



REAPPRAISING THE CORE LEGAL INSTRUMENTS PROTECTING THE RIGHT TO EDUCATION UNDER INTERNATIONAL LAW*****

Abstract

Education, throughout man's history, has been considered and regarded as both an end itself as well as a means for the full growth of the society and individuals. The acknowledgement and/or recognition of education as a human right emanated from its invaluable and indispensability to the preservation and enhancement of the inherent dignity of the human person. Although education as a human right was historically first laid down in 1948 in article 26 of the Universal Declaration of Human Rights (UDHR), the condition and situation of education in many States honestly leaves much to be desired. This has made one to keep wondering whether this said right to education has any adequate protection in the *corpus* of international law. This Article sought to critically examine the right to education as enshrined in the different international legal instruments both at the regional and international levels. The study x-rays the legal obligations of States towards actualizing the right to education. It is argued among other things that it is not just enough for States to be signatories to the legal instruments protecting right to education but should transform the respective core legal instruments to their respective legal order to ensure that the right is realized and actualized.

Keywords: Legal Instruments, Education, Right to Education, International Law.

1. Introduction

Aside from its obvious neglect in practice, the right to education has been officially recognised and acknowledged at the international level in several international and regional human rights instruments adopted after the Second World War.¹ The United Nations (UN) Charter enjoins the UN to promote 'international cultural and educational cooperation' for peaceful and friendly relations among nations.² Interestingly, all the United Nations members have pledged to take joint and separate action in co-operation with United Nations Educational, Scientific and Cultural Organization (UNESCO) for the achievement of the purposes of the UN, including the promotion of educational co-operation.³ It is clearly provided in the UN Charter that one of the purposes of the United Nations was to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without discrimination as to race, sex, language, or religion.⁴

It is abundantly clear that in the charter, the right to education was not expressly defined. However, it was implied by reference to 'international problems' of economic, social and cultural character. In addition to this, the reference in the Charter to "the promotion of human rights for all without discrimination," prepared the way for the future development of the non-discriminatory

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M Ssenyonjo, *Economic, Social and Cultural Rights in International Law*. (USA/Canada: Hart Publishing Ltd. 2009) p. 359.

² UN Charter, Art. 55(b).

³*Ibid*, art. 56.

⁴*Ibid*, art.1(3).



nature of the right to education, as shown below by the later human rights instruments that followed the UN Charter.⁵

The UN Charter provided a basis for the creation of a specialised agency in the fields of education and culture. As a result, UNESCO was established on 16 November 1945. In its preamble, the UNESCO Constitution states *inter alia*:

the education of humanity for justice and liberty and peace are indispensable to the dignity of man and constitute a sacred duty which all the nations must fulfil in a spirit of mutual assistance and concern; . . . the States Parties to this Constitution, believing in full and equal opportunities for education for all, in the unrestricted pursuit of objective truth, and in the free exchange of ideas and knowledge, are agreed and determined to develop and to increase the means of communication between their peoples and to employ these means for the purposes of mutual understanding and a truer and more perfect knowledge of each other's lives.⁶

The right to education, therefore, is at the core of UNESCO's Constitution given that it is considered to be a duty all States are obliged to 'fulfil.' This article, amongst other things, will examine some core legal instruments that protect the right to education both at the international and regional levels.

2. Conceptual Clarifications

a. Legal Instruments

Legal Instrument has been defined as "a legal term of art that is used for any formally executed written document that can be formally attributed to its author,⁷ records that formally expresses a legally enforceable act, process,⁸ or contractual duty, obligation, or right,⁹ and therefore evidences that act, process, or agreement.¹⁰ Legal instruments means legislative and statutory provisions, contracts, unilateral legal acts, payment instruments other than banknotes and coins, and other instruments with legal effect.¹¹

The United Nations (UN) initiated a number of international legal instruments concerning education which have been since adopted after the end of World War II. Such standard-setting legal instruments includes conventions, Declarations, Recommendations, Frameworks for action and charters.

b. Education

Education has to do with an activity purposefully directed at achieving certain aims such as passing knowledge transmitting or fostering skills and character traits. Education is the prerequisite for

⁵M Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (USA/Canada: Hart Publishing Ltd, 2009) P. 359.

⁶ UNESCO Constitution, adopted in London on 16 November 1945 and amended by the General Conference, 52 UNTS 275–302, available at <http://www.unesco.org>

⁷"Law Glossary", The K-zone, S.V. "instrument", retrieved on 19 May 2009: "Sample living trust masters business at Kevin boon.com. Accessed 15/02/2023.

⁸ Collaborative International Dictionary of English V.O. 44, S.V. "Instrument". Accessed 15/02/2023.

⁹ Instrument Oxford Dictionary of Law. Oxford University Press. Accessed 15/02/2023.

¹⁰ Barronis Law Dictionary, S.V. "instrument".

¹¹ Law Insider. <https://www.lawinsider.com/dictionary/legal-instruments>. Accessed 15/02/2023.



individual to function fully as a human being in modern society.¹² It is the fundamental building block for human development.¹³

In *Brown v Board of Education*,¹⁴ the Supreme Court of the United States of America stressed on the importance of education for the performance of public responsibilities, and for the due exercise of citizen's rights. The court pointed out that a well-educated citizenry is critical for the maintenance of democratic structures and ideas. Education is a significant element of human capital and it is considered a "multiplier right."¹⁵

c. Right to Education

The right to education is a fundamental human right. The right has been universally recognized and acknowledged since the Universal Declaration of Human Rights in 1948. It is considered a human right because it constitutes or forms part of the core components that improve the human worth.

It is right to education that gives meaning to and enhances the appreciation and enjoyment of the other rights such as right to life, right to freedom of expression, right to freedom of association, right to freedom of movement etc. Education takes on the status of human right because it is integrated to and enhances human dignity through its fruits of knowledge, wisdom and understanding.¹⁶ Right to education is the most evident example reflecting the universality, interrelatedness and indivisibility of human rights as it has been characterized as implying two different aspects: the social aspect and the freedom aspect.¹⁷

d. International Law

This refers to the legal system governing the relationships between nations; more modern, the law of international relations, embracing not only nations but also such participants as international organizations and individuals (such as those who invoke their human rights or commit, war crimes).¹⁸

International law or the law of nations, according to Jessup, must be defined as law applicable to states in their mutual relations and to individuals in their relations with states.¹⁹

3. International Legal Instruments on Right to Education

3.1. Universal Declaration of Human Rights, (UDHR)

The Universal Declaration of Human Rights (UDHR) provides for a general right to education.²⁰ The UDHR by virtue of Article 26 specifically provides as follows:

1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

¹² R P Claud, "The Right to Education and Human Right Education: *SUR International Journal on Human Rights*, 2005, P. 37.

¹³ K Singh, "Right to Education and Equality of Educational Opportunities", *Journal of International Cooperation in Education*, 2014, vol. 16(2) P. 5.

¹⁴ 347 U.S. 484,1954.

¹⁵ K Akbariav and M Tehrani, The Role of International Law in Protection against Attacks on Children's Education Rights in Armed Conflict, *Journal of Politics and Law* Vol. 13 No. 3 2020.

¹⁶ R P Claude, "The Right to Education and Human Right Education": *SUR International Journal on Human Rights*, 2005, P. 37.

¹⁷ E Koch, *Human Rights as Indivisible Rights: The Protection of Socio-Economic Demands under the European Convention on Human Rights*. (Martins: Nijhoff Publishers, 2009) P. 151.

¹⁸ B A Garner, *Black's Law Dictionary*, (US; Thomson West Publishing Co, 2004) P. 835.

¹⁹ P C Jessup, *A modern Law of Nations* 17 (1949).

²⁰ The UDHR was adopted in 1948.



2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
3. Parents have a prior right to choose the kind of education that shall be given to their children.
4. Article 26(1) reflects the social aspect of the right to education. It expects the state to attend positively to the realisation of the various levels of education. Generally, states have a wide latitude in determining how to go about realising the economic, social and cultural rights of the UDHR. Applied to article 26(1), states may set priorities when it comes to implementing a system of education. It needs to be appreciated, however, that article 26(1) prioritises the realisation of education at the elementary level. Article 26(1) requires that “. . . education shall be free, at least in the elementary and fundamental stages . . .” It is submitted that the implementation of elementary education in article 26(1) is subject to the notion of progressiveness to a far lesser extent than that of secondary and higher education.²¹ It will be difficult, therefore, for a state to discharge the onus of proving that it has not complied with its duty of realising elementary education because of a scarcity of resources.

In Article 26(2) of the UDHR, the aims of education are set out to include:

1. the full development of the human personality;
2. the strengthening of respect for human rights and fundamental freedoms;
3. the promotion of understanding, tolerance and friendship among all nations, racial and religious groups; and
4. the furtherance of the activities of the UN for the maintenance of peace.

The total and complete growth of the human personality encompasses and includes the general ethical aim of education. The human personality covers all dimensions of the human being: physical, intellectual, spiritual, psychological and social. Education must strengthen respect for human rights and fundamental freedoms. This requires at least an education that is not in contradiction with the UDHR.²²

Article 26(3) of the UDHR guarantees “the prior right²³ of parents to choose the kind of education that shall be given to their children.” Article 26(3) reflects the freedom aspect of the right to education. Article 26(3) further protects the right of parents to choose the school which their children should attend. There also exists a right to establish and direct private educational institutions. The education provided at such institutions must, however, conform to the minimum standards laid down by the state.²⁴ Even if the UDHR is of a non – binding nature as a resolution of the UN General Assembly, scholars have supported and emphasized the nature of customary law of the UDHR²⁵ and therefore that the right to education, namely the right to free and compulsory

²¹ *Ibid.*

²² *Ibid.*

²³ The concept of a “prior right” envisages that the right accrues to parents in the first place. The obligation of State parties in this respect is of a subsidiary nature. Parents are given a “prior right”, so that pluralism take prominence prevail in education. Assuming parents were not given such a right, it would not be a problem for the state to promote its political and philosophical ideas in education. The *raison d'être* of Article 26(3) is to provide protection against state indoctrination.

²⁴ K D Beiter, K. D. 2006. *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.* (Martinus Nijhoff Publishers, 2006) P. 93.

²⁵ J O Oraa, The Legal Value of the Universal Declaration. *International Protection of Human Rights: Achievement and Challenges, 2006.* F G Isa and K D Feyter, Eds. University of Deusto., 117-132.



primary education and the right not to be discriminated against in the enjoyment of the right to education forms part of customary law.

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

The right to education as a universal human right was in 1996 incorporated and enshrined into legally binding provisions of Article 13 and Article 14 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which are more elaborative and thus considered as constituting a codification of the right to education in international law. Unlike the UDHR which is a UN General Assembly Resolution of non-binding nature, the ICESCR is an International Convention which imposes legally binding obligations on State Parties.²⁶

Article 13 of the ICESCR provides that:

1. The States Parties to the present Covenant recognise 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 recognise that, with a view to achieving the full realisation of this right:
 - (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.

Under Article 13(1), states parties recognise every person's right to education.

²⁶D E Balanescu, Safeguarding Education Beyond Borders. *ICL Journal*. Retrieved Jul. 10, 2018, from <https://icl-journal.com/download/aad59e91b493d805d770d3bdd8034f38/ICL.pdf> p 8.



The provision goes on to set out the aims of education. It repeats the aims mentioned in article 26(2) UDHR,²⁷ but makes two additions. Firstly, it refers to the development of the human personality and the sense of its dignity. Secondly, it states that education should enable all persons to participate effectively in a free society. This aim appears to require that education must not solely be theoretically oriented but that it must also teach students how to satisfy their practical needs in life. Article 13(2) (a) directs that primary education be compulsory and free to all, article 13(2)(b) that secondary education be made generally available and accessible to all and article 13(2)(c) that higher education be made equally accessible to all, on the basis of capacity.

Concerning secondary and higher education, accessibility is to be realized “by every appropriate means, and in particular by the progressive introduction of free education.” Article 13(2) (d) requires that fundamental education be encouraged or intensified as far as possible in terms of article 13(2)(e), a system of schools at all levels must be developed, a fellowship system be established and the material conditions of teaching staff be improved.

Article 13(2) lays down State obligations with regard to the education system, which are defined by reference to the criteria of the availability and accessibility of education. Article 13(2)(a) on primary education (elementary education in the UDHR) endorses the rigorous standard formulated in article 26(1) UDHR. Primary education must be compulsory and free to all. The requirement that primary education be compulsory implies that such education must be generally available. Primary education clearly can only be made compulsory if there are sufficient schools to take on all pupils. The requirement that primary education be free means that such education must be generally accessible. Once school fees have been abolished, the most important obstacle to admission has been eliminated.²⁸

Article 14 guides state action in respect of the realisation of compulsory and free primary education. It effectively limits progressive realisation to two years plus additionally a reasonable number of years which must be clearly specified. By doing so, it confirms that the legal obligation contained in article 13(2)(a) is “stronger” than the other legal obligations under article 13(2).

3.3. The Convention on the Rights of the Child, (CRC)

In 1989, the Convention on the Rights of Child was adopted but it entered into force on 2nd September, 1990. There is no doubt that children are a vulnerable group in the society. Due to their tender age, they are basically not in a good stead to effectively articulate the rights which are accruable to them and to successfully enforce them. More so, children do not have a lobby which is committed to promoting the rights of children.²⁹ Human Rights Advocates believe that every child has a right to education.³⁰ Upholding and defending every child’s right to education is one way to advance every child’s chance to get at least a minimal level of protection and support as the child develops. It is an inert claim, however, to state that a child has a right to education if there are no

²⁷ Like Art. 26(2) UDHR, art. 13(1) ICESCR mentions the following aims of education: 1. the full development of the human personality, 2. the strengthening of respect for human rights and fundamental freedoms, 3. the promotion of understanding, tolerance and friendship among various groups and persons and 4. the development of respect for the principles enshrined in the UN Charter.

²⁸ K D 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* (Martinus Nijhoff Publishers, 2006) P. 96.

²⁹ *Ibid.*

³⁰ This belief is basically based on two premises. First, right advocates endorse the right to education because they believed that if children receive basic primary education, they will likely be literate and numerate and will have the basic social and life skills necessary to secure a job, to be an active member of a peaceful community, and to have a fulfilling life. Second, the rights advocate recognises that, despite this recognition of education as a right by the UDHR, for example, many children fail to benefit from even basic education.



means for the child to realise this claim.³¹ It is based on this background that the United Nations has made an effort to work out the particularities of the application of human rights to children. The United Nations has adopted the Declaration of the Rights of the Child in 1959³² and the Convention on the Rights of the Child in 1989.³³ The two Declaration and Convention have provisions on the right to education.³⁴

The Convention on the Rights of the Child provides for the rights of the child in a more elaborative way. In the Article 1 of the Convention, child is defined as “every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.”³⁵ The Convention, provides four general principles, which must guide the interpretation of the CRC’s rights provisions, also those on the right to education: non-discrimination,³⁶ the best interest of the child³⁷, the right to life, survival and development,³⁸ and the right to express views and have them taken into account.³⁹ It is provided in Article 28 of the Convention on the Rights of Child that:

1. States Parties recognise the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:
 - (a) Make primary education compulsory and available free to all;
 - (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
 - (c) Make higher education accessible to all on the basis of capacity by every appropriate means;
 - (d) Make educational and vocational information and guidance available and accessible to all children;
 - (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.
2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child’s human dignity and in conformity with the present Convention.
3. States Parties shall promote and encourage international co-operation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.

³¹ S E Lee, Education as a Human Right in the 21st Century. *Democracy & Education*, 2013 2:1. 1.

³² On 20 November 1959, the UN General Assembly proclaimed the Declaration of the Rights of the Child.

³³ As stated earlier, the Convention on the Rights of the Child (CRC) was adopted in 1989 entered into force on 2 September 1990.

³⁴ The Convention on the Rights of the Child (CRC) was intended to supplement and to expand on the provisions of the Declaration. Whereas the Declaration does not have a legally binding character, the Convention is a legally binding document.

³⁵ The Committee on the Rights of the Child, which supervises the CRC, has emphasised in General Comment No. 4 - Adolescent health and development in the context of the Convention on the Rights of the Child para. 1, that art. 1 CRC, therefore, covers adolescents. Adolescence may be stated to begin at 10 and end at 18.

³⁶ CRC, Art. 2

³⁷ CRC, Art. 3

³⁸ CRC, Art. 6

³⁹ CRC, Art. 12.



The purport of the above provisions in a nutshell is that State parties recognise the right to education. More clearly, Article 28(1)(a) to (c) address primary, secondary and higher education, respectively, and are comparable to Article 13(2)(a) to (c) ICESCR. Primary education, according to the Convention, must be made compulsory and free to all. Secondary education must be made available and accessible to every child.⁴⁰ Higher education must be made accessible to all on the basis of capacity.⁴¹ Article 28(1)(d) obliges states parties to make educational and vocational information and guidance available and accessible to all children. Article 28(1)(e) requires that states parties take measures to encourage regular attendance at schools and the reduction of drop-out rates.

Article 28(1) must be read together with Article 4 CRC. Article 4 obligates states parties to take all appropriate measures to implement the rights protected in the CRC.⁴² States parties are to “take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child’s human dignity and in conformity with the CRC.”⁴³ This provision is intended to protect the child against cruel, inhuman or degrading disciplinary measures in school. Article 28(3) calls upon states parties to co-operate in matters relating to education. Co-operation is to contribute in particular to “the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods”

Article 29 sets out the aims of education in paragraph (1) and addresses an aspect of the classical freedom of education in paragraph (2), which is, the right to establish private schools.

Article 29(1), it should be noted, is based on Article 13(1) ICESCR, but introduces two new aims of education. Firstly, Article 29(1)(c) refers to education which develops the respect of the child for various persons/states/cultures. Mention is made of respect for, firstly, the child’s parents, secondly, his own culture, thirdly, the national values of the country in which he lives, fourthly, the country from which he may originate, and, fifthly, civilisations different from his own.⁴⁴ Article 29(1)(c) further prohibits degrading references to other states and cultures. At the same time, however, it entails a positive obligation to ensure that children develop respect for such states and cultures.⁴⁵

Under the CRC, individuals and bodies may establish and direct educational institutions. The education provided at such institutions must, however, observe the aims of education enunciated in article 29(1) and it must conform to such minimum standards as may be laid down by the State.⁴⁶ Children must be protected from economic exploitation at the expense of their education. Article 32(1) directs states parties to “recognise the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the

⁴⁰ Availability and Accessibility is to be realised by taking appropriate measures, such as the introduction of free education and the offering of financial assistance to those in need thereof.

⁴¹ K D 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 Right*, (Martinus Nijhoff Publishers, 2006) P. 116.

⁴² Art. 4 CRC states, “States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation”.

⁴³ Article 28(2) CRC.

⁴⁴ K D Beiter, 2006. *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* (Martinus Nijhoff Publishers, 2006) P. 119.

⁴⁵ *Ibid.*

⁴⁶ Art. 29(2), this forms part of the freedom aspect of the right to education.



child's education...⁴⁷ It must be noted that where national or international law is more favourable to the child than provisions of the CRC, such law must prevail.⁴⁸

3.4. Convention Against Discrimination in Education, (CADE)

The Convention Against discrimination in Education was adopted on 14th December, 1960 in Paris but it came into effect on May 22nd, 1962. The Convention Against Discrimination in Education (GDE) runs the dual functions or twin objectives of proscribing any form of discrimination in education and of promoting equality of opportunity and treatment for all in that field, while respecting the diversity of national education systems. CADE is very important since it enables disadvantaged or vulnerable groups to benefit equally from the right to education, and here, great obstacles have to be overcome, since there are cultural and sociological constraints that cannot be overlooked and need to be taken into account.⁴⁹

The Convention, amongst other things, prohibits any "discrimination" or inequality of treatment in education of any kind. It specifies that organizing separate education for the two sexes should not be deemed to constitute discrimination, if the study courses are the same or equivalent and the teaching staff and premises are of comparable quality. In the same vein, separate education systems may be established for religious or linguistic reasons if they apply the same principle of equivalence, and participation in them remains optional and is left to the free choice of the interested parties. Private education may coexist with education provided by the public authorities, if the object is not to secure the exclusion of any group but to provide educational facilities in addition to those provided by the public authorities.⁵⁰

CADE also has to do with a very important principle of freedom, that of the right of parents to choose for their children the educational establishment of their choice when there exist institutions other than those maintained by the public authorities, and the right to ensure, in a manner consistent with the procedures followed in the State for the application of its legislation, the religious and moral education of their children. And lastly, it has to do with the educational rights of minorities.⁵¹

The two fundamental principles of non-discrimination and equality of opportunity being the foundational basis of the Convention, the Convention lays down several obligations the nature of which varies depending on whether they are related to one or the other of those principles. Article 3 accordingly sets forth precise obligations to counter it discrimination; it provides:

In order to eliminate and prevent discrimination within the meaning of this Convention, the States Parties thereto undertake:

- (a) To abrogate any statutory provisions and any administrative instructions and to discontinue any administrative practices which involve discrimination in education;
- (b) To ensure, by legislation where necessary, that there is no discrimination in the admission of pupils to educational institutions;

⁴⁷Work that is harmful to the child's health or physical, mental, spiritual, moral or social development must be discouraged *in toto*.

⁴⁸ Art. 41 CRC states, "Nothing in the present Convention shall affect any provisions which are more conducive to the realisation of the rights of the child and which may be contained in: (a) the law of a State Party; or (b) international law in force for that State".

⁴⁹ UNESCO Convention against Discrimination in Education and Articles 13 and 14 (Right to Education) of the International Covenant on Economic, Social and Cultural Rights: Comparative Analysis. 2006. Retrieved April 17, 2023, from <http://unesdoc.unesco.org/images/0014/001459/145922e.pdf> Mar 23, 2001.

⁵⁰ UNESCO Convention against Discrimination in Education and Articles 13 and 14 (Right to Education) of the International Covenant on Economic, Social and Cultural Rights: Comparative Analysis. 2006. Retrieved April 17, 2023, from <http://unesdoc.unesco.org/images/0014/001459/145922e.pdf>.

⁵¹*Ibid.*



- (c) Not to allow any differences of treatment by the public authorities between nationals, except on the basis of merit or need, in the matter of school fees and the grant of scholarships or other forms of assistance to pupils and necessary permits and facilities for the pursuit of studies in foreign countries;
- (d) Not to allow, in any form of assistance granted by the public authorities to educational institutions, any restrictions or preference based solely on the ground that pupils belong to a particular group;
- (e) To give foreign nationals resident within their territory the same access to education as that given to their own nationals.

Article 4 of the Convention Against Discrimination in Education, is aimed at the progressive achievement of equality of opportunity and defines the goals and different stages of national policy-making as a function of the level of education.

The rights of members of national minorities are also provided for by the Convention Against Discrimination in Education. In Article 5 (1) (c), of the Convention, it is provided that “it is essential to recognize the right of members of national minorities to carry on their own educational activities, including the maintenance of schools and, depending on the educational policy of each State, the use or the teaching of their own language, provided however:

- (i) That this right is not exercised in a manner which prevents the members of these minorities from understanding the culture and language of the community as a whole and from participating in its activities, or which prejudices national sovereignty;
- (ii) That the standard of education is not lower than the general standard laid down or approved by the competent authorities; and
- (iii) That attendance at such schools is optional.”

3.5. Convention on the Elimination of all forms of Discrimination Against Women, (CEDAW)

CEDAW was adopted in 1979. In a world that is getting globalized daily, the societies that triumph most will be those which guarantee women and girls equal access to education, thereby giving them the skills and the opportunities to develop their talents and interests, so they can contribute to building stronger and more resilient communities.⁵² Women and girls have historically suffered discrimination in the area of education, and continue to do so in many places of the world. Progress has been made in narrowing gender gaps in education over the past decade, in particular at the primary level. However, girls’ secondary school enrolment has increased at a much slower rate, and is widening in some regions.⁵³ The largest disparities are found in sub-Saharan Africa, South and West Asia, Central Asia and the Arab States. Within countries, significant inequalities can be found related to language, ethnicity or social status.⁵⁴

Social, cultural and economic factors interact to weaken the chances of girls completing primary school and making the transition to lower secondary education. One immediate legacy is the high levels of illiteracy among young and adult women. Of the 759 million adults who cannot read

⁵²UNESCO. Girls’ and Women’s Right to Education. retrieved April 17, 2017, from <http://unesco.doc>.

⁵³In footnote - Women and the Right to Education retrieved April 17, 2017, from <http://www.un.org/en/events/women/iwd/2011/pdfs>.

⁵⁴*ibid*. According to official UN statistics, of the estimated 72 million children who are not in school, girls are the majority. Girls are less likely than boys to be in school, and more likely than boys never to enrol. In contrast in terms of grade repetition, boys are more likely than girls to repeat primary grades in most countries where such data exists.



or write, the vast majority, close to 70 per cent, are women – a trend that has remained stable the last ten years.⁵⁵

Article 10 of the Convention on the Elimination of All Forms of Discrimination against Women, details a number of measures which should be taken to eliminate discrimination against women in order to provide them with equal rights with men in the field of education.

What Article 10 of the Convention entails may be summed up as follows: Women must have the same access to education as men. Quality norms concerning education must be the same for women as for men. This applies especially to curricula, examinations, teaching staff and school premises and equipment. Co-education must be promoted. Education should be directed to changing stereotyped views of the role of men and women in society. The types of action envisaged to achieve these goals may be gleaned from Articles 2 to 4 CEDAW. Article 2(d) expects the state to abstain from acts of discrimination against women.⁵⁶ Article 2(f) enjoins the state to abolish laws and regulations which constitute discrimination against women. The State would, for example, have to abolish a legal provision which forbids pregnant girls to attend school classes. Article 2(e) obliges the state to take measures which protect women against discrimination by third parties.⁵⁷

In Article 3, states parties are enjoined to take all appropriate measures to ensure the full development of women for the purpose of guaranteeing them the enjoyment of human rights and fundamental freedoms on a basis of equality with men. Article 4(1) stipulates that states parties may adopt “. . . temporary special measures aimed at accelerating *de facto* equality between men and women . . .”.⁵⁸

In the field of education, articles 3 and 4(1) have positive measures in mind, aimed at promoting equal opportunities and equal treatment for women in the exercise of the right to education. Article 4(1) contemplates affirmative action measures in favour of women.⁵⁹

3.6. Convention on the Rights of Persons with Disabilities, (CRPD)

Approximately, 650 million people live with a disability, comprising 10 per cent of the world's population.⁶⁰ In 2006, the United Nations adopted by consensus a historic Convention on the Rights of Persons with Disabilities (the ‘CRPD’) and an Optional Protocol. Based on the ambit and scope of the Convention (CRPD), it has been praised as a great step forward in reframing the needs and concerns of persons with disabilities in a human rights paradigm.⁶¹ The Convention serves as a shift

⁵⁵*Ibid.*

⁵⁶ For example, the state may not promulgate legislation which reserves access to education which prepares for technical professions to men.

⁵⁷ For example, it must not be permissible for private schools to use teaching materials which depict women in inferior social roles.

⁵⁸ Such measures are not considered to constitute discrimination as defined in the Convention. They must not, however, entail as a consequence the maintenance of separate standards and they must further be discontinued when the objectives of equality have been achieved. See The Committee on the Elimination of Discrimination against Women, supervising the CEDAW, considers the CEDAW to mandate temporary special measures. See General Recommendation No. 25 (Thirtieth Session, 2004) Article 4(1) CEDAW (temporary special measures) [Compilation, 2004, pp. 282–290], paras. 18, 24, 29 and 39.

⁵⁹ K D 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* (Martinus Nijhoff Publishers, 2006) P. 112.

⁶⁰ F Ahmad, and S Girijashanker, *The Convention on the Rights of Persons with Disabilities: The Right to Education and the Obligations of States*; SOAS International Human Rights Clinic Project. *SOAS School of Law Legal Studies Research Paper Series 2011*. Retrieved March. 9, 2017, from www.soas.ac.uk/law/researchpapers, also available at: <http://ssrn.com/abstract=1895726>

⁶¹ *Ibid.*



in understanding disability away from the usual medical model,⁶² which considers persons with disability as sick and therefore requiring some sort of cure or treatment. On the contrary, the CRPD adopts the social model,⁶³ which views disability as social oppression and aims to provide protection to acceptance of impairment as a positive aspect of human diversity. It aims at dismantling the social and physical barriers that prevent inclusion, integration and participation of persons with disabilities within the mainstream.

According to the Preamble of CRPD, disability is an evolving concept and that it results from the interaction of persons with impairments, on the one hand, and attitudinal and environmental barriers on the other. Article 1 states that: “Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”

Collectively, the two provisions exemplify an understanding of the social model of disablement. Article 24 sets out a series of rights for people with disabilities in education in five clauses. Education rights are fundamentally important because they allow people with disabilities to obtain the skills that will allow them to flourish in the workplace. In the past, many people with disabilities have been too frequently excluded from opportunities in employment, both because of barriers in the workplace and because of a relative lack of education compared to their able-bodied counterparts.

Article 24 of the Convention is very important and it represents a thoughtful synthesis of two distinct philosophies. One school of thought is predicated on the idea that students with disabilities must be mainstreamed with their able-bodied peers because it is only through such interaction that substantive equality can be achieved.⁶⁴ The underlying principle of equality is reinforced by the commitment to developing each disabled person’s personality, talents and creativity as directed explicitly in Article 24(1)(b). The provision specifically mandates in Article 24(2)(e) that State Parties provide environments that maximize academic and social development in keeping with the philosophy of “full inclusion.”

The use of this language specifically acknowledges the commitment of the signatories to integration of students with disabilities in regular classrooms with peers of the same age. However, others, including some disability rights advocates and parents’ groups, have suggested that at least in some contexts, the provision of services in separate settings can generate greater benefits for children with disabilities and that a true understanding of equality mandates separate education in some circumstances.⁶⁵

This can be seen by the language contained in Article 24(3)(c) which specifically states that the education of Deaf and/or blind children may occur in separate settings. Article 24 as a whole clearly mandates integration of students with disabilities, with very specific and narrowly drawn exceptions.⁶⁶

⁶² Disability, according to the Medical Model, is an illness intrinsic to the individual. The person concerned is a patient and their disability is something to be cured or managed. Based on the medical model, disability is static and a marker of deficiency.

⁶³ The social model of disability defines disability as the consequence of disabling conditions. It is the systemic barriers and negative attitudes within society that make variations in physical, sensory intellectual or psychological ability disabling. For example, it is the lack of ramps and lifts in an underground transportation system that disables a person in a wheelchair from accessing this form of transport, not the fact that the person in question requires a wheelchair. Based on the social model, disability is relative and a problem of society, not of the person themselves.

⁶⁴ R Malhotra, and R Hansen, The United Nations Convention on the Rights of Persons with Disabilities and its Implications for the Equality Rights of Canadians with Disabilities: The Case of Education. *Windsor Yearbook of Access to Justice*, 2011. 29: 82. Retrieved March, 17, 2007, from <http://ssrn.com/abstract=1906731>

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*



3.7. The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, (ICPRAMWMF)

The ICPRAMWMF was adopted in 1990. According to Article 2(1) of the Convention, a “migrant worker” is a person engaged in a remunerated activity in a state of which he is not a national. The Convention in its Part III protects the human rights of all migrant workers and members of their families, i.e., irrespective of whether their situation is regular or not. It is worthy to note articles 12(4) and article 30. Article 12 guarantees to migrant workers and members of their families the right to freedom of thought, conscience and Religion. Article 12(4) guarantees the liberty of parents, at least one of whom is a migrant worker, to ensure the religious and moral education of their children in conformity with their own convictions.⁶⁷

Article 30 states as follows:

Each child of a migrant worker shall have the basic right of access to education on the basis of equality of treatment with nationals of the State concerned. Access to public pre-school educational institutions or schools shall not be refused or limited by reason of the irregular situation with respect to stay or employment of either parent or by reason of the irregularity of the child’s stay in the State of employment

Article 30 grants to the children of migrant workers the right of access to education on an equal basis with nationals. Part IV of the Convention protects various other rights of those migrant workers and members of their families who are in a regular situation. In this part of the Convention, Articles 43⁶⁸ and 45⁶⁹ are relevant to the right to education. Article 43(1) provides that migrant workers must be treated equally with nationals as regards access to educational institutions and services, vocational guidance and placement services, and vocational training and retraining facilities and institutions. Article 43(2) then proceeds to obligate states parties to promote conditions to ensure effective equality of treatment to enable migrant workers to enjoy these rights. Article 45(1) provides that members of the families of migrant workers must be treated equally with nationals as regards

⁶⁷The provision accords to such parents the right generally provided for in Article 13(3) ICESCR.

⁶⁸ Art. 43 of the Convention states, “1. Migrant workers shall enjoy equality of treatment with nationals of the State of employment in relation to: (a) Access to educational institutions and services subject to the admission requirements and other regulations of the institutions and services concerned; (b) Access to vocational guidance and placement services; (c) Access to vocational training and retraining facilities and institutions; 2. States Parties shall promote conditions to ensure effective equality of treatment to enable migrant workers to enjoy the rights mentioned in paragraph 1 of the present article whenever the terms of their stay, as authorised by the State of employment, meet the appropriate requirements. 3. States of employment shall not prevent an employer of migrant workers from establishing housing or social or cultural facilities for them. Subject to article 70 of the present Convention, a State of employment may make the establishment of such facilities subject to the requirements generally applied in that State concerning their installation”.

⁶⁹ Art. 45 of the Convention states, “1. Members of the families of migrant workers shall, in the State of employment, enjoy equality of treatment with nationals of that State in relation to: (a) Access to educational institutions and services, subject to the admission requirements and other regulations of the institutions and services concerned; (b) Access to vocational guidance and training institutions and services, provided that requirements for participation are met; . . .

2. States of employment shall pursue a policy, where appropriate in collaboration with the States of origin, aimed at facilitating the integration of children of migrant workers in the local school system, particularly in respect of teaching them the local language.

3. States of employment shall endeavour to facilitate for the children of migrant workers the teaching of their mother tongue and culture and, in this regard, States of origin shall collaborate whenever appropriate. 4. States of employment may provide special schemes of education in the mother tongue of children of migrant workers, if necessary, in collaboration with the States of origin”.



access to educational institutions and services, and vocational guidance and training institutions and services.

Paragraphs (2) to (4) of article 45 address the educational situation of the children of migrant workers. States parties are required to pursue a policy aimed at facilitating the integration of the children of migrant workers in the local school system. In particular, such children should be taught the local language. States parties must further facilitate for the children of migrant workers the teaching of their mother tongue and culture. It is also stated that states parties may provide special schemes of education in the mother tongue of the children of migrant workers.

4. Regional Legal Instruments on Right to Education

4.1. The African Charter on Human and Peoples Rights, (ACHPR)

The African Charter on Human and Peoples' Rights (ACHPR)⁷⁰ which was adopted in 1981, explicitly provides for the right to education under Article 17(1), it states that "every individual shall have the right to education." Unlike provisions on right to education provided in other international and regional instruments, Article 17 of the African Charter on Human and Peoples Rights does not elaborate on the content of the right to education. For that reason, it has been contended that the general character of the provision leaves more question than answer.⁷¹ Whereas the Charter failed to provide the exhaustive list of socio-economic rights, the African Commission⁷² however is authorized to draw inspiration from international human rights laws and practices to close the normative gaps.⁷³ The scope of the right to education of Article 17 of the African Charter has been clarified by the African Commission in its Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' rights.⁷⁴ Accordingly, the right to education under article 17 encompasses pre-school, free and compulsory primary education, generally available and accessible secondary education, and merit based higher education. It has been indicated that availability, accessibility, acceptability and adaptability of education can be read into article 17 of the African Charter. Moreover, the African Commission on Human and Peoples' Rights recommends that state party to the ACHPR should take special measure in order to ensure vulnerable and disadvantaged groups attend school.⁷⁵

⁷⁰ Otherwise known as the "Banjul Charter" was adopted in 1981 by the former OAU i.e Organisation of African Unity.

⁷¹ M Senyonjo, Analysing the Economic, Social and Cultural Rights Jurisprudence of the African Commission: 30 years since the Adoption of the African Charter. *Netherlands Quarterly of Human Rights*, 2011 29:3. 358-397

⁷² The African commission on human and peoples' rights is a quasi- judicial regional body charged with functions of promoting and protecting human rights in Africa. Under its protective mandate, the African commission is granted power to examine inter-state and individual communication. It is worthy to note that the African Commission has dealt with a few socioeconomic cases. Hence, the Commission has immature jurisprudence with regard to social, cultural and economic rights. In *Les Te'moins de Jehova v Zaire*, the African Commission stated that the closure of universities and secondary schools for two years constitutes violation of article 17, The commission found violation of Article 17 of the African Charter without identifying the content of the right. Similarly, in *Kevin Mgwanga Gumme et al v. Cameroon*, the Commission had another opportunity to clarify the scope of the right to education under article 13 but did not do that. The Commission's decisions have not yet addressed the content of the right to education under article 17(1) of the African Charter.

⁷³ ACHPR, Article 60 and 61.

⁷⁴ African Commission on Human and People rights in Principles and Guidelines on the Implementation of Economic, Social and Cultural rights in the African Charter on Human and People's Rights. Pp34-36

⁷⁵ *ibid*



4.2. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Woman in Africa was adopted in 2003 by the African Union. Provisions on the right to education as it accrues to women can be found in Article 12 of the Protocol⁷⁶ which protects the “Right to Education and Training”.

The objective of Article 12 of the Protocol—like that of Article 10 of the international Convention on the Elimination of All Forms of Discrimination against Women—is to eliminate discrimination against women and to guarantee them equality of opportunity and treatment in the sphere of education and training.⁷⁷ Unlike the CEDAW, however, the Protocol does not list separate aspects in education with regard to which equality between men and women must be ensured. Article 12(1)(b) Protocol corresponds to Article 10(c) CEDAW, to the extent that both provisions envisage the revision of textbooks with the aim of eliminating all stereotypes which perpetuate discrimination against women. Considering the serious problem of violence against girls in African schools, the duties laid down for states parties in Article 12(1)(c) and (d) Protocol should be complied with as a matter of urgency.⁷⁸ In terms of the stated provisions, states parties must take steps to protect girls from abuse in schools and offer counselling and rehabilitation services to those girls who have suffered abuse.

It must be noted that the Protocol contemplates extensive positive action in the sphere of education and training. The specific positive measures referred to in Article 12(2) Protocol, namely, the promotion of literacy among women, of education and training for women at all levels and in all disciplines, of the enrolment and retention of girls in schools, should not be regarded as constituting an exhaustive list, but rather as instances of positive measures to be taken by states parties.

4.3. The African Charter on the Rights and Welfare of the Child, (ACRWC)

The Charter⁷⁹ makes elaborate provisions on the right to education for the African Child. Article 11 provides:

1. Every child shall have the right to an education.
2. The education of the child shall be directed to:
 - (a) the promotion and development of the child's personality, talents and mental and physical abilities to their fullest potential;
 - (b) fostering respect for human rights and fundamental freedoms with particular reference to those set out in the provisions of various African instruments on human and peoples' rights and international human rights declarations and conventions;
 - (c) the preservation and strengthening of positive African morals, traditional values and cultures;
 - (d) the preparation of the child for responsible life in a free society, in the spirit of understanding, tolerance, dialogue, mutual respect and friendship among all peoples, ethnic, tribal and religious groups;
 - (e) the preservation of national independence and territorial integrity;
 - (f) the promotion and achievement of African Unity and Solidarity;

⁷⁶ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, was adopted in 2003 by the AU,

⁷⁷ This is clearly expressed in article 12(1)(a) of the Protocol.

⁷⁸ K D 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*, (Martinus Nijhoff Publishers, 2006) p.215.

⁷⁹The African Charter on the Rights and Welfare of the Child (ACRWC), was adopted in 1990 by the former Organisation of African Union (OAU), now African Union (AU).



- (g) the development of respect for the environment and natural resources;
 - (h) the promotion of the child's understanding of primary health care.
3. States Parties to the present Charter shall take all appropriate measures with a view to achieving the full realisation of this right and shall in particular:
- (a) provide free and compulsory basic education;
 - (b) encourage the development of secondary education in its different forms and progressively make it free and accessible to all;
 - (c) make higher education accessible to all on the basis of capacity and ability by every appropriate means;
 - (d) take measures to encourage regular attendance at schools and the reduction of drop-out rates;
 - (e) take special measures in respect of female, gifted and disadvantaged children, to ensure equal access to education for all sections of the community.
4. States Parties to the present Charter shall respect the rights and duties of parents, and where applicable, of legal guardians to choose for their children, schools, other than those established by public authorities, which conform to such minimum standards as may be approved by the State, and to ensure the religious and moral education of the child in a manner consistent with the evolving capacities of the child.
5. States Parties to the present Charter shall take all appropriate measures to ensure that a child who is subjected to school or parental discipline shall be treated with humanity and with respect for the inherent dignity of the child and in conformity with the present Charter.
6. States Parties to the present Charter shall take all appropriate measures to ensure that children who become pregnant before completing their education shall have an opportunity to continue with their education on the basis of their individual ability.
7. 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 to the observance of the principles set out in paragraph 1 of this Article and the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

The ACRWC is the African counterpart of the CRC. Whereas the CRC refers to education which develops the respect of the child for his parents and for his own and other cultures, the ACRWC considers it to be an aim of education to preserve and strengthen positive African morals, traditional values and cultures.⁸⁰ The ACRWC introduces three new educational aims, namely, the preservation of national independence and territorial integrity,⁸¹ the promotion of African Unity and Solidarity⁸² and the promotion of the child's understanding of primary health care.⁸³

Article 11(3)(e) ACRWC introduces the provision that states parties must take special measures in respect of female, gifted and disadvantaged children, to ensure to them equal opportunities in education compared to the rest of the community. Article 11(4) and (7) ACRWC embody the freedom aspect of the right to education. Article 11(4) ACRWC obliges states parties to respect the right of parents to choose for their children non-state schools, which conform to the minimum standards approved by the state. States parties must further respect the right of parents to ensure the religious and moral education of the child "in a manner consistent with the evolving capacities of the child." School discipline of a child is expected to be administered in accordance with the inherent dignity of the child.⁸⁴ States parties to take all appropriate measures to ensure that

⁸⁰ACRWC, Art. 29(1) (c) CRC, art. 11(2) (c).

⁸¹ ACRWC, Art. 11(2) (e).

⁸² ACRWC, Art. 11(2) (f).

⁸³ACRWC, Art. 11(2) (h).

⁸⁴ ACRWC, Art. 11(5).



children, who become pregnant before completing their education, have an opportunity to continue with their education on the basis of their individual ability.⁸⁵

Many African schools define pregnancy as a disciplinary offence, which usually leads to the expulsion of the pregnant girl from school. This sometimes precludes the girl from continuing her education. The practice of defining pregnancy as a disciplinary offence needs to be changed.⁸⁶

4.4. Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, (P-1 ECHR)

In 1950, the Council of Europe adopted the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).⁸⁷ The ECHR mainly guarantees civil and political rights. It does not protect the right to education. Article 2 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (P-1 ECHR) of 1952, however, protects the right to education.⁸⁸ Article 2 provides:

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

Article 2 P-1 ECHR encompasses two different, though interconnected, rights. The first sentence protects the right to education, the second the right of parents to ensure the education of their children in conformity with their own religious and philosophical convictions. The right to education is the primary right. The right of parents, that their religious and philosophical convictions be respected, forms a constituent part of the right to education.⁸⁹

4.5. The Revised European Social Charter, (ESC)

In 1961, the Council of Europe adopted the European Social Charter (ESC).⁹⁰ The Charter protects economic, social and cultural rights. The Additional Protocol to the European Social Charter of 1988 extended the protection accorded to these rights under the Charter.⁹¹ On 3 May 1996, the Revised European Social Charter (Revised ESC) was adopted.⁹² Both the original and the revised version of the Social Charter include provisions relevant to the right to education. Only those of the Revised Charter, namely articles 7(3), 9, 10, 15(1), 17(1)(a) and (2), will be referred to here.

Article 7 Revised ESC deals with the right of children and young persons to protection. To ensure the effective exercise of the right to protection, states parties undertake inter alia, “to provide

⁸⁵ ACRWC, Art. 11(6).

⁸⁶ K D 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*, (Martinus Nijhoff Publishers, 2006) P. 219.

⁸⁷ European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) ETS No. 5, entered into force on 3 September 1953.

⁸⁸ Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (1952) ETS No. 9, entered into force on 18 May 1954.

⁸⁹ P Dijk, and G Hoof. *Theory and Practice of the European Convention on Human Rights (1998)*. 3rd ed. The Hague: Kluwer Law International/Utrecht. p56.

⁹⁰ European Social Charter (1961) ETS No. 35, entered into force on 26 February 1965.

⁹¹ Additional Protocol to the European Social Charter (1988) ETS No. 128, entered into force on 4 September 1992.

⁹² Revised European Social Charter (1996) ETS No. 163, entered into force on 1 July 1999. The Revised Charter contains in one instrument all the rights protected in the Charter and the Additional Protocol of 1988 and adds thereto new rights. States parties may choose by which rights of Part II of the Revised Charter—the part containing the rights provisions of the Charter—they wish to be bound. They must, however, select not less than sixteen articles or sixty-three numbered paragraphs from Part II.



that persons who are still subject to compulsory education shall not be employed in such work as would deprive them of the full benefit of their education”. Articles 9 and 10 Revised ESC protect the right to vocational guidance and the right to vocational training, respectively. Article 9 obligates states parties to make a vocational guidance service available to all persons. Vocational guidance should be provided free of charge. Article 10 imposes obligations on states parties to ensure the effective exercise of the right to vocational training. States parties must provide for the vocational training of all persons and “grant facilities for access to higher technical and university education, based solely on aptitude”.

Article 15 of the Revised ESC addresses the right of persons with disabilities to independence, social integration and participation in the life of the community. The right accrues to all persons with disabilities, irrespective of age and the nature and origin of their disabilities. Paragraph (1) directs states parties “to take the necessary measures to provide persons with disabilities with guidance, education and vocational training in the framework of general schemes wherever possible or, where this is not possible, through specialised bodies, public or private”.

In terms of Article 17, states parties must ensure that children and young persons “grow up in an environment which encourages the full development of their personality and of their physical and mental capacities”. Article 17(1)(a) directs states parties “to take all appropriate and necessary measures designed”, “to ensure that children and young persons, taking account of the rights and duties of their parents, have the care, the assistance, the education and the training they need, in particular by providing for the establishment or maintenance of institutions and services sufficient and adequate for this purpose”. Article 17(2) further instructs states parties “to take all appropriate and necessary measures designed”, “to provide to children and young persons a free primary and secondary education as well as to encourage regular attendance at schools”.

4.6. The American Convention on Human Rights (ACHR)

The ACHR was adopted in 1969. The American Convention on Human Rights⁹³ (ACHR) guarantees mainly civil and political rights. In relation to the right to education, Article 12(4) guarantees the right of parents or guardians “to provide for the religious and moral education of their children or wards that is in accordance with their own convictions”. For the rest, the Convention does not mention the right to education. Article 26, however, obliges states parties “to adopt measures, both internally and through international co-operation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realisation of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the convention. Reference should further be made to article 19, in terms of which, “every minor child has the right to the measures of protection required by his condition as a minor on the part of . . . the state”. It should be highlighted that “the right to education . . . stands out among the special measures of protection for children and among the right recognised for them in article 19”.⁹⁴

4.7. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (AP-ACHR)

Article 13 of the Additional Protocol⁹⁵ to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (AP ACHR) undoubtedly is the most extensive provision ever

⁹³ American Convention on Human Rights, 1969 - (otherwise known as the “Pact of San José”). OAS Treaty Series No. 36, entered into force on 18 July 1978.

⁹⁴ Legal Status and Human Rights of the Child, Advisory Opinion OC-17/2002 of the Inter-American Court of Human Rights of 28 August 2002, available on the Court’s website at www.corteidh.or.cr, para. 84.

⁹⁵ Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, 1988 - (otherwise known as the “Protocol of San Salvador”). OAS Treaty Series No. 69, entered into force on 16 November 1999.



made on the right to education. Article 13 of the Protocol has a keen resemblance with Article 13 of the International Covenant on Economic, Social and Cultural Rights which grants to everyone the right to education, setting the aims of education, establishing the minimum core obligations for all the levels of education and granting to the parents the right to select the type of education to be given to their children.

The sad and unfortunate aspect of Article 13 AP-ACHR is its employment of permissive language. The Article 13, instead of providing that State parties “shall” comply with the various obligations, provides that state parties “should” comply with these obligations. Worthy of notice again is Article 16 AP-ACHR which deals on the rights of children. The third sentence of the Article reiterates that “every child has the right to free and compulsory education, at least in the elementary phase, and to continue his training at higher levels of the educational system”

5. Conclusion

This Article has thoroughly assessed and examined the core legal instruments protecting and providing for the right to education in international law. As can be seen in the work, the right to education enjoys extensive and adequate protection in international law. The first international instrument to give life and expression to the right to education was the Universal Declaration of Human Right (UDHR). However, the most significant Convention which entrenches the right to education is the International Covenant on Economic, Social and Cultural Rights (ICESCR). It captured most clearly the acceptable and globally agreed norms or standards which give rise to State obligations.

6. Recommendations

From the study, it is crystal clear that there are enough laws providing for and protecting the right to education. However, fulfilling international legal obligations is a determinant factor in achieving the right to education. Based on this, we recommend the following:

- a. The United Nations should effectively monitor the State Parties to the Conventions on right to education and ensure that they are accountable and living up to their obligations under the Conventions.
- b. State Parties should make sure they enshrine into their domestic legal order their obligations under the various international and regional legal instruments providing and protecting right to education. The States obligations should be incorporated into national legal system or domestic legal order.
- c. Effective enforcement is also required on the part of the United Nations to ensure that the provisions of the law on right to education is implemented by the States, and serious sanctions should be imposed on States that fail in their obligations.