

# The evolving human right to education from the aspects of pre-primary and secondary education

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## I. Focus of the thesis

Since its first proclamation under Article 26 of the Universal Declaration of Human Rights ('UDHR')<sup>1</sup> in 1948, the right to education has become a fundamental right and is one of the most complex human rights under present international law<sup>2</sup>. It is guaranteed<sup>3</sup>, in whole or in part, in at least 48 legally binding instruments<sup>4</sup>, 28 of which are regional, and in 23 soft law instruments, as well as in many national constitutions and legislation. They recognize education as being integral to the full development of the human personality and a sense of dignity and self-worth, as well as being indispensable for the promotion of peace, democracy, environmental sustainability, citizenship, and for realising other human rights. Under the present international legal framework, everyone has the right to education<sup>5</sup>, and States are required to realise this right for all without discrimination of any kind<sup>6</sup>, and by providing inclusive<sup>7</sup>, quality, public education that is compulsory and provided free of charge at the primary and made progressively free at the secondary and higher levels<sup>8</sup>. Furthermore, States are required to respect the liberty of parents to choose for their children schools other than those established by the public authorities<sup>9</sup>, and the liberty of individuals or bodies to establish educational institutions<sup>10</sup>. In addition to States' legal undertakings to fully guarantee the right to education for all, governments have made a number of political commitments towards advancing this right, most recently under the 2030 Sustainable Development Agenda<sup>11</sup>.

Despite the binding legal frameworks on the right to education and high-level political declarations pledging to "ensure inclusive and equitable quality education and promote lifelong learning opportunities for all"<sup>12</sup>, the right to education continues to be infringed upon today. The major challenges to ensuring this fundamental right include: *providing free and*

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<sup>1</sup> Universal Declaration of Human Rights, adopted by the UN General Assembly in Paris on 10 December 1948 during its 183rd plenary meeting, A/RES/217(III).

<sup>2</sup> See Manfred Novak, "The right to education", in Asbjørn Eide et al. (eds), *Economic, Social and Cultural Rights* (M. Nijhoff, 2001) p. 268.

<sup>3</sup> As until 2018; UNESCO Handbook on the Right to Education (2019), at p 51.

<sup>4</sup> The most important of these instruments are *inter alia*: Article 26 of the Universal Declaration of Human Rights (UDHR); Article 5(1)(a) of the 1960 UNESCO Convention on Discrimination in Education (CADE); Articles 13-14 of the International Covenant on Economic, Social and Cultural Rights (ICESCR); Articles 28-29 of the United Nations Convention on the Rights of the Child (UNCRC); Article 17 of African Charter of Human and Peoples' Rights (ACHPR); Article 11 of the African Charter on the Rights and Welfare of the Child (ACRWC); Articles 13 of the Additional Protocol to the American Convention of Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador"); Article 17 of the Revised European Social Charter; Article 2 of Protocol No. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

<sup>5</sup> See Art. 26 (1) UDHR, Art. 13 (1) ICESCR.

<sup>6</sup> Art. 13(2) read together with Art. 2(2) ICESCR, Art. 28(1) CRC.

<sup>7</sup> Art. 24 CRPD

<sup>8</sup> See Art. 13 (2) (a)-(e) ICESCR, Art. 28 (1) CRC.

<sup>9</sup> See Art. 13 (3) ICESCR.

<sup>10</sup> See Art. 13(4) ICESCR and Art. 29(2) CRC.

<sup>11</sup> "Transforming our world: the 2030 Agenda for Sustainable Development", adopted unanimously by [UN GA Resolution 70/1](#).

<sup>12</sup> This is the title (the main aim) of SDG 4.

*compulsory education to all; eliminating inequalities and disparities in education; migration and displacement; privatization and its impact on the right to education; financing of education; quality imperatives and valuing the teaching profession.*<sup>13</sup> One cannot help but wonder: does this data suggest that the normative framework on the right to education is in need of reinforcement?

Several stakeholders, including the UN Educational, Scientific and Cultural Organization ('UNESCO'), scholars and civil society actors have suggested that it is time to adapt the right to education – which was conceived more than half a century ago – to the challenges and changing realities of our world today. The areas in relation to which the normative framework on the right to education might be in need of expansion to ensure that everyone benefits from learning opportunities that empower them to thrive even in this ever-changing world have been identified as follows: express recognition of the concept and modalities of lifelong learning and the right to education throughout life, including early childhood / pre-primary education and adult upskilling and reskilling; strengthening education delivery and regulation for digital learning and non-state actors; reinforcing the rights of the most vulnerable; and an express recognition of the right to free education from pre-primary through secondary school.<sup>14</sup>

The present thesis sets out to explore the possible reinforcement/expansion of the right to education from two specific angles: early childhood/ pre-primary education<sup>15</sup> and secondary education. The choice for this particular focus was prompted by the world's limited progress in achieving targets 4.1 and 4.2 of Sustainable Development Goal (SDG) 4<sup>16</sup>, under which States have committed to ensure the completion of *free primary and secondary education as well as ensure access to quality early childhood development, care and pre-primary education*, by 2030. Comparing the data available on States' progress in achieving these commitments against their legal obligations under the international normative framework has prompted this author to undertake a deeper analysis of the contemporary scope of the right to education in relation to early childhood/ pre-primary and secondary education. Moreover, the present author's position as a right to education officer at the Global Initiative for Economic, Social and Cultural Rights has allowed her to become directly involved in the policy discourse unfolding

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<sup>13</sup> See UNESCO: 'What do you need to know about the right to education?', available at <https://www.unesco.org/en/articles/what-you-need-know-about-right-education> (last accessed 12/21/2023).; see also the UNESCO Institute for Statistics (UIS), the custodian agency for SDG 4 data, which develops the indicators and methodologies needed to track progress towards international education goals: <http://uis.unesco.org> (last accessed 2/9/2024).

<sup>14</sup> This considerations regarding expansion will be detailed under Chapter II.

<sup>15</sup> It is important to clarify that this author uses the term 'early childhood / pre-primary education' to signify learning that takes place in a formalized educational context before the official primary entry age.

<sup>16</sup> "Transforming our world: the 2030 Agenda for Sustainable Development", adopted unanimously by [UN GA Resolution 70/1](#).

at the United Nations Educational, Scientific and Cultural Organization ('UNESCO'), particular within its initiative on 'The Evolving Right to Education'<sup>17</sup>. Her work has also enabled her to participate in Human Rights Watch's initiative to 'expand the right to education to explicitly guarantee free education from pre-primary through secondary schooling'<sup>18</sup>. These factors have heavily determined her preference for choosing this theme for her thesis.

## II. Scope of the analysis

To explore the contemporary scope of the evolving right to education and States' concomitant duties regarding the aspects of early childhood/ pre-primary as well as secondary education, the author sought, as a first step, to interpret the right to education as set out in the primary sources of international law, particularly, in the texts of relevant international human rights treaties.

It is now generally accepted that human rights treaties must be interpreted in the light of the customary rules of international law pertaining to treaty interpretation, which are reflected, *inter alia*, in Articles 31-33 of the Vienna Convention on the Law of Treaties (VCLT, 1969)<sup>19</sup>. Although some of the treaties under scrutiny were concluded before the entry into force of the non-retroactive VCLT, its rules of interpretation are nonetheless applicable because of their customary law character.<sup>20</sup> According to the VCLT, any treaty interpreter should first look at a treaty's wording. As the starting point, Art. 31 (1) demands 'the *ordinary meaning* to be given to the terms of the treaty *in their context and in the light of its object and purpose*'.<sup>21</sup> It has been argued, that especially in the field of human rights, it may be difficult to arrive at an acceptable 'ordinary meaning' of terms due to the abstract nature of some concepts or the general and/or broad terminology applied in some treaty provisions.<sup>22</sup> The *context* of the term in need of interpretation comprises of the text of the treaty, including its preamble and annexes (Art. 31(2)) and other external sources, such as 'any agreement' by the parties made in connection with the conclusion of the treaty (Art. 31(2)(a)), and 'any instrument' made by the parties in connection with the conclusion of the treaty accepted by the other parties as such (Art. 31(2)(b)). In addition to the context, Art. 31(3) of the VCLT sets out three further parameters that shall be taken into account in the interpretative exercise: 'any

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<sup>17</sup> The description of this initiative is available on UNESCO's website: <https://www.unesco.org/en/right-education/evolving>.

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<sup>19</sup> Vienna Convention on the Laws of the Treaties, United Nations, *Treaty Series*, vol. 1155, p. 331. The VCLT was adopted in May 1969 and entered into force on 27 January 1980.

<sup>20</sup> Malgosia Fitzmaurice, ' Interpretation of Human Rights Treaties', in Dinah Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (2013; online edn, Oxford Academic, 16 Dec. 2013), <https://doi.org/10.1093/law/9780199640133.003.0032>, (accessed 1 Feb. 2024).

<sup>21</sup> Art. 31 VCLT ('General rule of interpretation')

<sup>22</sup> M. Fitzmaurice, (note 20 above).

*subsequent agreement* between the parties' regarding the interpretation or application of treaty provisions (Art. 31(3)(a)) (emphasis added); 'any *subsequent practice* in the application of the treaty *which establishes the agreement of the parties* regarding its interpretation' (Art. 31(3)(b)) (emphasis added); and 'any *relevant rules of international law* applicable in the relations between parties' (Art. 31(3)(c)) (emphasis added). These subparagraphs allow for an evolutive/ dynamic interpretation of treaty provision, that is for the taking into account of changing circumstances and social realities in the interpretative exercise. As Schlütter and Fitzmaurice point out, there is no accepted hierarchy between the rules contained in Article 31: it enlists various interpretative methods, and the practice of scholars and courts has also been to refer to or combine several elements of this Article to determine the actual meaning of a particular treaty provision.<sup>23</sup> In addition to the means of interpretation specified under Art. 31 VCLT, the interpreter may, under Art. 32, have recourse to 'the preparatory works' (or the '*travaux préparatoires*') of the treaty as a 'supplementary means of interpretation', to clarify the meaning and intent of its provisions, 'the ordinary meaning of which might otherwise be ambiguous or obscure'.<sup>24</sup> In interpreting the treaty provisions on the right to education, the present author has combined the above interpretational means.

In addition to scrutinising the hard law provisions of international treaties as primary sources, as a second step, the present author examines the core materials produced by the treaty bodies, particularly those of the Committee on Economic, Social and Cultural Rights ('CESCR'), the Committee on the Rights of the Child ('CCRC'), the Committee on the Elimination of Discrimination against Women ('CEDAW Committee') and the Committee on the Rights of Persons with Disabilities ('CCRPD'), as important secondary sources of the right to education under international law.

These treaty bodies, also called monitoring committees, are entrusted to supervise the implementation by State Parties of the rights guaranteed under their respective treaties. On the one hand, and in direct response to States Parties reports on compliance with the treaties<sup>25</sup>, the treaty bodies make suggestions and recommendations through issuing so-called Concluding Observations ('COs'). In such COs, treaty bodies acknowledge positive steps towards implementation taken by the State, but also identify areas of concern and make recommendations as to what needs to be done to give full effect to the treaty's provisions.<sup>26</sup>

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<sup>23</sup> B. Schlütter, "Aspects of human rights interpretation by the UN treaty bodies", in Keller, H. and Ulfstein, G. (eds) *UN Human Rights Treaty Bodies: Law and Legitimacy*. Cambridge: Cambridge University Press (Studies on Human Rights Conventions), pp. 295-296 <https://doi.org/10.1017/CBO9781139047593.007>, at p. 274., see also M. Fitzmaurice (note 22 above).

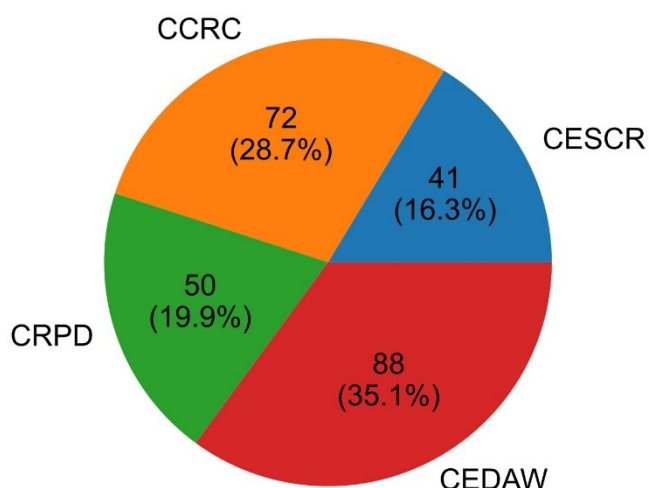
<sup>24</sup> Art. 32 VCLT

<sup>25</sup> The UN treaties require their States Parties to submit regular reports to treaty bodies on the measures they have taken and the progress they have made in implementing the treaties they have signed up to.

<sup>26</sup> See '[The United Nations Human Rights Treaty System, Fact Sheet No. 30 \(Rev.1\)](#)' (2012)

In subsequent periodic reports, State Parties are required by the treaty body to set out the concrete measures they have taken to implement previous recommendations.<sup>27</sup> Although not legally binding on the State Party, COs are nevertheless important insights into how the States Parties implement their obligations stemming from the UN treaties and how the treaty bodies understand the normative scope of State obligations in relation to the rights protected under those treaties. In this sense, they are important precursors regarding *subsequent State practice*, both in relation to Art. 31(3)(b) VCLT and the emergence of custom. Considering the foregoing, this author analyzed all together 248 Concluding Observations by the CESCR (n=41)<sup>28</sup>, the CCRC (n=71)<sup>29</sup>, the CEDAW Committee (n=88)<sup>30</sup> and the CRPD (n=48)<sup>31</sup> issued between the period of January 2018 and December 2022. As States are generally required to report on their compliance in one or two years after becoming party to a treaty, and in four- or five-year cycles thereafter<sup>32</sup>, it seemed sensible to focus on the most recent round or 5-year cycle of reporting to examine the treaty bodies' *contemporary* assessment of States'

**Number of COs by each treaty body reviewed  
2018 January - 2022 December**



compliance and to enable the identification of their contemporary and core concerns, as well as to highlight what is considered more peripheral or has not thus far received their attention. The full texts of the COs were initially searched for all references to the following terms: 'education', 'secondary', 'early childhood', 'preschool', 'pre-primary' and 'free'.

<sup>27</sup> Ibid.

<sup>28</sup> Concluding Observations issued by the CESCR between Jan 2018 and Dec 2022 can be accessed here: [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en)

<sup>29</sup> Concluding Observations issued by the CCRC between Jan 2018 and Dec 2022 can be accessed here: [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en)

<sup>30</sup> Concluding Observations issued by the CEDAW between Jan 2018 and Dec 2022 can be accessed here: [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en)

<sup>31</sup> Concluding Observations issued by the CRPD between Jan 2018 and Dec 2022 can be accessed here: [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en)

<sup>32</sup> See 'The United Nations Human Rights Treaty System, Fact Sheet No. 30 (Rev.1)' (2012). Under Article 17 of the ICESCR, States are required to submit their *initial reports within two years of the entry into force* of the Covenant. It does not establish a reporting periodicity but gives the Economic and Social Council discretion to establish its own reporting programme, according to which periodic reports should be submitted *every 5 years*. Under art. 44 of the CRC, States must report *initially within two years of the entry into force* of the Convention, *thereafter every five years*. Upon ratifying the CEDAW, States undertake to submit an *initial report* on the measures that adopted to give effect to the rights recognized in the Convention and on the progress made in ensuring their enjoyment *within one year after the entry into force of the Convention for that State and periodic reports every four years thereafter* and whenever the Committee so requests (art. 18 (1)). Under art. 35 of the CRPD, states parties are required to *submit a report within two years after the entry into force* of the Convention for the State Party, *thereafter at least every four years* and whenever the Committee requests.

Then, the context in which these terms appeared were examined in more detail to undertake a qualitative assessment.

On the other hand, treaty bodies produce so-called General Comments/Recommendations ('GC's/ GRs')<sup>33</sup>, which draw on their experience in monitoring State reports and distil their opinions and practice with respect to a number of rights and issues under their respective treaties.<sup>34</sup> Although not legally binding documents<sup>35</sup>, General Comments have sparked a lot of debate among scholars as to their legal significance.<sup>36</sup> One position holds, that General Comments themselves *constitute subsequent practice for purposes of Article 31(3)(b) VCLT*, or, alternatively, the acquiescence of States Parties to them does (that is, unless State Parties contest the content of these GCs, they should be regarded as subsequent practice).<sup>37</sup> According to another position, General Comments contain '*authoritative statements or interpretations of their treaties*, the term being variously defined.<sup>38</sup> Moreover,

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<sup>33</sup> While there were initial differences between recommendations and comments in terms of their length and formulation, practice in the treaty bodies has more or less converged and both descriptions are now used interchangeably; see C. Blake, [Normative Instruments in International Human Rights Law: Locating the General Comment](#), NYU Law, Center for Human Rights and Global Justice, Working Paper No. 17 (2008), 2–38, (last accessed: 1 February 2024); at p. 4.

<sup>34</sup> The treaty bodies are mandated to make general comments or recommendations under Article 45 (d) CRC, Article 21 CEDAW, Article 39 CRPD and regarding the CESCR, it is ECOSOC Resolution May 26, 1987, E/C. R/1989, at para. 9, which confers this function on the CESCR.

<sup>35</sup> As put by the Committee on International Human Rights Law and Practice of the International Law Association (ILA), this is so because "None of the human rights treaties explicitly confers on the relevant treaty bodies the power to adopt binding interpretations of the treaties, and the practice of at least some States suggest that this power has not been conferred implicitly, as part of the implied power that a body established by treaty is considered to possess in order to carry out the functions conferred on it by the States parties. At the same time, it can be accepted that the treaty bodies have, as a practical matter, the power to adopt interpretations of the treaty in question, since that is essential to their carrying out their functions." - ILA, Committee on International Human Rights Law and

Practice, [Final report on the impact of findings of the United Nations human rights treaty bodies](#), Berlin Conference 2014, at para 18 (last accessed 30 January 2024); See also U. Khaliq, and R. Churchill (2012) "The protection of economic and social rights: a particular challenge?," in H. Keller, and G. Ulfstein (eds) *UN Human Rights Treaty Bodies: Law and Legitimacy*. Cambridge: Cambridge University Press (Studies on Human Rights Conventions), pp. 199–260. DOI: <https://doi.org/10.1017/CBO9781139047593.006>, at p 205.

<sup>36</sup> See e.g. H. Keller, L. Grover (n.d.) (2012) "General Comments of the Human Rights Committee and their legitimacy", in H. Keller, and G. Ulfstein (eds) *UN Human Rights Treaty Bodies: Law and Legitimacy*. Cambridge: Cambridge University Press (Studies on Human Rights Conventions), pp. 116–198., <https://doi.org/10.1017/CBO9781139047593.005>, at p 128.; U. Khaliq, and R. Churchill (note 75 above) at p 205.; C. Blake (note 72 above); and K. Mechlem, 'Treaty Bodies and the Interpretation of Human Rights', *Vanderbilt Journal of Transnational Law* 42:3 (2009) 905–47, 926–31., available at: <https://scholarship.law.vanderbilt.edu/vjtl/vol42/iss3/4> (last accessed: 2/8/2024).

<sup>37</sup> In Its Final Report, the ILA raised the notion that "the findings of the UN human rights treaty bodies may constitute or generate subsequent practice establishing the agreement of the parties regarding interpretation of the relevant treaty, under Article 31(3)(b) of the VCLT" In this context the same Final Report also holds that "it appears arguable that in interpreting these types of treaties (with third-party beneficiaries and an independent monitoring mechanism), relevant subsequent practice might be broader than subsequent State practice and include the considered views of the treaty bodies adopted in the performance of the functions conferred on them by the States parties", see ILA Final Report (note 75 above) at paras 20., 22. See also H. Keller and L. Grover (note 76 above), at pp.128 and 130.

<sup>38</sup> However, certain States have objected to this position regarding GCs and rejected to the idea that the treaty body in question is 'the' authoritative interpreter of its respective treaty (e.g. the United Kingdom and the United States in relation to GC No. 33 (2008) of the Human Rights Committee). H. Keller and L. Grover (note 76 above), at pp.132-3.; see David McGrogan, 'On the Interpretation of Human Rights Treaties and Subsequent Practice' (2014) 32 *Netherlands Quarterly of Human Rights* 347-378., at p. 348., <https://doi.org/10.1177/016934411403200403>

some General Comments have also been described as “going beyond interpretation and appear to be *quasi-legislative* in nature”<sup>39</sup> (own emphasis). What is clear, however, is that General Comments are undoubtedly ‘secondary soft law instruments’, sources of non-binding norms that interpret and add detail to the rights and obligations contained in the respective human rights treaties and therefore are central to understanding human rights treaty obligations related to the right to education.<sup>40</sup> Therefore, the present author reviewed all the 98 General Comments/ Recommendations that have been issued by the CESCR (25 in total /3 relevant), the CCRC (26 in total/ 7+2 (joint GCs) relevant), the CEDAW Committee (39 in total / 2 relevant) and the CCRPD (8 in total / 1 relevant) to date. In order to reveal their findings related to the right to education with a specific focus on early childhood/pre-primary as well as secondary education, the full text of all 98 GCs/GRs were examined using the following search terms: “education”, “school”, “pre-primary”, “preschool”, “early childhood”, “secondary” and “free”.

In addition to the soft law instruments produced by the treaty bodies referred to above, a further source that informs the present analysis is the reports published under the mandate of the United Nations Special Rapporteur on the Right to Education (‘UNSR’ or ‘SRRE’). The Special Rapporteur is an independent human rights expert appointed by the United Nations Human Rights Council. First established in 1998 by resolution 1998/33 of the Commission on Human Rights for an initial period of three years, the mandate was most recently renewed in 2020 under resolution 44/3 of the Human Rights Council<sup>41</sup>. The SRRE, *inter alia*, gathers, requests, receives, and exchanges information from all relevant sources and stakeholders on the realization of the right to education and the obstacles limiting effective access to education, and makes recommendations to governments and other stakeholders on appropriate measures to promote and protect the right to education.<sup>42</sup> Her findings are published through annual reports to the Human Rights Council and the General Assembly. Special Rapporteurs’ reports have covered topical issues relating to the availability, accessibility, acceptability and adaptability of education at the different levels of education, from pre-primary to tertiary levels, including non-formal education systems<sup>43</sup> and have addressed the key challenges faced by disadvantaged groups and communities in realising their right to education. As such, these

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<sup>39</sup> Khaliq and Churchill suggest this by referring to CESCR General Comment No. 4 (1991) on the right to adequate housing and General Comment No. 15 (2002) on the right to water – see U. Khaliq, and R. Churchill (note 75 above), at p. 206.

<sup>40</sup> H. Keller and L. Grover (note 76 above), at pp 118,129.; U. Khaliq, and R. Churchill (note 75 above), at p.206. Alston has described the General Comment as the “means by which a UN human rights expert committee distills its considered views on an issue which arises out of the provisions of the treaty, whose implementation it supervises, and presents those views in the context of a formal statement....”, in Philip Alston, “The Historical Origins of ‘General Comments’ in Human Rights Law,” in Laurence Boisson De Charzournes and Vera Gowlland-Debbas (eds) , *The International Legal System in Quest of Equity and Universality* (2001) , p. 764.

<sup>41</sup> See Resolution 44/3 ([A/HRC/RES/44/3](#)) adopted by the Human Rights Council on 16 July 2020.

<sup>42</sup> See Commission on Human Rights resolution 1998/33, para 6 (a)

<sup>43</sup> <https://www.ohchr.org/en/special-procedures/sr-education>



soft law documents qualify as an important secondary source for understanding the right to education. Consequently, all 37 annual thematic reports adopted by the UNSR between 1998 and 2022<sup>44</sup> were analysed under this thesis with the help of using full text search for the phrases “preschool”, “pre-primary”, “early childhood”, “secondary” and “free”. Out of the 37 reports, the following 11 proved to be relevant for investigating the contemporary scope of the right to education regarding early childhood/ pre-primary as well as secondary education.

It is also important to mention that in the course of entangling the scope of the right to education and States entailing obligations as contemporaneously understood, the author relies on soft law instruments adopted or produced under the UN and/or the leadership of UNESCO, especially the 2030 Agenda for Sustainable Development and particularly Sustainable Development Goal 4, and the Incheon Declaration and Education 2030 Framework for Action.

Finally, where relevant, this author invokes the views or arguments of scholars who have written extensively on the topic of the right to education or more broadly, on economic, social and cultural rights, and whose writings and scholarly opinions, as secondary sources of international law, continues to assist the understanding of the international right to education.

## 1. Delimitations

The thesis also has its limitations. It does not draw upon the quasi jurisprudence of the UN treaty bodies under their individual communications procedures<sup>45</sup>, mainly because there are only very few decisions that touch upon the right to education. Those that indeed do touch upon it (there are no communications considering the right to education under the ICESCR and submitted to the CESCR, and only a few submitted to the CCRC and the CCRPD) none are relevant for purpose. Neither does it analyse the jurisprudence of international, regional courts, tribunals or bodies which have considered the right to education. Although this author acknowledges that the analysis of such resources would provide for an even richer and deeper interpretation of the contemporary scope of the right to education, particularly where the language of the relevant legal standards applied by these bodies approximates those of the ICESCR, CRC, CEDAW and CRPD, she finds it being beyond her research capacity to undertake such a review. Consequently, the thesis omits the systematic analysis of such

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<sup>44</sup> The UNSR's annual thematic reports may be accessed here: <https://www.ohchr.org/en/special-procedures/sr-education/annual-thematic-reports> [last access: 1/23/2023]

<sup>45</sup> See Optional Protocol to the International Covenant on Economic, Social and Cultural Rights on a Communications Procedure, adopted by General Assembly by resolution A/RES/63/117 of 10 December 2008., and  
Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, adopted by General Assembly resolution A/RES/66/138 of 19 December 2011.

resources and is primarily occupied with examining the contemporary scope of the international right to education through the sources detailed above.

## 2. Structure of the thesis

The thesis is divided into seven Chapters. **Chapter I** introduces the topic and lays out the background, methodology and structure of the thesis. **Chapter II** will introduce the discourses on the evolving dimensions of the right to education, followed by the introduction of the international and regional normative landscape concerning the right to education in **Chapter III**. **Chapters IV and V** will then delve into interpreting the scope of the right to education and concomitant State obligations regarding two important aspects of the right, namely, early childhood / pre-primary education and secondary education. **Chapter VI** will briefly consider the possible avenues for expanding or reinforcing the right to education under the international framework. Finally, the concluding **Chapter VII** will draw together the key findings and conclusions.

## III. Key findings

### 1. There is an implicit right to early childhood/pre-primary education under the international right to education that should be made more express

The main UN treaties that include provisions on the right to education *recognise* everyone's/ the child's/ persons with disabilities' *right to education* (the so-called general or basic right to education), name the *objectives that education should be directed towards*, and specify the *means* through which it shall be guaranteed (as well as safeguard for the liberty in education). The means or guarantees through which the basic right to education shall be realized and detailed under Article 13(2)(a)-(e) ICESCR, Article 28(1)(a)-(e) CRC and Article 24(1) and (2)(a)-(e) CRPD, *do not expressly include* provision of early childhood / pre-primary education. As this author has argued, this does not signify that the normative content of the right to education is exhausted only by those means that are provided in the texts of the above treaties. On the contrary: the right to education's normative content can and should be understood to allow for incorporation of additional guarantees and State obligations that will effectively assist the realization of the right to education for all. Thus, expanding the institutional framework in which States are obligated to guarantee the right to education to include the early childhood/ pre-primary level would undoubtedly contribute to the right to education's potential to achieve its fundamental goals for everyone.

Furthermore, the recognition that early childhood / pre-primary education plays a crucial role in the full development of all aspects of one's personality, abilities and talents, as

well as in enabling one's effective participation in a free society, both which are regarded as fundamental objectives of education under all the examined international treaties, provides a strong anchor for considering early childhood / pre-primary education as implicit under the right to education.

Additionally, the review of the UN treaty bodies interpretative (adoption of General Comments) and monitoring (adoption of Concluding Observations) practices also point to the conclusion, that early childhood / pre-primary education is implicit under the right to education and States Parties have implicit obligations to ensure such education. These obligations can be summarized as follows (1) ensuring that early childhood / pre-primary education is equally accessible to all (2) it is affordable to all (3) it is of quality (4) it is inclusive (5) it is adequately resourced (6) it is implemented progressively, to the maximum available resources (7) and the rights to equality and non-discrimination are observed throughout its realization.

In light of the above, this author argues that the soft-law sources examined for interpreting the right to early childhood/ pre-primary education in the present thesis, including the General Comments as well as the Concluding Observations of the treaty bodies, the annual reports of the Special Rapporteur as well as the SDG 4 and the frameworks adopted for its implementation, are all evidence on an on-going norm development at the international level. As such they serve as an important register for the potential expansion of the right to education.

## 2. The contemporary understanding of the right to secondary education is one that continues to view the introduction of free secondary education as a progressive obligation despite commitments under SDG 4

States' obligation to guarantee free secondary education under the text of the UN treaties is not an immediate, but a progressive duty. The ICESCR clearly obliges its States Parties to make secondary education accessible to everyone ("secondary education shall be made generally available and accessible") by making it *progressively* free ("in particular, by the *progressive introduction of free education*"). The CRC's corresponding provision is less strenuous, as it commits States "with a view to achieving this right *progressively*" to "*encourage the development of secondary education*", and the introduction of free education is only an example of the appropriate measures States Parties can take for making secondary education available and accessible to every child. What is clear from both these treaties' right to education provisions, however, is that the achievement of free secondary education should be accorded lesser priority (and urgency) by States than the realisation of free primary education. In 2015, all States committed under SDG 4 to "ensure that all girls and boys complete *free*, equitable and quality primary and *secondary education* [...], *by 2030*" (emphasis added). Undoubtedly, target 4.1 is the strongest articulation of free secondary

education compared to the language of the education provisions of the UN treaties and sets a clear timeframe of 15 years (that has started from 2015) for its full achievement. Therefore, this author argued that it should be working in tandem with the UN treaties' binding provisions on the right to education, *effectively limiting the progressivity of the realization of free secondary education to the year 2030*.

However, the review of four UN treaty bodies' (CESCR, CCRC, CCRPD and CEDAW) General Comments relevant for the consideration of the right to secondary education as well as of their Concluding Observations issued in the last five years concluded that even if the treaty bodies are ready to interpret progressive implementation of free secondary education in this manner, their comments and recommendations are not consistent and authoritative enough in this regard.

In fact, in their General Comments, the treaty bodies recommended the introduction of free and compulsory secondary education at least until the end of lower secondary school (usually 16 years of age). The CCRC has highlighted that the introduction of universal and free secondary education is the best way to ensure the immediate and long-term development of adolescents<sup>46</sup>; the CCRC and the CEDAW stressed that it is the most effective measure to protect children from early marriage and harmful practices<sup>47</sup> and against child labour<sup>48</sup>; and the CCRC, CEDAW Committee and CCRPD noted that it is the best way to ensure marginalized and/or vulnerable groups' access to education, including girl's and women's<sup>49</sup>, street children's<sup>50</sup>, indigenous children's<sup>51</sup> as well as disabled<sup>52</sup> children's access to education. The treaty bodies have generally interpreted the obligation to introduce free secondary education as a progressive one<sup>53</sup>. Interestingly, the CCRC has encouraged States in its General Comment No. 20 to "introduce widely available secondary education for all as a *matter of urgency*", but it has not called for introducing *free* secondary education as a matter of urgency. Importantly, all treaty bodies have consistently called on the elimination of both direct and indirect costs that are the main barriers to equal access to secondary education.

The review of Concluding Observations revealed that although treaty bodies frequently referenced SDG 4.1 in their recommendations to States Parties regarding their implementation of the right to education, they have seldom called on them or pushed them to

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<sup>46</sup> CCRC General Comment No. 20 (2016) on the implementation of the rights of the child during adolescence, at para 68.

<sup>47</sup> Joint General Comment No. 18 CCRC and Joint General Recommendation No. 31 CEDAW on harmful practices, at para 63.

<sup>48</sup> CCRC GC 20, at para 85.

<sup>49</sup> CEDAW General Recommendation No. 36 (2017) on the right of girls and women to education, at para 39 and 39 (a).

<sup>50</sup> CCRC General Comment No. 21 (2017) on children in street situations, para 54.

<sup>51</sup> CCRC General Comment No. 11 (2009) on Indigenous children and their rights under the Convention, at para 59.

<sup>52</sup> CCRPD GC No. 4, at paras 24 and 41.

<sup>53</sup> See e.g. CESCR GC No. 13

make secondary education free for all and have not in any case called expressly for the implementation of free secondary education immediately/as a matter of urgency, or by 2030. The reasons why the treaty bodies have decided to expressly address (free) secondary education in some States but not in others are difficult to gauge. One might argue that treaty bodies choose not to address secondary education in States where secondary education is already free and/ or where secondary school enrolment is nearly universal. Another explanation might be that it is unreasonable for the treaty bodies to push for free secondary education where States are already struggling to provide free and compulsory primary education because of their resource constraints. Moreover, it might as well be a conscious political choice by the treaty body to push for something else, especially where there are many pressing and potentially competing needs in the State under review. Alternatively, it is possible that the treaty bodies have not pushed for the realisation of free secondary education in a consistent manner because there is no express legal mandate in their respective treaties to this end<sup>54</sup>. Regarding the progressivity of introducing free secondary education, there is no clearly identifiable trend across the examined Concluding Observations that calls for a more immediate realization of free secondary education, or one that is limited in its progressivity (to 2030). Consequently, this author argues that the treaty bodies' interpretation of the progressive nature of the State obligation to guarantee free secondary education has not evolved, and the commitments made under SDG 4.1 regarding free secondary education, perhaps due to their non-binding nature, have not translated into a heightened effort on part of the treaty bodies to push for free secondary education with a 2030 "deadline". In fact, even when referencing or acknowledging the SDG 4.1 standard of free secondary education, the treaty bodies have not expressly pushed States to meet that goal.

In their reports on the right to education, the UN Special Rapporteurs have advocated *for universal secondary-level education for all* to ensure children keep up with the challenges posed by the globalized economy<sup>55</sup>, and crucially, have interpreted the right to free secondary education as implying not only the *elimination of direct costs, but also hidden costs of education*, such as textbooks, transportation, meals, as well as the costs of digital devices for education<sup>56</sup>. They have also argued for *lengthening the compulsory requirement of education into the secondary* stage to ensure children do not enter work or marriage too early and that they get a core education<sup>57</sup> that empowers them for adulthood. However, they have not put

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<sup>54</sup> This is in accordance with the argument of J. Todres and C. Alexander, 'Bringing the Right to Education in the 21<sup>st</sup> Century', Draft of Feb. 20, 2023, forthcoming in *Berkeley Journal of International Law*, vol 42:1 (2024) (pre-publication draft available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4391829](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4391829)).

<sup>55</sup> *The Post-2015 Education Agenda*, Report of the Special Rapporteur on the right to education, 2014, 68<sup>th</sup> session GA, [A/68/294](#), at para 113.

<sup>56</sup> *Impact of the digitalization of education on the right to education*, Report of the UNSR on education, 2022, at para 27.

<sup>57</sup> *The "4 As" framework, Progress report*, Special Rapporteur on the right to education, 2000, at para 46.

forward any recommendations regarding the progressivity of implementing free secondary education.

### 3. International soft law instruments, especially those produced in support of the implementation of SDG 4 bring added value for the further development of (the right to) education in international law

SDG 4, the Incheon Declaration and the Education 2030 Framework for Action<sup>58</sup> politically reaffirm the legal obligations that States have under human rights treaties. In fact, the SDGs expressly refer to human rights in their preamble – a huge improvement in comparison with its predecessor, the Millennium Development Goals (MDGs) – committing “to protect human rights and promote gender equality and the empowerment of women and girls”. It is suggested here that existing international human rights standards can and should be used to give binding force to SDGs, hence their referencing in the preamble. In turn, SDGs (as well as their operationalizing instruments) can and should be used to provide detailed content to the “broad-brush human rights guarantees”<sup>59</sup> under binding international norms. Importantly for the focus of this thesis, the content of SDG 4 differs from that of the right to education in some areas: early childhood / pre-primary education, and the progressive implementation of secondary education.<sup>60</sup>

Regarding the right to early childhood or pre-primary education, it is not (yet) included explicitly in contemporary international human rights law but features under target 4.2. of SDG 4 (by 2030 “ensure quality early childhood development, care, and pre-primary education”). With a view to implementing target 4.2., States have agreed to “introduce at least one year of free and compulsory quality pre-primary education”<sup>61</sup>. This has often been cited by the treaty bodies in their recommendations to specific States regarding their obligations in respect of early childhood/ pre-primary education.

Regarding free secondary education, target 4.1. of SDG 4 commits States to “by 2030, ensure that all girls and boys complete *free*, equitable and quality primary and *secondary* education [...]”. As discussed under Chapter V, the text of this target delineates a clear

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<sup>58</sup> See note 2 above; see also Incheon Declaration “Towards inclusive and equitable quality education and lifelong learning for all” was adopted during the World Education Forum in Incheon, (19-22 May 2015), Available at: [https://uis.unesco.org/sites/default/files/documents/education-2030-incheon-framework-for-action-implementation-of-sdg4-2016-en\\_2.pdf](https://uis.unesco.org/sites/default/files/documents/education-2030-incheon-framework-for-action-implementation-of-sdg4-2016-en_2.pdf) (last accessed 8 February 2024); SDG 4: Education 2030 Framework for Action ‘Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all’, adopted by UNESCO member states on 5 November 2015 in Paris. Available at: [https://uis.unesco.org/sites/default/files/documents/education-2030-incheon-framework-for-action-implementation-of-sdg4-2016-en\\_2.pdf](https://uis.unesco.org/sites/default/files/documents/education-2030-incheon-framework-for-action-implementation-of-sdg4-2016-en_2.pdf) (last accessed 8 February 2024).

<sup>59</sup> See Sandra Fredman, ‘The Right to Education’, *Comparative Human Rights Law* (Oxford, 2018; online edn, Oxford Academic, 20 Dec. 2018), <https://doi.org/10.1093/oso/9780199689408.003.0011>, at p 365.

<sup>60</sup> SDG 4 also introduces, for the first time in an international instrument, the right to lifelong learning, but as it falls outside the scope of this thesis, it is not discussed here.

<sup>61</sup> Education 2030 Framework for Action (note 53 above) at paras. 35–37.

deadline for States to achieve free secondary education, which is a step forward compared to the requirement of *progressive implementation* under the UN treaty provisions.

Arguably, the SDG 4 and its operationalizing instruments have a strong norm-generating potential in the above two areas. Because the texts of the specific targets under SDG 4 as well as the texts of the Incheon Declaration and Education 2030 Framework for Action received widespread endorsement from all regions of the world, it might as well be argued that they reflect a strong commitment and consensus on the part of the international community and thus might be understood as subsequent practice under Art. 31(3)(b) of the VCLT.

4. Any process seeking to expand or reaffirm the right to education to guarantee free education from the pre-primary through the secondary levels should be carefully thought through to ensure it does not result in a regression of existing legal guarantees

Nearly 60 years since the adoption of ICESCR, and 35 years since the adoption of the CRC, there is now wide consensus that access to free, quality and inclusive education from the early childhood/ pre-primary level through to secondary school is indispensable for thriving in the 21<sup>st</sup> century. However, the reality on the ground suggests that early childhood/pre-primary as well as the secondary school aspects of the right to education are not articulated clearly or expressly enough under current international law to fully guarantee their availability and accessibility free to all. It has been suggested that for this reason, it might be time to expand or reformulate the right to education under international law, to ensure there is more clarity and normative strengths regarding the precise content and nature of the State obligations regarding these two aspects of the right. Such an exercise might take various forms from norm-development through hard law to consolidating or clarifying norms through softer law type documents. Whichever process is given priority, it should be carefully thought through to ensure it truly strengthens rather than regresses the present legal framework on the international right to education.

## IV. Publications

Nyitray, Zsuzsanna “The Evolving Right to Education under the UN Human Rights Framework” in *ANNALES (UNIVERSITATIS SCIENTIARUM BUDAPESTINENSIS DE ROLANDO EÖTVÖS NOMINATAE SECTIO IURIDICA)*, TOMUS LX, Budapest 2021, pp 159-180. (Available at:

[https://www.ajk.elte.hu/dstore/document/3187/ELTE\\_AJK\\_Annales\\_2021\\_159-180.pdf](https://www.ajk.elte.hu/dstore/document/3187/ELTE_AJK_Annales_2021_159-180.pdf))

Nyitray, Zsuzsanna “The ECtHR' Jurisprudence on the Educational Segregation of Roma: A Children's Rights Perspective” in Liefwaard, Ton and Sloth-Nielsen, Julia (eds) *The United Nations Convention on the Rights of the Child. Taking Stock after 25 Years and Looking Ahead* (Brill | Nijhoff: 2016), pp 230-246., DOI: [https://doi.org/10.1163/9789004295056\\_014](https://doi.org/10.1163/9789004295056_014).

Nyitray, Zsuzsanna “A Gyermejjogi Egyezmény 3. Cikk 1. bekezdésének értelmezési és alkalmazási nehézségei” in: Fazekas Marianna (szerk.): *Jogi Tanulmányok 2012*. I-II. kötet: Az Eötvös Loránd Tudományegyetem Állam- és Jogtudományi Doktori Iskoláinak III. konferenciája, (Published: 20-Apr-2012), (Available at: [https://edit.elte.hu/xmlui/bitstream/handle/10831/35652/Jogi\\_tan\\_2012\\_2\\_Nyitray\\_Zsuzsanna\\_p\\_197-210.pdf](https://edit.elte.hu/xmlui/bitstream/handle/10831/35652/Jogi_tan_2012_2_Nyitray_Zsuzsanna_p_197-210.pdf))

Nyitray, Zsuzsanna “Az ENSZ Gyermejjogi Egyezménye és az Egyezményben biztosított jogok Érvényesülése”, in: Bencsik András és Fülöp Péter (szerk.) Pécsi Tudományegyetem Állam- és Jogtudományi Karának Doktori Iskolája, *JOGÁSZ DOKTORANDUSZOK I. PÉCSI TALÁLKOZÓJA. TANULMÁNYKÖTET* (Felelős kiadó: Dr. Kiss László, a Kari Doktori Iskola vezetője, Pécs 2011), pp 503-11. (Available at: [https://oszkdk.oszk.hu/storage/00/01/26/34/dd/1/Jog\\_sz\\_Doktoranduszok\\_I\\_P\\_csi\\_Talalkozaja\\_tanulmánykötet.pdf](https://oszkdk.oszk.hu/storage/00/01/26/34/dd/1/Jog_sz_Doktoranduszok_I_P_csi_Talalkozaja_tanulmánykötet.pdf))