforts made toward the satisfaction of rights. Examples of quantitative indicators that measure the realization of the right to education include: 1) the percentage of GDP a country spends on secondary education and 2) the ratio of the secondary school-aged children enrolled in secondary school as compared to the number of secondary school-aged children in the population.

While social scientists and development professionals have long used indicators in their work,<sup>20</sup> human rights scholars, advocates, and jurists over the last several decades have become increasingly interested in employing indicators to measure compliance with human rights obligations.<sup>21</sup> While development professionals typically employ indicators to compare the progress of one country's development to another, human rights advocates tend to use indicators to determine progress or assess compliance with human rights norms within a specific country.<sup>22</sup>

The human rights community initially began to monitor the status of international human rights through indicators in the 1970s. Freedom House began to publish a yearly accounting of human rights abuses, and the US Congress required the State Department to prepare a yearly report on the status of international human rights.<sup>23</sup> However, much of the early work on human rights indicators focused on measuring civil and political rights, such as the right to freedom of the press or the right to be free from torture.<sup>24</sup> As Shareen Hertel and Lanse Minkler point out, "economic rights remain less well articulated conceptually than civil and political rights, less accurately measured, and less consistently implemented in public policy."<sup>25</sup> Some scholars suggest that economic and social rights should not be monitored

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20. For example, see Maarseveen and Van der Tang who coded constitutions for 157 countries across a multitude of institutions and the rights for the period from 1788 to 1975. See generally HENC VAN MAARSEVEEN & GER VAN DER TANG, WRITTEN CONSTITUTIONS: A COMPUTERIZED COMPARATIVE STUDY (1978). This study compares the degree to which national constitutions contain those rights mentioned in the UDHR by examining the frequency and distributions across different history epochs before and after 1948. *Id.* Patrick Ball and Jana Asher studied patterns of killings and refugee migration of Albanians in Kosovo to determine if the violence and migration were due to activities of the Kosovo Liberation Army, NATO attacks, or systematic campaign by Yugoslav forces. Patrick Ball & Jana Asher, *Statistics and Slobodan*, 15 CHANCE 17 (2002).
  21. de Beco, *Human Rights Indicators for Assessing State Compliance with International Human Rights*, *supra* note 19, at 25; STEINER & ALSTON, *supra* note 7, at 316 ("Various commentators . . . have emphasized the importance of developing comprehensive statistical indicators as a means by which to monitor compliance with the ICESCR.").
  22. See de Beco, *Human Rights Indicators for Assessing State Compliance with International Human Rights*, *supra* note 19, at 25, 46.
  23. Andrew D. McNitt, *Some Thoughts on the Systematic Measurement of the Abuse of Human Rights*, in HUMAN RIGHTS: THEORY AND MEASUREMENT 89, 89 (David Louis Cingranelli ed., 1988).
  24. *Id.* at 93.
  25. Shareen Hertel & Lanse Minkler, *Economic Rights: The Terrain*, in ECONOMIC RIGHTS: CONCEPTUAL, MEASUREMENT, AND POLICY ISSUES 1,1 (Shareen Hertel & Lanse Minkler eds., 2007).

at all.<sup>26</sup> Recently, however, intergovernmental organizations such as the United Nations and the Organization of American States (OAS) have shown a heightened interest in enforcing ESCRs and have proposed guidelines for using indicators to measure compliance with ESCRs.<sup>27</sup>

Though essential in furthering the application of indicators in human rights advocacy, none of these proposals have explained how to ascertain violations of specific treaty obligations. Making determinations about violations of legal documents is typically the project of lawyers, while social scientists are more comfortable working with indicators. In the field of human rights, there is relatively little dialogue on this subject between academics and professionals. However, as Audrey R. Chapman points out in her important article that develops the “violations approach” to assess treaty compliance, “specific enumerated rights need to be adequately conceptualized and developed to measure implementation or to identify potential violations.”<sup>28</sup>

In light of the recent adoption of the Optional Protocol to the ICESCR, a framework for assessing violations is even more important. Although individuals and NGOs can soon bring complaints directly to the Committee on Economic, Social and Cultural Rights (CESCR or Committee), there is little guidance on how complainants determine whether a violation under the treaty has occurred. Indicators enhance the effectiveness of the violations approach, particularly in the context of ESCRs, because indicators assist in measuring progressive realization.<sup>29</sup>

We propose the following methodology for using indicators to measure compliance with ESCRs: 1) analyze the specific language of the treaty that pertains to the right in question; 2) define the concept and scope of the right; 3) identify appropriate indicators that correlate with the obligations; 4) set benchmarks to measure progressive realization; and 5) clearly identify what constitutes a violation of the right in question.

We illustrate how to apply this methodology by focusing on the right to education in the ICESCR. While much work has been done to define the

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26. See, e.g., McNitt, *supra* note 23, at 92.

27. INTER-AM. COMM’N ON HUMAN RIGHTS, GUIDELINES FOR PREPARATION OF PROGRESS INDICATORS IN THE AREA OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS, OEA/Ser.L/V/II.132 (Doc. 14) (2008) [hereinafter GUIDELINES FOR PREPARATION OF PROGRESS INDICATORS], available at <https://www.cidh.oas.org/pdf%20files/Guidelines%20final.pdf>; 2006 Report on Indicators, *supra* note 19; Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Paul Hunt, U.N. ESCOR, Comm’n on Hum. Rts., 62d Sess., U.N. Doc. E/CN.4/2006/48 (2006) [hereinafter 2006 Hunt Report]; Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Paul Hunt, U.N. GAOR, Hum. Rts. Council, 7th Sess., ¶ 48, U.N. Doc. A/HRC/7/11 (2008).

28. Audrey R. Chapman, A “Violations Approach” for Monitoring the International Covenant on Economic, Social and Cultural Rights, 18 HUM. RTS. Q. 23, 24 (1996).

29. See Gauthier de Beco, *Measuring Human Rights: Underlying Approach*, 2007 EUR. HUM. RTS. L. REV. 266, 272–73.

content and to set benchmarks for other ESCRs, such as the right to health,<sup>30</sup> comparatively little work has been done to monitor and enforce compliance with the right to education.<sup>31</sup> Additionally, although some treaties list specific indicators,<sup>32</sup> the ICESCR and other treaties protecting the right to education do not list any agreed-upon indicators to monitor fulfillment of the right.<sup>33</sup>

Despite these gaps, the right to education remains one of the most important, universally accepted, yet complex rights in international human rights law.<sup>34</sup> The right to education is a “multiplier”<sup>35</sup> or “empowerment” right<sup>36</sup> as well as an essential means to promote other rights,<sup>37</sup> the enjoyment of which enhances all rights and freedoms while its violation jeopardizes them all.<sup>38</sup> The denial of the right to education “leads to compounded denials of other human rights and perpetuation of poverty.”<sup>39</sup>

Even in the United States, where ESCRs are not universally accepted, many state constitutions guarantee the right to education,<sup>40</sup> recognizing that

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30. See DEP'T OF ETHICS, TRADE, HUMAN RIGHTS, & HEALTH LAW, WORLD HEALTH ORG., CONSULTATION ON INDICATORS FOR THE RIGHT TO HEALTH 8–10 (2004) [hereinafter WHO REPORT], available at <http://www.who.int/hhr/activities/en/indicator%20reportFINALnopart1st.pdf>.
31. For a few in-depth studies dealing with the right to education see KLAUS DIETER BEITER, *THE PROTECTION OF THE RIGHT TO EDUCATION BY INTERNATIONAL LAW* (2006); Julian Lonbay, *Implementing the Right to Education in England*, in *ECONOMIC, SOCIAL AND CULTURAL RIGHTS: PROGRESS AND ACHIEVEMENT* 163 (Ralph Beppard & Dilys M. Hill eds., 1992); Fons Coomans, *Clarifying the Core Elements of the Right to Education*, in *THE RIGHT TO COMPLAIN ABOUT ECONOMIC, SOCIAL AND CULTURAL RIGHTS* 11 (Fons Coomans & Fried van Hoof eds., 1995).
32. See, e.g., Convention on the Elimination of All Forms of Discrimination Against Women, adopted 18 Dec. 1979, G.A. Res. 34/180, U.N. GAOR, 34th Sess., art. 10, U.N. Doc. A/34/46 (1980), 1249 U.N.T.S. 13 (entered into force 3 Sept. 1981) [hereinafter CEDAW]. CEDAW has a provision for the reduction of the “female student drop out rate.” The ICESCR states in article 12(2)(a) that parties should take steps to reduce the still birth and infant mortality rates. ICESCR, *supra* note 4 art. 12(2)(a).
33. See Chapman, *A “Violations Approach,” supra* note 28, at 23–24. Additionally, even though many treaty monitoring bodies have highlighted the importance of indicators in their general comments as well as concluding observations, the use of indicators in the reporting and follow-up procedure of treaty bodies has been limited. See *2006 Report on Indicators, supra* note 19.
34. See Manfred Nowak, *The Right to Education*, in *ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK* 245 (Asbjørn Eide et al. eds., 2d rev. ed. 2001).
35. See KATARINA TOMAŠEVSKI, *HUMAN RIGHTS OBLIGATIONS IN EDUCATION: THE 4-A SCHEME* 7 (2006).
36. See Coomans, *supra* note 31, at 11; Jack Donnelly & Rhoda E. Howard, *Assessing National Human Rights Performance: A Theoretical Framework*, 10 *HUM. RTS. Q.* 214, 215 (1988).
37. General Comment No. 13, *supra* note 16, ¶¶ 1, 31.
38. See TOMAŠEVSKI, *HUMAN RIGHTS OBLIGATIONS IN EDUCATION, supra* note 35, at 47.
39. *The Right to Education: Report Submitted by the Special Rapporteur, Katarina Tomasevski*, U.N. ESCOR, Comm'n on Hum. Rts., 60th Sess., ¶11, U.N. Doc. E/CN.4/2004/45 (2004).
40. See, e.g., Roger Levesque, *The Right to Education in the United States: Beyond the Limits of the Lore and Lure of the Law*, 4 *ANN. SURV. INT'L & COMP. L.* 205, 217–18 (1997); Suzanne M. Steinke, *The Exception to the Rule: Wisconsin's Fundamental Right to Education and Public School Financing*, 1995 *WISC. L. REV.* 1387, 1388 (1995); Michael P. Mills & William Quinn II, *The Right to a “Minimally Adequate Education” as Guaranteed by the Mississippi Constitution*, 61 *ALB. L. REV.* 1521, 1527 (1998).

“it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.”<sup>41</sup> Moreover, according to the US Supreme Court, once a state assumes the duty to provide education, it “is a right which must be available to all on equal terms.”<sup>42</sup> The Court has found that the right to education “is not only a kind of idealistic goal . . . but a legally binding human right . . . with corresponding obligations of States under international law.”<sup>43</sup> Several key international instruments mention the right to education, including those relating to specific groups, such as children, racial minorities, and women,<sup>44</sup> but the ICESCR provides the most comprehensive protections of the right.<sup>45</sup> As such, we focus our study on the ICESCR.<sup>46</sup>

In Section II, we briefly discuss the historical and theoretical foundations for the right to education as it relates to the ICESCR. In Section III, we apply our proposed methodology to the right to education under the ICESCR. Section IV concludes by recommending the use of our methodology to ascertain violations of economic, social, and cultural rights.

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41. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 493 (1954).

42. *See id.*

43. Manfred Nowak, *The Right to Education—Its Meaning, Significance and Limitations*, 9 NETH. Q. HUM. RTS. 418, 425 (1991) [hereinafter Nowak 1991].

44. International Convention on the Elimination of All Forms of Racial Discrimination, *adopted* 21 Dec. 1965, G.A. Res. 2106 (XX), U.N. GAOR, 20th Sess., art. 5(e)(v), 660 U.N.T.S. 195 (*entered into force* 4 Jan. 1969) [hereinafter ICERD]; Convention on the Rights of the Child, *adopted* 20 Nov. 1989, G.A. Res. 44/25, U.N. GAOR, 44th Sess., art. 29(1)(c)-(d), U.N. Doc. A/44/49 (1989), 1577 U.N.T.S. 3 (*entered into force* 2 Sept. 1990) [hereinafter CRC]; CEDAW, *supra* note 32; American Declaration on the Rights and Duties of Man, *signed* 2 May 1948, O.A.S. Res. XXX, 9th Int. Conf., arts. 2, 9, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1, at 17 (1992); American Convention on Human Rights, *signed* 22 Nov. 1969, O.A.S.T.S. No. 36, art. 26, 1144 U.N.T.S. 123 (*entered into force* 18 July 1978); Additional Protocol to the American Convention in the Area of Economic, Social and Cultural Rights, *signed* 17 Nov. 1988, O.A.S.T.S. No. 69, arts. 3, 13, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1, at 67 (1992); Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, *signed* 9 June 1994, art. 6, 33 I.L.M. 1534; Draft Inter-American Convention Against Racism and All Forms of Discrimination and Intolerance, *signed* 18 Apr. 2006, art. 4, O.A.S. Doc. OEA/Ser. G, CP/CAJP-2357/06.

45. General Comment No. 13, *supra* note 16, ¶ 2; BEITER, *supra* note 31, at 86. (“Articles 13 and 14 [of the ICESCR] are comprehensive provisions. In fact, they feature among the most elaborate rights provisions of the ICESCR. Articles 13 and 14 may be viewed as constituting a codification of the right to education in international law.”) *See also* Section II *infra* for a discussion of other international instruments that uphold the right to education.

46. *See* ICESCR, *supra* note 4, arts. 13, 14. In addition to these main provisions, other articles refer to education. For instance, Article 6(2) obligates states parties to create and implement “technical and vocational guidance and training programs” to fully realize the right to work. *See id.* art. 6(2). Article 10(1) calls on states parties to protect and assist the family during the time it is responsible for the education of children. *See id.* art. 10(1).

## II. THE RIGHT TO EDUCATION IN THE ICESCR: A BRIEF HISTORY AND THEORY

Competing theoretical perspectives were at play in the development of the right to education provisions in international instruments, including Articles 13 and 14 of the ICESCR.<sup>47</sup> During the last few centuries, the responsibility to educate populations has generally shifted from that of the parents and the church to that of the state.<sup>48</sup> What had before been an upper-class privilege was repositioned as a “means of realising the egalitarian ideals upon which [the French and American Revolutions] were based.”<sup>49</sup> Such revolutions exemplified the “old axiom that ‘political and social upheaval is often accompanied by a revolution in education.’”<sup>50</sup>

Even though liberal concepts of education in the nineteenth century still reflected a fear of excessive state involvement in the educational system by giving parents the primary duty to provide an education to their children, states began regulating curricula and providing minimal educational standards.<sup>51</sup> Under socialist theory, the state was the primary means “to ensure the economic and social well-being of” communities.<sup>52</sup> By the dawn of the twentieth century, such ideals underscored the need to respond to the industrialization and urbanization of rapidly-developing countries such as the United States.<sup>53</sup>

The right to education provisions in the ICESCR derive from both the socialist and liberal theoretical traditions 1) as the primary responsibility of the state to provide educational services and 2) as the duty of the state to respect the rights of parents to establish and direct private schools and to ensure that their children receive an education that is in accordance with their own religious and moral beliefs.<sup>54</sup> Thus, the ICESCR enumerates a combination of both negative and positive obligations of states parties to provide education to their citizens. Even with these competing traditions shaping the right to education under the ICESCR, the aims and objectives of education have moved toward a growing consensus in international human rights law that education should enable the individual to freely develop her own personality and dignity, to participate in a free society, and to respect human rights.<sup>55</sup>

47. ICESCR, *supra* note 4, art. 13.

48. BEITER, *supra* note 31, at 21; DOUGLAS HODGSON, THE HUMAN RIGHT TO EDUCATION 8 (1998); Nowak, *The Right to Education*, *supra* note 34, at 247.

49. HODGSON, *supra* note 48, at 8.

50. JOHN L. RURY, EDUCATION AND SOCIAL CHANGE 48 (2002).

51. BEITER, *supra* note 31, at 22.

52. *Id.* at 23. Thus, socialism viewed education as a welfare entitlement of individuals which gave rise to claims of rights to educational services against the state. *Id.*

53. RURY, *supra* note 50, at 135–37.

54. See BEITER, *supra* note 31, at 24.

55. Nowak, *The Right to Education*, *supra* note 34, at 249; Universal Declaration of Human Rights, G.A. Res. 217A, art. 26, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (10 Dec. 1948) [hereinafter UDHR]; ICESCR, *supra* note 4 art. 13.

Despite its widespread acceptance and fundamental importance, the right to education was not directly nor specifically declared an international human right until the post-World War II era.<sup>56</sup> At that time, the international community contemplated the adoption of an International Bill of Human Rights,<sup>57</sup> including the 1948 Universal Declaration of Human Rights (UDHR), a document that has become the contemporary foundation of human rights codification and the primary source of internationally recognized human rights standards.<sup>58</sup> In 1946, the UN Educational, Scientific and Cultural Organization (UNESCO)<sup>59</sup> employed a committee of leading scholars to find common ground among the various cultural and philosophical foundations of all human rights, including the right to education.<sup>60</sup>

Then, the UN Human Rights Commission (HRC) prepared a first draft of the Declaration.<sup>61</sup> The draft circulated among all UN member states for comment and went to the HRC for debate.<sup>62</sup> After many revisions and lobbying efforts, the Economic and Social Commission (ECOSOC) approved the final draft of the UDHR and submitted it to the UN General Assembly in the fall of 1948.<sup>63</sup>

At the time of its passage, the most ground-breaking part of the UDHR was its fourth section—Articles 22 through 27—which protected ESCRs as fundamental rights.<sup>64</sup> The addition of ESCRs was not viewed as a concession to the Soviet Union's insistence on enumerating these rights; rather, it was seen as a deliberate inclusion of rights articulated in constitutions across the globe.<sup>65</sup> These guarantees received broad-based support; however, it

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56. HODGSON, *supra* note 48, at 7.

57. John P. Humphrey, *The International Bill of Rights: Scope and Implementation*, 17 WM. & MARY L. REV. 527, 527 (1976).

58. See Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287, 290 (1995/96).

59. UNESCO is a United Nations Specialized Agency whose mission is "to contribute to peace and security by promoting collaboration among the nations through education, science and culture in order to further universal respect for justice, for the rule of law and for the human rights and fundamental freedoms which are affirmed for the peoples of the world, without distinction of race, sex, language or religion, by the Charter of the United Nations." See UNESCO, *Constitution of the United Nations Educational, Scientific and Cultural Organization* (16 Nov. 1945), available at [http://portal.unesco.org/en/ev.php-URL\\_ID=15244&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=15244&URL_DO=DO_TOPIC&URL_SECTION=201.html).

60. Mary Ann Glendon, *Knowing the Universal Declaration of Human Rights*, 73 NOTRE DAME L. REV. 1153, 1156 (1998). The committee was called the Committee on the Theoretical Bases of Human Rights. *Id.*

61. *Id.* at 1157. The drafters borrowed freely from the draft of a transnational rights declaration then being deliberated in Latin America by the predecessor to the Organization of American States and a "Statement of Essential Human Rights" produced by the American Law Institute. See Mary Ann Glendon, *John P. Humphrey and the Drafting of the Universal Declaration of Human Rights*, 2 J. HIST. INT'L L. 250, 253 (2000).

62. Glendon, *Knowing the Universal Declaration of Human Rights*, *supra* note 60, at 1159.

63. *Id.* at 1160.

64. *Id.* at 1166.

65. *Id.*

was much more difficult to find agreement as to the relationship between these “new” economic and social rights and the “old” civil and political rights.<sup>66</sup>

After the adoption of the UDHR,<sup>67</sup> UN delegates began the task of codifying these rights to complete the International Bill of Human Rights in one document. Even though all member states agreed that CPRs and ESCRs were interconnected and interdependent, divergent political policy agendas of the Cold War era emerged, which led to the creation of two separate Covenants.<sup>68</sup> The assumptions that CPRs and ESCRs were different—that civil and political rights were immediate, absolute, justiciable, and required the abstention of state action while economic and social rights were programmatic, realized gradually, more political in nature, and required substantial resources—drove the debate as to whether there would be one or two separate treaties codifying the rights enumerated in the UDHR.<sup>69</sup> For example, English and other Western delegates saw economic and social rights as entirely different in their implementation procedure as civil and political rights. These delegates wanted to emphasize this distinction by creating two separate documents.<sup>70</sup> In contrast, the Soviet Union and other supporters of a single instrument contested any attempt to cast economic and social rights as inferior to civil and political rights.<sup>71</sup> Furthermore, Hansa Mehta, a delegate from India, argued that poorer nations could only hope to move progressively toward realizing these rights.<sup>72</sup> In the end, these diverging concepts of

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66. *Id.* at 1167.

67. See BEITER, *supra* note 31, at 90.

68. Kitty Arambulo, *Drafting an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: Can an Ideal Become Reality?*, 2 U.C. DAVIS J. INT'L L. & POL'Y 111, 114–15 (1996); *Preparation of Two Draft International Covenants on Human Rights*, adopted 5 Feb. 1952, G.A. Res. 543 (VI), U.N. GAOR, 6th Sess., at 36 (1952); Philip Alston, *Economic and Social Rights*, in HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY 137, 152 (Louis Henkin & John Lawrence Hargrove eds., 1994); see Asbjørn Eide, *Economic, Social and Cultural Rights as Human Rights*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS, *supra* note 34, at 9, 9–10 see also Nowak 1991, *supra* note 43, at 419 (“The main differences between the two Covenants are to be found in States’ obligations and in the measures of implementation, both on the domestic and international level.”).

69. Eide, *supra* note 68, at 10. These assumptions are not well-founded, overstated or mistaken. *Id.*

70. Hope Lewis, “New” Human Rights? U.S. Ambivalence Towards the International Economic and Social Rights Framework, in BRINGING HUMAN RIGHTS HOME: A HISTORY OF HUMAN RIGHTS IN THE UNITED STATES 100, 116 (Cynthia Soohoo, Catherine Albisa & Martha Davis eds., abr. ed. 2009).

71. *Id.* Supporters of one Covenant argued that there was no hierarchy of rights and that “[a]ll rights should be promoted and protected at the same time.” *Annotations on the Text of the Draft International Covenants on Human Rights*, U.N. GAOR, 10th Sess., at 7, ¶ 8 U.N. Doc. A/2929 (1955).

72. Glendon, *Knowing the Universal Declaration of Human Rights*, *supra* note 60, at 1167 (citing ELEANOR ROOSEVELT, THE AUTOBIOGRAPHY OF ELEANOR ROOSEVELT 318 (1961)).

human rights, and the arguments that centered on the obligations of states arising from these rights, led to the drafting of two separate instruments.<sup>73</sup> Those states that did not want to undertake ESCR obligations would ratify only the binding international human rights instrument protecting CPRs, while states that subscribed to the equality of all human rights would ratify two binding instruments protecting both CPRs and ESCRs.<sup>74</sup>

Consequently, the rights enumerated in the UDHR were codified in two separate, binding Covenants—the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR)—in 1954.<sup>75</sup> With respect to the right to education provisions of the ICESCR, UNESCO played an integral role in the drafting of Articles 13 and 14 and remains central in the monitoring and implementation of right-to-education guarantees under the Covenant.<sup>76</sup> Today, for instance, UNESCO receives copies of reports from states parties<sup>77</sup> to both the ICESCR and UNESCO as per Article 16(2)(b) of the ICESCR in order to provide technical assistance to states where appropriate.<sup>78</sup> Also, under Article 18 of the ICESCR, UNESCO reports on progress toward realizing Covenant rights, including the right to education.<sup>79</sup> Moreover, the Covenant permits UNESCO to cooperate with the CESCR in furtherance of ESCRs. In this regard, UNESCO sends representatives to Committee sessions, participates in making recommendations to states parties in the Committee's Concluding

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73. In 1951, the General Assembly decided that Covenants should be prepared for each category of rights. *Preparation of Two Draft International Covenants on Human Rights*, *supra* note 68. “[S]upporters of two separate instruments argued that” the implementation of civil and political rights would require an international quasi-judicial body, while the implementation of economic, social and cultural rights would be monitored “best by a system of periodic state” reporting. BEITER, *supra* note 31, at 52.
74. Eide, *supra* note 68, at 10-11.
75. UDHR, *supra* note 55; International Covenant on Civil and Political Rights, *adopted* 16 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (*entered into force* 23 Mar. 1976) [hereinafter ICCPR]; ICESCR, *supra* note 4.
76. See BEITER, *supra* note 31, at 229; Philip Alston, *The United Nations' Specialized Agencies and Implementation of the International Covenant on Economic, Social and Cultural Rights*, 18 COLUM. J. TRANSNAT'L L. 79 (1979/80).
77. State reporting serves as a review function of the CESCR to evaluate whether states parties are in compliance with their obligations under the ICESCR. See BEITER, *supra* note 31, at 350. The Committee has stated that: the reporting function ensures a comprehensive review of national legislation, policies and practices; regularly monitors the on-the-ground situation with respect to each right; engages states in a dialogue toward full realization of rights; and encourages civil society participation to ensure progress. See *Reporting by States Parties*, General Comment 1, *adopted* 17 Feb. 1989, U.N. ESCOR, Comm. on Econ., Soc. & Cult. Rts., 3d Sess., at 87-89, U.N. Doc. E/1989/22 (1989). For more information on state reporting, see Philip Alston, *The Purposes of Reporting*, in MANUAL ON HUMAN RIGHTS REPORTING, *supra* note 17, at 19.
78. BEITER, *supra* note 31, at 230; ICESCR, *supra* note 4.
79. ICESCR, *supra* note 4, art. 18.

Observations,<sup>80</sup> and sets international educational standards, giving content to Article 13 of the ICESCR.<sup>81</sup>

### III. MEASURING COMPLIANCE WITH THE RIGHT TO EDUCATION UNDER THE ICESCR

In this Section, we propose a framework for using indicators to ascertain violations of economic, social, and cultural rights and apply this framework to a specific right. Under this methodology, we first analyze the language of the right as set forth in the treaty in question, which, in this case, is the right to education as enumerated in the ICESCR. Second, we elaborate on the concepts and define the scope of the various obligations of the right. Third, we propose appropriate indicators to measure state compliance with the right. Finally, we discuss the importance of setting benchmarks and clearly identifying what constitutes a violation of the right to education in the ICESCR.

#### A. Right to Education Language in the ICESCR

To measure a state's compliance with treaty obligations, we must first carefully analyze the treaty language as it pertains to the rights and duties in question. Rajeev Malhotra and Nicolas Fasel stress that in giving meaning to the concept sought to be measured, the concept itself must be grounded in relevant human rights treaties.<sup>82</sup> In addition to focusing on the specific treaty language, it is also important to analyze how that language has been interpreted by relevant authoritative bodies.<sup>83</sup> To interpret the meaning of the right to education in the ICESCR, for example, we look to relevant language of the ICESCR and General Comments of the CESCR. The CESCR is the treaty body responsible for monitoring and evaluating states parties' compliance with the ICESCR, including the right to education.<sup>84</sup>

80. Although not legally binding, Concluding Observations are the stated interpretation of the experts who serve on the treaty monitoring body. The Committee has stated that General Comments serve "to make the experience gained so far through the examination of States' reports available . . . to assist and promote their further implementation of the Covenant." *Report of the Thirtieth and Thirty-First Sessions*, U.N. ESCOR, Comm. on Econ., Soc. & Cult. Rts., 30th & 31st Sess., ¶ 52, U.N. Doc. E/2004/22 (2004).

81. BEITER, *supra* note 31, at 232–33.

82. Malhotra & Fasel, *supra* note 19, at 26. The 2006 Report on Indicators also notes that it is important to anchor indicators in a conceptual framework. *2006 Report on Indicators*, *supra* note 19, ¶ 4.

83. This is similar to the first step suggested by Todd Landman who suggests that the background concept to be measured should be defined at the outset. *See generally* TODD LANDMAN, *STUDYING HUMAN RIGHTS* (2006).

84. Committee on Economic, Social and Cultural Rights, Monitoring the Economic, Social and Cultural Rights, available at <http://www2.ohchr.org/english/bodies/cescr/index.htm>.

General Comments are relevant to our analysis because they carry considerable weight and serve an important function: to define and clarify ICESCR provisions or other related topics in order “to assist and promote . . . further implementation of the Covenant . . . and to stimulate the activities of the States parties, international organisations and the specialised agencies concerned in achieving progressively and effectively the full realization of the rights recognized in the Covenant.”<sup>85</sup> Although not legally binding, General Comments serve an important jurisprudential function in relation to the meaning of rights and duties under the ICESCR: they provide guidance and explicit language toward effective implementation and compliance with treaty norms. Therefore, when assessing the obligations of a particular state party to the ICESCR, it is important to consult the General Comments pertaining to the particular right in question. Below, we discuss provisions of the ICESCR that are relevant to the right to education as interpreted by the CESCR in its General Comments.

### *1. Progressive realization and maximum available resources*

Unless specified otherwise, the rights in the ICESCR are subject to the concept of progressive realization enumerated in Article 2(1).<sup>86</sup> As mentioned above, progressive realization means that states parties are not obligated to realize these rights immediately; rather, states may fulfill these rights over time. Additionally, the realization of ICESCR rights is subject to states parties' maximum available resources.<sup>87</sup> Here, the Committee allots states discretion to determine the meaning of maximum available resources, including which resources to apply and what to regard as maximum.<sup>88</sup> Moreover, the CESCR has declared that the concept of progressive realization “imposes an obligation to move as expeditiously and effectively as possible towards the goal” of the full realization of the right in question.<sup>89</sup>

Even though the rights in the ICESCR can be realized progressively over time, states parties are obligated to immediately “take steps” toward the full realization of those rights.<sup>90</sup> According to the Committee's General Comment No. 3, “while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the states concerned.”<sup>91</sup> Furthermore, “[s]uch steps should be deliberate, concrete and

85. BEITER, *supra* note 31, at 364–65 (quoting *Report of the Thirtieth and Thirty-First Sessions*, *supra* note 80, ¶ 52).

86. ICESCR, *supra* note 4, art. 2(1). See also discussion *supra* note 13.

87. ICESCR, *supra* note 4; *The Nature of States Parties Obligations*, *supra* note 13, ¶ 9. Resources can mean money, natural resources, human resources, technology and information. See BEITER, *supra* note 31, at 382.

88. *The Nature of States Parties Obligations*, *supra* note 13.

89. See *id.* ¶ 9.

90. See *id.* For further discussion on the concept of progressive realization, see STEINER & ALSTON, *supra* note 7, at 246–49. See BEITER, *supra* note 31, at 376–77.

91. *The Nature of States Parties Obligations*, *supra* note 13, ¶ 2.

targeted as clearly as possible towards meeting the obligations recognized in the Covenant."<sup>92</sup>

Article 2(1) mandates that states parties use all appropriate means to further the rights under the ICECSR. The CESCR requires states parties to decide what measures are appropriate and to support their decisions in periodic reports to the Committee.<sup>93</sup> Ultimately, the CESCR retains the discretion to decide whether or not the state has taken all appropriate measures.<sup>94</sup> The Committee does not fully clarify what these appropriate means toward full realization should be, but it does articulate that government action should include legislative and judicial measures.<sup>95</sup> Legislative and judicial measures are especially appropriate, for example, where existing legislation violates the Covenant. Because only some articles of the Covenant specify which steps to take, a state's required measures should not be limited to those enumerated in the treaty.<sup>96</sup>

## *2. Immediately realized obligations: nondiscrimination and equal treatment*

Articles 2(2) and 3 obligate states parties to ensure all rights under the ICECSR, including the right to education, equally and without discrimination.<sup>97</sup> Article 3 specifically mandates that states "ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant."<sup>98</sup> The obligation of non-discrimination is of immediate effect.<sup>99</sup> Specifically, the CESCR states that Article 2(2) is "subject to neither progressive realization nor the availability of resources; it applies fully and immediately to all aspects of education and encompasses all internationally prohibited grounds of discrimination."<sup>100</sup> Thus, states par-

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92. *Id.* ¶ 2.

93. *Id.* ¶ 4.

94. *Id.*

95. *The Nature of States Parties Obligations*, *supra* note 13, ¶¶ 3–6. Other steps also identified include administrative, financial, educational, and social measures. *Id.* ¶ 7.

96. See BEITER, *supra* note 31, at 378.

97. ICECSR, *supra* note 4, art. 2(2), 3. Specifically, Article 2(2) declares that: "[t]he States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

98. *Id.* art. 3.

99. *The Nature of States Parties Obligations*, *supra* note 13, ¶ 1; General Comment No. 13, *supra* note 16, ¶ 31.

100. General Comment No. 13, *supra* note 16, ¶ 31 (citing ICECSR, *supra* note 4 art. 2(2) ("The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.")).

ties must immediately guarantee nondiscrimination and equal treatment in education, particularly with regard to gender and other enumerated grounds, in order to fulfill its obligations under the ICESCR.

### 3. *Scope of the right to education*

#### a. *Primary education*

Articles 13 and 14 articulate the ICESCR's specific guarantees of the right to education.<sup>101</sup> These articles impose differing obligations for each level—primary, secondary, and tertiary—of education. Article 13 recognizes that “primary education shall be compulsory and available free to all.”<sup>102</sup> States parties that have not secured compulsory, free primary education at the time of treaty ratification must develop a plan within two years and must implement it within a reasonable number of years after ratification.<sup>103</sup> Unlike with respect to some progressive obligations, the ICESCR specifically provides time periods for the realization of free and compulsory primary education. States parties must adopt a plan within two years, and this plan must call for the implementation of free and compulsory primary education within a reasonable number of years.<sup>104</sup> The Committee appears to agree that the requirement that states provide compulsory and free education is subject to a stronger requirement than progressive realization. The Committee notes that, when read together, Articles 13(2) and 14 require states parties to “prioritize the introduction of compulsory, free primary education.”<sup>105</sup> The Committee further points out that the requirement that primary education be free of charge is “unequivocal” and “[t]he right is expressly formulated so as to ensure the availability of primary education without charge to the

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101. ICESCR, *supra* note 4, arts. 13, 14.

102. *Id.* art. 13(2)(a); see also General Comment No. 13, *supra* note 16, ¶ 59.

103. ICESCR, *supra* note 4, art. 14; BEITER, *supra* note 31, at 390.

104. *Plans of Action for Primary Education*, General Comment 11, U.N. ESCOR, Comm. on Econ., Soc. & Cult. Rts., 20th Sess., ¶ 10, U.N. Doc. E/C.12/1999/4 (1999).

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 of the plan. This underscores both the importance and the relative inflexibility of the obligation in question.

105. General Comment No. 13, *supra* note 16, ¶ 51. Furthermore, the former Special Rapporteur on the Right to Education Katarina Tomaševski has explained that states are “obliged to ensure with immediate effect that primary education is compulsory and available free of charge to everyone, or to formulate a plan and seek international assistance to fulfill this obligation as speedily as possible.” *The Right to Education, Report Submitted by the Special Rapporteur, Katarina Tomaševski, Addendum, Mission to Colombia*, ¶ 23, U.N. ESCOR, Comm’n on Hum. Rts., 60th Sess., U.N. Doc. E/CN.4/2004/45/Add.2 (2004) [hereinafter *Tomaševski 2004 Report*].

child, parents or guardians."<sup>106</sup> Thus, the requirement to provide free and compulsory education is not subject to progressive realization; rather, immediate action must be taken.

*b. Secondary and tertiary education*

Secondary education must be made generally available and accessible to all,<sup>107</sup> and tertiary education must be made "equally accessible to all [] on the basis of capacity."<sup>108</sup> In addition, states parties must progressively achieve free secondary and tertiary education.<sup>109</sup> Also with regard to secondary and tertiary education,<sup>110</sup> states must immediately take steps toward full realization under Article 13(2)(b)–(c).<sup>111</sup> These steps must include adopting and implementing a national education strategy, which should provide mechanisms, such as indicators and benchmarks, to measure progress toward the full realization of the right to education.<sup>112</sup> The Committee also affirms obligations under Article 13(2)(e), noting that states must provide educational fellowships to assist disadvantaged groups.<sup>113</sup>

*c. Minimum core obligations*

To advance the nature of all human rights as fundamental and interdependent and to reconcile the differences among states parties' political, economic, and social systems,<sup>114</sup> Philip Alston proposes the concept of a "core content" of rights.<sup>115</sup> He argues that elevating "claims" to rights status is meaningless "if its normative content could be so indeterminate as to allow for the possibility that the rightholders possess no particular entitlement to anything."<sup>116</sup> Each

106. *Plans of Action for Primary Education*, *supra* note 104, ¶ 7.

107. The Covenant also recognizes technical and vocational education as secondary education. ICESCR, *supra* note 4, art. 13(2)(b).

108. *Id.* art. 13(2)(c).

109. *Id.* art. 13(2)(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").

110. General Comment No. 13, *supra* note 16, ¶¶ 21–22.

Fundamental education includes the elements of availability, accessibility, acceptability and adaptability which are common to education in all its forms and at all levels. . . . [F]undamental education corresponds to basic education as set out in the World Declaration on Education for All. By virtue of [ICESCR] article 13(2)(d), individuals "who have not received or completed the whole period of their primary education" have a right to fundamental education, or basic education as defined in the World Declaration on Education For All.

111. *Id.* ¶ 52.

112. *Id.*

113. *Id.* ¶ 53.

114. Arambulo, *supra* note 68, at 119.

115. Philip Alston, *Out of the Abyss: The Challenges Confronting the New U.N. Committee on Economic, Social and Cultural Rights*, 9 HUMAN RIGHTS Q. 332, 352 (1987).

116. *Id.* at 352–53.

of the ICESCR rights, he concludes, must “give rise to an absolute minimum entitlement, in the absence of which a state party is to be considered to be in violation of it [sic] obligations.”<sup>117</sup> Thus, the core content concept defines and elaborates upon the normative content of ICESCR rights.

To implement this concept, Alston calls upon the newly-established CESCR to prepare outlines enumerating the core content of each right under the ICESCR.<sup>118</sup> Addressing the difficulty in enforcing ESCRs due to the lack of conceptual clarity and specific implementation guidelines for states parties, the Committee adopted the concept of “minimum core obligations” in its General Comment 3.<sup>119</sup> The term “minimum core obligations” means that each state party must “ensure the satisfaction of, at the very least, minimum essential levels of each of the rights . . . [including] the most basic forms of education.”<sup>120</sup> The Committee also outlined the minimum core obligations of several other rights in its subsequent general comments.<sup>121</sup>

This concept of minimum core obligations is not clearly delineated. For instance, the Committee is not clear as to whether the minimum core itself is determined by each state’s available resources or whether the concept is absolute and equal for all states.<sup>122</sup> If the minimum core is relative, then it

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117. *Id.* at 353. Alston quotes Tom Campbell as outlining the task to define the core concept of rights: “the implementation of human rights, which requires the stimulation of governments to legislate and courts to develop appropriate methods of interpretation, is crucially dependent on the task of spelling out the force of human rights in terms of specific freedoms and, where relevant, clearly located duties, correlative to the rights in question. Procedures and formulae are in themselves inadequate for this objective and require supplementation by a living sense of the purposes of the rights in question and the nature of the harms which it is sought to eliminate.” *Id.* (quoting Tom Campbell, *Introduction: Realizing Human Rights*, in *HUMAN RIGHTS: FROM RHETORIC TO REALITY* 1, 7 (Tom Campbell et al. eds., 1986)).
118. *Id.* at 354–55. In addition to Alston’s core content concept, Fried van Hoof has argued that it is reasonable to find at least some elements of rights enumerated in the ICESCR as justiciable. See Fried van Hoof, *Explanatory Note on the Utrecht Draft Optional Protocol and the Utrecht Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, in *THE RIGHT TO COMPLAIN ABOUT ECONOMIC, SOCIAL AND CULTURAL RIGHTS*, *supra* note 31, at 147, 153.
119. *The Nature of States Parties Obligations*, *supra* note 13; General Comment No. 13, *supra* note 16, ¶ 57.
120. *The Nature of States Parties Obligations*, *supra* note 13, ¶ 10.
121. See, e.g., *The Right to the Highest Obtainable Standard of Health*, General Comment No. 14, adopted 11 May 2000, U.N. ESCOR, Comm. on Econ., Soc. & Cult. Rts., 22d Sess., Agenda Item 3, U.N. Doc. E/C.12/2000/4 (2000).
122. See Karin Lehmann, *In Defense of the Constitutional Court: Litigating Socio-Economic Rights and the Myth of the Minimum Core*, 22 *AM. U. INT’L L. REV.* 163, 183 (2006–2007). General Comment 3 and 14 suggest that the minimum core is absolute. However, General Comment 3 explicitly looks toward resource constraints to excuse a failure to meet minimum core obligations. *Id.* n.96. General Comment 13, however, does suggest that failing to meet the minimum core obligations under the right to education is a violation of Article 13 of the Covenant. General Comment No. 13, *supra* note 16, ¶ 57. Another related issue centers around the idea that minimum core obligations are a way to prioritize urgent interests. The confusion lies in determining on what basis these interests are to be ranked. See Lehmann, *supra*, at 185–86.

would be a changing, evolving concept based on the resources of each state. In contrast, an absolute minimum core of obligations would mean that each right contains a set of entitlements that a state must provide irrespective of its available resources.<sup>123</sup>

Some critics find that such a “minimalist” strategy thwarts the broader, long-term goals of realizing ESCRs by creating a ceiling on rights and corresponding obligations, or it at least attempts to create definiteness where there is none.<sup>124</sup> Others argue that attention is diverted away from middle- or high-income country violations of ESCRs toward examining only low-income, developing states’ violations of ESCRs.<sup>125</sup> Still others assert that certain claimants become more deserving of attention as victims of ESCR violations or even that related, structural issues, such as macroeconomic policies or defense spending, are ignored.<sup>126</sup>

While we recognize these criticisms and possible limitations of the minimum core obligations concept, we also believe that it is useful to use the minimum core obligations of the right to education because it has been adopted by the CESCR. The Committee’s views are important because it will be the same body that receives complaints under the Optional Protocol.

The Committee has articulated five minimum core obligations with respect to the right to education:

- [1.] to ensure the right of access to public educational institutions and programmes on a non-discriminatory basis;
- [2.] to ensure education conforms to the objectives set out in article 13(1) [of the Covenant];
- [3.] to provide [free and compulsory] primary education for all;
- [4.] to adopt and implement a national education strategy which includes provision for secondary, higher and fundamental education; and
- [5.] to ensure free choice of education without interference from the State or third parties, subject to conformity with “minimum educational standards” (art. 13(3) and (4)).<sup>127</sup>

123. See Lehmann, *supra* note 122, at 184-85.

124. See Katharine G. Young, *The Minimum Core of Economic and Social Rights: A Concept in Search of Content*, 33 *YALE J. INT’L L.* 113, 114 (2008) (citing Brigit Toebes, *The Right to Health*, in *ECONOMIC, SOCIAL AND CULTURAL RIGHTS*, *supra* note 34, at 169, 176 (“States could be encouraged to put the elements not contained by the core into the ‘indefinite.’”)).

125. MATTHEW CRAVEN, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT* 143-44, 152 (1995); Young, *supra* note 124, at 114.

126. See Young, *supra* note 124, at 114; Lehmann, *supra* note 122, at 196-97.

127. General Comment No. 13, *supra* note 16, ¶ 57; Scholars assert that additional elements should be included in the minimum core obligations with respect to the right to education. According to Fons Coomans, for example, the minimum core obligation should also include: (1) the provision of special facilities for persons with educational deficits such as girls in rural areas or working children; (2) the quality of education; and (3) the right to receive an education in one’s native language. Fons Coomans, *In Search of the Core Content of the Right to Education*, in *CORE OBLIGATIONS: BUILDING A FRAMEWORK FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS* 217, 229-30 (Audrey Chapman & Sage Russell

## B. Conceptual Framework for the Right to Education

Simply enumerating a right often does little to identify indicators. Indeed, before developing appropriate indicators, it is important to also identify “the major attributes of a right.”<sup>128</sup> Clearly understanding the concepts and scope of the obligations measured is an essential step in properly measuring state party compliance with its international legal duties.<sup>129</sup> As one author points out, the initial stage of the indicator development process for measuring state treaty compliance is to “clarify the content” of the particular human right in question.<sup>130</sup>

Many existing proposals to measure the right to education, however, fail to define the concept of the right to education that they purport to measure.<sup>131</sup> For instance, Isabel Kempf’s framework involves the creation of an information pyramid.<sup>132</sup> Under Tier 1 of her pyramid, she proposes key measures to evaluate a state’s promotion and protection of the right to education, such as literacy and primary school enrollment levels.<sup>133</sup> Tier 2 contains expanded indicators, such as government expenditure on education, transportation, and lunch programs.<sup>134</sup> In Tier 3, she evaluates the social, political, and environmental context by taking into account a study of the cultural context, the language difficulties in fulfilling rights, a description of functional literacy, and the normal duration of primary school.<sup>135</sup> Kempf’s framework, however,

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eds., 2002) (although he admits that it may be more difficult to justify including the last addition in core content of the right to education).

128. de Beco, *Human Rights Indicators for Assessing State Compliance with International Human Rights*, *supra* note 19, at 33.

129. *Id.* at 27. Landman also suggests specifying the concept that is to be measured. LANDMAN, *supra* note 83, at 76.

130. de Beco, *Human Rights Indicators for Assessing State Compliance with International Human Rights*, *supra* note 19, at 27.

131. Indeed, in their extensive survey of proposals for using indicators to measure human rights, Malhotra and Fasel conclude that “there is a near absence of conceptual framework[s]” “to develop such human rights indicators that could be sensitively and effectively used in guiding and monitoring public policy in the protection and promotion of human rights.” Malhotra & Fasel, *supra* note 19, at 24.

132. *How To Measure the Right to Education: Indicators and Their Potential Use by the Committee on Economic, Social and Cultural Rights, Background Paper Submitted by Isabell Kempf*, U.N. ESCOR, Comm. on Econ., Soc. & Cult. Rts., 19th Sess., Agenda Item 7, ¶ 6, U.N. Doc. E/C.12/1998/22 (1998).

133. *Id.*

134. *Id.*

135. *Id.*

Coverage is the category most explicitly stated in the Covenant. Indicators for coverage should measure whether all groups in society really have access to different levels of education. . . . In order to measure coverage, . . . it is necessary to look at the outcome, i.e. measure whether different groups of society actually are in primary, secondary and higher education and where they are situated within the system. . . .

The second category, *quality of education*, is important, given that in order for persons to participate effectively in society, minimum standards of education must be offered and verified. . . . Here indicators will be used to provide information on the quality of education, its relevance for the labour market and on inequality of standards between schools.

does not articulate a concept of the right to education that is directly linked to the ICESCR or another legal instrument protecting the right.

The Office of the United Nations High Commissioner for Human Rights (OHCHR) has also recently proposed comprehensive guidelines for the use of indicators to measure human rights obligations.<sup>136</sup> Although the OHCHR's report is a positive step toward operationalizing ESCRs and evaluating state compliance with these rights, it falls short of providing a concrete tool to monitor and evaluate states parties' adherence to a particular treaty. The report rightly recognizes that "there may be a need for further refinement or re-clubbing of the identified attributes of human rights to better reflect the treaty-specific concerns."<sup>137</sup> In the case of the right to education, for example, the OHCHR enumerates "characteristics" of the right that are derived from multiple sources, primarily from the Universal Declaration of Human Rights, and proposes indicators for these attributes as enumerated in the UDHR.<sup>138</sup> The OHCHR identifies four attributes of the right to education: 1) universal primary education; 2) accessibility to secondary and higher education; 3) curricula and educational resources; and 4) educational opportunity and freedom. Because these characteristics—and the resulting proposed indicators—of the right to education are not tied to any particular treaty, however, they would not be the most effective or accurate indications of compliance or noncompliance with specific treaty norms.

Additionally, the characteristics identified by the OHCHR report are narrower in scope than the attributes contemplated by the CESCR in interpreting the ICESCR's right to education provisions. The CESCR has defined the scope and attributes of the right to education broadly under the ICESCR through the 4-A Right to education framework—availability, accessibility, acceptability, and adaptability.<sup>139</sup> This framework, originally proposed by the former Special Rapporteur on Education, Katarina Tomaševski,<sup>140</sup> more comprehensively captures the many facets of the right to education. Consequently, we propose using the 4-A Framework when elaborating on the right to education as set forth in the ICESCR. Although the CESCR has adopted the

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The third category, *exclusion/inequality*, explicitly measures whether a State party recognises the right of every person to education or whether certain groups are excluded from specific levels of education. Here, not only will the opportunity to access education in its different forms be measured, but also other factors [such as] . . . . [l]anguage barriers, family background and hidden curricula constitute examples of important barriers.

*Id.* ¶ 16-18.

136. *Report on Indicators for Promoting and Monitoring the Implementation of Human Rights*, U.N. Doc. HRI/MC/2008/3\* (2008) [hereinafter *2008 Report on Indicators*].

137. *Id.* ¶ 7.

138. *Id.* ¶ 6-7, p. 28.

139. General Comment No. 13, *supra* note 16, ¶¶ 6–7; *Preliminary Report of the Special Rapporteur on the Right to Education*, Ms. Katarina Tomaševski, U.N. ESCOR, Comm'n on Hum. Rts., 55th Sess., ¶¶ 50–74, U.N. Doc. E/CN.4/1999/49 (1999).

140. TOMAŠEVSKI, HUMAN RIGHTS OBLIGATIONS IN EDUCATION, *supra* note 35.

4-A Framework, it has not explained how the framework is directly linked to the language of the ICESCR. In the analysis that follows, we attempt to clearly connect indicators to the ICESCR treaty language.<sup>141</sup>

### 1. Availability

Availability describes the government's obligation to ensure that there are educational institutions and programs in sufficient quantity, with the necessary facilities to function appropriately in the context in which they operate<sup>142</sup> (e.g., adequate structures, sanitation facilities for both sexes, safe drinking water, trained teachers who receive domestically competitive salaries, teaching materials, and even facilities such as libraries, computer facilities, and information technology). In making education available, the government must permit the establishment of schools and provide the resources necessary to develop the physical institutions.<sup>143</sup> This obligation includes the duty of the government to provide a sufficient number of schools so as to avoid excessive class sizes and resulting decreases in the quality of education.<sup>144</sup>

The concept of availability is explicitly protected by the ICESCR, but differs depending on the level of education. Specifically, primary education shall be "available free to all" and secondary education "shall be made generally available."<sup>145</sup> Higher education must be "equally accessible to all, on the basis of capacity, by every appropriate means."<sup>146</sup> This provision indicates that higher education need only be made available to those who qualify by some uniform standard—presumably set by the state or institution—that measures whether individuals are adequately prepared to study at the tertiary level. At all levels, education must be available to minorities on an equal basis with other students.<sup>147</sup>

Additionally, under Article 13(2)(e), states must develop a system of schools at all levels.<sup>148</sup> This means: 1) that states parties must set up an educational infrastructure to ensure that schools are provided at each education level; 2) that this infrastructure is in good repair; 3) that teaching materials

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141. The scope of other ESCRs have been outlined by the Committee as well. For instance, the CESCR uses a similar framework—availability, accessibility, acceptability and quality—to analyze the scope, or "essential elements" of the right to health. See *The Right to the Highest Obtainable Standard of Health*, *supra* note 121, ¶ 12. Thus, in applying this methodology to the right to health, the framework of analysis would be the AAAQ Framework.

142. See *Preliminary Report of the Special Rapporteur on the Right to Education*, Ms. Katarina Tomaševski, *supra* note 139, ¶¶ 51-55.

143. See *id.*

144. *Id.*

145. ICESCR, *supra* note 4, arts. 13(2)(a)-(b).

146. *Id.* art. 13(c).

147. See *Recommendations of the Forum on Minority Issues, Report of the Independent Expert on Minority Issues*, Gay McDougall, U.N. GAOR, Hum. Rts. Council, 10th Sess., Agenda Item 3, ¶ 28, U.N. Doc. A/HRC/10/11/Add.1 (2009).

148. ICESCR, *supra* note 4, art. 13(2)(e).

and equipment are of good quality; and 4) that sufficient teachers are available.<sup>149</sup> The CESCR has also noted that “functioning educational institutions and programmes have to be available in sufficient quantity within the jurisdiction of the State party.”<sup>150</sup> The CESCR further states that there must be a sufficient quantity of “trained teachers receiving domestically competitive salaries.”<sup>151</sup> Finally, the Committee has noted that states must: 1) respect the availability of education by not closing private schools and 2) fulfill the availability of education by actively developing school systems—that is, by building schools, developing programs and teaching materials, and adequately training and compensating educators.<sup>152</sup>

## 2. Accessibility

Accessibility refers to the need for education to be accessible and open to everyone.<sup>153</sup> The CESCR considers accessibility to have three components. First, education must be accessible to all without discrimination.<sup>154</sup> Articles 2(2) and 3 of the ICESCR explicitly recognize the importance of accessible education without discrimination.<sup>155</sup> The Committee specifically obligates states to ensure that third parties allow girls to attend school.<sup>156</sup> This means, for example, that states parties must create incentives to increase girls’ school attendance through measures such as the adoption of policies that work around housework schedules, the creation of financial incentives for parents, and the raising of the child marriage age.<sup>157</sup> Additionally, Article 13(e) requires that states parties establish an adequate fellowship system.<sup>158</sup>

149. BEITER, *supra* note 31, at 531.

150. General Comment No. 13, *supra* note 16(a), ¶ 6.

151. *Id.* ¶ 6(a).

152. *Id.* ¶ 50.

153. *Preliminary Report of the Special Rapporteur on the Right to Education, Ms. Katarina Tomaševski*, *supra* note 139, ¶ 57.

154. General Comment No. 13, *supra* note 16, ¶ 6 (“[E]ducation must be accessible to all, especially the most vulnerable groups, in law and in fact, without discrimination on any of the prohibited grounds.”). “In other words, states parties are obliged to take measures not only against ‘active,’ but also against ‘static’ discrimination.” BEITER, *supra* note 31, at 487.

155. Article 2(2) states that “[t]he States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” ICESCR, *supra* note 4, art. 2(2). Article 3 specifies that “[t]he States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.” *Id.* art. 3. See also ICCPR, *supra* note 75, art. 2(1); ICERD, *supra* note 44, arts. 1, 5; CRC, *supra* note 44, arts. 2, 28; CEDAW, *supra* note 32, arts. 1, 10.

156. General Comment No. 13, *supra* note 16, ¶ 50.

157. BEITER, *supra* note 31, at 488–89.

158. ICESCR, *supra* note 4, art. 13(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.”).

The CESCR further points out that the requirement to establish fellowships “should be read with the Covenant’s non-discrimination and equality provisions; the fellowship system should enhance equality of educational access for individuals from disadvantaged groups[,]”<sup>159</sup> including women and girls.

Second, education must be physically accessible to all.<sup>160</sup> This means that schools should be located in a manner that enables all individuals to participate, including those living in rural areas and vulnerable populations, such as racial and ethnic minorities.<sup>161</sup> This may mean building schools in indigenous regions, providing a means of transportation for certain groups, or using technology as an alternative means of instruction (e.g., online instruction). In the context of emergencies, armed conflicts, and natural disasters, the state must pay special attention to education because the children of minorities or vulnerable populations are often excluded from essential services during these times.<sup>162</sup>

Third, and finally, education must be economically accessible to all.<sup>163</sup> While all education should be economically accessible, the requirement that education be free is subject to the differential wording of Article 13(2) in relation to primary, secondary, and higher education.<sup>164</sup> With respect to primary education, if states parties had not already made education free to all at the time the treaty entered into force, then they had to adopt a plan within two years of ratification to introduce free primary education within a reasonable period of time.<sup>165</sup> Whereas the ICESCR is clear that primary education must be made free to all, secondary education must be made accessible only “by every appropriate means.”<sup>166</sup> States parties may decide what the appropriate means are to make secondary education accessible; however, the Committee finds that the most appropriate means is by making education progressively free.<sup>167</sup> Similarly, the Committee has noted that higher education should also be made progressively free.<sup>168</sup>

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159. General Comment No. 13, *supra* note 16, ¶ 26.

160. *Id.* ¶ 6(b) (“[E]ducation has to be affordable to all. This dimension of accessibility is subject to the differential wording of article 13 (2) in relation to primary, secondary and higher education: whereas primary education shall be available ‘free to all’, States parties are required to progressively introduce free secondary and higher education.”).

161. *Preliminary Report of the Special Rapporteur on the Right to Education, Ms. Katarina Tomaševski*, *supra* note 139, ¶ 58 For example, Tomaševski writes of “ensuring access to available public schools, most importantly [means acting] in accordance with the existing prohibition of discrimination.” *Id.* ¶ 57.

162. *See Recommendations of the Forum on Minority Issues*, *supra* note 147, ¶ 32.

163. General Comment No. 13, *supra* note 16(b), ¶ 6 (“[E]ducational institutions and programmes have to be accessible to everyone, without discrimination, within the jurisdiction of the State party.”).

164. ICESCR, *supra* note 4, art. 13(2).

165. *Id.* art. 14.

166. *Id.* art. 13(2)(b).

167. General Comment No. 13, *supra* note 16, ¶¶ 13-14.

168. *Id.* ¶¶ 13-14, 20.

Additionally, the CESCR believes that “[i]ndirect costs, such as compulsory levies on parents . . . or the obligation to wear a relatively expensive school uniform” are not permissible.<sup>169</sup> However, the Committee has noted that “other indirect costs may be permissible, subject to the Committee’s examination on a case-by-case basis.”<sup>170</sup> To date, the CESCR has yet to specify exactly which indirect costs may be permissible.

### 3. Acceptability

Acceptability addresses the form and substance of the education with regard to both quality and appropriateness.<sup>171</sup> This is a duty based on principles of basic human dignity, and it requires that education be of a quality that has meaning to the individual students, to the community, and to society at large.<sup>172</sup> Instruction should involve non-discriminatory subject matter and incorporate content appropriate to the students’ cultural, linguistic, and social backgrounds.<sup>173</sup> More broadly, acceptability describes the government’s duty to ensure that schools have certain minimum standards for teachers, students, building facilities, and curricula.<sup>174</sup>

The acceptability obligation flows directly from the treaty language. Article 13(2) of the ICESCR addresses the concept of acceptability by stating that the material conditions of teaching staff “shall be continuously improved.”<sup>175</sup> The Committee has also noted that “the form and substance of education, including curricula and teaching methods, have to be acceptable (e.g., relevant, culturally appropriate, and of good quality) to students and, in appropriate cases, parents; this is subject to the educational objectives required by Article 13(1) and such minimum educational standards as may be approved by the State.”<sup>176</sup> Additionally, the Committee requires states parties to ensure that curricula are directed to meet Article 13(1) objectives and to maintain a transparent system to monitor whether state educational objectives comply with Article 13(1).<sup>177</sup> Moreover, the Committee specifically obligates states to fulfill the acceptability requirement of education by providing culturally appropriate and quality education for all.<sup>178</sup>

169. *Plans of Action for Primary Education*, *supra* note 104, ¶ 7.

170. *Id.*

171. *Preliminary Report of the Special Rapporteur on the Right to Education, Ms. Katarina Tomaševski*, *supra* note 139, ¶¶ 62-69.

172. *Id.*

173. *Id.*; General Comment No. 13, *supra* note 16, ¶ 6(c); see *Recommendations of the Forum on Minority Issues*, *supra* note 147, ¶ 54.

174. General Comment No. 13, *supra* note 16, ¶ 6(c).

175. ICESCR, *supra* note 4, art. 13(2).

176. General Comment No. 13, *supra* note 16, ¶ 6(c).

177. *Id.* ¶ 49.

178. *Id.* ¶ 50; see *Recommendations of the Forum on Minority Issues*, *supra* note 147, ¶ 54.

#### 4. Adaptability

Finally, adaptability addresses the need for education to be flexible and able to respond to the needs of students within their diverse social and cultural settings.<sup>179</sup> In achieving adaptability in education, the government should provide resources that enable schools to develop individualized education plans that meet the needs of the communities served by the schools. In addition to customizing the curricula, schools must monitor the performance of teachers and students and make modifications depending on the results. An education system that is not adaptable is likely to have a high dropout rate for vulnerable groups of students, such as pregnant girls.<sup>180</sup>

Article 13(1) of the ICESCR states that:

[E]ducation shall be directed to the full development of the human personality and the sense of its dignity, . . . strengthen the respect for human rights and fundamental freedoms . . . [and] 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.<sup>181</sup>

In order for education to achieve these goals, it must be adaptable. Furthermore, in order to know whether a state party is respecting, protecting, and fulfilling the right to education, we must employ indicators to measure this component of the state's right-to-education obligations. The CESCR has further underscored that education must be flexible in order to adapt to the needs of changing societies and communities and respond to the needs of a diverse student population in varied cultural settings.<sup>182</sup> Additionally, the state must allow for "free choice of education without interference from the State or third parties, subject to conformity with 'minimum educational standards.'"<sup>183</sup>

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179. *Preliminary Report of the Special Rapporteur on the Right to Education, Ms. Katarina Tomaševski*, *supra* note 139, ¶¶ 70-74; General Comment No. 13, *supra* note 16, ¶ 6(d).

180. See, e.g., Right to Education Project, Education and the 4 As: Adaptability, available at <http://www.right-to-education.org/node/230>.

181. ICESCR, *supra* note 4, art. 13.

182. General Comment No. 13, *supra* note 16, ¶ 6(d); see also *Persons with Disabilities*, General Comment 5, U.N. ESCOR, Comm. on Econ., Soc. & Cult. Rts., 11th Sess., ¶ 35, U.N. Doc. E/1995/22 (1994) (dealing with the right to education of disabled persons); *The Economic, Cultural, and Social Rights of Older Persons*, General Comment 6, U.N. ESCOR, Comm. on Econ., Soc. & Cult. Rts., 13th Sess., ¶¶ 36-39, U.N. Doc. E/1996/22 (1996) (dealing with the right to education of older persons).

183. General Comment No. 13, *supra* note 16, ¶ 57 (citing ICESCR, *supra* note 4, art. 13(3)-(4)).

### C. Indicators for the Right to Education

Having examined the treaty language and defined the content of the right to education under the ICESCR, it is now possible to propose appropriate indicators to ascertain violations of the right to education.<sup>184</sup> Although there are a few existing proposals for using indicators to measure fulfillment of the right to education, these proposals have not proven useful for ascertaining violations of specific treaty obligations.<sup>185</sup> We propose to categorize

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184. See de Beco, *Human Rights Indicators for Assessing State Compliance with International Human Rights*, *supra* note 19, at 28; LANDMAN, *supra* note 83; BEITER, *supra* note 31, at 625-29. Danilo Türk first suggested using human rights indicators to measure state compliance with treaty norms in the 1990s. See *The Realization of Economic, Social and Cultural Rights, Second Progress Report Prepared by Mr. Danilo Türk, Special Rapporteur* U.N. ESCOR, Comm'n on Hum. Rts., Sub-Comm'n on Prev. of Discrim. & Protect. of Min., 43d Sess., ¶¶ 6-48, U.N. Doc. E/CN.4/Sub.2/1991/17 (1991); *Realization of Economic, Social and Cultural Rights, Progress Report Prepared by Special Rapporteur, Danilo Türk*, U.N. ESCOR, Comm'n on Hum. Rts., Sub-Comm'n on Prev. of Discrim. & Protect. of Min., 42d Sess., ¶ 1-105, U.N. Doc. E/CN.4/Sub.2/1990/19 (1990).
185. See, e.g., Katrien Beeckman, *Measuring the Implementation of the Right to Education: Educational Versus Human Rights Indicators*, 12 INT'L J. CHILD. RTS. 71-84 (2004) (offering a general framework of human rights indicators for monitoring compliance with the right to education). One important proposal on using indicators to measure the right to education was conceived at a workshop organized in 1999 by the World University Service-International. Workshop participants included members and staff of the CESCR, along with representatives of some of the specialized agencies and non-governmental organizations, along with a few academics knowledgeable about this subject matter. This workshop focused on statistical indicators of fulfillment. See Audrey R. Chapman, *Development of Indicators for Economic, Social and Cultural Rights: The Rights to Education, Participation in Cultural Life and Access to the Benefits of Science*, in HUMAN RIGHTS IN EDUCATION, SCIENCE AND CULTURE: LEGAL DEVELOPMENTS AND CHALLENGES 111, 124-26 (Yvonne Donders & Vladimir Volodin eds., 2007). During the workshop, participants proposed several key indicators that all treaty bodies and specialized UN agencies should agree to use to monitor the right to education, including: 1) literacy rates disaggregated by gender, urban/rural breakdown, ethnic group and age, and 2) net enrolment rates disaggregated by gender, urban/rural breakdown and ethnic group, with separate data for primary, secondary, and tertiary levels of education. Although these indicators are important, they are very limited and do not measure the broad concept of the right to education as described in this subsection, *supra*. Additionally, this particular proposal requires that the same set of indicators be utilized in all countries. For the reasons discussed in Subsection 1, *infra*, however, we believe indicators should be specifically tailored to the particular context and circumstances of the state party in question. Other proposals to use a specified set of indicators have not been motivated at measuring treaty compliance. For example, even though Katrien Beeckman's proposal adopts the conceptual 4-A Framework outlined by Tomaševski, Beeckman proposes a process that allows her to formulate one comparable score for education in each country. Beeckman suggests that "[a]vailability could be measured by 1. the absorption capacity of the (public and private) education system, 2. the competence and salaries of teachers and 3. the equitable distribution of the available infrastructure along relevant lines such as public/private, urban/rural." Beeckman, *supra*, at 77. "Accessibility could be measured . . . by 1. availability of free public education and 2. the gender parity index with regard to enrolment and drop out." *Id.* Other than these indicators, however, she does not propose indicators to measure adaptability or acceptability. *Id.* Thus, Beeckman's

indicators using the 4-A Framework. Even though Tomaševski noted the importance of using indicators and identified the topics for which indicators should be formulated, she did not propose specific indicators to measure compliance with the 4-A Framework.<sup>186</sup> Furthermore, we believe that the accessibility, availability, acceptability, and adaptability indicators should each be subcategorized into structure, process, and outcome. Utilizing the structure-process-outcome typology ensures that all aspects of state obligations will be measured—whether the laws of the country are in line with treaty obligations, whether the country has processes in place to implement the treaty obligations, and the actual status of the rights in the country. More importantly, it allows for a better assessment of violations by isolating the specific strengths and weaknesses of a country's fulfillment (or lack thereof) of its education obligations under each of the 4 As.

Initially, Paul Hunt suggested using structure, process, and outcome categories to measure the right to health.<sup>187</sup> The UN 2006 Report on Indicators for Monitoring Compliance with International Human Rights Instruments adopted Hunt's categorization for indicators and applied it to measuring the fulfillment of all human rights.<sup>188</sup> Following its lead, the Inter-American Commission on Human Rights has adopted Hunt's terminology for purposes of monitoring ESCRs as well.<sup>189</sup> Most recently, the OHCHR 2008 Report on Indicators for Promoting and Monitoring the Implementation of Human Rights reaffirms the relevance of the "structural—process—outcome" indicators framework, which reflects "the need to capture a duty-bearer's commitments, efforts and results, respectively" to select indicators for various human rights measurement.<sup>190</sup>

According to the UN 2006 Report, "[s]tructural indicators reflect the ratification/adoption of legal instruments and existence of basic institutional mechanisms deemed necessary for facilitating realization of the human right concerned."<sup>191</sup> Similarly, the Inter-American Commission on Human Rights Guidelines suggest that structural indicators should determine whether the law on the books complies with the state's treaty obligations but should

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proposal is geared toward allowing for cross-country comparisons rather than toward evaluating the extent to which a particular state is complying with or in violation of its treaty obligations under the ICESCR.

186. Chapman, *Development of Indicators for Economic, Social and Cultural Rights*, *supra* note 185, at 126, 128 tbl.3.1.

187. *The Right of Everyone To Enjoy the Highest Attainable Standard of Physical and Mental Health*, Note by the Secretary-General, U.N. GAOR, 58th Sess., ¶ 15, U.N. Doc. A/58/427 (2003); 2006 Hunt Report, *supra* note 27, ¶ 52.

188. 2006 Report on Indicators, *supra* note 19, ¶ 13, 17-19.

189. Malhotra & Fasel, *supra* note 19, at 28 (advancing this typology in their conceptual model).

190. 2008 Report on Indicators, *supra* note 136, ¶ 8.

191. 2006 Report on Indicators, *supra* note 19, ¶ 17.

also measure whether the state institutions are structured to incorporate international legal obligations.<sup>192</sup> However, we believe a clearer delineation between structural and process indicators would be to limit structural indicators to monitoring whether the state's laws reflect, incorporate, and implement its international treaty obligations.<sup>193</sup> On the other hand, process indicators, as discussed below, would account for whether or not the state has created appropriate institutions and taken additional implementation measures to fulfill its obligations.

Process indicators measure the extent to which the laws and policies of the state are effectively designed to implement the realization of the right. The UN 2006 Report defines process indicators as relating to "State policy instruments to milestones that become outcome indicators, which in turn can be more directly related to the realization of human rights."<sup>194</sup> These indicators "measure the quality and extent of state efforts to implement rights by measuring the scope, coverage, and content of strategies, plans, programs, or policies, or other specific activities and interventions designed to accomplish the goals necessary for the realization of [the right]."<sup>195</sup> Although the Inter-American Commission Guidelines suggest that structural indicators include the inquiry of whether or not the state has policies and procedures in place to implement the international and domestic laws, we believe that such indicators fit more neatly into the category of process indicators.<sup>196</sup> Therefore, while structural indicators answer the question of whether or not laws that comply with international treaty obligations exist on the books at the domestic level, process indicators answer the question of what mechanisms the state has put in place to implement its existing laws toward the realization of the right.

Outcome indicators measure the reality on the ground—to what extent the state is implementing the right in question. De Beco points out that both process and outcome indicators measure *de facto* treaty compliance.<sup>197</sup> He further points out that while process indicators focus on the actual efforts of states, outcome indicators focus on the results of those efforts.<sup>198</sup> Moreover,

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192. GUIDELINES FOR PREPARATION OF PROGRESS INDICATORS, *supra* note 27.

193. Similarly, de Beco points out that structural indicators measure *de jure* compliance rather than *de facto* compliance with human rights treaties. de Beco, *Human Rights Indicators for Assessing State Compliance with International Human Rights*, *supra* note 19, at 42. The 2008 Report on Indicators suggests that the number of human rights treaties that a state has signed that incorporates the right in question is a structural indicator. *2008 Report on Indicators*, *supra* note 136, ¶ 18. However, at least for the purposes of evaluating compliance with one single treaty, such an indicator is not necessary.

194. *2006 Report on Indicators*, *supra* note 19, ¶ 18.

195. GUIDELINES FOR PREPARATION OF PROGRESS INDICATORS, *supra* note 27, ¶ 31.

196. *Id.*

197. de Beco, *Human Rights Indicators for Assessing State Compliance with International Human Rights*, *supra* note 19, at 43.

198. *Id.* at 44.

the UN 2006 Report notes that an outcome indicator is “not only a more direct measure of the realization of a human right but it also reflects the importance of the indicator in assessing the enjoyment of the right.”<sup>199</sup> In other words, outcome indicators “measure the actual impact of government strategies,” whereas process indicators measure the “quality and extent” of these strategies.<sup>200</sup>

Although other accepted typologies, such as the states’ duties to respect, protect, and fulfill human rights,<sup>201</sup> are also useful in identifying states parties’ international treaty obligations, we find the structure-process-outcome framework most useful to further a violations approach to enforce ESCRs using indicators. The structure-process-outcome framework divides state duties into obligations of conduct and obligations of result,<sup>202</sup> while the respect, protect, and fulfill framework identifies positive and negative obligations of states for all rights, including ESCRs.

With regard to the respect, protect, and fulfill framework, for example, a negative obligation to *respect* the right to education is to refrain from interfering in parents’ decision-making as to which school they send their child. To *protect* the right to education, in contrast, requires positive obligations because the state must act. A state’s obligations to act include taking steps to ensure that girls are not expelled from school by third parties because they are pregnant. Similarly, the duty to fulfill the right to education is positive because states must affirmatively take action, such as progressively introducing free secondary education. Categorizing obligations within the respect, protect, and fulfill framework assesses whether or not the state has complied with both positive and negative obligations with respect to the right in question.

In contrast, the structure-process-outcome framework clarifies the amount of state control over particular treaty obligations. In other words, it separates indicators that measure obligations of conduct and obligations of result.<sup>203</sup> While presumably the state has the same level of control over its acts or omissions in its compliance with negative and positive obligations, it has decidedly higher levels of control over obligations of conduct (measured by structure and process indicators) than obligations of result (measured by outcome indicators). Therefore, states have a higher level of control over the obligations that structural and process indicators measure. As a result, viola-

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199. 2006 Report on Indicators, *supra* note 19, ¶ 19.

200. GUIDELINES FOR PREPARATION OF PROGRESS INDICATORS, *supra* note 27, ¶¶ 31-32.

201. Asbjørn Eide pioneered the use of the respect, protect, fulfill typology to conceptualize economic, social, and cultural rights, especially the right to food. ASBJØRN EIDE, RIGHT TO ADEQUATE FOOD AS A HUMAN RIGHT, HUMAN RIGHTS STUDY SERIES NO. 1, U.N. Sales No. E.89.XIV.2 (1989).

202. *The Nature of States Parties Obligations*, *supra* note 13, ¶ 1.

203. *Id.*

tions are more clearly attributable to state failures when looking at structure and process indicators. On the other hand, states have a lower level of control over obligations that outcome indicators measure. In assessing violations, taking into account the level of state control is important because it adds legitimacy, reasonableness, and fairness to the evaluation process; thus, it can also enhance compliance with treaty norms and ultimately improve state cooperation toward the fulfillment of ESCRs.

In Appendix 1, we have identified and categorized indicators to measure compliance with the right to education as seen through the 4-A Framework: availability, accessibility, acceptability, and adaptability. For each of these concepts, indicators are then subcategorized into structural, process, or outcome.<sup>204</sup> These indicators are derived directly from the language and interpretations of the ICESCR and appropriately reflect the major attributes of the right to education as contemplated by the treaty language and its monitoring body, the CESCR.

### 1. Notes on applying the indicators set forth in appendix 1

#### a. Use a toolbox approach

These indicators should be considered “candidate” indicators from which appropriate ones can be chosen.<sup>205</sup> The same pre-defined set of indicators (universal indicators) should not be applied to all countries. Instead, indicators used to measure treaty compliance with regard to a particular country should be carefully chosen for and tailored to the context of that state. Tomaševski asserts that “[a]pplying the same standard of performance to all countries as if all had identical infrastructures, institutions and resources is not only unfair . . . but it also disregards one of the main targets of international cooperation in the area of human rights, namely to promote human rights.”<sup>206</sup> Moreover, universal indicators do not comprehensively measure compliance or noncompliance of the state, and they may not provide useful insight as to the reasons behind the violations or as to the solutions to address human rights abuses in a particular state.

Universal indicators are more suitable for studies that aim to provide a picture of the degree of enjoyment of a right across several countries than for measuring whether, and to what degree, a state complies with its treaty obligations. Development professionals tend to use universal indicators when

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204. See Chapman, *Development of Indicators for Economic, Social and Cultural Rights*, *supra* note 185. Chapman divides the indicators she proposed to measure education into structure, process, and outcome. However, she does not tie these indicators to a conceptual framework defining education.

205. The concept of a “toolbox” of indicators has been advanced by the vice-chair of the CESCR. *Id.* at 116 (referring to Eibe Riedel, vice-chair of the ESC Committee).

206. See Katarina Tomaševski, *Indicators*, in *ECONOMIC, SOCIAL AND CULTURAL RIGHTS*, *supra* note 34, at 531, 532.

their goal is to compare the degree of protection of rights among countries in order to draw attention to unacceptable disparities, and to decide directions for program development and implementation.<sup>207</sup> As a result, some economic development studies present indicators in the form of indexes such as the Human Development Index<sup>208</sup> or the Physical Quality of Life Index, which combines life expectancy, infant mortality, and literacy into one indicator on a scale of 1 to 100 to allow for cross-country comparisons and analyses of countries' development or quality of life.<sup>209</sup>

Indicators aimed at providing information about the level of treaty compliance of a particular state need not be universal. Although context-specific indicators may make cross-country comparisons difficult, the ultimate goal of treaty monitoring bodies and others that measure compliance is to determine whether or not a state is fulfilling its particular obligations, not whether it is complying with a treaty to a greater or lesser extent than other states parties. Including a context-specific approach is superior to a universal-only approach when assessing human rights treaty compliance because it leads to a selection of indicators that is likely to be most appropriate for the situation of each particular state and most relevant to the treaty provisions in question.<sup>210</sup>

*b. Use both qualitative and quantitative indicators*

Some advocates and scholars in the human rights community believe that indicators can only be quantitative in nature.<sup>211</sup> Proponents of quantitative measurement define indicators to mean statistics that "serve as a proxy or metaphor for phenomena that are not directly measurable."<sup>212</sup> In contrast, proponents of a mixed quantitative and qualitative approach use indicators

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207. See U. N. DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 91 (2000), available at <http://hdr.undp.org/en/reports/global/hdr2000/>.

208. See U.N. Dev. Programme, Statistics of the Human Development Report, available at <http://hdr.undp.org/en/statistics>.

209. Stephen C. Thomas, *Measuring Social and Economic Rights Performance in the People's Republic of China: A Comparative Perspective Among Developing Asian Countries*, in HUMAN RIGHTS: THEORY AND MEASUREMENT, *supra* note 23, at 104, 113.

210. See *2006 Report on Indicators*, *supra* note 19, ¶ 28 (advocating for a hybrid approach that selects a core set of universal indicators and additional context-specific indicators).

211. See, e.g., *Realization of Economic, Social and Cultural Rights, Progress Report Prepared by Special Rapporteur, Danilo Türk (1990)*, *supra* note 184, ¶ 4.

212. CLIFFORD W. COBB & CRAIG RIXFORD, REDEFINING PROGRESS, LESSONS LEARNED FROM THE HISTORY OF SOCIAL INDICATORS (1998), available at <http://www.rprogress.org/publications/1998/SocIndHist.pdf>. For examples of definitions that are numerical and synonymous with statistical data, see *Realization of Economic, Social and Cultural Rights, Progress Report Prepared by Special Rapporteur, Danilo Türk (1990)*, *supra* note 184, ¶ 4; Report of the Workshop on Indicators to Monitor the Progressive Realisation of the Right to Education (World University Service-International, Geneva (Versiox), 9 May 1999); Douglas A. Samuelson & Herbert F. Spierer, *Use of Incomplete and Distorted Data in Inference About Human Rights Violations*, in HUMAN RIGHTS AND STATISTICS: GETTING THE RECORD STRAIGHT 62 (Thomas B. Jabine & Richard P. Claude eds., 1992).

to refer to more thematic measurements, which can be based on qualitative or quantitative data.<sup>213</sup> In order to understand the causes of some of the outcomes (such as low literacy level) in a particular country and to capture the complexity of human rights monitoring, it is important to employ both qualitative and quantitative indicators to measure state treaty compliance.

We believe that both quantitative and qualitative indicators are necessary in order to fully evaluate a state's compliance with the right to education. We thus agree with Katrien Beeckman, who explains why both quantitative and qualitative indicators are necessary, particularly in the context of the right to education.<sup>214</sup> First, quantitative indicators cannot easily measure important qualitative factors, such as whether books are of good quality or are outdated.<sup>215</sup> Second, quantitative indicators "only reveal part of the country's educational picture"—namely, those data that can be expressed numerically, such as school enrollment or educational costs.<sup>216</sup> Third, quantitative indicators do not explain the reasons behind the figures, which other qualitative indicators, such as findings from key informant interviews, might reveal.<sup>217</sup> These reasons become important to pinpoint government failures and suggest legal or policy reform with the ultimate goal to work toward full realization of the particular human right in question.

*c. Use appropriate data sources*

Consulting certain types of data sources for indicators in measuring ESCRs is important for human rights treaty monitoring. Data sources for human rights indicators can be divided into the following four categories:

- *Events-based Data.* "Events-based data provide information on single events."<sup>218</sup> They are usually qualitative or quantitative data that "primarily describe[] acts of human rights violations and identify[] victims and perpetrators."<sup>219</sup> Events-based data answer the question of what happened, when it happened, and who was involved, and then they report descriptive and numerical summaries of events.<sup>220</sup> Accumulation of data on individual violations over time can show improvement or deterioration of the human rights situation in a particular country.<sup>221</sup>

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213. Green, *supra* note 19, at 1078-80.

214. Beeckman, *supra* note 185, at 79-80.

215. *Id.* at 72.

216. *Id.* at 73.

217. Unless additional surveys are conducted with child laborers or in households, data collected by schools often used for purposes of quantitative indicators only reveal information about children within the educational system and do not uncover the situation for those left outside of the system. *Id.* at 74.

218. de Beco, *Human Rights Indicators for Assessing State Compliance with International Human Rights*, *supra* note 19, at 35.

219. Malhotra & Fasel, *supra* note 19, at 6.

220. LANDMAN, *supra* note 83, at 82.

221. de Beco, *Human Rights Indicators for Assessing State Compliance with International Human Rights*, *supra* note 19, at 35.

- *Socioeconomic and administrative statistics.* Socioeconomic and other administrative statistics are “aggregated data sets and indicators based on objective quantitative or qualitative information (i.e. information that can be observed and verified, such as wage, age, sex and race) related to standards of living and other facets of life.”<sup>222</sup> States often collect these data through “administrative records and statistical surveys,” like a census.<sup>223</sup> Socioeconomic and administrative statistics give information about the general state of society. For example, these data would include the literacy levels in a country, net enrollment in schools, infant mortality, as well as other indicators that are generally associated with ESCRs.
- *Household perception and opinion surveys.* Household perception and opinion surveys involve “polling a representative sample of individuals on their personal views on a given issue.”<sup>224</sup> The information is usually qualitative even though it can be turned into quantitative information by evaluating the public opinion at a defined community or population level.<sup>225</sup>
- *Expert Judgments.* Data based on expert judgments are informed opinions of a limited number of informed experts that can be translated into quantitative form.<sup>226</sup> Experts “are asked to evaluate and score the performance of States, using cardinal or ordinal scales and sets of relevant criteria or ‘checklists.’”<sup>227</sup>

Socioeconomic statistics<sup>228</sup> are most relevant for measuring the progressive realization component of ESCRs.<sup>229</sup> Socioeconomic statistics include data such as the net enrollment in secondary schools. Such trends in net enroll-

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222. Malhotra & Fasel, *supra* note 19, at 9.

223. *Id.*

224. *Id.* at 18.

225. de Beco, *Human Rights Indicators for Assessing State Compliance with International Human Rights*, *supra* note 19, at 37.

226. Malhotra & Fasel, *supra* note 19, at 20.

227. *Id.* Data based on expert judgments are less relevant for measuring ESCRs than for measuring CPRs. Often, measuring treaty compliance with CPRs requires subjective judgments because it is not possible to obtain socioeconomic data for many CPRs. For example, it is difficult to measure the degree to which the press is free in a particular country with socioeconomic data; thus, experts are consulted to provide their opinions on the level of freedom of press in a particular country. In contrast, expert judgments on ESCRs are not needed because socioeconomic data can be used to measure many aspects of the fulfillment of ESCRs. For example, if the data on maternal mortality in a particular country are properly collected, then it is possible to calculate that country's maternal mortality ratio, an indicator used to measure compliance with the right to health. Since objective evidence is available in most cases, the subjective judgment of experts regarding the mortality ratio is not needed.

228. A United Nations definition of socioeconomic statistics is any “quantitative information compiled and disseminated by the State through its administrative records and statistical surveys, usually in collaboration with national statistical agencies and under the guidance of international and specialized organizations.” *2006 Report on Indicators*, *supra* note 19, ¶ 24.

229. The 2006 Report on Indicators also supports the use of socioeconomic and administrative statistics for treaty monitoring purposes. *2006 Report on Indicators*, *supra* note 19, ¶ 24.

ment, for instance, can help determine whether or not a state is satisfying its obligations to progressively realize the right to education under Article 13(2)(b) of the ICESCR.<sup>230</sup>

On the other hand, events-based data will not likely assist with measuring progressive realization given that they are typically associated with only one event at one point in time.<sup>231</sup> Events-based data are useful, however, for measuring the components of ESCRs that states must immediately realize. For example, if a girl who becomes pregnant is expelled from school on account of her pregnancy, then events-based data such as interviews with teachers, children, the girl, and the girl's parents would be relevant to a claim that may soon be filed under the new ICESCR Optional Protocol. This claim would involve violations of the non-discrimination and equality provisions of the right to education under the ICESCR.

Household and perception surveys are also important in measuring ESCRs because they provide context to explain the reasons behind certain socioeconomic statistics. Gauthier de Beco notes that household and perception surveys complete, confirm, and question other kinds of data.<sup>232</sup> Indeed, the pyramid schematic proposed by Isabell Kempf (as discussed in Section III.B) to measure the right to education suggests that indicators do not tell the entire story; investigators must look at the context surrounding the indicator to understand the cause of the violations.<sup>233</sup>

#### *d. Use disaggregated data*

Several experts have emphasized the need for disaggregated data to measure treaty compliance.<sup>234</sup> Disaggregation (e.g., by sex, race, age, ethnic background, etc.) sheds light on disparities that aggregated data do not reveal, including disparities among groups. Under the ICESCR, as discussed above, states parties are immediately required to ensure that no such disparities in education exist in the population.<sup>235</sup> In particular, Article 2(2) of the ICESCR

230. ICESCR, *supra* note 4, art. 13(2)(b) says "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."

231. de Beco underscores this point by noting that the main problem is that it is impossible to collect enough information to know the human rights situation of the entire population. de Beco, *Human Rights Indicators for Assessing State Compliance with International Human Rights*, *supra* note 19, at 36.

232. *Id.* at 37.

233. See *How To Measure the Right to Education*, *supra* note 132.

234. Chapman, *Development of Indicators for Economic, Social and Cultural Rights*, *supra* note 185, at 115. Moreover, de Beco relates the importance of disaggregating indicators in order to evaluate the rights of vulnerable sub-populations, including the rights to non-discrimination and equality. de Beco, *Human Rights Indicators for Assessing State Compliance with International Human Rights*, *supra* note 19, at 29-30.

235. See, e.g., ICESCR, *supra* note 4, art. 13(2).

requires states to guarantee all of the rights set forth in that treaty, including the right to education, without discrimination of any kind.<sup>236</sup> Furthermore, Article 3 “ensure[s] the equal right of men and women to the enjoyment of all economic, social and cultural rights” found in the ICESCR.<sup>237</sup> Thus, disaggregated data deserves emphasis in order to demonstrate—with the goal of lessening—inequalities in the enjoyment of rights among groups, an obligation that is just as important and urgent as the obligation to fully realize the right to education for all.

## 2. Cautionary notes on the use of indicators

Although the benefits of employing indicators to measure fulfillment of ESCRs are enormous, there are also many challenges associated with using them. First, indicators have a problem known as “slippage”—they do not precisely or entirely measure the concept they are designed to assess.<sup>238</sup> In other words, indicators serve as proxies to measure concepts that are difficult, if not impossible, to measure.<sup>239</sup> For example, the availability of legal assistance in a country might serve as an indicator to measure whether trials are fair. Legal assistance, however, is only one component of fair trials; thus, legal assistance alone does not completely capture or entirely measure the concept. With regard to the right to education, the education level of teachers can be used to measure the quality of education. This single indicator, however, does not fully capture the entire concept. As a result of slippage, employing indicators to measure the fulfillment of human rights can lead to imperfect or incomplete assessments of state compliance or non-compliance with treaty obligations.

Second, different researchers or organizations may not use the same indicators to measure the same concepts or may define the same indicator differently, and they may consequently achieve very different results.<sup>240</sup> For example, the Census Bureau once found an illiteracy level of 1 percent in the United States, while the Department of Education found an illiteracy level of 13 percent.<sup>241</sup>

The above example illustrates that concepts and indicators need to be clearly defined and their units need to “be clearly bounded and exclusive.”<sup>242</sup>

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236. *Id.* art. 2(2).

237. *Id.* art. 3.

238. Russel Lawrence Barsh, *Measuring Human Rights: Problems of Methodology and Purpose*, 15 HUM. RTS. Q. 87, 91 (1993).

239. *Id.* at 90.

240. See Barsh, *supra* note 238.

241. Robert Justin Goldstein, *The Limitations of Using Quantitative Data in Studying Human Rights Abuses*, in HUMAN RIGHTS AND STATISTICS: GETTING THE RECORD STRAIGHT, *supra* note 212, at 35, 40.

242. Barsh, *supra* note 238, at 92.

Moreover, it demonstrates the importance of clearly defining and establishing indicators from the outset that will be used universally to measure a particular concept. Otherwise, stakeholders will use different definitions of the same indicator, or different indicators altogether, to reflect their own political needs.

Third, there are numerous difficulties associated with developing surveys, collecting information, and compiling data that may be needed for indicators. In many cases, historical data for indicators may be difficult to obtain, while, in other cases, up-to-date data may not exist at all.<sup>243</sup> In many instances, states either do not maintain quality data collection systems or do not make their data available to the public.<sup>244</sup> As a result, it may be impossible to use a particular indicator without investing resources and time into collecting and analyzing the relevant data. Even where there are current census results, those data may reflect the situation in the country as it was several years ago because a team of trained professionals may take years to develop an appropriate survey instrument and properly collect, compile, analyze, and disseminate the results of a national census or survey. This means that the data results are actually measuring past events and trends, rather than present conditions or situations. In addition, to the extent a government is responsible for compiling data, it may have an incentive to stall, refuse to release results, or even produce inaccurate data.<sup>245</sup> Finally, the data may not be disaggregated among relevant subgroups within society. In many cases, even government data itself can be used to demonstrate violations and where such data is used, the government is less likely to refute the results of its own statistical research.

Additionally, it is difficult to obtain the data for the same indicator over time. As a result, it is hard to draw conclusions about whether or not state parties are progressively fulfilling their obligations. These data must not only measure the same result; they must also be collected in the same manner in order to draw accurate conclusions from research findings. Possible solutions to overcome the problems of inadequate, unavailable, or unreliable statistics may be to advocate for improved government surveillance systems and systematic measurement methods,<sup>246</sup> to involve civil society in the

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243. Goldstein, *supra* note 241, at 41.

244. For example, when the authors conducted their research in Colombia, the National Administrative Department of Statistics (DANE) either did not keep disaggregated statistics or did not release relevant statistics related to education at the primary, secondary, and tertiary levels; neither did they have complete information on regional or ethnic distribution of education.

245. See Barsh, *supra* note 238, at 100 (stating that “[t]ruly repressive regimes are likely to suppress such information.”).

246. Treaty-Monitoring Bodies are doing this more and more. See *Concluding Comments: Burkina Faso*, U.N. GAOR, Comm. on the Elim. of Discrim. Against Women, 33d Sess., ¶ 346, U.N. Doc. A/60/38 (2005); *Concluding Comments: Georgia*, U.N. GAOR, Comm.

process of formulating a census and other survey instruments and methods, and to access the collected data to formulate indicators and independently analyze results.

Finally, there are difficulties associated with using indicators to determine whether or not a state has breached its obligations under the Covenant. For the same obligation, one indicator may show improvement, while another indicator suggests regression or a failure to satisfy immediate obligations. For example, with regard to the quality of education, the number of poor quality schools may increase, which would suggest a *decline* in education quality; however, test scores in some subjects may also increase, which would suggest an *improvement* in education quality.

We point out these limitations to inform other studies attempting to measure compliance with ESCRs. Despite these limitations, however, indicators remain a powerful tool with which to measure treaty compliance, pinpoint state failures, and provide guidance for future treaty compliance where violations are found.<sup>247</sup>

#### D. Benchmarks for Right to Education Indicators

Benchmarks set specific obligations that states must achieve over a period of time with respect to the relevant indicators discussed above.<sup>248</sup> The CE-

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on the Elim. of Discrim. Against Women, 36th Sess., ¶ 10, U.N. Doc. CEDAW/C/GEO/CO/3 (2006); *Concluding Comments of the Committee on the Elimination of Discrimination Against Women: Namibia*, U.N. GAOR, Comm. on the Elim. of Discrim. Against Women, 37th Sess., ¶ 24, U.N. Doc. CEDAW/C/NAM/CO/3 (2007) (expressing concerns when country reports contain insufficient data regarding maternal mortality and the measures taken to reduce maternal mortality ratios).

247. Rosga & Satterthwaite articulate several concerns with indicators. AnnJanette Rosga & Margaret L. Satterthwaite, *The Trust in Indicators: Measuring Human Rights*, 27 BERKELEY J. INT'L L. 253 (2009). They note the challenge of quantifying any information pertaining to a right, a process that itself involves policy decisions regarding what may be "counted" and is therefore not objective nor "apolitical." *Id.* at 267, 284. This problem, they claim, is related to the larger problem of indicators threatening to close the "fruitful gap" that exists between international law and domestic policy. *Id.* at 308. They believe that states may shy away from the most effective national programs and instead opt for those that most easily translate into measurable statistics. *Id.*

However, these authors fail to ask whether human rights treaty monitoring can include both evidence-based evaluations and experts' judgments. We believe that monitoring bodies will not substitute judgment with indicators but will supplement judgment with evidence-based data. In basing decisions on evidence and judgment, experts will retain a sense of credibility without appearing arbitrary and overly political.

In addition, these authors overlook the three tiers of the structure-process-outcome model, which rely not solely on measurable data but also on a holistic assessment of every country's legal structure and related programs. This approach can account for changes in policy or laws that are not necessarily quantifiable in the short term but are nonetheless effective to demonstrate state compliance with the ICESCR.

248. Green, *supra* note 19, at 1080.

SCR has noted the need for benchmarks for monitoring various ESCRs.<sup>249</sup> Similarly, the UN 2006 Report advocates for benchmarks, pointing out that they enhance and give “accountability of the State parties by making them commit to a certain performance standard on the issue under assessment.”<sup>250</sup> An example of a benchmark for a state with a current literacy rate of 80 percent would be that the state must ensure that the rate is 90 percent within a period of ten years.

Former Special Rapporteur on the Right to the Highest Attainable Standard of Physical and Mental Health Paul Hunt has proposed a process for setting benchmarks.<sup>251</sup> In his view, states parties would initially set benchmarks and would then report on progress they have made toward reaching those goals, thereby legitimizing their benchmarks through measuring, analyzing, and reporting the agreed indicators to the CESCR.<sup>252</sup> The Committee may then set new appropriate benchmarks with states parties,<sup>253</sup> and civil society may advocate for more ambitious benchmarks for future reporting cycles. The Committee and states parties must also identify a date for achieving the agreed-upon targets. The CESCR would then observe and evaluate whether and how (or why) these benchmarks have (or have not) been met when reviewing the periodic reports of states parties. Where a benchmark is set and how long the country has to achieve it may vary based on the extent of the fulfillment of the right as well as the resources of the country. Through such collaboration and commitment to prior agreed-upon goals, states parties may be more likely to accept the treaty monitoring body’s observations and may seek to improve their compliance with obligations under the Covenant. Thus, benchmarks create standards, and deviations from those agreed-upon standards can be considered violations.

### E. Ascertaining Violations of the Right to Education

Determining whether a country deviates from its obligations under the Covenant will help promote compliance with it. The CESCR has provided

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249. *Reporting by States Parties*, General Comment No. 1, adopted 17 Feb. 1989, U.N. ESCOR, Comm. on Econ., Soc. & Cult. Rts., 3d Sess., at 87-89, ¶ 6, U.N. Doc. E/1989/22 (1989) (recommending state parties “to set specific goals with respect to the reduction of infant mortality, the extent of vaccination of children, the intake of calories per person, the number of persons per health-care provider, etc.”).

250. *2006 Report on Indicators*, *supra* note 19, ¶ 12.

251. See WHO REPORT, *supra* note 30, at 14; see also BEITER, *supra* note 31, at 628-29 (setting national benchmarks for each selected indicator through a dialogue between state and Committee and monitoring setting of national benchmarks through reporting).

252. See WHO REPORT, *supra* note 30, at 14.

253. de Beco also agrees that the state must develop benchmarks under the supervision of treaty bodies. de Beco, *Human Rights Indicators for Assessing State Compliance with International Human Rights*, *supra* note 19, at 47.

some guidance on what constitutes a violation of the ICESCR, and the Limburg Principles and Maastricht Guidelines provide further guidance for ascertaining violations.<sup>254</sup> In this section, we draw from the General Comments, Limburg Principles, and Maastricht Guidelines to create a framework for assessing violations using indicators. Whether or not a state action or failure to act violates the ICESCR depends on the type of state obligation that is implicated (i.e., an obligation that must be immediately realized, a minimum core obligation, or a progressive obligation) and the type of indicator that is implicated (i.e., one that relates to the legal framework for the realization of a right within the state, one that relates to the processes in place in the state for the realization of a right, and one that relates to the reality on the ground with respect to the right in question). It is through this lens that we can determine whether or not a state is in violation of its obligations under the ICESCR.

### 1. Type of State Obligation

In assessing whether state action or inaction constitutes a violation, it is important to determine the nature of the state obligation in question—whether it is an obligation that: 1) must be immediately realized; 2) constitutes a minimum core obligation; or 3) is an obligation subject to progressive realization. Different standards apply to the type of obligation in question. According to the Committee, there are no justifications available for violations of “minimum core obligations.”<sup>255</sup> However, a state’s deviation from minimum core and progressive obligations create only a *prima facie* violation that the state can attempt to justify.<sup>256</sup>

The following chart categorizes the obligations relating to the right to education as outlined in parts A and B of this section.

### 2. Type of Indicator

The type of indicator being utilized is also relevant because indicators are proxies for the level of control exerted by a state in any given situation. A state has more control over the laws and policies it adopts, which are

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254. *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, adopted 8 Jan. 1987, U.N. ESCOR, Comm’n on Hum. Rts., 43d Sess., Agenda Item 8, Annex, ¶ 70, U.N. Doc. E/CN.4/1987/17 (1987), reprinted in *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, 9 HUM. RTS. Q. 122 (1987) [hereinafter *Limburg Principles*] and the *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, adopted 22-26 Jan. 1997, ¶ 5, reprinted in *The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, 20 HUM. RTS. Q. 691 (1998) [hereinafter *Maastricht Guidelines*]

255. *Maastricht Guidelines*, supra note 254, ¶ 9.

256. *The Nature of States Parties Obligations*, supra note 13, ¶ 10.

TABLE 1.

<i>Obligations that must be immediately realized</i>	<i>Obligations constituting the minimum core</i>	<i>Obligations that may be progressively realized</i>
States must ensure non-discrimination and equality in all forms of education.	States must ensure the right of access to public educational institutions and programs on a non-discriminatory basis.	States must ensure that secondary education is made available generally. To the extent made available, it must be accessible, acceptable, and adaptable.
States must provide primary education that is available, accessible, acceptable, and adaptable to all.	States must recognize the right to education as set forth in Article 13(1) of the ICESCR.	States must ensure that tertiary education is made available on the basis of capacity. To the extent made available, it must be accessible, acceptable, and adaptable.
States must ensure that primary education is compulsory and free of charge to all, or states must "formulate a plan and seek international assistance to fulfill this obligation as speedily as possible." <sup>257</sup>	States must provide free and compulsory primary education for all in accordance with Article 13(2)(a).	States must provide free secondary and tertiary education.
States must "take steps" that are "deliberate, concrete and targeted toward full realization" of rights.	States must adopt and implement a national education strategy that includes the provision of secondary, higher, and fundamental education.	
	States must provide free choice of education subject to "minimum educational standards" as contemplated by Articles 13(3) & (4).	

257. See, e.g., *Tomaševski 2004 Report*, *supra* note 105, ¶ 23.

measured by structural and process indicators, respectively, but a state may have less control over the reality of the situation in a practical sense, which is generally measured by outcome indicators. Of course, a state party is still responsible for the improvement of outcomes; however, there are circumstances that may be beyond the immediate control of a state, such as a natural disaster, that disrupts children's studies or destroys a school. In these cases, treaty monitoring bodies and civil society groups may not find a violation of the right if the state takes all reasonable steps to minimize the damage and continue to fulfill its right-to-education obligations. Below, we explain in greater detail the salience of the type of indicator in ascertaining violations or prima facie violations of the ICESCR.

### 3. *Violations as determined by structural indicators*

As explained above, structural indicators assess the extent to which a state's domestic law complies with its international legal obligations. General principles of international law suggest that states must ensure that they immediately comply with their treaty obligations.<sup>258</sup> The Maastricht Guidelines<sup>259</sup> indicate that a state violates the ICESCR if it adopts legislation inconsistent with the ICESCR<sup>260</sup> or fails to amend or repeal existing laws that are inconsistent with the obligations under the ICESCR.<sup>261</sup> This principle applies regardless of the type of obligation implicated—immediate obligations, minimum core obligations, or progressive obligations. For example, if a state party to the ICESCR adopts a law that bans all secondary schools, then it would violate its obligations under the ICESCR. Even though the state may not be required to provide secondary schools immediately, it is obligated to provide them

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258. Paragraph 70 of Limburg Principles and 5 of Maastricht Guidelines recognize that the failure of state party to comply with treaty obligations under international law is a violation of the treaty. *Limburg Principles*, *supra* note 254, ¶ 70; *Maastricht Guidelines*, *supra* note 254, ¶ 5.

259. Both the Maastricht Guidelines and Limburg Principles emerged from conferences that the International Commission of Jurists convened, providing an "authoritative 'gloss' on the ICESCR for the benefit of the Committee." Michael J. Dennis & David P. Stewart, *Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?*, 98 AM. J. INT'L L. 462, 492-93 n.219 (2004). The Maastricht Guidelines called for an optional protocol for the ICESCR. *Id.*

260. *Maastricht Guidelines*, *supra* note 254, ¶ 14(d) (explaining that an example of a violation would be "[t]he adoption of legislation or policies which are manifestly incompatible with pre-existing legal obligations relating to these rights, unless it is done with the purpose and effect of increasing equality and improving the realization of economic, social and cultural rights for the most vulnerable groups").

261. *Id.* ¶ 15(b) (explaining that a violation can occur through "[t]he failure to reform or repeal legislation which is manifestly inconsistent with an obligation of the Covenant"); see also *Limburg Principles*, *supra* note 254, ¶ 18 ("It should be noted, however, that article 2(1) would often require legislative action to be taken in cases where existing legislation is in violation of the obligations assumed under the Covenant.").

progressively. A law that bans such schools is clearly inconsistent with its obligations.

#### 4. *Violations as determined by process indicators*

Recall that process indicators relate to state party efforts to implement the obligations under the treaty. States parties have a duty to immediately implement, upon ratification of the ICESCR, those rights to education obligations that must be immediately realized. According to the Limburg Principles, "A State party will be in violation of the Covenant, inter alia, if . . . it fails to implement without delay a right which it is required by the Covenant to provide immediately."<sup>262</sup> Additionally, according to the Maastricht Guidelines, a state's failure to promptly remove obstacles in order to permit immediate fulfillment of a right violates its treaty obligations.<sup>263</sup>

Although there are no justifications for a state's failure to satisfy its immediate obligations under the ICESCR, there are limited justifications for a state's failure to satisfy its minimum core obligations. According to the Committee, a *prima facie* violation arises when a state fails to satisfy its minimum core obligations.<sup>264</sup> A state can attribute its failure to satisfy its obligations to a lack of available resources, but only if it can "demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations."<sup>265</sup>

Notably, the Maastricht Guidelines appear to contradict the Committee's view because they suggest that limitation of available resources cannot be a justification for a state's failure to satisfy minimum core obligations.<sup>266</sup> However, the Maastricht Guidelines do not define the content of the minimum core obligations as extensively as the Committee does. The Maastricht Guidelines simply indicate that the minimum core includes the most basic forms of education. On the other hand, the Committee's notion of minimum core obligations is much broader.<sup>267</sup> Practically speaking, the Committee is charged with interpreting the ICESCR by the terms of the

262. *Limburg Principles*, *supra* note 254, ¶ 72.

263. *Maastricht Guidelines*, *supra* note 254, ¶ 14(a).

264. *See The Nature of States Parties Obligations*, *supra* note 13, ¶ 10.

265. *Id.*; see Nowak, *The Right to Education*, *supra* note 34, at 256.

266. *Maastricht Guidelines*, *supra* note 254, ¶ 9 ("Violations of the Covenant occur when a State fails to satisfy what the Committee on Economic, Social and Cultural Rights has referred to as 'a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights [. . .]. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, violating the Covenant."); *The Nature of States Parties Obligations*, *supra* note 13, ¶ 10. Such minimum core obligations apply irrespective of the availability of resources of the country concerned or any other factors and difficulties.

267. *See General Comment 13*, *supra* note 16, ¶ 57.

ICESCR,<sup>268</sup> so we adopt its broader view of the definition of the minimum core in our analysis.

With respect to progressively realized rights, the Committee affirms that if a state deliberately takes regressive measures, then it has the burden of proving that: 1) such measures were introduced after the most careful consideration of alternatives; 2) such measures were fully justified by reference to the totality of the rights provided for in the Covenant; and 3) such measures were fully justified in the context of the full use of the state party's maximum available resources.<sup>269</sup> The Maastricht Guidelines and Limburg Principles underscore this principle by noting that if the states' policies or plans obstruct or halt the progressive realization of a right, then the state will be deemed to be in violation of the Covenant. In addition to the justifications provided by the Committee, however, the Maastricht Guidelines and Limburg Principles add another justification—that the state is acting due to *force majeure*.<sup>270</sup>

Additionally, the failure to meet agreed benchmarks for progressive obligations may also constitute a violation of the Covenant, but none of the authoritative documents—the Committee, the Maastricht Guidelines, or the Limburg principles—provide guidance on the issue. Although such a policy may create a perverse incentive for states parties to either refuse to set benchmarks or to set low benchmarks, sovereign states have adopted the Covenant and presumably aspire to give the impression that they are taking all possible steps to cooperate with the CESCR and to fulfill Covenant rights. Refusing to set benchmarks or setting low benchmarks where setting benchmarks is a requirement of all states parties could prove to be a political embarrassment or economic liability to a particular state. In such a case, a state party may also have the opportunity to justify its failures to move forward at the agreed-to levels with the same reasons it is permitted to use if it halts or retards progressive obligations. Thus, if the state fails to show an improvement in satisfying progressive obligations by achieving benchmarks, then it may have the burden of justifying such failure by proving that: 1)

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268. *Review of the Composition, Organization and Administrative Arrangements of the Sessional Working Group of Governmental Experts on the Implementation of the International Covenant on Economic, Social and Cultural Rights, adopted 28 May 1985, ECOSOC Res. 1985/17, 22d plenary mtg., at 15, U.N. Doc. E/1985/85 (1985).*

269. General Comment No. 13, *supra* note 16, ¶ 45.

270. *See Maastricht Guidelines, supra* note 254, ¶ 14(f) (explaining that a violation occurs when there is "[t]he calculated obstruction of, or halt to, the progressive realization of a right protected by the Covenant, unless the State is acting within a limitation permitted by the Covenant or it does so due to a lack of available resources or *force majeure*."); *Limburg Principles, supra* note 254, ¶ 72 (delineating that a "State party will be in violation of the Covenant, inter alia, if . . . it deliberately retards or halts the progressive realization of a right, unless it . . . it does so due to lack of available resources or *force majeure*.").

such measures were introduced after the most careful consideration of alternatives; 2) such measures were fully justified by reference to the totality of the rights provided for in the Covenant; and 3) such measures were fully justified in the context of the full use of the state party's maximum available resources.<sup>271</sup>

##### 5. *Violations as determined by outcome indicators*

As previously outlined, outcome indicators measure to what extent laws are being effectively implemented. With immediately realized rights, the state should ensure that the reality on the ground reflects the realization of those rights. For example, the state has the obligation to immediately ensure equality and non-discrimination in all forms of education. Therefore, if statistical evidence suggests that significantly fewer numbers of girls are enrolled in school than boys, the state should be deemed in violation of the ICESCR. The state should make all efforts to ensure that outcomes are in line with its immediate treaty obligations. The state should be responsible for the outcomes even if the result cannot be directly linked to state's policy or practices.

In contrast, if outcome indicators suggest that a state has failed to provide its citizens with the rights that constitute minimum core obligations, then the state is considered to be *prima facie* failing to discharge its obligations. The Committee's explanation of when a violation of minimum core obligations occurs suggests that a state not only has to make efforts to ensure the provision of the right, but also that the outcome must be that the right is actually being fulfilled. The Committee states that "a State party in which any significant number of individuals is deprived of . . . the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant."<sup>272</sup> A state can justify the outcome by citing a lack of available resources, but only if it can "demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations."<sup>273</sup> For example, if outcome indicators suggest that not all children who are of primary school age are enrolled in primary schools, then these indicators suggest that education is not free, not compulsory, or both, and the state can justify this outcome if it can prove that the result was due to a lack of resources.

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271. There is a strong presumption of impermissibility of any retrogressive measures taken in relation to the right to education, as well as other rights enunciated in the Covenant. If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the State party's maximum available resources.

General Comment 13, *supra* note 16, ¶ 45.

272. *The Nature of States Parties Obligations*, *supra* note 13, ¶ 10.

273. *Id.*; see also Nowak, *The Right to Education*, *supra* note 34, at 256.

States may be considered to be in *prima facie* violation of the ICESCR if outcome indicators measuring progressive obligations suggest a halting or regression of progressive obligations. In order to justify the negative outcomes, the state may have the burden of proving it has made all efforts to ensure that such regressing or halting does not occur, but that such regression or halting is due to factors outside of the state's control. For example, if there are fewer students enrolled in tertiary education than there were ten years ago, then this outcome suggests a failure to satisfy right-to-education obligations under the ICESCR. Similarly, if the state fails to meet the benchmarks that it has set for outcome indicators, it should have the burden of demonstrating that it has made all efforts to meet the agreed-upon benchmarks and that such failure was due to factors outside of its control.

#### 6. *Determining violations of the ICECR*

The chart below summarizes the discussion above and illustrates under what circumstances a state would be in violation or possible violation of the ICESCR.

## IV. CONCLUSION

International scholars and practitioners alike are recognizing the indivisibility and interrelatedness of all human rights and the need to focus on fulfilling economic, social, and cultural rights to afford all persons the opportunity to live with dignity. As these rights gain importance, the international human rights community is searching for mechanisms that rights-bearers can use to hold states parties accountable for their progressive realization obligations under treaties such as the ICESCR.

A violations approach using indicators is one mechanism to enhance treaty compliance. When closely tied to the treaty language, this approach points out the specific failures of a state in its attempt to comply with binding and legally-enforceable treaty obligations. Indicators are a powerful tool for measuring compliance with economic, social, and cultural rights because they are the best way to evaluate the progress and failures of individual states parties. Using indicators to measure treaty compliance gives real meaning to economic, social, and cultural rights and furthers the ultimate goal of full realization and enjoyment of all human rights.

Employing indicators to ascertain violations of ESCRs is the future of human rights advocacy. As the Optional Protocol to the ICESCR moves ever closer to full implementation, its states parties will allow individuals to petition the Committee on Economic, Social and Cultural Rights for alleged ESCR violations. With this emerging mechanism for enforcement of ESCRs there is an even more pressing need for frameworks to assess compliance with the

TABLE 2.

<i>Indicator</i>	<i>Nature of Right</i>	<i>Violation</i>	<i>Prima Facie Violation</i>
Structural	Immediate, Minimum Core, or Progressive	Indicators show that the state adopts laws or fails to amend or repeal laws that are inconsistent with its obligations under the ICESCR.	
Process	Immediate	Indicators show that policies or plans contravene immediate obligations or fail to further immediate obligations.	
	Minimum Core		Indicators show that policies or plans fail to ensure that minimum core obligations are satisfied unless the state can "demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations." <sup>274</sup>
	Progressive.		Indicators show that policies or plans deliberately retard or halt the progressive realization of a right, unless the state justifies such failure by proving that: 1) such measures were introduced after the most careful consideration of alternatives; 2) such measures were fully

274. *The Nature of States Parties Obligations*, supra note 13, ¶ 10.

justified by reference to the totality of the rights provided for in the Covenant; and 3) such measures were fully justified in the context of the full use of the state party's maximum available resources.

Indicators show a failure to meet agreed upon benchmarks unless the state justifies such failure by proving that: 1) such measures were introduced after the most careful consideration of alternatives; 2) such measures were fully justified by reference to the totality of the rights provided for in the Covenant; and 3) such measures were fully justified in the context of the full use of the state party's maximum available resources.

Indicators show that reality on the ground contravenes immediate obligations.

Immediate  
Minimum Core

Indicators suggest that the reality on the ground suggests that people do not have the minimum core guarantees unless the state can "demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations."<sup>275</sup>

Progressive

Indicators suggest that the reality on the ground suggests a retrogression or

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275. *Id.*

TABLE 2.

<i>Indicator</i>	<i>Nature of Right</i>	<i>Violation</i>	<i>Prima Facie Violation</i>
			<p data-bbox="325 258 420 634">halting of guarantees that constitute progressive obligations unless such retrogression or halting is occurring due to factors outside of its control.</p> <p data-bbox="451 234 597 634">Indicators suggest that the state fails to meet the benchmarks that it has set for outcome indicators unless it can demonstrate that it has made all efforts to meet the benchmarks, but such failure was due to factors outside of its control.</p>

**TABLE 3.**  
*Process Indicators*

*Structural Indicators*

*Outcome Indicators*

**1. AVAILABILITY**

<p>Existence (or nonexistence) of constitutional provision(s), case law precedent, and/or national legislation requiring an adequate number of schools within a reasonable distance from all school-age students in the population at the primary, secondary, and tertiary levels.</p>	<p>State adoption (or not) of a national educational strategy which includes provisions for secondary, higher, and fundamental education. The proportion of the state's GDP that is allocated to education.*</p>	<p>Number and proportion of communities/schools/classrooms that are without teachers broken down by rural/urban and region at the primary level.</p>
<p>Existence (or nonexistence) of a plan of action for a national education strategy.*</p>	<p>Broken down by region and state or province, the proportion of the budget that is allocated to primary education, secondary education, vocational training, higher education, teacher training, special disbursements to improve gender balance, and targeted aid to the poor localities.*</p>	<p>Number and proportion of teachers in all classrooms (adequate number necessary for availability requirements) at the secondary and tertiary levels.</p>
<p>Existence (or nonexistence) of constitutional provision(s), case law precedent, and/or national legislation requiring an adequate number of spaces in primary schools for each eligible primary age student.</p>	<p>The proportion of government expenditure that is spent on education and expenditure per pupil, with data disaggregated by urban/rural location for each level of education.* (at the primary, secondary, and tertiary levels)</p>	<p>The pupil/teacher ratio for primary, secondary, and tertiary education, with breakdowns for public and private education and in urban and rural areas.*</p>
<p>Existence (or nonexistence) of constitutional provision(s), case law precedent, and/or national legislation requiring adequate facilities (potable water, sanitation, materials, etc.) and number of teachers in schools at the primary, secondary, and tertiary levels.</p>	<p>The proportion of funding that is allocated to provide for construction and maintenance of schools. (at the primary, secondary, and tertiary levels)</p>	<p>The disaggregated proportion of primary/secondary schools by rural, urban, public, private, and by region of the following: schools with buildings in disrepair, schools that have a shortage of classrooms, schools that have inadequate textbooks, schools with no water within walking distance, schools with lack of access to sanitary facilities, schools with inadequate toilet facilities, and number of schools with lack of access to library facilities.</p>
<p>Existence (or nonexistence) of constitutional provision(s), case law precedent, and/or national legislation requiring uninterrupted, adequate</p>	<p>The policies or legislation that are in place regarding recruitment, training, and pay for teachers. (for primary,</p>	<p>The net enrollment rate (proportion of eligible children attending school) with separate data for primary, secondary,</p>

TABLE 3. Continued

<i>Structural Indicators</i>	<i>Process Indicators</i>	<i>Outcome Indicators</i>
<p>government funding for education at the primary, secondary, and tertiary levels.</p> <p>Existence (or nonexistence) of constitutional provision(s), case law precedent, and/or national legislation requiring uninterrupted, adequate government funding for teachers' salaries at the primary, secondary, and tertiary levels.</p>	<p>secondary, and tertiary level teachers)</p> <p>Salaries of teachers as compared to other professions, disaggregated by gender and urban/rural location for each level of educational system and further broken down by public/private education. Existence (or nonexistence) of adequate salary for primary, secondary, and tertiary level teachers.</p> <p>Teachers' pay in certain regions relative to other regions.*</p> <p>Proportion of teachers paid on time by region.*</p> <p>The wage gap between teachers in private schools and those in public schools at the primary, secondary, and tertiary levels.*</p> <p>The number and proportion of schools per capita throughout the country broken down by rural/urban and region; number and proportion that is available to all at the primary level; number and proportion that are available to all at the secondary level; number and proportion that are available to all who are capable at the tertiary level.</p>	<p>and tertiary levels of education. (also disaggregated data by gender, urban/rural, ethnic group, and public/private education)</p>

**2. ACCESSIBILITY**

<p>Existence (or nonexistence) of constitutional provision(s), case law precedent, and/or national legislation providing free and compulsory primary education for all, free secondary education and free tertiary education. (duration of compulsory education period)</p>	<p>Whether or not public policy measures have been taken to remove gender bias from primary education primers, remove gender bias from teacher educational strategies, remove gender bias in terms of male and female roles in school, remove gender bias in terms of general-targeted optional subjects.</p>	<p>In each case below, disaggregated by rural/urban, income, gender, and ethnic groups:</p>
<p>Existence (or nonexistence) and scope of constitutional provision(s), case law precedent and/or national legislation providing for equal and non-discriminatory access to education.</p>	<p>To what extent the state allocates resources for alternative means of education for extremely isolated geographic localities (e.g., use of plans for satellite learning) at the primary, secondary, and tertiary levels.</p>	<p>The proportion of school age children who are not in school at the primary or secondary levels (and for all who are capable at the tertiary level) and the trends for these ratios over time (especially for secondary and tertiary education).</p>
<p>Existence (or nonexistence) of constitutional provision(s), case law precedent and/or national legislation recognizing the importance of physical accessibility of education for all at the primary and secondary levels, as well as for all who are capable at the tertiary level.</p>	<p>Whether or not the government collects disaggregated data on the basis of age, sex, urban/rural location, income, language or disabilities.*</p>	<p>The proportion of all students who have to pay for primary education and, for these families, the average expenditure for education (direct costs and some indirect costs, like compulsory levies—even when portrayed as voluntary—on parents and relatively expensive school uniforms).</p>
<p>Existence (or nonexistence) of constitutional provision(s), case law precedent and/or national legislation recognizing the right of persons with disabilities, of other populations with special needs (IDPs, working children) to education for all at the primary and secondary levels, as well as for all who are capable at the tertiary level.</p>	<p>Whether or not the government implements effective affirmative action policies to improve enrollment rates and completion rates for minorities.</p>	<p>The proportion of students who have to travel more than a reasonable or safe distance to reach primary school* and secondary school, and the proportion of all capable students who have to travel more than a reasonable or safe distance to reach tertiary school.</p>
<p>Existence (or nonexistence) of constitutional provision(s), case law precedent, and/or national legislation</p>	<p>The existence (or nonexistence) of regulations permitting charges for any of the following in primary and secondary schools: enrollment fees, tuition fees, uniforms, school supplies, school meals, and school transport. At the primary level: enrollment fees, tuition fees, uniforms, school supplies, school meals, and school transport.</p>	

TABLE 3. Continued

<i>Structural Indicators</i>	<i>Process Indicators</i>	<i>Outcome Indicators</i>
<p>allowing the government to close schools in times of political tension (contravening Article 4 of the ICESCR).</p>	<p>If the government has not secured primary education, free of charge, within two years of signing the ICESCR. Whether or not it has adopted 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 primary education free of charge for all.</p>	
<p><b>3. ACCEPTABILITY</b></p> <p>Existence (or nonexistence) of constitutional provision(s), case law precedent, and/or national legislation to ensure that education conforms to the following objectives: 1) to be directed to the full development of the human personality and the sense of its dignity; 2) to strengthen the respect for human rights and fundamental freedoms; 3) to 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 4) to further the activities of the United Nations for the maintenance of peace.</p> <p>Existence (or nonexistence) and scope of constitutional provision(s), case law</p>	<p>Whether or not the state has methods for measuring acceptability (e.g., standardized test scores, inspection of facilities) and, if so, how often they are applied and monitored.</p> <p>Whether or not the state conducts regular assessments of educational needs, and if so, what this entails.</p> <p>Whether or not the required level of teacher training and certification is broken down by region. Whether or not these standards are used and enforced. Whether there have been efforts to train teachers.</p> <p>The expenditure per pupil in private school v. public school.</p>	

<p>precedent, and/or national legislation providing for free choice and (minimum standards of) acceptability for all levels of education for public and private institutions.</p>	<p>Whether the state sets minimum standards relating to education, including health, safety, and quality.</p> <p>Whether the state has mechanisms in place to investigate complaints on the right to education.*</p>	<p>Proportion of children who attend private schools as compared to public schools.</p>
<p>Existence (or nonexistence) of constitutional provision(s), case law precedent, and/or national legislation providing for the monitoring and evaluation of teachers and/or qualifications or certification requirements for teachers.</p>		<p>Proportion of children who are attending facilities that do not meet state requirements in terms of quality standards.</p>
<p>Existence (or nonexistence) of constitutional provision(s), case law precedent, and/or national legislation providing for continuing education or trainings for teachers.</p>		<p>The repetition and drop out rates at the primary, secondary, and tertiary education levels, as well as the trends over time.</p>
<p>Existence (or nonexistence) of constitutional provision(s), case law precedent, and/or national legislation providing for school accreditation and regular inspection.</p>		<p>Average students' scores on standardized tests and whether or not there exist facilities that do not meet standards.</p>
<p>Existence (or nonexistence) of constitutional provision(s), case law precedent, and/or national legislation providing for periodic testing of students to assure quality of the educational content.</p>		<p>Literacy or illiteracy levels as well as the trends over time.*</p>

**TABLE 3. Continued**

	<i>Structural Indicators</i>	<i>Process Indicators</i>	<i>Outcome Indicators</i>
<b>4. ADAPTABILITY</b>	<p>Existence (or nonexistence) and scope of constitutional provision(s), case law precedent, and/or national legislation providing for adaptability of all education to accommodate individual children's special needs.</p> <p>Existence (or nonexistence) of constitutional provision(s), case law precedent, and/or national legislation ensuring the right to retention in the education system.</p> <p>Existence (or nonexistence) of constitutional provision(s), case law precedent, and/or national legislation recognizing the liberty of individuals and groups to establish and direct educational institutions, subject to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the state.</p> <p>Existence (or nonexistence) of constitutional provision(s), case law precedent, and/or national legislation expressly recognizing the right of children other than those established by public authorities when such schools conform to the minimum requirements of the state.</p>	<p>Whether or not the official curriculum includes units on human rights education and values such as respect for human dignity, non-discrimination, and equal status before the law.</p> <p>The existence and scope of policies that provide for recruitment of and training for bilingual teachers.</p> <p>The existence and scope of policies and programs implemented to provide for ethno-education for minorities, disabilities, night classes for working students, etc.</p> <p>Whether there are teacher trainings or certifications to teach ethno-education, special education, etc.</p>	<p>The number and proportion of bilingual, ethno-education, and special education teachers in place per primary school child, and whether this differs according to geographic region (also for secondary and tertiary education)</p> <p>Number and proportion of children who both work and attend school in the population (at the primary, secondary, and tertiary levels)</p> <p>The enrollment rates for students with various special needs.</p> <p>The dropout rates for students with various special needs.</p> <p>*Outcome indicators marked with an asterisk may relate to one or more of the categories specified herein—availability, accessibility, acceptability, and adaptability. For instance, many availability indicators can also measure accessibility or acceptability as well. The specific situation/context of the state being analyzed will help determine to which attribute or attributes of the right these indicators relate.</p>

Existence (or nonexistence) of constitutional provision(s), case law precedent, and/or national legislation recognizing the right of parents to ensure religious and moral education of children in conformity with their own convictions.

Existence (or nonexistence) of constitutional provision(s), case law precedent, and/or national legislation mandating respect in educational system for the culture and religious practices of various groups and communities in the society.

Existence (or nonexistence) of constitutional provision(s), case law precedent, and/or national legislation denying academic freedom to staff and/or students

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ICESCR. In this article, we have proposed a methodology that demonstrates how indicators can be incorporated into a violations approach for the enforcement of treaty obligations, including progressive realization obligations. Although we have focused on the right to education, our methodology can be applied to other rights in an effort to enhance state compliance with their obligations. It is our hope that this framework will serve as a useful tool to improve state compliance with economic, social, and cultural rights obligations toward the fulfillment and enjoyment of human rights for all.