

A CIL Right to Free and Compulsory Education

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INTRODUCTION

Following World War II, the international community came together in 1948 for the first time to “reaffirm their faith in fundamental human rights, in the dignity and worth of the human person.”¹ One of the recognized fundamental human rights was the right to education for everyone.² Since that time, the right to education has been recognized and ratified in a variety of international and regional treaties. For example, the Convention on the Rights of the Child of 1989, which was widely ratified by nearly every country across the world,³ explicitly recognizes in article 28 “the right of the child to education” and obligates parties to the Convention to “[m]ake primary education compulsory and available free to all.⁴ However, the United States of America, while appearing as a signatory to the Convention on the Rights of the Child, chose ultimately not to ratify.⁵ Notably, where the United Nations Educational, Scientific and Cultural Organization (UNESCO) has identified a justiciable right to education in 107 countries (55%), a directive principle or aspirational right to education in fifty-three countries (27%), the United States of America is situated among the minority of States with no right to education recognized.⁶

In 1973, the United States Supreme Court found in *San Antonio Independent School Dist. v. Rodriguez*, that “[e]ducation, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.”⁷ Since *Rodriguez*, federal courts have consistently rejected claims of a federal fundamental right to education as protected under the

1. G.A. Res. 217A (III), Universal Declaration of Human Rights, at preamble (Dec. 10, 1948).

2. *Id.* at art. 26 (stating that education shall be free, at least for elementary stages, and compulsory).

3. *Status of Ratification Interactive Dashboard*, U.N. HUM. RTS. OFF. HIGH COMM’R (Mar. 9, 2022), <https://indicators.ohchr.org/> (select “International Covenant on Economic, Social and Cultural Rights” from the “Select a Treaty” dropdown).

4. G.A. Res. 44/25, *Convention on the Rights of the Child (Rights of the Child)*, art. 28 (Nov. 20, 1989).

5. *Status of Ratification Interactive Dashboard*, *supra* note 3 (Mar. 9, 2022) (select “International Covenant on Economic, Social and Cultural Rights” from the “Select a Treaty” dropdown, and then select “United States of America” from sidebar).

6. U.N. EDUC., SCI. & CULTURAL ORG., RIGHT TO EDUCATION HANDBOOK 39 (2019), https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/RTE-UNESCO_Right%20to%20education%20handbook_2019_En.pdf.

7. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973).

United States Constitution,⁸ thereby evaluating educational claims under a rational basis test.⁹ To be sure, the United States protects against equal protection violations under its Federal Constitution, particularly for individuals within suspect classifications, such as race and gender.¹⁰ But arguably, on a United States federal level, as long as all students, regardless of race, gender, or other protected classification, are equally denied an opportunity for an education, those individuals have no judicial remedy.

Regarding international law, the situation in the United States creates an interesting hypothetical. Although not a party to international treaties recognizing a right to education and obligating states parties to provide free and compulsory education at the primary school age, all of the states within the United States currently provide free and compulsory education to all children for at least a minimum of nine years.¹¹ In the United States, “Education is primarily a State and local responsibility.”¹² While some may argue that “the federal government has the responsibility to ensure the right to a free and high-quality education for all K–12 students by protecting their civil rights,”¹³ as discussed above, there is neither a civil right to a free education nor to a quality education under the federal government’s jurisdiction, except that where an education is provided to some, it must be provided to all without discrimination that is based on a protected classification under the Fourteenth Amendment. It is conceivable then, although impractical, that one or all states in the United States could make

8. See *Plyler v. Doe*, 457 U.S. 202 (1982); see *A.C. v. Raimondo*, 493 F.Supp.3d 170 (2020).

9. See *Raimondo*, 493 F.Supp.3d at 195.

10. See *Brown v. Board of Educ.*, 347 U.S. 483 (1953); see also *Obergefell v. Hodges*, 576 U.S. 644 (2015).

11. Nat’l Ctr. for Educ. Statistics, *Table 5.1: Compulsory School Attendance Laws, Minimum and Maximum Age Limits for Required Free Education, by State*, STATE EDUC. PRACTICES (2017) (explaining that free and compulsory education beginning from age 5 to 8 years old, and extending to age 16 to 18 years old, depending on the state) [hereinafter *Table 5.1*].

12. *The Federal Role in Education*, U.S. DEP’T OF EDUC. (2021), <https://www2.ed.gov/about/overview/fed/role.html>.

13. Kathryn Baron, *Finding a Balance for the Federal Role in Education Policy*, CARNEGIE FOUND.: CARNEGIE COMMONS BLOG (2016), <https://www.carnegiefoundation.org/blog/finding-a-balance-for-the-federal-role-in-education-policy/>.

constitutional amendments and pass legislation no longer requiring the provision of free and compulsory education and thereby cease to provide such to their citizens.

The argument made herein is that, despite not being recognized in the United States as a fundamental, constitutional right on a federal level, the right to education is a human right recognized not only in various treaty documents but also in customary international law (CIL). Although concededly an aspirational right for some developing nations, the customary right to education has come to be recognized as at least an obligation to provide a free and compulsory primary education for all children. As such, even where the United States has not been party to treaties recognizing this right, this CIL right would arguably apply to the United States, obligating it as a nation to ensure free and compulsory education, regardless of how one or all its individual states decide to fulfill their education responsibilities now or in the future.

This raises substantive and practical questions, such as whether the United States might be considered a “persistent objector,”¹⁴ whether an individual could bring a right to education cause of action in federal court under the theory of a violation of CIL,¹⁵ or whether a U.S. citizen could bring such an action against the United States in an international court. The discussion of these and other possible topics, however, is reserved for a later time. This Article will first discuss the principles of binding CIL. Second, an analysis will be made of the right to free and compulsory education as recognized in CIL, considering various hard and soft law treaties and declarations, respectively, along with evidence of state practice and *opinio juris*.

14. See generally Ted L. Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT'L. L. J. 457 (1985) (discussing elements of the persistent objector doctrine).

15. See generally Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997) (discussing the role of customary law in federal common law post-*Erie*); Anthony J. Bellia Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 COLUM. L. REV. 1 (2009) (discussing the “historical practice and constitutional structure” of the role of CIL in the United States judiciary); Tracy B. Holton, *Cause of Action to Recover Civil Damages Pursuant to the Law of Nations and/or Customary International Law*, 21 CAUSES OF ACTION 2D 327 (2021) (discussing causes of action under the Alien Tort Act based on the “law of nations”).

I. PRINCIPLES OF BINDING CIL

A. Human Rights in General and CIL

Since the Universal Declaration of Human Rights (UDHR) was drafted in 1948, it has served as inspiration for many global and regional human rights treaties, as well as numerous related declarations, comments, recommendations, and frameworks for action.¹⁶ Much has been done to secure human rights on an international and regional level. This elaboration of rights has created an impressive “network of treaties, declarations, and human rights-related institutions at the global, regional, and national levels.”¹⁷ A continuum of perspectives has developed on how human rights should be considered as it pertains to CIL. At one end of the spectrum are those who view the extensive adoption and acceptance of the Universal Declaration in various treaties, national constitutions, court decisions, and declarations as meaning that all of the substantive rights delineated in the Declaration as having met the standard of CIL.¹⁸ On the other end are those who see the Universal Declaration’s articulation of rights as “ha[ving] no bearing whatsoever on their status as customary law.”¹⁹ Even if it, and subsequent treaties and other soft law documents, might be evidence of *opinio juris*, those of this viewpoint question whether state practice supports human rights coming under CIL, asserting that “the record of state practice tends to suggest that states do *not* consistently honor human rights.”²⁰

16. G.A. Res. 217A (III), *supra* note 1; *International Law*, RIGHT TO EDUC. (Sept. 9, 2021), <https://www.right-to-education.org/page/international-law>.

17. Brian D. Lepard, *Toward a New Theory of Customary Interactional Human Rights Law*, in REEXAMINING CUSTOMARY INT’L L. 233, 239 (Brian D. Lepard ed., 2017); see Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT’L & COMP. L. 289, 340 (1996) (stating that “[t]hose who urge acceptance of the Declaration *in toto* as customary law are in a clear minority, and there is insufficient state practice to support such a wide-ranging proposition at this date However, there would seem to be little argument that many provisions of the Declaration today do reflect customary international law. ‘Few claim that any state that violates any provision of the Declaration has violated international law. Almost all would agree that some violations of the Declaration are violations of international law.’” (quoting LOUIS HENKIN, *THE AGE OF RIGHTS* 19 (New York: Columbia University Press, 1990)).

18. See Lepard, *supra* note 17, at 250.

19. *Id.* at 250–51.

20. *Id.* at 251 (emphasis in original).

The analysis made here will take an approach somewhere in the middle. The following will consider the widespread adoption of treaties since the Universal Declaration that has recognized a right to free and compulsory primary education.²¹ An examination will also be made regarding the evidence of “widespread and representative”²² state practice and *opinio juris* beyond the ratification of these treaties.

B. CIL and the Implication of Hard Law Treaties and Soft Law Declarations

Article 38 of the Statute of the International Court of Justice (ICJ)²³ recognizes “international conventions, whether general or particular, establishing rules expressly recognized by the contesting states,” as a main source of international law to draw from when exerting its jurisdiction over international claims. In general, and without going into

21. Compare Kedar S. Bhatia, *Reconsidering the Purely Jurisdictional View of the Alien Tort Statute*, 27 EMORY INT’L L. REV. 447, 501–02 (2013) (discussing the difficulty that U.S. federal courts have faced when attempting to analyze CIL and referring to the “dubious use of unconventional sources to glean the consensus of customary international law” made by Second Circuit judges when citing, “among other sources, two U.N. General Assembly resolutions, non-binding resolutions and treaties, and a survey of national constitutions,” stating that “[t]hose source are generally not accepted as valid tools for weighing the view of customary international law and their use creates, at a minimum, a potential for inconsistency among federal courts”); with Bradley & Goldsmith, *supra* note 15 (arguing that the establishment of the United Nations and the proliferation of multilateral treaties has influenced the nature of CIL, making it “less tied to state practice,” stating that “[i]nternational and U.S. courts now rely on General Assembly resolutions, multilateral treaties, and other international pronouncements as evidence of CIL without rigorous examination of whether these pronouncements reflect the actual practice of states” in reference to the Second Circuit cases discussed by Bhatia above and the International Court of Justice’s *Military and Paramilitary Activities in and against Nicaragua (Nicaragua)* (1984) case; citing the ICJ in the *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands) (North Sea)*, 1969 I.C.J. 3, 43 (1969) to argue that CIL can develop rapidly over a short period of time, because of “the fact that discrete events such as pronouncements of international organizations and the promulgation of multilateral treaties are treated as evidence of CIL”).

22. *N. Sea Cont’l Shelf (Fed. Republic of Ger./Den.; Fed. Republic of Ger./Neth.)*, Judgment, 1969 I.C.J. 3, ¶ 73 (Feb. 20).

23. Statute of the International Court of Justice, art. 38, ¶ 1.

detail about reservations,²⁴ States that ratify²⁵ or accede²⁶ to a treaty become party to it, thereby binding their nation to the obligations under the treaty.

As it pertains to CIL, also recognized by the ICJ as a legitimate and major source of international law,²⁷ the treaties that are products of convention negotiations among states parties have been viewed by some as evidence of CIL. As applied to CIL, “[c]onventions may be ‘naturalized’ over time, beginning as stipulated conventions, settle in as familiar custom and eventually become so deeply bred in the bone that they feel like ‘second nature.’”²⁸ The United States Court of Appeals for the Second Circuit has followed this rationale, looking to the ratification of treaties, and even soft law²⁹ declarations, as evidence of CIL.³⁰ Furthermore, the Second Circuit’s approach appears to be a fairly common approach in both international courts and within the United States.³¹ Research on the subject has shown that “in a majority of cases the [ICJ] has not examined the practice and *opinio juris* of states but, instead, has simply asserted the rules that it applies.”³² The same author referenced additional research which “suggests a similar tendency in U.S. Supreme

24. U.N. TREATY COLLECTION, GLOSSARY https://treaties.un.org/pages/overview.aspx?path=overview/glossary/page1_en.xml (last visited Nov. 29, 2021) (defining a reservation as “a declaration made by a state by which it purports to exclude or alter the legal effect of certain provisions of the treaty in their application to that state . . . , [although they] must not be incompatible with the object and the purpose of the treaty[.]. . .[and] a treaty might prohibit reservations or only allow for certain reservations to be made”).

25. *Id.* (defining ratification as “the act whereby a state indicates its consent to be bound to a treaty”).

26. *Id.* (defining accession as “the act whereby a state accepts the offer or the opportunity to become a party to a treaty already negotiated and signed by other states . . . [having] the same legal effect as ratification”).

27. Statute of the International Court of Justice, *supra* note 23.

28. GERALD POSTEMA, *THE NATURE OF CUSTOMARY LAW: LEGAL, HISTORICAL AND PHILOSOPHICAL PERSPECTIVES* 284 (Amanda Perreau-Saussine & James B. Murphy eds., 2007).

29. Ryan M. Scoville, *Finding Customary International Law*, 101 IOWA L. REV. 1893, 1944, 1914 (2016); see *Hard Law/Soft Law*, EUROPEAN CTR. FOR CONST. & HUM. RTS., <https://www.ecchr.eu/en/glossary/hard-law-soft-law/> (last visited Nov. 29, 2021) (defining soft law as “agreements, principles and declarations that are not legally binding”).

30. Bradley & Goldsmith, *supra* note 15.

31. Scoville, *supra* note 29.

32. *Id.* at 1944 (citing Stefan Talmon, *Determining Customary International Law: The ICJ’s Methodology Between Induction, Deduction and Assertion*, 26 EUR. J. INT’L L. 417, 441 (2015)).

Court cases,” noting that even *The Paquette Habana* case was “riddled with evidentiary deficiencies.”³³ Here, although contested as a viable analysis and determination of CIL,³⁴ the evidence of treaty ratification and international declarations will both be considered as relevant factors.

C. CIL and the Elements of State Practice and *Opinio Juris*

Although, as discussed above, treaties and declarations have been considered together as evidence of customary law in themselves, the traditional approach to determine whether a rule constitutes CIL is to show evidence of both state practice and *opinio juris*. In general, “A signal feature of custom is that it is a *practiced norm of a community*” that “set[s] standards for behavior.”³⁵ Thus, traditionally, for a rule or practice to be elevated to the notion of binding CIL, it requires “behavior or usage (*usus*) plus belief or conviction of (legal) necessity (*opinio juris sive necessitatis*).”³⁶ Behavior or usage is necessary “to distinguish custom from merely ideal standards, while *opinio juris* is necessary to distinguish legal custom from other regularities, rules, and routines ‘motivated only by considerations of courtesy, convenience or tradition.’”³⁷ This is largely based on the policy that “the two-part test [of finding state practice and *opinio juris*] has value insofar as it formally honors state consent.”³⁸ As such, the attempt will be made here to go beyond “emphasi[ing] the importance of state practice”³⁹ to provide “direct evidence of the actual practice of states.”⁴⁰

For example, in the 1900 *The Paquete Habana* case, the U.S. Supreme Court determined that a Spanish fishing vessel was not appropriately captured as a prize of war based on an analysis of the

33. *Id.* at 1944 (citing David J. Bederman, *Customary International Law in the Supreme Court, 1861–1900*, in INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE 89–123 (David L. Sloss et al. eds., 2011), and JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 66–78 (2005)).

34. Bhatia, *supra* note 21.

35. POSTEMA, *supra* note 28, at 285 (emphasis in original).

36. *Id.* at 279.

37. *Id.* at 279–80 (quoting N. Sea Cont’l Shelf (Fed. Republic of Ger./Den.; Fed. Republic of Ger./Neth.), Judgment, 1969 I.C.J. 3, ¶ 77 (Feb. 20)).

38. Scoville, *supra* note 29, at 1945.

39. *Id.* at 1943.

40. *Id.* (showing data to suggest that courts have, while referencing the importance of state practice, provided sparse direct evidence of such).

custom, or practiced norm, of the United States and other countries.⁴¹ The Court conducted a vast analysis and exposition of custom dating back to as early as the 1400s. Having examined the historical normative practice, the Court found that “[f]ishing boats have also, as a general rule, been exempted from the effects of hostilities.”⁴²

In contrast to *The Paquete Habana*, not every practice or rule has an extended history or such an obvious general practice. In the *North Sea Continental Shelf Cases*, the ICJ considered whether a relatively recent treaty might impose such an obligation on States that did not ratify the treaty.⁴³ While Germany did not ratify the treaty, Denmark and the Netherlands joined the thirty-nine states that had either ratified or acceded to the Convention.⁴⁴ Of relevance to the dispute, the Convention provided in article 6(2),

[W]here the same continental shelf is adjacent to the territories of the two adjacent States, the boundary shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.⁴⁵

The Court recognized that a single provision in a convention is “indeed one of the recognized methods by which new rules of CIL may be formed,”⁴⁶ but that to do so, it must “be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law.”⁴⁷

41. *The Paquete Habana*, 175 U.S. 677 (1900).

42. *Id.* at 698.

43. *N. Sea Cont’l Shelf* (Fed. Republic of Ger./Den.; Fed. Republic of Ger./Neth.), Judgment, 1969 I.C.J. 3 (Feb. 20).

44. *Id.*

45. *Id.* at 162.

46. *Id.* ¶ 71.

47. *Id.* ¶ 72.

Significantly, the Court considered whether the length of time between when the Convention was signed (1958), when it came into force (1964), and when the Court was called upon to adjudicate the matter was sufficient to establish a general rule.⁴⁸ In contrast to *The Paquete Habana* case, where there was evidence of hundreds of years of a generalized rule, here there were ten years or less of “what was originally a purely conventional rule.”⁴⁹ In this circumstance, the ICJ determined that “even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected.”⁵⁰ Also, relating to state practice and a sense of *opinio juris*, the Court added that with such a short period, State practice must be “both extensive and virtually uniform in the sense of the provision invoked;—and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.”⁵¹ Thus, even if not a centuries-old practice, a rule can qualify as CIL within a short period of time if there is widespread and representative participation to a convention of specially affected States, and subsequent state practice is consistent with the convention in an extensive and virtually uniform manner among affected States.

In *The Paquete Habana*, the U.S. Supreme Court described the special nature of CIL as it may come to be applied to other nations, even when a law may originate with just one or a handful of nations, stating,

[u]ndoubtedly no single nation can change the law of the sea. The law is of universal obligation and no statute of one or two nations can create obligations for the world. Like all the laws of nations, it rests upon the common consent of civilized communities. It is of force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct. Whatever may have been its origin, whether in the usages of navigation, or in the ordinances of maritime states, or in both, it has become the law of the sea only

48. *Id.* ¶ 74.

49. *Id.*

50. *Id.* ¶ 73.

51. *Id.* ¶ 74.

by the concurrent sanction of those nations who may be said to constitute the commercial world. Many of the usages which prevail, and which have the force of law, doubtless originated in the positive prescriptions of some single state, which were at first of limited effect, but which, when generally accepted, become of universal obligation.⁵²

Here, the U.S. Supreme Court makes at least two important distinctions about CIL. First, it is based on a notion of general consent for some type of rule, which consent becomes articulated through prevailing usages, or prevailing state practice. This notion of consent is important, as shown by the Permanent Court of International Justice's (PCIJ) statement that "[i]nternational law governs relations between *independent* states."⁵³ The PCIJ's *Lotus* decision established what is known as the "Lotus" principle of presumed independence, stating that

[t]he rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.⁵⁴

The PCIJ recognized the binding effect of conventions, or treaties, as well as "usages generally accepted as expressing principles of law," or CIL, but only where States express consent "from their own free will" to enter treaties or to join the community of States in adopting a practice or principle.⁵⁵ However, the second distinction from *The Paquete Habana* is that this process of developing a rule consensus among nation States can impose upon all States a universal obligation. This implies

52. *The Paquete Habana*, 175 U.S. 677, 711 (1900).

53. *The Case of the S.S. Lotus (Fr. v. Turk.)* Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 44 (Sept. 7).

54. *Id.*

55. *Id.*

that in some instances an obligation may be imposed despite a State's lack of consent to be bound.

Thus, based on the above discussion, it is clear that treaties and declarations are used to inform CIL and have at times been used exclusively to provide evidence of CIL without extensive evaluation of state practice and *opinio juris*. However, the traditional, and arguably more robust and valid approach, is to consider the evidence of actual state practice and whether the practice derives from a sense of legal obligation. This recognizes State sovereignty, which is important because, upon finding that a particular rule qualifies as CIL, the rule then obligates all States, even those not party to the original treaty recognizing the rule in question. Where human rights treaties and declarations are a relatively new concept within international law, the *North Sea Continental Shelf Cases* rationale regarding a shorter time period is particularly relevant to the argument that a right to free and compulsory education now constitutes CIL. Thus, to establish state practice and *opinio juris*, it will be important to show whether "a great number"⁵⁶ of the affected States acted to guarantee free and compulsory education, and that for those that did, whether there is "evidence that they so acted because they felt legally compelled . . . to do so."⁵⁷

Therefore, the following analysis will consider (1) the treaties establishing a right to a free and compulsory primary education and the declarations in support of such; and (2) evidence of actual state practice surrounding these treaty obligations to determine whether there is a widespread and representative practice based on a feeling of legal obligation.

II. EVIDENCE SUPPORTING A CIL RIGHT TO FREE AND COMPULSORY EDUCATION FOR PRIMARY-AGED CHILDREN

*"Education is not a luxury. It is a right."*⁵⁸

"The phrase 'a thousand points of light' has been used to describe stars in the sky or reflections in a river. I have come to view the perspectives on human dignity as points of light not just illuminating

56. *N. Sea Cont'l Shelf*, 1969 I.C.J., ¶ 78.

57. *Id.*

58. UNHCR, TURN TIDE: REFUGEE EDUC. CRISIS, IT'S EVERYONE'S BUSINESS TO EDUCATE REFUGEES 10 <https://www.unhcr.org/5b852f8e4.pdf> [hereinafter TURN TIDE].

our understanding of an important idea but also bringing light to a world that seems in darkness.”⁵⁹ Arguably, the constellation of human rights as an element of human dignity has included the right to education since the publication of the Universal Declaration of Human Rights, which lists it among the other twenty-nine articulated rights.⁶⁰ “With an education, everyone has an equal and fair chance to make it in life. But I believe education is not only about the syllabus. It is about friendship and also a place to discover our talents and allow us to discover our destiny.”⁶¹ The Universal Declaration, though non-binding soft law, has been influential in the drafting of multiple subsequent treaties and declarations, both hard and soft law, respectively, listing free and compulsory education for primary-aged children as a human right that states are obligated to provide. However, where the United States is not a party to treaties recognizing this right, the question of whether the right to education has become a matter of binding CIL could potentially be legally significant for the nation.

Building on the discussion above regarding the implications of treaties and declarations on the establishment of CIL, as well as the role of state practice and *opinio juris*, the following will present evidence of both treaties and declarations recognizing a right to education, and specifically a right to free and compulsory education for the primary grades. Then, evidence of state practice and *opinio juris* will follow.

A. Hard and Soft Law Articulations of the Right to Education

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

Article 13 of the ICESCR⁶² provides “the single most comprehensive provision on the right to education in international law.”⁶³ Together with the International Covenant on Civil and Political

59. Brett G. Scharffs, Rex E. Lee Chair and Professor of Law, Director of the International Center for Law and Religion Studies, BYU J. Reuben Clark Law School. (BYU Law School display) (2021).

60. G.A. Res. 217A (III), *supra* note 1.

61. TURN TIDE, *supra* note 58.

62. G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights (Dec. 16, 1966).

63. U.N. EDUC. SCI. & CULTURAL ORG., *supra* note 6, at 51.

Rights (1966, ICCPR), and Universal Declaration, and the UN Charter, ICESCR constitutes the International Bill of Rights,⁶⁴ jointly declaring the myriad of human rights recognized by the international community, at least aspirationally.

Article 13 of the ICESCR states that “[t]he States Parties to the present Covenant recognize the right of everyone to education,” and “recognize that, with a view to achieving the full realization of this right: (a) Primary education shall be compulsory and available free to all.”⁶⁵ Further, article 14 provides,

Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.⁶⁶

Thus, for the 171 nations⁶⁷ (not including the United States, who was a signatory to the treaty but did not ratify) who are parties to this Covenant, the right to education, including free and compulsory primary education, should be seen as a treaty obligation under international law, obligating states to adopt plans securing this right.

The United Nations Committee on Economic, Social and Cultural Rights, an entity consisting of independent experts with the role of monitoring implementation of the ICESCR,⁶⁸ issued a 1999 General Comment regarding the right to education.⁶⁹ The Committee reiterated

64. *Id.*

65. G.A. Res. 2200A (XXI), *supra* note 62, at art. 13(1)–(2)(a).

66. *Id.* at art. 14.

67. *Status of Ratification Interactive Dashboard*, *supra* note 3 (Mar. 9, 2022) (select “International Covenant on Economic, Social and Cultural Rights” from “Select a Treaty” dropdown).

68. *UN Committee on Economic, Social and Cultural Rights (CESCR)*, ECOI.NET (Dec. 1, 2020), <https://www.ecoi.net/en/source/11512.html>.

69. *General Comment No. 13: The right to education (article 13)*, Comm. on Econ., Soc. and Cultural Rts. on Its Twenty-First Session, U.N. Doc. E/C.12/1999/10 (1999) [hereinafter *Comment No. 13*].

that “[e]ducation is both a human right in itself and an indispensable means of realizing other human rights,”⁷⁰ and that “[a]rticle 13, the longest provision in the Covenant, is the most wide-ranging and comprehensive article on the right to education in international human rights law.”⁷¹

Although there was widespread acceptance of the obligation to work towards ensuring free and compulsory education for all children, the Committee recognized the fact “that for millions of people throughout the world, the enjoyment of the right to education remains a distant goal,” which “in many cases . . . is becoming increasingly remote.”⁷² The Committee also noted the “formidable structural and other obstacles impeding the full implementation of article 13 in many States parties.”⁷³ In the Committee’s General Comment No. 11, the Committee specified that at the time, it was estimated that 130 million school-aged children did not have access to primary education, two-thirds being girls.⁷⁴ The Committee also made clear, however, that despite challenges that “have greatly exacerbated the extent to which the right to primary education is being denied,” there is a “clear and unequivocal obligation” for each State party “to present to the Committee a plan of action drawn up” as specified.⁷⁵

Regarding the obligations imposed on states parties by the Covenant, the Committee clarified in Comment No. 13 that while states are obligated to work towards the “progressive realization” of “full realization of article 13,”⁷⁶ there are also immediate expectations, such as guaranteeing that the right to education will not be implemented discriminatorily and that parties are obligated immediately “to take steps” necessary for full implementation.⁷⁷ Furthermore, the term progressive means a “specific and continuing obligation ‘to move as expeditiously and effectively as possible’ towards the full realization of article 13.”⁷⁸

70. *Id.* ¶ 1.

71. *Id.* ¶ 2.

72. *Id.*

73. *Id.*

74. *Id.* ¶ 3.

75. *Id.*

76. *Id.* ¶ 44

77. *Id.* ¶ 43 (citation omitted).

78. *Id.* ¶ 44 (citation omitted).

Convention on the Rights of the Child

As of June 2021, the Convention on the Rights of the Child has now been ratified by 116 states parties, with just one signatory without ratification (the United States) and zero without other action.⁷⁹ Where there are currently 193 Member States of the United Nations,⁸⁰ this represents an overwhelming majority of the world's nation-states. In the preamble, the Convention recognizes both the Charter of the United Nations and the Universal Declaration of Human Rights as “reaffirm[ing] their faith in fundamental human rights and in the dignity and worth of the human person” and “proclaim[ing] and agree[ing] that everyone is entitled to all the rights and freedoms set forth therein,” respectively.⁸¹ Pertaining to education, article 28 provides the following as States Parties' obligations under the treaty:

1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular: (a) Make primary education compulsory and available free to all; (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.⁸²

79. *Status of Ratification Interactive Dashboard*, *supra* note 3 (Mar. 9, 2022) (select “Convention on the Rights of the Child” from the “Select a Treaty” dropdown).

80. U.N., *About Us*, <https://www.un.org/en/about-us> (last visited Mar. 9, 2022)

81. G.A. Res. 44/25, *supra* note 4, at preamble.

82. *Id.* at art. 28(1)(a)–(e).

Furthermore, the Convention obligates States Parties to “promote and encourage international cooperation,” to eliminate “ignorance and illiteracy throughout the world,” and to “facilitat[e] access to scientific and technical knowledge and modern teaching methods,” all with a focus on assisting developing countries with their efforts to meet these obligations.⁸³ Representing this reality, some of the developing nations made reservations similar to Eswatini, which stated that it “would undertake the implementation of the right to free primary education to the maximum extent of available resources and expects to obtain the co-operation of the international Community for its full satisfaction as soon as possible.”⁸⁴

Similar to obligations under the ICESCR, the Convention also obligates Parties to “undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized”⁸⁵ Additionally, in its Comment, the Committee encouraged States parties to develop and implement a “comprehensive national plan of action to promote and monitor realization of the objectives listed in article 29 (1).”⁸⁶ Along with a plan, periodic reports are expected to be submitted by States Parties to the Committee.⁸⁷

Additional Conventions and Relevant Soft-Law Sources

The UNESCO Convention against Discrimination in Education, which has been ratified by 106 States (excluding the United States),⁸⁸ reiterates both the Universal Declaration’s assertion of non-discrimination and the right to education for every person and that,

83. *Id.* at art. 28(3).

84. U.N. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

85. G.A. Res. 44/25, *supra* note 4, at art. 4.

86. *Comment No. 13*, *supra* note 69, ¶ 23.

87. *See Treaty-specific guidelines regarding the form and content of periodic reports to be submitted by States parties under article 44, paragraph 1 (b), of the Convention on the Rights of the Child*, U.N. Comm. on the Rts. of the Child on Its Fifty-Fifth Session, U.N. Doc. CRC/C/58/Rev.2 (2010) [hereinafter *Guidelines of Rights of the Child*].

88. U. N. Educ., Sci. & Cultural Org. Director General, *Implementation of Standard-Setting Instruments*, U.N. Doc. 212 EX/23.I, annex II (Aug. 16, 2021).

therefore, “discrimination in education is a violation of rights enunciated in that Declaration.”⁸⁹

Additionally, in its Right to Education Handbook, UNESCO identifies fifty-one treaties, as well as forty-nine soft-law declarations, comments, and recommendations, whether global or regional, that touch on some aspect of the right to education.⁹⁰ Global treaties include conventions such as the Convention on the Rights of the Child;⁹¹ the Convention on the Elimination of All Forms of Discrimination against Women,⁹² ratified by 189 States;⁹³ the Convention Relating to the Status of Refugees,⁹⁴ 146 parties to the treaty;⁹⁵ and the Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts.⁹⁶

Regional treaties include the African Charter on the Rights and Welfare of the Child;⁹⁷ the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights;⁹⁸ the Revised Arab Charter on Human Rights;⁹⁹ and Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.¹⁰⁰

Various relevant comments and recommendations accompany many of the conventions, particularly under the ICESCR and the Convention

89. United Nations Education, Science and Cultural Organization Convention against Discrimination in Education, preamble, Dec. 14, 1960.

90. U.N. EDUC., SCI. & CULTURAL ORG., *supra* note 6, 45–71.

91. *Id.* at 53–54 (recognizing the right to free compulsory primary education for every child).

92. *Id.* at 54–55 (obligating States Parties to provide the same access and same quality of education for women and men).

93. *Status of Ratification Interactive Dashboard*, *supra* note 3 (Mar. 9, 2022) (select “Convention on the Elimination of All Forms of Discrimination Against Women” from the “Select a Treaty” dropdown) (United States is a signatory but did not ratify).

94. U.N. EDUC., SCI. & CULTURAL ORG., *supra* note 6, at 61 (guaranteeing the right to public education of refugees and obligating States Parties to provide refugees the same treatment as it does for nationals regarding primary education).

95. United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 (United States not a party).

96. U.N. EDUC., SCI. & CULTURAL ORG., *supra* note 6, at 64 (obligating parties to the conflict to provide each child’s education in the event of evacuation).

97. *Id.* at 65 (recognizing the right of every child to education and prescribing measures for States to implement for the full realization of the right).

98. *Id.* at 66 (recognizing the right to education for everyone).

99. *Id.* at 68 (guaranteeing the right to education and providing for free and compulsory primary education).

100. *Id.* at 68–69 (protecting against the denial of the right to education).

on the Rights of the Child.¹⁰¹ Beyond the Universal Declaration of Human Rights, declarations relevant to the right to education include documents such as the Association of Southeast Asian Nations (ASEAN) Human Rights Declaration,¹⁰² the New York Declaration for Refugees and Migrants,¹⁰³ and the Safe Schools Declaration.¹⁰⁴

Call to Action on Education Finance

Recently, the Heads of State of nineteen African countries issued a declaration recognizing the negative economic impact that COVID-19 has had, and both recommitting to funding their education programs and “call[ing] upon world leaders, development partners and all [Global Partnership for Education (GPE)] GPE beneficiary countries to stand in solidarity and support the current GPE replenishment campaign”¹⁰⁵ These leaders recognized that to “guarantee quality education” and “maintain the gains and momentum generated towards ensuring inclusive and equitable quality education-for-all over the last two decades,” based largely on “concerted global efforts and catalytic GPE support,” this renewed commitment and additional support would be necessary.¹⁰⁶ Thus, these leaders pledged to either maintain budgets of at least 20% invested in their education systems, or to progressively increase their expenditures on education to be at least 20% within the next five years (2021–2025).¹⁰⁷ Finally, these leaders invited the GPE secretariat and GPE development partners to help monitor the implementation of these commitments and committed themselves “to fully fund education and strengthen education systems across our respective countries.”¹⁰⁸

101. *See id.* at 52–54.

102. *Id.* at 68 (guaranteeing the right to education and prescribing free and compulsory primary education).

103. *Id.* at 62 (committing states to provide quality primary and secondary education to all refugee children within a few months of arriving in the host country).

104. *Id.* at 64 (emphasizing the importance of ensuring the continuation of schooling during armed conflict and of keeping schools, students, and teachers safe from attack).

105. GPE, *Heads of State Call to Action on Education Finance*, ¶ 6 (July 6, 2021), <https://www.globalpartnership.org/news/heads-state-call-action-education-finance>.

106. *Id.* ¶ 5.

107. *Id.* ¶ 9.

108. *Id.* ¶ 15, 16.

B. State Practice and *Opinio Juris*

As it relates to whether customary law exists regarding a right to education, the pertinent question remains whether there is sufficient evidence of widespread and representative state practice recognizing and implementing this right, as well as evidence that States do so pursuant to a legal obligation under international law. In the attempt to address these two queries, the following will examine evidence of States' implementation of these treaty obligations, including the domestication of international treaty laws into national constitutions and statutes, data reflecting the number of children in school during the primary grades, and a number of the reports made by States from various regions of the world to the Committee on the Rights of the Child (Committee).

Domestication of International Treaty Law

Evidence of incorporation of the right to education into domestic law is a factor that signals further implementation of the right on behalf of the State's citizens. Harkening back to the United States, "[i]t is important to remember that the U.S. is an outlier among nations in not recognizing such a federal right."¹⁰⁹ In fact, "a large majority of countries, about 135 countries total and practically all developed nations, specify a federal right to education, although the number of years of education varies greatly from five to fifteen."¹¹⁰ UNESCO breaks the numbers down based on justiciability, noting where States have granted constitutional status to the right to education.¹¹¹ The majority of States have granted constitutional guarantees to a justiciable right to education, with 107, or 55% of nations, doing so.¹¹² Fifty-three States, or 27%, include a directive principle or aspirational right to education in their State's constitution.¹¹³ Thirty-six States, or 18%, including the United States, do not recognize a justiciable right to

109. Martha McCarthy, *Is There a Federal Right to a Minimum Education?*, 2020 BYU EDUC. & L.J. 2, 16 (2021) (footnote omitted).

110. *Id.* See EFA GLOBAL MONITORING REPORT, REACHING THE MARGINALIZED – TABLE 4, 332–39 (8th ed. 2010) <https://unesdoc.unesco.org/ark:/48223/pf0000186606> [hereinafter EFA REPORT] (noting the age group for compulsory education by individual State).

111. U.N. EDUC., SCI. & CULTURAL ORG., *supra* note 6, at 243.

112. *Id.*

113. *Id.*

education in their constitutional document.¹¹⁴ UNESCO points out, however, that there may be other means by which the right to education may be justiciable, such as through legislation or by court decision.¹¹⁵

Number of Primary-Age Students in School

Retrieving data from UNESCO Institute for Statistics (ISC), The World Bank Open Data website¹¹⁶ provides disaggregated data by country, region, and overall world percentages for the number of primary school-aged children who are in school. This data does not reflect whether school attendance is the result of free and/or compulsory, state-funded education, but instead focuses on the percentages of children who are attending school in the primary grades. The data from The World Bank shows that the percentage of primary school-aged children in school increased by nearly twenty percentage points over the past fifty years.¹¹⁷ The data shows a large increase in the number of children in school from 1970 to the early 1990s and then another significant increase in the early 2000s.¹¹⁸ The data is similar for the number of female, primary-aged children that

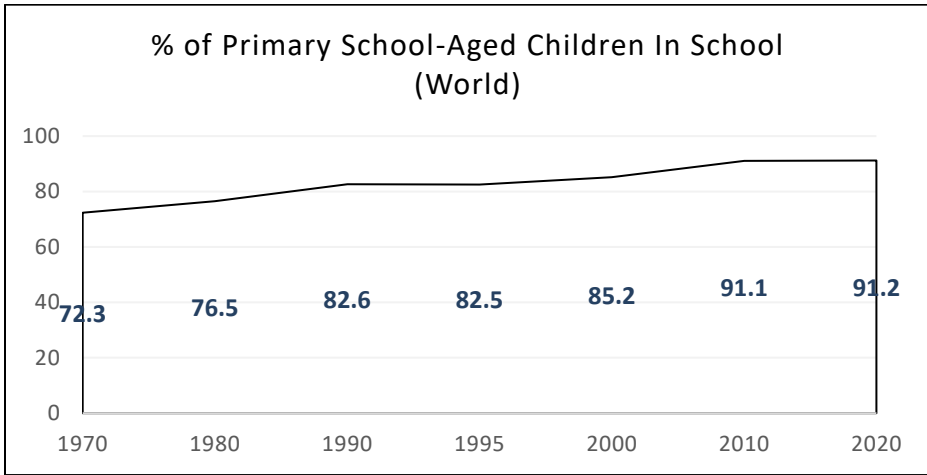
114. *Id.*

115. *Id.* at 244 (footnotes omitted).

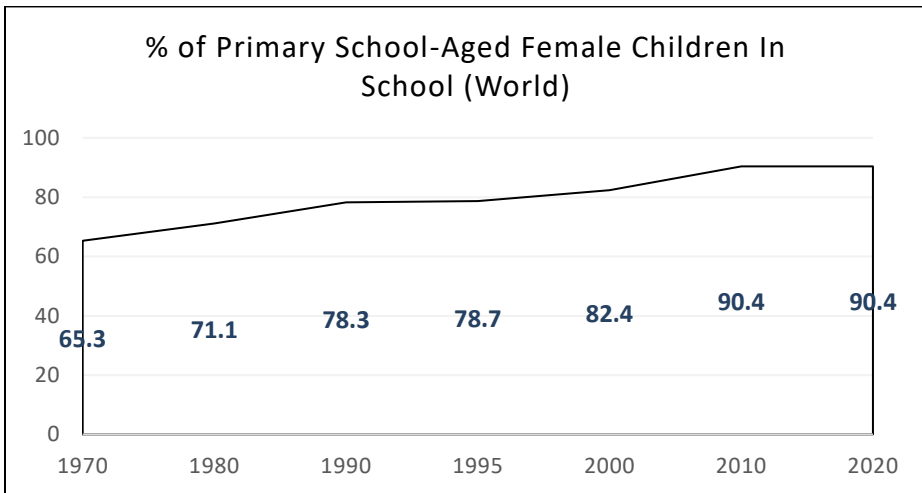
116. *World Bank Open Data*, WORLD BANK, <https://data.worldbank.org/> (last visited Nov. 23, 2021).

117. *Children out of school (% of primary school age)*, WORLD BANK, https://data.worldbank.org/indicator/SE.PRM.UNER.ZS?end=2020&name_desc=false&start=1999 (last visited Nov. 23, 2021) Notably, the Author created the three subsequent charts in this Article regarding the percent of primary school-age child in school from the information found in this source.

118. *Id.*

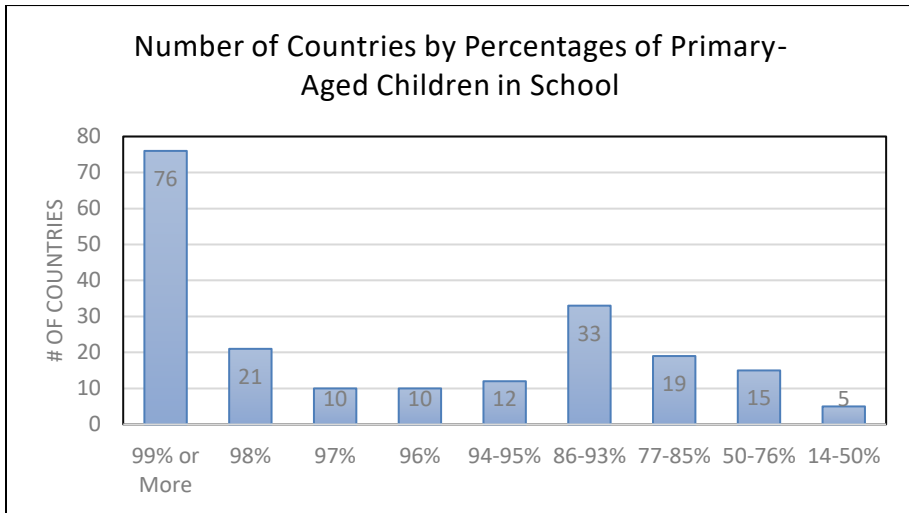


were attending school in the primary grades, although the percentage of female children attending school has consistently lagged behind the overall percentage of children in school.¹¹⁹ These numbers also saw a similar increase from the 1970s to the 1990s, and then another significant increase in the early 2000s.



119. *Children out of school, female (% of female primary school age)*, WORLD BANK, https://data.worldbank.org/indicator/SE.PRM.UNER.FE.ZS?end=2020&name_desc=false&start=1999 (last visited Nov. 23, 2021).

The following graph represents the number of countries within categories based on the percentages of students at the primary level attending school.¹²⁰ Pursuant to



the most current data, 129 States have 94% or more of their primary school-aged children attending school.¹²¹ Of the 193 Member States of the United Nations,¹²² this number represents two-thirds of the total number of recognized states. The report showed that high-income States were more likely to have all or nearly all children in school, while low-income States, heavily indebted poor countries, or States burdened by conflict were most likely to have lower percentages of children in school.¹²³

This may not always be the case, however. For example, based on this data, Equatorial Guinea only had 55% of its primary-aged children in school as of 2015.¹²⁴ Interestingly, according to earlier data from 2009, Equatorial Guinea had both compulsory education and legal guarantees of free education, at least for children between the ages of

120. *Children out of school*, *supra* note 117.

121. *Id.*

122. U.N., *supra* note 80.

123. *See Children out of school*, *supra* note 117.

124. *Id.*

seven to eleven years old.¹²⁵ On the other hand, countries such as the Republic of Congo had 84% of its primary-aged children in school.¹²⁶ This could perhaps be explained by the difference in ages for compulsory education, with its legal guarantees to free and compulsory education for children from the ages six to sixteen.¹²⁷ The UNESCO ISC shows that primary education in Equatorial Guinea spans the ages of seven years old to thirteen years old.¹²⁸ In contrast, in the Republic of Congo, primary education spans the ages of six years old to twelve years old.¹²⁹ Therefore, where compulsory education appears to only cover most, but not all of the primary grades in Equatorial Guinea, and where compulsory education covers all of the primary grades in the Republic of Congo, this could explain, at least in part, the discrepancy between the number of children that are not in school in the two countries.

On the other hand, and countering the general narrative that wealthier countries are more likely to have more of their primary-aged children in school, Human Rights Watch, a non-governmental organization that investigates human rights abuses and then shares its findings to “help shape public debate,”¹³⁰ presents a narrative of “corruption, poverty, and repression of civil and political rights”¹³¹ to explain why so many of Equatorial Guinea children were not in school. The report points out,

Vast oil revenues funded lavish lifestyles for political elite, while little progress was made improving access to health care and primary education Equatorial Guinea is among the top five oil producers in sub-Saharan Africa and has a population of approximately 1 million people. Although its two-year term on the Security Council was won campaigning as a champion of sustainable

125. EFA REPORT, *supra* note 110, at 338.

126. *Children out of school*, *supra* note 117.

127. EFA REPORT, *supra* note 110, at 338 (footnote omitted).

128. *Country Diagrams*, UNESCO INST. FOR STATISTICS, <http://isc.ed.uis.unesco.org/visualizations/> (search in search bar for and select “Equatorial Guinea”) (last visited Nov. 23, 2021).

129. *Id.* (search in search bar for and select “Congo”).

130. *Impact*, HUMAN RIGHTS WATCH, <https://www.hrw.org/impact> (last visited Nov. 23, 2021).

131. *Equatorial Guinea, Events of 2018*, HUMAN RIGHTS WATCH, <https://www.hrw.org/world-report/2019/country-chapters/equatorial-guinea#> (last visited Nov. 23, 2021).

development, it ranks 141 out of 189 countries in the Human Development Index, by far the world's largest gap between per capita wealth and human development score. Despite its natural resource wealth, Equatorial Guinea has failed to provide crucial public services, and . . . has the seventh highest proportion of children not registered in primary schools in the world, according to UNICEF.¹³²

Free and Compulsory Education

Those states parties to the ICESCR and the Convention on the Rights of the Child have an obligation under international law to provide free and compulsory education to children, at least in the primary grades.¹³³ According to UNESCO data,¹³⁴ this obligation is not uniformly met among all states parties to these treaties. As presented in the graph below, the data shows that while compulsory education is more likely to be found in each State by region, legal guarantees to free education is much less likely.¹³⁵ This is especially true for regions with more developing countries, such as Sub-Saharan Africa, Latin America, the Caribbean, East Asia, and the Pacific.¹³⁶ In contrast, in regions with more developed countries, it is much more likely to find both compulsory education and legal guarantees to free education.¹³⁷

132. *Id.*

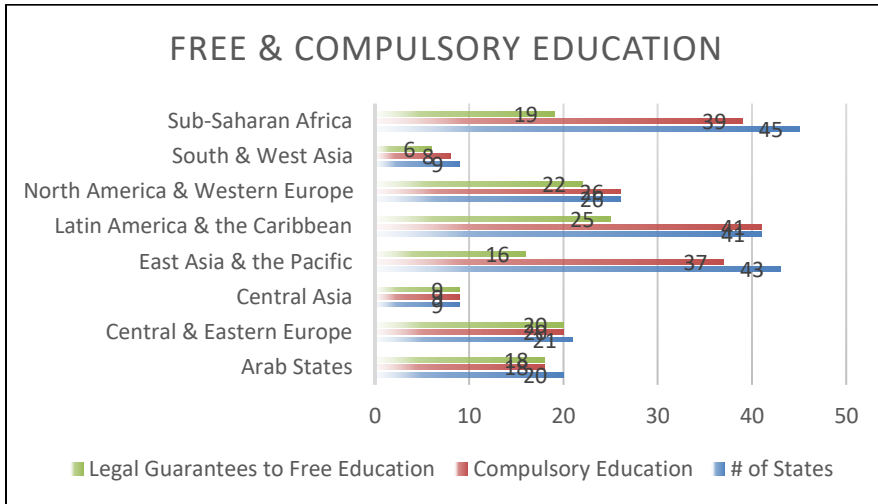
133. *See* G.A. Res. 2200A (XXI), *supra* note 62, at art. 13; *see also* Guidelines of Rights of the Child, *supra* note 87.

134. EFA REPORT, *supra* note 110, at 332–38. The Author created the next chart in this Article regarding free and compulsory education from the information found in this source.

135. *Id.*

136. *Id.*

137. *Id.*



States' Reports

As it pertains to evidence of state practice of recognizing and implementing a right to education, such that customary law is established, the mere act of reporting on treaty obligations by itself seems insufficient. In other words, a State might report that it does *not* have a state practice of recognizing and implementing a right to education, but it is still complying with treaty requirements to make its report. On the other hand, reporting does infer a sense of legal obligation. Here, where the Convention on the Rights of the Child explicitly recognizes a right to free and compulsory education for every child, at least at the primary level,¹³⁸ and where virtually every country in the world has ratified the Convention,¹³⁹ the reports provided to the Committee by states parties to this Convention will be the focus.

1. France

France, which has legal guarantees of free education and has compulsory education from age six to sixteen,¹⁴⁰ reported to the

138. G.A. Res. 44/25, *supra* note 4, at art. 28(1)(a)-(e).

139. *Status of Ratification Interactive Dashboard*, *supra* note 3 (Mar. 9, 2022) (select “Convention on the Rights of the Child” from the “Select a Treaty” dropdown, and then select “United States of America” from sidebar).

140. EFA REPORT, *supra* note 110, at 336.

Committee in 2016 that education reforms were adopted and budget allocations made to promote and strengthen participation in early childhood education, as well as to make education more inclusive.¹⁴¹ France redeveloped early childhood education, resulting in an increase of more than 20% of children under age three in school, which was seen as “one of the most important measures to combat inequality.”¹⁴² In general, although the report to the Committee involved many more rights and obligations to children, it stated that “[e]ducation was the focus of all policies for children; in France, 10 years of education were free and compulsory. . . . National education had benefitted from the largest budgetary increase and the sector of greatest public investment”¹⁴³ France’s Ministry of Education has made it a priority in its education policy to provide “more to those with greater needs.”¹⁴⁴ Thus, additional resources were allocated to schools where the communities had social and educational challenges.

2. Peru

Peru has a justiciable right to education in its constitution,¹⁴⁵ and compulsory education for children ages six to eighteen years old.¹⁴⁶ After Peru’s ratification of the Convention on the Rights of the Child in 1990,¹⁴⁷ it developed an Education for All National Plan 2005–2015, which, as its report to the Committee in 2021 stated, “outline[s] a model for the systematic monitoring of progress in the elimination of equity

141. Press Release, Committee on the Rights of the Child, Committee on the Rights of the Child Considers the Report of France, U.N. Press Release (Jan. 14, 2016), <https://www.ohchr.org/en/press-releases/2016/01/committee-rights-child-considers-report-france> [hereinafter France Press Release].

142. *Id.*

143. *Id.*

144. U.N. Comm. on the Rts. of the Child, Consideration of reports submitted by States parties under article 44 of the Convention, Fifth periodic reports of States parties due in 2012, ¶ 485, U.N. Doc. CRC/C/FAR/5 (Jan. 28, 2015).

145. U.N. EDUC., SCI. & CULTURAL ORG., *supra* note 6, at 243.

146. EFA REPORT, *supra* note 110, at 336.

147. *Status of Ratification Interactive Dashboard*, *supra* note 3 (Mar. 9, 2022) (select “International Covenant on Economic, Social and Cultural Rights” from the “Select a Treaty” dropdown, and then select “Peru” from sidebar) (last visited Nov. 23, 2021).

gaps and the improvement of educational quality”¹⁴⁸ From 2002 to 2010, net primary-school enrollment rate increased from 93.3% to 94%.¹⁴⁹ Peru reported increases “in the resources allocated to education,” for example, an increase from 629 nuevos soles per pupil in 2005 to 771 nuevos soles in 2007.¹⁵⁰ The government also established the Learning Outcomes Strategic Programme in order to assist in programming and creating a “budget for 2008 under the results-based budgeting strategy of the Ministry of Education.”¹⁵¹ From its efforts, the Ministry additionally reported increasing numbers of children in preschool education.¹⁵²

3. Ireland

Ireland has a justiciable right to education in its constitution,¹⁵³ along with compulsory education from ages six to fifteen years old.¹⁵⁴ Ireland’s Second Periodic Report gave “a comprehensive account of the right to access education,”¹⁵⁵ and this report set out to show key developments since the Second Report was made in 2006.¹⁵⁶ The Report stated that its Programme for Government had a commitment “to prioritiz[ing] investment in school building projects.”¹⁵⁷ It also reported working on a new regulatory framework for “open, equitable[,] and consistent” enrollment in schools.¹⁵⁸ It reported that the National Strategy to Improve Literacy and Numeracy among Children and Young People “has a timeline, and clear lead responsibility for delivery is assigned.”¹⁵⁹ The government made substantial investments in ICT grants to schools under the ICT in Schools Programme (tens of millions

148. U.N. Comm. on the Rts. of the Child, Consideration of reports submitted by States parties under article 44 of the Convention, Fourth and fifth periodic reports of States parties due in 2012, ¶ 290, U.N. Doc. CRC/C/PER/4-5 (Mar. 11, 2015).

149. *Id.* ¶ 278.

150. *Id.* ¶ 268 (nueves soles representing Peruvian currency).

151. *Id.* ¶ 264.

152. *Id.* ¶ 259.

153. U.N. EDUC., SCI. & CULTURAL ORG., *supra* note 6, at 243.

154. EFA REPORT, *supra* note 110, at 336.

155. U.N. Comm. on the Rights of the Child, Consideration of reports submitted by States parties under article 44 of the Convention, Combined third and fourth periodic reports of Ireland due in 2009, U.N. Doc. CRC/C/IRL/3-4 (Jan. 26, 2015).

156. *Id.* ¶ 568.

157. *Id.* ¶ 571.

158. *Id.* ¶ 572.

159. *Id.* ¶ 570.

of euros).¹⁶⁰ And finally, Ireland reported that the *Delivering Equality of Opportunity in Schools (DEIS)* programme instituted in 2005 to address educational needs from disadvantaged communities¹⁶¹ was having a positive impact.¹⁶² However, it did say that its ability to expand the DEIS Programme was limited economically.¹⁶³

4. Iran

Iran ratified the Convention on the Rights of the Child in 1994.¹⁶⁴ It also provides a justiciable right to education in its constitution,¹⁶⁵ including a legal guarantee to free education.¹⁶⁶ According to the Committee, Iran

had taken major steps in implementing the provisions of the Convention . . . Iran insisted on the education of children and the education of those working with children, and the National Body for the Convention on the Rights of the Child had instituted several campaigns to expand the education of teachers, judges, lawyers, social workers and others, in order to change attitudes.¹⁶⁷

The Committee recognized, although questioning Iran’s practice of sentencing children to death for criminal charges, that significant progress had been “made in Iran since 2005, especially in health and education.”¹⁶⁸

160. *Id.* ¶ 586.

161. *Id.* ¶ 588.

162. *Id.* ¶ 590.

163. *Id.* ¶ 591.

164. *Status of Ratification Interactive Dashboard*, *supra* note 3 (Mar. 9, 2022) (select “International Covenant on Economic, Social and Cultural Rights” from the “Select a Treaty” dropdown, and then select “Iran (Islamic Republic of)” from sidebar) (last visited (Dec. 1, 2021).

165. U.N. EDUC., SCI. & CULTURAL ORG., *supra* note 6, at 243.

166. EFA REPORT, *supra* note 110, at 336.

167. Press Release, Committee on the Rights of the Child, Committee on the Rights of the Child examines the report of Iran, U.N. Press Release (Jan. 12, 2016), <https://www.ohchr.org/en/press-releases/2016/01/committee-rights-child-examines-report-iran>.

168. *Id.*

Iran reported that “[a]rticle 43 of the Constitution of the Islamic Republic of Iran considers ‘education’ as a basic necessity for all citizens.”¹⁶⁹ Accordingly, [a]rticle 3 of the Constitution calls on the government/administration to provide “free education . . . for everyone at all levels, and the facilitation and expansion of higher education.”¹⁷⁰ The Ministry of Education was tasked with fulfilling this obligation.¹⁷¹ It reported that “[a]ll schools are required to prepare the necessary conditions and facilities so that no student is deprived of education”¹⁷² and that compulsory education extends to junior high school level.¹⁷³ To cover more children and ensure all have access to formal education, Iran reported its prohibition on primary schools from expelling students for any reason and that it established the Distant Education Institute to cover drop-out students through distance education.¹⁷⁴ Finally, because of difficulties establishing high schools in all villages, the Ministry established schools in central villages and then provided free transportation for students traveling into the central villages.¹⁷⁵

5. Israel

Israel does not provide a right to education in its constitution.¹⁷⁶ However, in its report, it noted that the Rotlevi Sub-Committee examined the then-existent Pupil’s Rights Law and determined that it was not consistent with the rights established in the Convention.¹⁷⁷ The Pupil’s Rights Law was amended to “render [the rights of pupils] compatible with the spirit of the Convention.”¹⁷⁸ Israel reported on various actions to promote greater educational equality among the Arab

169. U.N. Comm. on the Rts. of the Child, Consideration of reports submitted by States parties under article 44 of the Convention, Combined third and fourth periodic reports of States parties due in 2013, U.N. Doc. CRC/C/IRN/3-4, ¶ 153 (April 9, 2015).

170. *Id.*

171. *Id.* ¶ 154.

172. *Id.*

173. *Id.* ¶ 155.

174. *Id.* ¶ 157.

175. *Id.* ¶ 161.

176. U.N. EDUC., SCI. & CULTURAL ORG., *supra* note 6, at 243.

177. U.N. Comm. on the Rights of the Child, Consideration of reports submitted by States parties under article 44 of the Convention, Combined second, third and fourth periodic reports of parties due in 2008, U.N. Doc. CRC/C/ISR/2-4 (Aug. 28, 2012).

178. *Id.* ¶ 615.

and Bedouin population, including extending school days and adding new teachers to the system¹⁷⁹ and additional teacher training.¹⁸⁰

6. *Sierra Leone*

Sierra Leone does not have a justiciable right to education in its constitution, but rather recognizes a directive principle or aspirational right to education.¹⁸¹ It does not provide a legal guarantee to a free education but does have compulsory education for children ages six to eleven years old.¹⁸² The Committee experts expressed concerns about education in Sierra Leone, specifically as to “what efforts had been made to improve and enhance the quality of education and to enhance access in rural areas?”¹⁸³ Sierra Leone reported that “the promotion of education was being done on all levels.”¹⁸⁴ For example, the government fully funded food and books in schools and was “pushing girls to aspire to traditionally male dominated fields in education.”¹⁸⁵

Sierra Leone reported passing legislation that recognized the right to education and compulsory primary enrollment (Childs Rights Act, reinforcing the Education Act of 2004).¹⁸⁶ Sierra Leone noted that 93% of children who entered grade one reached grade six, which was the same for boys and girls.¹⁸⁷ Sierra Leone also reported that the Ministry of Education, Science and Technology (MEST) was pursuing capacity improvement programs to improve the quality of education by developing a Capacity Development Strategy: “The State Party notes that even though the challenges facing the country’s education system

179. *Id.* ¶ 626.

180. *Id.* ¶ 629.

181. U.N. EDUC., SCI. & CULTURAL ORG., *supra* note 6, at 243.

182. EFA REPORT, *supra* note 110, at 338.

183. Press Release, Committee on the Rights of the Child, Committee on the Rights of the Child reviews the report of Sierra Leone, U.N. Press Release (Sept. 15, 2016), <https://www.ohchr.org/en/press-releases/2016/09/committee-rights-child-reviews-report-sierra-leone>.

184. *Id.*

185. *Id.*

186. U.N. Comm. on the Rights of the Child, Consideration of reports submitted by States parties under article 44 of the Convention, Combined third, fourth and fifth periodic reports of State parties due in 2012, U.N. Doc. CRC/C/SLE/3-5, ¶ 119(i) (Jan. 27, 2015).

187. *Id.* ¶ 119(v).

are huge and diverse, given the country's brutal civil conflict, Government is determined to overcome them constructively."¹⁸⁸

Regarding its upcoming reporting, the Committee issued a request for information on a list of items, including "information on the steps taken to . . . [i]mplement and budget for key policy actions relating to children's rights under the Mid-Term National Development Plan entitled 'Education for Development'" for the years between 2019-2023.¹⁸⁹ The Committee is also seeking information about the measures Sierra Leone has taken to "[e]nsure free early childhood education, primary and secondary education as per the Free Quality School Education policy,"¹⁹⁰ and to "[e]nsure that the new policy issued on 31 March 2020 is effectively implemented to keep pregnant students and adolescent mothers in school."¹⁹¹

7. Canada

Canada provides a legal guarantee for a free education and has compulsory education for children from the age of six to sixteen years old.¹⁹² Canada has a justiciable right to education in its constitution.¹⁹³ In its Initial Report to the Committee in 1994, Canada explained that "[a]lthough education in Canada is a provincial and territorial (PT) responsibility, the Government of Canada promotes a coordinated national approach to education, based on excellence and equality of opportunity."¹⁹⁴ In its latest report, Canada reported on its focus on First Nation and Indigenous peoples to increase educational attainment and reduce dropout rates.¹⁹⁵

188. *Id.* ¶ 121.

189. U.N. Comm. on the Rights of the Child, List of issues prior to submission of the combined sixth and seventh reports of Sierra Leone, U.N. Doc. CRC/C/SLE/QPR/6-7, ¶ 5(b) (Oct. 12, 2021).

190. *Id.* ¶ 25(a).

191. *Id.* ¶ 25(d).

192. EFA REPORT, *supra* note 110, at 336.

193. U.N. EDUC., SCI. & CULTURAL ORG., *supra* note 6, at 243.

194. U.N. Comm. on the Rights of the Child, Consideration of reports submitted by States under article 44 of the Convention, Initial reports of State parties due in 1994, ¶ 273, U.N. Doc. CRC/C/11/Add.3 (July 28, 1994).

195. U.N. Comm. on the Rights of the Child, Canada's fifth and sixth reports on the Convention of the Rights of the Child, Consideration of reports submitted by States parties under article 44 of the Convention ¶ 69–70, U.N. Doc. CRC/C/CAN/CO/3-4 (October 5, 2012).

8. *China*

China provides legal guarantees of free education and has compulsory education for children ages six to fourteen years old.¹⁹⁶ Its constitution does not secure a justiciable right to education, but it has a directive principle or proclaims an aspirational right to education.¹⁹⁷ China's Compulsory Education Law "makes clear the right and duty of suitably-aged children to receive compulsory education, and that the State shall incorporate the necessary expenditure for the implementation of compulsory education."¹⁹⁸ China reported that it took into account the Committee's observations in its 2008 report and "fully implemented free compulsory education in both urban and rural areas," including the elimination of fees, providing free textbooks, and subsidizing living expenses where families struggled economically.¹⁹⁹

UNESCO Report

UNESCO's report from the Ninth Consultation of Member States highlights actions and challenges that Member States have taken and face as it pertains to the Convention against Discrimination in Education.²⁰⁰ "The vast majority of States reported on the duration of free and compulsory education," although the duration and structure of the educational systems vary greatly.²⁰¹ "Many" of the Member States reported that free education was a fundamental principle, the large majority providing free primary education.²⁰² However, Qatar reported collecting a "token annual amount" to aid with the cost of books and transportation, while the Democratic Republic of Congo reported its

196. EFA REPORT, *supra* note 110, at 334.

197. U.N. EDUC., SCI. & CULTURAL ORG., *supra* note 6, at 243.

198. U.N. Comm. on the Rights of the Child, Consideration of reports submitted by States parties under article 44 of the Convention, Third and fourth periodic reports due in 2009, ¶ 171, U.N. Doc. CRC/C/CHN/3-4 (June 6, 2012).

199. *Id.* ¶ 173.

200. U.N. EDUC. SCI. & CULTURAL ORG., ENSURING THE RIGHT TO EQUITABLE AND INCLUSIVE QUALITY EDUCATION: RESULTS OF THE NINTH CONSULTATION OF MEMBER STATES ON THE IMPLEMENTATION OF THE UNESCO CONVENTION AND RECOMMENDATION AGAINST DISCRIMINATION IN EDUCATION 29 (2018).

201. *Id.* at 31.

202. *Id.* at 32.

intention of making primary education free.²⁰³ In addition, “several” States reported on the challenges of expanding enrollment in primary education in general.²⁰⁴ For example, Australia and the Cook Islands struggle to provide access to education to children living in geographically remote locations.²⁰⁵ And despite legislative prohibitions, Haiti struggles to overcome the fact that many children are still working as live-in domestics instead of attending school.²⁰⁶

United States Compulsory School Attendance and Free Education

Although the United States is not a party to treaties recognizing a right to free and compulsory education for primary grades and does not recognize a federally protected right to education, it is appropriate to point out that all fifty states have compulsory school attendance laws for children starting at age five to eight and lasting until age sixteen to eighteen.²⁰⁷ All fifty states also provide free public education starting at least by age three.²⁰⁸

III. DOES THE RIGHT TO FREE AND COMPULSORY EDUCATION FOR PRIMARY-AGED CHILDREN QUALIFY AS CIL?

As discussed earlier, treaties and declarations have been made relevant in establishing CIL through national and international court decisions.²⁰⁹ In addition, state practice and *opinio juris* remain an integral component of CIL.²¹⁰ The following will consider these elements of CIL in light of the above evidence of a CIL right to free and compulsory education for primary-aged children.

203. *Id.* at 32–33.

204. *Id.* at 34.

205. *Id.*

206. *Id.*

207. *Table 5.1, supra* note 11.

208. *Id.*

209. *See* discussion *supra* Sections II.B and I.C.

210. *See* discussion *supra* Sections II.B and I.C.

A. Treaties and Declarations as Factors Establishing CIL

The *North Sea Continental Shelf Cases* decided by the ICJ²¹¹ provide an appropriate backdrop for analyzing the above evidence. In that case, ten years had passed between the time of the passage of the conventional rule and when the ICJ was tasked with determining whether there was “widespread and representative participation” of “States whose interests were specially affected.”²¹² Here, the ICESCR entered into force in 1976,²¹³ and the Convention on the Rights of the Child in 1990.²¹⁴ This does not take into account the different years that various States ratified the respective treaties, but regardless, a scan of ratification status of these treaties shows that all or nearly all states parties to the treaties have ratified within at least the past ten years.²¹⁵ This should make both the ICESCR and the Convention on the Rights of the Child at least as valid an instrument to establish a customary rule as the Convention establishing the equatorial distance rule at issue in the *North Sea Continental Shelf Cases*, if not more so.

In terms of widespread and representative participation of specially affected States, this consideration would be relevant as applied to a hypothetical case against the United States. In other words, if a case were brought against the United States for failing to provide and/or guarantee free and compulsory education to primary-aged children, the court would consider whether this conventional rule involved a wide sampling of States, particularly those representative of the United States and its relative interests. Where the ICESCR’s obligation to provide free and compulsory education to primary-aged children applies to 171²¹⁶ of the 193 Member States of the United Nations, including most if not all developed nations besides the United States, this would likely be seen as widespread and representative. Furthermore, where the Convention on the Rights of the Child, which recognizes the same obligation for

211. *N. Sea Cont’l Shelf* (Fed. Republic of Ger./Den.; Fed. Republic of Ger./Neth.), Judgment, 1969 I.C.J. 3 (Feb. 20).

212. *Id.* ¶ 73.

213. G.A. Res. 2200A (XXI), *supra* note 62.

214. G.A. Res. 44/25, *supra* note 4.

215. See *Status of Ratification Interactive Dashboard*, *supra* note 3.

216. *Id.* (select “International Covenant on Economic, Social and Cultural Rights” from the “Select a Treaty” dropdown) (March 9, 2022).

Parties to the treaty, has been ratified by every other Member State besides the United States, it seems to be the definition of a widespread and representative sampling of specially affected States.

These two conventions alone are probably sufficient to at least consider next the elements of state practice and *opinio juris*. However, as noted above, while perhaps not all address a specific right to free and compulsory education at the primary level, there are numerous additional treaties and declarations recognizing a right to education for all children and people. These additional hard and soft law documents at a minimum show additional support within the international community of the right to education as a robust human right that must be guaranteed by each individual's respective government. All of these, in addition to the ICESCR and Convention on the Rights of the Child, could perhaps in their totality be sufficient for some courts to hold a government accountable for providing a free and compulsory education based on CIL.

At a minimum, where the ICESCR and Convention on the Rights of the Child both recognize an obligation to provide a free and compulsory education at the primary grades, and are widespread and representative of specially affected States, the first element has been met.

B. Extensive and Virtually Uniform State Practice

In addition to a convention and accompanying rule being widespread and representative, to meet the state practice element, it must be shown that evidence of state practice consistent with the rule is existent in an "extensive and virtually uniform" manner.²¹⁷ The above-mentioned data on percentages of children in school makes it clear that not every child in the world is attending school, despite nearly every country being obligated to provide free and compulsory education. This fact is the result of various factors, but one clear factor that emerges from the World Bank data above²¹⁸ is that children out of school correlates with poverty and the State's development status. The less poverty and more highly developed the nation, the more children in school. The data showed that high-income States likely have all or

217. *N. Sea Cont'l Shelf*, 1969 I.C.J. ¶ 74.

218. See discussion *supra* Sections II.B and I.C.

nearly all children in school.²¹⁹ The UNESCO data²²⁰ regarding free and compulsory education corroborates this as well, showing that more developed countries are more likely to have compulsory education, along with the capacity to provide guarantees of free education.

Even including the States with less income and conflicts that have less children attending school, overall, about 91% of the world's children are now attending school regularly.²²¹ The data shows that there were jumps in percentage of children in school following both the ICESCR in the 1970s and the Convention on the Rights of the Child in the 1990s, raising ten percentage points after each respective convention.²²² This circumstantial evidence infers that subsequent to becoming parties to these Conventions, States made progressive efforts to provide additional resources and means to ensure that students were in school, at least in the primary grades.

An important factor with regard to the United States is the development level of the Parties and their respective state practice. A theme is emerging from the data, showing that developed countries are very likely to provide free and compulsory education and to have all or nearly all their primary-aged children enrolled in school. This is reflective in the States' reports. Developed countries such as France, Ireland, and Canada reported on efforts to improve the quality of education. Children being in school was not the issue, but rather, it was how to ensure that the children already in school might have a higher quality of education. In contrast, less developed countries like Sierra Leone and Peru reported on efforts to increase the numbers of children going to school.

This factor would likely take on special importance for the Court, especially considering the widespread nature of the relevant treaties that essentially include everyone else besides the United States. "Representative" and "specially affected" states might take on special meaning in the context of what state practice would be considered relevant to the United States. Where the United States is a developed country, and also has a practice of providing free and compulsory

219. See discussion *supra* Sections II.B and I.C.

220. See discussion *supra* Sections II.B and I.C.

221. See discussion, *supra* Section II.B.

222. See *Children out of school*, *supra* note 117.

education to all primary aged children, the state practice of other developed nations would likely weigh more heavily in the analysis than the state practice of those perhaps less-developed nations who might not be as representative as where the United States finds itself in.

In support of this notion, the Committee recognized that “France was one of the major powers in the world, its sixth richest country and a permanent member of the United Nations Security Council – all this carried a responsibility and the Committee expected France’s full commitment to children’s rights, which were human rights.”²²³ The same attitude of greater expectations would likely be applied to the United States. And this perspective lends itself to the likelihood that a court would find the state practice of France and other similarly situated nations more relevant to the United States than the state practice of Sierra Leone and other less-developed nations.

Therefore, considering the above, it is likely that a court would find that “a great number”²²⁴ of affected States have recognized and implemented a free and compulsory education. This is especially true among developed countries in whose company the United States would find itself. Thus, a court would likely find that the element of state practice would be met.

C. *Opinio Juris*

Opinio juris refers to state practice based on “fe[eling] legally compelled to . . . do so.”²²⁵ Perhaps the most obvious argument that States provide a free and compulsory education out of a legal obligation is because all States (except the United States) have obligated themselves legally to do so as part of the Convention on the Rights of the Child.²²⁶ This is supported by the increased number of children in school after both the ICESCR and the Convention on the Rights of the Child, as discussed above.

The lack of full compliance with this obligation among all nations of the world would perhaps suggest otherwise. It might signal the notion that there is not a sense of legal obligation, but it is instead merely more of a good, and perhaps important, thing to do. There are at least two

223. France Press Release, *supra* note 141.

224. *N. Sea Cont'l Shelf*, 1969 I.C.J. ¶ 78.

225. *Id.*

226. G.A. Res. 44/25, *supra* note 4, at art. 28(1)(a).

factors that would undermine this argument. First, States are required to make regular reports on their progress towards full implementation of this goal, and reports from States like Peru, Iran, Sierra Leone and others show that on subsequent reports, progress has been made. Furthermore, as evidenced in the Call to Action, these respective African leaders not only declared their commitment to ensure funding was at 20% of the budget for education but also encouraged oversight and accountability in the implementation of their commitments to continue making progress towards their goals.²²⁷

Second, where States do not comply with the obligation to provide free and compulsory education because of poverty, conflict, or other reasonable reasons, there is a strong argument that they are excused from compliance, despite their legal obligation. An excuse is defined as “[a] matter alleged as a reason for relief or exemption from some duty or obligation.”²²⁸ United States criminal law recognizes the doctrine of excuse as a defense for otherwise unlawful behavior. “An excuse defense does not deny that the actor has committed the act in question or that the conduct has harmed society; the defense lies in the absence of moral blameworthiness in the defendant for undertaking that conduct and causing the harm.”²²⁹ This principle is reflected in the recognition of the need for developed countries to assist less developed countries in the full realization of this goal,²³⁰ as well as reservations made by Eswatini and others to fully realize the legal obligations “to the maximum extent of available resources.”²³¹ Thus, except possibly in cases like those discussed above regarding Equatorial Guinea,²³² those developing nations who struggle in good faith to provide free and compulsory education because of a lack of resources and infrastructure are legally excused from immediate full compliance, despite a legal obligation.

227. See GPE, *supra* note 105, ¶ 9, 14.

228. *EXCUSE Definition & Legal Meaning*, LAW DICTIONARY, <https://thelawdictionary.org/excuse/> (last visited Dec. 1, 2021).

229. Saira Mohamed, *Restructuring the Debate on Unauthorized Humanitarian Intervention*, 88 N.C.L. REV. 1275, 1300 (2010) (describing the justification and excuse defenses).

230. G.A. Res. 44/25, *supra* note 4, at art. 28(3).

231. U.N. Convention on the Rights of the Child, *supra* note 84.

232. See *Equatorial Guinea, Events of 2018*, *supra* note 131.

The issue of legal obligation is less obvious an issue among developed nations, largely because providing free and compulsory education appears to largely be an already-common practice. However, the nearly 20% increase in school children enrolled in school worldwide from the 1970s to 2020, and even more so for female children during the same period, suggests that even developed countries have made improvements in the number of children attending school at the primary grades after ratification of these treaties.

Significantly, in the *North Sea Continental Shelf Cases*, the Court did not find evidence that the States who decided to determine their continental shelf boundary by the principle of equidistance did so from a sense of legal obligation.²³³ A major factor in this reasoning was that the Conventional rule framed the requirement of using the principle of equidistance second to determining the boundary by agreement between the respective States.²³⁴ In other words, agreement was the primary method, and the principle of equidistance was secondary to it. In contrast, speaking particularly of the Convention on the Rights of the Child, all states parties are primarily obligated to provide a free and compulsory primary education to all children;²³⁵ and secondarily, developed nations are called upon to help those who may not be fully capable at the time to meet this obligation.²³⁶ This distinction infers that unless reasonably excused, states parties are obligated by international law to provide free and compulsory education in the primary grades and that they comply or attempt to comply in large part because of this legal obligation.

Especially where States are legally obligated to provide free and compulsory education in the primary grades under treaty law, and most states do so or progressively do so, as well as report their progress to Committees of the conventions, it seems likely that a court would find “evidence that they so acted because they felt legally compelled to” do so.²³⁷ Thus, the last element of *opinio juris* would likely be established for a CIL right to free and compulsory education for primary-aged children.

233 *N. Sea Cont'l Shelf* (Fed. Republic of Ger./Den.; Fed. Republic of Ger./Neth.), Judgment, 1969 I.C.J. 3, ¶ 78 (Feb. 20).

234. *Id.* ¶ 72.

235. See G.A. Res. 44/25, *supra* note 4, at art. 28(1)(a)–(e).

236. *Id.* at art. 28(3).

237. *N. Sea Cont'l Shelf*, 1969 I.C.J. ¶ 78.

IV. CONCLUSION

Nearly every State is party to a treaty that explicitly recognizes the right to education as a human right, and obligates each State to provide, among other things, a free and compulsory education for all children. Where participation is very widespread and representative of specially affected parties, there is an argument that this alone would obligate the United States to provide free and compulsory education as a matter of CIL. Furthermore, although implementation in providing free and compulsory education is not entirely uniform, it is extensive, especially compulsory education. And where States not currently capable of providing free education to all children appear to generally be making good faith efforts to progressively attain that goal, there is a strong argument that doing so is a matter of normative state practice. And where virtually every State is party to a convention obligating them under international treaty law to provide a free and compulsory education, and States not currently in compliance appear to be making efforts to come into compliance, there is also a strong argument that the obligation is a matter of *opinio juris*. Thus, the right to education and its accompanying obligation for the government to provide a free and compulsory education to all children is very likely a matter of CIL. With that said, where the United States does not recognize a federal right to education, although unlikely, it is possible that it could fall out of compliance with international law, even though it has not been a party to any convention recognizing such a right.