

3-4-2009

Measuring State Compliance with the Right to Education Using Indicators: a Case Study of Colombia's Obligations Under the ICESCR

Sital Kalantry

Cornell Law School, sk49@cornell.edu

Jocelyn Getgen

Cornell Law School, jocelyngetgen@hotmail.com

Steven A. Koh

United States Court of Appeals for the Fifth Circuit

Recommended Citation

Kalantry, Sital; Getgen, Jocelyn; and Koh, Steven A., "Measuring State Compliance with the Right to Education Using Indicators: a Case Study of Colombia's Obligations Under the ICESCR" (2009). *Cornell Law Faculty Working Papers*. Paper 52.
http://scholarship.law.cornell.edu/clsops_papers/52

This Article is brought to you for free and open access by the Faculty Scholarship at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Faculty Working Papers by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

**Measuring State Compliance with the Right to Education Using Indicators:
A Case Study of Colombia’s Obligations Under the ICESCR¹**

Sital Kalantry,[†] Jocelyn E. Getgen^{††} & Steven Arrigg Koh^{†††}

I.	INTRODUCTION	3
II.	THE RIGHT TO EDUCATION IN THE ICESCR: A BRIEF HISTORY AND THEORY	12
III.	MEASURING COMPLIANCE WITH THE RIGHT TO EDUCATION UNDER THE ICESCR	18
A.	The Right to Education under the ICESCR	18
i.	Article 2(1): Progressive Realization.....	19
ii.	Articles 2(2) & 3: Nondiscrimination & Equal Treatment	21
iii.	Articles 13 & 14: The Right to Education	21
B.	Conceptual Framework for the Right to Education	28
i.	Availability	31
ii.	Accessibility	32
iii.	Acceptability.....	34
iv.	Adaptability	36
C.	Indicators for the Right to Education.....	37
i.	Categorization of Indicators.....	39
ii.	Context-specific v. universal indicators.....	42
iii.	Qualitative and quantitative indicators.	43
iii.	Data Sources	45
iv.	Disaggregated data.....	47
D.	Benchmarks for Right to Education Indicators.....	48

¹ This article was conceived from a project undertaken by the Cornell International Human Rights Clinic with the Robert F. Kennedy Center for Human Rights (RFK Center) and the University of Virginia’s International Human Rights Clinic. In December 2007, the authors traveled with the RFK Center staff to Colombia. We visited the cities of Bogotá, Cali (in the Valle del Cauca region) and Popayán (in the Cauca region). We conducted meetings with nearly 100 people, including Afro-Colombian leaders, indigenous school teachers, education reform activists, and government representatives, such as a vice-minister for education, a senator, and a magistrate justice of the Constitutional Court. We would like to thank Monika Kalra Varma, Marselha Gonçalves-Margerin, Deena Hurwitz and Fernanda Katz Ellenberg for their support, guidance and contributions to this article. An additional thank you goes to Benjamin Mason Meier for his insights during the revision process.

[†] Assistant Clinical Professor of Law, Cornell Law School. J.D., University of Pennsylvania Law School; MsC, London School of Economics; A.B., Cornell University.

^{††} Women and Justice Fellow, Cornell Law School. J.D., Cornell Law School; M.P.H., Johns Hopkins Bloomberg School of Public Health; B.A., Cornell University.

^{†††} Law Clerk to the Honorable Carolyn Dineen King, United States Court of Appeals for the Fifth Circuit. J.D., Cornell Law School; M.Phil. University of Cambridge, England; A.B., Harvard University.

E.	Ascertaining violations of the Right to Education	50
i.	Structural Violations	52
ii.	Process Violations	53
iii.	Outcome Violations	56
IV.	COLOMBIA CASE STUDY	60
A.	Structural Indicators	62
i.	Availability	62
ii.	Accessibility	63
iii.	Acceptability.....	65
iv.	Adaptability	66
B.	Process Indicators.....	67
i.	Availability	67
ii.	Accessibility	70
iii.	Acceptability.....	72
iv.	Adaptability	73
C.	Outcome Indicators	75
i.	Availability	75
ii.	Accessibility	81
iii.	Acceptability.....	84
iv.	Adaptability	85
C.	Evaluating Colombia’s Compliance with the Right to Education Provisions of the ICESCR.....	87
V.	LIMITATIONS OF USING INDICATORS.....	90
VI.	CONCLUSION.....	95

Abstract

The right to education is often referred to as a “multiplier right” because its enjoyment enhances other human rights. It is enumerated in several international instruments, but it is codified in greatest detail in the International Covenant on Economic, Social and Cultural Rights (ICESCR). Despite its importance, the right to education has received limited attention from scholars, practitioners, and international and regional human rights bodies as compared to other economic, social and cultural rights (ECSRs). In this Article, we propose a methodology that utilizes indicators to measure treaty compliance with the right to education. Indicators are essential to measuring compliance with ECSRs because indicators are, in many cases, the only way to evaluate whether or not a State is progressively realizing its obligations to fulfill ECSRs.

Human rights scholars, professionals and intergovernmental organizations have been increasingly interested in using indicators to measure and enforce a State's compliance with its obligations under international human rights treaties. However, there have been few attempts to develop a comprehensive methodology that uses human rights indicators closely tied to treaty language to measure a State's compliance with the right to education. Furthermore, there are no studies of which we are aware that analyze a specific country's treaty compliance using indicators. This Article's proposed framework is used to evaluate Colombia's compliance with its obligations relating to the right to education under the ICESCR.

In particular, the methodology that we propose to develop a suitable framework for measuring State party fulfillment of the right to education under the ICESCR calls for: 1) analyzing the specific language of the ICESCR that pertains to ensuring the right; 2) defining the concept and scope of obligations of the right in order to identify indicators for measurement; 3) identifying appropriate indicators to measure State compliance; 4) setting benchmarks to measure progressive realization; and 5) clearly identifying what constitutes a violation of the right to education in order to improve future State party compliance with its obligations under the ICESCR. This methodology can be used by States in reports and by NGOs in shadow reports submitted to the Committee on Economic, Social and Cultural Rights (CESCR), the committee that monitors compliance with the ICESCR. From our case study of Colombia, we conclude that, although Colombia has made strides in improving educational access, it is not in compliance with its many of its obligations relating to the right to education under the ICESCR.

I. Introduction

On December 10, 2008, the world celebrated the 60th anniversary of the Universal Declaration of Human Rights (UDHR).² This historic milestone also marked another achievement of the universal human rights system³: the United Nations General Assembly's adoption of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁴ The Optional Protocol to the ICESCR institutes an individual complaint mechanism to address state violations of economic, social and cultural rights (ESCRs).⁵ This new mechanism for state accountability underscores the importance of human rights in

² The Secretary-General, *Message of the Secretary-General on Human Rights Day*, available at <http://www.un.org/events/humanrights/2008/statementssg.shtml> (last visited Jan. 19, 2008).

³ Claire Mahon, *Progress at the Front: The Draft Optional Protocol to the International Covenant on Economic, Social, and Cultural Rights*, 8 HUMAN RIGHTS L. REV. 617, 618 (2008) (quoting the United Nations High Commissioner for Human Rights).

⁴ Human Rights Education Associates, *Historic Adoption of Optional Protocol for Economic, Social and Cultural Rights*, available at http://www.hrea.org/index.php?base_id=2&language_id=1&headline_id=8361 (last visited Jan. 24, 2009).

⁵ *Id.*

international law and the role of ESCRs as integral to a “trend towards a greater recognition of the indivisibility and interrelatedness of all human rights.”⁶ Today, the challenge that human rights scholars, practitioners, and intergovernmental organizations all face is how to fulfill the promises of the UDHR and the ICESCR as economic and social rights grow in importance.

In contrast to civil and political rights—which have been more actively recognized and accepted by the world’s nations—economic, social, and cultural rights have been neglected by certain countries who find them to be anathema to their conception of state obligations in society.⁷ This practice of distinguishing between these “first” and “second generation” rights, however, is no longer widely accepted.⁸ Indeed, the false distinction between ESCRs and CPRs is collapsing: both types of rights require both positive and negative obligations from states who are responsible for upholding them.⁹ ESCRs are now seen by the human rights community and by many states as essential to the full realization of human rights and necessary to live a life with dignity.¹⁰

Despite an increased focus on ESCRs, there have been major obstacles impeding their legal application. Historically, some scholars and practitioners have viewed these rights as

⁶ Mahon, *supra* note 3, at 618.

⁷ See HENRY J. STEINER & PHILIP ALSTON, HUMAN RIGHTS IN CONTEXT 249 (2000) (noting certain governments’ challenges to economic and social rights, as well as some countries’ ambivalence towards them).

⁸ See Tara J. Melish, *Rethinking the “Less as More” Thesis: Supranational Litigation of Economic, Social, and Cultural Rights in the Americas*, 39 N.Y.U. J. Int’l L. & Pol. 171, 173 (2006) (“The judicial enforceability of economic, social, and cultural rights has received increasing attention worldwide over the last decade.”)

⁹ See Nsongurua J. Udombana, *Social Rights are Human Rights: Actualizing the Rights to Work and Social Security in Africa*, 39 CORNELL INT’L L.J. 185–86 (2006) (“Civil and political rights have demonstrably been shown to demand positive state action and interference for their realization In practice, this positive obligation has primarily been limited to inhuman treatment and health conditions in prisons under articles 7 and 10 of the International Covenant on Civil and Political Rights (ICCPR). Among the positive obligations engendered by those two articles is the duty to train appropriate personnel: enforcement personnel, medical personnel, police officers, in short, any other persons involved in the custody or treatment of any individual subjected to any form of arrest, detention, or imprisonment.” (internal citations and footnotes omitted).

¹⁰ For example, the right to food, an ESCR, is seen as so essential to the right to participate in a free society that it has even been suggested that it rises to the level of customary international law. See Smita Nruela, *The Right to Food: Holding Global Actors Accountable Under International Law*, 44 COLUM. J. TRANSNAT’L L. 691, 780–91 (2006).

nonjusticiable.¹¹ In fact, one of the main obstacles to justiciability of ESCRs under the ICESCR is the challenge involved in measuring whether or not a State party has satisfied its obligations with respect to the rights enumerated in the treaty. The main reason for this measurement challenge is the concept of progressive realization¹² embedded in the ICESCR. With respect to many of the obligations set forth in the ICESCR, States parties to the treaty are not required to provide them immediately upon ratification of the treaty.¹³ Instead, the concept of progressive realization permits States parties to incrementally progress over time in realization of the right (although no time period is specified in the Covenant).¹⁴ In other words, a State party would be in compliance with the ICESCR even if it was not guaranteeing 100 percent of the people within its jurisdiction the full enjoyment of treaty rights immediately upon ratification. However, States

¹¹ See, e.g., Randall Peerenboom, *Human Rights and Rule of Law: What's the Relationship?*, 36 Geo. J. Int'l L. 809, 816 (2005) ("There is no accepted understanding of what a right is—whether collective or group rights and nonjusticiable social, economic and cultural rights are really rights; of how rights relate to duties; or whether a discourse of rights is complementary or antithetical to, or better or worse than, a discourse of needs or capabilities.") (internal citations omitted). But see, e.g., World Conference on Human Rights: Vienna Declaration and Programme of Action, U.N. DOC. A/CONF.157/23, Part I, ¶ 5 (asserting that all human rights are universal, indivisible, and interdependent and interrelated); Asbjørn Eide, *Interdependence and Indivisibility of Human Rights*, in HUMAN RIGHTS IN EDUCATION, SCIENCE AND CULTURE: LEGAL DEVELOPMENTS AND CHALLENGES 11–51 (Yvonne Donders & Vladimir Volodin eds., 2007); See Asbjørn Eide, *Economic, Social and Cultural Rights as Human Rights*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK 21, 25 (Asbjørn Eide ed., Springer 1995) (1995) ("It is only when [economic and social rights] are broken down into their more specific components that justiciability becomes practicable."); G. J. H. van Hoof, *The Legal Nature of Economic, Social and Cultural Rights: A Rebuttal of Some Traditional Views*, in THE RIGHT TO FOOD 101 (Philip Alston & Katarina Tomasevski eds., 1984).

¹² Progressive realization is a recognition that, while States are under an obligation to move as expeditiously as possible to realize economic, social and cultural rights, the full realization of these rights will take time and resources. See U.N. Econ. & Soc. Council, General Comment No. 3, *Report of the Committee on Economic, Social and Cultural Rights*, U.N. DOC. E/1991/23, at 83–87 [hereinafter General Comment 3]. For a complete look at States parties obligations under Article 2 of the ICESCR (including progressive realization obligations), see Philip Alston, *The International Covenant on Economic, Social and Cultural Rights*, in MANUAL ON HUMAN RIGHTS REPORTING 65–169 (1997).

¹³ See International Covenant on Economic, Social, and Cultural Rights art. 2, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR] ("Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.")

¹⁴ *Id.* at art. 2(1); General Comment 3, *supra* note 12, at para. 2 ("[W]hile the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.").

parties may not halt or retrogress on progress.¹⁵ Thus, it is important to know what percentage of the population enjoys the rights in question, to what extent it enjoys the right, and whether or not that percentage is increasing and enjoyment is improving over time.

A promising potential solution to this difficulty in determining whether states have met progressive realization requirements of ESCRs is the development of appropriate indicators to measure state compliance with treaty obligations. An indicator is “specific information on the state of an event, activity or an outcome that can be related to human rights norms and standards; that address and reflect the human rights concerns and principles; and that are used to assess and monitor promotion and protection of human rights.”¹⁶ Quantitative indicators, for example, can assist in determining compliance with the Covenant because they can provide statistical information about the general population of a country or State efforts made toward satisfaction of

¹⁵ For a discussion of the need to confront the practical difficulties presented by economic and social rights, see Michael J. Dennis & David P. Stewart, *Justiciability of Economic, Social and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing and Health?* 98 AM. J. INT’L L. 462, 464 (2004) (“The issue that needs to be confronted, instead, is that these rights present genuinely different and, in many respects, far more difficult challenges than do civil and political rights [I]t is a much more complex undertaking to ascertain what constitutes an adequate standard of living, or whether a state fully respects and implements its population’s right to education or right to work. Vexing questions of content, criteria, and measurement lie at the heart of the debate over “justiciability,” yet are seldom raised or addressed with any degree of precision.”).

¹⁶ Annual Meeting of Chairpersons of the Human Rights Treaty Bodies and the Inter-Committee Meeting, *Report on Indicators for Monitoring Compliance with International Human Rights Instruments*, ¶¶ 4 & 7, U.N. DOC. HRI/MC/2006/7 (May 11, 2006) [hereinafter UN 2006 Report]. Others use different definitions of indicators. see also Maria Green, *What We Talk About When We Talk About Indicators: Current Approaches to Human Rights Measurement* 23 HUM. RTS. Q. 1062, 1065 (2001) (“[A] human rights indicator is a piece of information used in measuring the extent to which a legal right is being fulfilled or enjoyed in a given situation”). Additionally, Gauthier de Beco defines human rights indicators as “indicators that are linked to human rights treaty standards, and that measure the extent to which duty bearers are fulfilling their obligations and rights-holders enjoying their rights.” See Gauthier de Beco, *Human Rights Indicators for Assessing State Compliance with International Human Rights*, 77 NORDIC J. INT’L L. 23, 24(2008). Rajeev Malhotra and Nicolas Fasel focus largely on a narrower concept of indicator: “the term “quantitative indicator” is used to designate any kind of indicators that are or can be expressed in quantitative form, such as numbers, percentages or indices.” Rajeev Malhotra & Nicolas Fasel, *Quantitative Human Rights Indicators—A Survey of Major Initiatives* 2 (2005) (paper prepared for the Turku Expert Meeting on Human Rights Indicators, Turku/Abo, Finland, Mar. 1–13, 2005). The definition we adopt above serves as a broad, all-encompassing definition tailored most closely to human rights norms in order to measure state compliance with treaty obligations.

rights.¹⁷ Examples of quantitative indicators to measure the realization of the right to education include the percentage of GDP a country is spending on secondary education and the ratio of the number of secondary school-aged children enrolled in secondary school as compared to the number of secondary school-aged children in the population.

While social scientists and development professionals have long used indicators in their work,¹⁸ there has been a growing interest among human rights scholars, advocates and jurists over the last several decades in employing indicators to measure compliance with human rights obligations.¹⁹ Throughout the 1970s and 1980s, the human rights community began to monitor the status of international human rights through indicators. For instance, Amnesty International vastly increased the scope of its reporting; Freedom House began to publish a yearly accounting of human rights abuses; and the U.S. Congress required the State Department to prepare a yearly report on the status of international human rights.²⁰ These early attempts at human rights measurement demonstrated a method of quantifying and categorizing human rights using evidence to evaluate compliance with treaty norms.

Though the human rights community has clearly demonstrated an interest in indicators, much of the early work on human rights indicators focused on measuring civil and political

¹⁷ The U.N. High Commissioner for Human Rights (UNHCHR) has noted that indicators and benchmarks have “a significant role to play in bringing about positive change in the protection and promotion of economic, social, and cultural rights,” serving as tools for measuring state compliance with human rights norms. See U.N. Econ. & Soc. Council, *Report of the United Nations Commissioner for Human Rights*, ¶ 2, U.N. Doc. E/2006/86 (June 21, 2006).

¹⁸ See e.g., Maarseveen and Van der Tang who coded constitutions for 157 countries across a multitude of institutions and the rights for the period 1788–1975. See generally Henc van Maarseveen and Ger van der Tang, *Written Constitutions: A Computerized Comparative Study* (1978). Their study compares the degree to which national constitutions contain those rights mentioned in the UNDR by examining the frequency and distributions across different history epochs before and after 1948. *Id.* Ball and Asher studied patterns of killings and refugee migration of Albanians in Kosovo to determine if the violence and migration were due to activities of the Kosovo Liberation Army, NATO attacks, or systematic campaign by Yugoslav forces. Patrick Ball and Jana Asher, *Statistics and Slobodan*, 15 CHANCE 17 (2002).

¹⁹ De Beco, *supra* note 16, at 25; STEINER & ALSTON, *supra* note 7, at 316 (“Various commentators . . . have emphasized the importance of developing comprehensive statistical indicators as a means by which to monitor compliance with the ICESCR.”).

²⁰ Andrew D. McNitt, *Some Thoughts on the Systematic Measurement of the Abuse of Human Rights*, in HUMAN RIGHTS THEORY AND MEASUREMENT 89 (David Louis Cingranelli ed., St. Martin’s Press 1988).

rights,²¹ such as the right to freedom of the press or right to be free from torture.²² As Hertel and Minkler point out, “economic rights remain less well articulated than civil and political rights, less accurately measured, and less consistently implemented in public policy.”²³ Recently, however, inter-governmental organizations such as the United Nations (UN) and the Organization of American States (OAS) have shown a renewed interest in enforcing ESCRs and have put forward proposals for using indicators to measure compliance with ESCRs.²⁴

This article builds on these organizations’ application of indicators to ESCRs by proposing a clear and effective method for monitoring state fulfillment with a vitally important ESCR: the right to education. While there has been much work done to define the content and to set benchmarks for monitoring States’ duties and individual enjoyment of the right to health,²⁵ comparatively little work has been done to monitor and enforce compliance with the right to education.²⁶ In fact, the right to education has been under-theorized as compared to other

²¹ Civil and political rights are typically rights such as freedom of press or freedom of torture and our set forth in the International Covenant on Civil and Political Rights, while ESCRs are rights such as the right to health and right to food.

²² Indeed, some go so far as to suggest that economic and social rights should not be monitored at all. McNitt, *supra* note 20, at 92.

²³ Shareen Hertel and Lanse Minkler, *Chapter 1, Economic Rights: The Terrain*, in *ECONOMIC RIGHTS: CONCEPTUAL, MEASUREMENT, AND POLICY ISSUES* (Shareen Hertel and Lanse Minkler eds., Cambridge University Press 2007).

²⁴ INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, GUIDELINES FOR PREPARATION OF PROGRESS INDICATORS IN THE AREA OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS, OEA/Ser/L/V/II.129 (Doc. 5) (Oct. 5, 2007), available at <https://www.cidh.oas.org/pdf%20files/Guidelines%20final.pdf>; Economic and Social Council, *Economic, Social and Cultural Rights: Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, Paul Hunt, U.N. DOC. E/CN.4/2006/48 (March 3, 2006) [hereinafter Hunt 2006 Report]; Special Rapporteur Paul Hunt, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social, and Cultural Rights: Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, ¶ 48, U.N. DOC. A/HRC/7/11 (Jan. 31, 2008) available at <http://daccessdds.un.org/doc/UNDOC/GEN/G08/105/03/PDF/G0810503.pdf?OpenElement>.

²⁵ See DEP’T ETHICS, TRADE, HUM. RTS., & HEALTH LAW, SUSTAINABLE DEVELOPMENT AND HEALTH ENVIRONMENTS, WORLD HEALTH ORG., CONSULTATION ON INDICATORS FOR THE RIGHT TO HEALTH 8–10 (2004) [hereinafter WHO REPORT].

²⁶ *But see, e.g.*, Audrey R. Chapman, *Development of Indicators for Economic, Social and Cultural Rights: The Rights to Education, Participation in Cultural Life and Access to the Benefits of Science*, in *HUMAN RIGHTS IN EDUCATION, SCIENCE AND CULTURE: LEGAL DEVELOPMENTS AND CHALLENGES* 111 (Yvonne Donders & Vladimir Volodin eds., 2007); ROBERT F. KENNEDY MEMORIAL CTR. FOR HUM. RTS., *THE RIGHT TO EDUCATION OF AFRO-DESCENDANTS AND INDIGENOUS PEOPLES IN THE AMERICAS* (2008) [hereinafter RFK Report] (report prepared for a thematic hearing before the Inter-American Commission on Human Rights (IACHR) on Mar. 12, 2008); Katrien

ESCRs.²⁷ Additionally, although some treaties list specific indicators,²⁸ the ICESCR and other treaties protecting the right to education do not list any agreed-upon indicators to monitor fulfillment of the right.²⁹ And yet the right to education is one of the most complex rights in international human rights law:³⁰ it is a “multiplier”³¹ or “empowerment” right³² as well as an essential means to promote other rights,³³ the enjoyment of which “enhanc[es] all rights and freedoms” while its violation “jeopardiz[es] them all.”³⁴ Conversely, the denial of the right to education leads to “compounds of denials of other human rights and the perpetuation of

Beeckman, *Measuring the Implementation of the Right to Education: Educational versus Human Rights Indicators*, 12 INT’L J. CHILDREN’S RTS. 71–84 (2004) (offering a general framework of human rights indicators for monitoring compliance with the right to education); Commission Hum. Rts., *The Right to Education, Preliminary Report of the Special Rapporteur Submitted in Accordance with Commission on Human Rights resolution 1998/33*, Katarina Tomasevski, U.N. DOC. E/CN.4/1999/49 (1999) [hereinafter Tomasevski 1999 Report] (offering a conceptual framework on the content of the right to education in order to measure State party compliance).

²⁷ For a few in-depth studies dealing with the right to education, see KLAUS DIETER BEITER, *THE PROTECTION OF THE RIGHT TO EDUCATION BY INTERNATIONAL LAW, INCLUDING A SYSTEMATIC ANALYSIS OF ARTICLE 13 OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS* (2006); J. Lonbay, *Implementation of the Right to Education in England*, in *ECONOMIC, SOCIAL AND CULTURAL RIGHTS: PROGRESS AND ACHIEVEMENT* 163–183 (R. Beddard & D. Hill eds., 1992); Fons Coomans, *Clarifying the Core Elements of the Right to Education*, in *THE RIGHT TO COMPLAIN ABOUT ECONOMIC, SOCIAL AND CULTURAL RIGHTS* 11–26 (Fons Coomans et al. eds., 1995).

²⁸ The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) has a provision for the reduction of the “female student drop out rate” and the ICESCR states in article 12 that parties should take steps to reduce the still birth and infant mortality rates. See, e.g., Convention on the Elimination of All Forms of Discrimination against Women art. 10, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW]; ICESCR, *supra* note 13 at art. 12.

²⁹ See Audrey R. Chapman, *A “Violations Approach” for Monitoring the International Covenant on Economic, Social and Cultural Rights*, 18 HUM. RTS. Q. 23, 23–24 (1996). Additionally, even though many treaty monitoring bodies have highlighted the importance of indicators in their general comments as well as concluding observations, the use of indicators in the reporting and follow-up procedure of treaty bodies has been limited. See UN 2006 Report, *supra* note 16.

³⁰ See Manfred Nowak, *The Right to Education*, in *ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK* (Asbjørn Eide, Catarina Krause & Allan Rosas eds., 2d Rev., 2001).

³¹ See KATARINA TOMASEVSKI, *HUMAN RIGHTS OBLIGATIONS IN EDUCATION: THE 4-A SCHEME* 7 (2006).

³² See Coomans, *supra* note 27, at 1f; Jack Donnelly & Rhoda E. Howard, *Assessing National Human Rights Performance: A Theoretical Framework*, 10 HUM. RTS. Q. 214, 215 (1988).

³³ U.N. Comm. Econ. Soc. & Cultural Rts., *General Comment No. 13: The Right to Education*, 21st Sess., at ¶¶ 1 & 31, U.N. DOC. E/C.12/1999/10 (1999), available at [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/E.C.12.1999.10.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/E.C.12.1999.10.En?OpenDocument) (last visited Oct. 10, 2008) [hereinafter General Comment 13].

³⁴ See TOMASEVSKI, *supra* note 31.

poverty.”³⁵ Even in the United States, where ESCRs are generally less well-recognized, many state constitutions guarantee the right to education,³⁶ recognizing that “it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.”³⁷ Moreover, according to the U.S. Supreme Court, once a state assumes the duty to provide education, “it is a right which must be available to all on equal terms.”³⁸ The Court has found that the right to education “is not only a kind of idealistic goal . . . but a legally binding human right . . . with corresponding obligations of States under international law.”³⁹ Several key international instruments mention the right to education, including those relating to specific groups such as children, racial minorities, and women,⁴⁰ but the ICESCR provides the most comprehensive protections of the right.⁴¹ As such, we focus our study on the ICESCR.⁴²

³⁵ U.N. Comm. Econ. Soc. & Cultural Rts., *The Right to Education: Report Submitted by the Special Rapporteur, Katarina Tomasevski, Addendum, Mission to Colombia*, U.N. DOC. E/CN.4/2004/45 7 (Feb. 17, 2004) [hereinafter Tomasevski 2004 Report].

³⁶ See, e.g., Roger Levesque, *The Right to Education in the United States: Beyond the Limits of the Lore and Lure of the Law*, 4 ANN. SURVEY OF INT’L L. 205 (1997); Suzanne M. Steinke, *The Exception to the Rule: Wisconsin’s Fundamental Right to Education and Public School Financing*, 1995 WISC. L. REV. 1387 (1995); Hon. Michael P. Mills & William Quinn II, *The Right to a ‘Minimally Adequate Education’ as Guaranteed by the Mississippi Constitution*, 61 ALB. L. REV. 1521 (1998).

³⁷ *Brown v. Board of Education of Topeka*, 347 U.S. 483, 493 (1954).

³⁸ See *id.*

³⁹ Nowak, *supra* note 30, at 425.

⁴⁰ See, e.g., International Convention on the Elimination of All Forms of Discrimination art 5(e)(v), Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter ICERD]; Convention on the Rights of the Child arts. 29(1)(c)-(d), Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC]; CEDAW Convention, *supra* note 28 [include other treaties from chart here or in another footnote.]

⁴¹ General Comment 13, *supra* note 33, at ¶ 2; KLAUS DIETER BEITER, *THE PROTECTION OF THE RIGHT TO EDUCATION BY INTERNATIONAL LAW, INCLUDING A SYSTEMATIC ANALYSIS OF ARTICLE 13 OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS* 86 (2006) (“Articles 13 and 14 [of the ICESCR] are comprehensive provisions. In fact, they feature among the most elaborate rights provisions of the ICESCR. Articles 13 and 14 may be viewed as a codification of the right to education in international law.”) See also Section II *infra* for a discussion of other international instruments that uphold the right to education. Article 13 of the ICESCR reads:

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:

By focusing on the right to education, we hope to rejuvenate scholarship and professional dialogue surrounding the assessment of indicators for other ESCRs in addition to the right to health. We first analyze the language of the ICESCR, elaborate on the concepts emanating from the ICESCR, and propose specific indicators to measure each concept. We then apply our proposed methodology to a case study of Colombia. The methodology we propose for monitoring the right to education will be useful to a wide group of scholars and practitioners seeking a concrete framework to measure state compliance with ESCRs, international treaty monitoring bodies such as the CESCR, and regional human rights bodies that monitor compliance with ESCRs.⁴³ Civil society organizations submitting shadow reports to the CESCR might also consider adopting this suggested approach to develop appropriate indicators for monitoring ESCRs. Finally, the methods we use can also assist petitioners in formulating the

-
- (a) Primary education shall be compulsory and available free to all;
 - (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
 - (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;
 - (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;
 - (e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

ICESCR, *supra* note 13, at art. 13.

⁴² See ICESCR, *supra* note 13, at arts. 13 & 14. In addition to these main provisions, other articles refer to education. For instance, article 6(2) obligates States parties to create and implement “technical and vocational guidance and training programs” to fully realize the right to work. *See id.* at art. 6(2). Article 10(1) calls on States parties to protect and assist the family during the time it is responsible for the education of children. *See id.* at art. 10(1). DIETER BEITER, *supra* note 27, at 86.

⁴³ This type of project is particularly important to the work of treaty monitoring bodies as they often do not have the capacity or time to design indicators. *See De Beco, supra* note 16, at 26.

claims they bring before the CESCR now that the U.N. General Assembly has adopted an Optional Protocol to the ICESCR.⁴⁴

In Section II, we briefly discuss the historical and theoretical foundations for the right to education as it relates to the ICESCR. In Section III, we propose a methodology for measuring treaty compliance with ESCRs, and, in Section IV, we apply this methodology to analyze whether Colombia's domestic laws incorporate its right-to-education obligations, the extent of efforts it has made in ensuring enjoyment of the right, and whether in reality people are enjoying the right. In Section IV, we determine whether and how Colombia is in violation of its obligations under the ICESCR's right to education provisions. In Section V, we address some of the limitations and challenges to using indicators to measure treaty compliance. Section VI is a conclusion.

II. The Right to Education in the ICESCR: A Brief History and Theory

Competing theoretical perspectives have shaped the right to education guarantee as enumerated in international instruments, including Articles 13 and 14 of the ICESCR.⁴⁵ During the last few centuries, the responsibility to educate populations has generally shifted from that of the parents and the church under a liberal model to that of the State.⁴⁶ What had before been an upper-class privilege was repositioned as a "means of realising the egalitarian ideals upon which

⁴⁴ Kanaga Raja, *Human Rights Council Adopts Optional Protocol on Economic and Social Rights* (June 19, 2008), available at <http://www.twinside.org.sg/title2/finance/twninfofinance20080606.htm> (last visited Dec. 8, 2008). The General Assembly will likely adopt the Protocol and open it for signature, ratification and accession in March 2009. Human Rights Council, Open-Ended Working Group on an optional protocol to the International Covenant on Economic, Social and Cultural Rights, *Report of the Open-Ended Working Group on an optional protocol to the International Convention on Economic, Social and Cultural Rights on its fifth session (Geneva 4–8 February and 31 March–4 April 2008)*, U.N. DOC. A/HRC/8/7 (May 6, 2008), at 32.

⁴⁵ Cite to ICESCR, *supra* note 13, at art. 13.

⁴⁶ DIETER BEITER, *supra* note 27, at 21; DOUGLAS HODGSON, *THE HUMAN RIGHT TO EDUCATION* 8 (1998); Nowak, *supra* note 30, at 191.

[the French and American Revolutions] were based”⁴⁷ Such revolutions exemplified the old axiom that “political and social upheaval is often accompanied by a revolution in education.”⁴⁸ Indeed, although liberal concepts of education in the nineteenth century still reflected a fear of too much state involvement in the educational system by giving parents the primary duty to provide an education to their children, States began regulating curricula and providing minimal educational standards.⁴⁹ Under socialist theory, the State was the primary means to ensure the economic and social well-being of communities.⁵⁰ By the dawn of the 20th century, such ideals underscored the need to respond to the rapid industrialization and urbanisation of rapidly-developing countries such as the United States.⁵¹

The right to education provisions in the ICESCR derive from both the socialist and liberal theoretical traditions: 1) as the primary responsibility of the State to provide educational services; and 2) as the duty of the State to respect the rights of parents to establish and direct private schools and to ensure that their children receive an education that is in accordance with their own religious and moral beliefs.⁵² Thus, the ICESCR enumerates a combination of obligations requiring both non-interference and positive action on the part of States parties to provide education to their citizens. Even with these competing traditions shaping the right to education under the ICESCR, the aims and objectives of education have moved toward a growing consensus in international human rights law: that education should enable the individual

⁴⁷ DIETER BEITER, *supra* note 27, at 20 (quoting HODGSON, *supra* note 46, at 8).

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

⁴⁹ DIETER BEITER, *supra* note 27, at 22 (citing Nowak, *supra* note 30, at 191–92; HODGSON, *supra* note 46, at 8–10).

⁵⁰ *Id.* at 23 (citing Nowak, *supra* note 30, at 192; HODGSON, *supra* note 46, at 9, 11). Thus, socialism viewed education as a welfare entitlement of individuals which gave rise to claims of rights to educational services against the state. *Id.*

⁵¹ RURY, *supra* note 48, at 135–37.

⁵² *See* DIETER BEITER, *supra* note 27, at 24.

to freely develop her own personality and dignity, to participate in a free society and to respect human rights.⁵³

Despite its widespread acceptance and fundamental importance, the right to education was not directly or specifically declared an international human right until the post-World War II era.⁵⁴ At that time, the international community contemplated the adoption of an International Bill of Human Rights,⁵⁵ including the 1948 Universal Declaration of Human Rights (UDHR), a document that has become the contemporary foundation of human rights codification and the primary source of internationally recognized human rights standards.⁵⁶ In 1946, the United Nations Educational, Scientific, and Cultural Organization (UNESCO)⁵⁷ employed a committee of leading scholars to find common ground among the various cultural and philosophical foundations of all human rights, including the right to education.⁵⁸

Then, the U.N. Human Rights Commission (HRC) prepared a first draft of the Declaration.⁵⁹ The draft circulated among all U.N. member states for comment and went to the

⁵³ Manfred Nowak, *The Right to Education*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK 249 (2001). Universal Declaration of Human Rights, G.A. Res. 217A, art. 26, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. DOC. A/810 (Dec. 10, 1948) [hereinafter UDHR]; ICESCR, *supra* note 13, at art. 13.

⁵⁴ HODGSON, *supra* note 46.

⁵⁵ John P. Humphrey, *The International Bill of Rights: Scope and Implementation* 17 WM. & MARY L. REV. 527, 527 (1975–1976).

⁵⁶ See Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287, 290 (1995–1996).

⁵⁷ UNESCO is a United Nations Specialized Agency whose mission is “to contribute to peace and security by promoting collaboration among the nations through education, science and culture in order to further universal respect for justice, for the rule of law and for the human rights and fundamental freedoms which are affirmed for the peoples of the world, without distinction of race, sex, language or religion, by the Charter of the United Nations.” See UNESCO, *Constitution of the United Nations Educational, Scientific and Cultural Organization* (Nov. 16, 1945), available at http://portal.unesco.org/en/ev.php-URL_ID=15244&URL_DO=DO_TOPIC&URL_SECTION=201.html.

⁵⁸ Mary Ann Glendon, *Knowing the Universal Declaration of Human Rights* 73 NOTRE DAME L. REV. 1153, 1156 (1997–1998). The committee was called the Committee on the Theoretical Bases of Human Rights. *Id.*

⁵⁹ Glendon, *supra* note 58, at 1157. The drafters borrowed freely from the draft of a transnational rights declaration then being deliberated in Latin America by the predecessor to the Organization of American States and a “Statement of Essential Human Rights” produced by the American Law Institute. See Mary Ann Glendon, *John P. Humphrey and the Drafting of the Universal Declaration of Human Rights* 2 J. HIST. INT'L L. 250, 253 (2000).

HRC for debate.⁶⁰ After many revisions and lobbying efforts, the Economic and Social Commission (ECOSOC) approved the final draft of the UDHR and submitted it to the U.N. General Assembly in the fall of 1948.⁶¹

At the time of its passage, the most ground-breaking part of the UDHR was its fourth section—Articles 22 through 27—which protected ESCRs as fundamental rights.⁶² The addition of ESCRs was not viewed as a concession to the Soviet Union’s insistence on including these rights; rather, it was seen as a deliberate inclusion of rights articulated in constitutions across the globe.⁶³ These guarantees received broad-based support; however, it was much more difficult to find agreement as to the relationship of these “new” economic and social rights to the “old” civil and political rights.⁶⁴

After the adoption of the UDHR,⁶⁵ U.N. delegates began the task of codifying these rights to complete the International Bill of Human Rights in one document. Even though all member states agreed that CPRs and ESCRs were interconnected and interdependent, divergent political policy agendas of the Cold War era emerged, leading to the creation of two separate Covenants.⁶⁶ The assumptions that CPRs and ESCRs were different—including that civil and political rights were immediate, absolute, justiciable and require the abstention of state action while economic and social rights were programmatic, realized gradually, more political in nature

⁶⁰ Glendon, *supra* note 58, at 1159.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ UDHR, *supra* note 53, at art. 26. See, e.g., HODGSON, *supra* note 46, at 7. See DIETER BEITER, *supra* note 27, at 90.

⁶⁶ Kitty Arambulo, *Drafting an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: Can an Ideal Become Reality?* 2 U.C. DAVIS J. INT’L L. & POL’Y 114–15 (1996); G.A. Res. 543, U.N. GAOR, 55th Sess., U.N. DOC. A/55/543 (Feb. 5 1953) [hereinafter Resolution 543]; Philip Alston, *Economic and Social Rights*, in HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY 137, 152 (Louis Henkin & J. Hargrove eds., 1994); see also Manfred Nowak, *The Right to Education – Its Meaning, Significance and Limitations*, 9 NETH. Q. HUM. RTS. 418, 419 (1991) (“The main differences between the two Covenants are to be found in States’ obligations and in the measures of implementation, both on the domestic and international level.”) [hereinafter Nowak 1991]. See Eide, *supra* note 11, at 28.

and require substantial resources—drove the debate as to whether there would be one or two separate treaties codifying the rights enumerated in the UDHR.⁶⁷ For example, English and other Western delegates saw economic and social rights as entirely different in their implementation procedure and wanted to emphasize this distinction by creating two separate documents.⁶⁸ In contrast, the Soviet Union and other supporters of a single instrument contested any attempt to cast economic and social rights as inferior to civil and political rights.⁶⁹ Madame Hansa Mehta, a representative from India, argued that poorer nations could only hope to move progressively toward realizing these rights.⁷⁰ In the end, these diverging concepts of human rights and arguments centering around the obligations of states arising from these rights led to the drafting of two separate instruments.⁷¹ Those States that did not want to undertake ESCR obligations would ratify only the binding international human rights instrument protecting CPRs while states subscribing to all human rights as equal would ratify two instruments protecting both CPRs and ESCRs.⁷²

Consequently, the content of the UDHR was codified in two separate binding Covenants—the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1954.⁷³ With

⁶⁷ Asbjørn Eide, *Economic, Social and Cultural Rights as Human Rights*, in *ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK* 10 (Asbjørn Eide, Catarina Krause & Allan Rosas eds., 2001). These assumptions are not well-founded, overstated or mistaken. Udombana, *supra* note 9, at 185–86

⁶⁸ RENÉ CASSIN, *LA PENSÉE ET L'ACTION* 110–11 (1972).

⁶⁹ *Id.* Supporters of one Covenant argued that there was no hierarchy of rights and that “[a]ll rights should be promoted and protected at the same time.” U.N. DOC. A/2929, at 7, ¶ 8.

⁷⁰ Glendon, *supra* note 58, at 1167 (citing ELEANOR ROOSEVELT, *THE AUTOBIOGRAPHY OF ELEANOR ROOSEVELT* 318 (1961)).

⁷¹ In 1951, the General Assembly decided that Covenants should be prepared for each category of rights. Resolution 543, *supra* note 99. Supporters of two separate instruments argued that the implementation of civil and political rights would require an international quasi-judicial body, while the implementation of economic, social and cultural rights would be monitored best by a system of periodic state reporting. See DIETER BEITER, *supra* note 27, at 52.

⁷² Eide, *supra* note 67, at 10.

⁷³ UDHR, *supra* note 53; International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171 [hereinafter ICCPR]; ICESCR, *supra* note 13. See Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT’L & COMP. L. 287, 290

respect to the right to education provisions of the ICESCR, UNESCO played an integral role in the drafting of Articles 13 and 14 and continues to play a central part in the monitoring and implementation of right-to-education guarantees under the Covenant.⁷⁴ Today, for instance, UNESCO receives copies of reports from states parties⁷⁵ to both the ICESCR and UNESCO as per Article 16(2)(b) of the ICESCR in order to provide technical assistance to states where appropriate.⁷⁶ Also, under Article 18 of the ICESCR, UNESCO reports on progress toward realizing Covenant rights, including the right to education.⁷⁷ Moreover, the Covenant permits UNESCO to cooperate with the CESCR in furtherance of ESCRs. In this regard, UNESCO sends representatives to Committee sessions, participates in making recommendations to states parties in the Committee's Concluding Observations,⁷⁸ and sets international educational standards, giving content to Article 13 of the ICESCR.⁷⁹ As a result of UNESCO's active role in shaping and codifying the right to education under the ICESCR and other instruments,⁸⁰ the right to education remains one of most well-defined and protected of all ESCRs—at least in theory.⁸¹

(1995–1996). The General Assembly decided in 1951 that two Covenants would be prepared, one for each category of rights. Resolution 543, *supra* note 99.

⁷⁴ See Dieter Beiter, *supra* note 27 at 229; Philip Alston, *The United Nations' Specialized Agencies and Implementation of the International Covenant on Economic, Social and Cultural Rights*, 18 COLUM. J. TRANS. L. 82 (1979).

⁷⁵ Describe here the state reporting process and where to look for more information. (Start with the ICESCR itself, then look at the CESCR website and find documents that cover procedures for state reporting, etc.)

⁷⁶ DIETER BEITER, *supra* note 27, at 230; ICESCR, *supra* note 13.

⁷⁷ DIETER BEITER, *supra* note 27, at 230; ICESCR, *supra* note 13.

⁷⁸ Describe what CO's are and their purpose for monitoring and evaluation.

⁷⁹ DIETER BEITER, *supra* note 27, at 232–33; Philip Alston, *The United Nations' Specialized Agencies and Implementation of the International Covenant on Economic, Social and Cultural Rights*, 18 COLUM. J. TRANS. L. 114 (1979).

⁸⁰ See, e.g., UNESCO Convention Against Discrimination in Education, Dec. 14, 1960, 429 U.N.T.S. 93; Convention on Technical and Vocational Education (1989), available at http://portal.unesco.org/en/ev.php-URL_ID=13059&URL_DO=DO_PRINTPAGE&URL_SECTION=201.html.

⁸¹ See DIETER BEITER, *supra* note 27, at 233 (citing Nartowski, 1974, p. 290).

III. Measuring Compliance with the Right to Education under the ICESCR

In this Section, we propose a framework for measuring treaty compliance with the obligations relating to the right to education focusing on the ICESCR. In developing a framework for monitoring State party fulfillment of the right, we first analyze the specific language of the ICESCR that pertains to ensuring the right to education. Second, we elaborate on the concepts and define the scope of obligations of the right to education. Third, we propose appropriate indicators to measure State compliance with the right to education under the ICESCR. Finally, we discuss the importance of setting benchmarks and clearly identifying what constitutes a violation of the right to education in order to improve State party compliance with the ICESCR.

A. The Right to Education under the ICESCR

In order to measure a State's compliance with a treaty, we must first carefully analyze the treaty language. Malhotra and Fasel stress that in giving meaning to the concept sought to be measured, the concept itself must be grounded in relevant human rights treaties.⁸² In addition to focusing on the specific treaty language, it is also important to analyze how that language has been interpreted by relevant bodies.⁸³ To interpret the meaning of the ICESCR, we look at the language of the treaty and the General Comments of the Committee on Economic, Social and Cultural Rights (CESCR or Committee), the treaty body responsible for monitoring and evaluating States parties' compliance with the ICESCR, including the right to education.⁸⁴

⁸² Malhotra and Fasel, *supra* note 16, at 26. The UN 2006 Report also notes that it is important to anchor indicators in a conceptual framework. UN 2006 Report, *supra* note 16, at para 4.

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

⁸⁴ Office of the United Nations High Commissioner for Human Rights, Committee on Economic, Social and Cultural Rights, *Monitoring the economic, social and cultural rights*, available at <http://www2.ohchr.org/english/bodies/cescr/index.htm>. *See* Peter Malanczuk, Akehurst's Modern Introduction to

General Comments carry considerable weight and serve an important function: to define and clarify ICESCR provisions or other related topics in order “to assist and promote . . . further implementation of the Covenant . . . and to stimulate the activities of the States parties, international organizations and the specialized agencies concerned in achieving progressively and effectively the full realization of the rights recognized in the Covenant.”⁸⁵ Although not legally binding, General Comments serve an important jurisprudential function in relation to the meaning of rights and duties under the ICESCR.⁸⁶ Therefore, when assessing the State obligations of a particular State party to the ICESCR, it is important to consult the General Comments that elaborate on the particular right in question. Below we discuss the rights and concomitant State obligations necessary to ensure the right to education as set forth in the ICESCR and as interpreted by the CESCR in its General Comments.

i. Article 2(1): Progressive Realization

All of the rights in the ICESCR are subject to the concept of progressive realization enumerated in Article 2(1).⁸⁷ Progressive realization means that States parties are not obligated to realize these rights immediately; rather, States may fulfill these economic, social and cultural rights over time. Additionally, realization is subject to States parties’ maximum available

International Law 365–66 (1997) (citing Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980)).

⁸⁵ U.N. DOC. E/2004/22, para. 52. (quoted in DIETER BEITER, *supra* note 27, at 364–65).

⁸⁶ DIETER BEITER, *supra* note 27, at 365. M. Craven, *Towards an Unofficial Petition Procedure: A Review on the Role of the U.N. Committee on Economic, Social and Cultural Rights*, in SOCIAL RIGHTS AS HUMAN RIGHTS: A EUROPEAN CHALLENGE 91, 101 (Drzewicki, Krause & Rosas eds., 1994). The Vienna Convention on the Law of Treaties states that “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation” must be considered when construing the treaty. See art. 31(3)(b) of the Vienna Convention.

⁸⁷ Article 2(1) declares:

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

ICESCR, *supra* note 13, at art. 2(1).

resources.⁸⁸ Here, the Committee allots States “wide discretion to determine which resources to apply and what to regard as maximum.”⁸⁹ Moreover, the CESCR has declared that the concept of progressive realization “imposes an obligation to move as expeditiously and effectively as possible towards the goal” of the full realization of the right in question.⁹⁰ In general, States parties must progressively realize economic and social rights under the ICESCR.

Even though the rights in the ICESCR can be realized progressively over time, States parties are obligated to immediately “take steps” toward the full realization of those rights.⁹¹ According to the Committee’s General Comment No. 3, the requirement that States parties “take steps” toward full realization means that “while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant’s entry into force for the States concerned.”⁹² Furthermore, “such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.”⁹³

Also under Article 2(1), States parties must use all appropriate means to further the rights under the ICECSR. The CESCR requires States parties to decide what measures are appropriate and to include their reasons in periodic reports to the Committee.⁹⁴ Ultimately, the CESCR retains the discretion to decide whether or not the State has taken all appropriate measures.⁹⁵ The Committee does not fully clarify what these appropriate means toward full realization should be, but it does articulate that government action should include legislative and judicial

⁸⁸ ICESCR, *supra* note 13; General Comment 3, *supra* note 12,. Resources can mean money, natural resources, human resources, technology and information. See DIETER BEITER, *supra* note 27, at 382.

⁸⁹ General Comment 3, *supra* note 12.

⁹⁰ See General Comment 3, *supra* note 12, at ¶ 9.

⁹¹ See *id.* For further discussion on the concept of progressive realization, see Steiner & Alston, *supra* note 7, at 246–49. See DIETER BEITER, *supra* note 27, at 376–77.

⁹² General Comment 3, *supra* note 12, at ¶ 2.

⁹³ *Id.* at ¶ 2.

⁹⁴ *Id.* at ¶ 4.

⁹⁵ *Id.* at ¶ 4.

measures, especially where existing legislation violates the Covenant.⁹⁶ Because some articles of the Covenant specify steps to take and others do not, the measures that a State is required to take should not be limited to those enumerated in the treaty.⁹⁷

ii. Articles 2(2) & 3: Nondiscrimination & Equal Treatment

Articles 2(2) and 3 obligate States parties to ensure all rights under the ICESCR, including the right to education, equally and without discrimination.⁹⁸ Article 3 specifically mandates that States “ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.”⁹⁹ The obligation of non-discrimination is of immediate effect.¹⁰⁰ Specifically, the CESCR states that Article 2(2) is “subject to neither progressive realization nor the availability of resources; it applies fully and immediately to all aspects of education and encompasses all internationally prohibited grounds of discrimination.”¹⁰¹ Thus, States parties must immediately guarantee nondiscrimination and equal treatment in education, particularly with regard to gender and other enumerated grounds in order to fulfill its obligations under the ICESCR.

iii. Articles 13 & 14: The Right to Education

⁹⁶ Chapman 2007, *supra* note 26, at 146. Other steps also identified include administrative, financial, educational and social measures.

⁹⁷ DIETER BEITER, *supra* note 27, at 378.

⁹⁸ ICESCR, *supra* note 13, at art. 2(2). Specifically, Article 2(2) declares that: “[t]he States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

⁹⁹ *Id.* at art. 3.

¹⁰⁰ General Comment 3, *supra* note 12, at para. 1; General Comment 13, *supra* note 33, at paras. 31–37.

¹⁰¹ General Comment 13, *supra* note 33, at para. 31 (citing ICESCR, *supra* note 13, at art. 2(2) (“The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”)).

a. Primary Education

Articles 13 and 14 of the ICESCR specifically articulate the guarantees of the right to education.¹⁰² These articles impose differing obligations for each level—primary, secondary and tertiary levels—of education. Article 13 recognizes that “primary education shall be compulsory and available free to all.”¹⁰³ Although not explicitly enumerated in the ICESCR, the Committee has stated in its General Comment No. 13 that primary education should be immediately available to all even if it is not immediately made compulsory and free to all.¹⁰⁴

Further, under the ICESCR, States parties that have not secured compulsory, free primary education at the time of treaty ratification must develop a plan within two years and must implement it within a reasonable number of years after ratification.¹⁰⁵ The education plan must also be “sufficiently detailed” and contain all necessary actions to secure “the comprehensive realization of the right [to education].”¹⁰⁶ Moreover, the Committee requires civil society participation and periodic review of progress.¹⁰⁷ In its General Comment No. 11, the Committee does not exempt States parties from this obligation on the grounds that the State lacks the necessary resources¹⁰⁸ and calls on the international community to assist in the adoption of a plan in cases where resources to adopt a plan are unavailable.¹⁰⁹ Although States must only progressively realize the right to free and compulsory primary education if they are unable to

¹⁰² ICESCR, *supra* note 13, at arts. 13 & 14.

¹⁰³ *Id.* at art. 13(2)(a); *see also* U.N. Econ. & Soc. Council, General Comment No. 8, *The Relationship between Economic Sanctions and Economic, Social and Cultural Rights*, U.N. DOC. E/C.12/1997/98, 17th Sess. (Dec. 12, 1997) (stating that governments must respect the right to education and all economic, social and cultural rights when imposing economic sanctions and that primary education should not be considered a humanitarian exemption because of the negative consequences for vulnerable groups) [hereinafter General Comment 8].

¹⁰⁴ *See* General Comment 13, *supra* note 33, at para. 51.

¹⁰⁵ ICESCR, *supra* note 13, at art. 14; DIETER BEITER, *supra* note 27, at 390.

¹⁰⁶ CESCR, General Comment No. 11 on Article 17, ¶ 8, U.N. DOC. E/C.12/1999/4 (Oct. 5, 1999) [hereinafter General Comment 11].

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at para. 9. The Committee justifies this conclusion by pointing to the purpose of Article 14 itself: to ensure that States parties that are likely lacking resources since they have not secured free and compulsory primary education. *See id.*

¹⁰⁹ *Id.*

guarantee it immediately, the target dates for implementation of free and compulsory primary education must “be fixed in the plan.”¹¹⁰

Thus, the requirement for the implementation of free primary education can be considered to be stronger than the requirement to progressively realize rights found in Article 2(1).¹¹¹ Unlike the requirements for the realization of other rights, the ICESCR specifically provides time periods for the realization of free primary education: States parties must adopt a plan within *two years* and this plan must call for the implementation of free primary education within a *reasonable number of years*.¹¹² The Committee notes that, when read together, Article 13(2) and Article 14 require States parties to “prioritize the introduction of compulsory, free primary education.”¹¹³ As a result, States have an immediate obligation to either provide free and compulsory primary education, or to ensure that a detailed plan is in place within two years of ratification of the treaty that sets forth a specific timeline for fulfillment of the right as quickly as possible.

¹¹⁰ ICESCR, *supra* note 13, at art. 14; General Comment 11, *supra* note 106, at para. 10.

¹¹¹ ICESCR, *supra* note 13, at art 2(1) (“Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”).

¹¹² General Comment 11, *supra* note 106, at para 10 (“The plan of action must be aimed at securing the progressive implementation of the right to compulsory primary education, free of charge, under article 14. Unlike the provision in article 2.1, however, article 14 specifies that the target date must be “within a reasonable number of years” and moreover, that the time-frame must “be fixed in the plan”. In other words, the plan must specifically set out a series of targeted implementation dates for each stage of the progressive implementation of the plan. This underscores both the importance and the relative inflexibility of the obligation in question.”)

¹¹³ General Comment 13, *supra* note 33, at para. 51. Furthermore, the former Special Rapporteur on the Right to Education Katarina Tomasevski has explained that States are “obliged to ensure with immediate effect that primary education is compulsory and free of charge to everyone, or to formulate a plan and seek international assistance to fulfill this obligation as speedily as possible.” Tomasevski 2004 Report, *supra* note 35, at para. 23.

b. Secondary & Tertiary Education

While primary education must be made immediately available to all, secondary education must be made generally available to all,¹¹⁴ and tertiary education must be made “equally accessible to all [] on the basis of capacity.”¹¹⁵ In addition, States parties must progressively achieve free secondary and tertiary education.¹¹⁶ With regard to secondary, tertiary and fundamental education,¹¹⁷ States must immediately take steps toward full realization under Article 13(2)(b)–(d).¹¹⁸ These steps must include adopting and implementing a national education strategy, which should provide mechanisms, such as indicators and benchmarks, to measure progress toward the full realization of the right to education.¹¹⁹ The Committee also affirms obligations under Article 13(2)(e), noting that States must provide educational fellowships to assist disadvantaged groups.¹²⁰

c. Minimum Core Obligations

In addition to the plain language of the ICESCR regarding the right to education, it is also constructive to review the “minimum core” of the right to education. Before doing so, we first review the development of the concept of “minimum core obligations.”

¹¹⁴ The Covenant also recognizes technical and vocational education as secondary education. ICESCR, *supra* note 13, at art. 13(2)(b).

¹¹⁵ ICESCR, *supra* note 13, at art. 13(2)(c).

¹¹⁶ *Id.* at art. 13(2)(b) (“Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education”).

¹¹⁷ General Comment 13, *supra* note 33, at para. 21–22 (“Fundamental education includes the elements of availability, accessibility, acceptability and adaptability which are common to education in all its forms and at all levels. . . . [F]undamental education corresponds to basic education as set out in the World Declaration on Education For All. By virtue of [ICESCR] article 13(2)(d), individuals ‘who have not received or completed the whole period of their primary education’ have a right to fundamental education, or basic education as defined in the World Declaration on Education For All.”)

¹¹⁸ *Id.* at para. 52.

¹¹⁹ *Id.*

¹²⁰ *Id.* at para.53.

To advance the nature of all human rights as fundamental and interdependent, and to reconcile the differences among States parties' political, economic and social systems,¹²¹ Philip Alston first proposed the concept of a “core content” of rights.¹²² In 1987, Alston recognized the vagueness of the norms recognized in the Covenant, and, although no less well-defined than some ICCPR enumerated rights, he noted the relative lack of domestic and international jurisprudence to shape the normative content of ESCR rights.¹²³ He argued that elevating “claims” to rights status is meaningless “if its normative content could be so indeterminate as to allow for the possibility that the rightholders possess no particular entitlement to anything.”¹²⁴ Each of the ICESCR rights, he concluded, must “give rise to a minimum entitlement, in the absence of which a state party is to be considered to be in violation of it [*sic*] obligations.”¹²⁵ Thus, the core content concept responds to define and elaborate upon the normative content of ICESCR rights.

To implement this concept, Alston called upon the newly-established CESCR to prepare outlines enumerating the core content of each right under the ICESCR.¹²⁶ Responding in order to address the difficulty in enforcing ESCRs due to the lack of conceptual clarity and specific implementation guidelines for States parties, the Committee adopted the concept of “minimum

¹²¹ Kitty Arambulo, *supra* note 66, at 119.

¹²² Philip Alston, *Out of the Abyss: The Challenges Confronting the New U.N. Committee on Economic, Social and Cultural Rights*, 9 HUMAN RIGHTS Q. 332, 353 (1996).

¹²³ *Id.* at 351.

¹²⁴ *Id.* at 352–53.

¹²⁵ *Id.* at 353. Alston quotes Tom Campbell as outlining the task to define the core concept of rights: “the implementation of human rights, which requires the stimulation of governments to legislate and courts to develop appropriate methods of interpretation, is crucially dependent on the task of spelling out the force of human rights in terms of specific freedoms and, where relevant, clearly located duties, correlative to the rights in question. Procedures and formulae are in themselves inadequate for this objective and require supplementation by a living sense of the purposes of the rights in question and the nature of the harms which it is sought to eliminate.” Tom Campbell, *Introduction: Realizing Human Rights*, in HUMAN RIGHTS: FROM RHETORIC TO REALITY 1, 7 (Tom Campbell et al. eds., 1986).

¹²⁶ *Id.* at 354–55 (1996). In addition to Alston’s core content concept, Fried van Hoof has argued that it is reasonable to find at least some elements of rights enumerated in the ICESCR as justiciable. See Fried van Hoof, *Explanatory Note on the Utrecht Draft Optional Protocol*, in THE RIGHT TO COMPLAIN ABOUT ECONOMIC, SOCIAL, AND CULTURAL RIGHTS 147, 153 (1995).

core obligations” in its General Comment No. 3.¹²⁷ The term “minimum core obligations” means that each State party must “ensure the satisfaction of, at the very least, minimum essential levels of each of the rights . . . [including] the most basic forms of education”¹²⁸ The Committee also outlines the minimum core obligations of several other rights in its subsequent general comments.¹²⁹

This concept of minimum core obligations has been subject to considerable confusion. For instance, the Committee is not clear as to whether the minimum core itself is determined by each State’s available resources or whether the concept is absolute and equal for all states.¹³⁰ If the minimum core is relative, then it would be a changing, evolving concept based on the resources of each State. In contrast, an absolute minimum core of obligations would mean that each right contains a set of entitlements that a State must provide irrespective of its available resources.¹³¹

Some critics find that such a “minimalist” strategy thwarts the broader, long-term goals of realizing ESCRs by creating a ceiling on rights and corresponding obligations, or at least attempts to create definiteness where there is none.¹³² Others argue that attention is diverted away from middle- or high-income country violations of ESCRs toward examining only low-

¹²⁷ General Comment 3, *supra* note 12.; General Comment 13, *supra* note 33, at para. 57.

¹²⁸ General Comment 3, *supra* note 12.; General Comment 13, *supra* note 33, at para. 57.

¹²⁹ See, e.g., General Comment 14 on the Right to Health (2000), available at [http://www.unhcr.ch/tbs/doc.nsf/\(symbol\)/E.C.12.2000.4.En?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(symbol)/E.C.12.2000.4.En?OpenDocument).

¹³⁰ See Karin Lehmann, *In Defense of the Constitutional Court: Litigating Socio-Economic Rights and the Myth of the Minimum Core*, AM. U. INT’L L. REV. 163, 183 (2006–2007). General Comment 3 and 13 suggest that the minimum core is absolute. However, General Comment 3 explicitly looks toward resource constraints to excuse a failure to meet minimum core obligations. General Comment 13, however, does suggest that failing to meet the minimum core obligations under the right to education is a violation of article 13 of the Covenant. General Comment 13, *supra* note 33, at para. 57. Another related issue centers around the idea that minimum core obligations are a way to prioritize urgent interests. The confusion lies in determining on what basis these interests are to be ranked. See *id.* at 185–86.

¹³¹ See Lehmann, *supra* note 130, at 185.

¹³² See Katharine G. Young, *The Minimum Core of Economic, Social and Cultural Rights: A Concept in Search of Content*, 33 YALE J. INT’L L. 113, 114 (2008) (citing Brigit Toebes, *The Right to Health*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK 169, 176 (Asbjørn Eide, Catarina Krause & Allan Rosas eds., 2001) (“States could be encouraged to put the elements not contained by the core into the “indefinite.”)).

income, developing States' violations of ESCRs.¹³³ Still others assert that certain claimants become more deserving of attention as victims of ESCR violations or even that related, structural issues, such as macroeconomic policies or defense spending, are ignored.¹³⁴

Recognizing these criticisms and possible limitations of the minimum core obligations concept, we use minimum core obligations outlined by the CESCR in General Comment No. 13 to evaluate State party compliance with the right to education under the ICESCR. Given that General Comments serve an important jurisprudential function as described at the beginning of this Section, *supra*, defining the right to education and its concomitant State party obligations as the Committee articulates the right is akin to the common law practice of following judicial precedent to define the legal standards governing the legal issues before a domestic court. The CESCR's use of minimum core obligations in its General Comment No. 13 indicates that, in practice, the Committee will look to its defined minimum core in order to assess State party compliance with treaty norms. Furthermore, the minimum core does closely relate to immediate State obligations; thus, monitoring compliance with the minimum core will evaluate components of these obligations as well. Thus, for practical purposes, indicators derived from the concept of the minimum core obligations will more closely assess State compliance as viewed by the CESCR.

The Committee has articulated five minimum core obligations with respect to Article 13:

1. to ensure the right of access to public educational institutions and programmes on a non-discriminatory basis;
2. to ensure education conforms to the objectives set out in article 13(1) [of the Covenant]
3. to provide free and compulsory primary education
4. to adopt and implement a national education strategy which includes provision for secondary, higher and fundamental education; and

¹³³ MATTHEW CRAVEN, THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT 143–44, 152 (1995).

¹³⁴ See Young, *supra* note 132, at 114; Lehmann, *supra* note 130, at ?.

5. to ensure free choice of education without interference from the State or third parties, subject to conformity with “minimum educational standards” (art. 13(3) and (4)).¹³⁵

Several of the minimum core obligations also overlap with obligations that must be immediately realized. Immediate obligations of the right to education under the ICESCR include: 1) the duty to provide education without discrimination; 2) the duty to provide primary education for all; and 3) the duty to take deliberate, concrete and targeted steps toward full realization of the right.¹³⁶

The prohibition against discrimination overlaps with the minimum core obligation to ensure the right of access to the public education system without discrimination. Similarly, the minimum core obligation to provide primary education for all reiterates the same immediate obligation explained by the Committee in General Comment No. 13.¹³⁷ Moreover, the minimum core obligations to ensure that education conforms to express objectives, to adopt a national educational strategy, and to ensure free choice of education conforming to minimum standards have an immediate obligation component—the obligation to “take steps.”¹³⁸

B. Conceptual Framework for the Right to Education

Simply enumerating a right as we have done *supra* often does little to identify indicators.¹³⁹ Indeed, before developing appropriate indicators, it is important to also identify “the major attributes of a right.”¹⁴⁰ Clearly understanding the concepts and scope of the

¹³⁵ General Comment 13, *supra* note 33, at para. 57, U.N. Doc. E/C.12/1999/10. Scholars assert that additional elements should be included in the minimum core obligations with respect to the right to education. According to Fons Coomans, for example, the minimum core obligation should also include: (1) the provision of special facilities for persons with educational deficits such as girls in rural areas or working children; (2) the quality of education; and (3) the right to receive an education in one’s native language. Coomans, *supra* note 27, at 230 (although he admits that it may be more difficult to justify including the last addition in core content of the right to education).

¹³⁶ General Comment 13, *supra* note 33, at paras. 31 & 43 (prohibition against discrimination), 51 (primary education), 43 & 52 (“take steps”).

¹³⁷ *Id.* at paras. 51 & 57.

¹³⁸ General Comment 3, *supra* note 12, at para. 2.

¹³⁹ *Id.* at para. 14.

¹⁴⁰ *Id.*

obligations measured is an essential step to properly measuring State party compliance with its international legal duties.¹⁴¹ As one author points out, the initial stages of the indicator development process for measuring State treaty compliance is to clarify the content of the particular human right in question.¹⁴²

Many existing proposals to measure the right to education, however, fail to define the concept of the right to education that they purport to measure.¹⁴³ For instance, Isabel Kempf's framework involves the creation of an information pyramid.¹⁴⁴ Under Tier 1 of her pyramid, she proposes key measures such as literacy and primary school enrolment levels.¹⁴⁵ Tier 2 contains expanded indicators such as government expenditure on education, transportation, and lunch programs.¹⁴⁶ In Tier 3, she evaluates the social, political and environmental context, taking into account a study of the cultural context, the language difficulties in fulfilling rights, a description of functional literacy, and the normal duration of primary school.¹⁴⁷ Kempf's framework,

¹⁴¹ De Beco, *supra* note 16, at 27. Landman also suggests specifying the concept that is to be measured. *See* LANDMAN, *supra* note 117.

¹⁴² De Beco, *supra* note 16, at 27.

¹⁴³ Indeed, in their extensive survey of proposals for using indicators to measure human rights, Malhotra and Fasel conclude that there is a near absence of conceptual frameworks to develop such human rights indicators that could be sensitively and effectively used in guiding and monitoring public policy in the protection and promotion of human rights." Malhotra and Fasel, *supra* note 16, at 24.

¹⁴⁴ Isabell Kempf, *How to Measure the Right to Education: Indicators and Their Potential Use by the Committee on Economic, Social and Cultural Rights*, para. 6, U.N. DOC. E/C.12/1998/22 (Nov. 30, 1998).

¹⁴⁵ *Id.* at para 20.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* ("Coverage is the category most explicitly stated in the Covenant. Indicators for coverage should measure whether all groups in society really have access to different levels of education. . . . In order to measure coverage, . . . it is necessary to look at the outcome, i.e. measure whether different groups of society actually are in primary, secondary and higher education and where they are situated within the system.

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

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

however, does not articulate a concept of the right to education that is tied directly to the ICESCR or other legal instrument protecting the right.

The Office of the United Nations High Commissioner for Human Rights (OHCHR) has also recently provided a comprehensive proposal for the use of indicators to measure human rights obligations.¹⁴⁸ Although the OHCHR's Report is a positive step toward operationalizing ESCRs and evaluating State compliance with these rights, it falls short of providing a concrete tool to monitor and evaluate States parties' adherence to a particular treaty. The Report rightly recognizes that "there may be a need for further refinement or re-clubbing of the identified attributes of human rights to better reflect the treaty-specific concerns."¹⁴⁹ In the case of the right to education, for example, the OHCHR enumerates "characteristics" of the right that are derived from multiple sources, primarily from the Universal Declaration of Human Rights, and proposes indicators for these attributes as enumerated in the UDHR.¹⁵⁰ Four attributes of the right to education are identified: 1) universal primary education; 2) accessibility to secondary and higher education; 3) curricula and educational resources; and 4) educational opportunity and freedom. Because these characteristics—and resulting proposed indicators—of the right to education are not tied to any particular treaty, however, they would not be the most effective or accurate indications of compliance or noncompliance with specific treaty norms.

The characteristics identified by the OHCHR Report are narrower in scope than the attributes contemplated by the CESCRC in interpreting the right to education provisions of the ICESCR. The CESCRC, in contrast, has defined the scope and attributes of the right to education broadly under the ICESCR through the "4-A Right to Education Framework"—availability,

¹⁴⁸ OHCHR, *Report on Indicators for Promoting and Monitoring the Implementation of Human Rights*, U.N. DOC. HRI/MC/2008/3 (June 6, 2008) [hereinafter 2008 Report on Indicators].

¹⁴⁹ *Id.* at ¶ 7.

¹⁵⁰ *Id.* at 28.

accessibility, acceptability and adaptability.¹⁵¹ This framework more comprehensively captures the many facets of the right to education. Consequently, we propose using the 4-A Framework in elaborating on the right to education as set forth in the ICESCR. Although the CESCR has adopted the 4-A Framework, it has not explained how it is linked directly to the language of the ICESCR. In the analysis that follows, we attempt to clearly tie indicators to the ICESCR treaty language.

i. Availability

Availability describes the government's obligation to ensure that there are educational institutions and programs in sufficient quantity, with the necessary facilities to function appropriately in the context in which they operate (*e.g.*, adequate structures, sanitation facilities for both sexes, safe drinking water, trained teachers receiving domestically competitive salaries, teaching materials, and so on; and even facilities such as libraries, computer facilities and information technology).¹⁵² In making education available, the government must permit the establishment of schools and provide the resources necessary to develop the physical institutions.¹⁵³ This obligation includes the duty of the government to provide a sufficient number of schools so as to avoid excessive class size.¹⁵⁴

The concept of availability is explicitly protected by the ICESCR, but to a different extent depending on the level of education. Specifically, primary education shall be “available free to all” and secondary education “shall be made generally available.”¹⁵⁵ This suggests that while States must make primary education available to all who are eligible for primary education, the same is not required for secondary education. Higher education must be made

¹⁵¹ General Comment 13, *supra* note 33, at paras. 6–7; Tomasevski 1999 Report, *supra* note 26.

¹⁵² Tomasevski 1999 Report, *supra* note 26, at paras. 51–56.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ ICESCR, *supra* note 13, at arts. 13(2)(a) & (b).

“equally accessible to all, on the basis of capacity, by every appropriate means.”¹⁵⁶ This indicates that higher education need only be made available to those who qualify by some uniform standard—presumably set by the State or institution—that measures whether individuals are adequately prepared to study at the tertiary level.

Additionally, under Art. 13(2)(e), States must develop a system of schools at all levels.¹⁵⁷ This means: 1) that State parties must set up an educational infrastructure to ensure that schools are provided at all levels; 2) that this infrastructure is in good repair; 3) that teaching materials and equipment are of good quality; and 4) that sufficient teachers are available.¹⁵⁸ The CESCR has also noted that “functioning educational institutions and programmes have to be available in sufficient quantity within the jurisdiction of the State party.”¹⁵⁹ The CESCR further states that there must be a sufficient quantity of “trained teachers receiving domestic competitive salaries.”¹⁶⁰ Finally, the Committee has noted that States must 1) respect availability of education by not closing private schools and 2) fulfill availability of education by actively developing school systems—that is, by building schools, developing programs and teaching materials, and adequately training and compensating educators.¹⁶¹

ii. Accessibility

Accessibility refers to the need for education to be accessible and open to everyone.¹⁶² The CESCR considers accessibility to have three components. First, education must be accessible to all without discrimination.¹⁶³ Articles 2(2) and 3 of the ICESCR explicitly

¹⁵⁶ *Id.* at arts. 13(c).

¹⁵⁷ *Id.* at art. 13(2)(e).

¹⁵⁸ DIETER BEITER, *supra* note 27, at 531.

¹⁵⁹ General Comment 13, *supra* note 33, at para. 6.

¹⁶⁰ *Id.* at para. 6(a).

¹⁶¹ *Id.* at para. 50.

¹⁶² Tomasevski 1999 Report, *supra* note 26, at para. 57.

¹⁶³ General Comment 13, *supra* note 33, at para. 6. (“[E]ducation must be accessible to all, especially the most vulnerable groups, in law and in fact, without discrimination on any prohibited grounds.” GC 13, para 6. In other words state parties must take measures only against static discrimination but active discrimination. 487.

recognize the importance of accessible education without discrimination.¹⁶⁴ The Committee specifically obligates States to protect accessibility of education by ensuring that third parties allow girls to attend school.¹⁶⁵ This means, for example, that State parties must create incentives to increase girls' school attendance through measures such as the adoption of policies that work around housework schedules, the creation of financial incentives for parents and the raising of the child marriage age.¹⁶⁶ Additionally, Article 13(e) requires that State parties establish an adequate fellowship system.¹⁶⁷ The CESCR further points out that the requirement to establish fellowships "should be read with the Covenant's non-discrimination and equality provisions; the fellowship system should enhance equality of educational access for individuals from disadvantaged groups[,]"¹⁶⁸ including women and girls.

Second, education must be physically accessible to all.¹⁶⁹ This means that schools should be located in a manner that enables all individuals to participate, including those living in rural areas and vulnerable populations, such as racial and ethnic minorities.¹⁷⁰ This may mean building schools in indigenous regions, providing a means of transportation for certain groups or using technology as an alternative means of instruction (*e.g.* online instruction).

¹⁶⁴ Art. 2(2) states that "The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Art. 3 specifies that "The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant." *See also* ICCPR, *supra* note 73, at art. 2(1); ICERD, *supra* note 40, at arts. 1 & 5; CRC, *supra* note 40, at arts. 2 & 28; CEDAW, *supra* note 28, at arts. 1 & 10.

¹⁶⁵ General Comment 13, *supra* note 33, at para. 50.

¹⁶⁶ DIETER BEITER, *supra* note 27, at 488–89.

¹⁶⁷ ICESCR, *supra* note 13, at art. 13(e) ("The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.")

¹⁶⁸ General Comment 13, *supra* note 33, at para. 26.

¹⁶⁹ *Id.* ("[E]ducation has to be affordable to all. This dimension of accessibility is subject to the differential wording of article 13 (2) in relation to primary, secondary and higher education: whereas primary education shall be available 'free to all,' States parties are required to progressively introduce free secondary and higher education.")

¹⁷⁰ Tomasevski 1999 Report, *supra* note 26, at para. 57 ("[E]nsuring access to available public schools . . . most importantly [means acting] in accordance with the existing prohibition of discrimination.")

Third, and finally, education must be economically accessible to all.¹⁷¹ While all education should be economically accessible to all, the requirement that education be free is subject to the differential wording of article 13(2) in relation to primary, secondary, and higher education.¹⁷² With respect to primary education obligations, if States parties have not already made education free to all at the time the treaty enters into force, then they must adopt a plan within two years of ratification to introduce free primary education within a reasonable period of time.¹⁷³ Whereas the ICESCR is clear that primary education must be made free to all, secondary education must be made accessible only “by every appropriate means.”¹⁷⁴ States parties may decide what the appropriate means are to make secondary education accessible; however, the Committee finds that the most appropriate means is by making education progressively free.¹⁷⁵ Similarly, the Committee has noted that higher education should also be made progressively free.

Additionally, the CESCR believes that “indirect costs, such as compulsory levies on parents . . . or the obligation to wear a relatively expensive school uniform” are not permissible.¹⁷⁶ However, the Committee has noted that other indirect costs may be permissible, subject to examination on a case-by-case basis.¹⁷⁷ To date, the CESCR has yet to specify exactly which indirect costs may be permissible.

iii. Acceptability

¹⁷¹ General Comment 13, *supra* note 33, at para. 6 (“[E]ducational institutions and programmes have to be accessible to everyone, without discrimination, within the jurisdiction of the State party.”).

¹⁷² ICESCR, *supra* note 13, at art. 13 (“Primary education shall be compulsory and available free to all . . . Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education . . . Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education . . .”).

¹⁷³ *Id.* at art. 14.

¹⁷⁴ *Id.* at art. 13(2)(b).

¹⁷⁵ General Comment 13, *supra* note 33, at para. 14.

¹⁷⁶ General Comment 11, *supra* note 106, at para. 7.

¹⁷⁷ *Id.*

Acceptability addresses the form and substance of the education with regard to both quality and appropriateness.¹⁷⁸ This is a duty based on principles of basic human dignity, and it requires that education be of a quality that has meaning to the individual students, to the community, and to society at large.¹⁷⁹ Instruction should involve non-discriminatory subject matter and should incorporate content appropriate to the students' cultural, language and social backgrounds.¹⁸⁰ More broadly, acceptability describes the government's duty to ensure that schools have certain minimum standards for teachers, students, building facilities and curricula.¹⁸¹

The acceptability obligation flows directly from the treaty language. Article 13(2) of the ICESCR addresses the concept of acceptability by stating that the material conditions of teaching staff shall be continuously improved.¹⁸² The Committee has also noted that "the form and substance of education, including curricula and teaching methods, have to be acceptable (*e.g.*, relevant, culturally appropriate and of good quality) to students and, in appropriate cases, parents; this is subject to the educational objectives required by article 13(1) and such minimum educational standards that may be approved by the State."¹⁸³ Additionally, the Committee requires states to ensure that curricula are directed to meet article 13(1) objectives and to maintain a transparent system to monitor whether State educational objectives comply with article 13(1).¹⁸⁴ Moreover, the Committee specifically obliges States to fulfill the acceptability of education¹⁸⁵ by providing culturally appropriate and good quality education for all.¹⁸⁶

¹⁷⁸ Tomasevski 1999 Report, *supra* note 26, at paras. 62–69.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*; General Comment 13, *supra* note 33, at (?)

¹⁸¹ Tomasevski 1999 Report, *supra* note 26, at para. 62; General Comment 13, *supra* note 33, at para. 6.

¹⁸² ICESCR, *supra* note 13, at art. 13.

¹⁸³ General Comment 13, *supra* note 33, at para. 6.

¹⁸⁴ *Id.* at para. 49.

¹⁸⁵ *Id.* at para. 50.

¹⁸⁶ *Id.* at para. 50.

iv. Adaptability

Finally, adaptability addresses the need for education to be flexible and able to respond to the needs of students within their diverse social and cultural settings.¹⁸⁷ In achieving adaptability in education, the government should provide resources that enable schools to develop individualized education plans that meet the needs of the communities served by the schools. In addition to customizing the curricula, schools must monitor the performance of both the teacher and the students and make modifications depending on the results. An education system that is not adaptable is likely to have a high drop out rate for students.¹⁸⁸ Article 13(1) of the ICESCR states that:

. . . education shall be directed to the full development of the human personality and the sense of its dignity, . . . strengthen the respect for human rights and fundamental freedoms . . . [and] enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups.”¹⁸⁹

In order for education to achieve these goals, it must be adaptable. Furthermore, in order to know whether a State party is respecting, protecting and fulfilling this right, we must employ indicators to measure this component of the State’s right-to-education obligations. The CESCR has further underscored that education has to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings.¹⁹⁰ Additionally, the State must allow for free choice of education without

¹⁸⁷ Tomasevski 1999 Report, *supra* note 26, at para. 62; General Comment 13, *supra* note 33, at para. 6.

¹⁸⁸ See, e.g., Right to Education Project, *Education and the 4 As: Adaptability*, available at <http://www.right-to-education.org/node/230>.

¹⁸⁹ ICESCR, *supra* note 13, at art. 13.

¹⁹⁰ General Comment 13, *supra* note 33, at para. 6; see also Office of the High Commissioner for Human Rights, Committee on Economic, Social, and Cultural Rights, General Comment 5: Persons with disabilities, U.N. DOC. E/1995/22 (Dec. 9, 1994) [hereinafter General Comment 5] (dealing with the right to education of disabled persons); Office of the High Commissioner for Human Rights, Committee on Economic, Social, and Cultural Rights, General Comment 6, The Economic, Cultural, and Social Rights of Older Person, U.N. DOC. E/1996/22 (1996) (dealing with the right to education of older persons).

interference from State or third parties, subject to conformity with minimum educational standards.¹⁹¹

C. Indicators for the Right to Education

Having defined the content of the right to education under the ICESCR, we now review the types of indicators that may be used to measure the right.¹⁹² Although there have been few key proposals of indicators to measure the right to education,¹⁹³ none of these proposals satisfactorily measures the concept of the right to education developed in the ICESCR.

One such proposal was conceived at a workshop organized in 1999 by the World University Service-International.¹⁹⁴ In the course of the workshop, participants proposed several key indicators that all treaty bodies and specialized U.N. agencies should agree to use to monitor the right to education, including: 1) literacy rates disaggregated by gender, urban/rural breakdown, ethnic group and age, and 2) net enrolment rates disaggregated by gender, urban/rural breakdown and ethnic group, with separate data for primary, secondary, and tertiary levels of education. Although these indicators are important, they are very limited and do not measure the broad concept of the right to education as described in Section in this subsection, *supra*. Additionally, this particular proposal requires that the same set of indicators be utilized in all countries. For the reasons discussed *infra*, however, we believe indicators should be specifically tailored to the particular context and circumstances of the State party in question.

Other proposals to use a specified set of indicators have not been motivated at measuring treaty compliance. For example, even though Katrien Beekman's proposal adopts the

¹⁹¹ ICESCR, *supra* note 13, at art. 13; General Comment 13, *supra* note 33, at para. 57.

¹⁹² De Beco, *supra* note 16, at 28. LANDMAN, *supra* note 83. DIETER BEITER, *supra* note 27, at 627–28.

¹⁹³ See, e.g., proposals here to measure the right to education, including Beekman.

¹⁹⁴ Workshop participants included members and staff of the CESCR, along with representatives of some of the specialized agencies and non-governmental organizations, along with a few academics knowledgeable about this subject matter. This workshop focused on statistical indicators of fulfillment. See Chapman, *supra* note 26.

conceptual “4-A Framework” outlined by Tomasevski, Beeckman proposes a process that allows her to formulate one comparable score for education in each country.¹⁹⁵ Thus, Beeckman’s proposal is geared toward allowing for cross-country comparisons rather than toward evaluating the extent to which a particular State is complying with or in violation of its treaty obligations under the ICESCR.

While Tomasevski noted the importance of using indicators and identified the topics for which indicators should be formulated, she did not propose specific indicators to measure compliance with her conceptual framework.¹⁹⁶ In Appendix 1, we have attempted to identify the most appropriate indicators for each of the concepts in the framework: availability, accessibility, acceptability and adaptability. We then categorize these indicators as structural, process or outcome (as further discussed *infra*).¹⁹⁷ These indicators more appropriately reflect the major attributes of the right to education as contemplated by the ICESCR and CESCR interpretations of the treaty language because they are derived directly from the ICESCR treaty language and the relevant General Comments. Of course, as is the case with all indicators, the selected indicators serve as a proxy and as evidence of compliance or non-compliance with the right to education under the ICESCR. Thus, the information gathered from the indicators we propose in Appendix 1 complements, but does not replace, the normative analyses and expert judgments of human rights advocates and treaty monitoring body members who must translate these data into

¹⁹⁵ Beeckman suggests that availability could be measured by absorption capacity of the public and private education system and competence and salaries along relevant lines such as public/private, urban/rural. Beeckman, *supra* note 26, at 71. Accessibility could be measured by availability of free public education and gender parity index with regard to enrolment and drop out. *Id.* Other than these indicators, however, she does not propose indicators to measure adaptability or acceptability. *Id.*

¹⁹⁶ Chapman 2007, *supra* note 26, at 126, 128 tbl. 3.1.

¹⁹⁷ Chapman divides the indicators she proposed to measure education into structure, process and outcome. However, she does not tie these indicators to a conceptual framework defining education. *See* Chapman, *supra* note 26.

evaluations of State adherence to treaty obligations.¹⁹⁸ In this subsection, we discuss the guidelines we used in formulating these indicators.

i. Categorization of Indicators

We believe that proposals to measure treaty compliance should utilize indicators in each of the following categories: structural, process and outcome. Indeed, this categorization will be integral to our proposed system of indicators that we will apply *infra*. The structure-process-outcome typology assists in determining whether the laws of the country are in line with treaty obligations, whether the country has processes in place to implement the treaty obligations, and the actual status of the rights in the country. Initially, Paul Hunt suggested using structural, process and outcome categories to measure the right to health.¹⁹⁹ The U.N. 2006 Report on Indicators for Monitoring Compliance with International Human Rights Instruments adopted Hunt's categorization for indicators and applied it for purposes of measuring the fulfillment of all human rights.²⁰⁰ Following its lead, the Inter-American Commission has adopted Hunt's terminology for purposes of monitoring ESCRs as well.²⁰¹ Most recently, the OHCHR 2008 Report reaffirms the relevance of the "structural—process—outcome" indicators framework,

¹⁹⁸ For a critical analysis of the use of indicators for monitoring and evaluating States parties' treaty compliance, see Ann Janette Rosga & Margaret L. Satterthwaite, *The Trust in Indicators: Measuring Human Rights*, 27 BERKELEY J. INT'L L. 2009 (publication forthcoming), available at <http://lsr.nellco.org/cgi/viewcontent.cgi?article=1091&context=nyu/plltwp>. We find that, although indicators are grounded in social science and can tend to create unwanted outcomes for State priority-setting, often judges use persuasive, social science indicators on which to base sound, normative analysis and judgment. Thus, indicators play an important, if not vital role in moving legal analysis and normative decision-making toward a just, fair and legitimate outcome. Additionally, evidence-based policymaking is essential to maximize resource utilization for successful improvements in social outcomes, including education outcomes.

¹⁹⁹ The Secretary-General, *The Right of everyone to enjoy the highest attainable standard of physical and mental health, delivered to the General Assembly*, U.N. DOC. A/58/427 (Oct. 10, 2003) [hereinafter Hunt 2003 Report]; Hunt 2006 Report, *supra* note 24.

²⁰⁰ UN 2006 Report, *supra* note 16, at para. 13.

²⁰¹ Malhotra and Fasel, *supra* note 16, at 28 (advancing this typology in their conceptual model).

which “reflects the need to capture the duty-bearer’s commitments, efforts and results, respectively[,]” to select indicators for various human rights measurement.²⁰²

According to the U.N. 2006 Report, “[s]tructural indicators reflect the ratification/adoption of legal instruments and existence of basic institutional mechanisms deemed necessary for facilitating realization of the human right concerned.”²⁰³ Similarly, the Inter-American Commission’s Guidelines suggest that structural indicators should determine whether the “law on the books” complies with the State’s treaty obligations but should also measure whether the State institutions are structured to incorporate international legal obligations.²⁰⁴ Nonetheless, for the sake of a clearer delineation between structural and process indicators, we limit structural indicators to monitoring whether the State’s laws reflect, incorporate and implement its international treaty obligations.²⁰⁵ But structural indicators, however, cannot alone evaluate State compliance with treaty obligations. A State party’s incorporation of treaty law into its own domestic law does not necessarily mean that it is fulfilling its obligations with regard to the right in question.

Process indicators measure the extent to which the laws and policies of the State are effectively designed to implement the realization of the right. The U.N. 2006 Report defines process indicators as relating to “State policy instruments to milestones that become outcome

²⁰² OHCHR, *Report on Indicators for Promoting and Monitoring the Implementation of Human Rights*, ¶ 8 U.N. DOC. HRI/MC/2008/3 (June 6, 2008) [hereinafter 2008 Report on Indicators].

²⁰³ UN 2006 Report, *supra* note 16, at para. 17.

²⁰⁴ INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, GUIDELINES FOR PREPARATION OF PROGRESS INDICATORS IN THE AREA OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS, OEA/Ser/L/V/II.129 (Doc. 5) (Oct. 5, 2007), available at <https://www.cidh.oas.org/pdf%20files/Guidelines%20final.pdf>.

²⁰⁵ Similarly, De Beco points out that structural indicators measure *de jure* compliance rather than *de facto* compliance with human rights treaties. De Beco, *supra* note 16, at 42. The UN 2008 Report suggests that the number of human rights treaties that a State has signed that incorporates the right in question is a structural indicator. 2008 Report on Indicators, *supra* note 202, at para. 18. However, at least for the purposes of evaluating compliance with one single treaty, such an indicator is not necessary.

indicators, which in turn can be more directly related to the realization of human rights.”²⁰⁶

These indicators “measure the quality and extent of State efforts to implement rights by measuring the scope, coverage, and content of strategies, plans, programs or policies, or other specific activities or interventions designed to accomplish the goals necessary for the realization of [the right].”²⁰⁷ Although the Inter-American Commission Guidelines suggest that whether or not the State has policies and procedures in place to implement the international law are structural indicators, we consider those indicators to be process indicators along with programs and strategies to comply with treaty obligations.²⁰⁸

Outcome indicators measure reality on the ground, that is, to what extent the State is implementing the right in question. De Beco points out that both process and outcome indicators measure *de facto* treaty compliance.²⁰⁹ He further points out that outcome indicators focus on results of the efforts, while process indicators focus on the actual efforts of States.²¹⁰ Moreover, the U.N. 2006 Report notes that outcome indicators are “not only a more direct measure of the realization of a human right but it also reflects the importance of the indicator in assessing the enjoyment of the right.”²¹¹ In other words, these indicators “measure the actual impact of government strategies,” whereas process indicators measure the “quality and extent” of these strategies.²¹² Furthermore, outcome indicators do not necessarily reflect an improvement in structural or process indicators:²¹³

An improvement in outcome indicators may be a sign of the adequacy of the measures adopted and of progressive improvements towards full realization of rights. However, to form a definitive opinion in this respect, a review of the

²⁰⁶ UN 2006 Report, *supra* note 16, at para. 18.

²⁰⁷ GUIDELINES, *supra* note 204, at para. 31.

²⁰⁸ *Id.*

²⁰⁹ De Beco, *supra* note 16, at 43.

²¹⁰ *Id.* at 44.

²¹¹ UN 2006 Report, *supra* note 16, at para. 19.

²¹² GUIDELINES, *supra* note 204, at paras. 31–32.

²¹³ *Id.* at 32.

specific measures adopted is necessary; a decline in outcome indicators may be due to circumstances not attributable to the actions of the State, while an improvement may be caused by fortuitous factors. Accordingly, particular attention should be given to process indicators.²¹⁴

ii. Context-specific v. universal indicators.

The same pre-defined set of indicators (i.e., universal indicators) need not be applied to all countries. Instead, indicators used to measure treaty compliance with regard to a particular country should be carefully chosen for and tailored to the context of that State. Tomasevski asserts that “[a]pplying the same standard of performance to all countries as if all had identical infrastructures, institutions and resources is not only unfair . . . but also disregards one of the main targets of international cooperation in the area of human rights, namely to promote human rights.”²¹⁵ Moreover, universal indicators do not comprehensively measure compliance or noncompliance of the State, and they may not provide useful insight as to the reasons behind the violations or the solutions to address human rights abuses.

Universal indicators are more suitable for studies that aim at providing a picture of the degree of enjoyment of a right across several countries than for measuring whether and to what degree a State is complying with its treaty obligations. Development professionals tend to use universal indicators when their goal is to compare the degree of enjoyment of rights across various countries for the purpose of drawing attention to unacceptable disparities and to decide directions for program development and implementation.²¹⁶ As a result, some economic development studies present indicators in the form of indexes such as the Human Development

²¹⁴ *Id.* at para. 32.

²¹⁵ See Katarina Tomasevski, *Indicators*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK 532 (Asbjørn Eide, Catarina Krause & Allan Rosas eds., 2001).

²¹⁶ UNITED NATIONS DEVELOPMENT PROGRAM, HUMAN DEVELOPMENT REPORT 2000 91 (2000), *available at* <http://hdr.undp.org/en/reports/global/hdr2000/>.

Index²¹⁷ or the Physical Quality of Life Index, which combines life expectancy, infant mortality and literacy into one indicator on a scale of 1 to 100 to allow for cross-country comparisons and analyses of countries' development or quality of life.²¹⁸

Indicators aimed at providing information about the level of treaty compliance of a particular State need not be universal. Although context-specific indicators may make cross-country comparisons difficult, the ultimate goal of treaty monitoring bodies and others measuring compliance is to determine whether or not a State is fulfilling its particular obligations, not whether it is complying with a treaty to a greater or lesser extent than other States parties. Therefore, applying a context-specific approach is superior to applying a universal approach when assessing human rights treaty compliance because it leads to a selection of indicators that is likely to be the most appropriate for the situation of each particular State and most relevant to the treaty provisions in question.²¹⁹

Furthermore, a context-specific approach supports the concept of a “toolbox” of indicators advanced by the vice-chair of the CESCR.²²⁰ Under this approach, there would be numerous indicators available from which the CESCR and the State could choose depending on which indicators are most relevant to a particular State's context. Once a State and the CESCR jointly select the most appropriate indicators, however, each subsequent report submitted by that State should provide data for those same indicators in order to measure the progressive realization—progress or lack of progress made over time—of States parties.

iii. Qualitative and quantitative indicators.

²¹⁷ See United Nations Development Program, *Human Development Indices: A Statistical Update 2008 - HDI Rankings*, available at <http://hdr.undp.org/en/statistics/> (last visited Jan. 25, 2009).

²¹⁸ Stephen C. Thomas, *Measuring Social and Economic Rights Performance in the People's Republic of China: A Comparative Perspective Among Developing Asian Countries*, in CINGRANELLI 113 (1988).

²¹⁹ See UN 2006 Report, *supra* note 16, at para. 28 (appearing to advocate a hybrid approach that selects a core set of universal indicators and additional context-specific indicators).

²²⁰ Green, *supra* note 16 (quoting Eibe Riedel, vice-chair of the ESC Committee).

Some advocates and scholars in the human rights community believe that indicators can only be quantitative in nature.²²¹ Proponents of quantitative measurement define indicators to mean statistics that “serve as a proxy or metaphor for phenomena that are not directly measurable.”²²² In contrast, proponents of a mixed quantitative and qualitative approach use indicators to refer to more thematic measurements, which can be based on either or both qualitative or quantitative data.²²³ In order to understand the causes of some of the outcomes in a particular country and to capture the complexity of human rights monitoring, it is important to employ both qualitative and quantitative indicators to measure State treaty compliance.

We believe that both quantitative and qualitative indicators are necessary in order to fully evaluate a state’s compliance with the right to education. We thus agree with Beeckman, who explains why, particularly in the context of the right to education, both quantitative and qualitative indicators are necessary.²²⁴ First, quantitative indicators cannot easily measure important qualitative factors, such as whether books are of good quality or are falling apart and outdated.²²⁵ Second, quantitative indicators only reveal part of the country’s educational picture—namely, those data that can be expressed numerically, such as school enrolment or educational costs.²²⁶ Third, quantitative indicators do not explain the reasons behind the figures,

²²¹ See, e.g., Danilo Türk, *Realization of Economic, Social and Cultural Rights, First Progress Report*, ¶ 4. U.N. DOC. E/CN.4/Sub.2/1990/19 (July 6, 1990); Report of the Workshop on Indicators to Monitor the Progressive Realisation of the Right to Education.

²²² For examples of definitions that are numerical and synonymous with statistical data, see, e.g., Danilo Türk, *supra* note 221, at ¶ 4; Report of the Workshop on Indicators to Monitor the Progressive Realisation of the Right to Education. World University Service–International, Geneva (Versiox), 9 May 1999; Douglas A. Samuelson & Herbert F. Spierer, *Use of Incomplete and Distorted Data in Inference About Human Rights Violations*, in HUMAN RIGHTS AND STATISTICS: GETTING THE RECORD STRAIGHT (Thomas B. Jabine & Richard P. Claude eds., 1992).

²²³ Green, *supra* note 16, at 1077.

²²⁴ Beeckman, *supra* note 26, at 80.

²²⁵ *Id.* at 72.

²²⁶ *Id.* at 73.

which other qualitative indicators, such as findings from key informant interviews might reveal.²²⁷

iii. Data Sources

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

1. *Events-based Data.* Events-based data provide information on single events.²²⁸ They are usually “qualitative data that primarily describe acts of human rights violations and identify victims and perpetrators.”²²⁹ Events-based data answer the question of what happened, when it happened and who was involved, and then they report descriptive and numerical summaries of events.²³⁰ Accumulation of data on individual violations over time can show trends of an improvement or deterioration of the human rights situation in a particular country.²³¹
2. *Socio-economic and administrative statistics.* Socio-economic and other administrative statistics are “aggregated data sets and indicators based on objective quantitative or qualitative information (*i.e.*, information that can be observed or verified, such as wage, age, sex and race) related to standards of living and other facets of life.”²³² These data are often collected by states through a census.²³³ Socio-economic and administrative statistics give information about the general state of society. For example, these data

²²⁷ Relatedly, unless additional surveys are conducted with child laborers or in households, data collected by schools often used for purposes of quantitative indicators only reveal information about children within the educational system and do not uncover the situation for those left outside of the system. *Id.* at 74.

²²⁸ De Beco, *supra* note 16, at 35.

²²⁹ Malhotra and Fasel, *supra* note 16, at 6.

²³⁰ LANDMAN, *supra* note 117, at 82.

²³¹ De Beco, *supra* note 16, at 35.

²³² Malhotra and Fasel, *supra* note 16, at 9.

²³³ *Id.*

would include the literacy levels in a country, net enrolment in schools, infant mortality as well as other indicators that are generally associated with ESCRs.

3. *Household perception and opinion surveys.* Household perception and opinion surveys involve “polling a representative sample of individuals on their personal views on a given issue.”²³⁴ The information is usually qualitative even though it can be turned into quantitative information by evaluating the public opinion at a defined community or population level.²³⁵
4. *Expert Judgments.* Data based on expert judgments are informed opinions of a limited number of experts that can be translated into quantitative form.²³⁶ Experts are asked to evaluate and score the performance of a State using cardinal or ordinal scales and sets of relevant criteria or checklists.²³⁷

Socio-economic statistics²³⁸ are most relevant for measuring the progressive realization component of ESCRs.²³⁹ Socio-economic statistics include data such as the net enrolment in secondary schools. Such trends in the net enrolment in secondary schools over time, for instance, can help determine within a particular context whether or not a State is satisfying its

²³⁴ *Id.* at 18.

²³⁵ De Beco, *supra* note 16, at 37.

²³⁶ Malhotra and Fasel, *supra* note 16, at 20.

²³⁷ *Id.* Data based on expert judgments are less relevant for measuring ESCRs than for measuring CPRs. Often, measuring treaty compliance with CPRs requires subjective judgments since it is not possible to obtain socio-economic data for many CPRs. For example, it is difficult to measure the degree to which the press is free in a particular country with socio-economic data; thus, experts are consulted to provide their opinions on the level of freedom of press in a particular country. LANDMAN, *supra* note 84. In contrast, expert judgments on ESCRs are not needed because socio-economic data can be used to measure many aspects of the fulfillment of ESCRs. For example, if the data on maternal mortality in a particular country are properly collected, then it is possible to calculate that country’s maternal mortality ratio, an indicator used to measure compliance with the right to health. Since objective evidence is available in most cases, the subjective judgment of experts regarding the mortality ratio is not needed.

²³⁸ A United Nations definition of socio-economic statistics is any “quantitative information compiled and disseminated by the State through its administrative records and statistical surveys, usually in collaboration with national statistical agencies and under the guidance of international and specialized organizations.” UN 2006 Report, *supra* note 16, at para. 24.

²³⁹ The 2006 UN Report also supports the use of socio-economic and administrative statistics for treaty monitoring purposes. UN 2006 Report, *supra* note 16, at para. 24.

obligations to progressively realize the right to education under Article 13(2)(b) of the ICESCR.²⁴⁰

On the other hand, events-based data will not likely assist with measuring progressive realization given that they are typically only associated with one event at one point in time rather than over a specified period of time.²⁴¹ Events-based data are useful, however, for measuring the components of ESCRs that States must immediately realize. For example, if a girl who becomes pregnant is expelled from school on account of her pregnancy, then events-based data such as interviews with teachers, children, the girl, and the girls' parents would be relevant to a claim that may soon be filed under the new ICESCR Optional Protocol involving violations of the non-discrimination and equality provisions of the right to education under the ICESCR.

Household and perception surveys are also important in measuring ESCRs because they provide context to explain the reasons behind certain socio-economic statistics. De Beco notes that household and perception surveys complete, confirm, and question other kinds of data.²⁴² Indeed, the pyramid schematic proposed by Kempf (as discussed in greater detail *infra*) to measure the right to education suggests that indicators do not tell the entire story; investigators must look at the context surrounding the indicator to understand the cause of the violations.²⁴³

iv. Disaggregated data.

Several experts, including Audrey Chapman and contributors to the OHCHR 2008 Report, have emphasized the need for disaggregated data to measure treaty compliance.²⁴⁴ Such

²⁴⁰ ICESCR, *supra* note 13, at art. 13(2)(b) (“Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education”)

²⁴¹ De Beco underscores this point by noting that the main problem is that it is impossible to collect enough information to know the human rights situation of the entire population. De Beco, *supra* note 16, at 36.

²⁴² De Beco, *supra* note 16, at 37.

²⁴³ See Kempf, *infra*.

²⁴⁴ Chapman, *supra* note 26, at 151; see also Malhotra and UN Development Report from 2000. Moreover, De Beco relates the importance of disaggregating indicators in order to evaluate the rights of vulnerable sub-populations,

disaggregation (*e.g.*, by sex, race, or ethnic background) sheds light on disparities that aggregated data do not reveal, including disparities among groups. Under the ICESCR, as discussed above, States parties are required to immediately ensure that no such disparities in education exist in the population in addition to their progressive duties to improve the overall state of the right across the population.²⁴⁵ In particular, Article 2(2) of the ICESCR requires States to guarantee all of the rights set forth in that treaty, including the right to education, without discrimination of any kind.²⁴⁶ Furthermore, Article 3 ensures the equal rights of men and women to the enjoyment of all economic, social and cultural rights found in the ICESCR.²⁴⁷ Thus, disaggregated data deserves emphasis in order to narrow inequalities in the enjoyment of rights among groups, which is just as important an obligation as the obligation to take steps toward the full realization of the right to education for all.

D. Benchmarks for Right to Education Indicators

Having reviewed the different categories of indicators that may be helpful in measuring compliance with the right to education, we now turn to the complementary concept of “benchmarks.” Benchmarks set specific obligations that States must achieve over a period of time with respect to the relevant indicators discussed above.²⁴⁸ The CESCR has noted the need for benchmarks for monitoring various ESCRs.²⁴⁹ Similarly, the U.N. 2006 Report advocates for benchmarks, pointing out that they enhance and give “accountability of the State parties by

including the rights to non-discrimination and equality. De Beco, *supra* note 16, at 28. 2008 Report on Indicators, *supra* note 202.

²⁴⁵ See, *e.g.*, ICESCR, *supra* note 13, at art. 13(2).

²⁴⁶ *Id.* at art. 2(2).

²⁴⁷ *Id.* at art. 3.

²⁴⁸ Green, *supra* note 16, at 1080.

²⁴⁹ Committee on Economic, Social and Cultural Rights, *General Comment No. 1, Reporting by States Parties*, U.N. DOC. E/1989/22; 1-1 IHRR 1 (Feb. 24, 1989.) (recommending state parties “to set specific goals or benchmarks with respect to the reduction of infant mortality, extent of vaccination of children, the intake of calories per person, the number of healthcare providers.”).

making them commit to a certain performance standard on the issue under assessment.”²⁵⁰ An example of a benchmark for a State with a current literacy rate of 80% would be that the State must ensure that the literacy rate is 90% within ten years. Thus, benchmarks aim at providing the specificity necessary to improve State party accountability and compliance with their progressive obligations.

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

²⁵⁰ UN 2006 Report, *supra* note 16, at para. 12.

²⁵¹ See WHO REPORT, at 5–6; see also Dieter Bieter, *supra* note 27, at 628–29 (setting national benchmarks for each selected indicator through a dialogue between State and Committee and monitoring setting of national benchmarks through reporting).

²⁵² See WHO REPORT, at 5–6.

²⁵³ De Beco also agrees that the State must develop benchmarks under the supervision of treaty bodies. De Beco, *supra* note 16, at 47.

E. Ascertaining violations of the Right to Education

In order to promote compliance with the ICESCR, it is important to determine whether a country deviates from its obligations under the Covenant. The CESCR has provided some guidance on what constitutes a violation of the ICESCR, and the Limburg Principles and Maastricht Guidelines further clarify what is meant by non-compliance or failure to fulfill rights enumerated in the Covenant.²⁵⁴ In this section, we develop those suggestions to the structure, process and outcome framework of indicators.

The nature of the obligation—whether it is an obligation that 1) must be immediately realized, 2) constitutes a minimum core obligation or 3) is an obligation subject to progressive realization—is relevant in evaluating violations of the Covenant because the extent of a State’s obligations varies depending upon the nature of the obligations. The chart *infra* categorizes the obligations relating to the right to education as was developed in Sections III A and B *supra*.

Obligations that must be immediately realized	Obligations constituting the minimum core	Obligations that may be progressively realized
States must ensure non-discrimination and equality in all forms of education	States must ensure the right of access to public educational institutions and programs on a non-discriminatory basis	States must ensure that secondary education is made available generally. To the extent made available, it must be accessible, acceptable, and adaptable
States must provide primary education that is available, accessible, acceptable and adaptable to all	States must recognize the right to education as set forth in Article 13(1) of the ICESCR	States must ensure that tertiary education is made available on the basis of capacity and to the extent made available, it must be accessible, acceptable,

²⁵⁴ Limburg Principles on the Implementation of the International Convention on Economic Social and Cultural Rights, ¶¶ 70, Annex, U.N. DOC. E/CN.4/1987/17 (June 2–6, 1986) [hereinafter Limburg Principles]; Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, ¶ 5, U.N. DOC. E/C.12/2000/13 (Jan. 22–26, 1997) [hereinafter Maastricht Guidelines].

		and adaptable
States must ensure that primary education is compulsory and available free of charge to all or States must “formulate a plan and seek international assistance to fulfill this obligation as speedily as possible.” ²⁵⁵	States must provide free and compulsory primary education for all in accordance with Article 13(2)(a) ²⁵⁶	States must provide free secondary and tertiary education
States must “take steps” that are “deliberate, concrete and targeted toward full realization” of rights	States must adopt and implement a national education strategy which includes the provision of secondary, higher and fundamental education	
	States must provide free choice of education subject to “minimum educational standards” as contemplated by Articles 13(3) & (4)	

According to the Committee, a State’s deviations from its minimum core and progressive obligations creates only a prima facie violation that can be justified by the State.²⁵⁷ However,

²⁵⁵ Tomasesvki 2004 Report, *supra* note 35, at para. 23.

²⁵⁶ The Committee has described this both as a minimum core obligation and an obligation that must be immediately realized.

²⁵⁷ General Comment 3, *supra* note 12, at para. 10.

there are no justifications available for violations of immediately realized rights.²⁵⁸ Thus, in determining violation of the ICESCR, we must take into consideration the nature of the obligation that is purported to be violated and type of indicator.

The type of indicator is also relevant, because the obligations of the State are tied to the amount of control a State exerts over the result. A State has control over the laws and policies it adopts which are measured by structural and process indicators, respectively, but may have less control over the reality of the situation in a practical sense (which are generally measured by outcome indicators). Of course, a State party is still responsible for the improvement of outcomes; however, there are circumstances that may be beyond the immediate control of a State, such as a natural disaster that disrupts children's studies or destroys a school. In these cases, treaty monitoring bodies and civil society groups may not find a violation of the right if the State takes all reasonable steps to minimize the damage and to continue to ensure fulfillment of its right-to-education obligations.

i. Structural Violations

As explained *supra*, structural indicators assess the extent to which a State's domestic law complies with its international legal obligations. General principles of international law suggest that States must ensure that they immediately comply with their treaty obligations.²⁵⁹

The Maastricht Guidelines²⁶⁰ indicate that a State is in violation of the ICESCR if it adopts

²⁵⁸ *Id.* at para. 9

²⁵⁹ Paragraph 70 of Limburg Principles and 5 of Maastricht Guidelines recognize that the failure of State party to comply with treaty obligations under international law is a violation of the treaty. Limburg Principles, *supra* note 254, at ¶ 70; Maastricht Guidelines, *supra* note 257, at ¶ 5.

²⁶⁰ Both the Maastricht Guidelines and Limburg Principles emerged from conferences that the International Commission of Jurists convened, providing an "authoritative 'gloss' on the ICESCR for the benefit of the Committee." Michael J. Dennis & David P. Stewart, *Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?*, 98 AM. J. INT'L L. 462, 492 n.219 (2004). The Maastricht Guidelines called an optional protocol for the ICESCR. *Id.*

legislation inconsistent with the ICESCR²⁶¹ or fails to amend or repeal existing laws that are inconsistent with the obligations under the ICESCR.²⁶² A State violates the ICESCR if it adopts legislation or fails to either amend or repeal existing legislation that is inconsistent with the obligations that must be immediately realized, the duties that constitute minimum core obligations, or the obligations that may be progressively realized.

ii. Process Violations

Recall that process indicators relate to State party efforts to implement the obligations under the treaty. States parties have a duty to immediately implement, upon ratification of the ICESCR, those right to education obligations that constitute obligations that must be immediately realized. According to the Limburg Principles, “a State party will be in violation of the Covenant, *inter alia*, if: . . . it fails to implement without delay a right which it is required by the Covenant to provide immediately”²⁶³ Additionally, according to the Maastricht Guidelines, a State’s failure to promptly remove obstacles to which a State party is under a duty to remove in order to permit immediate fulfillment of a right violates its treaty obligations.²⁶⁴

Although there are no justifications for a State’s failure satisfy its immediate obligations under the ICECSR, there are limited justifications for a State’s failure to make efforts to satisfy its minimum core obligations. According to the Committee, a State is considered to be *prima facie* failing to discharge its obligations if it fails to satisfy the minimum core obligations.²⁶⁵ A

²⁶¹ Maastricht Guidelines, *supra* note 257, at para. 14(d) (“The adoption of legislation or policies which are manifestly incompatible with pre-existing legal obligations relating to these rights, unless it is done with the purpose and effect of increasing equality and improving the realization of economic, social and cultural rights for the most vulnerable groups”).

²⁶² *Id.* at para. 15(b) (“The failure to reform or repeal legislation which is manifestly inconsistent with an obligation of the Covenant”); *see also* Limburg Principles, *supra* note 257, at para. 18 (“It should be noted, however, that article 2(1) would often require legislative action to be taken in cases where existing legislation is in violation of the obligations assumed under the Covenant.”).

²⁶³ Limburg Principles, *supra* note 257, at para. 72 (“[A] State party will be in violation of the Covenant, *inter alia*, if . . . it fails to implement without delay a right which it is required by the Covenant to provide immediately”)

²⁶⁴ *Id.*; Maastricht Guidelines, *supra* note 257, at 14(a).

²⁶⁵ *See* General Comment 3, *supra* note 12, at para. 10.

State can attribute its failure to satisfy the obligations to a lack of available resources, but only if it can “demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.”²⁶⁶

Notably, the Maastricht Guidelines appear to contradict the Committee’s view, because they suggest that limitation of available resources cannot be a justification for a State’s failure to satisfy minimum core obligations.²⁶⁷ However, the Maastricht Guidelines do not define the content of the minimum core obligations as extensively as the Committee outlines the concept. The Maastricht Guidelines simply indicate that the minimum core includes the most basic forms of education. On the other hand, for the Committee, the notion of minimum core obligations is much broader.²⁶⁸ Since, practically speaking, the Committee is charged with interpreting the ICESCR by the terms of the ICESCR,²⁶⁹ we adopt its broader view of the definition of the minimum core in our analysis.

With respect to progressively realized rights, the Committee states that if the State is taking deliberately retrogressive measures, then it has the burden of proving that 1) such measures were introduced after the most careful consideration of alternatives, 2) such measures were fully justified by reference to the totality of the rights provided for in the Covenant, and 3)

²⁶⁶ General Comment 3, *supra* note 12, at para.10; *see* Nowak, *supra* note 30, at 256.

²⁶⁷ Maastricht Guidelines, *supra* note 257, at para 9. Violations of the Covenant occur when a State fails to satisfy what the Committee on Economic, Social and Cultural Rights has referred to as “a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, violating the Covenant.” General Comment 3, *supra* note 12, at para. 10. Such minimum core obligations apply irrespective of the availability of resources of the country concerned or any other factors and difficulties.

²⁶⁸ *See* General Comment 13, *supra* note 33, at para. 57 (“[Minimum] core includes 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); to adopt and implement a national educational strategy which includes provision for secondary, higher and fundamental education; and to ensure free choice of education without interference from the State or third parties, subject to conformity with ‘minimum educational standards’ (art. 13 (3) and (4)).”).

²⁶⁹ Committee on Economic, Social and Cultural Rights, Working Methods: Overview of the Present Working Methods of the Committee, ¶ 53, U.N. DOC. E/2004/22 (2004) *available at* <http://www2.ohchr.org/english/bodies/cescr/workingmethods.htm>.

such measures were fully justified in the context of the full use of the State party's maximum available resources.²⁷⁰ The Maastricht Guidelines and Limburg Principles underscore this principle by noting that if the States' policies or plans obstruct or halt the progressive realization of a right, then it will be deemed to be in violation of the Covenant. In addition to the justifications provided by the Committee, however, the Maastricht Guidelines and Limburg Principles add another justification—that the State is acting due to *force majeure*.²⁷¹

Additionally, even though neither the Committee, the Maastricht Guidelines nor the Limburg Principles provide guidance on the issue, the failure to meet agreed benchmarks for progressive obligations may also constitute a violation of the Covenant. Although such a policy may create a perverse incentive for States parties to either refuse to set benchmarks or to set low benchmarks in order to avoid non-compliance with the ICESCR, sovereign States have adopted the Covenant and presumably aspire to give the impression that they are taking all possible steps to cooperate with the CESCR and fulfill Covenant rights. Refusing to set benchmarks or setting low benchmarks where setting benchmarks is a requirement of all States parties could prove to be a political embarrassment or economic liability to a particular State. In such a case, a State party may also have the opportunity to justify their failures to move forward at the agreed-to levels with the same justifications they are permitted if they halt or retard progressive obligations. Thus, if the State fails to show an improvement in satisfying progressive obligations by achieving benchmarks, then it may have the burden of justifying such failure by proving that:

²⁷⁰ General Comment 13, *supra* note 33, at para. 45. There is a strong presumption of impermissibility of any retrogressive measures taken in relation to the right to education, as well as other rights enunciated in the Covenant. If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the State party's maximum available resources.

²⁷¹ See Maastricht Guidelines, *supra* note 259, at para. 14(f) ("The calculated obstruction of, or halt to, the progressive realization of a right protected by the Covenant, unless the State is acting within a limitation permitted by the Covenant or it does so due to a lack of available resources or force majeure.").

1) such measures were introduced after the most careful consideration of alternatives, 2) such measures were fully justified by reference to the totality of the rights provided for in the Covenant, and 3) such measures were fully justified in the context of the full use of the State party's maximum available resources.²⁷²

iii. Outcome Violations

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

In contrast, if outcome indicators suggest that a State has failed to provide its citizens with the rights that constitute minimum core obligations, then the State is considered to be *prima facie* failing to discharge its obligations. The language used by the Committee in explaining when a violation of minimum core obligation occurs, suggests that a State not only has to make efforts to ensure the provision of the right, but that the outcome must be that the right is actually being fulfilled. The Committee states that "a State party in which any significant number of individuals is *deprived of* . . . the most basic forms of education is, *prima facie*, violating the

²⁷² General Comment 13, *supra* note 33, at para. 45. There is a strong presumption of impermissibility of any retrogressive measures taken in relation to the right to education, as well as other rights enunciated in the Covenant. If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the State party's maximum available resources.

Covenant.”²⁷³ A State can justify the outcome by citing a lack of available resources, but only if it can “demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.”²⁷⁴ For example, if outcome indicators suggest that not all children who are of primary school age are enrolled in primary schools, then these indicators suggest that education is not free, not compulsory, or both, and the State can justify this outcome if it can prove that the result was due to a lack of resources.

Although the Committee, the Limburg Principles nor the Maastricht Guidelines provide insight into this issue, if the outcome indicators measuring progressive obligations suggest a halting or retrogression of the progressive obligations, then States may be considered to be in *prima facie* violation of the ICESCR. In order to justify the negative outcomes, the State may have the burden of proving it has made all efforts to ensure that such retrogressing or halting does not occur, but such retrogression or halting is occurring due to factors outside of its control. For example, if there are fewer students enrolled in tertiary education who are eligible to enroll now than there were ten years ago, then this outcome suggests a failure to satisfy right-to-education obligations under the ICESCR. The State then has the burden of justifying that it does made all efforts to avoid such retrogression but the retrogression is due to factors outside of its control. Similarly, if the State fails to meet the benchmarks that it has set for outcome indicators, it should have the burden of demonstrating that it has made all efforts to meet the agreed-upon benchmarks and that such failure was due to factors outside of its control.

The chart *infra* illustrates under what circumstances a State would be in violation or possible violation of the ICESCR.

²⁷³ General Comment 3, *supra* note 12, at para. 10.

²⁷⁴ *Id.*; see Nowak, *supra* note 30, at 256.

Indicator	Nature of Right	Violation	Prima Facie Violation
Structural	Immediate, Minimum Core or Progressive	State adopts laws or fails to amend to repeal laws that are inconsistent with its obligations under the ICESCR.	
Process	Immediate	Policies or plans contravene immediate obligations or fail to further immediate obligations	
	Minimum Core		Policies or plans fail to ensure that minimum core obligations are satisfied unless the State can “demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.”
	Progressive		<p>Policies or plans deliberately retard or halts the progressive realization of a right, unless State justifying such failure by proving that 1) such measures were introduced after the most careful consideration of alternatives, 2) such measures were fully justified by reference to the totality of the rights provided for in the Covenant, and 3) such measures were fully justified in the context of the full use of the State party’s maximum available resources.</p> <p>Failure to meet agreed to benchmarks unless justifying such failure by proving that 1) such</p>

Indicator	Nature of Right	Violation	Prima Facie Violation
			<p>measures were introduced after the most careful consideration of alternatives, 2) such measures were fully justified by reference to the totality of the rights provided for in the Covenant, and 3) such measures were fully justified in the context of the full use of the State party's maximum available resources.</p>
Outcome	Immediate	Reality on the ground contravenes immediate obligations	
	Minimum Core		<p>The reality on the ground suggests that people do not have the minimum core guarantees unless the State can “demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.”</p>
	Progressive		<p>The reality on the ground suggests a retrogression or halting of guarantees that constitute progressive obligations unless such retrogression or halting is occurring due to factors outside of its control.</p> <p>The State fails to meet the benchmarks that it has set for outcome indicators unless it can demonstrate that it has made all efforts to meet the benchmarks, but such failure was due</p>

Indicator	Nature of Right	Violation	Prima Facie Violation
			to factors outside of its control.

Thus far, this article has reviewed the parameters of the right to education, its background and the challenges of monitoring state compliance with it. Initially, it reviewed the history and theory behind the right to education. It then discusses the language of the ICESCR, including progressive realization, nondiscrimination, and the right to education. It also considers the concept of “minimum core” obligations, as well as the contents and scope of states’ obligations with regard to the right to education. Next, it proposes the necessary steps and framework to develop a relevant set of indicators for evaluating ESCRs such as the right to education.

Having demonstrated the possibilities for such an approach, we apply our proposed framework of indicators to the education system in Colombia. Such application evaluates Colombia’s compliance with right-to-education provisions of the ICESCR. This section will also reveal the promise of a new framework of indicators that can be applied to monitor progressive realization of ESCRs generally.

IV. Colombia Case Study

Colombia provides a rich context for applying our proposed framework that demonstrates state compliance and noncompliance right-to-education obligations under the ICESCR.

Colombia’s colonial history and diverse geography have contributed to a long civil conflict between various factions of guerillas, paramilitary groups, and other factions locked in a struggle against the central government in Bogotá.²⁷⁵ More relevantly to the right to education, Colombia

²⁷⁵ Conciliation Resources, *Historical Background*, Patrick Costello, 1997, available at <http://www.c-r.org/ourwork/accord/guatemala/historical-background.php>; Global Security, *Guatemala Civil War 1960–1996*, available at

is generally divided between a series of distinct ethnicities: Colombians of European descent, *mestizos* (people of mixed race), Afro-Colombians, and indigenous Colombians.²⁷⁶ This complex political and ethnic tapestry has led to grave inequalities, including inequalities within the education system, between regions and within populations.²⁷⁷

Hence, a country such as Colombia demonstrates the crucial need for a rigorous, multi-faceted application of indicators to reveal both the progress that Colombia has achieved, but also the impediments to fulfillment of their right to education and the inequality in the administration of education.

Colombia is also fitting for a case study because it is a State party to several treaties protecting the right to education, including the ICESCR, which it ratified in 1969.²⁷⁸ Colombia has made no reservations or declarations to modify its obligations under the ICESCR.²⁷⁹ Furthermore, Article 93 of Colombia's Constitution specifically incorporates all human rights and obligations enumerated in the international treaties to which Colombia is State party and mandates that the Constitution be interpreted in conformity with international obligations.²⁸⁰ In

<http://www.globalsecurity.org/military/world/war/guatemala.htm>; *Memory of Silence*, Report of the Commission for Historical Clarification: Conclusions and Recommendations, Feb. 1999, available at <http://shr.aaas.org/guatemala/ceh/report/english/toc.html> [hereinafter *Memory of Silence*].

²⁷⁶ Central Intelligence Agency, CIA World Factbook, Colombia, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/co.html> (last updated Jan. 22, 2000) [hereinafter CIA World Factbook].

²⁷⁷ See JAIRO A. ARBOLEDA ET AL., VOICES OF THE POOR IN COLOMBIA: STRENGTHENING LIVELIHOODS, FAMILIES AND COMMUNITIES 3 (2004).

²⁷⁸ See, e.g., ICESCR, *supra* note 13; ICERD, *supra* note 40; CRC, *supra* note 40; CEDAW, *supra* note 28; International Conference of American States, American Declaration of the Rights and Duties of Man, OEA/ser.L./V./II.23, doc. 21 rev. 6 (1948) [hereinafter American Declaration]; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Nov. 17, 1988, O.A.S.T.S. No. 69, 28 I.L.M. 156 (1989).

²⁷⁹ See Office of the United Nations High Commissioner for Human Rights, International Covenant on Economic, Social and Cultural Rights New York 16 December 1966, available at <http://www2.ohchr.org/english/bodies/ratification/3.htm#ratifications> (lacking Colombia as a country that has made any declarations or reservations).

²⁸⁰ Colombian Constitution art. 93 (“The treaties and international conventions ratified by the Congress, that recognize human rights and that prohibit their limitation in states of emergency, prevail in the internal order. The rights and duties consecrated in this Letter will be interpreted in accordance with international treaties on human rights ratified by Colombia. The Colombian State can recognize the jurisdiction of the Penal Court the International

this section, we use the framework proposed in Section III *supra* to evaluate whether the government is fulfilling its treaty obligations under the ICESCR.

A. Structural Indicators

i. Availability

As discussed in greater detail *supra*, availability requires that the government establish schools, allow the private establishment of schools and provide the resources necessary to develop educational institutions.²⁸¹ The “law on the books,” including the Colombian Constitution, recognizes the importance that education be available.²⁸² For instance, Article 67 mandates that the government guarantee an “adequate supply” of educational services, stating that “it is the responsibility of the State . . . to guarantee an adequate supply [of education]”²⁸³

The Constitutional Court has interpreted the constitutional guarantees and has further explained the availability guarantee. For example, the Court found that the right to education must include the right to school placement and adequate schoolroom capacity.²⁸⁴ In addition, the Court has indicated that the State fails to guarantee an available education when it fails to provide adequate, uninterrupted government funding,²⁸⁵ when it does not hire substitute

in the terms anticipated in the adopted Statute of Rome the 17 of July of 1998 by the Conference of Plenipotentiary of the United Nations and, consequently, ratifying this treaty in accordance with the procedure established in this Constitution. The admission of a treatment different in substantial matters on the part of the Statute from Rome with respect to the guarantees contained in the Constitution will exclusively have effects within the scope of the matter regulated in it.”).

²⁸¹ Tomasevski 1999 Report, *supra* note 26, at paras. 51–56.

²⁸² Colombian Constitution, *supra* note 280, at art. 67, para. 5.

²⁸³ *Id.*

²⁸⁴ DEFENSORÍA DEL PUEBLO COLOMBIA, SISTEMA DE SEGUIMIENTO Y EVALUACIÓN DE LA POLÍTICA PÚBLICA EDUCATIVA A LA LUZ DEL DERECHO A LA EDUCACIÓN 26 (2004) [hereinafter DEFENSORÍA 2004 REPORT].

²⁸⁵ Sentencia T-571 de 1999. Suspension of services must have an “exceptional character” and be justified. *See* Sentencia T-467 de 1994; Defensoria 2003 report, at 77.

teachers,²⁸⁶ or when it refuses to pay teachers' salaries.²⁸⁷ Moreover, according to the Court, the right to education obligates the Colombian government to ensure the availability of education equally for rural children.²⁸⁸ The Court noted that "students from a small rural school have the same right to receive [an education] . . . without finding themselves in inferior conditions"²⁸⁹ Thus, in line with the obligations under the ICESCR, the Colombian Constitution as interpreted by the Constitutional Court requires that the State provide adequate school placement, adequate schoolroom capacity, adequate funding for schools, adequate supply of teachers and that education be provided equally to rural and urban areas.

ii. Accessibility

As discussed in greater detail *supra*, accessibility refers to the ability of all individuals to physically and economically access and receive an education without discrimination.²⁹⁰ Under the ICESCR, all education must be economically accessible, but the ICESCR goes further with respect to primary education. It requires that State parties either immediately provide free primary education to all at the time of ratification or adopt a plan within two years to provide full realization of free primary education within a reasonable number of years.²⁹¹ However, after ratifying the ICESCR, Colombia adopted a Constitution that explicitly conflicts with Colombia's obligation to provide free primary education and nor to our knowledge has it adopted a plan to setting forth its timeline for adopting free primary education.

²⁸⁶ Sentencias T-935 of 1999; T-467 of 1994; T-450 of 1997; T-571 of 1999; T-1102 of 2000; DEFENSORÍA DEL PUEBLO, EL DERECHO A LA EDUCACIÓN: EN LA CONSTITUCIÓN, LA JURISPRUDENCIA, Y LOS INSTRUMENTOS INTERNACIONALES 62 (2003) [hereinafter DEFENSORÍA 2003 REPORT].

²⁸⁷ T-1102 of 2000; DEFENSORÍA 2003 REPORT, *supra* note 286, at 62.

²⁸⁸ DEFENSORÍA 2003 REPORT, *supra* note 286, at 70.

²⁸⁹ T-467 of 1994 (translated by authors).

²⁹⁰ DEFENSORÍA 2004 REPORT, *supra* note 284, at 27.

²⁹¹ Again, Tomasevski clarifies these obligations, stating that "[g]overnments are thus obliged to ensure with immediate effect that primary education is compulsory and available free of charge to everyone, or to formulate a plan and seek international assistance to fulfill this obligation as speedily as possible." Tomasevski 2004 Report, *supra* note 35, at para. 23.

The Colombian Constitution, which was adopted almost twenty-three years after Colombia's ratification of the ICESCR expressly permits the State to charge fees for educational services.²⁹² It states that “[e]ducation will be free of charge in the State institutions, *without prejudice to those who can afford to defray the costs.*”²⁹³ In other words, those who can pay education costs must pay them. Moreover, Colombian administrations have consistently interpreted this provision restrictively, seeing free education as a subsidy for those otherwise unable to pay and a shared responsibility between the State and families rather than viewing it as a fundamental aspect of the right to education and a State responsibility.²⁹⁴ This restrictive view means that education in practice is not free.²⁹⁵ For this reason, Special Rapporteur Tomaševski concluded that “Colombia remains an exception in the region because the government is not committed to free and compulsory education for all.”²⁹⁶ Indeed even the CESCR has indicated that Colombia is in violation of Articles 13 and 14 of the Covenant when it levies fees for public education on individuals.²⁹⁷

The Constitutional Court has also recognized the right to physically accessible education. In particular, the Court noted that the State's obligation to ensure the right to education “implies the precondition of accessible educational institutions.”²⁹⁸ Further, the Court condemned discriminatory selection criteria in schools that resulted in limiting physical access to education

²⁹² Colombian Constitution, *supra* note 280, at art. 67.

²⁹³ *Id.* Notably, the 1936 Colombian Constitution enumerated the principle of free compulsory education, and the law provided for free secondary education in 1938. Tomasevski 2004 Report, *supra* note 35, at para. 14.

²⁹⁴ Tomasevski 2004 Report, *supra* note 35, at para. 26 (citing “Público y privado”, *Educación Compromiso de Todos*, No. 5, June 2003).

²⁹⁵ Katerina Tomasevski, Free or Fee: 2006 Global Report 200–201 (2006), available at http://www.katarinatomasevski.com/images/Global_Report.pdf [hereinafter Tomasevski Global Report]

²⁹⁶ *Id.* at 201.

²⁹⁷ Econ. and Soc. Council, Committee on Economic, Social, and Cultural Rights, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding observations of the Committee on Economic, Social and Cultural Rights*, ¶ 27, U.N. Doc. E/C.12/1/Add.74 (Dec. 6, 2001).

²⁹⁸ T-402 de 1992.

for minorities.²⁹⁹ Additionally, the Ombudsman (*Defensoría del Pueblo de Colombia*) has argued that if the government denies a child school placement, it is in violation of Article 67 of the Constitution because it effectively impedes the exercise of the rights of children to access the educational system, a right that is also protected by the Constitution.³⁰⁰ Affirmative action intended to mitigate the effects of structural discrimination for marginalized groups, however, do not violate the right to access education equally.³⁰¹

iii. Acceptability

States parties to the ICESCR are obligated to provide an acceptable, high-quality education to all students.³⁰² The Colombian Constitution incorporates the requirement that education be acceptable. It states that the government must “perform the final inspection and supervision of education in order to control its quality, to ensure it fulfills its purposes, and for the improved moral, intellectual, and physical training of [students]”³⁰³ In addition, there are laws in place that regulate education quality.³⁰⁴ Thus, Colombia’s constitution and laws

²⁹⁹ T-064 de 1993.

³⁰⁰ Colombian Constitution, *supra* note 280, arts. 67 & 44.

³⁰¹ T-441 de 1997.

³⁰² ICESCR, *supra* note 13; General Comment 13, *supra* note 33; DEFENSORÍA 2003 REPORT, *supra* note 286, at 205.

³⁰³ Colombian Constitution, *supra* note 280, at art. 67.

³⁰⁴ See ALVARO VILLANUEVA TORRESGROZA, LEY GENERAL DE EDUCACIÓN ARTICULACIÓN CON LA LEY 715 (2004) (providing a detailed analysis and commentary of the regulation and jurisprudence of education in Colombia). For example, Article 4 obligates the State to “increase the quality and improvement of education; especially it will monitor qualifications and trainings of educators, educational promotion, resources and educational methods, educational innovation and research, educational and professional orientation, and inspection and evaluation of the educational process.” Law 115, at art. 4. Article 74 of Law 115 sets up a national accreditation system and Article 75 calls for a national information system to ensure high educational quality. Law 115, at arts. 74 & 75. Moreover, Article 80, in conformity with Article 67 of the Constitution, establishes a national system of evaluation of education that coordinates with the National Testing Service of the Colombian Institute for the Promotion of Superior Education (ICFES). Law 115, at art. 80. Finally, several articles of Law 115 establish requirements and certification for teachers. See, e.g., Title VI of Law 115 of 1994: “Educators.” The Constitutional Court has suggested that the State is responsible for providing an acceptable education. The Court declared that the government is in violation of the right to education when the public educational system does not adequately prepare students or teach them the skills and values it is designed to instill. DEFENSORÍA 2004 REPORT, *supra* note 284, at 28. The Court also found that public authorities must advance or execute important administrative procedures to provide the most efficient and highest quality educational services possible. See Corte Constitucional. Sentencias T-337-95 & T-571-99. Furthermore, teachers and others in the education system must respect students while allowing for their free development of personality. Dieter Bieter, *supra* note 27; Supreme Court of Colombia, T-259, 27 May

recognize that education must satisfy the criteria of acceptability by providing quality standards for institutions, teachers and students.

iv. Adaptability

States parties to the ICESCR must ensure that education is adaptable;³⁰⁵ that is, the educational system must be able to accommodate students who may require particular arrangements because of their individual needs or their specific social or cultural backgrounds in order to retain them in the system.³⁰⁶ Several provisions of the Constitution recognize the need for adaptable education. Under fundamental rights guarantees, the Colombian Constitution entitles all persons “to their free and personal development without limitations.”³⁰⁷ In addition, the Constitution protects minorities’ rights to education “that respects and develops their cultural identity” and special education for children with disabilities or exceptional abilities.³⁰⁸

Additionally, the Constitution also protects the right to retention and obligates the state to ensure adaptability of the educational system for students by requiring the government to provide “the minimum conditions necessary for [students’] . . . retention in the educational system.”³⁰⁹ According to the Constitutional Court, the right to retention in education is also connected to other fundamental rights, including the rights to equality, due process and personal

1998. Lastly, the government must monitor and evaluate the educational system as part of its obligation to provide acceptable education. See DEFENSORÍA 2003 REPORT, *supra* note 286, at 142; Sentencia T-562 of 1993.

³⁰⁵ See General Comment 13, *supra* note 33, at para. 6.

³⁰⁶ Tomasevski 1999 Report, *supra* note 26, at para. 72.

³⁰⁷ Colombian Constitution, *supra* note 280, at art. 16.

³⁰⁸ *Id.* at art. 68.

³⁰⁹ *Id.* at art. 67; DEFENSORÍA 2004 REPORT, *supra* note 284, at 26. The Constitutional Court has reiterated this guarantee, finding that the “effectiveness of the fundamental right to education is having access to a place which provides for educational services and guarantees retention of the student in the educational system.” Corte Constitucional. Sentencia T-290-96 (1996) (translated by authors). Specifically with regard to retention, the Court found that a minor with access to a school who is performing satisfactorily and conforming to school rules has a fundamental right to continued placement in that school. Corte Constitucional. Sentencia T-402 of 1992.

development.³¹⁰ Case law prohibits educational institutions from expelling or punishing students on account of “pregnancy, hair color, sexual identity, or marital status . . .”³¹¹ in order to protect students’ rights to remain in school.

Moreover, the General Education Law and its implementing Decree outlines State obligations to adapt educational services through providing “ethno-education,”³¹²—education for ethnic groups or communities that have their own indigenous cultures, languages and traditions—and education to rural populations, which focuses on agriculture, fishing and forestry.³¹³ Furthermore, Law 70 contains special provisions for ethno-education for Afro-Colombians.³¹⁴ Thus, these extensive Constitutional and other legal guarantees indicate that domestic laws recognize the importance of adaptable education to all.

B. Process Indicators

i. Availability

Some process indicators measuring the quality and extent of States’ efforts to implement its treaty obligations³¹⁵ suggest that Colombia is making efforts to make education available, but others indicate a retrogression in State efforts to make it available. Strong institutions are in place in Colombia that promote availability in education. First, there is a Ministry of Education whose mandate includes formulating national educational policies to improve access, quality and equity in education for all; preparing the National Educational Development Plan (*Plan Nacional*

³¹⁰ DEFENSORÍA 2004 REPORT, *supra* note 284, at 27. Corte Constitucional. Sentencia T-1635 of 2000; DEFENSORÍA 2003 REPORT, *supra* note 286, at 142.

³¹¹ Sentencia T-1032-00.

³¹² General Education Law, at Chapter III, Education for Ethnic Groups, arts. 55–63.

³¹³ General Education Law, at Chapter IV, Rural Education, arts. 64–67. The Constitutional Court recognized the rights to education that aims to preserve culture as necessary for an adaptable education for minority and rural communities under the Constitution’s Article 68, which requires the State to respect ethnic and cultural identity and development through the educational system. Political Constitution of Colombia, at art. 68; DEFENSORÍA 2003 REPORT, *supra* note 286, at 142.

³¹⁴ Law 70 of 1993, arts. 34–42.

³¹⁵ See GUIDELINES, *supra* note 24, at para. 31; Hunt 2006 Report, *supra* note 24, at para. 55.

de Desarrollo Educativo); coordinating, funding and stimulating national programs to improve education; and monitoring the educational sector's compliance with laws and policies.³¹⁶

Second, Colombia has adopted strong national education plans. The government's current Ten-Year National Educational Development Plan (2006–2015) proposes objectives and goals for the government to effectively guarantee the right to education in Colombia.³¹⁷ The Plan's eleven themes include guaranteeing the right to education in conditions of equality for the entire population at all levels of education and strengthening public education at all levels to ensure availability, access, permanence, and quality in terms of equality, equity, and inclusion.³¹⁸ Third, in addition to government mandates, Colombia's Attorney General asserts that the State must invest sufficient resources in constructing and staffing schools, paying teachers, providing educational materials and other needs that fill the educational "basket."³¹⁹

Despite these strong measures to ensure that education is available to all, other indicators suggest that the State is failing to progressively improve its efforts. First, government spending for education services as a percentage of GDP has decreased over time.³²⁰ Although spending has increased from 2.39 percent to 3.11 percent from 1995 to 2004, spending in current pesos has been decreasing each year since 2001.³²¹

³¹⁶ Ministry of National Education, Republic of Colombia, Functions (July 10, 2007), *available at* <http://www.mineducacion.gov.co/1621/article-85252.html>.

³¹⁷ ALCANCE, VISIÓN, PROPÓSITOS, MECANISMOS DE SEGUIMIENTO Y OBJETIVOS DEL PLAN NACIONAL DECENAL DE EDUCACIÓN 2006–2015 (2007). the General Education Law of 1994—Law 115—empowers the Ministry of Education to develop a National Educational Development Plan (*PDNE*) every ten years “in order to complete the constitutional and legal mandates to implement educational services.” General Education Law, at art. 72 (Plan Nacional de Desarrollo Educativo).

³¹⁸ PACTO SOCIAL POR LA EDUCACIÓN, PLAN DECENAL DE EDUCACIÓN 2006–2015 5 (2007), *available at* http://www.plandecenal.edu.co/html/1726/articles-140247_archivo_1.pdf.

³¹⁹ PROCURADURÍA GENERAL DE LA NACIÓN, EL DERECHO A LA EDUCACIÓN: LA EDUCACIÓN EN LA PERSPECTIVA DE LOS DERECHOS HUMANOS 108 (2006_ [hereinafter PROCURADURÍA 2006 REPORT]).

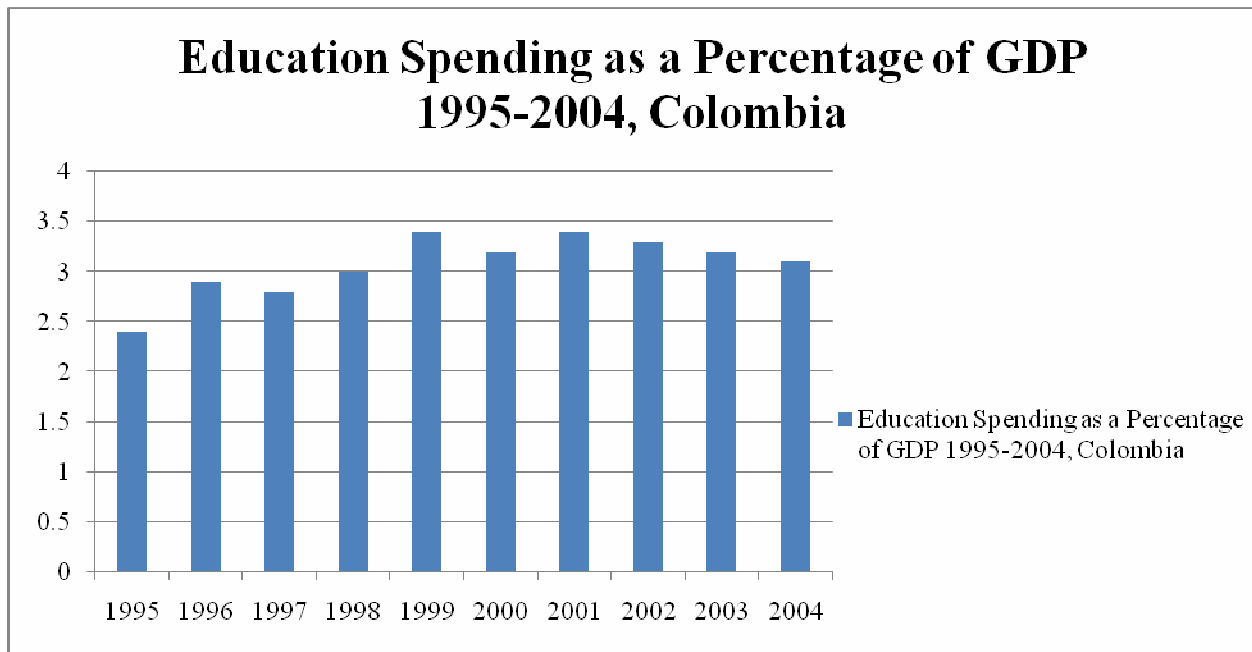
³²⁰ *Id.* at 111.

³²¹ *Id.* at 111, t. 18. In 2001, spending was 3.44 percent and decreased to 3.30 percent in 2002, 3.19 percent in 2003 and 3.11 percent in 2004. *Id.*

Education Spending as a Percentage of GDP 1995–2004, Colombia

Años	GDP (Millions of Current Pesos)	Spending on Education	Percentage of GDP
1995	84,439,109	2,015,332	2.39
1996	100,711,389	2,873,969	2.85
1997	121,707,501	3,373,304	2.77
1998	140,483,322	4,169,078	2.97
1999	151,565,005	5,196,542	3.43
2000	174,896,258	5,583,410	3.19
2001	188,558,786	6,479,228	3.44
2002	204,529,736	6,750,338	3.30
2003	230,466,526	7,357,193	3.19
2004	256,862,128	7,981,819	3.11

*Adapted from Chart 18 of the report of the Procuraduría General de la Nación (Attorney General), *El Derecho a la Educación: La Educación en la Perspectiva de los Derechos Humanos 111* (2006).



*Adapted from Graph 12 of the report of the Procuraduría General de la Nación (Attorney General), *El Derecho a la Educación: La Educación en la Perspectiva de los Derechos Humanos 112* (2006).

This decrease in spending corresponds with a change in education policy which has moved from mandating public funding for primary education³²² to educational reforms based on liberalization and privatization in 2001.³²³ Previously in Colombian history, it had legislation in place that promised 10 per cent of its national budget to the education sector.³²⁴ Secondly and relatedly, resources spent per student has been decreasing from \$1.061.804 in constant pesos in 2001 to \$962.468 in 2004 (explained, *infra*).³²⁵ From the statistics we have, we were not able to determine whether the process indicators that show retrogression relate to immediate obligations, minimum core obligations or progressive obligations. We can assume, however, that if there was an overall decrease in the budget allocated to education and decrease in the spending per student, then this decrease applies across the board to all forms of education, including primary education.

ii. Accessibility

Although there are processes in place to enhance accessibility of education, several of those policies have inherent design failures. First, even though policies are in place to increase educational coverage, because primary education is not free, financial burdens have kept students out of school even when physical space is available.³²⁶ Second, while policies are in place for internally displaced children to attend school without cost to their parents, the implementation of registration policies systematically denies educational access to many internally displaced

³²² Acto Legislativo de 1968 (Situado Fiscal). See PROCURADURIA 2006 REPORT, *supra* note 319, at 109.

³²³ Tomasevski Global Report, *supra* note 295, at 200. Tomasevski has asserted that, in Colombia, education is seen as a commodity and business rather than a right and public good. See 2004 Report on Mission to Colombia. *Id.* at paras. 10–12.

³²⁴ Tomasevski 2004 Report, *supra* note 35, at para. 14.

³²⁵ The cost per student went from \$1.061.804 in constant pesos in 2001 to \$962.468 in 2004. See PROCURADURÍA 2006 REPORT, *supra* note 319, at 112

³²⁶ Meeting with PCN, Cali, Valle del Cauca, Colombia (Dec. 8, 2007) (on file with authors) [hereinafter PCN Meeting].

persons (IDPs).³²⁷ Colombia's 60-year violent, internal conflict has displaced between 2 and 3.5 million Colombians from their homes and communities, and many displaced persons relocate to urban centers.³²⁸ Although individuals accepted as IDPs qualify for free education, many people who are in fact displaced do not receive education because Colombia has adopted a restrictive definition of who constitutes a displaced person.³²⁹ Additionally, the policy requires IDPs to file within one year of displacement.³³⁰ As a result, many victims of internal displacement due to fumigations, army operations or a failure to file within the one-year time limit are excluded from the official registry and consequently denied an identification card to access essential services, including education access.³³¹

Third, even though affirmative action policies exist to improve university enrolment rates for minorities, these programs do little to ensure that minorities graduate from Colombian universities.³³² For instance, given that only 14 percent—almost half the rate of enrolment of the rest of the population—of Afro-Colombians enroll in tertiary education,³³³ the Valle University in Cali accepts all Afro-Colombian (and indigenous) high school students who score in the top 4 percent of the university entrance exam.³³⁴ Despite the implementation of such a program, many minority students drop out of school before the end of their first years³³⁵ due to the need to

³²⁷ RFK Report, *supra* note 26, at 67.

³²⁸ CIA World Factbook, *supra* note 276.

³²⁹ Law 387 (insert definition here).

³³⁰ *Id.*; Refugees International, *Bulletin: Colombia: Flaws in Registering Displaced People Leads to Denial of Services* (2007), available at <http://www.unhcr.org/refworld/pdfid/47a6eef41e.pdf>.

³³¹ PCN meeting, *supra* note 326; Refugees International, *supra* note X.

³³² Meeting with Maria Cristina Tenorio, Professor of Social Psychology, Universidad de Valle del Cauca, Cali, Valle del Cauca, Colombia (Dec. 10, 2007) [hereinafter Maria Cristina Tenorio Meeting].

³³³ Diego Escobar Meeting, *supra* note 341.

³³⁴ The exam is called the ICFES exam, which stands for “Instituto Colombiano de Fomento de Educación Secundaria.” PCN Meeting, *supra* note 326; Meeting with Carlos Gonzalez (UNOCAL), Cali, Valle del Cauca, Colombia, Dec. 8, 2007 [hereinafter Carlos Gonzalez Meeting]. Without such a program, one professor reports that no more than two to four minority students would enroll at the University. Maria Cristina Tenorio Meeting, *supra* note 332.

³³⁵ Maria Cristina Tenorio Meeting, *supra* note 332.

continue working, travel long distances, study harder to make up for previous poor education preparation, and adjust to new cultures and lifestyles.³³⁶ For these reasons, affirmative action programs that fail to offer additional orientation, academic and social support services may not adequately ensure the realization of the right to education for Afro-Colombians and indigenous Colombians. Thus, although the State does have policies and programs in place to increase accessibility of education, many of these programs have design failures.

iii. Acceptability

Colombia recently adopted regulations that have allowed for the creation of primary and secondary schools with low educational standards. In an effort to increase school coverage, Colombia enacted a law to permit the government to contract with private entities or individuals in areas where the existing public educational system is inadequate.³³⁷ Decree 4313 adopted in 2004 created evaluation criteria and qualification levels for schools to participate in a pool of institutions eligible to receive public funding, known as the “Supply Bank” (*Banco de Oferentes*).³³⁸ Despite these set standards, the guide for the implementation of Decree 4313 for the Supply Bank includes a critical “escape” clause that allows for public funding of sub-standard schools.³³⁹ The clause reads as follows: “[w]hen it is shown that the average score of the educational services in the area are lower than this established minimum, the certified territorial entity shall, with justification, establish a lower minimum technical score”³⁴⁰

³³⁶ *Id.* See RFK Report, *supra* note 26, at 66.

³³⁷ Law 715 of 2001; Meeting with Marta Franco, Ministry of Education (Dec. 13, 2007) [hereinafter Marta Franco Meeting].

³³⁸ Colombia Decree 4313, Chapter II, Sec. 1.6.3, at 4 (2004) (“The Ministry of National Education shall establish the evaluation and qualification criteria, which shall include technical aspects . . . and shall take economic aspects into consideration”).

³³⁹ NATIONAL MINISTRY OF EDUCATION OF THE REPUBLIC OF COLOMBIA, GUÍA PARA LA CONFORMACIÓN DEL BANCO DE OFERENTES 8 n.3 (2008).

³⁴⁰ *Id.*

As a result of these policies, the government is permitted to fund sub-standards schools in areas where there are no educational institutions that meet minimum government certification standards. Private entities of this nature receiving public educational funds exist throughout the country and are commonly referred to as “garage schools.”³⁴¹ Thus, under the State’s own regulations, the government condones public spending on private and low-quality education for Colombian students. The Ministry of Education staff confirmed these practices, and one staff person commented that she “prefer[s] ‘garage schools’ to the traffic light,” meaning that sub-standard schools were better than no schools at all.³⁴²

iv. Adaptability

To its credit, the government has numerous programs and policies in place to ensure that education satisfies the needs of various groups, including minorities. With regard to programs, the government has implemented one plan called “Change to Build Peace” (“*Cambio para Construir la Paz*”) that includes a specific education strategy for Afro-Colombians.³⁴³ In addition, the government institutionalized Law 70’s National Pedagogical Commission, in which elected representatives from Afro-Colombian communities advise the Ministry of Education in the formation of ethno-educational policies, as well as departmental committees on ethno-education, working groups, community assemblies and academic studies to understand what constitutes ethno-education.³⁴⁴ Moreover, the National Table of Indigenous Education serves to

³⁴¹ Meeting with Diego Escobar, Cali, Valle del Cauca, Colombia (Dec. 9, 2007) (on file with authors) [hereinafter Diego Escobar Meeting].

³⁴² Marta Franco Meeting, *supra* note 337.

³⁴³ PROCURADURÍA 2006 REPORT, *supra* note 319, at 142–143. This plan formulated and implemented an Afro-Colombian ethno-education project in the national educational system, assisting projects in curriculum design, qualification and training of teachers and administrators, and production of socio-cultural, linguistic and ethno-historical educational materials. *Id.*

³⁴⁴ *Id.* at 164.

consolidate policies and proposals of indigenous communities and to advise the government on ethno-education programs.³⁴⁵

The General Education Law, Law 115, requires that competent authorities, together with ethnic groups, select teachers that work in minority communities—preferably community members themselves—and train them in ethno-education and in their community’s culture and language.³⁴⁶ The State has also created seven ethno-educator programs in universities throughout the country, all of which prepare students to become educators with additional community roles, such as a project facilitator and human rights defender roles.³⁴⁷ Finally, the Academy of Afrocolombian Studies investigates problems and issues surrounding ethno-education, advancing the pedagogy, alternative education models, curriculum design and textbooks for ethno-education.³⁴⁸

Additionally, the government has established institutions, policies and programs to improve the adaptability of education to the needs of children with disabilities. For instance, the Ministry of Social Protection and the Council of Special Projects and Programs have implemented a national action plan to ensure integration of persons with disabilities in all sectors of society, and the Ministry of Education is responsible for implementing programs in the educational system.³⁴⁹ The Ministry of Education has developed a National Plan of Assistance to Persons with Disabilities, in which the State guarantees educational programs for students with special needs, and Resolution 2565 of 2003 outlining criteria for special educational services and instructing local governments to implement Institutional Education Projects

³⁴⁵ *Id.* at 165.

³⁴⁶ Law 115, at art. 6; PROCURADURÍA 2006 REPORT, *supra* note 319, at 148–49.

³⁴⁷ PROCURADURÍA 2006 REPORT, *supra* note 319, at 165.

³⁴⁸ *Id.* at 166.

³⁴⁹ DEFENSORÍA DEL PUEBLO COLOMBIA & PROGRAMA DE SEGUIMIENTO DE POLITICAS PÚBLICAS EN DERECHOS HUMANOS (PROSEDHER), LA INTEGRACIÓN EDUCATIVA DE LOS NIÑOS Y LAS NIÑAS CON DISCAPACIDAD: UNA EVALUACIÓN DE BOGOTÁ DESDE LA PERSPECTIVA DEL DERECHO A LA EDUCACIÓN 19 (2004) [hereinafter PROSEDHER].

(*Proyectos Educativos Institucionales – PEI*) that respond to the needs of students with disabilities.³⁵⁰

Under the National Policy for Rural Education, the Colombian government is currently implementing a Rural Education Project (*Proyecto de Educación Rural – PER*) aimed to improve rural education access and quality and to make education more adaptable to the needs of the rural population through a reorganization of technical and vocational education.³⁵¹ Although still in progress, the Project has seen positive results in participating communities: rural student's enrolment and educational achievement have improved significantly.³⁵² Consequently, it appears that Colombia is implementing some programs to make education adaptable.

C. Outcome Indicators

i. Availability

Outcome indicators suggest that, in reality,³⁵³ education is decreasingly available in Colombia. First, the net enrolment ratio (NER),³⁵⁴ which is the proportion of all primary school-age students who are enrolled in school, slightly decreased from 88 percent in 1999 and 87 percent in 2005.³⁵⁵ The reason for this decrease may be related to the fact that there are fewer educational institutions available to students. Second, there has been a decrease in the number of public school teachers. In 1999, there were 215,000 teachers on staff in the country, while only

³⁵⁰ PROSEDHER, *supra* note 349, at 28 (2004).

³⁵¹ WORLD BANK, IMPLEMENTATION, COMPLETION AND RESULTS REPORT ON A LOAN IN THE AMOUNT OF US\$20 MILLION EQUIVALENT TO THE REPUBLIC OF COLOMBIA FOR A RURAL EDUCATION PROJECT 2, *available at* http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2007/08/20/000020439_20070820093159/Rendored/PDF/ICR0000177.pdf.

³⁵² *Id.* at 2.

³⁵³ GUIDELINES, *supra* note 24, at para. 32; Hunt 2006 Report, *supra* note 24, at para. 56.

³⁵⁴ The Net Enrolment Ratio (NER) is the enrolment of the official age group for a given level of education, expressed as a percentage of the population in that age group. UNESCO, EFA Report, Glossary 393 (2008).

³⁵⁵ UNESCO, EFA Report, Annex Table 5 287 (2008).

187,000 teachers were on staff in 2005.³⁵⁶ Relatedly, there has also been an increase in student-to-teacher ratios from 24 students per teacher in 1999 to 28 in 2005.³⁵⁷ Teacher shortages are often due to threats and assassinations by paramilitary groups.³⁵⁸ Further, the government regularly fails to pay teachers, resulting in lower recruitment levels, frequent strikes and closed schools.³⁵⁹ The lack of teachers aids in making education less available.

Additionally, disparities among groups persist in the availability of education. First, although illiteracy levels are improving in the aggregate across the entire population;³⁶⁰ disaggregated data demonstrate that illiteracy levels are much higher among ethnic minorities and rural communities. The nationally observed adult illiteracy data over time decreased from 19 percent (1985–1994) to 7 percent (1995–2004).³⁶¹ Illiteracy levels of men and women are fairly equal and have decreased equally over time,³⁶² suggesting there is no large gender gap in at least the most basic forms of education. However, a 2006 World Bank Report found that 33.4 percent of indigenous peoples and 31.4 percent of Afro-Colombians were illiterate.³⁶³ In addition, 2003 government statistics show that illiteracy levels were significantly lower (4.7

³⁵⁶ *Id.* at Table 10a, 335.

³⁵⁷ *Id.*

³⁵⁸ UNESCO Division for the Coordination of United Nations Priorities in Education, *Education Under Attack: A Global Study on Targeted Political and Military Violence Against Education Staff, Students, Teachers, Union and Government Officials, and Institutions 26 (2007)*, available at http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/28/09/48.pdf.

³⁵⁹ Diego Escobar Meeting, *supra* note 341.

³⁶⁰ http://www.dane.gov.co/censo/files/boletines/bol_educacion.pdf.

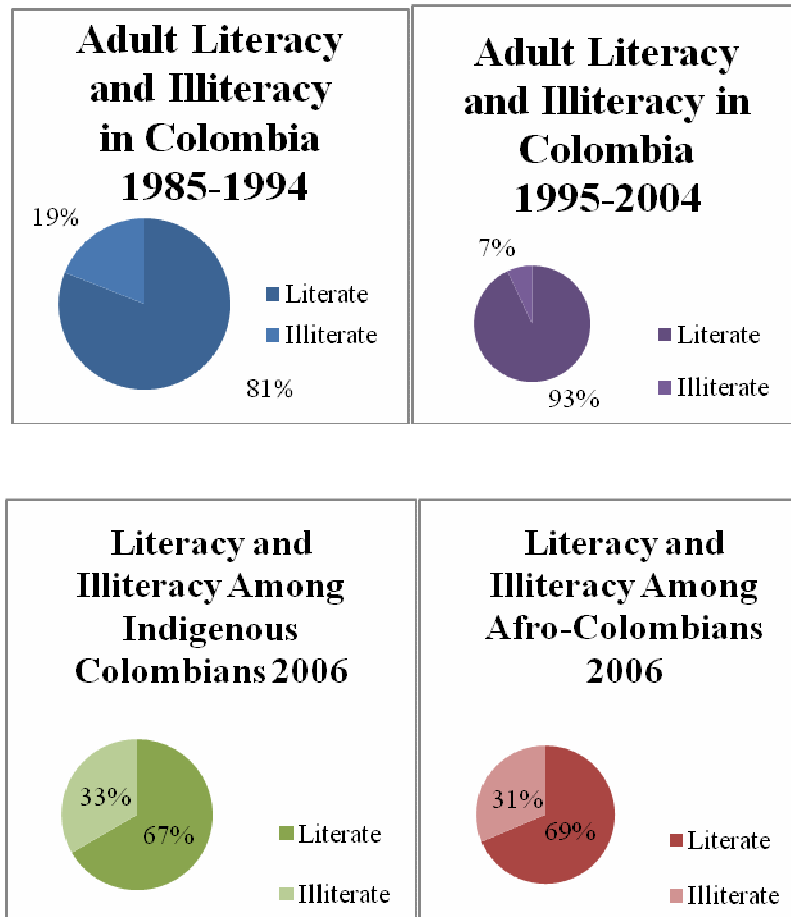
³⁶¹ UNESCO, EFA Report, Annex, Table 2 254 (2008). The youth literacy levels similarly rose from 91 percent (1985–1994) to 98 percent (1995–2004). *Id.* at Annex, Table 2 255.

³⁶² *Id.* at Annex, Table 2 254–55 (reporting adult literacy levels at 81 percent (women, 1985-1994) and 81 percent (men, 1985-1994); 93 percent (women, 1995-2004) and 93 percent (men, 1995-2004)).

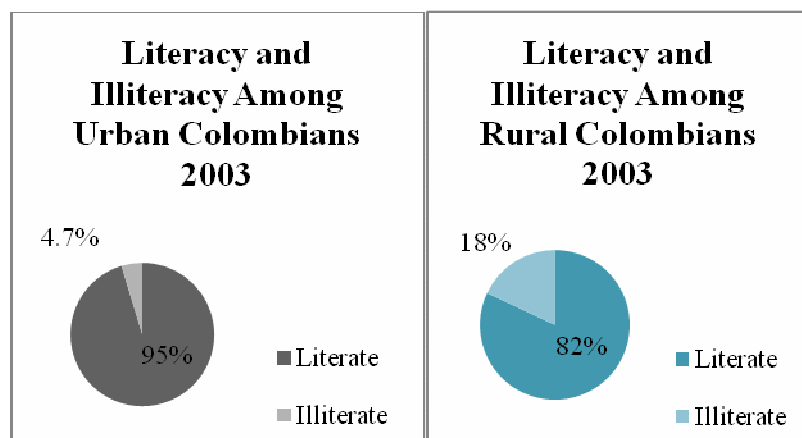
³⁶³ See ENRIQUE SÁNCHEZ & PAOLA GARCÍA, WORLD BANK, *MÁS ALLÁ DE LOS PROMEDIOS: AFRODESCENDIENTES EN AMÉRICA LATINA 38 (2006)*, available at www.acnur.org/biblioteca/pdf/4558.pdf. The government 2003 survey data from DANE show that only 17.7 percent of indigenous and only 13 percent of Afro-Colombians are illiterate. Even with these conservative estimates, however, indigenous women are far more likely to be illiterate (22.5 percent) than indigenous men (13.1 percent). See PROCURADURIA 2006 REPORT, *supra* note 319, at 153–54.

percent) in urban areas than in rural areas (18 percent).³⁶⁴ These data indicate that more indigenous peoples, Afro-Colombians and rural Colombians are excluded from the education system than children from the general population.

The charts below illustrate the literacy and illiteracy rates in Colombia over time, broken-down by minority groups and rural/urban:



³⁶⁴ PROCURADURÍA 2006 REPORT, *supra* note 319, at 153.



*Data taken from UNESCO, Education for All (EFA) Report (2008); World Bank (2006) Report; Colombian Procuraduría Report (2006).

Second, enrolment of Afro-Colombians and indigenous in *educación media*—the last two years of secondary education after basic education— is lower than that of the general population. 17.5 percent of Afro-Colombians are enrolled in *educación media* while 23.7 percent of indigenous people are enrolled in *educación media*.³⁶⁵ In contrast, net enrolment ratios in *educación media* for the general population are higher at 29 percent.³⁶⁶ The Attorney General has concluded that these indicators show a “true disaster” in the educational coverage and services for ethnic minority groups in Colombia.³⁶⁷

Third, there are disparities in tertiary education among the general population and minorities. To Colombia’s credit, enrolment for tertiary school increased from 22 percent in

³⁶⁵ PROCURADURÍA 2006 REPORT, *supra* note 319, at 158.

³⁶⁶ CORPOEDUCACIÓN, HAY AVANCES, PERO QUEDAN DESAFIOS: INFORME DE PROGRESO EDUCATIVO DE COLOMBIA Annex, 31, t.A3 (2006). UNESCO report states that these data were not available. See Table 8 of the EFA Report, at 311. In addition, the Procuraduría report also lacks this data. See PROCURADURIA 2006 REPORT, *supra* 319 (comb this report just to make sure).

³⁶⁷ PROCURADURIA 2006 REPORT, *supra* note 319, at 158.

1999 to 29 percent in 2005.³⁶⁸ However, indigenous peoples, who comprise 2 to 4 percent of the population,³⁶⁹ make up only 0.71 percent of enrolled students.³⁷⁰ For Afro-Colombians, who represent 27 percent of the population, a mere 7.07 percent are enrolled in higher education.³⁷¹

Finally, the number of school-age children out of schools is higher in rural areas than urban areas: 30 percent of primary-age rural children were not enrolled in schools, while nationally, only 22 percent of children were not enrolled.³⁷² Furthermore, secondary schools and universities are often located in urban areas. According to one leader in Cali, for instance, there are 83 urban educational systems with 290 primary and 129 secondary schools facilities and only 7 rural systems with 23 primary school facilities and 0 secondary schools.³⁷³

The qualitative data we collected providing insight into the general educational situation, especially for ethnic minorities and rural Colombians, supports these statistical findings. For instance, in some indigenous and rural areas, the lack of any physical infrastructure denies some children any education at all.³⁷⁴ Additionally, many schools near resettlement areas for displaced populations do not have the ability to accommodate IDP children,³⁷⁵ a population that is

³⁶⁸ UNESCO EFA Report, at Table 9A, 318.

³⁶⁹ LOOK THIS UP IN REPORT FOR CITE.

³⁷⁰ See VICE MINISTER OF PRESCHOOL, BASIC, AND MEDIUM EDUCATION, MINISTRY OF EDUCATION, DIRECTION OF ORDER AND EQUITY (2007), available at www.mineducacion.gov (last visited Mar. 7, 2008) [hereinafter VICE MINISTER REPORT].

³⁷¹ See VICE MINISTER OF PRESCHOOL, BASIC, AND MEDIUM EDUCATION, MINISTRY OF EDUCATION, DIRECTION OF ORDER AND EQUITY (2007), available at www.mineducacion.gov (last visited Mar. 7, 2008) [hereinafter VICE MINISTER REPORT]. The last census showed the Afro-Colombian population at 11%. See, e.g., Committee on the Elimination of Racial Discrimination, *Reports Presented for All States Part of Conformity with Article 9 of the Convention*, U.N. DOC. CERD/C/COL/14 (May 5, 2008), available at http://www2.ohchr.org/english/bodies/cerd/docs/AdvanceVersions/CERD.C.COL.14_spadvuneditdver.pdf [hereinafter ICERD Colombia Report]. However, these numbers are hotly contested and disputed by Afro-Colombian groups. CITES

³⁷² See ARBOLEDA, *supra* note 277, at 56.

³⁷³ Diego Escobar Meeting, *supra* note 341.

³⁷⁴ Meeting with CRIC, Popayán, Cauca, Colombia (Dec. 10, 2007) (on file with authors) [hereinafter CRIC Meeting].

³⁷⁵ See WOMEN'S COMMISSION FOR REFUGEE WOMEN AND CHILDREN, at 23.

disproportionately Afro-Colombian and indigenous. Furthermore, poor families in rural areas, many of whom are indigenous, do not enroll their school-age children in school.³⁷⁶ One indigenous leader found it extremely difficult to send her children to school as a single mother: “[I] can send them to primary school but not to secondary school because we do not feel we have the economic resources to allow them to continue to study in other towns.”³⁷⁷

We witnessed first-hand the inadequate infrastructure of Colombia’s educational institutions on a site visit to Escuela Benjamin Herrera, a primary school in Cali. The building was dilapidated, suffering from neglect and termite infestations in its supporting columns. Administrators closed one classroom due to severe rain damage, and the other rooms still in use were missing ceiling tiles or had partially-collapsed roofs. Computers donated to the school by the local government were infected with viruses and abandoned since the electrical wiring of the school could not support running them.

In another school in Chocó, students attended school in classrooms made of palm leaves and without a roof.³⁷⁸ Other areas, such as IDP communities, have schools with no working bathrooms, no roofs, three students to every desk, and students sitting on the floor without a desk at all.³⁷⁹ Still other schools lack basic materials or equipment³⁸⁰ and have no space for recreation or for eating.³⁸¹ One teacher commented that he teaches 50 students in one classroom, a number that renders it impossible to control the classroom let alone to teach all 50 children the required

³⁷⁶ See ARBOLEDA, *supra* note 277, at 56.

³⁷⁷ Meeting with indigenous leaders, Cali, Valle del Cauca, Colombia (Dec. 8, 2007) (on file with authors) [hereinafter Indigenous Leaders Meeting].

³⁷⁸ PLATAFORMA COLOMBIANA, INFORME SOBRE EL DISFRUTE DEL DERECHO A LA EDUCACIÓN EN COLOMBIA 18 (2003), available at www.plataforma-colombiana.org/biblioteca_pag/045.pdf

³⁷⁹ PCN Meeting, *supra* note 326.

³⁸⁰ WOMEN’S COMMISSION FOR REFUGEE WOMEN AND CHILDREN, UNSEEN MILLIONS: THE CATASTROPHE OF INTERNAL DISPLACEMENT IN COLOMBIA 25 (2002), available at www.womenscommission.org/pdf/co2.pdf.

³⁸¹ See ARBOLEDA, *supra* note 277, at 56–57; Visit to Escuela Benjamin Herrera (Dec. 10, 2007) (on file with authors) [hereinafter Benjamin Herrera Visit].

subjects.³⁸² These conditions are more often the reality for Afro-Colombians and indigenous Colombians since they are disproportionately represented among the nation's poor, rural and IDP populations.

ii. Accessibility

Education is not economically accessible to all people in Colombia. Some parents must pay to send their children to public school in Colombia. Only parents from what are considered the lowest two income levels on a scale of one through six are legally exempt from paying enrolment fees.³⁸³ Even those parents who do not have to pay tuition fees, often must pay enrolment fees, costs of books and school supplies, transportation and uniforms.³⁸⁴ The Colombian Commission of Jurists has found that the average cost of education per student in Colombia is 1,080,000 pesos [\$587 USD] per year,³⁸⁵ three times the minimum monthly wage and beyond the means of the poor and marginalized in the country.³⁸⁶ Sending a child to school costs the average family 13 percent of household income,³⁸⁷ and the costs of education or lack of income accounted for economically excluding 33 percent of school-age (5 to 17 years) Colombians in 1997 and 46 percent in 2003.³⁸⁸ Additionally, 7 percent of school-age Colombians in 1997 and 6 percent in 2003 reported the need to work as a reason to forego an

³⁸² PCN Meeting, *supra* note 326.

³⁸³ Tomasevski 2004 Report, *supra* note 35, at ¶ 16.

³⁸⁴ Aside from school enrolment, all parents, including parents legally exempt from paying enrolment fees, must pay incidental educational costs, such as uniforms, books and transportation costs. Tomasevski 2003 report, at ¶ 16. (check cite); RFK Report, *supra* note 26, at 69.

³⁸⁵ Tomasevski 2004 Report, *supra* note 35, at para. 24. These costs amount to “30,000 to 40,000 pesos in elementary school and in high school 60,000, 70,000, and even 80,000 pesos.” See ARBOLEDA, *supra* note 277, at 57.

³⁸⁶ Tomasevski 2004 Report, *supra* note 35, at para. 24.

³⁸⁷ Comisión Colombiana de Juristas—*El disfrute del derecho a la educación en Colombia. Informe alterno presentado a la Relatora Especial de Naciones Unidas sobre el derecho a la educación*, Bogotá, 2004, at 53–54. Moreover, education costs are on the rise due to a series of government reforms to liberalize and privatize the educational sector, including a 1996 change that allowed for local authorities to levy fees in public schools. Tomasevski Global Report, *supra* note 295, at 200.

³⁸⁸ PROCURADURÍA REPORT 2006, *supra* note 319, at 119.

education.³⁸⁹ Moreover, students from the lowest two socioeconomic strata (categories one and two) complete an average of 5.7 years of education, while students from the highest category (six) finish more than 11 years of schooling.³⁹⁰ At the tertiary level, 95 percent of Afro-Colombians cannot afford to send their children to university.³⁹¹ In the end, the economic barriers to access education perpetuates the cycle of poverty and limits opportunities for the poor in Colombia.³⁹²

In addition to being economically inaccessible, educational institutions are not physically accessible to many Colombian children, especially rural and ethnic minority children. Indigenous leaders reported that the government requires them to have a minimum number of students to support a public school and teacher.³⁹³ This requirement is difficult to meet in rural areas where there are fewer children. Consequently, many rural and minority communities do

³⁸⁹ *Id.*

³⁹⁰ Tomasevski 2004 Report, *supra* note 35, at para. 16.

³⁹¹ Leonardo Reales Jiménez, *Afro-Colombian National Movement CIMARRON Report on the Human Rights Situation of Afro-Colombians (1994-2004)*, in MOVIMIENTO NACIONAL CIMARRON (2004).

³⁹² INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, THIRD REPORT ON THE HUMAN RIGHTS SITUATION IN COLOMBIA, ch. 3, at ¶ 14. The Committee stated that “[b]ecause the level of schooling has a direct effect on wages earned, education is an important aspect of a cycle of poverty. Children from poor families receive fewer years of education than their wealthier counterparts and, as a result, obtain lower wages at adulthood. Their families thus tend to remain poor, making it likely that their children, in turn, will benefit from fewer years of education.” *Id.* An Afro-Colombian community leader confirmed these findings:

The Constitution says that education is free, but in reality it is not free. Students are charged 25,000 pesos [\$18 USD] for the year. This is not too much. However, for many families this is a lot because they still have to pay for uniforms, transportation, books, etc. and this can become very expensive On the other hand, it costs more to continue on to high school. This is in the public schools. For the private schools, where most students attend, the schools charge [as well]. Take Agua Blanca, for example. Children arrive to the school and they have to pay There is a system of ‘seats.’ There are some spaces that are paid for, but this does not cover everyone.

PCN Meeting, *supra* note 326; RFK Report, *supra* note 26, at 69.

³⁹³ Meeting with indigenous teachers in Poblazón, Cauca, Colombia (Dec. 10, 2007) (on file with authoris) [hereinafter Poblazón Meeting].

not have any secondary schools and the closest secondary schools are not within a reasonable or safe distance from their homes.³⁹⁴

Key informant interviews with an indigenous teacher and an Afro-Colombian community leader explained the problem of physical accessibility of education. Students who want to continue on to secondary school must “leave [their] famil[ies] . . . [and] wake up at five in the morning. There are safety risks, the food is the same, and they don’t eat well It is preferable that they do not go to study.”³⁹⁵ In Afro-Colombian communities, “students cannot arrive to their schools and this is especially a problem for rural children. There are no roads. There are bodies of water to cross and this causes great difficulty. Other kids have to leave at three or four in the morning to arrive to school and they are gone until the middle of the day.”³⁹⁶ Although Afro-Colombians make up 27 percent of the population, only 10.96 percent of students who are enrolled in secondary school are Afro-Colombian.³⁹⁷

Economic and physical access to education is also a major problem for displaced Colombians. The CEDAW Committee, for instance, found that rural and displaced children were less likely to be enrolled in school or to complete an education.³⁹⁸ Once admitted through the IDP identification card process explained in Section IV.C.2 *supra*, all IDP students have to pay for the required uniforms, books and other incidental costs.³⁹⁹ For these reasons, 77 percent

³⁹⁴ ARBOLEDA, *supra* note 277, at 56.

³⁹⁵ Poblazón Meeting, *supra* note 393,.

³⁹⁶ PCN Meeting, *supra* note 326,

³⁹⁷ See VICE MINISTER OF PRESCHOOL, BASIC AND MEDIUM EDUCATION, MINISTRY OF EDUCATION, DIRECTION OF ORDER AND EQUITY (2007), available at www.mineducacion.gov (last visited Mar. 7, 2008) [hereinafter VICE MINISTER REPORT].

³⁹⁸ See Committee on the Elimination of Discrimination Against Women, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Colombia*, ¶¶ 12, 13 & 30, U.N. Doc. CEDAW/C/COL/CO/6 (Feb. 2, 2007).

³⁹⁹ WOMEN’S COMMISSION FOR REFUGEE WOMEN AND CHILDREN, *supra* note 380, at 23.

of displaced children abandon school⁴⁰⁰ and between 1.5 and 3.3 million displaced children are excluded from the educational system in Colombia.⁴⁰¹ As demonstrated by the outcome indicators, education in practice is not accessible for many Colombians, especially for vulnerable populations.

iii. Acceptability

The quality of many public educational institutions is low. First, there is a proliferation of “garage schools,” which as discussed *supra* are low-quality schools. According to Afro-Colombian leaders, there is a high prevalence of “garage schools” in Cali, a region that has a large minority population.⁴⁰² One Afro-Colombian community leader expressed that the owners of these schools “do not care whether the students learn at school as long as they are receiving the money for having a school.”⁴⁰³

Second, the quality of education is reflected in the achievement or lack of achievement of its students. Approximately half of all public schools report low levels of achievement on assessment tests.⁴⁰⁴ Students are improving in some subject areas; however, test results from recent years over time indicate a decrease in performance trends in several subject areas, including physics, chemistry and math.⁴⁰⁵ In addition, very few if any students receive high scores (above 70 percent) in any of the subjects tested. According to the Attorney General of Colombia, these test scores demonstrate a deficient situation and a crisis in the quality of basic and middle education throughout the country.⁴⁰⁶

⁴⁰⁰ SENIOR INTER-AGENCY NETWORK ON INTERNAL DISPLACEMENT MISSION TO COLOMBIA, FINDINGS AND RECOMMENDATIONS 6 (2001), *available at* www.reliefweb.int/idp/docs/reports/Colombiaiarepaug2001.pdf.

⁴⁰¹ Tomasevski 2004 Report, *supra* note 35, at ¶ 29.

⁴⁰² PCN Meeting, *supra* note 326,

⁴⁰³ *Id.*

⁴⁰⁴ *See* ARBOLEDA, *supra* note 277, at 50.

⁴⁰⁵ PROCURADURÍA 2006 REPORT, *supra* note 319, at 91–92.

⁴⁰⁶ *Id.* at 95 (2006).

Finally, the quality of the teachers also impacts the quality of the education that the students receive. More than half (52.5%) of teachers have only a secondary education, while some teachers (0.5%) have only a primary education.⁴⁰⁷

iv. Adaptability

Outcome indicators paint a mixed picture, with education increasingly more adaptable in some ways but not others. On the positive side some outcome indicators suggest that education is adaptable to the needs of the people. The overall grade repetition rate of Colombian children in primary school has decreased from 5.2 percent in 1999 to 4.1 percent in 2005, indicating that children may be attending more frequently, improving on tests or that the quality of teaching is higher.⁴⁰⁸ In addition, completion rates for primary school have increased significantly from 67 percent of children completing the fifth year of primary school in 1999 to 81 percent in 2005.⁴⁰⁹

On the other hand, a majority of all Colombian children do not complete secondary education; the average dropout age is 13 and some leave school as early as ages 8 and 9.⁴¹⁰ According to the Colombian Ombudsman, the average education desertion rate in Bogotá increased from 3.1 percent per year in 1997 to 3.8 percent per year in 2001.⁴¹¹

Additionally, although special education projects in schools must establish Special Aid Classrooms (*Aulas de Apoyo Especializadas – AAE*) with structure and curricula to adequately adapt to the needs of children with disabilities or special abilities, many schools do not

⁴⁰⁷ INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, THIRD REPORT ON THE HUMAN RIGHTS SITUATION IN COLOMBIA, ch. 13, ¶ 15 (1999).

⁴⁰⁸ UNESCO, EFA Report, Annex Table 6 295 (2008). Primary education repetition rates in 2004 [grade 1: 7.3 (7.9 m, 6.5 f); grade 2: 4.4 (4.9 m, 3.9 f); grade 3: 3.3 (3.6 m, 2.9 f); grade 4: 2.5 (2.9 m, 2.1 f); grade 5: 2.1 (2.5 m, 1.8 f)]. *Id.* at 294–95 (2008). Also, primary education dropout rates are higher—11.5 percent (12.4 percent male, 10.6 percent female)—for the first year of primary school and then significantly decrease in subsequent years. *Id.* at Annex Table 7 302 ([grade 1: 11.5 12.4 10.6; grade 2: 2.2 2.9 1.4; grade 3: 3.1 3.6 2.5; grade 4: 2.4 3.0 1.8]).

⁴⁰⁹ UNESCO, EFA Report, Annex Table 7 303 (2008). Following a single cohort completing the fifth year in 2004, UNESCO found that 75 percent (73 percent male, 77 percent female) of students completed primary school. *Id.*

⁴¹⁰ ARBOLEDA, *supra* note 277, at 60.

⁴¹¹ DEFENSORÍA DEL PUEBLO, LA DESERCIÓN ESCOLAR EN LOS ESTABLECIMIENTOS EDUCATIVOS DEL DISTRITO CAPITAL, INFORME 104 2 (2002).

implement such programs.⁴¹² For instance, in Bogotá only 28 percent of schools adopted trainings and permanent assistance to teachers and parents; only 22 percent adopted programs to combat discrimination against persons with disabilities; 21 percent implemented flexible curricula to adapt to special needs; and 27 percent implemented programs to bring services, such as transportation, food, and sporting events, to students with disabilities.⁴¹³ Moreover, programs in some districts fail because teachers are not consulted or properly trained to successfully implement such programs to adapt to the needs of children with special needs.⁴¹⁴

A serious challenge to Colombia's educational system is to provide a meaningful curricula for ethnic minority populations. Ethnic minority communities insist that the role of educational institutions continues to be one to assimilate students while negating the values, resources and cultural diversity of each community.⁴¹⁵ Many times, communities find that mayors, governors and other public officials lack knowledge or interest in the established policies to provide ethno-education; thus, ethno-education continues to be a marginalized theme in national educational policies.⁴¹⁶ Moreover, Afro-Colombian and indigenous leaders report a lack of diversity among teachers in schools; thus, students do not learn from individuals with similar backgrounds.⁴¹⁷ Others find that even when minority teachers are in schools, they are not trained to teach ethno-education or alternative curricula.⁴¹⁸ Finally, leaders argued that even if

⁴¹²See Martha María Tobón, *Integración Escolar: Utópica o Realidad?*, in 9 OCUPACIÓN HUMANA (2001). Some methods of inclusion force the children with disabilities to adapt to the classroom rather than the classroom to adapt to the children's needs. *Id.* See also DEFENSORÍA DEL PUEBLO COLOMBIA & PROGRAMA DE SEGUIMIENTO DE POLITICAS PÚBLICAS EN DERECHOS HUMANOS (PROSEDHER), LA INTEGRACIÓN EDUCATIVA DE LOS NIÑOS Y LAS NIÑAS CON DISCAPACIDAD: UNA EVALUACIÓN DE BOGOTÁ DESDE LA PERSPECTIVA DEL DERECHO A LA EDUCACIÓN 23 (2004) [hereinafter PROSEDHER].

⁴¹³ PROSEDHER, *supra* note 412, at 23.

⁴¹⁴ *Id.*

⁴¹⁵ PROCURADURÍA 2006 REPORT, *supra* note 319, at 135–36.

⁴¹⁶ *Id.* at 169–70.

⁴¹⁷ CRIC Meeting, *supra* note 374.

⁴¹⁸ PCN Meeting, *supra* note 326.

such curricula were available to teachers, they would not be free in practice to teach it because students must prepare for the standardized university entrance exam (*ICFES*).⁴¹⁹

Finally, a recent study found that only three out of every ten children who work attend school;⁴²⁰ thus, seven in ten child laborers do not receive an education. The U.S. State Department finds that 38 percent of working children are in school.⁴²¹ Another study reported that only 2,189,000 Colombian children between 5 and 17 years of age are committed exclusively to their studies, a number equal to only 20.2 percent of the total observed population of school-aged children.⁴²² This suggests that schools are not adaptable to the needs of working children.

C. Evaluating Colombia's Compliance with the Right to Education Provisions of the ICESCR

Thus far, this section has applied the "4 A" framework within the recommended system of structure, process, and outcome indicators. This analysis has shown the importance and efficacy of a rigorous and systematic application of indicators to a country that has faced a myriad of challenges in fulfilling its obligation to provide education without discrimination.

At the level of structural indicators, Colombia's Constitution and Constitutional Court interpretations of the Constitution appear to incorporate Colombia's obligations under the ICESCR, except that the Constitution conflicts with the obligation under the ICESCR to adopt

⁴¹⁹ *Id.*

⁴²⁰ DEFENSORÍA 2003 REPORT, *supra* note 286, at 178.

⁴²¹ U.S. State Department, Colombia: Country Reports on Human Rights Practices 2005 (2006), *available at* <http://www.state.gov/g/drl/rls/hrrpt/2005/61721.htm>

⁴²² REPÚBLICA DE COLOMBIA, ENCUESTA NACIONAL DE TRABAJO INFANTIL 8 (2001).

free primary education for all. The Constitution contains a provision that permits the government to charge for primary education violates Colombia's obligations under the ICESCR.

While some process indicators suggest that the Colombian government has made efforts to comply with its obligations under the ICESCR, others indicate that the State is in violation or *prima facie* violation of its obligations under the ICESCR. First, Colombia has made efforts to make education more available, but has decreased spending on education. Decreased spending indicates less availability of education. Although we do not have disaggregated statistics, we can assume that this decrease impacts all forms of education. At a time when Colombia is not fulfilling its obligation to make primary education free and when the coverage rate for primary education is less than 100 percent, by decreasing public spending on primary education, Colombia contravenes its immediate obligation to make primary education available to all. Colombia is required to make secondary and tertiary education progressively available to differing degrees. However, by decreasing spending on secondary and tertiary education, it creates a *prima facie* violation because it has adopted retrogressive measures relating to progressive obligations.

Second, while there are programs in place to improve educational accessibility, many have design failures. Most importantly, Colombia does not have any policies in place that ensure that primary education will be free. This contravenes the minimum core obligations under the ICESCR, which suggests a *prima facie* violation. Finally, Colombia has adopted policies that permit the creation of poor quality primary educational institutions. This public policy violates Colombia's immediate obligation to provide acceptable primary schools. To the extent such

policies permit the creation of poor quality secondary schools, this is a *prima facie* violation of ICESCR right-to-education obligations as well.

Outcome indicators suggest both possible compliance and noncompliance with the right to education—some suggest that the reality on the ground is consistent with Colombia’s obligations under the ICESCR while others are evidence of a deviation. First, the illiteracy rate is improving across the general population, but not among the minority groups. This disparate outcome suggests a violation of Colombia’s immediate obligation to ensure that there is non-discrimination and equality in education. Outcome indicators also suggest disparities among protected groups in secondary and tertiary education. Second, as predictable from the fact that the Constitution permits the State to charge for public primary education, many students and parents who cannot afford to do so still have to pay primary education tuition. This is a violation of Colombia’s obligation to provide free primary education as a minimum core obligation. Third, there has been a proliferation of low quality schools that are sanctioned by government policy. This contravenes the immediate obligation to provide acceptable primary education. Yet, test scores in national achievements tests are increasing in some subjects while decreasing in others. Fourth, although the completion rates for primary education are increasing, they are very low for secondary education. Therefore, although Colombia has made strides in improving educational access, it is not in compliance with its many of the obligations relating to the right to education.

Having reviewed our findings, we may now see the advantages of combining the structure-process-outcome indicators with the “4 A” framework. The primary advantage of this system of indicators is its increased precision in focusing on exactly what causes compliance or

non-compliance with states' human rights obligations. In this instance, for example, we see that Colombia's failure to comply with its ICESCR obligations is not necessarily in the structural Constitution (though there is one flaw) or in the interpretations of the Constitutional Court. The framework demonstrates the progressive nature of the new Constitution and rulings of the Court. However, it also isolates the process by which education is administered and the relevant data that constitute outcome indicators, divided among the 4 A's. In so doing, this framework reveals precisely how the government has failed Afro-Colombian and indigenous populations.

More generally, this analysis provides precise parameters with which to measure Colombia's future compliance with the ICESCR. For example, as noted above, a member of the Ministry of Education has discussed the Ministry's plans to ultimately eliminate garage schools as part of a larger effort to reduce regional and ethnic educational disparities. How realistic are these plans, and how effective will these programs be? Is the Colombian government complying with its obligation to provide education without discrimination? This framework offers a means to measure Colombia's progressive realization (or lack thereof) in the future.

V. Limitations of Using Indicators

Although the benefits of employing indicators to measure compliance with ESCRs are enormous, there are many challenges associated with using them. We briefly review certain limitations to using indicators in hopes of provoking further academic debate and scholarship while also providing a cautionary note to human rights practitioners.

We encountered several issues in applying the framework of indicators to assess Colombia's compliance with the ICESCR. First, indicators have a problem known as "slippage"—they do not precisely or entirely measure the concept they are designed to assess. In

other words, indicators serve as proxies to measure concepts that are difficult, if not impossible to measure.⁴²³ For example, the availability of legal assistance in a country might serve as an indicator to measure whether trials are fair. Legal assistance, however, is only one component of fair trials; thus, legal assistance alone does not completely capture or entirely measure the concept. In our case study, we used the education level of teachers as a measure for the quality of education. This single indicator, however, does not fully capture the entire concept. As a result of slippage, employing indicators to measure the fulfillment of human rights can lead to imperfect or incomplete assessments of State compliance or non-compliance with treaty obligations.

Second, different researchers or organizations may not use the same indicators, or may define the same indicator differently, to measure the same concepts and consequently, achieve very different results.⁴²⁴ As a result of these varying definitions of the same indicator, each agency reported a different result. In this particular case, the Census Bureau found an illiteracy level of 1 percent in the United States, while the Department of Education found an illiteracy level of 13 percent.⁴²⁵

The above example illustrates the need for concepts and indicators to be clearly defined and their units to be clearly bounded and exclusive.⁴²⁶ Moreover, it demonstrates the importance of clearly defining and establishing indicators from the outset that will be used universally to measure a particular concept. Otherwise, stakeholders will use different definitions of the same

⁴²³ De Beco, *supra* note 16, at 39.

⁴²⁴ Russel Lawrence Barsh, *Measuring Human Rights: Problems of Methodology and Purpose*, 15 HUM. RTS. Q. 87 (1993).

⁴²⁵ Robert Justin Goldstein, *The Limitations of Using Quantitative Data in Studying Human Rights Abuses*, in HUMAN RIGHTS AND STATISTICS: GETTING THE RECORD STRAIGHT 40, (Thomas B. Jabine and Richard P. Claude eds., 1992).

⁴²⁶ Barsh, *supra* note 424, at 90.

indicator or different indicators altogether to reflect their own political needs. In the end, this practice may create disagreement over the best definition for a particular indicator instead of creating a meaningful dialogue to improve compliance where a statistic accepted by all has demonstrated a rights violation.

Third, there are numerous difficulties associated with developing surveys, collecting information and compiling data that may be needed for indicators. In many cases, historical data for indicators may be difficult to obtain, while, in other cases, up-to-date data may not exist at all.⁴²⁷ In many instances, States either do not maintain quality data collection systems or do not make their data available to the public.⁴²⁸ As a result, it may be impossible to use a particular indicator without investing resources and time into collecting and analyzing the relevant data.

Even where there are current census results, those data may reflect the situation in the country as it was several years ago. It can take a team of trained professionals to develop an appropriate survey instrument and years to properly and accurately collect, compile, analyze and disseminate the results of a national census or survey. This means that the data results are actually measuring past events and trends, rather than present conditions or situations. In addition, to the extent a government is responsible for compiling data, it may have an incentive to stall or refuse to release results, or even to produce inaccurate data.⁴²⁹ Finally, the data may not be disaggregated among relevant sub-groups within society. Relying on government data is many times less than ideal because the State has a particular interest in the data; however, conclusions based on the government's own statistics can be extremely compelling for drawing

⁴²⁷ Goldstein, *supra* note 425, at 41.

⁴²⁸ For example, when the authors conducted their research in Colombia, the National Administrative Department of Statistics (DANE) either did not keep disaggregated statistics or did not release relevant statistics related to education at the primary, secondary, and tertiary levels, nor did they have complete information on regional or ethnic distribution of education.

⁴²⁹ Barsh, *supra* note 424, at 102.

conclusions about whether or not the State is complying with its treaty obligations since the government will be less likely to refute the results.

In our case study of Colombia, this challenge is pervasive. Due to a number of disagreements about concepts and measurement, Colombia has only recently released data from its most recent census taken in 2005.⁴³⁰ Additionally, we rely on the government agency, the National Administrative Department of Statistics DANE, to release the data in the method and analysis of its choosing. In many cases, the raw data are not available to the public, government data are not disaggregated, or the government does not provide data for many indicators we would ideally use for evaluating compliance with the right to education.

Additionally, it is difficult to get the data for the same indicator over time. Without data over time, it is difficult to measure progressive realization. Even when data exist for certain indicators, it is necessary to compare the same information collected over a period of time in order to evaluate progress of States parties toward full realization of the right. These data must not only measure the same result; they must also be collected in the same manner in order to accurately draw conclusions from research findings. Possible solutions to overcome the problems of inadequate, unavailable or unreliable statistics may be to advocate for improved government surveillance systems and systematic measurement methods, to involve civil society in the process of formulating the census and other survey instruments and methods, and to exercise the right to access the collected data to formulate indicators and independently analyze results.

⁴³⁰ DANE, *Censo de 2005*, available at <http://www.dane.gov.co/censo/files/libroCenso2005nacional.pdf>.

Fourth, without setting benchmarks for indicators, it is difficult to measure progressive realization. And without government cooperation it is difficult to set benchmarks. Thus, indicators can be useful in measuring progressive realization only to the extent that States cooperate in agreeing to benchmarks for progressive realization. This challenge proved to be a limitation of our study.

Finally, there are difficulties associated with using indicators to determine whether or not State has breached its obligations under the Covenant. For the same obligation, one indicator may show improvement while another indicator suggest a retrogression or a failure to satisfy immediate obligations. For example, in our case study, in terms of the quality of education, there has been a growth in poor quality schools, however, test scores in some subjects have increased, which suggests an improvement in quality.

It is important to point out these limitations to inform other studies attempting to measure compliance with ESCRs. Despite these limitations, however, indicators remain a powerful tool to use to measure treaty compliance, to pinpoint State failures and to provide guidance for future treaty compliance where violations are found.⁴³¹

⁴³¹ In a forthcoming article, Soga and Satterthwaite articulate several concerns with indicators. Ann Janette Rosga & Margaret L. Satterthwaite, *The Trust in Indicators: Measuring Human Rights*, 27 BERKELEY J. INT'L L. __ (2009) (publication forthcoming). *Id.* They note the challenge of quantifying any information pertaining to a right, a process that itself involves policy decisions regarding what may be “counted” and is therefore not objective nor “apolitical.” *Id.* This problem, they claim, is related to the larger problem of indicators threatening to close the “fruitful gap” that exists between international law and domestic policy. *Id.* They believe that states may shy away from the most effective national programs and instead opt for those that most easily translate into measurable statistics.

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

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

VI. Conclusion

At the beginning of this Article, we noted the importance of human rights to international law and the ways in which economic, social, and cultural rights are increasingly—and deservedly—occupying the attention of international law scholars, practitioners, and international organizations. Yet this increased attention also begs the question of how the international community may hold states accountable for their progressive realization obligations under treaties such as the International Covenant on Economic, Social, and Cultural Rights (ICESCR). Indeed, when a country becomes State party to a treaty, it is making legally-binding and enforceable law. Using indicators to measure treaty compliance attempts to give teeth to economic, social and cultural rights that may still be considered nonjusticiable or “soft” promises. As the Optional Protocol to the ICESCR moves ever closer to full implementation, future States parties will allow individuals to petition the Committee on Economic, Social and Cultural Rights for alleged ESCR violations. With these new mechanisms for enforcement of ESCRs will come an even more pressing need to apply such frameworks in order to determine with some evidence base and legitimacy the progressive duties of States, rights of individuals and rights of groups under the Covenant.

The useful framework combination that we propose may be the most effective means yet of preparing for the advent of these new mechanisms of ESCR enforcement. By incorporating the “4 A” framework with the structure-process-outcome indicators, we provide a diagnosis for

are nonetheless effective to demonstrate State compliance with the ICESCR. For example, Colombia’s 1991 Constitution marked a drastic shift in Colombia’s fundamental legal framework, one that would immediately be reflected as a structural indicator but would not necessarily translate into easily measurable data. Despite this lack of quantifiability, the change was be a clear sign of progressive realization for Colombia with regard to a variety of ESCRs.

the issues that States parties face rather than simply denouncing the government's failures. This gives legitimacy to the analysis and, more importantly, offers a constructive dialogue to continue working toward the ultimate goal: to ensure the State party's fulfillment of its economic, social and cultural rights obligations and to protect individuals' enjoyment of their economic, social and cultural rights.

APPENDIX 1: INDICATORS TO MEASURE STATE PARTY COMPLIANCE WITH RIGHT TO EDUCATION OBLIGATIONS UNDER THE ICESCR

	STRUCTURAL INDICATORS	PROCESS INDICATORS	OUTCOME INDICATORS
1. AVAILABILITY	<p>Existence (or nonexistence) of constitutional provision(s), Case law precedent and/or national legislation requiring an adequate number of schools within a reasonable distance from all school-age students in the population at the primary, secondary and tertiary levels.</p> <p>Existence (or nonexistence) of a plan of action for a national education strategy.*</p> <p>Existence (or nonexistence) of constitutional provision(s), Case law precedent and/or national legislation requiring an adequate number of spaces in primary schools for each eligible primary age student.</p> <p>Existence (or nonexistence) of constitutional provision(s), Case law precedent and/or national legislation requiring adequate facilities (potable water, sanitation, materials, etc.) and number of teachers in schools at the primary secondary and tertiary levels.</p> <p>Existence (or nonexistence) of constitutional provision(s), Case</p>	<p>State adoption (or not) of a national educational strategy which includes provisions for secondary, higher and fundamental education.</p> <p>The proportion of the State's GDP that is allocated to education.*</p> <p>Broken down by region and state or province, the proportion of the budget that is allocated to primary education, secondary education, vocational training, higher education, teacher training, special disbursements to improve gender balance, and targeted aid to the poor localities.*</p> <p>The proportion of government expenditure that is spent on education and expenditure per pupil, with data disaggregated by urban/rural location for each level of education.* (at the primary, secondary and tertiary levels)</p> <p>The proportion of funding that is allocated to provide for construction and maintenance of schools. (at the primary, secondary and tertiary levels)</p> <p>The policies or legislation that are in place regarding recruitment, training, and pay for teachers. (for</p>	<p>The number and proportion of schools per capita throughout the country broken down by rural/urban and region; number and proportion that are available to all at the primary level; number and proportion that are available to all at the secondary level; number and proportion that are available to all who are capable at the tertiary level.</p> <p>Number and proportion of communities/ schools/classrooms are without teachers broken down by rural/urban and region at the primary level.</p> <p>Number and proportion of teachers in all classrooms (adequate number necessary for availability requirements) at the secondary and tertiary levels.</p> <p>The pupil/teacher ratio for primary, secondary and tertiary education, with breakdowns for public and private education and in urban and rural areas.*</p> <p>The disaggregated proportion of primary/secondary schools by rural, urban, public, private and by region of the following: schools</p>

APPENDIX 1: INDICATORS TO MEASURE STATE PARTY COMPLIANCE WITH RIGHT TO EDUCATION OBLIGATIONS UNDER THE ICESCR

	<p>law precedent and/or national legislation requiring uninterrupted, adequate government funding for education at the primary, secondary and tertiary levels.</p> <p>Existence (or nonexistence) of constitutional provision(s), Case law precedent and/or national legislation requiring uninterrupted, adequate government funding for teachers' salaries at the primary, secondary and tertiary levels.</p>	<p>primary, secondary and tertiary level teachers)</p> <p>Salaries of teachers as compared to other professions, disaggregated by gender and urban/rural location for each level of educational system and further broken down by public/private education.</p> <p>Existence (or nonexistence) of adequate salary for primary, secondary and tertiary level teachers.</p> <p>Teachers' pay in certain regions relative to other regions.*</p> <p>Proportion of teachers paid on time by region. *</p> <p>The wage gap between teachers in private schools and those in public schools at the primary, secondary and tertiary levels.*</p>	<p>with buildings in disrepair, schools that have a shortage of classrooms, schools that have inadequate textbooks, schools with no water within walking distance, schools with lack of access to sanitary facilities, schools with inadequate toilet facilities, and number of schools with lack of access to library facilities.</p> <p>The net enrolment rate (proportion of eligible children attending school) with separate data for primary, secondary, and tertiary levels of education. (also disaggregated data by gender, urban/rural, ethnic group, and public/private education)</p>
<p>2. ACCESSIBILITY</p>	<p>Existence (or nonexistence) of constitutional provision(s), Case law precedent and/or national legislation providing free and compulsory primary education for all, free secondary education and free tertiary education. (duration of compulsory education period)</p> <p>Existence (or nonexistence) and scope of constitutional provision(s), Case law precedent and/or national legislation providing for equal and</p>	<p>Whether or not public policy measures have been taken to remove gender bias from primary education primers, remove gender bias from teacher educational strategies, remove gender bias in terms of male and female roles in school, remove general bias in terms of general-targeted optional subjects.</p> <p>To what extent the State allocates resources for alternative means of education for extremely isolated</p>	<p>In each case below, disaggregated by rural/urban, income, gender, and ethnic groups:</p> <p>The proportion of school age children who are not in school at the primary, secondary levels (for all who are capable at the tertiary level) and the trends for these ratios over time (especially for secondary and tertiary education).</p> <p>The proportion of all students who have to pay for primary education</p>

APPENDIX 1: INDICATORS TO MEASURE STATE PARTY COMPLIANCE WITH RIGHT TO EDUCATION OBLIGATIONS UNDER THE ICESCR

	<p>non-discriminatory access to education.</p> <p>Existence (or nonexistence) of constitutional provision(s), Case law precedent and/or national legislation recognizing the importance of physical accessibility of education for all at the primary and secondary levels, as well as for all who are capable at the tertiary level.</p> <p>Existence (or nonexistence) of constitutional provision(s), Case law precedent and/or national legislation recognizing the right of persons with disabilities, of other populations with special needs (IDPs, working children) to education for all at the primary and secondary levels, as well as for all who are capable at the tertiary level.</p> <p>Existence (or nonexistence) of constitutional provision(s), Case law precedent and/or national legislation allowing the government to close schools in times of political tension (contravening article 4 of the ICESCR).</p>	<p>geographic localities (e.g., use of plans for satellite learning) at the primary, secondary and tertiary levels.</p> <p>Whether or not the government collects disaggregated data on the basis of age, sex, urban/rural location, income, language or disabilities.*</p> <p>Whether or not the government implements effective affirmative action policies to improve enrollment rates and completion rates for minorities.</p> <p>The existence (or nonexistence) of regulations permitting charges for any of the following in primary and secondary schools: enrollment fees, tuition fees, uniforms, school supplies, school meals, and school transport? At the primary level? enrollment fees, tuition fees, uniforms, school supplies, school meals, and school transport.</p> <p>If the government has not secured primary education, free of charge, within two years of signing the ICESCR, whether or not it has adopted a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle</p>	<p>and, for these families, the average expenditure for education (direct costs and some indirect costs, like compulsory levies—even when portrayed as voluntary—on parents and relatively expensive school uniforms).</p> <p>The proportion of students who have to travel more than a reasonable or safe distance to reach primary school* and secondary school, and the proportion of all capable students who have to travel more than a reasonable or safe distance to reach tertiary school.</p>
--	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

APPENDIX 1: INDICATORS TO MEASURE STATE PARTY COMPLIANCE WITH RIGHT TO EDUCATION OBLIGATIONS UNDER THE ICESCR

		of compulsory primary education free of charge for all.	
3. ACCEPTABILITY	<p>Existence (or nonexistence) of constitutional provision(s), Case law precedent and/or national legislation ensure that education conforms to the following objectives: 1) to be directed to the full development of the human personality and the sense of its dignity; 2) to strengthen the respect for human rights and fundamental freedoms; 3) to enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups; and 4) to further the activities of the United Nations for the maintenance of peace.</p> <p>Existence (or nonexistence) and scope of constitutional provision(s), Case law precedent and/or national legislation providing for free choice and (minimum standards of) acceptability for all levels of education for public and private institutions.</p> <p>Existence (or nonexistence) of constitutional provision(s), Case law precedent and/or national legislation providing for the monitoring and evaluation of</p>	<p>Whether or not the State has methods for measuring acceptability (e.g., standardized test scores, inspection of facilities) and, if so, how often they are applied and monitored.</p> <p>Whether or not the State conducts regular assessments of educational needs, and if so, what this entails.</p> <p>Whether or not the required level of teacher training and certification is broken down by region. Whether or not these standards are used and enforced.</p> <p>Whether there have been efforts to train teachers.</p> <p>The expenditure per pupil in private school v. public school.</p> <p>Whether the State sets minimum standards relating to education, including health, safety, and quality.</p> <p>Whether the State has mechanisms in place to investigate complaints on the right to education.*</p>	<p>Proportion of children who attend private schools as compared to public schools.</p> <p>Proportion of children are attending facilities that do not meet State requirements in terms of quality standards.</p> <p>The repetition and drop out rates at the primary, secondary and tertiary education levels, as well as the trends over time.</p> <p>Average students' scores on standardized tests and whether or not there exist facilities that do not meet standards.</p> <p>Literacy or illiteracy levels as well as the trends over time.*</p>

APPENDIX 1: INDICATORS TO MEASURE STATE PARTY COMPLIANCE WITH RIGHT TO EDUCATION OBLIGATIONS UNDER THE ICESCR

	<p>teachers and/or qualifications or certification requirements for teachers.</p> <p>Existence (or nonexistence) of constitutional provision(s), Case law precedent and/or national legislation providing for continuing education or trainings for teachers.</p> <p>Existence (or nonexistence) of constitutional provision(s), Case law precedent and/or national legislation providing for school accreditation and regular inspection.</p> <p>Existence (or nonexistence) of constitutional provision(s), Case law precedent and/or national legislation providing for periodic testing of students to assure quality of the educational content.</p>		
<p>4. ADAPTABILITY</p>	<p>Existence (or nonexistence) and scope of constitutional provision(s), Case law precedent and/or national legislation providing for adaptability of all education to accommodate individual children's special needs.</p> <p>Existence (or nonexistence) of constitutional provision(s), Case law precedent and/or national legislation ensuring the right to retention in the education system.</p>	<p>Whether or not the official curriculum includes units on human rights education and values such as respect for human dignity, non-discrimination and equal status before the law.</p> <p>The existence and scope of policies that providing for recruitment of and training for bilingual teachers.</p> <p>The existence and scope of policies and programs implemented to provide for ethno-</p>	<p>The number and proportion of bilingual, ethno-education, and special education teachers in place per primary school child, and whether this differs according to geographic region (also for secondary and tertiary education)</p> <p>Number and proportion of children who work attend school in the population (at the primary, secondary and tertiary levels)</p> <p>The enrolment rates for students with various special needs.</p>

APPENDIX 1: INDICATORS TO MEASURE STATE PARTY COMPLIANCE WITH RIGHT TO EDUCATION OBLIGATIONS UNDER THE ICESCR

	<p>Existence (or nonexistence) of constitutional provision(s), Case law precedent and/or national legislation recognizing the liberty of individuals and groups to establish and direct educational institutions, subject to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the state.</p> <p>Existence (or nonexistence) of constitutional provision(s), Case law precedent and/or national legislation expressly recognizing the right of parents to choose for their children schools other than those established by public authorities when such schools conform to the minimum requirements of the state.</p> <p>Existence (or nonexistence) of constitutional provision(s), Case law precedent and/or national legislation recognizing the right of parents to ensure religious and moral education of children in conformity with their own convictions.</p> <p>Existence (or nonexistence) of</p>	<p>education for minorities, special education for children with disabilities, night classes for working students, etc. Whether there are teacher trainings or certifications to teach ethno-education, special education, etc.</p>	<p>The dropout rates for students with various special needs.</p>
--	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------

APPENDIX 1: INDICATORS TO MEASURE STATE PARTY COMPLIANCE WITH RIGHT TO EDUCATION OBLIGATIONS UNDER THE ICESCR

	<p>constitutional provision(s), Case law precedent and/or national legislation mandating respect in educational system for the culture and religious practices of various groups and communities in the society.</p> <p>Existence (or nonexistence) of constitutional provision(s), Case law precedent and/or national legislation denying academic freedom to staff and/or students</p>		
--	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--	--

*Outcome indicators marked with an asterisk may relate to one or more of the categories specified herein—availability, accessibility, acceptability and/or adaptability. For instance, many availability indicators can also measure accessibility or acceptability as well. The specific situation/context of the State being analyzed will help to ascertain to which attribute or attributes of the right these indicators relate.