



FACULTY OF LAW

Lund University

Elsa Wagenius

# The right to education during armed conflicts

Upholding core obligations during insecure  
times

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Supervisor: Ulf Linderfalk

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# Contents

<b>SUMMARY</b> .....	<b>1</b>
<b>SAMMANFATTNING</b> .....	<b>2</b>
<b>ABBREVIATIONS</b> .....	<b>3</b>
<b>1 INTRODUCTION</b> .....	<b>5</b>
1.1 Background .....	5
1.2 Aim and Research questions .....	6
1.3 Delimitations .....	7
1.4 Method and Material .....	8
1.5 Previous research .....	9
1.6 Outline .....	10
<b>2 THE RIGHT TO EDUCATION</b> .....	<b>11</b>
2.1 Education in international law .....	11
2.2 The right to education in ICESCR .....	11
2.3 To respect, to protect and to fulfil .....	14
2.4 Core obligations .....	15
<b>3 LIMITATIONS ON THE RIGHT TO EDUCATION</b> .....	<b>18</b>
3.1 Different kinds of limitations .....	18
3.2 Article 4 ICESCR .....	19
3.3 Invoking Article 4 .....	21
<b>4 ARMED CONFLICTS' IMPACT ON EDUCATION</b> .....	<b>23</b>
4.1 Attacks on schools and staff .....	23
4.2 Closure of schools .....	23
4.3 Military usage of schools .....	24
4.4 Quality and content .....	25
4.5 Limited resources .....	25
4.6 Long term effects .....	26
<b>5 DISCUSSION AND CONCLUSION</b> .....	<b>28</b>
<b>BIBLIOGRAPHY</b> .....	<b>32</b>

# Summary

The right to education is a fundamental human right protected by international law. While included in several instruments, Article 13 and 14 of the ICESCR is viewed as the codification of the right. Most of the obligations of the ICESCR should be implemented progressively as stipulated in Article 2(1). This includes most obligations relating to education. However, the CESCR has stated that some parts of the rights are core obligations which must be fulfilled immediately.

It is impossible to overlook the fact that our world is facing widespread conflicts. This affects all aspects of society, including the educational system. During public emergencies, which armed conflicts can qualify as, limitations can be placed on the rights outlined in the ICESCR. However, limitations can only be justified if they align with the requirements of Article 4 of the Covenant. Today, States who are experiencing armed conflicts are subject to attacks and other challenges resulting in students being deprived of education. The aim of this thesis is to investigate what obligations remain on States during such difficult times. What measures must States take to uphold their core obligations? The thesis uses a legal dogmatic method to scrutinize the law. In addition to this, a legal analytical method is employed to explore the implementation of law and its possible consequences.

The result of this study shows that, while limitations are permitted, many obligations remain on States. As the core obligations are non-derogable, measures must be taken to ensure their fulfilment. This includes for example preventing disruption, allocating resources and continuing to improve the education in the State. A concern that has emerged from this study is the ambiguity surrounding the obligations, which could lead to obligations being disregarded. Another issue that this study shows is the flaws in the reporting system under the CESCR. If the committee is not able to control the obligations being fulfilled it poses a risk of violations. The effects of neglecting the right to education is an uneducated population. This creates further, and more severe, problems for the State and the individual.

# Sammanfattning

Rätten till utbildning är en grundläggande mänsklig rättighet vilken skyddas av internationell rätt. Rättigheten skyddas av flera instrument. Artikel 13 och 14 i ICESCR anses dock utgöra dess kodifiering. Majoriteten av skyldigheterna i ICESCR ska implementeras progressivt enligt artikel 2(1) i konventionen. Detta gäller även för rätten till utbildning. CDESCR har dock utpekat vissa skyldigheter som kärnskyldigheter vilka måste förverkligas omedelbart då konventionen ratificeras.

Det är omöjligt att blunda för de omfattande konflikter som drabbar vår värld idag. Detta påverkar hela samhället, även utbildningssystemet. Under allmänna nödsituationer, vilket väpnade konflikter kan anses vara, finns det möjlighet att begränsa rättigheter i ICESCR. Dessa begränsningar måste dock göras i enlighet med artikel 4 i konventionen. Väpnade konflikter resulterar i attacker och andra utmaningar för stater vilket medför att studenter berövas utbildning. Syftet med denna uppsats är att utreda vilka skyldigheter som kvarstår under dessa kritiska omständigheter. Vilka åtgärder måste stater ta för att tillgodose sina kärnskyldigheter? Den rättsdogmatiska metoden används för att utreda gällande rätt. Följande används den rättsanalytiska metoden för att undersöka implementeringen av lagstiftningen samt dess konsekvenser.

Denna undersökning visar att, trots att begränsningar är tillåtna, kvarstår skyldigheter för stater. Då kärnskyldigheterna är tvingande måste åtgärder vidtas för att upprätthålla dessa. Detta innefattar skyldigheten att förhindra störningar, allokera resurser samt att fortsätta att förbättra utbildningen i staten. Av utredningen har en osäkerhet gällande skyldigheters omfattning noterats. Detta kan medföra att skyldigheterna inte fullföljs enhetligt. Även brister i rapporteringssystemet under CDESCR har uppmärksammats. Då CDESCR inte kan kontrollera förpliktelseernas efterföljande finns en risk för överträdelser. Effekterna av att rätten till utbildning försummas är en utbildad befolkning. Detta skapar ytterligare, och allvarigare, utmaningar för staten och individen.

# Abbreviations

ACLED	Armed Conflict Location and Event Data Project
CESCR	Committee on Economic, Social and Cultural Rights
ECHR	European Court of Human Rights
ECtHR	European Court of Human Rights
ESC	Economic and Social Council
GDP	Gross Domestic Product
HKSAR	Hong Kong Special Administrative Region
HRC	Human Rights Council
HRW	Human Rights Watch
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
IHL	International Humanitarian Law
OHCHR	United Nations High Commissioner for Human Rights
TVE	Technical and Vocational Education
UDHR	Universal Declaration of Human Rights

UN	United Nations
UN Charter	United Nations Charter
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNHRC	United Nations General Assembly Human Rights Council
UNSC	United Nations Security Council
UNSG	United Nations Secretary-General

# 1 Introduction

## 1.1 Background

The world is becoming more violent. According to Armed Conflict Location and Event Data (ACLED) Project Conflict Index, 50 countries were object to extreme, high, or turbulent levels of conflict in 2023.<sup>1</sup> Armed conflicts are increasing in number and tending to be more protracted.<sup>2</sup> The International Committee of the Red Cross (ICRC) identified protracted conflicts as one of the main challenges of international humanitarian law (IHL).<sup>3</sup> The effects of these conflicts are visible on all aspects of society. Armed conflicts lead to endangerment of the population, infrastructure destruction and scarcity of resources. When the entire societal system is jeopardized, important fundamental rights are at risk of being compromised.<sup>4</sup>

Vulnerable groups such as children are deemed more likely to be affected by conflict situations.<sup>5</sup> During 2022 there were 468 million children living in conflict zones.<sup>6</sup> One of the losses that children experience during conflicts is the access to education. Education is a vital instrument for individual development by providing opportunities to actively participate in society.<sup>7</sup> It has also been proven that a well-educated population improves a State's welfare.<sup>8</sup>

The right to education is a human right in itself as well as a necessary mean for the realization other human rights.<sup>9</sup> Since the 20<sup>th</sup> century, the right to education has been protected by international law. While protected in multiple instruments, Article 13 and 14 of International Covenant on Economic, Social and Cultural Rights (ICESCR) is generally understood as the codification of the right.<sup>10</sup> The obligations in ICESCR are often object to progressive

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<sup>1</sup> ACLED Conflict Index.

<sup>2</sup> Von Einsiedel, et al. (2017), para. 2.

<sup>3</sup> ICRC, 33IC/19/9.7, page 30.

<sup>4</sup> OHCHR, E/2015/59, para. 1.

<sup>5</sup> ICRC, Vulnerabilities in armed conflicts.

<sup>6</sup> Obermeier, Aas Rustad (2023).

<sup>7</sup> Beiter (2006), page 26.

<sup>8</sup> Beiter (2006), page 26.

<sup>9</sup> CESCR, E/C.12/1999/10, para. 1.

<sup>10</sup> Beiter (2006), page 86.

realization instead of immediate.<sup>11</sup> However, this does not apply to parts of the obligations. The Committee on Economic, Social and Cultural Rights (CESCR) has, as the monitoring body of the ICESCR, defined core obligations which must be fulfilled immediately.<sup>12</sup> What core obligations apply for the right to education will be further investigated in chapter two.

Under modern international law it is recognized that human rights remain applicable during armed conflicts.<sup>13</sup> However, violations are occurring continuously.<sup>14</sup> Article 4 of ICESCR provides the possibility to limit the obligations of the Covenant. Limiting rights can be a necessary precaution during an emergency. A limitation of core obligations is however not permissible.<sup>15</sup> Amidst the ongoing armed conflicts worldwide, a question arises regarding the fulfilment of these core obligations. The lack of States invoking Article 4 regarding limiting the right to education is also notable. Are states exceeding the requirements of Article 4 in limiting the right to education? Additionally, what are the long-term consequences of a generation of children being deprived of education?

## 1.2 Aim and research questions

The purpose of this thesis is to examine what obligations remain on States to uphold their core obligations related to the right to education during armed conflicts and what consequences neglect of these might lead to. To investigate this, the thesis explores what limitations can be justified under ICESCR and what limitations cannot. Further, examples of the effects armed conflicts may have on education are included.

The text's research question is:

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<sup>11</sup> Saul (2014), page 1.

<sup>12</sup> Saul (2014), page 152.

<sup>13</sup> Giacca (2014), page 25.

<sup>14</sup> HRC, A/HRC/55/28.

<sup>15</sup> Müller (2009), page 581.



1. What measures must States undertake to fulfil their core obligations related to the right to education during armed conflicts and what are the consequences on society of these not being fulfilled?

To answer this overarching question three sub-questions have been formulated:

- 1.1. What does the right to education entail and what core obligations are States obligated to fulfil?
- 1.2. What limitations on the right to education can be justified according to Article 4 ICESCR during armed conflicts?
- 1.3. What impact does armed conflicts have on education?

### 1.3 Delimitations

The right to education is regulated in numerous documents and treaties, both at national and international level. The entailing of the right in the different instruments are not equivalent to each other. Therefore, this thesis focuses exclusively on the regulation of the ICESCR. Other treaties and national law are thus excluded.

During armed conflicts, IHL is *lex specialis*. The relationship between human rights and IHL has been explored in doctrine where it has been established that human rights are still applicable during armed conflicts.<sup>16</sup> IHL serves an important role during armed conflicts, particularly regarding the protection of school facilities.<sup>17</sup> Despite this, as this thesis focuses on obligations pertaining to ICESCR, IHL will not be subject to examination.

The ICESCR offers a few different ways to perform limitations on its rights. Limitations can be justified both with reference to Article 2(1), rights-specific limitations and Article 4 of the Covenant. This thesis will discuss the distinction between these, however solely Article 4 will be explored in depth. Article

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<sup>16</sup> Giacca (2014), page 25.

<sup>17</sup> OHCHR, E/2015/59, para. 3.

4 of the Covenant controls limitations during public emergencies. As armed conflicts can qualify as such emergencies, I found it more relevant to focus the examination on this part.

## 1.4 Method and material

In this thesis a combination between a legal dogmatic method and a legal analytical method is used. The legal dogmatic method aims to describe established law.<sup>18</sup> This is done by examining traditional legal sources.<sup>19</sup> The legal sources used are the ones stipulated in Article 38(1) of the International Court of Justice Statute (ICJ Statute). These are said to be the most entrenched sources of international law.<sup>20</sup> The central focus of this thesis lies in the treaty ICESCR, being the primary source.

To interpret the treaty, subsidiary sources are employed. Firstly, the general comments of the CESCR provides valuable guidance. Despite not being internationally binding it has been affirmed that the general comments should be treated as authoritative.<sup>21</sup> The reporting guidelines of the CESCR were also used to provide direction regarding the criteria for State reports.<sup>22</sup> Alongside the work of the CESCR, the Limburg Principles served as an important complement in elucidating the implications of the Covenant.<sup>23</sup> These recommendations have developed to reflect international human rights law.<sup>24</sup> Additional research materials used were court rulings, doctrine and other documents supplied by the CESCR.

As this thesis aims to examine the right to education from a critical perspective, extending beyond the confines of the legal dogmatic approach, the legal analytical method is also employed. The legal analytical method allows for a wider range of material and assessments. This also enables an analysis of the

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<sup>18</sup> Sandgren (2021), page 51f.

<sup>19</sup> Kleineman (2018), page 21.

<sup>20</sup> Thirlway (2019), page 6.

<sup>21</sup> Boerefijn (1999), page 294 and 300.

<sup>22</sup> Beiter (2006), page 351.

<sup>23</sup> ESC, E/CN.4/1987/17.

<sup>24</sup> Forsythe (2009), Limburg Principles.

practical effects of law.<sup>25</sup> Therefore, sources such as State reports and recommendations from entities like the United Nations (UN) are integrated into the thesis. The combination of this, along with legal sources, enables an exploration into how the States are implementing the Covenant.

## 1.5 Previous research

Many scholars have argued that the ICESCR rights have not been given adequate attention. The element of progressive realisation has resulted in delayed implementation.<sup>26</sup> This has been argued to be a result of the rights being vague and lacking clear legal guidance.<sup>27</sup> In recent years, there has been a heightened emphasis on the implementation of ICESCR rights, with clearer definitions and greater commitment to practical application.<sup>28</sup> For example, Mr. A. Eide<sup>29</sup> has developed a theoretical framework subsequently applied for interpreting the rights enshrined in the ICESCR.<sup>30</sup>

The CESCR offers guidance through its issuance of general comments. The committee coined the concept minimum core obligations.<sup>31</sup> This represents a more tangible delineation of States' obligations. Nonetheless, the extent of these obligations remains uncertain which has been questioned by scholars.<sup>32</sup>

Regarding limitations on the ICESCR, the CESCR has provided scarce clarification. This has caused scholars to investigate what limitations can be justified.<sup>33</sup> The State reports submitted to the CESCR frequently fail to mention limitations. Among others, Amrei Müller has asserted that this suggests that States consider it unnecessary to explicitly mention limitations on the Covenant.<sup>34</sup>

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<sup>25</sup> Sandgren (2021), page 53f.

<sup>26</sup> Ssenyonjo (2009), page 4.

<sup>27</sup> Ssenyonjo (2009), page 5.

<sup>28</sup> Saul (2014), page 3.

<sup>29</sup> Professor Emeritus in human rights law.

<sup>30</sup> ESC, E/CN.4/Sub.2/1987/23, para. 66-71.

<sup>31</sup> Beiter (2006), page 384.

<sup>32</sup> Giacca (2014), page 36.

<sup>33</sup> Müller (2009), page 558.

<sup>34</sup> Müller (2009), page 596f.

## 1.6 Outline

The second chapter of this thesis is dedicated to what the right to education entails. It begins with the emergence of the right to education as a human right. Following this, it offers a description of the regulations outlined in the ICESCR, explaining the obligations posed upon States in upholding this right. Subsequently, the core obligations of the right to education are examined. In the third chapter, the thesis elucidates the requirements for limitations in the ICESCR. Furthermore, it explores the practical application of these limitations by States. The fourth chapter gives concrete examples on what effects armed conflicts may have on education. The final chapter contains a discussion regarding the findings in the previous chapters. It culminates with the conclusion, answering the research question.

## 2 The right to education

### 2.1 Education in international law

Before the 20<sup>th</sup> century, education rights were primarily governed by domestic legislation. However, over the past century, the international community has acknowledged its importance.<sup>35</sup> The rights were formally incorporated into international law with the establishment of the UN and the adoption of the United Nations Charter (UN Charter). The UN Charter created protection for human rights and imposed obligations upon Member States. However, the content of what the human rights entailed were not yet specified. In 1948 the Universal Declaration of Human Rights (UDHR) was adopted by the United Nations General Assembly (UNHRC). The right to education was formulated in Article 26 of UDHR which stated that “everyone has the right to education”. This entails a general right to education on different levels, the central purpose of education and the liberty of choice regarding education. To render these values into legally binding obligations for Member States, the ICESCR was created. The Covenant entered into force on January 3, 1976, following its ratification by 35 States.<sup>36</sup> Today 172 States are parties to the ICESCR. Several other treaties regarding education have been drafted, imposing additional obligations on States.<sup>37</sup>

In international law, the term “education” is narrowly defined.<sup>38</sup> The definition has been made by the European Court of Human Rights (ECHR) which refers to “transmission of knowledge and to intellectual development”.<sup>39</sup> This implies education provided in specialised institutions.<sup>40</sup>

### 2.2 The right to education in ICESCR

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<sup>35</sup> Beiter (2006), page 24f.

<sup>36</sup> Ssenyonjo (2009), page 6ff.

<sup>37</sup> Beiter (2006), page 87.

<sup>38</sup> Beiter (2006), page 19.

<sup>39</sup> *Campbell & Cosans v. UK*, para. 33.

<sup>40</sup> Beiter (2006), page 19.

In the ICESCR, there are two articles devoted to the protection of the right to education. Article 13 of the Covenant concretizes what the right means for the States' duties. Article 13(1) asserts the aims and objectives of the right to education, namely the interpretation mostly aligns with the UN Charter and UDHR.<sup>41</sup> The education "shall be directed to the full development of the human personality".<sup>42</sup> This emphasizes the individual's sense of dignity, gives opportunities to participate in society and promotes understanding of diverse groups.<sup>43</sup>

Article 13(2) lists the different levels of education. These are Technical and Vocational Education (TVE), primary education, secondary education, higher education, and fundamental education. Solely primary education is deemed compulsory. If States fail to meet this requirement, they are obliged to develop a plan of action as stipulated by Article 14 of the Covenant.<sup>44</sup> However, this does not imply that States are absolved of their obligations concerning the remaining levels. States are required to progressively develop, given their conditions, towards achieving accessible education for all on all levels. To fulfil these elements the education must adhere to the following features: *availability, accessibility, acceptability, and adaptability*.<sup>45</sup>

*Availability* implies that functional institutions for providing education must exist in all member States.<sup>46</sup> *Accessibility* includes aspects of non-discrimination, physical accessibility and economic accessibility. Article 2(2) of the Covenant declares a prohibition of discrimination both *de jure* and *de facto*.<sup>47</sup> States are obligated to offer education to all persons of school age residing in their territory. This encompasses obligations to monitor whether the educational system is attaining equitable outcomes. The requirement for physical accessibility means that education must be delivered in a secure setting at a

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<sup>41</sup> CESCR, E/C.12/1999/10, para. 4.

<sup>42</sup> CESCR, E/C.12/1999/10, para. 4.

<sup>43</sup> Saul (2014), page 1095.

<sup>44</sup> CESCR, E/C.12/1999/4, para. 1.

<sup>45</sup> CESCR, E/C.12/1999/10, para. 6.

<sup>46</sup> Beiter (2006), page 478ff.

<sup>47</sup> ESC, E/CN.4/1987/17, para. 37-38.

conveniently situated geographical location. Ultimately, education must be accessible to all at an affordable cost.<sup>48</sup>

*Acceptability* pertains to the content of education, which must align with the objectives outlined in Article 13(1) of the Covenant, and meet the minimum standards established by the member State, as laid out in Articles 13(3) and 13(4). The application of these features should always consider the best interests of the student foremost.<sup>49</sup>

The last requirement for *adaptability* includes that States must be able to change the education as the society evolves. When students' needs change the education provided must be reconsidered.<sup>50</sup> This includes adapting the education in emergency situations.<sup>51</sup>

Article 13(2) (e) requires States to have a development strategy for their school system. This applies for education on all levels. The strategy should involve improving the material conditions of the teaching staff. Teacher working conditions need to be consistently evaluated.<sup>52</sup>

Article 13(3) of the Covenant stipulates the right for parents to influence their children's education regarding the content and format. Education shaped by religious and moral values should be imparted objectively, while upholding the freedom of individual opinions. To ensure that education aligns with the convictions of each individual, tailored content and non-public institutions may also be utilized as alternatives to the public system. However, the alternatives must adhere to the objectives outlined in the Covenant and comply with the minimum standards set by member States.<sup>53</sup> Lastly, Article 13(4) illuminates the opportunity for individuals and "bodies" to establish new educational institutions.<sup>54</sup>

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<sup>48</sup> Beiter (2006), page 487ff.

<sup>49</sup> CESCR, E/C.12/1999/10, para. 6-7.

<sup>50</sup> CESCR, E/C.12/1999/10, para. 4 and 50.

<sup>51</sup> Saul (2014), page 260.

<sup>52</sup> CESCR, E/C.12/1999/10, para. 25-27.

<sup>53</sup> CESCR, E/C.12/1999/10, para. 28-29.

<sup>54</sup> CESCR, E/C.12/1999/10, para. 30.

The implementation of all rights outlined in the ICESCR must be contextualized in relation to Article 2(1). This Article contains four key sections: “(i) the undertaking to take steps; (ii) to utilize maximum available resources; (iii) to achieving progressively the full realization of rights; and (iv) doing so by employing all appropriate means”.<sup>55</sup> This includes both obligations of conduct and obligations of results. States should be achieving the right to education progressively, constantly taking measures to fulfil the right.<sup>56</sup>

## 2.3 To respect, to protect and to fulfil

The Covenant imposes both positive and negative obligations on States. Not all obligations can be concrete actions, some are related to upholding the rights themselves. Mr. A. Eide, created a theory of dividing the obligations into three categories: the obligation to *respect*, *protect*, and *fulfil*.<sup>57</sup> This concept has been recognized as a method of operationalizing the rights delineated within the ICESCR.<sup>58</sup>

The obligation to *respect* hinders States from interfering with rights being exercised.<sup>59</sup> This has an immediate effect on all States that have ratified the Covenant. States are prohibited from implementing measures that impede individuals' abilities to realize their rights. In the context of education, this could involve discrimination in the admission process for public schools.<sup>60</sup> Another example is obstructing access or destroying educational facilities.<sup>61</sup> The obligation also encompasses the establishment of institutions capable of investigating and prosecuting violations by State agents.<sup>62</sup>

The obligation to *protect* involves the State's duty to prevent violations by third parties. Protection can be achieved through legislation or other measures that prohibit infringement. States are entitled to a margin of appreciation since

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<sup>55</sup> Saul (2014), page 136.

<sup>56</sup> CESCR, E/1991/23, para. 1.

<sup>57</sup> ESC, E/CN.4/Sub.2/1987/23, para. 66-71.

<sup>58</sup> Giacca (2014), page 51.

<sup>59</sup> Giacca (2014), page 52.

<sup>60</sup> CESCR, E/C.12/1998/16, para. 26.

<sup>61</sup> CESCR, E/CN.4/1992/26, para 57.

<sup>62</sup> Giacca (2014), page 53.



the developmental situation of the State influences its ability to establish effective forms of remedy.<sup>63</sup> States can be held responsible for failing to protect rights resulting in violations from non-State actors. For example, recruitment of child soldiers by armed groups thereby constitutes a violation of Article 13.<sup>64</sup> States should also prevent and punish attacks on students, teachers, and facilities.<sup>65</sup>

Lastly, States have the obligation to *fulfil*. This aspect is more long-term in its nature, involving the allocation of resources for fulfilment. With these measures, States are compelled to attain outcomes.<sup>66</sup> This obligation takes into account the concept of progressive realization. States are required to facilitate legal, institutional, administrative, procedural, and material conditions to ensure the possibility of the fulfilment of the rights. When individuals are unable to secure their rights, the State is obliged to proactively ensure their provision.<sup>67</sup> The CESCR has stated that this includes a requirement to provide security for students to attend school.<sup>68</sup> Another example is that States are obligated to expeditiously restore educational institutions that have been destroyed.<sup>69</sup>

## 2.4 Core obligations

The ICESCR rights are not an exhaustive list of obligations that must be fulfilled by ratification. However, the CESCR has delineated minimum core obligations that all States are obligated to ensure, irrespective of any prevailing circumstances.<sup>70</sup> Most of them apply immediately.<sup>71</sup> This represents the minimum essential level which applies universally and is not country-dependent.<sup>72</sup> Failing to meet this standard would likely constitute a violation of the

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<sup>63</sup> Giacca (2014), page 58f.

<sup>64</sup> Giacca (2014), page 59.

<sup>65</sup> OHCHR, E/2015/59, para. 68.

<sup>66</sup> CESCR, E/C.12/1998/16, para. 25.

<sup>67</sup> Giacca (2014), page 61.

<sup>68</sup> CESCR, E/C.12/AFG/CO/2-4, para. 43.

<sup>69</sup> Giacca (2014), page 26.

<sup>70</sup> CESCR, E/1991/23, para. 10.

<sup>71</sup> Hausler (2020), page 91.

<sup>72</sup> CESCR, E/C.12/1998/16, para 10.

ICESCR.<sup>73</sup> In relation to specific rights this hinders certain limitations, as regarding the right to housing where it is impermissible to render a person homeless.<sup>74</sup>

The CESCR and States are continuously codifying what these core obligations entail.<sup>75</sup> The implications of this vary for each right. In general comment No. 13, the CESCR concluded:

In the context of article 13, this core includes an obligation: to ensure the right of access to public educational institutions and programmes on a non-discriminatory basis; to ensure that education conforms to the objectives set out in article 13 (1); to provide primary education for all in accordance with article 13 (2) (a); to adopt and implement a national educational strategy which includes provision for secondary, higher and fundamental education; and to ensure free choice of education without interference from the State or third parties, subject to conformity with “minimum educational standards” (Art.13(3) and (4)).<sup>76</sup>

Firstly, the CESCR asserts that any form of discrimination impeding the enjoyment of the right constitutes a violation. Denying access, whether *de jure* or *de facto*, contravenes the essence of the right.<sup>77</sup> All individuals must equally be entitled to access education of uniform quality. The education provided must also align with the aims for education outlined in the Covenant. The CESCR has in previous concluding observations pointed out when the educational material, curriculum, and other elements have been incongruent with those aims.<sup>78</sup>

Primary education is widely considered fundamental for personal development. A core obligation is therefore that primary education must be compulsory and free for all.<sup>79</sup> The aspect of compulsory education encompasses both the *availability* of sufficient schools and the inability of parents to prevent

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<sup>73</sup> Müller (2009), page 581.

<sup>74</sup> Saul (2014), page 257f.

<sup>75</sup> Giacca (2014), page 29ff.

<sup>76</sup> CESCR, E/C.12/1999/10 para. 57.

<sup>77</sup> CESCR, E/C.12/1998/16, para 11.

<sup>78</sup> CESCR, E/C.12/1/Add.67, para. 59.

<sup>79</sup> Saul (2014), page 1102.

their children from attending school.<sup>80</sup> The CESCR has asserted that the term “free” covers both direct and indirect costs.<sup>81</sup>

Additionally, States are mandated to formulate an educational strategy, which considers education across all levels. This plan must include the provision of facilities, personnel, and materials.<sup>82</sup> Education on secondary level should aim to be accessible to all, whereas higher education may consider the capacity of the individual.<sup>83</sup>

Lastly, the CESCR emphasizes the requirement for unrestricted choice of education. It should be acknowledged that the variety of educational institutions within the State may restrict the range of choices available.<sup>84</sup>

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<sup>80</sup> Beiter (2006), page 511.

<sup>81</sup> CESCR, E/C.12/1999/4, para. 7.

<sup>82</sup> Hausler (2020), page 90.

<sup>83</sup> Hausler (2020), page 90.

<sup>84</sup> CESCR, E/C.12/1998/16, para 13.

## 3 Limitations on the right to education

### 3.1 Different kinds of limitations

As a general principle, limitations on rights and retrogressive measures are regarded as violations of the ICESCR.<sup>85</sup> At the same time, human rights are rarely absolute and can be implemented in various ways. The element of progressive realisation stipulated in Article 2(1) allows States to gradually implement rights based on the resources at their disposal.<sup>86</sup> This authorizes limitations provided that the State is working towards fulfilment. Limitations can be necessary due to other public interests or conflicts between sources of law.<sup>87</sup> However, this does not imply that rights can be undermined without the measures being justifiable. The ICESCR also includes rights-specific limitations, such as regarding the right to form and join a trade union in Article 8(1).<sup>88</sup> The right-specific limitations should be exclusively applied to restrictions within their respective domains.<sup>89</sup> Limitations can also be implied such as with compulsory military service compared to prohibition of forced labour in Article 6. To impose the rights specific limitations there are requirements. Limitations must be determined by law and adhere to the principles of necessity and proportionality.<sup>90</sup> The limitation must be an adequate response to the situation. If these conditions are met the limitation can be in force over a long period of time.<sup>91</sup>

Article 4 becomes pertinent if the before mentioned possibilities are unattainable. The Article can be invoked only during exceptional situations which constitute a threat to the State.<sup>92</sup> When the situation ceases to be sufficiently

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<sup>85</sup> Giacca (2014), page 28.

<sup>86</sup> CESCR, E/1991/23, para. 9.

<sup>87</sup> Müller (2009), page 559f.

<sup>88</sup> ESC, E/CN.4/1987/17, para. 60.

<sup>89</sup> Saul (2014), page 244.

<sup>90</sup> Müller (2009), page 560.

<sup>91</sup> Giacca (2014), page 70.

<sup>92</sup> Müller (2009), page 562.

grave, the limitation must cease. This is solely intended to be applicable for a brief duration.<sup>93</sup>

As demonstrated, the ICESCR accommodates various possibilities to limit rights if the specific requirements are met. The distinction between the different kinds of limitations appears to lie in the conditions of the situation and the duration for which they can persist. As this thesis focuses on armed conflicts, which can qualify as exceptional situations, Article 4 of the Covenant will now be examined more carefully.

### 3.2 Article 4 ICESCR

Article 4 of the Covenant is not a derogation clause but a general limitation.<sup>94</sup> The purpose of Article 4 of the Covenant is to safeguard individuals' rights from arbitrary limitations. To invoke Article 4 the situation must amount to an emergency. Armed conflicts are one example of such a situation that could constitute an emergency.<sup>95</sup> However, it must be emphasized that the mere existence of an armed conflict does not permit limitations.<sup>96</sup> States themselves have been deemed the most appropriate to determine whether a state of emergency is present, but supervision is necessary.<sup>97</sup> The declaration of a state emergency is made at the national level and should only persist for as long as it remains necessary and proportionate under Article 4. The CESCR oversees these declarations and has urged States to lift the state of emergency when appropriate.<sup>98</sup>

There are requirements to what limitations can be done when these two conditions are met. Limitations must comply with current domestic legislation.<sup>99</sup> This is an expression of the principle of legality. The domestic legislation must live up to certain minimum elements. This includes elements of quality. Regulations must be non-retrospective, not arbitrary or discriminatory,

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<sup>93</sup> Müller (2009), page 565.

<sup>94</sup> Saul (2014), page 240.

<sup>95</sup> Saul (2014), page 259.

<sup>96</sup> Müller (2009), page 587.

<sup>97</sup> Şahin Alpay v. Turkey, para. 75.

<sup>98</sup> CESCR, E/C.12/DZA/CO/4, para. 23.

<sup>99</sup> Giacca (2014), page 81.

accessible, foreseeable, and subject to effective remedies.<sup>100</sup> It is the responsibility of the CESCR to oversee the States' regulations.<sup>101</sup>

A limitation can solely be made for the purpose of promoting general welfare in a democratic society. The limitation must aim to restore public order and enable the State to ensure the human rights once again. General welfare is characterized by "furthering the well-being of the people as a whole".<sup>102</sup> The CESCR holds that this includes national security or the preservation of public order.<sup>103</sup> Objectives such as "social problems" are not an acceptable justification.<sup>104</sup> In addition to this, the measure must be necessary and acceptable in a democracy.<sup>105</sup> The Wall Advisory Opinion by The International Court of Justice (ICJ) examined the requirement for necessity. The case revolved around whether Israel's construction of a wall on occupied territory constituted a breach of the human rights of the citizens residing in that area. The ICJ stated that the measures taken by Israel were not necessary given the circumstances. Consequently, the construction of the wall constituted a violation of the ICESCR, encompassing, among other rights, the right to education.<sup>106</sup>

Limitations must also be compatible with the nature of the right. The minimum core content of the Covenant cannot be deviated from, which has been frequently reaffirmed by the CESCR.<sup>107</sup> This would undermine the entire provision.<sup>108</sup> Relating to the principle of proportionality, such deviation would not be proportionate.<sup>109</sup> The measures taken must be required given the circumstances. If there were to exist a less intrusive option, it should be used.<sup>110</sup>

When a limitation is made, the State must explain the scope, the circumstances justifying them and for how long the limitation is said to occur.<sup>111</sup>

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<sup>100</sup> Saul (2014), page 248.

<sup>101</sup> Saul (2014), page 249.

<sup>102</sup> ESC, E/CN.4/1987/17, para. 52.

<sup>103</sup> CESCR, E/C.12/1999/10, para. 42.

<sup>104</sup> CESCR, E/C.12/1/Add.15, para. 16.

<sup>105</sup> Saul (2014), page 257.

<sup>106</sup> ICJ, advisory opinion (2004), para. 137.

<sup>107</sup> Teshome (2022), page 342.

<sup>108</sup> ESC, E/CN.4/1987/17, para. 56.

<sup>109</sup> Saul (2014), page 258.

<sup>110</sup> Müller (2009), page 584.

<sup>111</sup> UNSG, HRI/GEN/2/Rev.6, para. 40(c).

States are obligated to continuously inform the CESCR regarding the development in the State. Compared to the general reports, it is especially necessary to inform the CESCR during times of emergency.<sup>112</sup> It has been argued that prompt notification is required.<sup>113</sup> The European Court of Human Rights (ECtHR) has provided remarks on the timing of notification. ECtHR found a two-week period acceptable for limitations but deemed four months too long.<sup>114</sup>

### 3.3 Invoking Article 4

In its capacity as the monitoring body of the ICESCR the CESCR supervises the enforcement of the Covenant by States, primarily through the examination of State reports. To ensure the accuracy of the reports, the CESCR has issued reporting guidelines. The first two guidelines omitted recommendations for States to integrate information regarding Article 4 within their reports. It was not until the guidelines from 2008, which are currently in force, that this requirement was established.<sup>115</sup> When examining State reports in the years that followed, Article 4 is still not consistently mentioned. When States have imposed limitations on the ICESCR rights it has seldom been with reference to Article 4.<sup>116</sup> More commonly Article 2(1) is seemingly used to justify measures. This states a broader discretion as it does not necessitate the promotion of general welfare, rendering it more advantageous for States to invoke.<sup>117</sup>

During the COVID-19 pandemic, restrictions were placed on human rights.<sup>118</sup> Numerous States declared a state of emergency and invoked possible limitation clauses. Limitations were made on the ICESCR rights, although few States mentioned this in their reports. The CESCR acknowledged this, and issued a statement regarding the pandemic where they emphasised that

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<sup>112</sup> Boerefijn (1999), page 280.

<sup>113</sup> Istrefi and Humburg (2020).

<sup>114</sup> *Lawless v. Ireland* (no.3).

<sup>115</sup> CESCR, E/C.12/2008/2, para. 14.

<sup>116</sup> Giacca (2014), page 71.

<sup>117</sup> Müller (2009), page 587f.

<sup>118</sup> Teshome (2022), page 308.

limitations must adhere to the provisions outlined in Article 4.<sup>119</sup> Concerning education, the CESCR advocated for remote solutions in the event of school closures, while also highlighting the challenge of access to the internet.<sup>120</sup> The closure of schools emerged as a prevalent measure adopted in response to the pandemic. However, the measures adopted had a negative effect even on the core obligations of the right to education.<sup>121</sup>

On a few occasions, the CESCR has invoked Article 4 of the Covenant. In their concluding observations of China in 2001, they reiterated that any limitations must comply with Article 4. The CESCR urged China to reassess its policies regarding permanent residence and split families for them to be deemed justified.<sup>122</sup> In response to this, China declared that their policies were in line with the Covenant and that no changes were necessary.<sup>123</sup>

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<sup>119</sup> CESCR, E/C.12/2020/1, para. 11.

<sup>120</sup> CESCR, E/C.12/2020/1, para. 7.

<sup>121</sup> Teshome (2022), page 344.

<sup>122</sup> CESCR, E/2002/22;E/C.12/2001/17, para. 202.

<sup>123</sup> HKSAR (2003), second report.



## 4 Armed conflicts' impact on education

It has been established that the ICESCR remains applicable during armed conflicts. This includes obligations to *respect, protect and fulfil*.<sup>124</sup> However, armed conflicts pose greater challenges to upholding the obligations stipulated in the Covenant. Armed conflicts impact the resources, infrastructure, and overall security of the State. Consequently, the educational system experiences widespread disruption. Down below are a few examples of situations affecting the education in the State.

### 4.1 Attacks on schools and staff

Attacks on schools are widespread and saw a staggering 112% increase during 2022.<sup>125</sup> International human rights law does not protect infrastructure. However, the provision of education necessitates the presence of adequate facilities.<sup>126</sup> When a school is targeted, or damaged as a result of an armed attack, this may limit students' access to education. The decrease in educational institutes contributes to overcrowding and may ultimately render school attendance unfeasible.<sup>127</sup>

Attacks on teachers and students have also increased in recent years.<sup>128</sup> For both teachers and children attending school, even in the absence of tangible threats, the insecure environment that an armed conflict creates can pose dangers.<sup>129</sup> When teachers are unable to work in a secure setting, they are unable to provide education. The role of teachers as community leaders providing security is subsequently undermined.<sup>130</sup>

### 4.2 Closure of schools

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<sup>124</sup> HRC, A/HRC/8/10, para. 37.

<sup>125</sup> UNSC, S/2023/363, para. 9.

<sup>126</sup> Giacca (2014), page 55.

<sup>127</sup> Sheppard (2019).

<sup>128</sup> UNESCO (2010).

<sup>129</sup> Giacca (2014), page 59.

<sup>130</sup> Justino (2010), page 14.

During armed conflicts some States have deemed it impossible to keep the schools open as usual.<sup>131</sup> Allowing children to be educated at school may risk their security. This has led to schools being closed. Similarly, the COVID-19 pandemic also led to widespread school closures, consequently depriving some children of access to education during these periods of shutdown.<sup>132</sup> If school closures generally were justifiable has been questioned by scholars.<sup>133</sup> The African Commission on Human and Peoples' Rights has previously found that closing schools during a two year period constituted a violation of the right to education in the African Charter on Human and Peoples' Rights.<sup>134</sup> Amidst the COVID-19 pandemic, measures undertaken could be argued to safeguard the subsistence rights essential for the survival of individuals. Protecting this may be perceived as more paramount in contrast to the right to education.<sup>135</sup>

When schools are closed, or are in bad conditions, exploring alternative options may become necessary. As during the COVID-19 pandemic, a possible measure during armed conflicts is the usage of digital education. Although, remote learning has demonstrated a tendency to yield poorer academic outcomes.<sup>136</sup>

### 4.3 Military usage of schools

Armed forces are not unfamiliar with utilizing schools for military purposes. The usage of schools serves many tactical advantages. Schools are often well constructed facilities equipped with necessities such as electricity, kitchens, and toilets. For students, schools can represent both a psychical and psychological safe place. However, when schools are involved in military operations, this is undoubtedly put at risk. Even when students continue to attend school during occupation, it has been shown to lead to a discontinuation of school attendance.<sup>137</sup> The Secretary-General (UNSG) has on multiple

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<sup>131</sup> Justino (2010), page 7.

<sup>132</sup> HRW (2020).

<sup>133</sup> Teshome (2022), page 346f.

<sup>134</sup> ESC, E/CN.4/2000/6, para. 32.

<sup>135</sup> Müller (2009), page 584.

<sup>136</sup> Di Maio (2022).

<sup>137</sup> Sheppard (2019).

occasions pointed out that this “impede[s] childrens’ access to education”.<sup>138</sup> In recent years, international support for the prohibition of military usage of schools has been demonstrated. This has resulted in endorsements such as the Safe Schools Declaration and domestic legislation. The international community seems to be almost unanimous that this should not be accepted under international law.<sup>139</sup>

## 4.4 Quality and content

As a result of armed conflicts, the quality and content of education might be at risk of deteriorating. During violent periods, the education provided has been demonstrated to be of lesser quality. This corresponds to facilities being destroyed and teachers facing threats.<sup>140</sup> Even if this is not directly caused by the State, it remains incumbent upon them to ensure the effective provision of education. It has also been demonstrated that the education system can be altered at the initiative of the respective State. Human Rights Watch (HRW) reported that during the conflict in Ukraine, Russian teachers have been compelled to disseminate misinformation to children. The content has been adapted based on the interests of the governing authorities.<sup>141</sup>

## 4.5 Limited resources

In 2023, global military expenditure amounted to \$2.443 billion.<sup>142</sup> War costs money which is taken from other societal projects. Prioritizing military reinforcement and infrastructure repair is likely to constrain the resources allocated to education.<sup>143</sup>

During an armed conflict States remain obligated to use all available resources to ensure that the right to education is supplied. This includes resources that must be relocated from other sections and those that can be achieved from international collaboration. The CESCR has promoted

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<sup>138</sup> UNSG, A/61/529-S/2006/826, para. 91.

<sup>139</sup> Sheppard (2019).

<sup>140</sup> Justino (2010), page 11.

<sup>141</sup> HRW (2023).

<sup>142</sup> SIPRI.

<sup>143</sup> Justino (2010), page 2.

international cooperation and has underscored the obligation to seek assistance when necessary.<sup>144</sup> The CESCR has expressed their concern regarding the distribution of resources in States to the social sectors.<sup>145</sup> States have on multiple occasions been criticized for not prioritizing education in their budget.<sup>146</sup>

## 4.6 Long term effects

The enduring effects of armed conflicts persist in society for numerous years. The ensuing costs have been shown to reflect on the welfare of the State, impacting various sectors including education.<sup>147</sup> For example, after armed conflicts, there is evidence that suggests that total factor productivity experiences a slower rate of increase.<sup>148</sup>

The economic effects on society do not only affect the current population but extends to future students. Rebuilding facilities, schools being occupied, teachers prohibited from providing education et cetera all result in children being deprived of access to education. This results in the population lacking in education.<sup>149</sup>

The long-term effects of an uneducated population have many disadvantages. Education is vital for the development of the individual. It is frequently referred to as an “empowerment right”, giving the individual the opportunity to have control over their life.<sup>150</sup> This benefits all aspects of their personality, by, for example, making them more productive.<sup>151</sup> Lower education has also been documented to lead to poverty traps.<sup>152</sup>

Individuals attaining higher levels of education are more likely to receive higher salaries, leading to increased tax revenue. A higher salary also

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<sup>144</sup> Hausler (2020), page 88f.

<sup>145</sup> CESCR, E/C.12/COD/CO/4, para. 16.

<sup>146</sup> CESCR, E/C.12/1/Add.71, para. 23.

<sup>147</sup> Justino (2010), page 3.

<sup>148</sup> Koczan and Chupilkin (2022).

<sup>149</sup> Justino (2010), page 5.

<sup>150</sup> Beiter (2006), page 28.

<sup>151</sup> Berger, Fisher (2013).

<sup>152</sup> Justino (2010), page 3f.

decreases the likelihood of relying on social support programs. In addition to this, studies have shown that education has positive effects on the health of the individual, and, consequently, reducing the burden on the healthcare system.<sup>153</sup>

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<sup>153</sup> Berger, Fisher (2013).

## 5 Discussion and conclusion

The right to education is a human right that has shown to be fundamental for the individual and the society. For the right to be fulfilled individuals must *de facto* be able to access education. All aspects encompassing *availability*, *accessibility*, *acceptability*, and *adaptability* must be satisfied. The core obligations relating to education must be achieved despite other factors impact. The core obligations are no discrimination, adhering with the aims of the right, supplying compulsory primary education, implementing an educational strategy, and enabling freedom of choice in education.

Although the ICESCR does not include a derogation clause it is possible to limit rights in times of emergency according to Article 4 of the Covenant. The international community has recognized that this might be necessary in acute situations. For an armed conflict to qualify as such it must affect the whole population and constitute a threat to the State. As noted above, all armed conflicts do not live up to these requirements. The State must declare emergency, and the CESCR must concur.

To be justifiable, a limitation must be in accordance with the stipulations outlined in Article 4. A limitation must align with the States' regulations and solely be for the purpose of promoting general welfare in a democratic society. Each measure taken must be justified with this objective. It must also be a necessary and proportionate measure considering the circumstances. Limitations on the core obligations are not proportionate, these obligations are non-derogable.

When a limitation is posed on the ICESCR rights, the CESCR must be informed. The reporting system under the CESCR has been proven to be flawed, States are not always providing the material that the reporting guidelines require them to. This impedes the CESCR's ability to ensure the upholding of rights, potentially leading to arbitrary limitation and therefore neglect of obligations.

During armed conflicts, States face different conditions for providing education. The destruction or repurposing of educational facilities, threats against teachers, the necessity to resort to alternative educational methods, and economic ramifications all significantly impact education. This investigation shows that the right to education is consequently being limited as a cause of this. To answer the text's research question, I have concluded what obligations remain incumbent upon States in accordance with the ICESCR during armed conflicts.

Adhering to the responsibility to *protect*, States are obligated to defend schools from being attacked. I contend that this necessitates tangible steps from the State, such as formulating a strategy for the protection of facilities. To what extent the protection must function effectively has not been clearly defined. In the event of a school being targeted in an attack, this study indicates the necessity for promptly reconstructing the facility. It needs to be prioritized in budget allocation. As confirmed by the CESCR, States who are not providing resources for this are not meeting their obligations.

Closing schools for the purpose of protecting students is not *per se* prohibited. During the COVID-19 pandemic, many scholars questioned the permissibility of such actions under international law. The absence of physical education has a significant impact on students, affecting both their mental health and academic performance. In contrast, having schools open for education might risk the safety of students and staff. Moreover, the right to education may be considered subordinate to other rights. It could be argued that in instances where keeping schools open lead to severe consequences, the justification for closing such facilities becomes apparent. Based on the findings of the investigation, this should entail new obligations for States. The requirement for *adaptability* obligates States to adapt the education to the situation. If States deem it necessary to close schools, they must offer a different way to receive education. Remote learning is an option. However, because it does not properly fulfil all students' needs, it must be carefully supervised.

I would argue that it is the prevailing opinion among most States that the utilization of school facilities for military purposes should be minimized to the greatest extent possible. While not mandated by the ICESCR, numerous other international instruments have enforced prohibitions against it. The Safe Schools Declaration is only one example of this. States that have not endorsed these types of documents should still exercise caution when utilizing schools for this purpose. Otherwise, it could potentially result in the curtailment of the core obligations inherent in the right to education.

The aims of education in the ICESCR are essential to the realization of the right. The same applies for the principle of non-discrimination. On the basis of my study, I would argue that this could never be compromised. The content of the education can never be directed away from the aims. In addition to this, the content must meet a certain standard of quality. However, the criterion for this standard remains unclear.

A crucial aspect of fulfilling all core obligations pertains to economic investments. States are obligated to achieve outcomes in accordance with their obligation to *fulfil*. This should be accomplished by allocating resources, both individually and through international cooperation, to effectively provide education. This investigation demonstrates that the prioritization of education is not universally fulfilled in all instances. I would argue that this is the result of diffuse guidance from the CESCR and the absence of consequences when states fail to comply. Furthermore, I highlight the importance of reassessment in States' budgetary allocations.

In conclusion, limitations on the right to education are subject to a certain threshold and may impose additional obligations on States. The core obligations of the right to education can never be subject to limitation. To fulfil their responsibility according to the Covenant, States must take action to preserve the right to education. This includes adapting and choosing their measures carefully. Limitations can only be done under exceptional circumstances for a short period of time. From this investigation, it remains unclear what specific measures are necessary in each situation. I have examined situations



where certain actions should be preferred, but alternative solutions might be justifiable. The obligations under the ICESCR are vague which results in varying implementations of the Covenant among States. It seems as if States are generally not treating the ICESCR obligations with the seriousness they deserve. States arbitrarily limit the right to education without explicitly acknowledging their failure to fulfil their obligations. In my opinion, there is a need for evaluation of the reporting system, obligations being further defined, and violations being acknowledged. Education is vital for the development of the individual and the society. This needs to be prioritized. The practical effects of limitations exceeding justifiable bounds is a population deprived of education. The long-term consequences relate to economic and social challenges for the State. For the individual, the lack of education impedes their ability to access other fundamental human rights. The right to education is the responsibility of every State and upholding this is crucial for humanity and the international community.

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