

THE RIGHT TO PRIMARY EDUCATION IN AFRICA – A HUMAN RIGHT OR AN UNFULFILLED PROMISE DURING SITUATIONS OF EMERGENCY?

An analysis of state obligations during situations of poverty,
natural disaster and conflict



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*“[S]ince wars begin in the minds of men,
it is in the minds of men that the defenses of
peace must be constructed.”*

–UNESCO Constitution–

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Abbreviations & Acronyms

4A's	Availability, Accessibility, Adaptability and Acceptability
Banjul Charter	African Charter on Human and Peoples' Rights (ACHPR)
CADE	UNESCO Convention against Discrimination in Education
CEDAW	Convention for the Elimination of Discrimination against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CESCR	Committee on Economic Social and Cultural Rights
Children's Charter	African Charter on the Rights and Welfare of the Child (ACRWC)
CRC Committee	Committee on the Rights of the Child
CRC	Convention on the Rights of the Child
Delors Commission	International Commission in Education for the Twenty-first Century
DRC	Democratic Republic of Congo
ECOSOC	United Nations Economic and Social Council
EFA	Education for All
GDP	Gross Domestic Product
HDI	Human Development Index
HRC	Human Rights Committee
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICL	International Law Commission
ICRC	International Committee of the Red Cross
IDP	Internally Displaced Person
IHL	International Humanitarian Law
INEE	Inter-Agency Network for Education in Emergencies

ISCED	International Standard Classification of Education
LDC	Least Developed Country
MDG	Millennium Development Goals
RtE	Right to Education
RtPE	Right to Primary Education
UDHR	Universal Declaration on Human Rights
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNISDR	UN International Strategy for Disaster Reduction
VCLT	Vienna Convention on the Law of Treaties

1 Introduction

The discourse on the right to education ('RtE') is not always sufficiently nuanced when describing the scope and content of the right.¹ Basic needs are sometimes not differentiated from human rights, and the impression one is often left with is that every child can claim a place in school today regardless of the circumstances, when in fact the underlying legal sources lead to a much more complex conclusion. There is thus a risk that those instances where there is a legitimate right to a result, cannot be discerned from those where there is a complex matrix consisting of both obligations of conduct and result. Rights holders and advocates then run the risk of a devaluation of the right to education, for all, contrary to the literature's good intentions.

The Universal Declaration on Human Rights ('UDHR')² proclaims: Everyone has the right to education.³ The international community is politically committed to the fulfillment of this promise by 2015 through Millennium⁴ Development Goal ('MDG') 2⁵ and the Education for All ('EFA') campaign.⁶ The International Covenant on Economic, Social and

¹See e.g. A/63/500 p. 1 and http://www.ineesite.org/post/about_the_right_to_education_in_emergencies2/.

² Art. 26.

³ For a drafting history of art. 26, see Halvorsen (1990) p 349.

⁴ See the United Nations Millennium Declaration.

⁵ All UN member states are committed to the MDGs. Goal no. 2 is to "[e]nsure that, by 2015, children everywhere, boys and girls alike, will be able to complete a full course of primary schooling". Goal no. 3 is also relevant. Its target is to "[e]liminate gender disparity in primary and secondary education, preferably by 2005, and in all levels of education no later than 2015". The MDGs do however not mention free and compulsory education specifically. See <http://www.un.org/millenniumgoals/bkgd.shtml>.

⁶ The goals in the Dakar Framework for Action ('Dakar 2000') include free and compulsory primary education for all by 2015. The EFA movement is lead by UNESCO and was launched after the after the

Cultural Rights ('ICESCR') was the first binding international agreement to recognize the right of everyone to education. It imposes a legal obligation on state parties, requiring that "[p]rimary education shall be compulsory and available free to all".⁷

However, in 2008, 67 million children of primary school age were out of school. Of these children, 42 per cent lived in conflict-affected countries⁸ and 43 per in Sub-Saharan Africa.⁹ 796 million people – about 17 per cent of the world population – still lack basic literacy skills.¹⁰ Poverty is a major obstacle to the fulfillment of the RtE and education is an important enabling right, which could empower people to claim other rights¹¹ and escape from poverty.¹²

The right to primary education ('RtPE') can be considered an economic right, a social right and a cultural right, but in many ways also as a civil and political right, since it is central to the full and effective realization of those rights.¹³ It therefore epitomizes the indivisibility and interdependence of all human rights.¹⁴ Today the RtE is recognized in a number of international instruments regarding such diverse groups as woman, children, refugees and migrants.¹⁵ In spite of the many legal bases and expressions of political will, the right, is for many children – especially in Africa and during emergencies – an unfulfilled promise. The

World Conference on Education for All in 1990, see UNESCO (1994) preface. It has been criticized for focusing on needs rather than rights. See also Beiter (2006) p. 323.

⁷ Art. 13(2)(a).

⁸ EFA (2011) p. 15.

⁹ Ibid p. 5. 10 million children also drop out of school each year in Sub-Saharan Africa, EFA (2011) p. 1.

¹⁰ Ibid p. 1.

¹¹ Committee on Economic, Social and Cultural Rights General Comment ('CESCR General Comment') no. 13 [1].

¹² See Dakar (2000) p. 13 and A/RES/S-27/2 [7], where the Assembly noted its conviction that "investments in children and the realization of their rights are among the most effective ways to eradicate poverty."

¹³ Prado (1998) [1]-[4].

¹⁴ CESCR General Comment 11 [2] and Vienna Declaration and Programme of Action [5].

¹⁵ See Beiter (2006) p. 87.

aim of this thesis is to analyze and detail specific state obligations during typical situations where the right is not fulfilled, thus untangling the situations where there is a clear and immediate right to a result, from those where the obligations are mainly those of conduct.

1.1 Structure of the thesis

The first chapter contains: an introduction explaining the background for and purpose of the thesis; the scope and necessary limitations (1.2); methodological issues – including an overview of the main legal sources in the thesis and a note on their value and relevance (1.3) and finally research questions (1.4). Chapter 2 details the general right to primary education in Africa with an analysis of state obligations based on the ICESCR (2.1); the right to primary education under other relevant legal bases (2.2); and possible restrictions (2.3). Chapter 3, 4 and 5 contain an analysis of state obligations during the type situations of poverty, natural disasters and conflict respectively. Chapter 6 contains the conclusions.

1.2 Scope and limitations

The thesis' principal limitation is its scope. By covering many separate issues, I am forced to compromise the depth of detail in the analysis, for the sake of the bigger picture. The aim of the thesis is to describe the right to primary education as held by inhabitants of the continent of Africa – during emergencies. The normative basis is the ICESCR, but the right is also contained in other universal and regional treaties, which have been ratified by a majority of African states. I will briefly detail the general RtPE in Africa in chapter 2 before focusing on three specific type situations of emergency. They are selected to comprise a large share of potential emergency situations, but are not an attempt to exhaustively define emergencies.

Poverty is considered a type of chronic or silent emergency,¹⁶ and is intricately linked to the more acute emergencies; natural disasters and conflict. They are discussed separately as different rules apply and influence state obligations. For the purpose of this thesis the following definition of *emergency* covers the type situations:

¹⁶ Sinclair (2002) p. 23.

*An emergency is understood as a man-made or natural situation, which has prevented the establishment of, destabilized, disorganized, or destroyed the education system, thereby disrupting, denying, hindering progress of or delaying the realization of the right to education.*¹⁷

1.2.1 Definition of the *right to education* for the purpose of this thesis

The thesis will examine the substantive legal right to education under international law. This means the rights created by inter-state agreements and customary international law. I take a positivist¹⁸ approach and aim to describe the state obligations to respect, protect and fulfill the RtE as they emanate from this right when interpreted in accordance with the customary rules of treaty interpretation.¹⁹

None of the main legal bases contain a definition of the right to education. The definition in the UNESCO Convention against Discrimination in Education ('CADE') will therefore form the basis of my own definition of education for the purpose of this thesis. It encompasses "all types and levels of education, (including) access to education, the standard and quality of education, and the conditions under which it is given".²⁰ This is further limited to free and compulsory primary education as expressed in ICESCR art. 13(2)(a).

Primary education can be negatively defined as what lies between pre-primary and secondary education.²¹ The content is further complicated by the use in several legal bases

¹⁷ Inspiration taken from Committee on the Rights of the Child ('CRC Committee') Day of General Discussion on "The Right of the Child to Education in Emergency Situations" Recommendations 19. September 2008 ('CRC Day of Discussion 2008') [2], The UN International Strategy for Disaster Reduction: <http://www.unisdr.org/we/inform/terminology> and Rhoades (2010) p. 9.

¹⁸ See Hart (1957) p. 594.

¹⁹ See e.g. Alston (1987) p. 160.

²⁰ See art. 1(2) and Beiter (2006) p. 17-21 for more on the definition of education.

²¹ ISCED (1997) p. 22-23 and ISCED (2011) p. 26-27.

of the terms *fundamental* and *basic* education,²² but primary is considered a more narrow term and contained in the two former. According to UNESCO,²³ primary education is classified as level 1 and begins between the ages of 5 and 7 and should last for 6 years of full time education. The Committee on the Rights of the Child (‘CRC Committee’) has recommended that a school year should conform to the international standard of 180 days per year.²⁴ The purpose of this thesis, based on the above-mentioned, will be to describe the content and extent, of African states’ obligations to provide:

No less than six years of full time, free and compulsory primary education consisting of a minimum of 180 days and starting from between the ages of 5 and 7, based on rights accruing from international law.

The Committee on Economic, Social and Cultural Rights (‘CESCR’) considers that primary “education must be universal, ensure that the basic learning needs of all children are satisfied, and take into account the culture, needs and opportunities of the community.”²⁵ The right can also be understood as to contain a social aspect and a freedom aspect. The latter is concerned mostly with the freedom to choose how, when and where education shall be given and will not be discussed further. The social aspect concerns the right to access to education of a certain type and quality, and will be the focus of the thesis.²⁶ The CESCR has employed a framework of four essential features (4A’s)²⁷ as an analytical tool to describe state obligations. The features of availability and accessibility are the thesis’ primary focus and are contained in ICESCR art. 13(2). The feature of

²² In CESCR General Comment 13 [9] primary education is understood as “the most important component of basic education”.

²³ Nearly all states are members of UNESCO, see <http://www.unesco.org>. Alston claims the travaux préparatoires show that the Specialized Agencies, of which UNESCO is one, should add detail to the rights in the ICESCR, see art. 23 and Alston (1980) p. 114, see Beiter (2006) p. 233-235.

²⁴ CRC/C/TKM/CO/1 [59].

²⁵ CESCR General Comment 13 [9].

²⁶ See Beiter (2006) p. 39 for more on the freedom and social aspects.

²⁷ CESCR General Comment 13 [8] and Tomaševski (1999) [50].

adaptability is important for understanding the right in the different type situations, while the element of acceptability, which *inter alia* concerns the quality of education, is crucial to the realization of the right, but not central in the discussion as it is a constant requirement²⁸ and prerequisite for the other features. As explained in a later chapter, these 4A's also form a suitable conceptual basis for describing state obligations under the other legal bases in chapter 2 and 3. In Chapter 4 and 5 the focus will be on restrictions and international humanitarian law ('IHL') respectively.

Pre-primary, fundamental and secondary education is important to prepare a child for a life of self-sufficiency. The level of protection afforded by international law is however weaker, and these other levels are therefore beyond the scope of this thesis. Due to the limited space available, procedural rights and enforcement of the right will not be discussed either, except where they illustrate substantive issues. The thesis is concerned with the human right to education, other fields of law such as refugee and IHL will only be mentioned superficially when relevant for the RtE.

1.3 Methodology

The Statute of the International Court of Justice ('ICJ') is considered to spell out the sources of international law, with treaties, custom and general principles of law considered primary sources.²⁹ As subsidiary means of interpretation, the Court can also apply judicial decisions and "teachings of the most highly qualified publicists".³⁰ The Vienna Convention on the Law of Treaties ('VCLT') arts. 31-33 reflect the generally accepted customary rules of treaty interpretation.³¹ Together, these rules and principles form the basis of my analysis.

²⁸ Beiter contends that the two latter are better suited for describing rights *in* education, rather than the right *to* education. Beiter (2006) p. 476-477.

²⁹ Art. 38(1)(a),(b) and (c).

³⁰ Art. 38(1)(d).

³¹ Alston (1987) p. 160-161.

The substantive right to primary education has a fragmented legal basis, presenting a challenge when trying to formulate something general. A rights holder has the right to a concept – education – which is contained in two universal³² and two regional³³ human rights treaties. The ICESCR³⁴ is ratified by every African state except five, while the Convention on the Rights of the Child (‘CRC’)³⁵ is ratified by every African state except Somalia. The African Charter on the Rights and Welfare of the Child (‘Children’s Charter’)³⁶ has been ratified by 43 out of Africa’s 53 states, while the African Charter on Human and Peoples’ Rights (‘Banjul Charter’)³⁷ has been ratified by every African state. In the following, an analysis based on the customary rules of treaty interpretation will show that the four legal bases do not contain conflicting norms. It is generally accepted that when several norms “bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations”³⁸ Each treaty – and indeed other instruments reflecting state practice³⁹ – can help to clarify and update the understanding and content of the other, creating one applicable set of rights and obligations.⁴⁰ As the normative analysis is based on the ICESCR, it will apply to every state – or resident person in that state – which has ratified the Covenant. Where other legal bases are discussed, status of ratification must be consulted.

³² It is also contained in the UDHR art. 26. See Annex I.

³³ See Annex II.

³⁴ The RtE is contained in arts. 13 and 14. Non-parties are: Mozambique, Comoros, São Tomé and Príncipe, South Africa and Botswana.

³⁵ The RtE is contained in arts. 28 and 29.

³⁶ The RtE is contained in art. 11.

³⁷ The RtE is contained in art. 17.

³⁸ See Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America, International Court of Justice (ICJ), 6 November 2003 [41]. See the “principle of harmonization” in Koskenniemi (2006a) [14(4)], and generally regarding treaty interpretation, Fitzmaurice (1951) p. 1-6.

³⁹ VCLT art. 31(3)(b)

⁴⁰ VCLT art. 31(3)(c). The International Law Commission (‘ILC’) refers to this as “systemic integration”, see Koskenniemi (2006 b) [410]-[428].

In addition to the protection afforded by human rights law, there are relevant rules for the RtE contained in International Humanitarian Law (IHL) and in a number of instruments protecting the non-discrimination⁴¹ of certain vulnerable groups such as woman, persons with disabilities, migrants and refugees and on specific grounds such as racial discrimination and specifically – discrimination in education.⁴² Human rights law applies during emergencies and conflict, but IHL will, as a general rule, if there is a case of normative conflict, take precedent as *lex specialis*.⁴³

When the term *instrument* is used in the thesis this can refer to binding treaties, charters, covenants and protocols, but also other normative sources such as declarations. The UDHR is formally a non-binding declaration. However, parts of it are considered customary international law, and some authors claim the right to free and compulsory primary education has attained this status.⁴⁴ If this can be established, the customary RtPE would impose a legal obligation also on those African states which have not signed the relevant treaties. Due to the high level of acceptance of treaty obligations among African countries, the content of, and possible status of a customary RtPE, whether based on the UDHR or other sources, will not be discussed further.

The thesis will rely on some important soft law⁴⁵ documents as “subsidiary means”⁴⁶ for determining the law. Interpretative comments from treaty supervisory bodies are important sources for determining state obligations. There is little authoritative case law available,

⁴¹ These legal bases are not exhaustive. See Beiter (2006) p 87.

⁴² CADE art. 4 and 5. The Convention has not been ratified by many African states, and the substantive provisions will not be discussed in detail. For more information see Beiter (2006) p. 243.

⁴³ According to the ILC, special law taking priority over general law is justified by the fact that special law often is more concrete and takes better account of the particular features of the context. Koskeniemi (2006a) [14.2(5)] – [14.5].

⁴⁴ Beiter (2006) p. 44-46.

⁴⁵ See generally Cassese (2005) p. 196-197.

⁴⁶ See ICJ Statute art. 38(1)(d).

and the relevant treaties have relatively weak enforcement mechanisms.⁴⁷ When a treaty body – which is entrusted through the treaty to oversee implementation⁴⁸ – issues its interpretation of the rights and obligations emanating from the treaty, it should be considered elaboration on already existing obligations incurred by a state through its ratification of that treaty. The content of such a statement must thus be analyzed and weighed in accordance with the general rules of international sources of law. In practice General Comments carry considerable weight and are widely referred to, including by the ICJ.⁴⁹ The following three CESCR General Comments will be widely referred to in order to elaborate on state obligations; General Comment 3 (1990): The nature of States parties obligations (Art. 2, para. 1 of the Covenant) ('CESCR General Comment 3'); General Comment 11 (1999): Plans of action for primary education (article 14 of the International Covenant on Economic, Social and Cultural Rights) ('CESCR General Comment 11') and General Comment 13 (1999): The right to education (article 13 of the Covenant) ('CESCR General Comment 13').⁵⁰

Several Special Rapporteurs are referenced in the thesis. They are international experts with a mandate from the Human Rights Council ('HRC') to rapport on certain issues. Their reports are authoritative, but not legally binding.

For determining state obligations, two soft law instruments – the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights ('Limburg Principles') and the Maastricht Guidelines on Violations of Economic, Social

⁴⁷ Beiter (2006) p. 345-349.

⁴⁸ See ICESCR part IV. Economic and Social Council ('ECOSOC') resolution 1985/17 entrusted the supervision of the Covenant to the CESCR, See Beiter (2006) p. 348

⁴⁹ See Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, International Court of Justice (ICJ), 9 July 2004 ('ICJ Wall Opinion'), [136]. The African Commission on Human and Peoples' Rights ('African Commission') made specific reference to CESCR General Comments as a means of interpreting state obligations under the Banjul Charter; see *SERAC v Nigeria* (2001) [51] and [63]. See also Beiter (2006) p. 364-371.

⁵⁰ The CESCR has adopted an 'Outline for drafting general comments', to ensure consistency.

and Cultural Rights ('Maastricht Guidelines') – will be referred to in the thesis. They are not legally binding instruments, but were written by distinguished scholars – the International Commission of Jurists – who were of the opinion that they were describing the *lex lata*, not expanding on applicable law. They are also widely relied on in practice, and are considered “an authoritative interpretation of Covenant provisions.”⁵¹

1.4 Research questions

The thesis will answer the following research questions.

- What is the nature, scope and content of the state’s obligations to provide free and compulsory primary education during situations of emergency; poverty, natural disaster and conflict?
- Is the right to primary education subject to restriction, and if so; to what extent?
- Do African regional instruments afford added protection, in general and during emergencies?

⁵¹ Beiter (2006) p. 375.

2 The Right to Free and Compulsory Primary Education in Africa

The value and importance of education is shared across cultures and through history.⁵² It has been articulated well, for Africa, by South Africa's President Tabo Mbeki:

*[N]owhere in the world has sustained development been attained without a well-functioning system of education, without universal and sound primary education[.]*⁵³

This chapter will analyze the nature, scope and content of the legal bases which protect the RtPE in Africa. Most African states are parties to the ICESCR and CRC. The concept of human rights in Africa, has however, by some authors, been described as different from universal human rights.⁵⁴ The Banjul and Children's Charters, discussed here, retain much from the UDHR, but also reflect some cultural differences, such as the inclusion of solidarity rights.⁵⁵ They do not contain a sharp dichotomy between civil and political rights on the one hand, and economic, social and cultural rights on the other. They also differ from the universal human rights treaties in some of the obligations imposed on individuals, and inter alia extending protection to a wider group of refugees and internally displaced persons ('IDP').⁵⁶

⁵² For the history of the RtE see Beiter (2006) p. 21.

⁵³ Dakar (2000) p. 25.

⁵⁴ See e.g. Keetharuth (2009) p. 203 and Okere (1984) p. 145-146.

⁵⁵ See generally Mutua (1995) p. 339.

⁵⁶ For more on African human rights, see Howard (1984). He rejects the notion of African human rights as non-universal and based on different concepts (see e.g. p. 173-175).

2.1 A normative analysis of the RtPE with the ICESCR art. 13(2)(a) as point of departure

The point of departure for interpreting the ICESCR and other treaties is the VCLT art. 31(1) which state that a treaty shall be “interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” The ICESCR art. 13(1) first sentence affirms that “[t]he States Parties to the present Covenant recognize⁵⁷ the right of everyone to education.” The second sentence elaborates on the aims of education which includes the full development of the human personality, while the third sentence inter alia states that education shall “enable all persons to participate effectively in a free society”.

Art. 13 second paragraph litra (a) is the first binding legal treaty obligation to protect the right to primary education. It recognizes that “with a view to achieving the full realization of this right: (a) [p]rimary education shall be compulsory and available free to all”. The verb *shall* is imperative and normally implies that what is stated is mandatory. It thus creates the prima facie obligation under the provision. The content of the terms *free* and *compulsory* beyond their immediate semantic context will be discussed in later chapters.

There has been some debate as to whether primary education is an immediate obligation or subject to the general principle of progressive realization contained in art. 2(1).⁵⁸ The CESCR has made statements that could lead to confusion on this issue by inter alia remarking that “[t]he obligation to provide primary education for all is an immediate duty of all States parties.”⁵⁹ Alston has however refuted this suggestion by reference to the voting history of the Covenant which makes it clear that art. 13(2) should be subject to progressive realization.⁶⁰

⁵⁷ Alston (1987) p. 185 and see also Coomans (1998) [5].

⁵⁸ E.g. Coomans considers that free and compulsory primary education should be immediately realized, Coomans (1998) [20].

⁵⁹ CESCR General Comment 13 [51].

⁶⁰ Alston (1987) p. 186.

A contrary interpretation, read with the inclusion of art. 14 and the principle of effectiveness⁶¹ in mind, would be illogical. In its General Comment 13 on the RtE the CESCR noted that “[s]tates parties are obliged to prioritize the introduction of compulsory, free primary education”⁶² over other levels of education, thus the obligation to prioritize the *introduction* of primary education is an immediate one.

For a full understanding of the right to education, and the corresponding obligations regarding free and compulsory primary education, art. 13 must be read in conjunction⁶³ with arts. 14, 2(1) and 2(2). The first two are relevant for the progressive realization of the RtPE while the latter secures non-discrimination in the application of all the provisions in the Covenant.

2.1.1 Progressive realization

According to the CESCR, art. 2 is “of particular importance to a full understanding of the Covenant and must be seen as having a dynamic relationship with all of the other provisions.”⁶⁴

2.1.1.1 General obligations in the Covenant

Art. 2 describes the nature of the state’s general legal obligations, which include both “obligations of conduct and obligations of result.”⁶⁵ The obligation of conduct requires action reasonably calculated to realize the enjoyment of a particular right, while obligations of result require States to achieve specific targets to satisfy a detailed substantive standard.⁶⁶

⁶¹ See e.g. Lauterpacht (1949) p. 67-69.

⁶² See CESCR General Comment 13 [51].

⁶³ See VCLT art. 31(1).

⁶⁴ CESCR General Comment 3 [1].

⁶⁵ Ibid [1]-[2].

⁶⁶ Maastricht Guidelines [7].

2.1.1.2 To take steps...towards progressive realization (art. 2.1)

Art. 2(1) contains a general provision regarding the progressive realization of the rights in the Covenant. The main obligation of result is to take steps "with a view to achieving progressively the full realization of the rights recognized";⁶⁷ by all appropriate means. The steps must be taken "within a reasonably short time"⁶⁸ and be "deliberate, concrete and targeted as clearly as possible".⁶⁹ The time limit for primary education is further specified to two years by art. 14. The steps must be taken "to the maximum of [the state's] available resources",⁷⁰ including what is available through "international assistance and co-operation".⁷¹

Progressive realization means that states "have a specific and continuing obligation 'to move as expeditiously and effectively as possible' towards the full realization of article 13"⁷² This results in a "minimum core obligation"⁷³ to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights". Art. 13(2)(a) read in conjunction with art 2(1) transforms the prima facie obligation to provide free and compulsory primary education, into a complex set of rights and obligations, which must be examined for each specific country and situation.

2.1.1.3 Immediate obligations

Two obligations are immediate and apply regardless of the resource situation.⁷⁴ Art. 2(2) imposes an unequivocal obligation not to discriminate⁷⁵ on prohibited grounds. The other

⁶⁷ CESCR General Comment 3[9].

⁶⁸ Ibid [2].

⁶⁹ Ibid.

⁷⁰ Ibid [10].

⁷¹ Ibid [13]-[14].

⁷² See CESCR General Comment 13 [44].

⁷³ The CESCR has not yet defined these for the RtE, see Hunt (1998) [6(b)].

⁷⁴ CESCR General Comment 3 [1]. See also CESCR General Comment nr. 13 [43].

⁷⁵ CESCR General Comment 20 Non-discrimination in economic, social and cultural rights and CESCR General Comment 13 [31]-[37].

obligation is to take deliberate, concrete and targeted steps⁷⁶ which includes the specific requirement for primary education in art. 14.

2.1.1.4 Specific obligations for primary education (art. 14)

Art. 14 imposes requirements on states which at the time of becoming a party to the Covenant, have not secured free and compulsory primary education for all. They must undertake,⁷⁷ within two years of becoming a party, to “work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.”⁷⁸ The provision establishes a clear obligation of result; a plan meeting these requirements must be created within two years.⁷⁹

2.1.1.5 Retrogressive measures and minimum core obligations

The CESCR has explained that a:

*[s]tate party in which any significant number of individuals is deprived of [inter alia] the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its raison d'être.*⁸⁰

These minimum core obligations can be seen as minimum benchmarks which must be met, *prima facie*, regardless of state resources.⁸¹ Violations of article 13 “may occur through the direct action of States parties (acts of commission) or through their failure to take steps

⁷⁶ Alston argues that the words reflect an obligation of conduct, Alston (1987) p.165.

⁷⁷ Coomans claims the travaux préparatoires indicate that to “undertake” implies immediate obligations, Coomans (1998) [7].

⁷⁸ Art. 14.

⁷⁹ CESCR General Comment 11 [1] and [8].

⁸⁰ CESCR General Comment 3 [10] (CESCR’s emphasis).

⁸¹ Kalantry finds that the CESCR has described five minimum core obligations regarding the RtE, Kalantry (2010) p. 272.

required by the Covenant (acts of omission).”⁸² “In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.”⁸³ Failure to satisfy the minimum obligations described, in spite of exerting every effort, is thus not necessarily a violation of the Covenant. As a minimum the state is required – in good faith – to fulfill a strict obligation of conduct.⁸⁴ According to the CESCR, the minimum core includes inter alia:

*[...] an obligation: to ensure the right of access to public educational institutions and programmes on a non-discriminatory basis; to ensure that education conforms to the objectives set out in article 13 (1); to provide primary education for all in accordance with article 13 (2) (a).*⁸⁵

The “assessment as to whether a State has discharged its minimum core obligation must [...] take account of resource constraints applying within the country concerned.”⁸⁶ However, even where “the available resources are demonstrably inadequate, the obligation remains for a State party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances.”⁸⁷ The minimum core obligation, as an obligation of result, is thus individual for each country and resource contingent. Even where the level of realization is good, relative to other countries, the minimum obligation must progressively increase, requiring the effective use of resources and progress. The

⁸² CESCR General Comment 13 [58].

⁸³ CESCR General Comment 3 [10] and Robertson (1994) p. 695 for more regarding the content of “resources”.

⁸⁴ See Alston (1987) p. 161 for more regarding the “good faith” required.

⁸⁵ CESCR General Comment 13 [57]. Art. 13(2)(a) must be understood as incorporating “progressive realization”.

⁸⁶ CESCR General Comment 3 [10].

⁸⁷ CESCR General Comment 3 [11].

CESCR has stated that it considers the core of the right to health as non-derogable,⁸⁸ thus making it likely that this would also apply to other rights.

2.1.1.6 Benchmarks and indicators

The obligation incumbent on each state may be different depending on its resources and level of development. Arts. 16 and 17 ICESCR obligates states parties to submit reports to the CESCR, and the obligation to monitor compliance with,⁸⁹ and non-realization of the Covenant is “not in any way eliminated as a result of resource constraints.”⁹⁰ The purpose of reporting was explained in CESCR General Comment 1: Reporting by States parties, as inter alia to effectively evaluate progress. From the need for effective evaluation and monitoring, an obligation to identify specific benchmarks – which should be feasible if good faith use of maximum resources is carried out - can be inferred. According to the CESCR states should set country specific benchmarks, as common global benchmarks are of limited use, to evaluate the progress of individual states.⁹¹ If a state has a current literacy rate of 80 per cent, a feasible benchmark would be to reach 90 per cent within a certain agreed upon time period.⁹²

Likewise, the state has a mandatory duty to submit reports on its progressive implementation of primary education. The art. 14 plan emphasizes the need for the benchmarks to be “sufficiently detailed so as to ensure the comprehensive realization of the right”.⁹³ It must “specifically set out a series of targeted implementation dates for each stage of the progressive implementation of the plan.”⁹⁴ The CESCR has elaborated on the process termed *scoping* in CESCR General Comment no. 14: The right to the highest

⁸⁸ CESCR General Comment 14 [47]. Coomans argues that core content (as opposed to core obligation) is the essence of the RtE, and should not be country specific, Coomans (1998) [20].

⁸⁹ See ICESCR Part IV and Alston (1987) p. 163.

⁹⁰ CESCR General Comment 3 [11].

⁹¹ CESCR General Comment 1 [6], and Hunt (1998) [8]-[23]. See also generally INEE (2010).

⁹² Kalantry (2010) p. 292.

⁹³ CESCR General Comment 11 [8].

⁹⁴ Ibid [10].

attainable standard of health.⁹⁵ After identifying indicators, the state sets appropriate benchmarks, and during the periodic reports the CESCR and state party scopes, or jointly considers the targets, which will be based on the indicators and benchmarks. The state party then monitors its progress based on the agreed upon benchmarks, and reports to the Committee.

2.1.2 The nature and content of state obligations

The CESCR has described art. 13(2) as containing the obligation to respect, protect and fulfill⁹⁶ four essential features – or 4A's: the availability, accessibility, acceptability and adaptability of education⁹⁷ The state must inter alia:

*[...] respect the availability of education by not closing private schools; protect the accessibility of education by ensuring that third parties, including parents and employers, do not stop girls from going to school; [...] and fulfil (provide) the availability of education by actively developing a system of schools, including building classrooms, delivering programmes, providing teaching materials, training teachers and paying them domestically competitive salaries.*⁹⁸

The precise and appropriate application of these terms will depend upon the conditions prevailing in a particular State party.⁹⁹ Resources and the security situation will in practice greatly impact and differentiate the level of enjoyment of the RtPE. Indicators should show the level of realization, grouped into the four interrelated features (4A's) education exhibits.¹⁰⁰

⁹⁵ CESCR General Comment 14 [58].

⁹⁶ CESCR General Comment 13 [46]-[47].

⁹⁷ See generally Tomaševski (2001) p. 12-17.

⁹⁸ CESCR General Comment 13 [50].

⁹⁹ Ibid [6].

¹⁰⁰ Hunt (1998) [8]-[9].

2.1.2.1 Availability

Availability entails that “functioning educational institutions and programmes have to be available in sufficient quantity within the jurisdiction of the State party.”¹⁰¹ This requires spending on the building of schools and training of teachers, and for full realization, would entail inter alia “buildings or other protection from the elements, [...] trained teachers receiving domestically competitive salaries, teaching materials, and so on [...]”.¹⁰² It also contains the requirement of compulsory attendance. This element is affirmed by art. 13(2)(e)¹⁰³ which imposes an “obligation to pursue actively the ‘development of a system of schools at all levels’ [and] reinforces the principal responsibility of States parties to ensure the direct provision of the right to education in most circumstances.”¹⁰⁴

2.1.2.2 Accessibility

Accessibility contains three overlapping dimensions. Access to education cannot be denied on a discriminatory basis. The non-discrimination¹⁰⁵ provision in art 2(2)¹⁰⁶ applies immediately, and education must be accessible, “in law and fact, without discrimination on any of the prohibited grounds” which are on account of “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”. All existing facilities must be available without discrimination, even if the number of schools does not match the number of students. This requires immediate legislation to eliminate de jure discrimination.¹⁰⁷ Unfortunately, discrimination is one of the biggest

¹⁰¹ CESCR General Comment 13 [6(a)].

¹⁰² Ibid.

¹⁰³ See Beiter (2006) p. 530-532.

¹⁰⁴ CESCR General Comment 13 [25].

¹⁰⁵ See CADE art. 1.1 for a definition of “discrimination in education.”

¹⁰⁶ Art. 2(3) contains a narrow exception for non-nationals. The CESCR, however, considers the RtE to also extend to non-nationals, in practice often refugees and IDPs, see CESCR General Comment 13[34], and [31] which looks to the CRC. CRC art. 2 forbids nationality-based discrimination.

¹⁰⁷ Limburg Principles [37].

obstacles to fulfillment of the RtE. Indicators should therefore be disaggregated to show the level of realization for vulnerable groups such as IDPs and rural woman.

Economic accessibility entails that primary education shall be available and free to all.¹⁰⁸ The semantic content of the term *free* seems at first straight forward; there shall be *no* school fees. But in practice, the line between direct and indirect costs can be difficult to draw, and the CESCR has not defined these limits.¹⁰⁹

Physical access exemplifies indirect costs, and entails that the school must be accessible either geographically or via modern technology. This means, since primary education shall be free, that the cost of travel to the school must be kept to a minimum.

2.1.2.3 Acceptability

Acceptability refers to the form and substance of education, and entails that e.g. curricula and teaching methods “have to be acceptable (e.g. relevant, culturally appropriate and of good quality.”¹¹⁰ The objectives of education contained in art. 13(1) are also included, but can be difficult to measure. When trying to provide accelerated programs which ensure school places, logistical and other problems arise regarding the quality of teaching. In Africa, many pupils go through years of schooling without acquiring the necessary skills such as literacy and numeracy, due to the poor quality of teaching and teaching materials. The quality of education is thus a crucial and constant prerequisite for the other features to have practical value.

2.1.2.4 Adaptability

Adaptability means that education must be “flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their

¹⁰⁸ CESCR General Comment.13 [6(b)].

¹⁰⁹ CESCR General Comment 11 [7].

¹¹⁰ CESCR General Comment 13 [6(c)].

diverse social and cultural settings.”¹¹¹ This adaptability extends to emergency situations, which severely impacts the needs of society, and requires the state to have a plan and appropriate measures for how to handle such situations. Indicators include minimum age of employment and the presence of armed conflict.¹¹²

2.2 Resolving the different legal bases – establishing a coherent RtE for the further discussion

In addition to the ICESCR, three treaties protect the substantive RtE in Africa. In what way do these three substantive legal bases protect the right to primary education?

2.2.1 The CRC

CRC arts. 28 and 29 contain the right to education. According to the travaux préparatoires, the intended purpose of the wording of art. 28(1) was to reflect the same standard and rights contained in ICESCR art. 13(2) read in conjunction with the Covenant’s art. 2(1).¹¹³ Art. 29 adds a qualitative dimension¹¹⁴ to the RtE, beyond that contained in the ICESCR.

States shall according to art. 28(1)(a) make primary education compulsory and available free to all. Primary education is subject to progressive realization in both the main article and art. 4. This double emphasis together with the use of the words “shall make”, offers a weaker degree of progressive realization,¹¹⁵ making the ICESCR the common benchmark for states bound by both treaties. The CRC Committee has stated that CESCR General Comments are complimentary to its own,¹¹⁶ while the CESCR has emphasized that it encourages a “contemporary interpretation of article 13 (1)”¹¹⁷ in light of other international legal developments. There is thus a large degree of coherence between the

¹¹¹ CESCR General Comment 13 [6(d)].

¹¹² De Beco (2009) p. 20.

¹¹³ See Detrich (1999) p. 475-480.

¹¹⁴ Committee on the Rights of the Child General Comment (‘CRC General Comment’) 1 [2].

¹¹⁵ Beiter (2006) p. 115-123.

¹¹⁶ CRC General Comment 5 [5].

¹¹⁷ CESCR General Comment 13 [5].

two treaties. The CRC Committee looks to the CESCR for interpretative guidance, making the analytical features (4A's) suitable for describing state obligations also under the CRC.

2.2.2 The Children's Charter

The Children's Charter is modeled on the CRC,¹¹⁸ but contains some novel provisions and slight differences.¹¹⁹ Art. 11(1) states that: Every child shall have the right to an education. This initial obligation is modified by art. 11(3) which instructs that states parties "shall take all appropriate measures with a view to achieving the full realization" in particular "(a) provide free and compulsory basic education." As the wording is slightly different, the level of realization required might also be different.¹²⁰ States are obligated, "in accordance with their means and national conditions the¹²¹ all appropriate measures", to assist with inter alia educational materials and programmes.¹²² The similarity to the CRC, and the principle of effectiveness, leads me to conclude that the right to primary education – a narrower term than basic – in the Children's Charter is also subject to a level of progressive realization, not unlike that in the CRC and ICESCR. The Charter's practical importance has, however, so far been limited – perhaps influenced by it taking 10 years to enter into force, compared to the CRC, which took one.¹²³

2.2.3 The Banjul Charter

The Banjul Charter contains a short reference to education in art. 17(1) where it states: Every individual shall have the right to education. The Charter does not specifically guarantee primary education, nor does it make reference to it being free or compulsory. It also does not contain a specific provision on progressive realization, but includes a non-

¹¹⁸ For a general comparison, see Beiter (2006) p. 216 and Gose (2002).

¹¹⁹ E.g Article 31: Responsibility of the Child, see also Chirwa (2002) p. 169.

¹²⁰ Beiter contends that the absence of "to make" which is found in the CRC, means primary education is not subject to progressive realization, Beiter (2006) p. 218. Gose claims the Charter follows the progressive realization of the CRC, Gose (2002) p. 114.

¹²¹ Presumably the original document contains a misspelling; "the" taking the place of "take".

¹²² Art. 20(2) and Gose (2002) p. 37.

¹²³ Lloyd (2002) p. 180.

discrimination provision in art. 2. The jurisprudence of the African Commission is not conclusive, but supports the interpretation that progressive realization was not intended.¹²⁴

The objective reading of the terms in the provision and the absence of other sources, means it is unlikely that the Banjul Charter can be invoked to claim a right to free and compulsory primary education.¹²⁵ Should the African Commission expand on the right through dynamic interpretation in the future, this might change.¹²⁶

2.2.4 Summary

The Banjul Charter does not explicitly cover primary education and will therefore not be discussed in detail in the following. The CRC and Children's Charter contain a substantive right to primary education, which shall be progressively realized. The similarities between the treaties and the principle of the effective protection of human rights, where the strictest provision prevails, leads to the ICESCR being the logical point of departure for describing state obligations for African states and the corresponding right to primary education for its residents.¹²⁷

2.3 Restrictions to the right to education

Restrictions on rights can take many forms and the application of terms is not always consistent. Derogation, limitation, restriction and exception are all terms which to some extent are used interchangeably. A derogation clause such as ICCPR art. 4 can only be applied in exceptional circumstances, while claw back clauses¹²⁸ and limitation clauses¹²⁹ such as ICESCR art. 4 are applicable under normal situations. Such clauses reflect the need for a flexible system and the weighing and balancing of the rights of the individual against the needs of society. They are also possible tools for misuse and abuse. Even where not

¹²⁴ See Odinkalu (2001) p. 362-369.

¹²⁵ See VCLT art. 31.

¹²⁶ See Banjul Charter art. 61 and Coomans (2003) p. 757-760.

¹²⁷ VCLT art. 31(1)(c).

¹²⁸ Of which there are several in the Banjul Charter, regarding claw back clauses, see Higgins (1977) p. 281.

¹²⁹ E.g. UDHR art. 29(2).

expressly stated, restrictions on rights can occur through a normative conflict with other rights and obligations contained in different sources of law.¹³⁰ Derogation measures also have a legal basis in general principles of law such as Force Majeur and Neccesity.¹³¹ Any conflict of norms must be resolved on the basis of the VCLT.¹³² The following chapter will analyze if, and to what extent, primary education is subject to restrictions.

2.3.1 Limitations to the RtPE with the ICESCR art. 4 as point of departure

ICESCR art. 4 contains a general, but narrow limitation clause which was intended for situations not covered by art. 2(1).¹³³ Limitations to the RtPE must be “determined by law only in so far as this may be compatible with the nature of [this right] and solely for the purpose of promoting the general welfare in a democratic society.”¹³⁴ The CDESCR has not elaborated much on the provision except emphasizing that its primary intent is to be protective¹³⁵ of individual rights, rather than permissive in allowing states to apply limitations.¹³⁶ This means that “a State party which closes a university or other educational institution on grounds such as national security or the preservation of public order”¹³⁷ has the burden of proving that measures taken are in accordance with the 4 cumulative requirements which can be deduced from art. 4. The provision will be discussed in detail in Chapter 3.4.1.

¹³⁰ See ICJ Statute art. 38(1).

¹³¹ Despouy (1995) Annex 1 [26]; the Special Rapporteur on the Independence of Judges and Lawyers considers these rules conceptually to be derogation, see also Steiner (2007) p. 393.

¹³² See generally Koskenniemi 2006(b).

¹³³ Art. 2(1) includes retrogressive measures, see Beiter (2006) p. 458. Müller is of the opinion that retrogressive measures should be applicable to art. 4, but this is not the approach taken by the CDESCR, see Müller (2009) p. 484.

¹³⁴ ICESCR art. 4.

¹³⁵ See also ICESCR art. 5.

¹³⁶ CDESCR General Comment 13 [42].

¹³⁷ CDESCR General Comment 13 [42]. For a contrary view to the CDESCR, see Müller (2009) p. 585.

2.3.1.1 Application of art. 4 limitations to the three other legal bases

None of the three legal bases contain a general limitation clause. The principle of *pacta sunt servanda*¹³⁸ would thus dictate that states should be bound by the obligations in the treaties.¹³⁹ However, the treaties must be viewed as a part of a larger integrated system – International law. Restriction could thus be possible based on analogous application.

I – CRC

The CRC places restrictions on some rights¹⁴⁰ but not the right to education. The absence of a limitation clause, and the approach to treaty interpretation in VCLT art. 31(1) leads to the *prima facie* conclusion that limitations should not be permitted. The close similarities between the ICESCR and CRC on the subject of education, however, favour a common solution. The systemic integration or harmonization approach to treaty interpretation, described by the International Law Commission,¹⁴¹ supports this interpretation, as does the CRC Committee's focus on the ICESCR. Art. 4 consistent limitations should therefore not be considered violations of the CRC.

II – The Children's Charter

The Children's Charter contains no general limitation clause and is almost identical in structure to the CRC. The conclusion there, regarding limitations to the RtPE, also applies to the Charter.¹⁴²

III – The Banjul Charter

The Banjul Charter contains several wide claw back clauses which permit limitations on rights for a number of reasons under normal circumstances.¹⁴³ It does not contain one for

¹³⁸ VCLT art. 26

¹³⁹ Despouy (1995) Annex 1 [25].

¹⁴⁰ E.g. arts. 13 and 14.

¹⁴¹ Koskenniemi (2006b) [37]-[43].

¹⁴² See Chapter 2.2.1-2.2.2.

¹⁴³ Mugwanya (2000) p. 48

the RtE, and it is therefore unlikely that specific limitations are allowed. As the treaty does not specifically protect primary education, possible limitations will not be discussed further.

2.3.2 Derogation from the right to education with the ICESCR as point of departure

Is derogation from the RtPE permitted? According to the HRC, derogation “is clearly distinct from restrictions or limitations”,¹⁴⁴ which are allowed during normal times. Derogation can be understood as the “complete or partial elimination [of a right or an aspect of a right] as an international obligation¹⁴⁵ in times of emergency which ‘threatens the life of the nation.’”¹⁴⁶

As the ICESCR does not contain a derogation clause¹⁴⁷ the permissibility of possible derogation measures must be based on analogy from ICCPR art. 4¹⁴⁸ or on general principles of international law.¹⁴⁹ Legal theory is not clear on the issue of derogation where the treaty does not expressly regulate it.¹⁵⁰ The former Special Rapporteur on the Independence of Judges and Lawyers considers the concept of derogation to have its legal bases in either treaty, or inter alia the general principles of Force Majeur and Necessity. As grounds for invocation, these legal bases are on a gliding scale, with statutory derogation requiring the least serious situation, followed by Force Majeur and Necessity.

¹⁴⁴ Human Rights Committee General Comment (‘HRC General Comment’) 29 [4].

¹⁴⁵ Quotation mark omitted.

¹⁴⁶ Müller (2009) p. 561 and see generally OHCHR (2003) p. 813.

¹⁴⁷ According to Alston, the travaux préparatoires give no indication as to whether or not a derogation clause was considered necessary, or even appropriate, in the context of the ICESCR. See Alston (1987) p. 217.

¹⁴⁸ See generally regarding the norm creating character of ICCPR art. 4 in Oraá (1992) p. 229-238.

¹⁴⁹ See generally McGoldrick (2004) p. 381-390.

¹⁵⁰ See e.g. Despouy (1995) Annex 1 [28]-[29], Alston contends that derogation based on the requirements in the ICCPR could be permissible in exceptional circumstances, with some rights non-derogable, Alston (1987) p. 217-219. See also Müller (2009) p. 569 and 592-596.

2.3.2.1 Derogation based on analogy from ICCPR art. 4

The CESCR has noted that “because core obligations are non-derogable, they continue to exist in situations of conflict, emergency and natural disaster.”¹⁵¹ However, the HRC has specified that “[c]onceptually, the qualification of a [ICCPR] provision as a non-derogable one does not mean that no limitations or restrictions would ever be justified.”¹⁵² The “permissibility of restrictions is independent of the issue of derogability.”¹⁵³

Placing derogation under procedural requirements as in the ICCPR¹⁵⁴ formally restricts the freedom to misuse power. However, in practice it does not always function as an effective check. Derogation reflects the pragmatism of the real world and is in itself negative as it restricts rights otherwise due under normal circumstances. The HRC has explained that “measures derogating from the provisions of the [ICCPR] must be of an exceptional and temporary nature [and] two fundamental conditions must be met: the situation must amount to a public emergency which threatens the life of the nation, and the State party must have officially proclaimed a state of emergency.”¹⁵⁵

Arguments in favour of permitting derogation from human rights treaties which do not contain such a clause “highlight that this purpose could, for example, justify derogations from [...] children’s rights to education by closing schools for a limited period of time in order to protect their right to life and health in the aftermath of a severe natural disaster. The right to education would be derogated from in order to protect the ‘more essential’ right to life.”¹⁵⁶

¹⁵¹ E/C.12/2001/10 [18].

¹⁵² HRC General Comment 29 [7].

¹⁵³ Ibid.

¹⁵⁴ HRC General Comment 5 [3].

¹⁵⁵ HRC General Comment 29 [2].

¹⁵⁶ Müller (2009) p. 592.

The rights in the ICESCR including the RtE are less compelling to restrict during emergencies, and the general obligation in art. 2(1) means the rights have a more “flexible and accommodating nature”.¹⁵⁷ The ICJ has noted that restrictions to economic, social and cultural rights during Israel’s derogation under a state of emergency, did not meet the requirements in art. 4 ICESCR, of being “solely for the purpose of promoting the general welfare in a democratic society.”¹⁵⁸ The Court thus seems to consider the limitation provision in art. 4 as the appropriate measure to restrict economic, social and cultural rights also during emergencies.¹⁵⁹ In conclusion; restriction to the right to education during emergencies should be consistent with the requirements in ICESCR art. 4 or be based on general principles of law.

2.3.2.2 Analogous application of ICCPR art. 4 to the three other legal bases

The CRC does not contain a derogation clause and the CRC Committee has stated “that the implementation of the right of the child to education in emergency situations must meet the requirements set out in articles 28 and 29 of the Convention without limitation.”¹⁶⁰ The inclusion of a specific reference to IHL in the CRC, makes derogation from the RtPE during emergencies less likely. Possible restrictions during emergencies would have to be based on a different basis than analogous application of art. 4 ICCPR.

The Children’s Charter also does not contain a derogation clause, and due to the similarities to the CRC, the conclusion is the same.

The Banjul Charter does not contain a derogation clause, and the African Commission has explicitly stated that the Charter “does not allow for states parties to

¹⁵⁷ Suggested by the Chairman of the CESCR, Despouy (1995) Annex 1 [20].

¹⁵⁸ ICJ Wall-opinion [136].

¹⁵⁹ The view is also expressed by Alston (1987) p 217-219.

¹⁶⁰ CRC Day of Discussion 2008 [28].

derogate from their treaty obligations during emergency situations.”¹⁶¹ As it does most likely not protect the RtPE, it will however not be discussed further.

2.3.3 Derogation based on general principles of law

Emergency situations will impact the enjoyment of rights, and from a practical point of view, suspending some rights momentarily; to protect more fundamental rights is understandable. It is important to distinguish between situations where a state incurs international responsibility and where it does not, and apply any restrictions or exceptions narrowly. Although human rights are not confined solely to the sphere of inter-state relations,¹⁶² rules on state responsibility and in particular the two principles of Necessity and Force Majeur, are relevant.¹⁶³ Both principles are based on the “assumption that the non-performance of a legal duty can be justified only where there is impossibility¹⁶⁴ of proceeding by any other method than the one contrary to law.”¹⁶⁵ There might thus be situations which are so grave that they require action in violation of statutory derogation provisions and substantive rights, but which are still legal based on general principles of law. There are also situations – typically natural disasters – where the state is legitimately unable to fulfill its obligations, for a certain amount of time. The following principles could absolve a state of its responsibility to fulfill its obligations temporarily.

2.3.3.1 Force Majeur

Force Majeur is codified in the Draft articles on Responsibility of States for Internationally Wrongful Acts (‘Draft Articles’) art. 23. A wrongful act is precluded if it is due to an:

- 1 irresistible force or of an unforeseen event,
- 2 beyond the control of the State,

¹⁶¹ African Commission; 74/92 Commission Nationale des Droits de l’Homme et des Libertés v Chad, [21]. See also Odinkalu (2001) p. 349-350.

¹⁶² See HRC General Comment 24 [17].

¹⁶³ The rules regarding suspension of treaties and distress will not be discussed further.

¹⁶⁴ Impossibility of performance in VCLT art. 61, regarding justification for the termination of a treaty, will not be discussed further, see ILC (2001) p. 71.

¹⁶⁵ Despouy (1995) Annex 1 [22].

- 3 making it materially impossible in the circumstances to perform the obligation.

The state is still responsible if the situation can be attributed in whole or part to conduct of the state¹⁶⁶ or the State has assumed the risk of that situation occurring.¹⁶⁷ Force Majeur differs from the situations of distress and necessity in that the state conduct is involuntary or does not involve an element of free will.¹⁶⁸ During an emergency, “situations can arise in which it is impossible to protect certain rights.”¹⁶⁹ If an earthquake has shattered a city resulting in complete chaos, it may thus be materially impossible to fulfill the right to education for a limited amount of time – without this constituting a breach of the state’s obligations.

2.3.3.2 Necessity

Necessity is codified in the Draft Articles art. 24. The principle is formulated negatively, and may not be invoked as grounds for precluding the wrongfulness of an obligation unless it is:

- a) the only way for the State to safeguard an essential interest against a grave and imminent peril;¹⁷⁰ and
- b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.¹⁷¹

Necessity can in no case be invoked if:

1. the international obligation in question excludes the possibility of invoking necessity;¹⁷² or

¹⁶⁶ Art. 23(2)(a)

¹⁶⁷ Art. 23(2)(b)

¹⁶⁸ See ILC (2001) p. 76.

¹⁶⁹ Despouy (1995) Annex 1 [27].

¹⁷⁰ Art. 25(1)(a)

¹⁷¹ Art. 25(1)(b)

¹⁷² Art. 25(2)(a)

2. the State has contributed to the situation of necessity.¹⁷³

The ICJ commented on the contents of the ILC Draft Articles in the Wall-opinion and made reference to a prior case where it explained that necessity “can only be accepted on an exceptional basis”. It remarked that the state of necessity is recognized in customary international law, but it “can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met”¹⁷⁴

2.3.4 Summary

In short; restrictions to the RtPE are possible under specific and narrow circumstances. The most likely justification would be Force Majeur or Necessity, with ICESCR art. 4 a less likely option.

2.4 Conclusions

The RtPE contained in the ICESCR is suitable for describing state obligations under the four legal bases. In the following chapter, the 4A’s will be used to analyze state obligations during poverty. Restrictions to the RtE are conceivable in a narrow set of circumstances and will be the focus for describing state obligations in chapter 4. In chapter, 5 IHL is an important and additional factor for describing state obligations.

¹⁷³ Art. 25(2)(b)

¹⁷⁴ See ICJ Wall-opinion [140].

3 The right to education during poverty

*The Committee is concerned about the discrimination against women, migrants, IDPs, poor people, disabled people and persons affected with HIV/AIDS who suffer from inadequate access to basic education [...] The Committee notes with concern that: (a) indicators for education in the State party are very low; (b) the illiteracy rate among people over 15 years is very high; (c) children from poor families, girls, children with disabilities, victims of mine accidents and children living in both urban and remote rural areas have limited access to education [...]*¹⁷⁵

The silent emergency of poverty impacts millions of African children. 51 per cent of the population in Sub-Sahara Africa live on less than 2 dollars a day¹⁷⁶ and 33 of the 48 Least Developed Countries ('LDC') are on the continent.¹⁷⁷ Poverty can last for generations or be caused by a sudden financial crisis. It is often the result, and sometimes also the cause – of some of the emergencies described in the following chapters. As a result of the current crisis, “Sub-Saharan Africa faces a potential loss of around US\$4.6 billion annually in financing for education in 2009 and 2010, equivalent to a 10% reduction in spending per primary school pupil.”¹⁷⁸

What obligations does a state have where it does not have revenue to finance basic services, and where unemployment is the norm for a majority of the population? This chapter is based on the assumption that primary education is not provided to all children and will analyze state obligations during chronic poverty and financial crises.

¹⁷⁵ E/C.12/AGO/CO/3 [15], [38] and [39].

¹⁷⁶ MDG (2010) p. 6.

¹⁷⁷ See <http://www.unohrlls.org/en/ldc/25/>

¹⁷⁸ EFA (2010) p 4.

The ICESCR art. 13(2)(a) imposes on states the prima facie obligation to provide compulsory primary education, free of charge to all children, subject to their individual level of development and progressive realization.

3.1 Progressive realization during poverty

Art. 2(1) contains four elements. It requires states to:

1. “[T]ake steps [...] by all appropriate means, including particularly the adoption of legislative measures”.

The constitution of Congo guarantees free and compulsory education, but no free schools exist. This exemplifies the problem of de jure and de facto adherence, and also why legislation is necessary where existing laws are in violation of the Covenant.¹⁷⁹ It is however not sufficient, unless backed up by political and financial decisions, including judiciary means of enforcement, which result in the building of schools, hiring of teachers and provision of pencils and paper.¹⁸⁰ As a minimum, the right to free and compulsory primary education would require legislation ensuring that the minimum age of employment is higher than the age for compulsory school attendance. The recruitment of children under the age of 15 into armed forces must also be forbidden, as the alternative would in effect not make attendance compulsory. Legislation should also guarantee that existing school facilities are compulsory and available on a non-discriminatory basis, where they exist.

2. The steps must be made “to the maximum of [the state’s] available resources,” including the resources coming from “international assistance¹⁸¹ and co-operation, especially economic and technical”.

¹⁷⁹ See e.g. E/C.12/COD/5 [287].

¹⁸⁰ See Alston (1987) p 166-172.

¹⁸¹ However, no legal obligation to provide aid can be deduced, see Alston (1987) p. 186.

The formulation is the basis for resource constraints being considered a legitimate obstacle, and justification for the lack of immediate realization of economic, social and cultural rights, including the RtE. When the state is poor, this obligation is one of conduct, but with benchmarks of result to work against.

The CESCR has competence to judge objectively if state conduct meets the good faith maximum use of available resources. In this evaluation account will be taken of international assistance, which could include providing teachers and material, and financial resources.¹⁸² Even where poverty persists, and there is no increase in resources, progress must be made through the effective use of what is available.¹⁸³

3. The steps should aim to “achieve progressively”.

The words must be read in good faith and mean that intentional retrogressive measures are not permitted. The progress must be measured separately, and objectively, for each state compared to its set benchmarks.¹⁸⁴

4. “[T]he full realization”

Not reaching this obligation of result immediately is not necessarily a violation of the RtE, but one could question the appropriateness of the term *fulfill* to the situation. The state is fulfilling obligations of conduct, but in relation to the rights holders they are only partially respecting and protecting the right, and for all practical purposes from a rights holder’s perspective, denying it. An alternative term to describe the situation is a state’s “failure to comply” with its obligations.¹⁸⁵ Eventually, full realization means free and compulsory primary education for all, and the imposed obligations of conduct should, if fulfilled in good faith, eventually lead to it.

¹⁸² Alston (1987) p. 191.

¹⁸³ See Limburg Principles [23] and CESCR General Comment 4 [10]-[11].

¹⁸⁴ See Alston (1987) p. 180 and generally p. 172-177.

¹⁸⁵ Beiter (2006) p 651.

3.1.1 Identifying violations of the Covenant

According to the CESCR “[v]iolations of article 13 may occur through the direct action of States parties (acts of commission) or through their failure to take steps required by the Covenant (acts of omission).”¹⁸⁶ The CESCR differentiates between cases where the state is unwilling or unable to meet its obligations.¹⁸⁷ In the latter case, the burden of proving that it has met its obligation of conduct rests on the state. Although an effort of good faith is required, the state has a margin of discretion “in selecting the means for carrying out its objects,”¹⁸⁸ and “factors beyond [the state’s] reasonable control may adversely affect its capacity to implement particular rights.”¹⁸⁹

3.1.1.1 Non-progress and retrogressive measures

The CESCR has stated that “any deliberately retrogressive measures [...] would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.”¹⁹⁰ This would mean for a retrogressive measure in relation to education to be permitted; that the diversion of resources to the realization of other human rights, would have to objectively entail a higher utilitarian value, and simultaneously maximum use of, available resources.

During chronic poverty it is difficult to imagine decrease in education spending, teacher pay or reintroducing school fees being permitted. During sudden crises, there is still an obligation to seek assistance. The assessment should require an objective minimum budget allocation to meet the good faith standard, and priority to primary education.

¹⁸⁶ CESCR General Comment 13 [58], see also Beiter (2006) p. 641, see generally Chapman (1996) p. 46.

¹⁸⁷ See also Maastricht Guidelines [13]-[14].

¹⁸⁸ Limburg Principles [71].

¹⁸⁹ Ibid.

¹⁹⁰ CESCR General Comment 3 [9] and CESCR General Comment 13 [45].

3.1.1.2 Failure to adopt a plan and report on progress

Art. 14 imposes on states to undertake “within two years, to work out and adopt a detailed plan of action”. The two year limit is a clear obligation of result, and should be interpreted as within two years “of the Covenant's entry into force of the State concerned, or within two years of a subsequent change in circumstances which has led to the nonobservance of the relevant obligation.”¹⁹¹ In spite of this clear obligation, “a number of States parties have neither drafted nor implemented a plan of action for free and compulsory primary education.”¹⁹² The obligation is also a continuing one, and applies to those states that did not meet the initial two year requirement. It also applies if a sudden occurrence like a natural disaster or conflict were to disrupt the progress made, obligating the state to adopt a new plan.¹⁹³ The plan should aim for the progressive implementation of primary “education free of charge for all.”¹⁹⁴ In addition the provision specifies the target date to be “within a reasonable number of years”¹⁹⁵ and include targeted implementation dates. The CESCR has not elaborated further on the content of the term “targeted implementations dates”.¹⁹⁶ But as in any treaty obligation, good faith is required and the CESCR has authority on a case by case basis to determine whether or not the obligation is fulfilled.

As art. 14 applies “almost by definition, to situations characterized by inadequate financial resources”,¹⁹⁷ the state can not absolve itself of the obligation to adopt a plan for primary education due to resource constraints. The CESCR regards it an obligation on the state to

¹⁹¹ CESCR General Comment 11 [8].

¹⁹² Ibid 1.

¹⁹³ Ibid 8.

¹⁹⁴ Ibid 1.

¹⁹⁵ Ibid 10.

¹⁹⁶ Ibid.

¹⁹⁷ Ibid 9.

seek assistance,¹⁹⁸ although it is unlikely that a legal obligation to assist can be imposed on other states.¹⁹⁹

ICESCR art. 16 and 17 require states to periodically report on their progress. In spite of this clear obligation, by 2007, only 20 out of 47 African states had submitted a report.²⁰⁰ The revised general guidelines regarding the form and contents of reports²⁰¹ include questions regarding indicators such as; statistics on enrollment, percentage of budget spent on education, identifying vulnerable groups, laws or policies having negative effect and the role of international assistance in the realization of the right. It is conducive to group these indicators into the 4A's.²⁰²

3.2 State obligations during chronic poverty

During chronic poverty, the constant obligation to work towards realization through the setting of higher benchmarks must be emphasized; satisfying the minimum core obligation is not sufficient.

3.2.1 Availability

Availability primarily concerns the number of school places and compulsory attendance.

3.2.1.1 Sufficient numbers of schools and teachers

During poverty, the progressive realization requirement is an obligation of conduct which requires “equitable and effective use of and access to”²⁰³ available resources. As an objective minimum, six per cent of a country's GNP should be allocated for education,

¹⁹⁸ As required by art. 2(1).

¹⁹⁹ The CESCR claims there is a “clear obligation to assist” without elaborating on the legal basis the statement, CESCR General Comment 11 [9], see also Beiter (2006) p. 380.

²⁰⁰ See e.g. <http://www.unhcr.ch/tbs/doc.nsf> and Jackson (2007) p. 56. Chapman points to the practical obstacles to reporting, see Chapman (1996) 9. 34.

²⁰¹ E/C.12/1991/1.

²⁰² See Beiter (2006) p. 476-478.

²⁰³ See Limburg Principles [27].

with the primary level a priority.²⁰⁴ The EFA fast track initiative, which supports 25 countries in Sub-Saharan Africa, will often require 20 per cent of the state budget allocated for education, in exchange for additional funding.²⁰⁵ Where resources are severely lacking there will not be a school place for every child. If monitoring shows retrogression or non-progress, the state must justify this by reference to an objective minimum standard or its higher benchmarks, and seek international assistance.

In Zaire in the 1980's, only two per cent of the national budget was earmarked for education. 75 per cent of the school age population failed to attend school, while the Zairian government abolished free education and had no plan to reintroduce it. The CESCR found that the failure to secure "primary education free of charge was in contravention of articles 13 and 14 of the Covenant"²⁰⁶ – two per cent did not meet the good faith requirement. Resource constraints can also be a disguise for lack of political will. In Nigeria, the government "bought 18 [...] tanks as part of \$150 million deal – equivalent to over half of the total national expenditure on basic education."²⁰⁷ More recently, a new national stadium in Abuja was constructed for more than the total basic education budget."²⁰⁸

3.2.1.2 Compulsory attendance

The term *compulsory* implies the negation of free will. There shall be no choice for the child, parent or guardian whether or not to attend school²⁰⁹ – what is compulsory must be

²⁰⁴ The standard was set by the International Commission on Education for the 21st Century (Delors Commission), see an analysis of correlation between education spending and purchasing power:

<http://www.slideshare.net/sixwillfix/the-neglected-generation>

²⁰⁵ EFA is a global partnership between donor and developing countries to meet the MDGs. See Takala (2003) [3]. It changed name in September 2011 to Global Partnership for Education, see

<http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTEDUCATION/0,,contentMDK:20278663~menuPK:617564~pagePK:148956~piPK:216618~theSitePK:282386,00.htm>

²⁰⁶ See Coomans (1998) [21].

²⁰⁷ Reference omitted.

²⁰⁸ ActionAid (1) p. 6.

²⁰⁹ CESCR General Comment 11 [6].

abided by. To give this legal effect²¹⁰ laws must be adopted with minimum age of employment higher than primary school age.²¹¹ As a minimum, legislation making the existing school places available and compulsory should be required, but full compulsory education for all is dependent on the availability of free school facilities. Conversely, in many countries education is compulsory by law, but facilities do not exist. In these situations the government has an even higher benchmark to strive for, and this should be reflected in fiscal policy.

3.2.2 Accessibility

Accessibility contains the dimensions of free, non-discrimination and geographic proximity.

3.2.2.1 Free

Free means *no* school fees.²¹² It also covers more indirect costs such as school uniforms and materials. According to the former Special Rapporteur on the Right to Education, the price of school textbooks and uniforms can vary between less than three, and more than 30 per cent of a family's budget.²¹³ In 2006 primary education was only free in three countries in Sub-Saharan Africa; in seven countries over 30% of children never even started school.²¹⁴ Violations of art. 13 include "the failure to introduce, as a matter of priority, primary education which is compulsory and available free to all."²¹⁵ *As a matter of priority*, must entail that if limited resources should be allocated, in a state budget, non-violation of the article requires spending directed at providing everyone with primary education, before resources are allocated to secondary or higher education. States thus have clear quantifiable

²¹⁰ See art. 2(1): "all appropriate means, including particularly the adoption of legislative measures".

²¹¹ CESCR General Comment 13 [55].

²¹² CESCR General Comment 11 [7].

²¹³ See Tomaševski (2006) p. 5.

²¹⁴ The countries are: Botswana, Mauritius and Seychelles, Tomaševski (2006) p. 4 and 9.

²¹⁵ CESCR General Comment 13 [59]

obligations regarding their resource and budget allocations. Even in times of severe resources constraints and in recession, low cost programmes must be adopted.²¹⁶

3.2.2.2 Non-discrimination

The CESCR has identified violations of article 13 as including:

*the introduction or failure to repeal legislation which discriminates against individuals or groups, on any of the prohibited grounds, in the field of education; the failure to take measures which address de facto educational discrimination;*²¹⁷

Access to existing educational institutions must be non-discriminatory, and where school fees are in existence; this can be de facto discrimination as boys are prioritized while girls work in the home. Discrimination can take on many forms, and is protected through the immediate obligation in art. 2(2). The inclusion of “other status” indicates that this list is not exhaustive and the CESCR has extended the term to cover inter alia IDPs, HIV positive, rural people and asylum seekers. Discrimination “must be eliminated both formally and substantively[.][...] Eliminating discrimination in practice requires paying sufficient attention to groups of individuals which suffer historical or persistent prejudice instead of merely comparing the formal treatment of individuals in similar situations.”²¹⁸ There is a specific obligation to monitor compliance with art. 2(2)²¹⁹ and resources must be allocated to ameliorate factual differences, so that regions which are comparatively worse off see progress. Such affirmative action measures are sometimes required to ensure equality.²²⁰ Woman, minorities, and linguistic groups are examples of groups who may need such measures.

²¹⁶ CESCR General Comment 3 [12].

²¹⁷ CESCR General Comment 13 [59].

²¹⁸ See CESCR General Comment 20 [8] and also CESCR General Comment 16.

²¹⁹ CESCR General Comment 20 [41], see also Beiter (2006) p. 408.

²²⁰ CESCR General Comment 20 [9], see also A/RES/63/241 [21].

3.3 State obligations during financial crises

Where sudden financial crises occur, the state must adapt to a new resource situation. The total amount of aid and tax base may decrease, leading to tough fiscal policy choices and de facto retrogressive measures.

3.3.1 Adaptability

Adaptability is important during transitional and suddenly changing situations. It can be seen as having an integrated relationship to the other essential features. The state has a continuous duty to assess and report, and set benchmarks. If it does not meet its agreed upon benchmarks, it must be determined if maximum resources have been spent in good faith; if the action and results are due to lack of will or capacity, and if it constitutes retrogression or a retrogressive measure. Clearly, reintroducing school fees or discriminatory policies, are deliberately retrogressive measures, and a breach of the state's obligations. Resources must be prioritized and the state must provide what it can through inter alia informal schooling, outdoors. At a minimum, the plan should address how to cope with the resource situation, and how to move progressively out of it.

3.3.2 Acceptability

That education is of a certain minimum quality is a constant requirement, and prerequisite for the other essential features. It can be difficult to measure, but is monitored through indicators such as student-teacher ratio and literacy upon completion. The quality can often be at odds with the availability of education, as illustrated by the situation in Liberia where:

many children and youth (i.e. children aged 14 to 18 years) with very limited primary education have returned to school in large numbers. This has placed further burdens on poorly paid and demoralized public primary school teachers who, in addition to teaching larger classes than normal, are having to cope with teaching children with enormous differences in age. For example, the recent school census found that 85 percent of the students in Grade 1 were 8 to 20 years old, in contrast to the normal age

*of 6 to 7 years. Furthermore, 50 percent of these children were aged between 11 and 20 years old.*²²¹

3.4 Restrictions to the RtE during poverty

Does poverty – in its essence the lack of sufficient resources – justify limitations to the right to primary education?

3.4.1 Limitations

The limitations clause in art. 4 is an acknowledgement that no norms are absolute and is intended for “where rights [collide and] where the exigencies of state-administered socioeconomic welfare programs might necessitate limitations on the provision of benefits or other entitlements; limitations different in kind from those already contained in Article 2(1).”²²² Can poverty justify measures limiting the right to free and compulsory primary education, beyond the restrictions imposed by progressive realization? The limitations clause contains four requirements which must be cumulatively satisfied:

1. [A]s are determined by law

The formulation is identical to that in the UDHR art. 29(2). This requires a legislative basis for any measure taken. Emergency laws, and possibly other domestic levels of norms, would satisfy the requirement by being statutory, but would also have to satisfy substantive standards.²²³

2. [C]ompatible with the nature of these rights

The nature of education can be found in ICESCR art. 13(1) and CRC art. 29. The core of a right can never be restricted, and any restriction “must be in accordance with the law, including international human rights standards, compatible with the nature of the rights

²²¹ Liberia (2007) p. 8.

²²² Alston (1987) p. 194.

²²³ See Alston (1987) p. 199. Garibaldi equates the substantive requirements to the “Principle of legality”, see Garibaldi (1976).

protected by the Covenant, in the interest of legitimate aims pursued.”²²⁴ Restrictions must therefore be “proportional, i.e. the least restrictive alternative must be adopted where several types of limitations are available. Even where such limitations on grounds of protecting public health are basically permitted, they should be of limited duration and subject to review.”²²⁵

3. [S]olely for the purpose of promoting the “general welfare”

The primary objective of the formulation was protection of the rights in the Covenant, not to permit limitations to a great extent. “General welfare” must thus be interpreted narrowly; the broad general definition of the term cannot be applied without close consideration. The instances where the right to education could be restricted for this purpose is similarly narrow. The assessment of whether a purpose is promoting the “general welfare” is to be judged by the CESCR, not left to the state’s discretion.²²⁶

4. [I]n a democratic society

This does not imply that a state must have a democratic system of government nor can a lack of democracy justify limitations. A limitation measure must be applied in such a manner as could be expected from a democratic society, understood as being consistent with the principles of the United Nations.²²⁷ Limitations to economic, social and cultural rights shall not be arbitrary or unreasonable or discriminatory,²²⁸ nor shall the clause “be interpreted or applied so as to jeopardize the essence of the right concerned.”²²⁹

The CESCR has asserted that a “[s]tate party which closes a university or other educational institution on grounds such as national security or the preservation of public order has the

²²⁴ CESCR General Comment 14 [28]. See also Alston (1987) p. 201.

²²⁵ In line with art. 5(1), see CESCR General Comment 14 [29].

²²⁶ See Alston (1987) p. 202.

²²⁷ See Limburg Principles [55], Alston (1987) p. 203.

²²⁸ See Limburg Principles [49].

²²⁹ Ibid [56].

burden of justifying such a serious measure in relation to each of the elements identified in article 4.”²³⁰ Not providing education is detrimental to the general welfare of the population, and if one priority should not be compromised when allocating scarce resources, it is the provision of education. Promotion of human rights, one of the aims of education, and democracy, is contingent upon educated citizens, especially during emergencies. In short; it is unlikely that poverty will justify art. 4 limitations to the RtPE.

3.4.2 Derogation

The CESCR has stressed that even in “times of severe resource constraints whether caused by a process of adjustment, of economic recession, or by other factors [there is an obligation to adopt] relatively low-cost targeted programmes”²³¹ It is unlikely, barring a more pressing emergency occurring simultaneously, that poverty would satisfy the requirements for derogation based on the general principles of Force Majeur or Necessity.²³² A famine would for instance be discussed in chapter 4, if natural causes created the situation, but if caused by the state’s neglect, these general principles would not exculpate the state.

3.5 Conclusions

Poverty is not an exceptional situation which easily justifies restrictions to the RtE. For any retrogressive measure to be justified, many obligations of both conduct and result must be fulfilled. These include, but are not limited to; adoption of a plan, a good faith effort, an objectively assessed budget allocation for education, benchmarking and reporting on progress. Many African states have never fulfilled their obligation to create a plan for primary education and report on the progress of implementation. This is a clear breach of the Covenant and a continuous obligation, which must be fulfilled.

²³⁰ CESCR General Comment 13 [42].

²³¹ CESCR General Comment 3 [12].

²³² See ILC (2001) p. 76.

4 The right to education during emergencies – natural disasters

*In 1998 hundreds of schools in Central America were damaged by Hurricane Mitch and many others were turned into shelters. In Aceh, Indonesia, 1,000 teachers were lost after the tsunami in 2004, and 50 per cent of schools were destroyed, leaving 140,000 elementary students and 20,000 junior high school students with nowhere to study. The tsunami destroyed 112 schools in Sri Lanka.*²³³

Natural disasters epitomize the term *emergency*, and are a varied group of occurrences, ranging from the slow onset of a drought to the sudden event of a flood or an earth quake. They typically render an area incapable of handling even the most basic tasks for a certain amount of time and result in damaged infrastructure and loss of lives. According to the Special Rapporteur on the Right to Education, 90 per cent of those affected “live in States with limited capacity to cope with that impact.”²³⁴ Often, a state of emergency is declared with legal implications for various rights, including human rights and the RtPE.

4.1 The content of state obligations

A natural disaster often places a country in a precipitous and weakened resource situation. In the type situation described in the quotation above, educational infrastructure is destroyed, there is an absence of teachers, and for a time attending school is rendered impossible due to the circumstances. The available resources will often at first, at least for developing countries, be provided by the international community. These resources must be taken into account when evaluating whether or not the response is adequate. For analyzing state obligations during natural disasters, I will employ a tripartite timeline; what

²³³ Muñoz (2008) [27].

²³⁴ Muñoz (2008) [26].

obligations do states have to prepare for emergencies, during emergencies and during transition to normalcy.

4.1.1 Obligations to plan for emergencies

As described in chapter 3, the obligation to adopt a plan for primary education applies without exception. As the Special Rapporteur on the Right to Education has mentioned, natural disasters happen more and more frequently.²³⁵ There is a prohibition, understood from the obligation to progressively realize the RtE, on deliberate retrogressive measures. Involuntary retrogression is also forbidden, unless the state can justify its maximum good use of resources or exculpation from responsibility based on e.g. Force Majeur. A logical consequence of this is an obligation to plan for emergencies which have a relatively high probability of occurring. A failure to plan would deprive the state of the argument that the retrogression – or retrogressive measures – was an unfortunate result which occurred in spite of a good faith effort to use maximum available resources. The state will thus not satisfy the burden of proof requirements²³⁶ and will be in violation of the Covenant.

An exceptional occurrence like the 2004 tsunami can perhaps not be planned for, but many emergencies are more predictable and appear slower, such as floods. Earth quakes happen with regular frequency, droughts are cyclical and floods happen yearly. If the state knows the likelihood of an emergency occurring is high, it should be required to have a response – mainly an obligation of conduct; to provide temporary measures. As a school year is recommended as consisting of 180 days, there is also the possibility of compensating for time spent without facilities. This obligation can be inferred from the element of adaptability, in that education should “adapt to the needs of changing societies and communities and respond to the needs of students.”²³⁷

²³⁵ Muñoz (2008) [28].

²³⁶ CESCR General Comment 13 [42].

²³⁷ CESCR General Comment 13 [6(d)].

The obligation to adopt legislative measures should also impose a clear obligation to recognize and protect the RtE in the domestic legal system, including the express right to education during emergencies. The General Assembly, in 2009, adopted a resolution emphasizing that there is a right to education during emergencies, and that education should be part of the humanitarian response, and include risk assessment and disaster preparedness.²³⁸ It also urged states to factor disaster risk and safety considerations “into all phases of the planning, design, construction and reconstruction of educational facilities.”²³⁹

4.1.2 Obligations during emergencies

When natural disasters occur, a state of emergency will often follow and impact the enjoyment of human rights. Specific derogation measures are not permitted under the four legal bases, but restrictions to rights could be possible under ICESCR art. 4 and based on general principles of law. The RtE could also be adversely affected by legitimate derogation from other rights.

4.1.2.1 Restrictions to the RtE during emergencies

Where an earth quake has destroyed a school building or a volcano threatens to cover a city in lava, common sense and pragmatism calls for an evacuation and as a consequence, children not receiving an education. The same applies if an infectious disease threatens to cause an epidemic.²⁴⁰ Measures must be weighed against the consequences for the rights it infringes upon, and must be proportional.²⁴¹ Acute emergency situations do not fit well with the understanding of human rights violations. In the midst of an emergency, complete suspension – or non-fulfillment – of rights may be permitted, for a short period of time, before the transition to normalcy must resume. A “temporary closure of an educational institution due to an earthquake, for instance, would be a circumstance beyond the control

²³⁸ A/RES/64/290 [8].

²³⁹ Ibid [11].

²⁴⁰ See Vasak (1982) p. 190.

²⁴¹ See e.g. Müller (2009) p. 592.

of the State”,²⁴² and the correct approach is viewing the situation as a conflict of norms, where the protection of e.g the right to life, takes precedent over the RtE. The question is, under which rules can such action be legal? And where are the lines to be drawn between legal and illegal action?

I - Limitations

The CESCR specifically addressed the RtE in emergencies in General Comment no. 13. It stated that “a State party which closes a university or other educational institution on grounds such as national security or the preservation of public order has the burden of justifying such a serious measure in relation to each of the elements identified in article 4.”²⁴³ The CESCR thus seems to view grounds such as “national security or the preservation of public order” as valid grounds under art. 4. The provision allows limitations which are “compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society”. The scope of art. 4 therefore seems to also cover many situations which would also be covered by derogation provisions in other treaties, but any measure must fulfill the four requirements described in chapter 3.4.1. Where consequences are more severe, Necessity or Force Majeur are more likely to be asserted as grounds for a state’s failure to fulfill its obligations.

II – Force Majeur and Necessity

As described in chapter 2.3.3 Force Majeure applies where the state is unable to fulfill obligations, while Necessity applies where the state takes conscious but necessary action. The Limburg Principles acknowledge that “factors beyond [the state’s] reasonable control may adversely affect its capacity to implement particular rights.”²⁴⁴ During natural disasters the inability to protect and fulfill rights is the most likely scenario, with Force Majeur the most probable justification. According to the Special Rapporteur on the

²⁴² Maastricht Guidelines [13].

²⁴³ See General Comment 13 [42].

²⁴⁴ Limburg Principles [71].

Independence of Judges and Lawyers; "the worst violations of the right to education occur [...] during the period from early response to an emergency to the initial stages of reconstruction".²⁴⁵ This highlights how crucial the temporal factor is in protecting the RtE. Even where obligations are temporarily suspended on legitimate grounds of Force Majeur or Necessity, they quickly resume, imposing continuous and new obligations on the state, when the grounds have ceased. In acute emergencies, temporary evacuations and closing of schools would be justified on this basis,²⁴⁶ however, no "state of emergency may remain in force for longer than is strictly necessary."²⁴⁷

4.1.3 Obligations during transition to normalcy

At some point there is an obligation to rebuild, and one must make a reassessment of the resource situation. It is not automatic that this coincides with the formal lifting of the state of emergency. The new resource situation triggers the continuing obligation to make a plan for primary education, and set benchmarks for how to reach them.²⁴⁸ This must be done "within two years of a subsequent change in circumstances which has led to the nonobservance of the relevant obligation."²⁴⁹ According to a questionnaire from the Special Rapporteur on the Right to Education; "the period for resuming educational activities varies between 24 hours and two months. However, it can be observed that reintegration and resumption of school are not a priority for all countries, even though they are vital for educational development and for the continuity of education in emergency situations."²⁵⁰ When the acute disaster is over, the situation is often practically the same as described in chapter 3: poverty.²⁵¹ The state must then reassess the resource situation and adopt a new plan with benchmarks reflecting the new situation. The emergency is in no way a

²⁴⁵ Muñoz (2008) [18].

²⁴⁶ See e.g. Vasak (1982) p. 186.

²⁴⁷ Despouy (1997) [74].

²⁴⁸ ICESCR. Art. 14.

²⁴⁹ CESCR General Comment 11 [8].

²⁵⁰ Muñoz (2008) [135].

²⁵¹ Around "90 per cent of those affected by natural disasters live in States with limited capacity to cope with that impact", see Muñoz (2008) [26].

justification for not fulfilling this continuous obligation; it applies, particularly to such situations.²⁵²

4.2 Conclusions

Natural disasters are unpredictable, heterogeneous and have been occurring more and more frequently in recent years. Each situation requires its own tailored response. The Special Rapporteur on the Right to Education has highlighted in his report on education in emergencies from 2008 that “[e]ducation, a basic human right, is frequently found to be interrupted, delayed or even denied during the reconstruction process and early response to emergencies.”²⁵³ He has also recommended that general educational programs should “include specific measures for continuity of education at all levels and during all the phases of the emergency. Such a plan should include training for the teachers in various aspects of emergency situations”.²⁵⁴ In short; an emergency situation may justify temporary non-fulfillment of the RtPE, however, all the obligations described in chapter 3 apply in full as soon as the grounds for restrictions are lifted.

²⁵² See CESCR General Comment 11 [9].

²⁵³ Muñoz (2008) [12].

²⁵⁴ Muñoz (2008) [146].

5 The right to education during armed conflict

Long years of civil war, combined with constant political instability, have taken a heavy toll on the education sector in Liberia. In terms of infrastructure, an estimated 80 percent of schools were destroyed. During the short window of peace in the late 90s, some reconstruction took place and enrolment almost doubled. However, between 2001 and 2003, the conflict re-emerged and further destruction and damage took place. In [a 2003-04-study...] 20 percent of schools had been completely destroyed, while many of the remaining 80 percent were in urgent need of repair.²⁵⁵

According to the The Special Rapporteur on the Right to Education “half the children who receive no education live in countries where there is or has recently been armed conflict and in some of those countries, net school enrolment is below 50 per cent. Recent estimates put the figure at 39 million children.”²⁵⁶

During conflict situations, respecting and protecting civil and political rights often receives priority. Fulfillment of other rights is considered less pressing, something the limited priority afforded to education in humanitarian response is evidence of.²⁵⁷ As the quotation shows, conflict also severely impacts the resources available to education, both by destroying facilities, limiting the availability of teachers²⁵⁸ and by diverting resources to

²⁵⁵ Liberia (2007) p. 7.

²⁵⁶ Muñoz (2008) [6].

²⁵⁷ Humanitarian aid for education is estimated to account for no more than 2% of total humanitarian aid, see EFA (2011) p. 19. Also, estimates for the years 2001 to 2005 show that the actual financial contributions made for education averaged 42 per cent of the real needs, as compared with 66 per cent in all the other humanitarian sectors, Muñoz (2008) [70].

²⁵⁸ UNESCO (2010) p. 12

war time production. It also creates vulnerable groups such as refugees and IDPs, and exposes woman and children to dangers such as sexualized violence.

Before analyzing what obligations states have during armed conflict, it is conducive to describe specific conflict related protection measures in the four legal bases, then some explicit non-derogable prohibitions which indirectly protect the right to education, and finally positive protection of the RtE in IHL.

5.1 Conflict related protection from the four legal bases

Legal theory has debated the extent to which the CRC applies during conflict.²⁵⁹ It is considered to protect children to a greater extent than the ICESCR during emergencies. Art. 38(1) ensures respect for IHL applicable to them “in armed conflicts which are relevant to the child.”²⁶⁰ The provision does not separate between internal and international armed conflict and should therefore apply to both as the treaty applies at all times. This could be interpreted as meaning that states which have not ratified the Geneva Conventions²⁶¹ and Protocols – rules of IHL²⁶² – are still bound by all applicable humanitarian laws which are relevant to the child – during both internal and international conflicts.²⁶³ The Children’s Charter confirms this principle in art. 22(1).²⁶⁴

CRC art. 38(3) forbids the recruitment of children under 15 years of age into armed forces, while art. 38(2) imposes on states an obligation to “take all feasible measure” to ensure

²⁵⁹ See Cohn (1991) p. 101-105.

²⁶⁰ UNICEF (2007) p. 574.

²⁶¹ The four Geneva Conventions are ratified by 194 states including every African state. See Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949 (‘Geneva Convention IV’).

²⁶² See generally Henckaerts (2009)

²⁶³ Cohn (1991) p. 104.

²⁶⁴ See generally Ang (2005).

children under 15 do not take part in hostilities.²⁶⁵ The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (‘Optional Protocol CRC’) raises this limit to 18 years for those 143 states which have ratified it.²⁶⁶ The Children’s Charter art. 22(2) mirrors these rules but as a child is defined as every person under 18, it raises the age for at least the 45 states parties.²⁶⁷ These are important rules as:

[i]n 2008, the UN estimated that more than 250,000 children remained in the ranks of armed forces or groups. Voluntary or forced recruitment of children from school, or en route to or from school, by armed groups or security forces for combat or forced labour from 2006 to 2009 was reported in [18 countries, 7 of which in Africa].²⁶⁸

CRC art. 38(4) obligates states to “take all feasible measures” to protect the civilian population, and particularly children “who are affected by armed conflict.” It does not make specific reference to internal conflicts, but the Children’s Charter extends this principle specifically “to children in situations of internal armed conflicts, tension and strife.”²⁶⁹ Possible objections to the lowering of standards through the use of “feasible measures”, unlike the absolute standards in IHL, are resolved through art. 41, which sets the CRC as a minimum standard.²⁷⁰ It is likely that in regards to children and education, all rules of IHL apply, also during internal conflicts, although in practice it is far from certain

²⁶⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. (‘Additional Protocol I’) art. 77(2) and the Rome Statute of the International Criminal Court (‘ICC Statute’) art. 8(2)(b)(xxvi) contains the same normative content for international conflicts, while ICC Statute art. 8(2)(e)(vii) and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977 (‘Additional Protocol II’) art. 4(3)(c) applies the same normative content to internal armed conflicts.

²⁶⁶ See art. 1-3.

²⁶⁷ See generally Vandewiele (2006).

²⁶⁸ EFA (2010) p. 22

²⁶⁹ Art. 22(3).

²⁷⁰ Cohn (1991) p. 9.

that all parties to conflicts will be willing to accept these obligations. In the following the analysis of state obligations will be based on the assumption that IHL applies as described.

5.2 International Humanitarian law (IHL)

International Humanitarian Law applies to varying degree, depending on whether the conflict is international or internal. It also applies to a larger extent if states are parties to the four Geneva Conventions and the two protocols, in which case, they are bound by all these provisions, not just those considered codification of customary law.²⁷¹

The severity of situations of armed tension can be divided in three. Internal disturbances and civil unrest is not protected by IHL. When these situations evolve so that the life of the nation is threatened, it reaches the level of internal armed conflict where some IHL rules apply. Where two or more states are involved there is an international armed conflict.²⁷²

5.2.1 Internal armed conflict

During internal armed conflicts art. 3 common to the Geneva Conventions of 1949 applies together with Additional Protocol II art. 4 and other customary rules.²⁷³

5.2.2 International armed conflict

The four Geneva Conventions and its first protocol contain rules for the protection of different victims of war and apply to conflicts where at least two states are involved. Art. 2 common to the Conventions is considered customary international law and is also binding on non-parties, along with other customary rules of conduct.²⁷⁴

²⁷¹ See ICJ Wall-opinion [89] and Meron (1987) p. 348.

²⁷² See Vasak (1982) p 192-197

²⁷³ Ibid.

²⁷⁴ Ibid. See also International Red Cross (IRC) list of customary rules:

<http://www.icrc.org/eng/resources/documents/misc/customary-law-rules-291008.htm>

I will first examine the relevant rules of international humanitarian law which indirectly respect and protect the RtE, and the specific IHL provisions which protect it. These obligations are incumbent on both parties to a conflict.

5.2.2.1 Prohibited behavior – restrictions on conduct

The intentional targeting of buildings dedicated to education is a war crime.²⁷⁵ In addition the conduct of war must conform to a number of customary rules. The principle of Distinction requires that distinction is made between military and civilian objectives.²⁷⁶ The principle of Proportionality prohibits attacks which are “excessive in relation to the concrete and direct military advantage anticipated.”²⁷⁷ The principle of Military Necessity requires that designated protected areas are not targeted unless absolutely necessary.²⁷⁸ Together these principles set barriers for the type of behavior which is considered legal during *jus in bello*, and formally protects children of primary school age and institutions of education to a large extent. Unfortunately, it is not uncommon in practice for contending parties to use educational buildings for their operations.

5.2.2.2 Positive rules of IHL protecting the RtE during international conflicts

Additional protocol I art. 77(1) requires that children are the object of special respect and protection from assault. They must receive the care and aid they require. The Fourth Geneva Convention protects the RtE of orphans, separated and interned children. Art. 24 ensures that children under 15, “who are orphaned or are separated from their families as a result of the war” have their education “facilitated in all circumstances.” During internment the detaining power shall encourage *inter alia* educational pursuits, and children “shall be allowed to attend schools either within the place of internment or outside.”²⁷⁹ Internees shall also be allowed to “receive, by post or by any other means, individual parcels or

²⁷⁵ ICC Statute art. 8(2)(b)(ix) and 8(2)(e)(iv).

²⁷⁶ See Henckaerts (2009) p. 3 and 25 and Additional Protocol I art. 48.

²⁷⁷ *Ibid* p. 46 and Additional Protocol I art. 51.

²⁷⁸ *Ibid* p. 127 and Additional protocol I art. 52.

²⁷⁹ Geneva Convention IV art. 94.

collective shipments containing [...] books and objects of a devotional, educational or recreational character which may meet their needs.”²⁸⁰

5.3 State obligations during conflict

During conflict, state obligations are inextricably linked to the possible grounds for restricting rights. A conflict situation can be viewed along a tripartite timeline; hostilities, occupation and re-construction.

5.3.1 Obligations during hostilities

Conflict will often lead to states of emergency, but unlike during natural disasters, laws of humanitarian law will, as a general rule, apply as non-derogable *lex specialis* rules. A measure in violation of the abovementioned rules can thus not be exculpated based on Necessity or Force Majeur.²⁸¹ We are thus left with the narrow possibility that education, for short periods of time can be derogated from on these grounds, where there is no IHL-protection. Where an invading army or an expected bombing requires an evacuation restrictions would be temporarily justified, otherwise normal obligations apply.

The ICJ noted in the Wall-opinion that restrictions on the enjoyment of economic social and cultural rights – or limitations – must be “solely for the purpose of promoting the general welfare in a democratic society”, and proportional.²⁸² As seen in chapter 4, limiting the right to education to save the lives of the same children and rights holders is justified under art. 4.

The Special Rapporteur believes that “security in schools forms part of the human right to education. Security means not only physical, psychological and moral safety but also a right to be educated without interruption in conditions conducive to the formation of

²⁸⁰ Ibid art 108.

²⁸¹ Draft Articles art. 55.

²⁸² See Müller (2009) p. 560 and 583.

knowledge and character development.”²⁸³ National security is a legitimate reason for limiting rights under the ICESCR, but it is difficult to see how a limitation on the RtE could be “taken to protect the existence of the nation or its territorial integrity or political independence against force or threat of force.”²⁸⁴ In instances such as these, the rules of IHL specifically protect education. State obligations are thus not influenced by the conflict.

5.3.2 Obligations during occupation

During occupation, there is an obligation on the occupying power to “facilitate the proper working of all institutions devoted to the care and education of children”²⁸⁵ with the cooperation of the national and local authorities. The ICJ has clarified that human rights obligations, including the RtE, apply where a state exercises territorial jurisdiction. “Thus Article 14 makes provision for transitional measures in the case of any State which ‘at the time of becoming a party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge’.”²⁸⁶ A violation of the right to education can thus be made by the state of residence, but also by an aggressor or occupying state.²⁸⁷ If local institutions are inadequate, the occupying power shall “make arrangements for the maintenance and education”²⁸⁸ of separated and orphaned children. The occupying state should be bound by its own benchmarks and required to extend it to occupied territories. If infrastructure, teachers and material has been destroyed, the obligation to adopt a new plan reflecting the new resource situation, within two years, applies. Non-discrimination applies in full, and is particularly important when two nationalities have just fought a war.

²⁸³ Muñoz 2005 [119].

²⁸⁴ Limburg Principles [62].

²⁸⁵ See Geneva Convention IV art. 50

²⁸⁶ See ICJ Wall-opinion [112].

²⁸⁷ See also Maastricht Guidelines [17].

²⁸⁸ See art. Geneva Convention IV art. 50(3).

5.3.3 Obligations post-conflict – during reconstruction

CRC art. 39 obligates states to “take all appropriate measures to promote physical and psychological recovery and social reintegration” of children who are victims of inter alia conflict. Education should be included among these measures.

During a rebuilding phase – post conflict – a state of normalcy is resuming. These situations may however be varied, in resources, damage of infrastructure, and whether the occupying state is still in control. At some point humanitarian law ceases to apply, and there will be no legitimate grounds for upholding a state of emergency. The obligation to adopt a new plan²⁸⁹ with benchmarks is incumbent within two years. The more the situation resembles a situation of normalcy, the closer we get to the discussion of state obligations in chapter 3: poverty.

5.3.4 The obligation to protect vulnerable groups during and after conflict

ICESCR art. 2(2) imposes an immediate obligation not to discriminate – which also applies in full during conflict – on account of “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”²⁹⁰ Emergency situations, including armed conflict, often increases inequality and discrimination for marginalized groups;²⁹¹ including woman, refugees and IDPs.²⁹² While the two former have specific treaties addressing them as a group,²⁹³ the situation for IDPs has until recently mainly been addressed by the Guiding Principles on Internal Displacement.²⁹⁴ The African

²⁸⁹ ICESCR art. 14.

²⁹⁰ See also International Convention on the Elimination of All Forms of Racial Discrimination (‘CERD’) art. 5(v).

²⁹¹ Muñoz (2008) [88].

²⁹² CESCR General Comment 20 [34].

²⁹³ See Convention on the Elimination of All Forms of Discrimination against Women (‘CEDAW’) art. 10 and Convention relating to the Status of Refugees (‘Refugee Convention’) art. 22. See also General Comment 13 [31].

²⁹⁴ See Principle 23. Additional Protocol I art. 78(2) is also relevant for IDPs.

Human Rights system incorporates a wider definition of refugees²⁹⁵ and the Children's Charter extends refugee protection to internally displaced children, whether their displacement is caused by "natural disaster, internal armed conflicts, civil strife, breakdown of economic and social order or howsoever caused."²⁹⁶ In addition, the African Union, in 2009, concluded the Convention for the Protection and Assistance of Internally Displaced Persons in Africa ('Kampala Convention'). It has yet to receive the required 15 ratification to enter into force, but is based on the Guiding Principles on Internal Displacement,²⁹⁷ thus giving local legitimacy to this important soft law document, in an African context.

IDPs are still resident in their state of nationality, and are entitled to the same protection as any other non-combatant in a conflict zone²⁹⁸. The Special Rapporteur on the Right to Education has noted that IDPs are "disproportionately denied the right to education [and that] number of internally displaced persons without the right to education is generally 90 per cent."²⁹⁹

Africa is home to more than 11 million IDPs – or 40 per cent of the world total.³⁰⁰ Currently the average length of displacement is 17 years.³⁰¹ Denying refugees and IDPs education could thus lead to a whole generation not acquiring basic skills. The Kampala

²⁹⁵ See. E.g. the OAU Convention governing the Specific Aspects of Refugee Problems in Africa ('OAU Refugee Convention') art. 1.

²⁹⁶ Children's Charter art. 23(4).

²⁹⁷ Kälin (2008) p 2-5. IDPs are according to the Guiding Principles also those fleeing from "natural or human-made disasters", but international reporting normally reports on a narrower group, see e.g. <http://www.internal-displacement.org> which reports on those fleeing conflict and violence.

²⁹⁸ See Kälin (2009) p. 123.

²⁹⁹ Muñoz (2008) [92].

³⁰⁰ See www.internal-displacement.org

³⁰¹ See Winthrop (2006) p. 2.

Convention which protects the right to education,³⁰² and an added focus on the somewhat neglected³⁰³ Children's Charter, could be employed to better their situation in the future.

5.4 Conclusions

The right to education is protected well through IHL, and the CRC and Children's Charter extends this protection to situations of instability and generalized violence. Except for in acute situations, where Force Majeur of Necessity would allow for restrictions, the obligation to provide primary education applies in full. This does not hide the fact that there are many practical obstacles, of security and concerning the general issue of resources. Emergencies and conflict, like poverty, still require state parties to fulfill clear obligations of conduct and result, which should lead to full realization of the RtPE; free and compulsory for all.

³⁰² Art. 1(j) and 9(2)(b).

³⁰³ Gose (2002) p. 139.

6 Final conclusions and observations

This thesis has shown that although not every child in Africa can claim the right to a free and compulsory place in school today, this is largely due to states not fulfilling their obligations. Many states have not fulfilled the clear result obligation to adopt a plan for primary education within two years and report on its progressive implementation. This is a mandatory and continuous requirement and not subject to progressive realization.

There *is* a coherent right to primary education for children in Africa, and beyond progressive realization, it is only subject to narrow and brief restrictions. The type situations are causally linked, with a common core; poverty and lack of resources. State obligations are in essence very much the same during all three situations. In emergencies the CRC and African Children's Charter give additional protection, while in general, the affirmation of the RtE in an African context through regional treaties, also contributes to local legitimacy.³⁰⁴

States which have not adopted a plan for primary education should do so immediately, so the system of indicators and benchmarks – obligations of conduct and result – can lead to the result of full realization; and free and compulsory primary education for all.

Recommendations to the Committee on Economic, Social and Cultural Rights:

- The CESCR should define fewer, and less complicated rights-based indicators, for measuring compliance.³⁰⁵

³⁰⁴ See Thoko Kaime (2009) p. 36 (African charter Child)

³⁰⁵ See Beiter (2006) p. 625, Limburg Principles [89] and Hunt (1998) [8]-[9].

- Initiatives like the EFA campaign focus on the primary obstacle to the fulfillment of the right to primary education – resources. The emphasis in ICESCR art. 2(1) on international assistance should be used to highlight that aid earmarked for education creates a binding obligation on states to factor these resources into their budget, as a basis for the evaluation of a good faith effort. An objective minimum of six per cent of the state budget should be allocated for education

By insisting that states comply with their clear and unambiguous obligations, as identified in this thesis, the likelihood of achieving universal primary education, has a greater chance of succeeding.

References

Treaties

- Additional Protocol I Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, (entry into force: 7 December 1979)
- Additional Protocol II Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, (entry into force: 7 December 1979)
- Banjul Charter African Charter on Human and Peoples' Rights, 27 June 1981 (entry into force: 21 October 1986)
- CADE UNESCO Convention against Discrimination in Education, 14 December 1960 (entry into force: 22 May 1962)
- CEDAW Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979 (entry into force: 3 September 1981)
- CERD International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965 (entry into force: 4 January 1969)
- Children's Charter African Charter on the Rights and Welfare of the Child, 1990 (entry into force: 29 November 1999)
- CRC Convention on the Rights of the Child, 20 November 1989 (entry into force: 2 September 1990)

Geneva Convention IV	Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949 (entry into force: 21 October 1950)
ICC Statute	Statute of the International Criminal Court, 17 July 1998 (entry into force: 1 July 2002)
ICCPR	International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171 (entry into force: 23 March 1976)
ICESCR	International Covenant on Economic, Social and Cultural Rights, 19 December 1966 (entry into force: 3 November 1976).
ICJ Statute	Statute of the International Court of Justice, Annex to the Charter of the United Nations, 26 June 1945 (entry into force: 24 October 1945)
Kampala Convention	African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, 22 October 2009 (Not yet in force)
OAU Refugee Convention	1969 OAU Convention governing the Specific Aspects of Refugee Problems in Africa, 10 September 1969 (entry into force: 20 June 1974)
Optional Protocol CRC	Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, 25 May 2000 (entry into force: 12 February 2002)
Refugee Convention	Convention relating to the Status of Refugees, 28 July 1951 (entry into force: 22 April 1954)
UN Charter	United Nations Charter, 26 June 1945 (entry into force: 24 October 1945).
VCLT	United Nations, Vienna Convention on the Law of Treaties, 23 May 1969 (entry into force: 27 January 1980).

Judicial decisions

Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, International Court of Justice (ICJ), 9 July 2004

Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America, International Court of Justice (ICJ), 6 November 2003

Communication 74/92, Commission Nationale des Droits de l'Homme et des Libertés v Chad, Decided at the 18th ordinary session, Oct 1995, 9th Annual Activity Report

SERAC v Nigeria (2001), Communication 155/96, Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria, Decided at the 30th ordinary session, Oct 2001, 15th Annual Activity Report

Declarations, resolutions, and other non-binding documents

- A/63/500 Letter dated 20 September 2008 from the Permanent Representatives of Benin, Bosnia and Herzegovina, Costa Rica, Nicaragua, Norway and Qatar to the United Nations addressed to the President of the General Assembly.
A/63/500 (Retrieved: <http://www.un.org/ga/president/63/interactive/education/letter200708.pdf> [Accessed: 29.11.2011])
- A/RES/63/241 Rights of the Child : resolution / adopted by the General Assembly, 13 March 2009, A/RES/63/241 (Retrieved: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/485/25/PDF/N0848525.pdf?OpenElement> [Accessed: 29.11.2011])
- A/RES/64/290 The right to education in emergency situations: resolution / adopted by the General Assembly, 27 July 2010,

- A/RES/64/290 (Retrieved: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/479/23/PDF/N0947923.pdf?OpenElement> [Accessed: 29.11.2011])
- A/RES/S-27/2 A world fit for children: resolution / adopted by the General Assembly, 10 May 2002, A/RES/S-27/2 (Retrieved: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N02/481/78/PDF/N0248178.pdf?OpenElement> [Accessed: 29.11.2011])
- CRC Day of Discussion 2008 Committee on the Rights of the Child ('CRC Committee') Day of General Discussion on "The Right of the Child to Education in Emergency Situations" Recommendations CRC Day of Discussion 2008, 19 September 2008. (Retrieved: <http://www2.ohchr.org/english/bodies/crc/discussion2008.htm> [Accessed: 29.11.2011])
- CRC/C/TKM/CO/1 UN Committee on the Rights of the Child (CRC). Concluding observations; Turkmenistan, 02.06.2006, CRC/C/TKM/CO/1 (Retrieved: <http://www.unhcr.ch/tbs/doc.nsf/%28Symbol%29/CRC.C.TKM.CO.1.En?Opendocument> [Accessed: 29.11.2011])
- Draft Articles Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10) A/RES/56/83 (Retrieved: http://www.lcil.cam.ac.uk/Media/ILCSR/A_56_83%28e%29.pdf [Accessed: 29.11.2011])
- E/C.12/1991/1 Revised general guidelines regarding the form and contents of reports to be submitted by states parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights, 17/06/91. E/C.12/1991/1. (Retrieved: <http://www.unhcr.ch/tbs/doc.nsf/%28Symbol%29/903e9a13>

- [32660f74c12563ef004ea4b0?Opendocument](http://www.unhcr.org/refugees/32660f74c12563ef004ea4b0?Opendocument) [Accessed: 29.11.2011])
- E/C.12/2001/10 Committee on Economic, Social and Cultural Rights, Statement by the Committee to the Third United Nations Conference on Least Developed Countries, Poverty and the International Covenant on Economic, Social and Cultural Rights, 10 May 2001, E/C.12/2001/10 (Retrieved: <http://www.unhcr.ch/tbs/doc.nsf/%28Symbol%29/E.C.12.2001.10.En> [Accessed: 29.11.2011])
- E/C.12/AGO/CO/3 Committee on Economic, Social and Cultural Rights. Consideration of State Reports, Angola, 1 December 2008, E/C.12/AGO/CO/3. (Retrieved: <http://www2.ohchr.org/english/bodies/cescr/cescrs41.htm> [Accessed: 29.11.2011])
- E/C.12/COD/5 Committee on Economic, Social and Cultural Rights. Consideration of State Reports, Democratic Republic of Congo, 21 January 2009. E/C.12/COD/5 (Retrieved: <http://www2.ohchr.org/english/bodies/cescr/cescrwg42.htm> [Accessed: 29.11.2011])
- Economic and Social Council resolution 1985/17 Economic and Social Council resolution 1985/17, Review of the composition, organization and administrative arrangements of the Sessional Working Group of Governmental Experts on the Implementation of the International Covenant on Economic, Social and Cultural Rights (Retrieved: <http://www2.ohchr.org/english/bodies/cescr/> [Accessed: 29.11.2011])
- Millennium Declaration Resolution Adopted by the General Assembly, 18 September 2000, A/RES/55/2 (Retrieved:

<http://www.un.org/millennium/declaration/ares552e.htm>

[Accessed: 29.11.2011])

Vienna Declaration and
Programme of Action

Vienna Declaration and Programme of Action, 12 July 1993,
A/CONF.157/23 (Retrieved: [http://www.un-
documents.net/ac157-23.htm](http://www.un-documents.net/ac157-23.htm) [Accessed: 29.11.2011])

Guiding Principles on
Internal Displacement:

Guiding Principles on Internal Displacement, 22 July 1998,
E/CN.4/1998/53/Add.2 (Retrieved:
[http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/d2e008c61b
70263ec125661e0036f36e](http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/d2e008c61b70263ec125661e0036f36e) [Accessed: 29.11.2011])

Limburg Principles

Limburg Principles on the Implementation of the
International Covenant on Economic, Social and Cultural
Rights. E/C.12/2000/13 (Retrieved:
[http://www.unhchr.ch/tbs/doc.nsf/0/6b748989d76d2bb8c125
699700500e17/\\$FILE/G0044704.pdf](http://www.unhchr.ch/tbs/doc.nsf/0/6b748989d76d2bb8c125699700500e17/$FILE/G0044704.pdf) [Accessed:
29.11.2011])

Maastricht Guidelines

Maastricht Guidelines on Violations of Economic, Social and
Cultural Rights. E/C.12/2000/13 (Retrieved:
[http://www.unhchr.ch/tbs/doc.nsf/0/6b748989d76d2bb8c125
699700500e17/\\$FILE/G0044704.pdf](http://www.unhchr.ch/tbs/doc.nsf/0/6b748989d76d2bb8c125699700500e17/$FILE/G0044704.pdf) [Accessed:
29.11.2011])

Outline for drafting
general comments

Outline for drafting general comments on specific rights of
the International Covenant on Economic, Social and Cultural
Rights. Report on the Twentieth and Twenty-first sessions
(26 April-14 May 1999, 15 November-3 December 1999)
Annex IX. E/2000/22/, E/C.12/1999/11 (Retrieved:
<http://daccess-dds->

[ny.un.org/doc/UNDOC/GEN/G00/412/10/PDF/G0041210.pdf?OpenElement](http://www.un.org/doc/UNDOC/GEN/G00/412/10/PDF/G0041210.pdf?OpenElement) [Accessed: 29.11.2011])

UDHR Universal Declaration of Human Rights, 10 December 1948, 217 A (III) A/810 (Retrieved: <http://www.un.org/en/documents/udhr/> [Accessed: 29.11.2011])

General Comments

- CESCR General Comment 1 UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 1: Reporting by States parties, 4 February 1989. E/1989/22
- CESCR General Comment 3 UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), 14 December 1990, E/1991/23
- CESCR General Comment 4 UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant), 13 December 1991, E/1992/23
- CESCR General Comment 11 UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 11: Plans of Action for Primary Education (Art. 14 of the Covenant), 10 May 1999, E/C.12/1999/4
- CESCR General Comment 13 UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 13: The Right to Education (Art. 13 of the Covenant), 8 December 1999, E/C.12/1999/10
- CESCR General Comment 14 UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health

- (Art. 12 of the Covenant), 11 August 2000,
E/C.12/2000/4
- CESCR General Comment 20 UN Committee on Economic, Social and Cultural Rights (CESCR), General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), 2 July 2009, E/C.12/GC/20
- CRC General Comment 1 UN Committee on the Rights of the Child (CRC), CRC General Comment No. 1: The Aims of Education, 17 April 2001, CRC/GC/2001/1
- CRC General Comment 5 UN Committee on the Rights of the Child (CRC), General comment no. 5 (2003), General measures of implementation of the Convention on the Rights of the Child, 27 November 2003, CRC/GC/2003/5
- HRC General Comment 5 UN Human Rights Committee (HRC), CCPR General Comment No. 5: Article 4 (Derogations), 31 July 1981
- HRC General Comment 24 UN Human Rights Committee (HRC), CCPR General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant, 4 November 1994, CCPR/C/21/Rev.1/Add.6
- HRC General Comment 29 UN Human Rights Committee (HRC), CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency, 31 August 2001, CCPR/C/21/Rev.1/Add.11

Literature and reports

- ActionAid (1) ActionAid. Education in Africa: Responding to a Human Rights Violation, undated (Retrieved: http://www.actionaid.org.uk/doc_lib/135_1_education_in_africa.pdf [Accessed: 29.11.2011])
- Alston (1980) Alston, Philip. *The United Nations' Specialized Agencies and Implementation of the International Covenant on Economic, Social and Cultural Rights*, In: 18 Colum. J. Transnat'l L. 79 1979-1980 (Retrieved: HeinOnline)
- Alston (1987) Alston, Philip and Quinn, Gerard. *The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights*. In: 9 Hum. Rts. Q. 156 1987. (Retrieved: HeinOnline)
- Ang (2005) Ang, Fiona. *Article 38 Children in Armed Conflicts*. In: the series: A Commentary on the United Nations Convention on the Rights of the Child, Leiden, 2005.
- Beiter (2006) Beiter, Klaus Dieter. *The Protection of the Right to Education by International Law*. Leiden / Boston, 2006
- Cassese (2005) Cassese, Antonio. *International Law*, second edition, Oxford, 2005.
- Chapman (1996) Chapman, Audrey R. A "Violations Approach" for Monitoring the International Covenant on Economic, Social and Cultural Rights . 18 Hum. Rts. Q. 23 1996. (Retrieved: HeinOnline [Accessed: 29.11.2011])
- Chirwa (2002) Chirwa, Danwood Mzikenge. *The merits and demerits of the African Charter on the Rights and Welfare of the Child*. The International Journal of Children's Rights 10: 157-177, 2002. (Retrieved: HeinOnline)
- Cohn (1991) Cohn, Ilene. *The Convention on the Rights of the Child: What it Means for Children in War*. In: International Journal of Refugee Law Vol. 3 No. 1. 1991 (Retrieved:

- <http://ijrl.oxfordjournals.org/content/3/1/100.full.pdf> [Accessed: 29.11.2011])
- Coomans (1998) Coomans, Fons. *The right to education as a human right: an analysis of key aspects*: 29.09.1998. E/C.12/1998/16. (<http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/5d4d58f954bad909802566e1003e3d43?Opendocument> [Accessed: 29.11.2011])
- Coomans (2003) Coomans, Fons. *The Ogoni Case Before The African Commission on Human and Peoples' Rights*. *International and Comparative Law Quarterly* (2003), 52 : pp 749-760. (Retrieved: *International and Comparative Law Quarterly*).
- Dakar (2000) UNESCO, Dakar Framework for Action, The. *Education for All: Meeting our Collective Commitments*. UNESCO, Paris, 2000 (Retrieved:<http://unesdoc.unesco.org/images/0012/001211/121147e.pdf> [Accessed: 29.11.2011])
- De Beco (2009) Beco, Gauthier de. *Right to Education Indicator based on the 4 A framework Concept Paper for The Right to Education Project*, 2009. (Retrieved: <http://www.right-to-education.org/sites/r2e.gn.apc.org/files/Concept%20Paper.pdf> [Accessed: 29.11.2011])
- Despouy (1995) Despouy, Leandro. *The Administration of Justice and Human Rights of Detainees: Question of Human Rights and States of Emergency*. Eighth annual report and list of States which, since 1 January 1985, have proclaimed, extended or terminated a state of emergency, presented by Mr. Leandro Despouy, Special Rapporteur appointed pursuant to Economic and Social Council resolution 1985/37. 26 June 1995 Doc.: E/CN.4/Sub.2/1995/20 (<http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/9d7accdf228e4a3802566bf00556e7f?Opendocument> [Accessed: 29.11.2011])
- Despouy (1997) Despouy, Leandro. *Report by the UN Special Rapporteur, Mr. Leandro Despouy, on the question of Human Rights and States of*

- Emergency*. 23 June 1997. E/CN.4/Sub.2/1997/19 (Retrieved: <http://www.unhcr.ch/Huridocda/Huridoca.nsf/%28Symbol%29/E.CN.4.Sub.2.1997.19.En?Opendocument> [Accessed: 29.11.2011])
- Detrich (1999) Detrich, Sharon, *A Commentary in the United Nations Convention on the Rights of the Child*. Hague/Boston/London, 1999.
- EFA (2010) UNESCO, *EFA Global Monitoring Report 2010, Summary, Reaching the Marginalized*. Paris, 2010. (Retrieved: <http://unesdoc.unesco.org/images/0018/001865/186525E.pdf> [Accessed: 29.11.2011])
- EFA (2011) UNESCO, *EFA Global Monitoring Report 2011, The hidden crisis: Armed Conflict and education*, Paris, 2011. (Retrieved: <http://www.unesco.org/new/en/education/themes/leading-the-international-agenda/efareport/reports/2011-conflict/> [Accessed: 29.11.2011])
- Fitzmaurice (1951) Fitzmaurice, G. G. *Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points*. 28 Brit. Y.B. Int'l L. 1 (1951) (Retrieved: HeinOnline).
- Garibaldi (1976) Garibaldi, Oscar M. *General Limitations on Human Rights: The Principle of Legality*. In: 17 Harv. Int'l. L. J. 503 1976 (Retrieved: HeinOnline)
- Gose (2002) Gose, Michael. *The African Charter on the Rights and welfare of the Child. An assessment of the legal value of its substantive provisions by means of a direct comparison to the Convention on the Rights of the Child*. Bellville, 2002. (Retrieved: http://www.communitylawcentre.org.za/clc-projects/childrens-rights/other-publications/african_charter.pdf [Accessed: 29.11.2011])
- Halvorsen (1990) Halvorsen, Kate. *Notes on the Realization of the Human Right to Education*. In: Human Rights Quarterly, Vol. 12, No. 3. (Aug.,

- 1990), pp. 341-364 (Retrieved: http://www.escr-net.org/usr_doc/Notes_on_Realization.pdf [Accessed: 29.11.2011])
- Hart (1957) Hart, H. L.A. *Positivism and The Separation of Law and Morals*. In: 71 Harv. L. Rev. 593 1957 (Retrieved: HeinOnline)
- Henckaerts (2009) Henckaerts, Jean-Marie and Doswald-Beck, Louise. *Customary International Humanitarian Law Volume I: Rules*. Cambridge, 2009. (Retrieved: <http://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf> [Accessed: 29.11.2011])
- Howard (1984) Howard, Rhoda. *Evaluating Human Rights in Africa: Some Problems of Implicit Comparisons*. In: 6 Hum. Rts. Q. 160 1984 (Retrieved: HeinOnline)
- Hunt (1998) Hunt, Paul. *State obligations, indicators, benchmarks and the right to education*. 16.07.1998. E/C.12/1998/11 (<http://www.unhchr.ch/tbs/doc.nsf/0/3e83f2a145015575802566ab0051ce4e?Opendocument> [Accessed: 29.11.2011])
- ILC (2001) ILC. *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*. In: Yearbook of the International Law Commission, 2001, vol. II, Part Two. (Retrieved: http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf [Accessed: 29.11.2011])
- INEE (2010) INEE Minimum Standards Handbook 2010. *Minimum Standards for Education: Preparedness, Response, Recovery*. New York, 2010. (Retrieved: http://www.ineesite.org/uploads/documents/store/Minimum_Standards_2010_eng.pdf [Accessed: 29.11.2011])
- ISCED (1997) UNESCO. *International Standard Classification of Education*, Re-edition, 2006. (Retrieved: <http://www.uis.unesco.org/Library/Documents/isced97-en.pdf> [Accessed: 29.11.2011])

- ISCED (2011) UNESCO. *Revision of the International Standard Classification of Education* (ISCED), Paris, 2011 (Retrieved: http://www.uis.unesco.org/Education/Documents/UNESCO_GC_36_C-19_ISCED_EN.pdf [Accessed: 29.11.2011])
- Jackson (2007) Jackson, Laurie-Ann S. *The International Covenant on Economic Social and Cultural Rights: A Critical Examination of the Relative Importance of Resource Constraints on Benchmarks And Benchmarking Processes in The African Context*. Master thesis, Master of Philosophy: Public International Law, University of Cape Town, Faculty of Law, Cape Town, 2007. (Retrieved: http://www.publiclaw.uct.ac.za/usr/public_law/LLMPapers/jackson.pdf [Accessed: 29.11.2011])
- Kalantry (2010) Kalantry Sital, Getgen Jocelyn E., Koh Steven Arrigg. *Enhancing Enforcement of Economic, Social, and Cultural Rights Using Indicators: A Focus on the Right to Education in the ICESCR*. Human Rights Quarterly, Volume 32, Number 2, May 2010, pp. 253-310. (Retrieved: Project Muse)
- Kälin (2008) Kälin, Walter. *Guiding Principles on Internal Displacement, Annotations*, Studies in Transnational Legal Policy, No. 38, The American Society of International Law Washington, DC. 2008 (Retrieved: <http://www.asil.org/pdfs/stlp.pdf> [Accessed: 29.11.2011])
- Keetharuth (2009) Keetharuth, Sheila B. *Major African legal instruments*. In: Bösl, Anton and Diescho, Joseph. *Human Rights in Africa Legal Perspectives on their Protection and Promotion*. Windhoek, 2009. (Retrieved: http://www.kas.de/upload/auslandshomepages/namibia/Human_Rights_in_Africa/7_Keetharuth.pdf [Accessed: 29.11.2011])
- Koskenniemi (2006a) Koskenniemi, Martti. *Fragmentation of international law: difficulties arising from the diversification and expansion of*

- international law*. Report of the Study Group of the International Law Commission. 18 July 2006, UN. A/CN.4/L.702 (Retrieved: <http://daccess-dds-ny.un.org/doc/UNDOC/LTD/G06/628/63/PDF/G0662863.pdf?OpenElement> [Accessed: 29.11.2011])
- Koskenniemi (2006b) Koskenniemi, Martti. *Fragmentation of international law: difficulties arising from the diversification and expansion of international law*. Report of the Study Group of the International Law Commission. 13 April 2006. A/CN.4/L.682. (Retrieved: <http://daccess-dds-ny.un.org/doc/UNDOC/LTD/G06/610/77/PDF/G0661077.pdf?OpenElement> [Accessed: 29.11.2011])
- Lauterpacht (1949) Lauterpacht, H. *Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties*. 26 Brit. Y.B. Int'l L. 48 1949 (Retrieved: HeinOnline)
- Lineria (2007) *Liberian Primary Education Recovery Program, Prepared for Fast Track Initiative*. Ministry of Education Republic of Liberia Monrovia, Liberia, 2007 (Retrieved: http://www.globalpartnership.org/media/library/Liberia_plan.pdf [Accessed: 29.11.2011])
- Lloyd (2002) Lloyd, Amanda. *Evolution of the African Charter on the Rights and Welfare of the Child and the African Committee of Experts: Raising the gauntlet*, In: 10 Int'l J. Child. Rts. 179 2002 (Retrieved: HeinOnline)
- McGoldrick (2004) McGoldrick, Dominic. *Interface between Public Emergency Powers and International Law*, The., 2 Int'l J. Const. L. 380 (2004) (Retrieved: HeinOnline)
- MDG (2010) United Nations, *The Millennium Development Goals Report 2010*, New York, 2010 (Retrieved: <http://www.un.org/millenniumgoals/pdf/MDG%20Report%202010>)

- [%20En%20r15%20-low%20res%2020100615%20-.pdf](#) [Accessed: 29.11.2011])
- Meron (1987) Meron, Theodor. *The Geneva Conventions as Customary Law*. In: *The American Journal of International Law*, Vol. 81, No. 2. (Apr., 1987), pp. 348-370. (Retrieved: <http://www.jstor.org/stable/2201080> [Accessed: 29.11.2011])
- Mugwanya (2000) Mugwanya, George William. *Realizing Universal Human Rights Norms through Regional Human Rights Mechanisms: Reinvigorating the African System*. In: *10 Ind. Int'l & Comp. L. Rev.* 35 (1999-2000) (Retrieved: HeinOnline).
- Müller (2009) Müller, Amrei. *Limitations to and Derogations from Economic, Social and Cultural Rights*. In: *Human Rights Law Review* (2009) 9 (4): 557-601. (Retrieved: Oxford Journals).
- Muñoz (2008) Muñoz, Vernor. *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including The Right To Development. Right to education in emergency situations* Report of the Special Rapporteur on the right to education, Vernor Muñoz. 20 May 2008. A/HRC/8/10 (Retrieved: <http://www2.ohchr.org/english/bodies/hrcouncil/8session/reports.htm> [Accessed: 29.11.2011])
- Mutua (1995) Mutua, Makau Wa. *Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties*, The. In: *35 Va. J. Int'l L.* 339 (1994-1995) (Retrieved: HeinOnline).
- Odinkalu (2001) Odinkalu, Anselm Chidi. *Analysis of Paralysis or Paralysis by Analysis? Implementing Economic, Social, and Cultural Rights Under the African Charter on Human and Peoples' Rights*. In: *Human Rights Quarterly*, Volume 23, Number 2, May 2001, pp. 327-369 (Article) (Retrieved: Project Muse)
- OHCHR (2003) OHCHR. *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*. Professional

- Training Series No. 9. New York, 2003. (Retrieved: <http://www.ohchr.org/Documents/Publications/training9chapter16en.pdf> [Accessed: 29.11.2011])
- Okere (1984) Okere, B. Obinna. *The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: A Comparative Analysis with the European and American Systems*. In: 6 Hum. Rts. Q. 141 1984 (Retrieved: HeinOnline)
- Oraá (1992) Oraá, Jaime. *Human Rights in States of Emergency in International Law*. Oxford, 1992.
- Prado (1998) Gomez del Prado, José L. *Comparative analysis of the right to education*. Geneva, 20.11.1998. E/C.12/1998/23
- Rhoades (2010) Rhoades, Amy. *Internally Displaced Persons and the Right to Education*. El Rodeo, 2010. (Retrieved: http://www.right-to-education.org/sites/r2e.gn.apc.org/files/displaced_futures.pdf [Accessed: 29.11.2011])
- Robertson (1994) Robertson, Robert E. *Measuring State Compliance with the Obligation to Devote the "Maximum Available Resources" to Realizing Economic, Social, and Cultural Rights*. In: 16 Hum. Rts. Q. 693 1994 (Retrieved: HeinOnline).
- Sinclair (2002) Sinclair, Margaret. *Planning education in and after emergencies*. Paris, 2002. Published in the series Fundamentals in Education Planning – 73. (Retrieved: <http://www.iiep.unesco.org/> [Accessed: 29.11.2011])
- Steiner (2007) Steiner Henry J, Alston Philip, Goodman Ryan. *International Human Rights in Context*, third edition, Oxford, 2007.
- Takala (2003) Takala, Tuomas. *Analysis of the Education for All Fast-Track Initiative*, Prepared for the Ministry for Foreign Affairs of Finland, January 2003. (Retrieved: http://www.dvv-international.de/files/analysis_of_the_education_for_all_fast_track_initiative.pdf [Accessed: 29.11.2011])

- Thoko Kaime (2009) Kaime, Thoko. *The African Charter on the Rights and Welfare of the Child A socio-legal perspective*, Cape Town, 2009 (retrieved: http://www.pulp.up.ac.za/pdf/2009_11/2009_11.pdf [Accessed: 29.11.2011])
- Tomaševski (1999) Tomaševski, Katarina. *Preliminary report of the Special Rapporteur on the right to education, Ms. Katarina Tomasevski, submitted in accordance with Commission on Human Rights resolution 1998/33*, 13 January 1999, E/CN.4/1999/49 (Retrieved: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G99/101/34/PDF/G9910134.pdf?OpenElement> [Accessed: 29.11.2011])
- Tomaševski (2001) Tomaševski, Katarina. *Human rights obligations: making education available, accessible, acceptable and adaptable, Right to education primers no. 3*, Gothenburg, 2001. (Retrieved: <http://www.right-to-education.org/sites/r2e.gn.apc.org/files/B6g%20Primer.pdf> [Accessed: 29.11.2011])
- Tomaševski (2006) Tomaševski, Katarina. *The State of the Right to Education Worldwide Free or Fee Executive Summary*, 2006,(Retrieved: <http://www.katarinatomasevski.com/images/Summary.pdf> [Accessed: 29.11.2011])
- UNESCO (1994) World Declaration on Education for All and The Framework for Action to Meet the Basic Learning Needs, 3d printing, Paris, 1994. (Retrieved: http://www.unesco.org/education/pdf/JOMTIE_E.PDF [Accessed: 29.11.2011])
- UNESCO (2010) UNESCO, *Protecting Education from Attack, A State-of-the-Art Review*. Paris, 2010. (Retrieved: <http://unesdoc.unesco.org/images/0018/001867/186732e.pdf> [Accessed: 29.11.2011])
- UNICEF (2007) UNICEF. *Implementation Handbook for the Convention on the rights of the Child, Fully Revised Third Edition*. Geneva, 2007.

- (Retrieved: http://www.unicef.org/publications/index_43110.html
[Accessed: 29.11.2011])
- Vandewiele (2006) Vandewiele, Tiny. *Optional Protocol The Involvement of Children in Armed Conflicts*. In: the series: A Commentary on the United Nations Convention on the Rights of the Child, Leiden, 2006.
- Vasak (1982) Vasak, Karel. *The international Dimensions of Human Rights vol. 1*, UNESCO, Paris, 1982
- Winthrop (2006) Winthrop, Rebecca. *Education in emergencies: a critical factor in achieving the Millennium Development Goals*. The Commonwealth Ministers Reference Book, 2006. (Retrieved: http://www.rescue.org/sites/default/files/migrated/resources/education-in-emergencies_a-critical-factor-in-achieving-the-millennium-development-goals.pdf [Accessed: 29.11.2011])

Online Resources

<http://www.icrc.org/eng/resources/documents/misc/customary-law-rules-291008.htm>

[Accessed: 29.11.2011]

<http://www.icrc.org/eng/resources/documents/misc/customary-law-rules-291008.htm>

[Accessed: 29.11.2011]

<http://www.internal-displacement.org> [Accessed: 29.11.2011]

<http://www.slideshare.net/sixwillfix/the-neglected-generation> [Accessed: 29.11.2011]

<http://www.un.org/millenniumgoals/bkgd.shtml> [Accessed: 29.11.2011]

<http://www.unhchr.ch/tbs/doc.nsf> [Accessed: 29.11.2011]

<http://unesco.org> [Accessed: 29.11.2011]

<http://www.unisdr.org/we/inform/terminology> [Accessed: 29.11.2011]

<http://www.unohrrls.org/en/ldc/25> [Accessed: 29.11.2011]

http://www.ineesite.org/post/about_the_right_to_education_in_emergencies2/ [Accessed: 29.11.2011]

Annex I – Substantive Universal Legal Bases for the RtPE

Universal Declaration of Human Rights (UDHR)

Article 26

1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
3. Parents have a prior right to choose the kind of education that shall be given to their children.

International Covenant on Economic, Social and Cultural Rights (ICESCR)

Article 13

1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.
2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:
 - (a) Primary education shall be compulsory and available free to all

(e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

Article 14

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

Convention on the Rights of the Child (CRC)

Article 28

1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

- (a) Make primary education compulsory and available free to all;
- (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.

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;
- (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
- (c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;

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

Annex II – Substantive Regional Legal Bases for the RtPE

African Charter on Human and peoples' Rights (Banjul Charter)

Article 17

1. Every individual shall have the right to education.

African Charter on the Rights and welfare of the Child (Children's Charter)

Article 11: Education

1. Every child shall have the right to an education.
2. The education of the child shall be directed to:
 - (a) the promotion and development of the child's personality, talents and mental and physical abilities to their fullest potential;
 - (b) fostering respect for human rights and fundamental freedoms with particular reference to those set out in the provisions of various African instruments on human and peoples' rights and international human rights declarations and conventions;
 - (c) the preservation and strengthening of positive African morals, traditional values and cultures;
 - (d) the preparation of the child for responsible life in a free society, in the spirit of understanding tolerance, dialogue, mutual respect and friendship among all peoples ethnic, tribal and religious groups;
 - (e) the preservation of national independence and territorial integrity;
 - (f) the promotion and achievements of African Unity and Solidarity;
 - (g) the development of respect for the environment and natural resources;
 - (h) the promotion of the child's understanding of primary health care.
3. States Parties to the present Charter shall take all appropriate measures with a view to achieving the full realization of this right and shall in particular:
 - (a) provide free and compulsory basic education;

- (b) encourage the development of secondary education in its different forms and to progressively make it free and accessible to all;
- (c) make the higher education accessible to all on the basis of capacity and ability by every appropriate means;
- (d) take measures to encourage regular attendance at schools and the reduction of drop-out rates;
- (e) take special measures in respect of female, gifted and disadvantaged children, to ensure equal access to education for all sections of the community.