



United Nations
Educational, Scientific and
Cultural Organization



Global
Education
Monitoring
Report

Background paper prepared for the 2017/8 Global Education Monitoring Report

Accountability in education: Meeting our commitments

Accountability from a human rights perspective: The incorporation and enforcement of the right to education in the domestic legal order

This paper was commissioned by the Global Education Monitoring Report as background information to assist in drafting the 2017/8 GEM Report, Accountability in education: Meeting our commitments. It has not been edited by the team. The views and opinions expressed in this paper are those of the author(s) and should not be attributed to the Global Education Monitoring Report or to UNESCO. The papers can be cited with the following reference: "Paper commissioned for the 2017/8 Global Education Monitoring Report, Accountability in education: Meeting our commitments". For further information, please contact gemreport@unesco.org.

Outline

Introduction.....	3
Human rights accountability	4
1. Understanding the right to education	6
2. The right to education in international law	7
2.1 Linking the right to education to Sustainable Development Goal Four.....	9
2.2 Monitoring and accountability of the right to education at the international level.....	18
2.3 International human rights mechanisms	19
2.4 Accountability and the right to education at the regional level.....	21
3. The right to education in national law	22
3.1 Giving effect to the right to education in the domestic legal order	22
3.2 Ratification / accession.....	23
3.3 Incorporation of international human rights treaties within the domestic legal order.....	24
3.3.1 Dualism	24
3.3.2 Monism.....	25
3.3.3 Hybrid/ Mixed	25
3.4 How to identify whether a ratified treaty has been incorporated directly or indirectly.....	26
3.5 Status of the treaty in the national legal order	27
3.6 Indirect / informal methods of implementation	28
3.7 Hierarchy of domestic laws	29
3.8 Sustainable development frameworks and economic and social rights.....	29
4. A justiciable right to education	30
4.1 Towards a justiciable right to education.....	31
4.2 How to identify whether the right to education is formally justiciable.....	32
4.3 Barriers to the justiciable right to education.....	35
5. Adjudicating the right to education	37
5.1 Legal accountability: One strategy among others for the enforcement and realisation of the right to education	37
5.2 A global survey of the justiciability of the right to education.....	38
5.3 The impact of court decisions on the realisation of the right to education	40
5.4 The limits and challenges of legal enforcement.....	43
5.5 Enabling conditions for the legal enforcement of the right to education.....	44
5.5.1 Beneficial enabling conditions for the legal enforcement of the right to education	46
6. Conclusion.....	49

Introduction

In 2015 the international community made a clear political commitment to education through the adoption of the 2030 Agenda for Sustainable Development² ('2030 Agenda') and Incheon Declaration and Framework for Action.³ Whilst this commitment is laudable and expected to drive significant change, it is not legally binding for Member States, in contrast to States extant legal obligations under international human rights law to implement the right to education.

The fact that States commit both politically and legally to education does not mean that measures taken to comply with the realisation of either are mutually exclusive. Rather, these commitments aggregate and interact with each other, requiring States to ensure that efforts taken to achieve Education 2030 (Sustainable Development Goal Four and the Incheon Declaration and Framework for Action) and the broader 2030 Agenda are human rights compliant. This applies to both the normative content⁴ of such measures and the processes that underpin their formulation and implementation. The 2030 Agenda recognises this and is a political reaffirmation of States' legal commitments to human rights.⁵

One of the biggest criticisms of the 2030 Agenda is the weakness of inbuilt accountability mechanisms. The architecture of the 2030 Agenda establishes voluntary 'follow-up and review' processes at the national, regional, and global levels designed to promote accountability. However, the onus is on States—although there is no formal obligation—to establish effective, inclusive, participatory, and transparent accountability mechanisms at the national and regional levels as 'national ownership is key to achieving sustainable development'.⁶ This lack of entrenched accountability is a concern from a human rights perspective as it may lead to negative human rights impacts. For example, States may implement laws and policies that prioritise economic growth to the detriment of human rights enjoyment or it may discourage States from addressing systemic education issues primarily affecting marginalised groups.

Part of the reason there is concern over the weakness of external processes to hold States to account is because in many States (across income levels) domestic conditions are not, in general, conducive to accountability in matters of public policy. Accountability, as a global governance issue, is itself addressed in the 2030 Agenda

¹ Work was completed by the Right to Education Project, a project of ActionAid International. The Right to Education Project is now known as the Right to Education Initiative, a global human rights organisation focusing on the right to education. For more information, see our website www.right-to-education.org. This report was written by Erica Murphy with contributions from Delphine Dorsi. Special thanks to Sara Clarke and Samara Hand for their research support and valuable contributions to this report, David Archer for his insightful comments, and Viv Griffith for proofreading. Lastly, thank you to Advocates for International Development and White & Case for their generous *pro bono* work in providing the case summaries used throughout this report.

² United Nations General Assembly (UNGA). Resolution 70/1 (21 October 2015). (Doc. A/RES/70/1.)

³ UNESCO *et al.* 2015. *Education 2030 Incheon Declaration and Framework for Action: Towards Inclusive and Equitable Quality Education and Lifelong Learning for All* (adopted 22 May 2015). (Doc. ED-2015/Education2030/1.) Available at www.right-to-education.org/resource/education-2030-incheon-declaration-and-framework-action (Accessed 28 September 2017.)

⁴ See table 1.

⁵ UNGA, *op. cit.*, para. 8.

⁶ UNESCO *et al.*, *op. cit.*

under Goal 16.⁷ A human rights-based approach offers insights and practical solutions to address the accountability deficits found in both public policy decision-making and implementation, and the 2030 Agenda itself.

Human rights accountability

Human rights are fundamental and universal rights that inform the normative standards to which all societies should adhere. They have two facets: the normative content owed to rights-holders and the corresponding obligations of duty-bearers. Human rights accountability is therefore concerned with rights-holders' ability to hold duty-bearers to account according to their obligations and should be understood as continuously underpinning this relationship.

Duty-bearers must act *ex ante* to mitigate possible negative human rights impacts; duty-bearers must ensure that decision-making on matters affecting rights-holders complies with human rights principles, such as transparency and participation; and rights-holders must have the opportunity to have violations and grievances addressed and remedied *ex post facto*.

According to the Office of the High Commission for Human Rights and the Center for Economic and Social Rights, accountability from a public policy perspective as applied to the 2030 Agenda requires that those in authority have defined *responsibilities*, are *answerable* for actions regarding those responsibilities, and must be subject to forms of *enforceable* sanctions or remedial action for failures to carry out those responsibilities.⁸ The human rights framework strengthens all three dimensions of accountability.

Human rights designate and delineate substantive *responsibilities* under international human rights law. It identifies duty-bearers and the rights-holders, the relationship between them, including the normative content owed to rights-holders and the nature of the obligations of duty-bearers regarding that content.⁹

Human rights principles, such as *transparency*¹⁰ and *participation*,¹¹ inform the mechanisms, processes, and conditions under which decisions affecting rights-holders are made such that duty-bearers are *answerable* for these decisions.

Lastly, human rights law provides a framework that specifies the rights (access to justice, right to a fair hearing and an effective remedy) and mechanisms (judicial and administrative) that provide for avenues of redress for victims of violations to have their right to education and related rights *enforced*.

⁷ UNGA. Resolution 70/1 (21 October 2015). (Doc. A/RES/70/1.) Target 16.3: 'Promote the rule of law at the national and international levels and ensure equal access to justice for all,' 16.6: 'Develop effective, accountable and transparent institutions at all levels,' 16.7: 'Ensure responsive, inclusive, participatory and representative decision-making at all levels,' and 16.10: 'Ensure responsive, inclusive, participatory and representative decision-making at all levels.'

⁸ United Nations Office of the High Commission for Human Rights (OHCHR) and Center for Economic and Social Rights (CESR). 2013. *Who Will Be Accountable—Human Rights and the post-2015 Development Agenda*. New York and Geneva, p. 15. (Doc. HR/PUB/13/1.)

⁹ *Ibid.*, p. ix.

¹⁰ See, for example, the RTE's *Guide to Monitoring the Right to Education Using Indicators - Transparency*. Available at www.right-to-education.org/monitoring/guide/52-transparency (Accessed 10 November 2016.)

¹¹ See, for example, *Ibid.*, *Participation*. Available at www.right-to-education.org/monitoring/guide/53-participation (Accessed 10 November 2016.)

The aim of this paper is to reframe States' political commitment to education under Education 2030 as a legal commitment the vast majority of States have already made under international human rights law. By recasting the content of SDG Four as part of the right to education, the legal obligations owed to that content can be invoked. This renders various elements of SDG Four, if the State in question has legally committed to the right to education and incorporated the right to education in their domestic legal orders, amenable to adjudication by competent mechanisms, offering the possibility of legal accountability through legal enforcement.

Legal enforceability is the most salient feature of human rights. This is not simply because human rights are legal rights—although this status is the basis for how human rights are enforced—but also due to their content. Article 8 of the Universal Declaration of Human Rights (1949)¹² provides: 'Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.' This means that judicial and administrative mechanisms can make a determination as to whether a State (or other duty-bearer) has complied with its human rights obligations, and hold them to account by assigning responsibility and imposing sanctions for violations and transgressions, and ensure that appropriate corrective and remedial action is taken when required.¹³

There is no doubt that the 2030 Sustainable Development Agenda will focus the efforts of States and provide global political impetus for action over the next 13 years. However, human rights, particularly economic and social rights, must not be neglected in the process, in fact they should be promoted. The best strategy for realising Education 2030 is the full implementation of the right to education and the promotion of the conditions required to enforce it. Human rights accountability mechanisms can then be leveraged for increased accountability of States in implementing their Education 2030 commitments. However this requires a special set of legal and institutional conditions whereby States have domesticated their international human rights commitments through the adoption of 'effective laws, policies, institutions, procedures, and mechanisms of redress that ensure delivery of entitlements and redress for denials and violations.'¹⁴

This paper focuses on the following questions:

1. What is the right to education and what is its relationship with SDG Four?
2. How do States implement the right to education at the international and national levels?
3. What is justiciability and what are the barriers to a justiciable right to education?
4. How has the right to education been adjudicated?
5. What are the enabling conditions that allow for the adjudication of the right to education?
6. What have been the impacts of adjudication on the realisation of the right to education?

¹² UNGA. Res 217 A(III). Universal Declaration of Human Rights (adopted 10 December 1948) (UDHR).

¹³ OHCHR and CESR. 2013. *Who Will Be Accountable—Human Rights and the post-2015 Development Agenda*. New York and Geneva, p. 10. (Doc. HR/PUB/13/1.)

¹⁴ Alston, P. and Goodman, R. 2012. *International Human Rights*, 2nd edn. Oxford, Oxford University Press, p. 55.

1. Understanding the right to education

International human rights law sets the normative standards of conduct of States towards their citizens and non-citizens¹⁵ alike. The international human rights regime consists mainly of two sources of international law: customary law¹⁶ and treaty law. This paper focuses on the right to education in human rights treaty law.¹⁷

Strictly speaking, human rights treaties (also known as ‘covenants’, ‘conventions’, or ‘charters’) are multilateral agreements between States (horizontal application), however the normative content of a human rights treaty is directed and owed to the people living in the jurisdiction of the State party (vertical application). This arrangement eschews the typical enforcement mechanisms generally associated with treaties (State interference through economic or military means). Human rights treaties therefore require domestication, that is, they must be incorporated into the domestic legal order of the State party in order to ensure enjoyment by rights-holders.

In addition, soft law instruments (so-called because they are not legally binding), such as declarations, guidelines, resolutions, general comments, and principles play a role in shaping, expanding, and clarifying international human rights law.

At the international level there are nine core UN human rights treaties,¹⁸ as well as instruments adopted by various UN agencies, such as UNESCO¹⁹ and the ILO.²⁰

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

¹⁵ OHCHR. 2006. *The Rights of Non-Citizens*. (Doc. HR/PUB/06/11.)

¹⁶ Statute of the International Court of Justice (adopted June 26 1945, entered into force 24 October 1945) 33 UNTS 993 (ICJ Statute) Article 38 (1) (b).

¹⁷ The content of the right to education in customary international law is contested, as is whether the right to education is part of customary international law. For further information, see, for example Beiter, K. D. 2006. *The Protection of the Right to Education in International Law*. Leiden, Martinus Nijhoff Publishers, pp. 44-46.

¹⁸ International Convention on the Elimination of All Forms of Racial Discrimination (1965); International Covenant on Civil and Political Rights (1966); International Covenant on Economic, Social and Cultural Rights (1966); Convention on the Elimination of All Forms of Discrimination against Women (1979); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984); Convention on the Rights of the Child (1989); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990); International Convention for the Protection of All Persons from Enforced Disappearance (2006); Convention on the Rights of Persons with Disabilities (2006).

¹⁹ See the following list of UNESCO conventions

http://portal.unesco.org/en/ev.php-URL_ID=12025&URL_DO=DO_TOPIC&URL_SECTION=-471.html (Accessed 9 October 2017.)

²⁰ See the following list of ILO conventions www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12000:0::NO:: (Accessed 14 September 2017.)

Education is also protected in other regimes of international law, for instance, humanitarian law,²¹ refugee law,²² and international criminal law.²³

2. The right to education in international law

Various aspects of the right to education are protected in at least 42 international and regional instruments, including in seven of the nine core UN human rights treaties.²⁴ Every State has legally committed to the right to education, through ratification of at least one human rights treaty guaranteeing the right to education.

International human rights law delimits the normative content of the right to education (owed to rights-holders) and the legal obligations attached to implementing the normative content (the corresponding obligations of duty-bearers).

The right to education is most comprehensively laid out in Articles 13 and 14 of the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966).²⁵ Its normative content includes:

- the aims of education
- free and compulsory primary education
- available and accessible secondary education (including technical and vocational education and training) made progressively free
- equal access to higher education on the basis of capacity made progressively free
- fundamental education for those who have not received or completed primary education made progressively free
- quality education both in public and private schools
- freedom of parents to choose schools for their children in conformity with their religious and moral convictions
- freedom of individuals and bodies to establish and direct education institutions in conformity with minimum standards established by the State
- academic freedom of teachers and students

The normative content of the right to education is expounded by the body responsible for the authoritative interpretation of a given treaty, such as courts (in the case of regional instruments) or UN treaty bodies. These bodies use various schema to interpret right to education provisions, the most widely used being the 4As framework.²⁶ Education must be:

- *Available* in sufficient quantity

²¹ See, for example, RTE's page *Education in Emergencies* www.right-to-education.org/issue-page/education-emergencies. (Accessed 14 September 2017.)

²² See, for example, RTE's page *Migrants, Refugees, and Internally Displaced Persons* www.right-to-education.org/issue-page/marginalised-groups/migrants-refugees-and-internally-displaced-persons (Accessed 9 October 2017.)

²³ See, for example, RTE's page *Education in Emergencies* www.right-to-education.org/issue-page/education-emergencies (Accessed 9 October 2017.)

²⁴ For States parties to human rights treaties, see, for example <http://indicators.ohchr.org/> (Accessed 9 October 2017.)

²⁵ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR). Available at www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/ICESCR_1966_en.pdf (Accessed 18 September 2017.)

²⁶ See RTE. 2001. *Project Primer 3: Human Rights Obligations: Making Education Available, Accessible, Acceptable and Available* and UN Committee on Economic, Social and Cultural Rights (CESCR). 1999. *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)*, para. 6. (Doc. E/C.12/1999/10.) (CESCR General Comment 13)

- *Accessible* to everybody without discrimination
- *Acceptable*, that is, the form and substance must be appropriate and of good quality
- *Adaptable*, so that it is able to meet the unique needs of individual students

In addition, there are numerous right to education provisions in international law laying out the content of the right to education as applied to different groups and in different circumstances,²⁷ for instance the Convention on the Elimination of All forms of Discrimination against Women (1979) calls on State parties to eliminate gender stereotypes in learning materials.²⁸ Regional instruments address the human rights issues common to a region, for example the African Youth Charter (2006) provides that education curricula should include issues such as HIV, reproductive health, substance abuse, and cultural practices harmful to the health of girls.²⁹

Human rights treaties also ascribe legal obligations to the normative content of each provision. Under the ICESCR these are: immediate obligations, minimum core obligations, and progressive realisation.

Obligations of immediate effect are unqualified and not limited by other considerations. *Vis-à-vis* the right to education, obligations of immediate effect include:

- ensure the right to education is exercised free from discrimination of any kind
- provide free and compulsory primary education. If this is not immediately possible States must work out and adopt a plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all
- take ‘deliberate, concrete and targeted’ steps towards the full realisation of the right to education

The obligations to secure the right to education free from discrimination and to provide free and compulsory primary education are also minimum core obligations of the right to education. Minimum core obligations prioritise certain content of the right to education, without which rights-holders are considered to be deprived of the right to education. They include:

- ensure that education conforms to the aims of education
- adopt and implement a national educational strategy that includes provision for secondary, higher, and fundamental education (youth or adult basic education, or education that replaces missed or incomplete primary education)
- ensure the free choice of education without interference from the State or third parties, subject to conformity with ‘minimum educational standards’
- ensure the right of access to public educational institutions and programmes on a non-discriminatory basis
- guarantee free and compulsory primary education

The remaining content of the right to education is subject to progressive realisation according to maximum available resources. This is because certain aspects of the right to education can only realistically be achieved over a period of time, particularly for States with fewer resources, for example, the introduction of free secondary (including technical and vocational), higher, and fundamental education. Although progressive realisation means that obligations are subject to time and available resources, States are obliged to ‘move as

²⁷ See, for example, RTE’s page *United Nations Instruments* www.right-to-education.org/page/united-nations-instruments (Accessed 9 October 2017.)

²⁸ Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW). Available at www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/CEDAW_1979.pdf (Accessed 30 November 2016.)

²⁹ African Youth Charter (adopted 2 July 2006, entered into force 8 August 2009) Article 13(3)(f).

expeditiously and effectively as possible' towards the full realisation of the right to education.³⁰ This implies that States should not take backwards steps or adopt measures that will repeal existing guarantees of the right to education. For instance, arbitrarily ending adult fundamental education programmes that provide those who have never received or completed primary education with a good quality substitute, or the unjustified year-on-year reduction of resources allocated to education, would both constitute retrogressive measures.

One commonly used analytical tool for clarifying human rights obligations is the 'tripartite typology'³¹ consisting of the obligations to respect, protect, and fulfil:³²

- the obligation to *respect* requires the State refrain from interfering with the enjoyment of the right. For example, the State must respect the liberty of parents to choose schools for their children
- the obligation to *protect* requires the State to prevent others from interfering with the enjoyment of the right usually through regulation and legal guarantees. For example, the State must ensure that third parties, including parents, do not prevent girls from going to school, and States must set or approve minimum education standards for private schools, and ensure compliance with those standards
- the obligation to *fulfil* requires the State to adopt legislative, administrative, budgetary, judicial, and other appropriate measures towards the full realisation of the right to education. For example, the State must take positive measures to ensure that education is culturally appropriate for minorities and Indigenous Peoples, and of good quality for all

2.1 Linking the right to education to Sustainable Development Goal Four

The normative content of Sustainable Development Goal Four (SDG Four) and its associated targets is largely aligned with the right to education normative framework.³³ Below is a table linking the normative content of SDG Four and the right to education. The table shows the direct relationship between each of the targets (4.1-4.7) and means of implementation (4.a-4.c) with provisions in international human rights law, as well as the more general relationships and human rights issues.

By recasting the content of SDG Four as part of the right to education, the legal obligations owed to that content can be invoked, rendering various elements of SDG Four—if the State in question has legally committed to the right to education—amenable to adjudication. This reframes States' political commitments as legal commitments offering the possibility of legal accountability.

It should also be noted that States, in implementing their political commitments to SDG Four, should do so in a manner which respects their obligations of immediate effect and progressive realisation, and minimum core obligations. For example, the obligation to ensure free education at the primary level (target 4.1) and to ensure equal access to education in a non-discriminatory manner (targets 4.1-4.3, 4.5-4.6, 4.a-4.b) are both minimum core obligations and obligations of immediate effect, meaning these aspects of SDG Four must be prioritised in development policies. For content subject to progressive realisation, such as target 4.1 which requires the completion of free secondary education, SDG Four effectively creates a 15 year time limit.

³⁰ CESCR. 1990. *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, para. 9. (Doc. E/1991/23.) (CESCR General Comment 3)

³¹ See for example: Koch, I.E. 2005. Dichotomies, Trichotomies or Waves of Duties. *Human Rights Law Review*, Vol. 5, No. 1, pp. 81-103.

³² For further information on the tripartite typology see, CESCR General Comment 13, paras. 46-48 & 50.

³³ For further information on Education 2030 and the right to education, see www.right-to-education.org/issue-page/education-2030 (Accessed 14 January 2017.)

Table 1. Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all

Target	Relationship to the right to education and human rights law	Human rights issues
4.1 By 2030, ensure that all girls and boys complete free, equitable and quality primary and secondary education leading to relevant and effective learning outcomes	<p>Free education³⁴</p> <ul style="list-style-type: none"> • ICESCR (Article 13(2)(a)) and CRC³⁵ (Article 28(1)(a)) state that primary education shall be free and compulsory. • At the secondary level education shall be made progressively free (ICESCR Article 13(2)(b); CRC Article 28(1)(b)). Target 4.1 effectively creates a 15-year deadline for the progressive realisation of the right to free secondary education. <p>Quality education³⁶</p> <ul style="list-style-type: none"> • Quality education is a dynamic concept, however, international human rights law provides a general legal framework: <ul style="list-style-type: none"> ○ The UNESCO CADE³⁷ is the only human rights treaty to refer specifically to quality education (Articles: 1(2), 2(a), & 4(b)). ○ According to CESCR, in its interpretation of Article 13, education must be ‘acceptable’ and ‘adaptable’ (General Comment 13). ○ Human rights treaties that guarantee the right to education also refer to quality education when defining the aims of education (ICESCR Article 13(1); CRC Article 29(1)) which impact on the content of education, teaching and learning processes and materials, the learning environment and learning outcomes. <p>Non-discrimination and inclusive education</p> <ul style="list-style-type: none"> • Equality and non-discrimination are fundamental principles underpinning the right to education. There is an entire convention dedicated to discrimination in education: CADE. In addition, 	<p>The right to free primary education in international law is complemented by the fact that it shall be compulsory, which this target does not expressly provide for, although it may be implied by the reference to completion of education. The compulsory nature of primary education ensures that parents, the State, and the child himself/herself cannot act to interfere with the right to primary education. See CESCR General Comment 11⁴⁵ for further information.</p> <p>‘Equitable’ and ‘equity’ are not legal terms. Human rights law generally refers to ‘equality’ or ‘non-discrimination’. As Margaret Satterthwaite points out: ‘While equity may denote justice to many, it also carries with it the possibility of diluting the rights claims of those who suffer inequality as a result of discrimination.’</p>

³⁴ For human rights standards related to free education, see, for example www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/RTE_International_Instruments_Free_and_Compulsory_2014_en.pdf (Accessed 14 January 2017.)

³⁵ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC). Available at www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/CRC_1989.pdf (Accessed 18 September 2017.)

³⁶ For human rights standards related to quality education see, for example www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/RTE_International_Instruments_Quality_Education_2014.pdf (Accessed 6 October 2017.)

³⁷ UNESCO Convention against Discrimination in Education (adopted 14 December 1960, entered into force 14 December 1960) 429 UNTS 93 (CADE).

⁴⁵ CESCR. 1999. *General Comment No. 11: Plans of Action for Primary Education (Article 14 of the International Covenant on Economic, Social and Cultural Rights)*. (Doc. E/C.12/1999/4.) Available at www.right-to-education.org/resource/cescr-general-comment-11-plans-action-primary-education (Accessed 10 October 2107.)

	<p>each human rights treaty has a standalone non-discrimination and equality clause:</p> <ul style="list-style-type: none"> ○ ICESCR Article 2 ○ ICCPR³⁸ Article 2(1) ○ CEDAW Articles 1-5 ○ CRC Article 2 ○ CRPD³⁹ Articles 5 & 6 ○ ICERD⁴⁰ Articles 1-3 ○ ICRMW⁴¹ Article 1(1) ○ UNDRIP⁴² Article 2 ○ Refugee Convention⁴³ (as applied through the ratification of the Protocol)⁴⁴ Article 3 <ul style="list-style-type: none"> ● In addition, human rights treaties apply equality and non-discrimination to the right to education for specific marginalised groups: <ul style="list-style-type: none"> ○ CRC Articles 28 & 29 ○ CEDAW Article 10 ○ CRPD Article 24 ○ ICERD Article 7 ○ ICRMW Articles 30, 43(1) & 45(1) ○ UNDRIP Article 14 ○ Refugee Convention Article 22 	<p>Furthermore, some understandings of the term equity have the potential to directly undermine human rights.⁴⁶</p> <p>The global indicator for this target reduces learning outcomes to reading and mathematics proficiency. Whilst these are important skills, the right to education provides a broader understanding of the aims of education: ‘The development of the child's personality, talents and mental and physical abilities to their fullest potential’ (CRC Article 29(1)(a)).</p>
<p>4.2 By 2030, ensure that all girls and boys have access to quality early childhood development, care and pre-primary education so that they are ready for primary education</p>	<p>Non-discrimination in access to pre-primary education</p> <ul style="list-style-type: none"> ● Article 10(a) of CEDAW provides that equality between men and women in the field of education shall be ensured in pre-school. ● Article 30 of the ICRMW states that access to public pre-primary schools or institutions shall not be refused or limited on the basis of irregular status. ● Article 1(a) of CADE prohibits discrimination in access to education at all levels and types. <p>Aims of education</p>	<p>The right to education applies regardless of age. However, pre-primary education is not an explicit right under international law. International law does however prohibit discrimination in access to all levels of education, including pre-primary (see left). In contrast, the entitlement to early</p>

³⁸ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR). Available at www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/ICCPR_1966.pdf (Accessed 18 September 2017.)

³⁹ Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (CRPD). Available at www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/CRPD_2006_en.pdf (Accessed on 18 September 2017.)

⁴⁰ International Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 195 (ICERD).

⁴¹ International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3 (ICRMW).

⁴² UNGA. Resolution 61/295. United Nations Declaration on the Rights of Indigenous Peoples (adopted 2 October 2007). (Doc. A/RES/61/295.) (UNDRIP).

⁴³ Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).

⁴⁴ Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 (Protocol).

⁴⁶ Satterthwaite, M. 2012. *Background Note on MDGs, Non-Discrimination and Indicators in Water and Sanitation*, p. 11.

	<ul style="list-style-type: none"> Paragraph 28, CRC General Comment 7⁴⁷ reads: ‘The Committee interprets the right to education during early childhood as beginning at birth and closely linked to young children’s right to maximum development (Article 6(2), CRC). Linking education to development is elaborated in article 29(1): “States parties agree that the education of the child shall be directed to: (a) the development of the child’s personality, talents and mental and physical abilities to their fullest potential”. General Comment 1 on the aims of education explains that the goal is to “empower the child by developing his or her skills, learning and other capacities, human dignity, self-esteem and self-confidence” and that this must be achieved in ways that are child-centred, child-friendly and reflect the rights and inherent dignity of the child (paragraph 2).’ 	<p>childhood care has been recognised in international law. Article 18(3) of the CRC states: ‘children of working parents have the right to benefit from child-care services and facilities for which they are eligible.’ Article 24 of the CRC makes a link to the right to education: to pursue the full implementation of the right to health, States are required to take appropriate measures, including ensuring that all segments of society have access to education.</p>
<p>4.3 By 2030, ensure equal access for all women and men to affordable and quality technical, vocational and tertiary education, including university</p>	<p>Technical and Vocational Education and Training (TVET)⁴⁸</p> <ul style="list-style-type: none"> TVET forms part of both the right to education and the right to work (ICESCR Articles 13(2)(c) & 6(2)). It applies to all levels of education (CESCR General Comment 13, para. 15) and should be understood as a component of general education (CESCR General Comment 13, para. 16). CEDAW applies TVET to women and girls in Articles 10(a), 11(1)(c), & 14(2)(d). CRC reaffirms the ICESCR in Article 28(1)(b)(d) and includes the provision to: ‘Make educational and vocational information and guidance available and accessible to all children.’ The CRPD prohibits discrimination in access to vocational education and requires States to ensure reasonable accommodation is provided for persons with disabilities (Article 24(5)). In addition, instruments by UN agencies provide frameworks for TVET policies, e.g., UNESCO Convention on Technical and Vocational Education⁴⁹ and ILO Convention on Human Resources Development (C142).⁵⁰ <p>Tertiary education:</p>	<p>Technical, vocational, and tertiary education should, under human rights law, be made progressively free. Whilst ‘affordable’ is acceptable if it cannot be made free due to resource constraints, the appropriate target should be to progressively eliminate all costs in order to ensure equal access.</p> <p>According to the ICESCR, CRC, and CADE higher education should be made equally accessible to all on the <i>basis of capacity</i>. Paragraph 19, CESCR General Comment 13, states: ‘The “capacity” of individuals should be assessed by reference to all</p>

⁴⁷ UN Committee on the Rights of the Child. 2005. *General Comment No. 7: Implementing Child Rights in Early Childhood*. (Doc. CRC/C/GC/7/Rev.1.)

⁴⁸ For human rights standards related to technical and vocational education and training, see, for example www.right-to-education.org/issue-page/issues/adult-education-and-learning (Accessed 17 September 2017.)

⁴⁹ UNESCO Convention on Technical and Vocational Education (adopted 10 November 1989, entered into force 29 August 1991) 1649 UNTS 144.

⁵⁰ ILO Convention 142: Human Resources Development Convention (Convention concerning Vocational Guidance and Vocational Training in the Development of Human Resources) (adopted 23 Jun 1975, entered into force 19 Jul 1977).

	<ul style="list-style-type: none"> • The right to equal access to tertiary education, is guaranteed in the following treaties: <ul style="list-style-type: none"> ○ ICESCR Article 13(2)(c) ○ CRC Article 28(1)(c) ○ CADE Article 4(a) ○ CRPD Article 24(5) 	<p>their relevant expertise and experience.’</p>
<p>4.4 By 2030, substantially increase the number of youth and adults who have relevant skills, including technical and vocational skills, for employment, decent jobs and entrepreneurship</p>	<p>Technical and vocational education and training</p> <ul style="list-style-type: none"> • See TVET provisions in target 4.3. • In addition, CRPD Article 23(3) recognises that assistance for disabled children, ‘shall be designed to ensure that the disabled child has effective access to and receives education, training... preparation for employment...in a manner conducive to the child’s achieving the fullest possible social integration and individual development...’ <p>Right to work</p> <ul style="list-style-type: none"> • According to ICESCR Article 6(2), the right to work includes: ‘technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.’ 	<p>The goal to ‘substantially increase’ is vague. All people should have the opportunity, free from discrimination, to receive a quality education that imparts relevant skills.</p> <p>Although skills for employment, decent jobs, and entrepreneurship are extremely important in a development context, the skills as set-out in paragraph 9, CRC General Comment 1⁵¹ on the aims of education, should not be neglected: ‘Education must also be aimed at ensuring that essential life skills are learnt by every child and that no child leaves school without being equipped to face the challenges that he or she can expect to be confronted with in life. Basic skills include not only literacy and numeracy but also life skills such as the ability to make well-balanced decisions; to resolve conflicts in a non-violent manner; and to develop a healthy lifestyle, good social relationships and responsibility, critical thinking, creative talents, and other abilities which give children the tools</p>

⁵¹ UN Committee on the Rights of the Child. 2001. *General Comment No. 1: The Aims of Education*. (Doc. CRC/GC/2001/1.) Available at www.right-to-education.org/resource/crc-general-comment-1-article-29-1-aims-education (Accessed 10 October 2017.)

		needed to pursue their options in life.’
4.5 By 2030, eliminate gender disparities in education and ensure equal access to all levels of education and vocational training for the vulnerable, including persons with disabilities, Indigenous Peoples and children in vulnerable situations	<p>Non-discrimination in access to education</p> <ul style="list-style-type: none"> The CESCR states that ensuring non-discrimination is a key dimension of accessibility, which is an essential feature of education. There is an entire convention dedicated to the elimination of discrimination in education, CADE. <p>Women and girls⁵²</p> <ul style="list-style-type: none"> CEDAW Article 10 <p>Children</p> <ul style="list-style-type: none"> CRC Articles 28 & 29 <p>Persons with disabilities⁵³</p> <ul style="list-style-type: none"> CRPD Article 24 <p>Indigenous Peoples⁵⁴</p> <ul style="list-style-type: none"> ILO Indigenous and Tribal Peoples Convention (No. 169) UNDRIP Article 14 ICERD Article 7 <p>Migrants, refugees, and internally displaced persons⁵⁵</p> <ul style="list-style-type: none"> ICRMW Articles 30, 43(1) & 45(1) Refugee Convention Article 22 	<p>Other marginalised groups whose right to equal access to education is at risk, include:</p> <ul style="list-style-type: none"> LGBTQI Ethnic, linguistic, and religious minorities Persons in detention Persons with HIV Non-citizens Child labourers Street children
4.6 By 2030, ensure that all youth and a substantial proportion of adults, both men and women, achieve literacy and numeracy	<p>Fundamental education⁵⁶</p> <ul style="list-style-type: none"> Human rights law prioritises State efforts to ensure free and compulsory primary education and makes provision for education that replaces missed primary education for youth and adults, referred to as ‘fundamental education’ (CADE Article 4(c); ICESCR Article 13(2)(d)). Fundamental education is considered, by CESCR, an integral component of adult education and lifelong learning. <p>Literacy⁵⁷</p>	<p>That all youth should attain literacy and numeracy is consistent with human rights law. However, that only a ‘substantial proportion’ of adults achieve literacy and numeracy is problematic from a human rights perspective, as fundamental education</p>

⁵² For human rights standards related to the right to education of girls and women, see, for example, RTE’s resource *International Instruments: Girls and Women’s Right to Education*. Available at [www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/RTE International Instruments Girls Women Right to Education.pdf](http://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/RTE%20International%20Instruments%20Girls%20Women%20Right%20to%20Education.pdf) (Accessed 6 October 2017.)

⁵³ For human rights standards related to the right to education of persons with disabilities, see, for example, RTE’s resource *International Instruments: Persons with Disabilities*. Available at [www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/RTE International Instruments Persons with Disabilities Right to Education 2016 en.pdf](http://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/RTE%20International%20Instruments%20Persons%20with%20Disabilities%20Right%20to%20Education%202016%20en.pdf) (Accessed 6 October 2017.)

⁵⁴ For human rights standards related to the right to education of minorities and Indigenous Peoples, see, for example, RTE’s resource *International Instruments: Minorities and Indigenous Peoples*. Available at [www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/RTE International Instruments Minorities and Indigenous 2015 en.pdf](http://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/RTE%20International%20Instruments%20Minorities%20and%20Indigenous%202015%20en.pdf) (Accessed 6 October 2017.)

⁵⁵ For human rights standards related to the right to education of migrants, refugees, and internally displaced persons, see, for example, RTE’s resource *International Instruments: Migrants, Refugees and Internally Displaced Peoples*. Available at [www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/RTE International Instruments Migrants Refugees IDPs 2014.pdf](http://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/RTE%20International%20Instruments%20Migrants%20Refugees%20IDPs%202014.pdf) (Accessed 6 October 2017.)

⁵⁶ For human rights standards related to fundamental education, see, for example www.right-to-education.org/issue-page/issues/adult-education-and-learning (Accessed 17 September 2017.)

⁵⁷ For human rights standards related to literacy, see, for example www.right-to-education.org/issue-page/issues/adult-education-and-learning (Accessed 17 September 2017.)

	<ul style="list-style-type: none"> • CESCR General Comment 13 and CRC General Comment 1 refer to literacy and numeracy as ‘basic learning needs’ and ‘basic skills’, respectively. • CEDAW Article 10(e) requires that States take all appropriate measures to ensure: ‘The same opportunities for access to programmes of continuing education, including adult and functional literacy programmes, particularly those aimed at reducing, at the earliest possible time, any gap in education existing between men and women.’ • CRC Article 28(3) provides that States shall contribute to elimination of illiteracy throughout the world. 	<p>should be accessible on a non-discriminatory basis.</p>
<p>4.7 By 2030, ensure that all learners acquire the knowledge and skills needed to promote sustainable development, including, among others, through education for sustainable development and sustainable lifestyles, human rights, gender equality, promotion of a culture of peace and non-violence, global citizenship and appreciation of cultural diversity and of culture’s contribution to sustainable development</p>	<p>Aims of education</p> <ul style="list-style-type: none"> • Respect for human rights, tolerance, mutual respect, and respect for the environment are all elements of the aims of education. <ul style="list-style-type: none"> ○ According to the CRC the aims are: development of respect for human rights (Article 29(1)(b)), an enhanced sense of identity and affiliation (29 (1)(c)), and his or her socialisation and interaction with others (29(1)(d)) and with the environment (29(1)(e)). CRC General Comment 1 elaborates on each of these aims. ○ ICESCR Article 13(1) states that: ‘education shall...strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.’ ○ CESCR General Comment 13, para. 1, elaborates: ‘Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment’. ○ CADE Article 5(1)(a) states: ‘Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights 	

	<p>and fundamental freedoms; it shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace’.</p> <p>Human rights education</p> <ul style="list-style-type: none"> • Human rights education is an integral part of the right to education. It is defined as any learning, education, training, and information efforts aimed at building a universal culture of human rights. It embraces all education levels and all forms of teaching and learning. <ul style="list-style-type: none"> ○ United Nations Declaration on Human Rights Education and Training⁵⁸ Article 1 states: ‘Everyone has the right to know, seek and receive information about all human rights and fundamental freedoms’. ○ CRC General Comment 1, paras 15-16, state: ‘Human rights education should provide information on the content of human rights treaties. But children should also learn about human rights by seeing human rights standards implemented in practice...Education about international humanitarian law also constitutes an important, but all too often neglected, dimension’. 	
<p>4.a Build and upgrade education facilities that are child, disability and gender sensitive and provide safe, non-violent, inclusive and effective learning environments for all</p>	<p>Quality education⁵⁹</p> <ul style="list-style-type: none"> • The right to quality education includes a safe learning environment <ul style="list-style-type: none"> ○ ‘All institutions and programmes are likely to require buildings or other protection from the elements’ (CESCR General Comment 13, para. 6a). <p>Corporal punishment/Non-violence</p> <ul style="list-style-type: none"> • CESCR and CRC take the position that corporal punishment is inconsistent with respect for human dignity (CESCR General Comment 13, para. 41; CRC 28(2)) and education must promote non-violence in school (CRC General Comment 1, para. 8). <p>Gender sensitive</p> <ul style="list-style-type: none"> • CESCR requires sanitation facilities for both sexes (CESCR General Comment 13, para. 6a). 	

⁵⁸ UN Human Rights Council. Resolution 16/1. United Nations Declaration on Human Rights Education and Training. (Doc. A/HRC/RES/16/1.)

⁵⁹ For further information, see, for example, RTE’s page *Quality Education*. Available at www.right-to-education.org/issue-page/education-quality (Accessed 6 October 2017.)

	<ul style="list-style-type: none"> • The CRC states: ‘gender discrimination can be reinforced by practices such as a curriculum which is inconsistent with the principles of gender equality...and by unsafe or unfriendly environments which discourage girls’ participation’ (CRC General Comment 1, para. 10). • CEDAW calls for the elimination of stereotyped concepts of men and women in textbooks (Article 10(c)). <p>Inclusive</p> <ul style="list-style-type: none"> • See provisions on inclusive education and non-discrimination in 4.1. • See also CRPD General Comment 4⁶⁰ on inclusive education. 	
<p>4.b By 2020, substantially expand globally the number of scholarships available to developing countries, in particular least developed countries, small island developing States and African countries, for enrolment in higher education, including vocational training and information and communications technology, technical, engineering and scientific programmes, in developed countries and other developing countries</p>	<p>Scholarships/Fellowships</p> <ul style="list-style-type: none"> • Article 13(3) of the ICESCR provides that: ‘an adequate fellowship system shall be established’. CESCR, in General Comment 13, elaborates that this requirement ‘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.’ • Article 10(d) of CEDAW states: ‘The same opportunities to benefit from scholarships and other study grants.’ 	<p>The distribution of scholarships poses equality concerns as historically they have largely benefitted elite groups. Any substantial expansion of the number of scholarships available should primarily benefit those from marginalised groups, including women and girls, in order to be human rights compliant.</p>
<p>4.c By 2030, substantially increase the supply of qualified teachers, including through international cooperation for teacher training in developing countries,</p>	<p>Teachers</p> <ul style="list-style-type: none"> • Teachers are key to providing a good quality education: <ul style="list-style-type: none"> ○ The ILO/UNESCO Recommendation concerning the Status of Teachers⁶¹ and the UNESCO Recommendation concerning the Status of Higher-Education Teaching Personnel⁶² provide a comprehensive 	<p>This target fails to address the labour rights of teachers. Article 13(2)(e), ICESCR states: the ‘material conditions of teachers shall be continuously improved’. Unacceptable working conditions for teachers</p>

⁶⁰ Committee on the Rights of Persons with Disabilities. 2016. *General Comment No. 4: Article 24: Right to Inclusive Education*. (Doc. CRPD/C/GC/4.)

⁶¹ ILO/UNESCO Recommendation concerning the Status of Teachers (adopted 5 October 1966).

⁶² UNESCO Recommendation concerning the Status of Higher-Education Teaching Personnel (adopted 11 November 1997).

<p>especially least developed countries and small island developing States</p>	<p>normative framework on teachers’ status, including their responsibilities, career advancement opportunities, security of tenure, and conditions of service.</p>	<p>constitute a barrier to realising the right to education (paragraph 27, CESCR General Comment 13).</p> <p>UNESCO CADE includes two provisions on teachers: Article 2(a) states that teachers at both public and private schools should provide teachers with qualifications of the same standard. Article 4(d) states that training for the teaching profession should be provided without discrimination.</p>
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2.2 Monitoring and accountability of the right to education at the international level

Unlike a State’s political commitment to Education 2030, once a State has ratified a human rights treaty, it is legally obliged to comply with the provisions of the treaty. This includes ensuring that human rights are implemented and enforced at the national level so they can be enjoyed and claimed by the people of the State.

The lack of in-built robust and effective accountability mechanisms in the architecture of the 2030 Agenda is problematic from a human rights perspective. Processes known as ‘follow-up and review’ do exist but they function more like monitoring mechanisms and are entirely voluntary.

At the national level, States are expected to establish inclusive monitoring mechanisms to track progress and review implementation. Outcomes from national level monitoring will provide the basis to inform regional and international mechanisms.

Regional follow-up and review mechanisms are currently being developed, where the focus will be on peer learning and exchange of best practices. In addition, UN Regional Economic Commissions and regional political and technical bodies will be involved, as well as civil society.

At the international level, the 2030 Agenda is monitored by the High-Level Political Forum (HLPF). However, States are not obliged to undergo national reviews. The HLPF meets annually to keep track of global progress on implementation, provide political leadership and guidance, and address new and emerging issues, especially those of an international nature.

To fill the accountability gap, human rights mechanisms at the international and national level can be engaged, particularly as the normative content of SDG Four is rights-based. The following sections describe the international and regional mechanisms that are in place to monitor compliance with human rights treaties.

2.3 International human rights mechanisms

The implementation of international human rights treaties is monitored by judicial and/or quasi-judicial mechanisms, depending on the treaty in question. For the core UN human rights treaties, this is done through periodic reporting by States on the measures they have taken to implement the treaty, including steps taken to incorporate provisions into the domestic legal order, ensuring they are justiciable, and that there is a right to an effective remedy when they have been violated.⁶³ The treaty body then examines the reports, engages in constructive dialogue with the State and interested third parties, and finally publishes concluding observations and recommendations. The State is expected to address the issues raised in the concluding observations and implement the recommendations. This process allows for interventions by CSOs who are permitted to submit parallel reports based on the evidence they have gathered. Third party submissions can be used strategically to complement advocacy efforts at the domestic level, and may spark engagement with relevant decision-makers, raise awareness of issues, and attract media attention—indirect methods of conducting accountability.

Treaty bodies do not have the legal authority to enforce their concluding observations and recommendations, or decisions under complaints procedures (see below). This lack of enforcement is the primary weakness of international human rights law and a major barrier to accountability at the international level. Treaty compliance and effective implementation are ultimately the responsibility of the State (this is also true of Education 2030). According to Alston and Goodman,⁶⁴ human rights treaties have limited impact because:

- States view effective enforcement mechanisms at the international level as an encroachment on State sovereignty
- State institutions are unaware of the treaty system and therefore do not address the issues raised by treaty bodies
- the lack of a domestic enabling environment, including a lack of human rights culture in government and society, and the absence of a strong civil society
- journalists are unaware of the treaty system and therefore fail to report on human rights issues
- socio-economic factors, such as lack of education render people unaware of the treaty system and their human rights

However, that is not to say that treaty bodies cannot indirectly influence State compliance. Treaty bodies provide exegesis of the normative content and obligations relating to human rights standards, through general comments and general recommendations. General comments ensure that human rights standards are applied to changing contexts, and emerging issues and practices. For example, the Committee on Economic, Social and Cultural Rights (CESCR) has progressively developed its thinking on the extra-territorial application of human rights obligations⁶⁵ and the applicability of human rights law to non-State actors,⁶⁶ and the Human Rights Committee,⁶⁷ among others, have highlighted that a lack of effective remedies at the domestic level is a violation of States' obligations. The value of these interpretations (considered soft law) is their contribution to the international understanding of human rights standards, as well as their persuasive authority in domestic and regional courts.

Example 1: The use of general comments in interpreting the right to education at the national level

⁶³ CESCR. 1998. *General Comment No. 9: The Domestic Application of the Covenant*. (Doc. E/C.12/1998/24.) (CESCR General Comment 9)

⁶⁴ Alston, P. and Goodman, R. 2012. *International Human Rights*, 2nd edn. Oxford. Oxford University Press, pp. 1054-1055.

⁶⁵ Coomans, F. 2011. The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights. *Human Rights Law Review*, Vol. 11, No. 1, pp. 1-35.

⁶⁶ CESCR. 2017. *General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities*. (Doc. E/C.12/GC/24.)

⁶⁷ Human Rights Committee (CCPR). 2004. *General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*. (Doc. CCPR/C/21/Rev.1/Add.13.)

In Canada, in a case concerning the right to education of a boy with Down's Syndrome, the Human Rights Tribunal found that the legal requirement of integration established by the Education Act together with the prohibition of disability-based discrimination requires that reasonable accommodation measures be taken at each stage of a student's integration.⁶⁸ In supporting this view, the Tribunal reiterated the three accessibility dimensions expounded in General Comment 13 of the Committee on Economic, Social and Cultural Rights as well as General Comment 5 which recognises that persons with disabilities are best educated within integrated settings. The consideration of general comments highlights their normative value in interpreting and applying human rights standards. This 'cross-fertilisation' indicates an approach used by courts to ensure that domestic implementation of the right to education aligns with international human rights standards.

At the international level the strongest accountability mechanisms are the complaints procedures of each treaty body.⁶⁹ These mechanisms are vital for victims of violations who cannot access justice at the national level, which itself demonstrates a State's failure to give effect to human rights. International determination and acknowledgment of a violation, important in itself for the victim, can spur States to remedy the situation—although treaty bodies cannot enforce their decisions.

Treaty bodies can hear individual and collective complaints, as well as initiate confidential inquiries on grave or systematic violations, if the State is party to the treaty in question and has accepted the competence of the body to hear complaints against it (through ratification of an optional protocol or making a declaration to that effect), and the complaint itself meets certain criteria.⁷⁰ Third party interventions are also possible under these mechanisms, providing civil society an international avenue for highlighting violations at the national level. To date, there have been ten complaints submitted to treaty bodies on different aspects of the right to education, three of them finding a violation of the right to education.⁷¹ This number is expected to increase, as the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights⁷² and Optional Protocol to the Convention on the Rights of the Child on a communications procedure⁷³ which establish communications procedures, have only recently entered into force.

Example 2: Treaty body enforcement of the right to education

In the 2003 case of *Leirvåg and ors v Norway*, Norway had introduced a mandatory Christian religion subject that only provided limited exemptions from certain parts of the teaching.⁷⁴ The Human Rights Committee, which oversees the implementation of the International Covenant on Civil and Political Rights (1966, ICCPR), found that the system of partial exemptions did not protect the right of parents to ensure the religious and moral education of their children is in conformity with their own convictions. The Committee concluded that Norway had violated

⁶⁸ *Commission des droits de la personne et des droits de la jeunesse v Commission scolaire des Phares* [Commission on the Rights of the Person and the Rights of the Young v Phares School Commission] 2004 CanLII 46172 (QC TDP). Available at www.canlii.org/en/qc/qctdp/doc/2004/2004canlii46172/2004canlii46172.html (Accessed 20 December 2016.)

⁶⁹ For information on treaty body complaints procedures, see the OHCHR's page *Human Rights Bodies Complaints Procedures* www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx (Accessed 12 December 2016.)

⁷⁰ For information on the procedure for complaints by individuals, see OHCHR's page *Human Rights Bodies Individual Communications* available at www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx#individualcomm (Accessed 9 October 2017.)

⁷¹ CERD/C/71/D/40/2007 violation of Article 5(e)(v); CCPR/C/82/D/1155/2003 violation of Article 18(4); CEDAW/C/36/D/4/2004 violation of Article 10(h).

⁷² Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (adopted 10 December 2008, entered into force 5 May 2013) (Doc. A/63/435.) (OP-ICESCR)

⁷³ Optional Protocol to the Convention on the Rights of the Child on a communications procedure (adopted 14 July 2011, entered into force 14 April 2014) (Doc. A/HRC/RES/17/18.) (OP3-CRC)

⁷⁴ CCPR *Leirvåg and ors v Norway* (2004) Communication No. 1155/2003 (Doc. CCPR/C/82/D/1155/2003.)

Article 18(4) of the ICCPR. Following the decision, Norway introduced amendments to education laws and the curriculum, including a system of exemptions.⁷⁵

Further examples of complaint and monitoring mechanisms can be found at the international level:

The Human Rights Council has a number of charter bodies, including: a complaints procedure;⁷⁶ a range of special procedures with either a thematic or country-specific mandate, including the right to education,⁷⁷ and extreme poverty and human rights,⁷⁸ that can receive and investigate complaints; and the Universal Periodic Review, a peer review mechanism whereby States monitor other States' human rights record.

Lastly, UNESCO has a confidential complaints procedure competent to receive complaints on the right to education.⁷⁹

2.4 Accountability and the right to education at the regional level

Regional legal frameworks give rights-holders the possibility of bringing their case to a regional mechanism, provided the State in question is party to the relevant regional instrument, and that all domestic remedies have either been exhausted or deemed insufficient.

Table 2. Regional human rights mechanisms⁸⁰

Region	Forum	Complaints	Monitoring
Africa	African Court on Human and Peoples' Rights	Yes—issues binding decisions and advisory opinions	No
	ECOWAS Court of Justice	Yes—issues binding judgments	No
	African Commission on Human and Peoples' Rights	Yes—non-binding	Yes
	African Committee of Experts on the Rights and Welfare of the Child	Yes—non-binding	Yes
Arab	Arab Human Rights Committee	No	Yes
Asia	ASEAN Intergovernmental Commission on Human Rights	No	No

⁷⁵ In 2007 the European Court of Human Rights made a similar finding in a case brought by different applicants. The Court found that there had been a violation of Article 2, Protocol 1 to the European Convention on Human Rights. By the time of this decision Norway had already introduced legislative amendments in response to the decision of the Human Rights Committee. In light of criticisms from an NGO that the measures taken were insufficient in practice to prevent future violations, the Council of Europe Committee of Ministers continued to assess the measures taken and was communicating with Norwegian authorities to clarify outstanding issues. See *Folgerø and Others v Norway* [GC] (2008) 46 EHRR 47.

⁷⁶ For a description of the UN Human Rights Bodies complaints procedure see www.ohchr.org/EN/HRBodies/HRC/ComplaintProcedure/Pages/HRCComplaintProcedureIndex.aspx (Accessed 5 January 2017.)

⁷⁷ For further information on submitting information or individual complaints to the UN Special Rapporteur for Education see www.ohchr.org/EN/Issues/Education/SREducation/Pages/IndividualComplaints.aspx (Accessed 5 January 2017.)

⁷⁸ For further information on the UN Special Rapporteur on Extreme Poverty and Human Rights, see www.ohchr.org/EN/Issues/Poverty/Pages/SRExtremePovertyIndex.aspx (Accessed 5 January 2017.)

⁷⁹ For further information on the UNESCO procedure for claiming in the event of human rights violations related to the UNESCO mandate, see www.claiminghumanrights.org/unesco_procedure.html (Accessed 5 January 2017.)

⁸⁰ For further information on regional human rights mechanisms, see, for example www.right-to-education.org/page/regional-human-rights-mechanisms (Accessed 5 January 2017.)

Europe	European Court of Human Rights	Yes—issues binding judgments	No
	European Committee on Social Rights	Yes—competent to receive collective complaints and issue declaratory decisions	Yes
Inter-America	Inter-American Commission on Human Rights	Yes—if States fail to comply with its recommendations it can refer the matter to the Inter-American Court of Human Rights	Yes—undertakes thematic, country, and annual reporting
	Inter-American Court of Human Rights	Yes—issues binding decisions and advisory opinions	No

3. The right to education in national law

Ultimately, the right to education is best promoted, secured, protected, enforced, and realised at the national level. The right to education in international law provides the normative standards to which States must adhere. Respect for these standards, as *normative* standards, is the single most important predictor of whether these standards will be implemented at the national level. If a State sincerely commits to the right to education, politically or legally, it will take its commitments seriously. This does not mean, however, that the right to education will necessarily be immediately realised, as there are numerous barriers, for instance, lack of resources, institutional and/or formal barriers, that need to be overcome. This section focuses on how sincere ratifiers of human rights treaties incorporate and translate their international commitments into national law. However ratification by insincere ratifiers still can have a positive effect in that it may spur political mobilisation.⁸¹

3.1 Giving effect to the right to education in the domestic legal order

Under international human rights law it is the prerogative of States to determine how human rights treaties are implemented, based on the principle of subsidiarity. This allows for a diversity of means and methods of implementation to fully realise the right to education, that best suit the national education context, as well as the legal and political structures that will enforce it. Democratically agreed and relevant right to education measures that take account of the national context and legal and political conditions are far more legitimate and likely to be enforced by human rights and non-human rights accountability mechanisms.

Example 3: Ensuring national education laws are culturally relevant

In 2009 Bolivia amended its constitutional provision on the right to education to refocus education on being intracultural, intercultural, and plurilingual.⁸² Following this, in 2010 Bolivia introduced the Avelino Siñani-Elizardo Pérez Education Law which mandates a new education model that is decolonising and ‘oriented towards

⁸¹ See, for example, the theory of transnational human rights advocacy networks. Neumayer, E. 2005. Do International Human Rights Treaties Improve Respect for Human Rights? *Journal of Conflict Resolution*, Vol. 49, No. 6, pp. 930-931.

⁸² The (Plurinational State of) Bolivia Constitution (2009) Chapter VI, Section 1, Articles 77-90.

cultural reaffirmation’ of all nations and peoples.⁸³ It emphasises the importance of productive training, community involvement, and legitimising the knowledge and culture of Indigenous Peoples. These changes represent an attempt to adapt and implement the right to education in a culturally relevant way that recognises the unique demographic characteristics of Bolivia, where Indigenous Peoples represent approximately 62% of the population.

Recognising this fact, human rights treaty law requires States to give effect to the treaties it ratifies ‘by all appropriate means’. According to the Committee on Economic, Social and Cultural Rights, this requires that: ‘norms must be recognised in appropriate ways within the domestic legal order, appropriate means of redress, or remedies, must be available to any aggrieved individual or group, and appropriate means of ensuring governmental accountability must be put in place.’⁸⁴

The following section describes the process States follow in order to create the legal conditions necessary for the right to education, as defined by international law, to be nationally implemented and adjudicated on by judicial and quasi-judicial mechanisms.

3.2 Ratification / accession

A State must first ‘consent to be bound by a treaty’.⁸⁵ There are two processes by which a State becomes party⁸⁶ to a treaty: ratification or accession.⁸⁷

Ratification is a two-step procedure: first an authorised representative of the State signs the treaty, signalling its intention to become legally bound by the treaty (this intention is not itself binding). At this stage States should refrain from acts that go against the object and purpose of the treaty. However, in some circumstances, signing may create an obligation to take positive measures to guarantee the object and purpose of the treaty, such as amending domestic legislative provisions that conflict with the object and purpose of the treaty.⁸⁸ The State then concludes the process by ratifying the treaty. Accession has the same legal effect as ratification but is concluded directly, without signing.

Formal procedures for accession and ratification vary according to the constitutional procedures of the State, but usually involves a formal decision made by the legislature, head of State, and/or government—adding democratic legitimacy to the process. The instrument of ratification or accession is then exchanged or deposited. The treaty then enters into force immediately or according to the terms of the treaty.⁸⁹

Once a treaty enters into force, States parties are legally bound to the provisions of that treaty⁹⁰ and must act in good faith in observing the treaty (*pacta sunt servanda*).⁹¹ The object and purpose of every human rights treaty is the full realisation of the human rights contained therein. Ratification without subsequent action is highly

⁸³ *Ley de la educación* Nº 070 ‘Avelino Siñani-Elizardo Pérez’ Artículo 3(2) [Education Law No. 070 ‘Avelino Siñani-Elizardo Pérez’ Article 3(2)].

⁸⁴ CESCR General Comment 9, para. 2.

⁸⁵ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT)

⁸⁶ Party to a treaty indicates that the treaty has entered into force, before entry into force States can only be ‘contracting States’ (Article 2 (1)(f) VCLT).

⁸⁷ For constitutional procedures for ratification for each state, see, for example www.constituteproject.org/search?lang=en&key=treat (Accessed 9 October 2017.)

⁸⁸ See Corten, O. and Klein, P. (eds). 2011. *The Vienna Conventions on the Law of Treaties: A commentary*. Oxford, Oxford University Press.

⁸⁹ VCLT Article 24.

⁹⁰ Note, States can make reservations or interpretative declarations to human rights treaties which limit or modify the legal effect of a treaty, although a reservation must not go against the object and purpose of the treaty (VCLT Article 19).

⁹¹ *Ibid.*, Article 26.

unlikely to result in the full realisation of the right to education. This is because the internal legal (education legal and policy framework) and institutional arrangements of States are likely to require alteration in order to align with international human rights law. An important point here is that treaties create obligations independent from domestic law: States cannot invoke extant national law as an excuse for noncompliance with a treaty.⁹² Ratification, therefore, requires that all relevant laws be amended if in conflict with the provisions of the treaty.

The modification of incompatible laws is the minimum a State can do to ensure respect for the right to education. For maximum protection conducive to the legal enforcement and full realisation of the right to education, States must first recognise the right to education ‘in appropriate ways within the domestic legal order’.⁹³

3.3 Incorporation of international human rights treaties within the domestic legal order

States can choose the specific means by which a human rights treaty is incorporated within their domestic legal system, as well as the status of the treaty within their national law. The method of incorporation can vary widely between States and is influenced by multiple factors relating to the historical, political, and legal culture of the country, often depending significantly on the approach the individual State has taken generally to incorporate treaties in its domestic legal order.⁹⁴

It is important to understand a State’s approach to treaty incorporation in order to be able to identify whether the right to education is enforceable in national courts, either by the court’s direct application of the treaty (the *monist* system) or indirectly through adjudication of the right as incorporated in national implementing legislation (the *dualist* system).⁹⁵

3.3.1 Dualism

States which follow the dualist approach consider national law and international law as two separate sources of law and, therefore, international treaties do not apply directly within the domestic legal order. In order for a treaty’s provisions to have effect domestically, they need to first be implemented through legislation.

Historically, common law countries such as the United Kingdom, Australia, Canada, and India have adhered to the dualist system. For example, the adoption of the Human Rights Act in 1998 incorporated almost all of the European Convention on Human Rights, including the right to not be denied an education, into UK law and as a result is enforceable in national courts.

State reports to UN treaty monitoring bodies (particularly the Committee on Economic, Social and Cultural Rights and the Committee on the Rights of the Child) and their corresponding concluding observations can be a useful means by which to identify whether a treaty has been incorporated. For example, in its reports to the Committee on the Rights of the Child Ghana confirmed that, as a dualist State, it had enacted the Children’s Act 1998 (Act 560) to domesticate the Convention.⁹⁶ The Committee has acknowledged that the Children’s Act conforms to the CRC.⁹⁷

⁹² *Ibid.*, Article 27.

⁹³ CESCR General Comment 9, para. 2.

⁹⁴ *Ibid.*, para. 6.

⁹⁵ In a global survey on the Convention of the Rights of the Child, CRIN have found that the Convention, which includes the right to education, can be directly enforced in its entirety in 48 per cent of all countries. See CRIN. 2016. *Rights, Remedies & Representation: Global Report on Access to Justice for Children*, p. 14. Available at www.crin.org/en/library/publications/rights-remedies-and-representation-global-report-access-justice-children (Accessed 12 October 2017.)

⁹⁶ Committee on the Rights of the Child (CRC) *Third, Fourth, and Fifth Periodic Report of Ghana to the UN Committee on the Rights of the Child*, 9 June 2015, para. 6. (Doc. CRC/C/GHA/35.)

⁹⁷ CRC *Second Periodic Reports of States Parties Due in 1997, Ghana*, 14 July 2005, para. 1. (Doc. CRC/C/65/Add.34.)

There are a variety of legal techniques that dualist States use to incorporate treaties into national law which can sometimes make it difficult to clearly identify whether a treaty has been implemented.⁹⁸ In reviewing States' incorporation of the Convention on the Rights of the Child, CRIN observed that the overwhelming majority of dualist countries, have failed to recognise the Convention as part of the national law, instead developing piecemeal legislation on the various areas that the Convention addresses. For example, despite ratifying the Convention more than 20 years ago, The Bahamas has not enacted legislation to incorporate the Convention meaning it is not directly enforceable in Bahamian courts.⁹⁹ In contrast, Finland ratified the Convention in 1991 and the same year enacted legislation to incorporate the entire treaty and clarify its place in national law.¹⁰⁰ Hungary, Italy, and Iceland have also undergone similar processes to give effect to the Convention demonstrating that there is no legal obstacle for dualist States to fully incorporate human rights treaties where there is political will to do so.¹⁰¹

3.3.2 Monism

States that follow the monist approach consider that international law and national law form part of the same legal system and this means that when a treaty is ratified or acceded to it automatically becomes part of national law without the need for implementing legal instruments. States that generally follow the monist approach include the Netherlands, the Czech Republic, Argentina, Austria, and Sweden.¹⁰²

In relation to the International Covenant on Economic, Social, and Cultural Rights (ICESCR) the Committee indicated that a monist approach of direct incorporation was 'desirable', as it avoids the danger with dualism that rights may be modified to the detriment of rights-holders through the translation and legal drafting process.¹⁰³ In respect of the Convention on the Rights of the Child, Burundi is a clear example of the monist approach: all treaties enter into force upon ratification and the CRC is explicitly identified as an 'integral' part of the Constitution.¹⁰⁴ This is a common and simple way of bringing treaties and the CRC into national practice,¹⁰⁵ adopted in a range of States from Venezuela¹⁰⁶ to Bosnia and Herzegovina.¹⁰⁷

3.3.3 Hybrid/ Mixed

Some States, known as 'hybrid' or 'mixed' systems, take both a monist and dualist approach, depending on the type of treaty and/or the source of international law. In South Africa such an approach is taken, with monism applied in relation to customary international law and dualism followed in respect of treaties.¹⁰⁸

⁹⁸ The Venice Commission notes the techniques of transformation, adaptation, adoption. Venice Commission. 2014. *Report on the Implementation of International Human Rights Treaties in Domestic Law and the Role of the Courts* (CDL-AD(2014)036). See also Sloss, D. 2011. *Domestic Application of Treaties*, pp. 4 -5. Available at <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1620&context=facpubs> (Accessed 8 January 2017.)

⁹⁹ CRIN. 2014. *Access to Justice for Children: Bahamas*. Available at www.crin.org/sites/default/files/bahamas_access_to_justice_-_updated_sep_2015.pdf (Accessed 11 January 2016.)

¹⁰⁰ CRIN. 2013. *Access to Justice for Children: Finland*. Available at www.crin.org/sites/default/files/finland_access_to_justice.pdf (Accessed 9 October 2017.)

¹⁰¹ CRIN. 2016. *Rights, Remedies & Representation: Global Report on Access to Justice for Children*, p.13.

¹⁰² Weissbrodt, D and de La Vega, C. 2007. *International Human Rights Law: An Introduction*, University of Pennsylvania Press, p. 344.

¹⁰³ CESCR General Comment 9, para. 8.

¹⁰⁴ Constitution of Burundi (2005) Articles 19 and 292.

¹⁰⁵ CRIN. 2016., op. cit., p. 13.

¹⁰⁶ Constitution of the Bolivarian Republic of Venezuela (1999, amended 2009) Articles 19 and 23.

¹⁰⁷ Constitution of Bosnia and Herzegovina (1995, amended 2009) Annex I.

¹⁰⁸ Barnard, M. 2015. *Legal Reception in the AU Against the Backdrop of the Monist/Dualist Dichotomy*, p.161.

The Venice Commission has found that most States today belong to what could be described as a ‘mixed’ type.¹⁰⁹ Several other commentators suggest that no country perfectly conforms to either model¹¹⁰ and most States fall somewhere in between monist and dualist systems.¹¹¹

3.4 How to identify whether a ratified treaty has been incorporated directly or indirectly

Although identifying whether a State’s general approach to treaties is monist or dualist can be a helpful starting point for understanding whether and how a human rights treaty has been incorporated, the utility of the monist/dualist dichotomy is limited due to the number of mixed systems and increasingly blurred lines of State practice. In many instances it will be necessary to carry out an analysis of the State’s constitutional provisions, customary rules, and judicial practice to identify whether a treaty has been formally incorporated or informally implemented and, therefore, whether the provisions have legal effect at the national level.

The simplest starting point for such an analysis is to check whether the State’s constitution has an ‘incorporation clause’.¹¹² This is one of the most common legal techniques for incorporation in monist systems and the wording of the clauses is quite standardised.¹¹³ For example, in the Constitution of Albania¹¹⁴ Article 122 states:

1. *Any international agreement that has been ratified constitutes part of the internal juridical system after it is published in the Official Journal of the Republic of Albania. It is implemented directly, except for cases when it is not self-executing and its implementation requires issuance of a law*

Another legal technique for incorporation is for national laws or other domestic legal acts to include concrete references to the specific international treaty, giving legal force to the treaty within the domestic legal order. Less commonly, the incorporation of international treaties may be based on non-written, customary rules, or case-law.¹¹⁵

As the wording of Albania’s incorporation clause suggests, even if a State is ostensibly ‘monist’ it does not follow that a particular treaty can be automatically directly applied by national courts. It may be necessary for the court to first establish whether the treaty, or the relevant provisions of the treaty, are self-executing,¹¹⁶ which can depend upon whether the court considers the provisions to be ‘specific’ enough to be applied without national implementing legislation. On this issue the Committee on Economic, Social and Cultural Rights (CESCR) has stressed that:

*It is especially important [for courts] to avoid any a priori assumption that the [Convention] norms should be considered to be non-self-executing. In fact, many of them are stated in terms which are at least as clear and specific as those in other human rights treaties, the provisions of which are regularly deemed by courts to be self-executing.*¹¹⁷

¹⁰⁹ Venice Commission. 2014. *Report on the Implementation of International Human Rights Treaties in Domestic Law and the Role of the Courts*, p. 7.

¹¹⁰ Weissbrodt, D and de La Vega, C. 2007. *International Human Rights Law: An Introduction*, University of Pennsylvania Press, p. 343.

¹¹¹ Moore, J. 2012. *Humanitarian Law in Action within Africa*. Oxford. Oxford University Press, p. 30

¹¹² The Toronto Initiative for Economic and Social Rights’ Constitution Reports are a useful resource for identifying whether a country’s constitution has an incorporation clause. See www.tiesr.org/data_cr.html (Accessed 11 January 2017.)

¹¹³ Venice Commission, op. cit., p. 8.

¹¹⁴ Constitution of Albania (1998, amended 2015).

¹¹⁵ For example, the Swiss Federal Court has declared that international treaties constitute part of the national legal order (see the leading case of *Frigerio* BGE 94 I 669, S. 678 E. 6a. [1968]).

¹¹⁶ For example, in *Guengueng and Others v Habré* (2002) AHRLR 183 (SeCC 2001), the Senegalese Court of Cassation found that the relevant sections of the CAT were not self-executing and therefore Senegal would have had to implement domestic legislation in order for the Court to have jurisdiction over such crimes committed outside of Senegal.

¹¹⁷ CESCR Comment 9, para. 11.

In its general comment, the CESCR explicitly states that many aspects of the right to education are ‘capable of immediate application by judicial and other organs in many national legal systems. Any suggestion that the provisions indicated are inherently non-self-executing would seem to be difficult to sustain.’¹¹⁸ CRIN have observed that it is common for States from the French legal tradition, such as Belgium, to directly apply the Convention on the Rights of the Child where the court considers that a specific provision is clear enough, whilst France’s Court of Cassation has declared that it is willing to directly apply 11 of the Convention’s articles including Article 29(1) on the aims of education.¹¹⁹

A further practical point is whether the State requires the ratified treaty to have been published before it can be considered officially incorporated. In Benin, for example, after the Convention of the Rights of the Child had been ratified but before it had been published, the Constitutional Court found that it was not part of Benin’s positive law as it had not been published and was not, therefore, directly enforceable. Benin subsequently published the CRC in the Official Gazette in 2006.¹²⁰

3.5 Status of the treaty in the national legal order

Once a treaty is recognised as part of a national legal system, the next question is what status it holds in the national legal hierarchy. The importance of incorporating a treaty is that it ensures the rights are applicable at the national level and allowing treaty rights to override conflicting law is an effective way of enforcing those rights. However, the adherence of a State to monism does not automatically signify superiority of international law over national law. Again, in some instances the constitution will explicitly stipulate the status of international treaties, sometimes by affording them the same status as the constitution itself or by stating that international treaties prevail over domestic law. The Constitution of Argentina,¹²¹ for example, at Section 75.22 explicitly lists those treaties on which it confers constitutional status, whilst Article 13 of the Constitution of Bolivia¹²² explicitly states that international human rights treaties shall prevail in the internal legal order. However, in some instances the constitution may be silent or unclear on the status of international treaties in which case the issue may have been the subject of judicial interpretation. For example, the Peruvian Constitutional Court has clarified that human rights treaties have constitutional ranking.¹²³

In its global survey of States’ incorporation of the CRC, CRIN found that in 42 per cent of countries the Convention takes precedence over primary legislation. In other jurisdictions, particularly Commonwealth countries such as the United Kingdom¹²⁴ and India,¹²⁵ where national law clearly conflicts with the Convention, national law must be applied. In over half of all States, the CRC takes precedence over some conflicting provisions in national law. In Belgium, for example, only those provisions of the CRC considered to be ‘directly applicable’ can take

¹¹⁸ CESCR General Comment 3, para. 5.

¹¹⁹ CRIN. 2016. *Rights, Remedies & Representation: Global Report on Access to Justice for Children*, p. 14.

¹²⁰ CRIN. 2014. *Access to Justice for Children: Benin*. Available at www.crin.org/sites/default/files/benin_access_to_justice_0.pdf (Accessed 13 January 2017.)

¹²¹ Constitution of Argentina (1853, amended 1994).

¹²² Constitution of the Plurinational State of Bolivia (2009).

¹²³ Micus, A. 2015. *Inter-American Human Rights Systems as a Safeguard for Justice in National Transitions*. Boston. Brill Nijhoff, p. 197.

¹²⁴ For example, *Cameron Mathieson, a deceased child (by his father Craig Mathieson) v Secretary of State for Work and Pensions* [2015] UKSC 47. See CRIN. 2015. *Access to justice for children: England and Wales* for discussion. Available at www.crin.org/en/library/publications/united-kingdom-access-justice-children (Accessed 12 October 2017.)

¹²⁵ For example, *People’s Union for Civil Liberties v Union of India* [1997] 125 ILR 510. Available at <http://indiankanoon.org/doc/544871/> See CRIN. 2014. *Access to justice for children: India* for discussion. Available at www.crin.org/en/library/publications/india-access-justice-children (Accessed 12 October 2017.)

precedence over national law leaving the courts with discretion to decide which provisions take precedence over domestic law on a case by case basis.¹²⁶

3.6 Indirect / informal methods of implementation

If, having carried out such an analysis of the State's formal system of incorporation, it remains unclear whether a ratified treaty has been incorporated, it is worth exploring whether unincorporated treaties have nonetheless been given legal effect at the domestic level through indirect or informal mechanisms. A number of commentators have noted an apparently growing trend in some traditionally dualist systems of domestic courts utilising unincorporated international treaties to interpret domestic statutes or constitutional provisions.¹²⁷

CRIN has observed that the approach of using the CRC less directly as an interpretive tool to develop national law has been popular among Commonwealth States that have not incorporated the CRC. In Canada, for example, the Supreme Court held that administrative decision-makers must exercise their statutory discretion in conformity with the Convention on the Rights of the Child, despite the fact the CRC had not been incorporated,¹²⁸ whilst India and South Africa routinely invoke treaties in the context of constitutional interpretation.¹²⁹

In some States the constitution or an 'interpretation act' includes an explicit provision on the role of international law in the interpretation of the Bill of Rights and other legislation. For example, the South African constitution includes the provision in Section 39(1)(b) that courts 'must consider international law when interpreting the Bill of Rights'¹³⁰ and the Angolan Constitution requires that in any matter involving fundamental rights, judges shall apply all relevant provisions of ratified human rights instruments, even if they have not been invoked by the parties concerned.¹³¹ However, it is important to note that in other instances, where there is no requirement for the Court to consider treaty provisions or case-law, the interpretive approach taken is a matter of judicial discretion illustrating an enabling judicial culture.

States may also have implemented a treaty by introducing, supplementing, or amending existing legislation without explicitly invoking the specific terms of the treaty¹³² or the treaty rights may be covered by a State's bill of rights. Magnus Killander and Horace Adjolohoun noted that direct application of international human rights treaties in the African States they surveyed was rare, which they ascribed not to whether the constitutional framework is monist or dualist, but the fact that international human rights treaties have clearly influenced the national bills of rights in many of those countries.¹³³ They noted that while this indirect domestication makes it less likely that international human rights treaties need to be directly applied, it reinforces the importance of treaties and case-law, resolutions, etc. associated with them for judicial interpretation of the constitutional provisions.¹³⁴ By citing not only the treaty provisions but cases where the treaty has been applied, including in

¹²⁶ CRIN. 2016. *Rights, Remedies & Representation: Global Report on Access to Justice for Children*, p. 13.

¹²⁷ See, for example, Waters, A. 2007. *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*; Sloss, D. 2011. *Domestic Application of Treaties*; and *Ibid.*, p. 14.

¹²⁸ *Ibid.*, Sloss, p. 6.

¹²⁹ *Ibid.*, p. 18.

¹³⁰ Other examples include Malawi and Botswana. The Constitution of Malawi (1994, amended 2010) provides that in interpreting the Constitution courts shall, 'where applicable, have regard to current norms of public international law'. The Interpretation Act (29 of 1987) of Botswana provides that 'as an aid to the construction of the enactment a court may have regard to...any relevant international treaty'

¹³¹ Constitution of Angola (2010) Article 26(b).

¹³² CESCR General Comment 9, para. 6.

¹³³ Killander, M. and Adjolohoun, H. 2010. *International Law and Domestic Human Rights Litigation in Africa: An Introduction*. Killander, M. (ed), *International Law and Domestic Human Rights Litigation in Africa*. Pretoria, Pretoria University Law Press, p. 3.

¹³⁴ *Ibid.*, p. 14.

similar cases from foreign jurisdictions, courts can contribute to understanding and defining the scope of the rights.

3.7 Hierarchy of domestic laws

The highest legal protection a State can afford the right to education is constitutional recognition. Currently 82% of national constitutions contain a provision on the right to education, varying in scope and enforceability (see table 3, section 4.2). Constitutional protection is important because it offers the possibility for the highest domestic court, given certain other conditions detailed in the following section, to adjudicate on the legal right to education, thus ensuring its legal enforceability. Constitutional law takes primacy, meaning that, in general, all other laws, policies, and State actions must be compatible. Laws and policies found contrary to the constitution ('unconstitutional') can be struck down by courts. Finally, constitutional protection also ensures robust protection from changing political whims.

The next highest legal protection of the right to education is the enactment of legislation, for example, an Education Act or Children's Act. (In federal systems where education lies within the powers of regional governments, there is likely to be some degree of variation in education laws and policies between the regions.) The importance of legislation is that it implements the constitutional provision, or in the absence of a right to education provision, is the primary legal means by which the right is recognised—if it is recognised as a legally enforceable right. Laws are also enforceable in courts, however, laws are more easily repealed than constitutional provisions, and therefore offer less certainty and permanence, and therefore less legal protection.

States can also implement the right to education through policies, plans, and programmes for action. Policies are informal and set out a government's major objectives, defining the government's priorities, and strategies to achieve its goals. They are not enforceable in courts and are not a suitable means to give legal effect to the right to education, however, if they do not align with the Constitution or national laws they can be subject to review by a court.

Together the above constitute the national legal and policy framework. The most effective means to realise the right to education is the combination of all these measures, where the constitution provides for a legally enforceable right to education, laws implement the right to education in order to further enjoyment (for example, laws guaranteeing free education), and policies augment those laws.

3.8 Sustainable development frameworks and economic and social rights

It is important to note that whilst there is a connection between economic and social rights and sustainable development, they are not the same thing. State efforts to realise SDG Four are not automatically synonymous with compliance with the right to education under international law. In fact, as Philip Alston, UN Special Rapporteur on extreme poverty and human rights, points out in his report on economic and social rights: 'States often invoke development and welfare initiatives when challenged to explain how they respect economic and social rights, however such initiatives may not protect and/or promote rights, in fact they may end up promoting the special interests of a targeted group.'¹³⁵

¹³⁵ Alston, P. 2016. *Report of the Special Rapporteur on extreme poverty and human rights. Promotion and protection of all human rights, civil, political, economic, social and cultural, including the right to development*, para. 6. (Doc. A/HRC/32/31.)

4. A justiciable right to education

The right to education should be incorporated in the domestic legal order in a manner that creates justiciable legal rights (rather than implemented through education or sustainable development laws and policies—although these are key to fully implementing the right to education and minimising litigation) that can be invoked before fora competent to enforce it and provide effective remedies—itsself a core feature of human rights law.¹³⁶ Through this process States are held accountable to the law—given the legal character of human rights—via legal mechanisms.

Justiciability refers to the amenability of an issue to be adjudicated upon in judicial or quasi-judicial fora. A justiciable right to education means that when this right is violated, the right-holder can take her claim before an independent and impartial body, and if the claim is upheld, be granted a remedy, which can then be enforced.¹³⁷

Ultimately domestic fora are better placed to apply national laws, grant redress and remedies, and to ensure enforcement of the right to education—a principle recognised in international law. Article 8 of the Universal Declaration of Human Rights provides: ‘Everyone has the right to an effective remedy by the competent *national* tribunals for acts violating the fundamental rights granted him by the *constitution or by law*.’ Article 2(3) of the International Covenant on Civil and Political Rights (1966) on the administration of justice guarantees the right to a fair hearing which includes the right to an effective remedy. The Committee on Economic, Social and Cultural Rights has stated:

*a State party seeking to justify its failure to provide any domestic legal remedies for violations of economic, social and cultural rights would need to show either that such remedies are not “appropriate means” within the terms of article 2.1 of the Covenant or that, in view of the other means used, they are unnecessary. It will be difficult to show this and the Committee considers that, in many cases, the other “means” used could be rendered ineffective if they are not reinforced or complemented by judicial remedies.*¹³⁸

Access to justice is an indispensable part of the rule of law and is important because it provides an opportunity to hold violators to account; an alternative avenue to ensure change in a way that respects people’s rights; deters others from violating fundamental human rights; encourages respect for human rights; and discourages impunity. Ultimately it means that courts can ensure that the State is held accountable for its actions, in accordance with its international, regional, and domestic human rights obligations.

One of the ways courts hold States to account is by compelling the State to correct the actions, or lack thereof, that led to the violation, and granting remedies to address the harms done to the complainant, for example, through injunctions, preventative measures, recommending policy measures, striking down of laws, administrative penalties, compensation, and criminal punishment. In some instances these remedies benefit more than just the claimant but also all those affected or likely to be affected by the actions (or inactions) that led to the case being brought.

An important function of courts is to give persons belonging to marginalised groups, particularly those living in poverty, a ‘voice’ in democratic systems that may otherwise neglect their interests, especially through judicial

¹³⁶ International Covenant on Civil and Political Rights Article 2(3); International Convention on the Elimination of All Forms of Racial Discrimination Article 6; and Universal Declaration of Human Rights Article 8. In addition, see, CESCR General Comment 9, para. 9.

¹³⁷ International Commission of Jurists (ICJ). 2008. Courts and the Legal Enforcement of Economic, Social and Cultural Rights. Comparative Experiences of Justiciability. *Human Rights and Rule of Law Series*, No. 2, p. 1.

¹³⁸ CESCR Comment 9, para. 3.

review proceedings. As Iain Byrne points out: ‘...in the face of executive and legislative inaction and an inability of the poor and marginalised to exert political pressure, courts are often their last hope.’¹³⁹

Judicial and quasi-judicial bodies also play a pivotal role in clarifying the normative content and scope of the right to education; progressively identifying its justiciable elements; as well as finding innovative ways to adjudicate on issues concerning economic and social rights. Judicial enforcement of the right to education in other jurisdictions can help courts to understand how economic and social rights can be adjudicated to better hold States to account in accordance with their obligations under international law.

Lastly, a justiciable right to education means that civil society can be more effective in campaigning, advocating, and mobilising for accountability and change. Litigation—even just the threat of it—offers an important avenue to publicise human rights violations and attract media attention, which may lead to accountability and change in the future.

4.1 Towards a justiciable right to education

Historically a distinction was made between civil and political rights on the one hand and economic, social and cultural rights on the other, reflected in the bifurcation of the Universal Declaration of Human Rights into separate legal instruments in 1966: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The adoption of two separate instruments, as opposed to a unified International Bill of Rights, was made for a variety of reasons. One of which was the view that economic and social rights are conceptually different to civil and political rights because they are not justiciable. This argument accounts for the historical differential status of economic and social rights compared to civil and political rights in both international and national law.

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

The nature of the obligations imposed on States are often said to be positive and burdensome. So when judges make decisions concerning economic and social rights, they are making decisions about the allocation of resources and are therefore effectively making policy decisions, violating the normative principle of the separation of powers. But this is disingenuous, civil and political rights also entail redistributive consequences. For example, the right to a fair trial entails many costs, including—but not limited to—the training of judges, court costs, and the provision of legal aid. In other words, all human rights are composed of different types of obligations: to abstain from interference (respect), to ensure third parties do not negatively impact the enjoyment of human rights (protect), and to take measures to make enjoyment possible (fulfil). The right to education is a good example of this. Its realisation requires States not to interfere in the free choice of education by parents and children, while at the same time it requires States to develop a system of schools and continuously improve the material conditions of teachers.

Today, it is generally accepted that all human rights are indivisible, interdependent, and interrelated.¹⁴⁰ This is reflected at the international level through the adoption of treaties that combine civil and political rights and economic and social rights, such as the Convention on the Rights of the Child (1989), and the increasing

¹³⁹ Byrne, I. 2010. The role of Access to Justice in Alleviating Poverty. Bueren, G. V. (ed), *Freedom from Poverty as a Human Rights: Law’s Duty to the Poor*. Paris, UNESCO, p.297.

¹⁴⁰ UNGA *Vienna Declaration and Programme of Action*, 12 July 1993, para. 5. (Doc. A/CONF.157/23.)

codification of economic and social rights in national constitutions. The jurisprudence of national and regional courts provides empirical evidence that there is no legal or conceptual impediment to identifying and adjudicating violations of economic and social rights, particularly the right to education.

4.2 How to identify whether the right to education is formally justiciable

According to our research, based on data from the Toronto Initiative on Economic and Social Rights (TIESR),¹⁴¹ a dataset on the constitutional status of economic and social rights, and the Comparative Constitutions Project,¹⁴² as of 2014, 160 States mention the right to education¹⁴³ explicitly in their constitutions (82% of the 196 States surveyed). Of those, 107 States provide for a formally justiciable right to education and 53 States constitutionally guarantee the right to education as a directive principle of State policy.¹⁴⁴

Table 3. State's constitutional status of the right to education, distinguished by justiciability.

Justiciable right to education		Directive principle/aspirational right to education	No right to education
Albania	Montenegro	Afghanistan	Antigua and Barbuda
Andorra	Mozambique	Algeria	Australia
Argentina	Myanmar	Angola	Bahamas
Armenia	Namibia	Bahrain	Barbados
Austria	Nepal	Bangladesh	Botswana
Azerbaijan	Nicaragua	Belize	Brunei Darussalam
Belarus	Niger	Bhutan	Cook Islands
Belgium	Pakistan	Bosnia and Herzegovina	Côte d'Ivoire
Benin	Panama	Bulgaria	Djibouti
Bolivia	Paraguay	Burkina Faso	Dominica
Brazil	Peru	Cameroon	France
Burundi	Poland	Chile	Germany
Cabo Verde	Portugal	China	Granada
Cambodia	Republic of Moldova	Cuba	Israel
Canada	Romania	Czech Republic	Kiribati
Central African Republic	Russian Federation	Democratic People's Republic of Korea	Lebanon
Chad	Rwanda	Denmark	Liechtenstein
Colombia	San Marino	Ethiopia	Malaysia
Comoros	Sao Tome and Principe	Guyana	Mauritania
Congo	Serbia	Iceland	Mauritius
Costa Rica	Seychelles	Iraq	Nauru
Croatia	Slovenia	Kuwait	New Zealand
Cyprus	South Africa	Lao People's Democratic Republic	Niue
Democratic Republic of the Congo	South Sudan		Papua New Guinea
	Spain		Saint Kitts and Nevis
	State of Palestine		Saint Lucia

¹⁴¹ www.tiesr.org/index.html (Accessed 6 January 2017.)

¹⁴² <http://comparativeconstitutionsproject.org/> (Accessed 6 January 2017.)

¹⁴³ According to the coding manual this includes explicit reference to the right to education and/or the mention that the State will provide education (sometimes free and/or compulsory education), para. 29. Available at www.tiesr.org/TIESR%20Coding%20Manual%208%20March%202011.pdf (Accessed 6 January 2017.)

¹⁴⁴ www.tiesr.org/data.html (Accessed 6 January 2017.)

Dominican Republic	Sudan	Lesotho	Saint Vincent and the Grenadines
Ecuador	Sweden	Liberia	Samoa
Egypt	Switzerland	Luxembourg	Singapore
El Salvador	Syrian Arab Republic	Mali	Solomon Islands
Equatorial Guinea	Tajikistan	Malta	Tonga
Eritrea	Thailand	Micronesia (Federated States of)	Trinidad and Tobago
Estonia	The former Yugoslav Republic of Macedonia	Morocco	Tunisia
Fiji	Timor-Leste	Netherlands	Tuvalu
Finland	Turkey	Nigeria	United States of America
Gabon	Turkmenistan	Norway	Vanuatu
Gambia	Uganda	Oman	
Georgia	Ukraine	Palau	
Ghana	Uruguay	Philippines	
Greece	Uzbekistan	Qatar	
Guatemala	Venezuela (Bolivarian Republic of)	Republic of Korea	
Guinea	Yemen	Saudi Arabia	
Guinea-Bissau		Senegal	
Haiti		Sierra Leone	
Honduras		Slovakia	
Hungary		Somalia	
India		Sri Lanka	
Indonesia		Suriname	
Iran (Islamic Republic of)		Swaziland	
Ireland		Togo	
Italy		United Arab Emirates	
Jamaica		United Kingdom of Great Britain and Northern Ireland	
Japan		United Republic of Tanzania	
Jordan		Viet Nam	
Kazakhstan		Zambia	
Kenya		Zimbabwe	
Kyrgyzstan			
Latvia			
Libya			
Lithuania			
Madagascar			
Malawi			
Maldives			
Marshall Islands			
Mexico			
Monaco			
Mongolia			
Total: 107 (55 per cent)		Total: 53 (27 per cent)	Total: 36 (18 per cent)

The above table is a useful starting point in identifying the formal constitutional status regarding the justiciability of the right to education. However, in practice, justiciability requires extra-constitutional enabling conditions (see section 5.5) and the absence of certain barriers (see section 4.3). This means that although the right to education may be formally justiciable according to the constitution, it may not be justiciable in practice.

If the State you are looking at falls within either of the last two columns, there may be other mechanisms that can provide an effective remedy if the right to education is not formally justiciable. In order to identify whether the right to education or aspects of the right to education are directly or indirectly justiciable the following factors are relevant:

Table 4. Identifying a justiciable right to education / justiciable components of the right to education
Domestic application of human rights
<ul style="list-style-type: none"> right to education is given legal effect in domestic legal order (see section 3)
National constitutional and legislative guarantees
<ul style="list-style-type: none"> constitutional provision provides for an effective remedy for all human rights enshrined in the constitution, either explicitly or implicitly, or certain rights including the right to education. For example, most Latin American countries (and Spain) have a constitutional provision on <i>amparo</i>, a mechanism which allows citizens to apply to the courts for relief of a violation of a right protected in the constitution. See country reports on TIESR (e.g., Guatemala). In other jurisdictions a provision on the enforcement of codified rights (e.g., South Africa, Canada) or a provision on judicial jurisdiction of matters concerning the constitution (e.g., Indonesia) may specify that the right to education is justiciable constitutional provision explicitly guarantees certain rights including the right to education as opposed to ascribing the right as aspirational legislation provides access to a judicial remedy for a violation of human rights legislation guarantees access to judicial review for administrative decisions relating to education
Equality and non-discrimination provisions
<ul style="list-style-type: none"> certain aspects of the right to education may be justiciable under other human rights provisions, for instance non-discrimination and equality provisions. The US case <i>Brown v Board of Education</i>¹⁴⁵ is an example of the application of an equality provision to the right to education
Civil and political rights
<ul style="list-style-type: none"> even where the constitutional and legislative framework does not provide for the remedies for violations of the right to education, proactive courts may nonetheless render the right justiciable through innovative interpretations of civil and political rights which are guaranteed. For example, in <i>Mohini Jain v Karnataka</i>¹⁴⁶ which concerned the charging of a ‘capitation fee’ by the private educational institutions, the Supreme Court of India held although the right to education was not explicitly guaranteed by the Constitution, it is essential to the realisation of the fundamental right to life and human dignity which was guaranteed by the Constitution
Federal systems: State constitutional and legislative guarantees
<ul style="list-style-type: none"> in federal systems where the national constitutional and legislative framework does not guarantee the right to education or provide for an effective remedy, it may instead be guaranteed under state constitutional or legislative frameworks, such as in the United States

¹⁴⁵ *Brown v Board of Education of Topeka* 347 U.S. 483 (1954). Available at www.law.cornell.edu/supremecourt/text/347/483 (Accessed 14 January 2017.)

¹⁴⁶ *Miss Mohini Jain v State of Karnataka and Others* 1992 AIR 1858. Case summary available at www.right-to-education.org/resource/mohini-jain-v-karnataka-supreme-court-india-1992 (Accessed 14 January 2017.)

(see, for example, *Edgewood Independent School District v Kirby*¹⁴⁷ and *Campaign for Fiscal Equity et al. v State of New York et al.*)¹⁴⁸

Other laws

Other areas of law may provide an effective remedy where the main issue in question intersects with the right to education:

- criminal law applies to issues such as corporal punishment (e.g., in Bangladesh case *Blast v Secretary of the Ministry of Education and Others*),¹⁴⁹ child marriage, and truancy
- tort and negligence law (e.g., *Gower v London Borough of Bromley*)¹⁵⁰
- labour law (see Canada case of *British Columbia Teachers' Federation v British Columbia*)¹⁵¹

4.3 Barriers to the justiciable right to education

In some jurisdictions, barriers to achieving the justiciability of the right to education still persist, even in States that guarantee a formally justiciable right to education. These barriers must be removed in order to enable the conditions required for the justiciability and enforcement of the right to education.

The existence of legal structures that make the right to education capable of being adjudicated is likely reflective of a genuine commitment to the right to education, human rights more generally, and respect for the rule of law, and the political will that is necessary to drive structural changes to the legal system and wider conditions that may be needed to ensure its justiciability.

Outlining the connection between human rights, sustainable development, and the rule of law, the UN General Assembly, states:

*We are convinced that the rule of law and development are strongly interrelated and mutually reinforcing, that the advancement of the rule of law at the national and international levels is essential for sustained and inclusive economic growth, sustainable development, the eradication of poverty and hunger and the full realisation of all human rights and fundamental freedoms..., all of which in turn reinforce the rule of law.*¹⁵²

Common barriers to the justiciability of the right to education include a lack or absence of:

- respect for the rule of law. A key component of the rule of law is equality before the law, that is, non-discrimination in the access and administration of justice, as well as open justice, underscored by the principle of transparency
- an independent judiciary to uphold the rule of law
- impartial judges. Relevant factors include: the process of judicial appointment, the qualifications and experience required to become a judge, and the duration of terms of office

¹⁴⁷ *Edgewood Independent School District v Kirby* 777 S.W. 2d 391 (Tex. 1989). Case summary available at www.escr-net.org/caselaw/2006/edgewood-independent-school-district-v-kirby-cited-777-sw-2d-391-tex-1989 (Accessed 14 January 2017.)

¹⁴⁸ *Campaign for Fiscal Equity et al. v State of New York et al.* 719 N.Y.S.2d 475. Case summary available at www.escr-net.org/caselaw/2006/campaign-fiscal-equity-et-al-v-state-new-york-et-al-719-nys2d-475 (Accessed 14 January 2017.)

¹⁴⁹ *Bangladesh Writ Petition No. 5684 of 2010*. Case summary available at www.crin.org/en/library/legal-database/blast-v-secretary-ministry-education-and-others (Accessed 14 January 2017.)

¹⁵⁰ *Gower v London Borough of Bromley* [1999] EWCA Civ 2012.

¹⁵¹ *Columbia Teachers' Federation v British Columbia* 2016 SCC 49. Case summary available at www.escr-net.org/caselaw/2016/british-columbia-teachers-federation-v-british-columbia-2016-scc-49 (Accessed 14 January 2017.)

¹⁵² UNGA. 2012. *Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels*, para. 7. (Doc. A/RES/67/1.)

- a constitutional right to have a case concerning human rights heard
- enjoyment of civil and political rights, such as the right to a fair hearing
- judges competent to adjudicate on right to education cases
- an amenable judicial culture to scrutinising the sort of issues raised by economic and social rights
- lawyers who are trained in human rights law and are competent in bringing cases on the right to education
- legal aid provision

Procedural barriers that may impede the justiciability of the right to education include:

- admissibility criteria
- rules of standing may prevent children,¹⁵³ third party, and anonymous applications, as well as prohibit class actions or public interest litigation which limits the available means of addressing collective or group violations, and the potential for remedies that address systemic issues
- human rights law may not allow for proceedings to be initiated against non-State actors who are increasingly taking on the role of education provider
- high standards of proof to show violations

However, even when the right to education is justiciable there remain barriers to accessing justice. In a report on the justiciability of the right to education, Kishore Singh, (former) Special Rapporteur on the right to education, highlights the challenges facing those (particularly members of marginalised groups) who want to bring allegations of violations to court.¹⁵⁴ They include:

- lack of awareness, particularly of persons belonging to marginalised groups of their human rights and existing enforcement mechanisms that can be accessed in cases of violations. This may be due to a lack of human rights education or a lack of awareness of legal processes, or socio-economic barriers such as a general low level of education. Here it is important to note the instrumental value of education in empowering rights-holders to consider violations of their rights as actionable rather than something they have no control over
- violations tend to disproportionately affect children, given that children are most likely to be in education. Children may be less aware of their human rights or may be unwilling to report violations
- cultural barriers, including poor languages skills, may deter linguistic minorities from accessing justice, despite the right to a fair trial requiring that those who cannot speak the language be entitled to a free assistance from an interpreter¹⁵⁵
- the right of women to represent themselves
- high financial cost of pursuing legal remedies particularly in the absence of legal aid provision
- difficulty finding legal advice and adequate representation
- fear of reprisals
- the formality of court procedures may deter people from bringing claims

¹⁵³ For further information, see CRIN. 2016. *Rights, Remedies & Representation: Global Report on Access to Justice for Children*. pp. 17-18.

¹⁵⁴ Singh, K. 2013. *Report of the UN Special Rapporteur on the right to education: Justiciability of the Right to Education*, paras. 74-80.

(Doc. A/HRC/23/35.) Available at www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/UNSR_Justiciability_Right_to_Education_2012.pdf (Accessed 9 October 2017.)

¹⁵⁵ ICCPR Article 14(3)(f).

5. Adjudicating the right to education

Once the right to education is given legal effect in domestic legal orders and is rendered justiciable as a legal right, courts are able to adjudicate on issues and violations regarding the right to education. This means that judicial mechanisms can make a determination as to whether a State (or other duty-bearer) has complied with its human rights obligations, hold them to account by assigning responsibility and imposing sanctions for violations and transgressions, and ensure that appropriate corrective and remedial action is taken when required.¹⁵⁶ In this way, courts play a crucial role in enforcing the right to education, ensuring legal accountability, and therefore contributing to the realisation of the right to education in practice.

It should be pointed out that in order for States to fully discharge their obligations to realise the right to education, measures besides ensuring its justiciability and enforcement through legal mechanisms are required. States must implement the right to education ‘by all appropriate means’ including, but not limited to, legislation.¹⁵⁷ Implementing the right to education through a variety of methods is the best way to ensure enjoyment and minimise litigation. However, the importance of legal enforcement is that, despite progress, States have generally failed to realise the full enjoyment of the right to education. This failure necessitates and underscores the importance of a legally enforceable right to education in ensuring accountability.

5.1 Legal accountability: One strategy among others for the enforcement and realisation of the right to education

Although judicial mechanisms are a key avenue by which to pursue legal redress and remedies for human rights violations, they are not the only means of enforcing the right to education. In its general comment on the domestic application of the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Committee on Economic, Social and Cultural Rights (CESCR) highlights that: ‘The right to an effective remedy need not be interpreted as always requiring a judicial remedy.’¹⁵⁸

According to Philip Alston: ‘all three branches of government offer potential accountability mechanisms for economic and social rights claims.’¹⁵⁹ Legislatures often establish human rights committees that can review draft legislation to ensure compliance with the State’s human rights obligations as well as hear evidence on human rights issues in their oversight duties. Executives can monitor the implementation of the right to education in order to improve policy-making, and provide participatory mechanisms through which stakeholders can engage in policy-making decisions. In addition, quasi-judicial and administrative bodies, such as national human rights institutions and ombudspersons all provide alternative avenues for seeking enforcement of the right to education.¹⁶⁰ The CESCR notes that: ‘Any such administrative remedies should be accessible, affordable, timely and effective. An ultimate right of judicial appeal from administrative procedures of this type would also often be appropriate’ adding, ‘whenever a Covenant right cannot be made fully effective without some roles for the judiciary, judicial remedies are necessary.’¹⁶¹

Court action might best be used in conjunction with other advocacy methods and should, in most instances, be a last resort, where less adversarial methods have been tried.¹⁶² Actually, litigation in defence of economic and

¹⁵⁶ OHCHR and CESR. 2013. *Who Will Be Accountable—Human Rights and the post-2015 Development Agenda*. New York and Geneva, p. 10. (DOC. HR/PUB/13/1.)

¹⁵⁷ ICESCR Article 2(1).

¹⁵⁸ CESCR General Comment 9, para. 9.

¹⁵⁹ Alston, P. 2016. *Report of the Special Rapporteur on extreme poverty and human rights*, para. 41. (Doc. A/HRC/32/31.)

¹⁶⁰ *Ibid.*

¹⁶¹ CESCR General Comment 9, para. 9.

¹⁶² Legal Resources Centre (LRC). 2015. *Fighting to Learn: A Legal Resource for Realising the Right to Education*, p. 1. Available at www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/LRC_Fighting_to_Learn_2015_En.pdf (Accessed 9 October 2017.)

social rights tends to be more effective when it is associated with other advocacy strategies, such as monitoring social policies, lobbying political branches of governments, social mobilisation, and public awareness campaigns¹⁶³ as shown in box 1 below.

It is worth noting that legal accountability is not only achieved through bringing action under education or right to education law. Litigation may be initiated under human rights laws relating to non-discrimination (see for example the US *Brown* case) or labour law (see Canada case of *British Columbia Teachers' Federation v British Columbia*),¹⁶⁴ as well as tort and negligence law (see for example the UK case of *Gower v London Borough of Bromley*).¹⁶⁵ While this avenue does not necessarily reinforce a State's human rights obligations per se, it may nonetheless provide effective redress for those whose rights have been violated.

5.2 A global survey of the justiciability of the right to education

The right to education has been adjudicated in many jurisdictions around the world.¹⁶⁶ Having undertaken a cursory global survey we have found decisions on some aspect of the right to education in 80 countries. In some countries, such as South Africa, US, and Colombia the adjudication of the right to education has been possible due to particular enabling conditions (see section 5.5).

There are several explanations for the absence or low number of cases in some jurisdictions. It may be an indication that there are no or few issues relating to the right to education, such as in Sweden.¹⁶⁷ As Ellen Wiles points out: 'It is notable that countries with the strongest "socio-economic rights" such as Sweden actually have very little litigation, and just have strong welfare systems.'¹⁶⁸ But it can also indicate that the right to education is not protected in national frameworks, and/or there are no accessible effective redress mechanisms. Or, this framework may exist but individuals are not aware of their rights and/or do not have the capacity and resources to go to court.

¹⁶³ OHCHR and CESR. 2013. *Who Will Be Accountable—Human Rights and the post-2015 Development Agenda*. New York and Geneva, p. 57. (DOC. HR/PUB/13/1.); Abramovich, V. 2005. Fostering Dialogue: The Role of the Judiciary and Litigation. Squires, J. et al (eds), *The Road To A Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights*. The University of New South Wales and Australian Human Rights Centre, pp. 167-176.

¹⁶⁴ *Columbia Teachers' Federation* 2016 SCC 49.

¹⁶⁵ *Gower* [1999] EWCA Civ 2012.

¹⁶⁶ See for instance Coomans, F. 2009. Justiciability of the Right to education. *Erasmus Law Review*, Vol. 2, No. 4, pp. 427-443. Available at www.right-to-education.org/resource/justiciability-right-education (Accessed 8 October 2017.); Singh, K. 2013. *Report of the UN Special Rapporteur on the right to education: Justiciability of the Right to Education*. (Doc. A/HRC/23/35.)

¹⁶⁷ Wiles, E. 2006. Aspirational Principles or Enforceable Rights? The Future for Socio-Economic Rights in National Law. *American University International Law Review*, vol 22, no. 1 (2006), p. 40.

¹⁶⁸ *Ibid.*

This body of right to education cases shows that some States' have failed to guarantee the right to education without discrimination, particularly for vulnerable groups, such as pregnant girls,¹⁶⁹ children with disabilities,¹⁷⁰ minorities and Indigenous Peoples,¹⁷¹ children with HIV,¹⁷² and displaced persons.¹⁷³

Court decisions also highlight the failure of the State in guaranteeing the right to free education. Recent decisions in South Africa¹⁷⁴ and Colombia¹⁷⁵ have ordered the government to provide free transportation for children, thereby eliminating an indirect cost of education. In Costa Rica, the Constitutional Court has declared that school fees or charges of any kind, whether direct or indirect, are unconstitutional.¹⁷⁶

A number of courts have also dealt with the funding of public education, often in regards to the principles of non-discrimination and equality, notably in the United States. In a recent decision for instance, the Kansas Supreme Court ruled that the state legislature had failed to ensure equitable school funding.¹⁷⁷

¹⁶⁹ See *Crisanto Arcangel Martinez Martinez y Maria Eglina Suarez Robayo v Colegio Ciudad de Cali* Case No. T-177814 and *Student Representative Council of Molepolole College of Education v The Attorney General* (Civil Appeal No. 13 of 1994) [1995] BWCA 17; [1995] B.L.R. 178 (CA).

¹⁷⁰ See recent case in Argentina *Juzgado en lo Contencioso Administrativo y Tributario N. 1 [Tax and Administrative Court – Chamber N. 1 of Buenos Aires]*, 24/10/2016, *César Alan Rodríguez / acción de amparo* (Arg.). Case summary available at www.right-to-education.org/resource/c-sar-alan-rodriguez (Accessed 12 October 2017.) In Colombia, *Sentencia T-523/16*. In Canada, *Frederick Moore on behalf of Jeffrey P. Moore v Her Majesty The Queen in Right of the Province of British Columbia, represented by the Ministry of Education, and Board of Education of School District No. 44 (North Vancouver), formerly known as The Board of School Trustees of School District No. 44 (North Vancouver) and others* 2012 SCC 61, [2012] 3 S.C.R. 360. Case summary available at www.right-to-education.org/resource/moore-v-british-columbia (Accessed 9 October 2017.)

¹⁷¹ See CRIN. 2016. *Canada : Droits des enfants autochtones : un jugement sans précédent*. Available at www.crin.org/fr/bibliothèque/archives-des-actualités/canada-droits-des-enfants-autochtones-un-jugement-sans (Accessed 9 October 2017.)

¹⁷² In April 2016, ruling on a case involving a 5-year-old boy who was denied admission to school because he was believed to be HIV-positive, Sri Lanka's Supreme Court said children living with or affected by HIV have the full right to education. The court also reminded the government of its obligation to take steps to protect, promote and respect the human rights of people living with HIV. See RTE 2016. *Sri Lanka's Supreme Court Rules to Prohibit Discrimination in Education Settings*. Available at www.right-to-education.org/news/sri-lanka-s-supreme-court-rules-prohibit-discrimination-education-settings (Accessed 9 October 2017.)

¹⁷³ See *Acción de tutela instaurada por Abel Antonio Jaramillo, Adela Polanía Montaña, Agripina María Nuñez y otros contra la Red de Solidaridad Social, el Departamento Administrativo de la Presidencia de la República, el Ministerio de Hacienda y Crédito Público, el Ministerio de Protección Social, el Ministerio de Agricultura, el Ministerio de Educación, el INURBE, el INCORA, el SENA, y otros* Sentencia T-025/04. Available at www.corteconstitucional.gov.co/relatoria/2004/t-025-04.htm (Accessed 10 October 2017.)

¹⁷⁴ In the decision of *Tripartite Steering Committee*, the Eastern Cape High Court in South Africa held that the constitutional right to a basic education is 'meaningless' unless students have access to transport to and from school, at Government's expense, in appropriate cases. *Tripartite Steering Committee and Another v Minister of Basic Education and Others* (1830/2015) [2015] ZAECGHC 67; 2015 (5) SA 107 (ECG); [2015] 3 All SA 718 (ECG) (25 June 2015). For case summaries, see www.right-to-education.org/resource/tripartite-steering-committee-and-another-v-minister-basic-education-and-others (Accessed 8 October 2017.)

¹⁷⁵ See *Sentencia T-008/16*. Case summary available at www.right-to-education.org/resource/judgment-t-00816 (Accessed 8 October 2017.)

¹⁷⁶ *Decision 10//2000*, No. 2000-039 4 of 14: of 10 May 2000, cited in Byrne, I. 2013. *Litigating the Right to Universal Primary Education: Challenges and Prospects*. *INTERIGHTS Bulletin*, Vol. 17, No. 2, p. 61. Available at www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/Interights_Bulletin_17.2_2013_en.pdf (Accessed 8 October 2017.)

¹⁷⁷ RTE. 2016. *USA: Kansas Supreme Court Rules School Funding Inequitable*. Available at www.right-to-education.org/news/usa-kansas-supreme-court-rules-school-funding-inequitable-updated (Accessed 8 October 2017.)

Other decisions show the current, growing issue regarding the role of private actors in education,¹⁷⁸ including with respect to the quality of education.¹⁷⁹ There is also a growing body of decisions banning or restricting the non-civilian use of education institutions.¹⁸⁰

Beyond highlighting the lack of enjoyment of the right to education and the failure of the State to realise the right to education, decisions can contribute to the enjoyment of the right to education.

5.3 *The impact of court decisions on the realisation of the right to education*

Interpretations made by courts on the various aspects of the right to education contribute to a better understanding of its normative content and related States' obligations, adapted to the national context and in light of changing societal values, particularly in fora where judges adopt a 'living instrument approach' as opposed to a strict 'textualist' approach to interpretation.¹⁸¹ For instance, in a recent case, the Constitutional Court of Colombia adopted a progressive decision regarding the freedom of expression of a transgender student within the school. The Court reasoned that the school is obliged to treat the student according to his gender identity. The decision also included a general measure to promote inclusion, equality, and the free development of the person in school.¹⁸²

Courts often play an important role in realising the right to education by providing a forum for people to hold their governments to account by granting enforceable remedies. Court decisions can have an impact on the specific circumstances of those bringing the case and/or lead to structural and policy changes. The Legal Resources Center in South Africa states they 'litigate always with the view of systemic challenges,' seeking 'to leverage individual victories into systemic relief for all schools and learners that face similar challenges.' Their cases 'often run in stages, with the first stage securing immediate relief for client schools and the subsequent stages broadening that relief to all schools in the province and addressing systemic blockages.'¹⁸³

Remedies for violation of the right to education can take different forms (see section 4). For instance, in a recent Argentine case brought to the Administrative Court of Buenos Aires by a student with Down's syndrome because the school he attended for three years refused to give him his degree, the Court ordered that the school and ministry of education issue and legalise his degree.¹⁸⁴ In another case, the Buenos Aires Court of Appeals forced the government to build a school, because the local authorities had, for several years, failed to implement a law

¹⁷⁸ See Singh, K. 2013. Report of the UN Special Rapporteur on the right to education: *Justiciability of the Right to Education*, para. 82. (Doc. A/HRC/23/35.) See also RTE case-law on privatisation www.right-to-education.org/resources/issues/110/type/22 (Accessed 8 October 2017.)

¹⁷⁹ See for instance *Avinash Mehrotra v Union of India* Writ Petition (Civil) No.483 of 2004, (2009) 6 SCC 398. Case summary available at www.right-to-education.org/resource/avinash-mehrotra-v-union-india and *Philippine Association of Colleges and Universities v Secretary of Education* G.R. No. L-5279. Available at www.lawphil.net/judjuris/juri1955/oct1955/gr_l-5279_1955.html

¹⁸⁰ Global Coalition to Protect Education from Attack. 2012. *Lessons in War - Military Use of Schools and Other Education Institutions during Conflict*. Available at http://protectingeducation.org/sites/default/files/documents/lessons_in_war.pdf

¹⁸¹ See, for example, Icelandic Human Rights Centre's page on *Interpretation of Human Rights Treaties*. Available at www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/part-i-the-concept-of-human-rights/interpretation-of-human-rights-treaties (Accessed 14 January 2017.)

¹⁸² *Sentencia T-363/16*. Case summary available at www.right-to-education.org/resource/judgment-t-36316-colombia. For a summary in Spanish, see CLADE. 2016. *Colombia: Corte afirma que las instituciones educativas tienen la obligación de brindar a sus estudiantes un trato acorde con su identidad de género*. Available at <http://justiciabilidad.campanaderechoeducacion.org/clad.php?catId=1&contId=256&p=1> (Accessed 8 October 2017.)

¹⁸³ LRC. 2015. *Fighting to Learn: A Legal Resource for Realising the Right to Education*, p. 87.

¹⁸⁴ See César Alan Rodríguez. Case summary available at www.right-to-education.org/resource/c-sar-alan-rodriguez (Accessed 9 October 2017.)

ordering the construction of the school.¹⁸⁵ In a case in India, after a fire had killed 93 children in a private school, the Supreme Court of India ordered state governments to file affidavits on schools' adherence to basic safety standards to ensure that school buildings were safe and secure in order to prevent such a tragedy happening again.¹⁸⁶ Sometimes, courts impose financial sanctions as a means to compel implementation of court orders. For instance, the Washington Supreme Court ordered the Washington State Legislature to pay a daily fine of \$100,000, to be reserved for education funding, for non-compliance with the court order to adopt and fully implement a programme of basic education for each school year until 2018.¹⁸⁷

Court decisions recognising a violation of the right to education are important¹⁸⁸ whether they concern individual cases (e.g. in the case of pregnant girls excluded from schools) or society in general (e.g. *Brown* in the US).¹⁸⁹ However, court decisions have a stronger impact when they bring structural and policy changes that create the condition for the full enjoyment of the right to education.¹⁹⁰ As underlined by Siri Gloppen: 'enforcement resulting in policy change—if implemented—can easily outweigh the impact of thousands of individual cases.'¹⁹¹ For instance, it has been estimated that 350,000 additional girls are now going to school in India thanks to the midday school meal scheme implemented as a result of right to food litigation before the Indian Supreme Court.¹⁹²

Court decisions can lead to constitutional, legislative, and policy changes. In India for instance, in a historic decision, the Supreme Court of India ruled that the right to education (even when not expressly provided for in India's Constitution as such) was an integral part of the right to life,¹⁹³ and was therefore indirectly justiciable. Pursuant to this and other Supreme Court decisions, the Constitution of India was amended, establishing the right of children aged 6-14 to free and compulsory education.

In Colombia, following a decision of the Constitutional Court¹⁹⁴ that found that the Education Act, which allowed the government to impose fees for primary education, was unconstitutional, the Colombian government issued a national decree establishing that education shall be free in public institutions at the primary and secondary levels. In other examples, courts have ordered governments to adopt a method for evaluating whether the

¹⁸⁵ See *Asesoría Tutelar Justicia Contencioso Administrativo y Tributario de la C.A.B.A. c. s/Amparo*, discussed by Christian Courtis in Courtis, C. 2006. Socio-Economic Rights before the Courts in Argentina. Coomans, F. (ed), *Justiciability of Economic and Social Rights – Experiences from Domestic Systems*. Antwerp and Oxford, Intersentia, p. 309.

¹⁸⁶ *Avinash Mehrotra Writ Petition (Civil) No.483 of 2004*, (2009) 6 SCC 398.

¹⁸⁷ *McCleary v State* 269 P.3d 227 (Wash. 2012). Case summary available at www.right-to-education.org/resource/mccleary-v-state. For further information, see RTE. 2015. *Court Fines Washington State Over Education Funding*. Available at www.right-to-education.org/news/court-fines-washington-state-over-education-funding (Accessed 9 October 2017.)

¹⁸⁸ Rupert Skilbeck highlights: 'the power of courts to declare that something is wrong should not be underestimated. Court proceedings force governments to address political problems that have been ignored, which are unpopular, or have no champions, requiring the authorities to make an official response to the claim, on the record, and to be held to an account.' See Skilbeck, R. 2015. *Litigating the Right to Education*. *Oxford Human Rights Hub*. Available at <http://ohrh.law.ox.ac.uk/litigating-the-right-to-education/>

¹⁸⁹ In *Brown*, the US Supreme Court decided that the existence of schools segregated according to racial criteria amounted to a breach of the equal protection clause, and ordered that the school system be overhauled in accordance with the ruling.

¹⁹⁰ OHCHR and CESR. 2013. *Who Will Be Accountable—Human Rights and the post-2015 Development Agenda*. New York and Geneva, p. 16. (Doc. HR/PUB/13/1.)

¹⁹¹ Gloppen, S. 2009. Legal Enforcement of Social Rights: Enabling Conditions and Impact Assessment. *Erasmus Law Review*, Vol. 2, No. 4, p. 475. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1542681 (Accessed 8 October 2017.)

¹⁹² OHCHR and CESR, op. cit.

¹⁹³ *Unni Krishnan, J.P. v State of A.P.* 1993 I. SCC 645.

¹⁹⁴ *Demanda de inconstitucionalidad contra el artículo 183 de la Ley 115 de 1994 Sentencia C-376/10*. Available at www.corteconstitucional.gov.co/RELATORIA/2010/C-376-10.htm. For an English summary, see *Claim of Unconstitutionality against Article 183 of the General Education Law*. Available at www.right-to-education.org/resource/claim-unconstitutionality-against-article-183-general-education-law-colombia-constitutional (Accessed 8 October 2017.)

quality of education is adequate for the education of persons with disabilities,¹⁹⁵ and to provide data about their education.¹⁹⁶

In the United States, the Supreme Court of Washington ruled that an Act establishing and funding charter schools (a type of private school) using public money was unconstitutional and as a result charter schools in Washington are no longer funded through public money.¹⁹⁷

Court decisions have a real impact when they order for the fulfilment (rather than protection or respect) of the right to education. As underlined by Iain Byrne: ‘...because of the significant resource implications that flow from such cases, courts have often proved reluctant to address fulfilment issue,’ even if ‘there is a gradual but steady trend of judges being prepared to make decisions which do require positive fulfilment by the State.’¹⁹⁸

Regarding the right to education, a recent decision from the Court of Appeal of the State of Sao Paulo in Brazil ruled that the city of Sao Paulo should provide at least 150,000 new spots in childcare facilities and elementary schools by 2016, for children aged five years old and under. In its decision, the Court kept open the possibility of penalising the failure of the executive to produce a consistent plan, and even warned that it would adopt its own plan in the case of an unsatisfactory proposal from the executive.¹⁹⁹

Another recent decision from the United States shows how courts can compel States to fulfil their obligations. In February 2016, the Kansas Supreme Court ruled in *Gannon v Kansas II* that the legislature had failed to cure inequities between rich and poor school districts, and was therefore in violation of the Kansas Constitution. The legislature had been given until 30 June 2016 to find a way to constitutionally (i.e. equitably) fund schools or risk the closing of public schools. On 27 June 2016 after a special session in the Kansas Legislature, the Governor of Kansas signed a bill that restored \$38 million in funding to the Kansas public education system.²⁰⁰

In Indonesia, from 2005 to 2006 a public law charity brought a series of cases against a law that sought to bring education spending up to 20 per cent of the budget gradually and against successive budgets that only allocated 7 per cent and 8.1 per cent to education, despite the Constitution and the Law on National Education System stipulating that the State shall provide 20 per cent of national and regional budgets for education. The Court ruled that the law and both budget allocations were unconstitutional, striking down the law. It did not void the budget however it ordered that if any extra revenue became available, it must be allocated to education. Despite the reluctance of the Court, it is instructive to note that spending on education in Indonesia had risen to 11.8 percent by 2008, no doubt due to the Court’s influence.²⁰¹

¹⁹⁵ In Colombia, *Sentencia T-523/16*, case summary (in Spanish) available at

<http://justiciabilidad.campanaderechoeducacion.org/clad.php?catId=1&contId=270&p=1> (Accessed 8 October 2017.)

¹⁹⁶ See CLADE. 2016. *Argentina: Se ordena que informen a la situación educativa de las personas con discapacidad*. Available at <http://justiciabilidad.campanaderechoeducacion.org/clad.php?catId=1&contId=269&p=1>

¹⁹⁷ *League of Women Voters of Wash. v State* 355 P.3d 1131 (Wash. 2015). Case summary available at www.right-to-education.org/resource/league-women-voters-wash-v-state (Accessed 8 October 2017.)

¹⁹⁸ Byrne, I. 2010. The role of Access to Justice in Alleviating Poverty. Bueren, G. V. (ed), *Freedom from Poverty as a Human Rights: Law’s Duty to the Poor*. Paris, UNESCO, p. 293.

¹⁹⁹ See Vilhena Viera, O. August 2014. *Judicial Experimentation and Public Policy: A New Approach to the Right to Education in Brazil*. Available at www.right-to-education.org/blog/judicial-experimentation-and-public-policy-new-approach-right-education-brazil (Accessed 8 October 2017.)

²⁰⁰ *Gannon v State* 298 Kan. 1107 (Kan. 2014) (*Gannon I*); *Gannon v State* 303 Kan. 682 (Kan. 2016) (*Gannon II*); *Gannon v State* 304 Kan. 490 (Kan. 2016) (*Gannon III*). Case summaries available at www.right-to-education.org/resource/gannon-v-state See also USA: *Kansas Supreme Court Rules School Funding Inequitable*.

²⁰¹ *Decision Number 13/PUU-VI/2008* cited in Singh, K. 2013. *Justiciability of the Right to Education*. (Doc. A/HRC/23/35.) See also Susanti in Gauri, V and Brinks, DM. 2008. *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World*. Cambridge University Press, Cambridge, pp. 258-262.

Siri Gloppen notes: ‘since public budgets are usually not infinite, increased costs in one area normally have to be compensated for in another area (although not necessarily, or fully, as increased costs may lead to efficiency gains or fresh resources). Changes in costs and relative budget allocations can tell us something about how court-enforced rights change priorities between policy areas.’²⁰²

Sometimes, litigation gets the attention of the executive even without a judgment having been entered. In the ‘mud schools’ case in South Africa (so-called because of the deteriorating mud buildings and lack of water and sanitation facilities), litigation became necessary because repeated requests from seven schools to address severe infrastructure problems were ignored. Once faced with a legal challenge, the government saw fit to enter into a significant memorandum of agreement. Ann Skelton notes that: ‘whilst litigation is often seen as adversarial it can open the door to appropriate exchange with the executive, which results in improved access to the right to a basic education.’²⁰³

It is important to note that even if a case fails, this does not mean that there is no discernable effect. In some instances, dissenting opinions are published which may have an effect in the future as interpretation evolves. Further, an unfavourable decision may attract the attention of decision-makers, the media, civil society, and other stakeholders, raising awareness of the issue and spurring political mobilisation

5.4 The limits and challenges of legal enforcement

The main challenge of judicial accountability is the enforcement of court decisions into concrete changes in practice. Even when they are favourable outcomes, there are not always guarantees that redress will be obtained.²⁰⁴ In these instances, follow-up litigation may be required as well as sustained monitoring and campaigning.

Siri Gloppen has criticised the weakness of legal accountability noting:

*Litigation, even when it succeeds and is implemented, may still have very limited or even a negative overall impact on the ground, either because it affects few people, because the measures taken to implement it are ineffective or because it skews resource allocation so that other rights are jeopardised. Litigation that is positive for particular individuals and groups and helps to secure their social rights may at the same time have a detrimental effect on the broader advancement of social rights in society.*²⁰⁵

An example is the US *Brown* case in which the Supreme Court found that racial segregation in public education violated the constitutional right of African-American children to equality before the law - a decision that was enforced through military means. Fifty years after the decision, although some progress has been made, equal access to quality education is still an unfulfilled promise:

These disparities are not a matter of happenstance. They are the result of a systematic disregard for sustained remediation of past intentional government supported racial discrimination in public schools across the nation. The

²⁰² Gloppen, S. 2009. Legal Enforcement of Social Rights: Enabling Conditions and Impact Assessment. *Erasmus Law Review*, Vol. 2, No. 4, p. 477.

²⁰³ Skelton, A. 2013. The Role of the Courts in Ensuring the Right to a Basic Education in a Democratic South Africa: A Critical Evaluation of Recent Case Law. *De Jure*, 46 Vol. 1, p. 1. Available at www.right-to-education.org/resource/role-courts-ensuring-right-basic-education-democratic-south-africa-critical-evaluation (Accessed 8 October 2017.)

²⁰⁴ Byrne, I. 2010. The role of Access to Justice in Alleviating Poverty. Bueren, G. V. (ed), *Freedom from Poverty as a Human Rights: Law's Duty to the Poor*. Paris, UNESCO, pp. 269-297.

²⁰⁵ Gloppen, S. 2009. Legal enforcement of social rights: enabling conditions and impact assessment. *Erasmus Law Review*, Vol. 2, No. 4, p. 473.

*declaration by the Supreme Court in 1954 in the Brown case that segregated schools were inherently unequal promised a remedy that has never been fully realised in any state.*²⁰⁶

Ellen Wiles highlights that litigation as a means to enforce economic and social rights favours the wealthy and educated who are far likelier to bring a case than victims of violations who are marginalised and may not be unaware of their legal rights and that a remedy can be sought through judicial or quasi-judicial means. Further, she points out that cases brought by the wealthy may actually be decided in a manner detrimental to the rights of the marginalised, particularly through the diversion of resources.²⁰⁷

In addition:

- the length of the legal process makes legal action unsuitable for those seeking immediate relief
- failed cases, particularly in common law systems where court decisions are a source of law ('case-law' or 'judge made law') but also in civil systems where unfavourable precedents are set, can impede the realisation of the right to education

However, in a number of countries around the world the adjudication of the right to education has contributed to its enforcement and realisation. In the section below we highlight the enabling conditions for this enforcement giving emphasis on three country cases where the right to education has been extensively adjudicated: South Africa, United States, and Colombia.

5.5 Enabling conditions for the legal enforcement of the right to education

The absence of the formal, procedural, and informal barriers listed in the section 4.3 is a prerequisite for the justiciability of the right to education. In such cases the right to education is formally justiciable, perhaps resulting in *ad hoc* cases. However, for the *effective* legal enforcement of the right to education, that is, where the justice system is accessible and considered a viable avenue for redress,²⁰⁸ we have identified the following necessary enabling conditions, based on an analysis of the cases cited in this section and a literature review:

1. The right to education is incorporated into the domestic legal order, protected, and guaranteed by the constitution and national laws.²⁰⁹ This is the case in South Africa and Colombia where the right to education is guaranteed by the constitution. In the USA, some aspects of the right to education are protected at the state level (namely public education, equity, and adequacy) whilst others (namely equal protection) at the federal.
2. The existence of an accessible, independent, and efficient judicial system, which includes access to quasi-judicial mechanisms such as national human rights institutions, ombudspersons, or other administrative mediators.

²⁰⁶ US Racial Discrimination Program. 2004. *The Justiciability of Economic, Social, and Cultural Rights in the US - Domestic Implementation of the Right to Equal Education*. Global Rights. Available at www.nesri.org/sites/default/files/Justiciability_of_Economic_Social_and_Cultural_Rights_in_US.pdf (Accessed 8 October 2017.)

²⁰⁷ Wiles, E. 2006. Aspirational principles or enforceable rights? The future of socio-economic rights in national law. *American University International Law Review*. Vol. 22, no. 1, p. 56.

²⁰⁸ A very high number of cases may also be indicative of serious problems in the education system itself. However, the fact that litigation is used to enforce the right to education, shows that it is seen as a viable avenue for redress.

²⁰⁹ Singh, K. 2013. Report of the UN Special Rapporteur on the right to education: *Justiciability of the Right to Education*, para. 82. (Doc. A/HRC/23/35.); OHCHR and CESR. 2013. *Who Will Be Accountable—Human Rights and the post-2015 Development Agenda*. New York and Geneva, p. 16. (Doc. HR/PUB/13/1.)

3. Progressive and proactive judges. Judges who recognise that economic and social rights are human rights on par with civil and political rights, particularly in less developed countries, are likely to reflect this in their reasonings, leading to innovative interpretations that generally advance the realisation of the right to education. In South Africa and Colombia for instance, the composition of courts has played a key role in enforcing the right to education. Siri Gloppen notes that in South Africa the composition and nature of the Constitutional Court was remarkable and included judges deeply committed to social rights.²¹⁰ In Brazil, Rupert Skilbeck reports that there are many problems with the realisation of the right to education, particularly in rural areas. Litigation has been used to confront the failure of the authorities to provide sufficient school places, and judges have been proactive in ensuring their decisions are implemented.²¹¹
4. Active civil society organisations providing strong legal support.²¹² This is particularly the case in South Africa and Colombia. The former UN Special Rapporteur on the right to education, Kishore Singh, emphasised, ‘the important role of civil society in disseminating information regarding the right to education to parents, teachers and school administrators, and also in identifying and publicising violations of the right to education.’²¹³ Civil society organisations with legal expertise can also contribute to the enforcement of the right to education by submitting third party interventions and bringing cases themselves. Civil society also plays a key role in ensuring the enforcement of court orders (see, for instance, in South Africa in box 1).
5. The litigation of the right to education is complemented by other strategies.²¹⁴ As underlined by CESR and OHCHR: ‘litigation is most effective when legal claims are associated with social and political mobilisation on the same issue. In some cases, the possibility of judicial enforcement has a deterrent effect and has provided social movements with leverage.’²¹⁵ This is the case in South Africa,²¹⁶ the United States,²¹⁷ and Colombia for instance.
6. Rights-holders are aware of their rights and have the capacity to claim them. Katarina Tomasevski, the first UN Special Rapporteur on the right to education observes that: ‘There is an inverse proportion between the availability of education and access to remedy for its denial or violation, namely litigation tends to be confined to those parts of the world where education is both available and accessible.’²¹⁸ UNESCO and the Committee on Economic, Social and Cultural Rights have also noted that legal and political processes enabling rights-holders to seek effective enforcement is ‘possible only if these

²¹⁰ Gloppen, S. 2009. Legal Enforcement of Social Rights: Enabling Conditions and Impact Assessment. *Erasmus Law Review*, Vol. 2, No. 4, p. 477.

²¹¹ Skilbeck, R. 18 November 2015. *Litigating the Right to Education*. Oxford Human Rights Hub. Available at <http://ohrh.law.ox.ac.uk/litigating-the-right-to-education/> (Accessed 8 October 2017.)

²¹² Byrne, I. 2010. The role of Access to Justice in Alleviating Poverty. Bueren, G. V. (ed), *Freedom from Poverty as a Human Rights: Law’s Duty to the Poor*. Paris, UNESCO, p. 282.

²¹³ Singh, K. 2013. *Report of the UN Special Rapporteur on the right to education: Justiciability of the Right to Education*, para. 82. (Doc. A/HRC/23/35.)

²¹⁴ See, for instance, Abramovich, V. 2005. Fostering Dialogue: The Role of the Judiciary and Litigation. Squires, J. et al (eds), *The Road To A Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights*. The University of New South Wales and Australian Human Rights Centre, pp. 167-176.

²¹⁵ OHCHR and CESR. 2013. Who Will Be Accountable—Human Rights and the post-2015 Development Agenda. New York and Geneva, p. 10. (Doc. HR/PUB/13/1.)

²¹⁶ See, for instance, RTE / Section27. 2014. *The Limpopo Textbook Crisis in South Africa - How SECTION27 used rights-based strategies to hold the government accountable*.

²¹⁷ See, for instance, Rebell, M. 11 December 2015. *Litigating the Right to education in the United States*. Available at www.right-to-education.org/blog/litigating-right-education-united-states (Accessed 10 October 2017.)

²¹⁸ Tomasevski, K. 2011. *Annual Report of the Special Rapporteur on the right to education submitted in accordance with the commission on human rights resolution 2000/9*, para. 65. (Doc. E/CN.4/2001/52.)

beneficiaries are conversant with the legal processes and ways and means of seeking remedies in case of the violation of the right to education,' adding that for this purpose, they must be able to receive minimum basic education which empowers them to do so.²¹⁹

5.5.1 Beneficial enabling conditions for the legal enforcement of the right to education

In addition, there are a number of beneficial enabling conditions that make legal enforcement of the right to education even more effective. These, in addition to the above conditions, represent the ideal conditions under which the right to education is effectively enforced. They may also mitigate certain barriers and weaknesses of the justice system.

1. Innovative informal procedures and court orders. Iain Byrne highlights the need to legally empower the poor and points out as a good example the recognition, by the Constitutional Court of Colombia, of the validity of Indigenous Peoples' community justice decisions. Innovative court orders can, for instance, include the participation of civil society organisations in the enforcement of the decisions.²²⁰ In Brazil, in a recent case on the lack of childcare facilities and elementary schools, the Sao Paulo Court of Appeal ordered the municipality itself to draft a plan for the provision of 150,000 additional school places and ruled that the Court's section on children's rights would be responsible for monitoring the implementation of the plan, along with civil society organisations, the public Prosecutor's Office, the Public Attorney's Office, among others, 'in relation to the opening of new school vacancies, or in relation to the provision of quality education.'²²¹ In *Linkside II*, the Eastern Cape High Court ordered, as requested by the Legal Resources Center, that a 'claims administrator' be appointed to monitor the disbursement of payments to claimant schools for failure to secure the timely appointment and funding of teachers at all public schools.²²²
2. Progressive changes to society also facilitate progressive decision-making of judges, for instance in the recent LGBTQI case in Colombia where the Constitutional Court judged that the school has an obligation to treat the student according to his gender identity.²²³ For Siri Gloppen an 'effective social mobilisation campaign meant that the case was basically 'won in the street' before it came to the Constitutional Court.'²²⁴
3. Cross-fertilisation of jurisprudence between jurisdictions. The use of international and regional international human rights law and soft law instruments, such as general comments, as well as the citing of cases from foreign jurisdictions to inform decisions can lead to more favourable outcomes from a human

²¹⁹ UNESCO. 2006. *Report of the fourth meeting of the Joint Expert Group UNESCO (CR)/ECOSOC (CESCR) on the monitoring of the right to education focusing on the justiciability of the right to education, Annex, 175 EX/28*, para. 19. Available at www.right-to-education.org/resource/report-fourth-meeting-joint-expert-group-unesco-crecosoc-cescr-monitoring-right-education (Accessed 10 October 2017.)

²²⁰ Byrne, I. 2010. The role of Access to Justice in Alleviating Poverty. Bueren, G. V. (ed), *Freedom from Poverty as a Human Rights: Law's Duty to the Poor*. Paris, UNESCO, p. 293.

²²¹ See Vilhena Viera, O. August 2014. *Judicial Experimentation and Public Policy: a New Approach to the Right to education in Brazil*. Available at www.right-to-education.org/blog/judicial-experimentation-and-public-policy-new-approach-right-education-brazil (Accessed 10 October 2017.)

²²² *Linkside and Others v Minister of Basic Education and Others* (3844/2013) [2015] ZAECGHC 36 (26 January 2015). Case summary available at www.right-to-education.org/resource/linkside-and-others-v-minister-basic-education-and-others-linkside-ii

²²³ *Sentencia T-363/16*. Case summary available at www.right-to-education.org/resource/judgment-t-36316-colombia. For a summary in Spanish, see CLADE. 9 August 2016. *Colombia: Corte afirma que las instituciones educativas tienen la obligación de brindar a sus estudiantes un trato acorde con su identidad de género*. Available at <http://justiciabilidad.campanaderechoeducacion.org/clad.php?catId=1&contId=256&p=1>

²²⁴ Gloppen, S. 2009. Legal Enforcement of social rights: Enabling Conditions and Impact Assessment. *Erasmus Law Review*, Vol. 2, No. 4, p. 471.

rights perspective. In addition, jurisdictions that allow civil society organisations to bring and intervene in cases may potentially prove beneficial, as civil society, particularly human rights organisations, are adept at highlighting comparative case-law and international law. For instance, the LRC have been granted leave by the European Court of Human Rights to intervene in a case on scholar transport in Hungary²²⁵—an issue they themselves have litigated in South Africa.²²⁶

²²⁵ See LRC. 2016. *European Court of Human Rights to Consider Right to Education*. Available at <https://realisingrights.wordpress.com/2016/10/03/legal-resources-centre-to-participate-in-the-european-court-of-human-rights/> (Accessed 10 October 2017.)

²²⁶ *Tripartite Steering Committee and Another v Minister of Basic Education and Others* (1830/2015) [2015] ZAECGHC 67; 2015 (5) SA 107 (ECG); [2015] 3 All SA 718 (ECG) (25 June 2015). For case summary, see www.right-to-education.org/resource/tripartite-steering-committee-and-another-v-minister-basic-education-and-others (Accessed 10 October 2017.)

Box 1: Vignette: South Africa

In 1996, South Africa adopted a progressive²²⁷ constitution that explicitly incorporates socio-economic rights that can be challenged through courts if they are not met.²²⁸ Section 29 provides that ‘everyone has the right to basic education’, which has been recognised by the Constitutional Court as ‘immediately realisable’.²²⁹

In this country, affected by huge inequalities,²³⁰ ‘the delivery of basic education, particularly in the context of the legacy of the apartheid history is a gargantuan challenge. There are huge backlogs in infrastructure, there is an ever-increasing demand for more schools and classrooms amongst a socially and geographically mobile population, there are acute concerns about quality.’²³¹

Due to the scale of the education crisis, in excess of 25 cases have been brought to courts.²³² In recent years, supported by a ‘well-organised social movement’, civil society organisations²³³ have actively submitted cases to court and ensured the enforcement of the court decisions on issues such as school infrastructures, textbooks delivery,²³⁴ free transport, and inclusive education.²³⁵

Litigation and courts decisions have had a positive impact on the enforcement of the right to education. In the ‘mud schools’ case for instance, the Legal Resource Center instituted proceedings to replace unsafe school structures with classrooms that are safe and functional. The litigation resulted in concrete relief for the individual client schools, which had new classrooms built. However, more importantly, it secured a binding commitment by the state to eradicate all ‘mud schools’ across the Eastern Cape and the rest of the country, including a financial commitment of over R8 billion and a plan of action.²³⁶

Beyond the submission of cases to courts, civil society organisations have played an active role in monitoring the implementation of judgments checking the practical measures taken and going back to courts when the court orders were not respected.²³⁷ They have also pushed for the adoption of norms and standards in 2013 to ensure that learners receive an education in a safe and functional school environment.

²²⁷ Pieterse, M. 2004. *Possibilities and Pitfalls in the Domestic Enforcement of Social Rights: Contemplating the South African Experience*. Human Rights Quarterly, Vol. 26, No. 4 (Nov., 2004), p. 885. Available at www.jstor.org/stable/20069766 (Accessed 10 October 2017.)

²²⁸ Constitution of South Africa Section 38.

²²⁹ *The Governing Body of the Juma Masjid Primary School v Essay* No 7 BCLR 651, CC. Case summary available at www.right-to-education.org/resource/juma-musjid-primary-school-v-essay-constitutional-court-south-africa-2011 (Accessed 9 October 2017.)

²³⁰ In South Africa, the government has faced huge, deep seated inequalities of segregation, where the apartheid government spent five times more on white learners than black learners, leaving immense challenges for the poorest children. See Open Society Justice Initiative. 2015. *Conference Report: The Impacts of Strategic Litigation on Equal Access to Quality Education, New Delhi, 16 September 2015*. Available at www.opensocietyfoundations.org/sites/default/files/slip-education-newdelhi-20161014.pdf (Accessed 9 October 2017.)

²³¹ Skelton, A. 2013. *The Role of the Courts in Ensuring the Right to a Basic Education in a Democratic South Africa: A Critical Evaluation of Recent Case Law*. *De Jure*, 46 Vol. 1, p. 4.

²³² Open Society Justice Initiative. 2015. *Conference Report: The Impacts of Strategic Litigation on Equal Access to Quality Education, New Delhi, 16 September 2015*. Available at www.opensocietyfoundations.org/sites/default/files/slip-education-newdelhi-20161014.pdf (Accessed 9 October 2017.)

²³³ In particular the Legal Resources Center and Section27.

²³⁴ *Minister of Basic Education v Basic Education for All* (20793/2014) [2015] ZASCA 198; [2016] 1 All SA 369 (SCA); 2016 (4) SA 63 (SCA) (2 December 2015). Case summaries available at www.right-to-education.org/resource/minister-basic-education-and-others-v-basic-education-all-and-others. See also RTE and Section27. 2014. *The Limpopo Textbook Crisis in South Africa - How SECTION27 Used Rights-Based Strategies to Hold the Government Accountable*.

²³⁵ LRC 2015. *Fighting to Learn: A Legal Resource for Realising the Right to Education*; *Ibid.*, RTE and Section27.

²³⁶ *Ibid.*, LRC.

²³⁷ LRC, RTE and Section27, *op. cit.*

In South Africa, quasi-judicial mechanisms also play a relevant role. Following the Limpopo textbook case for instance, the South African Human Rights Commission undertook an investigation into the issue of the broader problems relating to textbook procurement and delivery to make recommendations to improve these systems.²³⁸

The adjudication of the right to education ‘has undoubtedly improved education for children in South Africa, and has obliged the government to invest in education when it otherwise would have delayed or failed to have done so.’²³⁹

Enabling conditions that have made the enforcement of the right to education possible in South Africa include: the recognition of the right to education in the constitution, with mechanisms to claim it in cases of violation, the important role of the civil society, using various strategies (litigation with social and political mobilisation) and the competency and engagement of the judges producing innovative jurisprudence and remedies, as well as a degree of political will.

It should be noted that the right to education in South Africa remains largely unrealised, a fact reflected in the plethora of right to education cases that have and continue to be brought. Legal action, although there have been real positive impacts, has not yet been enough to reverse the legacy of decades of Apartheid.

6. Conclusion

The right to education is explicitly recognised in 82 per cent of national constitutions and is a legally enforceable constitutional right in 107 States (55 per cent of States). In addition, certain aspects of the right to education are justiciable in many other jurisdictions. Further, we have found right to education cases in at least 80 States, empirically showing that the right to education is justiciable, with many more likely to exist. Although these figures do not represent full adherence to the obligations imposed by human rights treaties guaranteeing the right to education (196 States have ratified the Convention on the Rights of the Child and 165 the International Covenant on Economic, Social and Cultural Rights), they do nonetheless signify that legal enforcement is a viable avenue for legal accountability in many States.

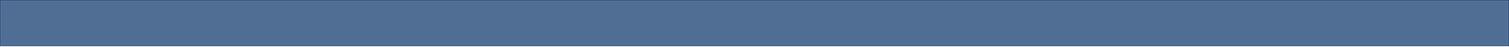
In some States the right to education is extensively litigated, in others there are *ad hoc* cases, whilst in others formal, procedural, and informal barriers impede its justiciability and legal enforcement. The global picture is mixed. However, what is clear from our analysis is that legal enforcement, through mechanisms competent to hold duty-bearers legally accountable, has a positive impact on the realisation of the right to education.

We have shown that the legal enforcement of the right to education has led to positive outcomes. From remedies that correct injury to single applicants to decisions that have led to significant structural reform on a broad range of right to education issues, including: free education; the rights of marginalised groups, in particular girls, persons with disabilities, minorities, and persons identifying as LGBTQI; education financing; the rights of teachers; and safe learning environments—all of which are covered by SDG Four on education of the 2030 Agenda for Sustainable Development.

Given that the normative content of the right to education and SDG Four are aligned, by reframing the content of SDG Four as part of the right to education, the legal obligations owed to that content can be invoked, rendering

²³⁸ Ibid., RTE and Section 27.

²³⁹ Ibid.



most aspects of SDG Four capable of legal enforcement. Although legal enforcement will not always be the ideal means by which to hold States accountable for their obligations flowing from their political commitment to sustainable development, accountability through legal enforcement is important because of its legal character. Human rights are legal rights and duty-bearers are accountable to the law, with judicial mechanisms existing precisely to uphold those laws.

That is not to say that the failure of many States (89 according to our research) to ensure the legal enforcement of the right to education, human rights more generally, and the conducive conditions required for enjoyment, are not major global issues. They are. Indeed the noncompliance of States with their human rights obligations, particularly economic and social rights, has been to the detriment of the most marginalised—the very people the 2030 Agenda aims to empower and lift out of poverty—whose human rights are more likely to be violated and whose human rights are most in need of legal enforcement. If States are serious about ending poverty and achieving sustainable development then implementing the right to education and other economic and social rights is one of the best strategies they can employ.