

Recognizing Early Childhood Education as a Human Right in International Law

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ABSTRACT

There is incontrovertible evidence that early learning opportunities shape long-term development and health. Nevertheless, early childhood care and education (ECCE) is not expressly mentioned as part of the right to education in the Convention on the Rights of the Child, the International Covenant on Economic, Social and Cultural Rights, and the Convention on the Rights of Persons with Disabilities. This paper argues that the right to education can nevertheless be regarded as including ECCE. We examine the treaties, General Comments, and 264 Concluding Observations by relevant UN monitoring bodies, covering 152 countries from 2015 to 2020, to determine whether the right to ECCE is regarded as part of States' obligations and the content of the duty. These demonstrate consistently that States must provide affordable, accessible, quality, inclusive ECCE, with adequate resources. We argue

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that monitoring committees should draw these obligations together in one General Comment, thereby improving States' accountability and guiding the delivery of ECCE.

KEYWORDS: early childhood education, sustainable development goals, CRC, ICESCR, CRPD

1. INTRODUCTION

While it is widely recognized that the mass closure of schools and pre-school facilities precipitated by COVID-19 has had an enormous and ongoing impact on children and families, its consequences for very young children are easily overlooked.¹ Yet it is well established that informal and formal early learning opportunities and child development programmes have important long-term cognitive, social, health and human capital benefits. As Britto et al. show, 'Advances in basic and intervention science indicate that early childhood is a period of special sensitivity to experiences that promote development, and that critical time windows exist when the benefits of early childhood development interventions are amplified.'² Children's early learning is supported both by stimulating home environments and participation in high-quality early childcare and educational programmes.³ By the time they turn three, children's brain volumes reach 80–90 per cent of their adult sizes, so that, as the Jomtien World Declaration on Education for All stated in 1990: 'Learning begins at birth.'⁴ It is therefore clear that we can no longer regard education as beginning when children start primary education. As Richter et al put it: 'It is critical to bear in mind the long-term importance of the enormous learning that occurs—or does not occur—from before birth to when children walk into their first-grade classrooms.'⁵

Early childhood education has its strongest articulation in the United Nations Sustainable Development Goals (SDGs), the ambitious global programme to eradicate poverty and reduce inequality within and between nations by 2030.⁶ SDG4 commits the world to ensure inclusive and equitable quality education and promote lifelong learning opportunities for all by 2030. In an important breakthrough for early childhood education, Target 4.2 requires all countries in the world, by 2030 to: 'ensure that all girls and boys have access to quality early childhood development, care and pre-primary education so that they are ready for primary education.' The SDGs are, however, only political commitments, with no legally binding force and can be displaced if States regard other priorities as more pressing.

This raises the question of the extent to which early childhood care and education (ECCE) can be regarded as an aspect of the right to education in international human rights law, and, if so, what is the content of the correlative obligations. The right to education is enshrined in three

¹ Lopez Boo, Behrman and Vazquez, 'Economic Costs of Preprimary Program Reductions Due to COVID-19 Pandemic' (2020) Technical Note No. IDB-TN-2000 Inter-American Development Bank; McCoy and others, 'Global Estimates of the Implications of COVID-19-Related Preschool Closures for Children's Instructional Access, Development, Learning, and Economic Wellbeing' (2021) *Child Development*; Yoshikawa and others, 'Effects of the Global Coronavirus Disease-2019 Pandemic on Early Childhood Development: Short- and Long-Term Risks and Mitigating Program and Policy Actions' (2020) 223 *The Journal of Pediatrics* 188.

² Britto and others, 'Nurturing Care: Promoting Early Childhood Development' (2017) 389 *The Lancet* 91.

³ Richter and others, 'Measuring and Forecasting Progress in Education: What About Early Childhood?' (2021) 6 *NPI Science of Learning* 27.

⁴ United Nations, *World Declaration on Education for All*, https://www.humanium.org/en/wp-content/uploads/2017/03/Education_for_all.pdf (1990).

⁵ Richter and others above, n.4.

⁶ UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

international treaties, the CRC,⁷ the International Covenant on Economic, Social and Cultural Rights (ICESCR),⁸ and the Convention on the Rights of Persons with Disabilities (CRPD).⁹ The CRC also requires States to ‘ensure, to the maximum extent possible, the . . . development of the child.’¹⁰ All these conventions have been ratified by the vast majority of States.¹¹ The critical question then is how and in what ways the right to education applies to children before they enter formal education, and what the content of the correlative obligations is.

Establishing the scope of the right to ECCE and its correlative obligations is crucial to ensure that governments can be called to account in achieving and maintaining compliance to fulfil the rights of young children. Furthermore, these conventions include an undertaking by State parties, where relevant, to engage in international assistance and co-operation. Given the enormous numbers of competing needs and priorities facing governments as we confront and eventually emerge from the pandemic, being aware of these rights and their content, as well as the corresponding obligations on States, will be of great value in advocating for appropriate investment in the growth and development of the youngest amongst us. It will also give weight and content to co-operation and assistance, so that high-income States shoulder their responsibility to share resources with middle- and lower-income States. This is especially so since education is almost always a funding priority for overseas development aid.

At first glance, it may seem that the paradigm adopted by international human rights law is indeed that the right education only begins when children reach the age of entry into first-grade. While all three treaties make specific mention of primary and secondary education, early childhood education is not mentioned. However, all three treaties require States to ensure that education is directed to the full development of the child’s personality, and that education should enable full participation in society. As set out above, there is now powerful evidence that early childhood education is crucial to the child’s development, and with it their ability to participate in society.¹² It is therefore argued in this paper that early childhood education can rightly be regarded as an aspect of States’ legally binding obligations in relation to the right to education. This paper shows that this is borne out in the practice of the UN monitoring committees, both in relation to General Comments issued by these committees, and their Concluding Observations (COs). It is also borne out by State responses to the recommendations in the COs.

Equally important is the need to set out with greater detail the content of the State parties’ responsibilities in relation to ECCE. COs give important guidance as to the content of these responsibilities, particularly in relation to equality, positive measures and resources. However, these are found in a fragmented form, across numerous different sets of COs by different treaty bodies. This paper draws together these different fragments, over three different treaty bodies, over a period of five years, to draw together a coherent set of principles to guide States parties going forward. As well as being bolstered by the scientific evidence of the benefits of ECCE, mentioned above, such principles will also facilitate States in meeting their promises under SDG 4.2. The paper concludes by arguing that it is time for the monitoring committees to issue a new

⁷ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, Vol. 1577, p 3.

⁸ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, Vol. 993, p 3.

⁹ UN General Assembly, *Convention on the Rights of Persons with Disabilities: Resolution/Adopted by the General Assembly*, 24 January 2007, A/RES/61/106. The CERD includes a right not to be discriminated against on grounds of race in the enjoyment of the right to education (Art. 5(S)). The Convention on the Elimination of Discrimination against Women (CEDAW) requires States to eliminate discrimination against women in the field of education (Art.10). These provisions do not refer to the aims of the right to education in the same way as CRC, ICESCR and CRPD and were therefore not included.

¹⁰ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, Vol. 1577, p 3 (CRC), Art 6(2).

¹¹ CRC ratified by 196 states, ICESCR ratified by 171 states, CRPD ratified by 182 states.

¹² Richter and others, above n.4; Britto and others, above n.3.

General Comment, or to amend their existing General Comments, to set out clearly, and in one document, how States should act to comply with their responsibilities in relation to the right to early childhood education, both in relation to their own jurisdictions and the undertakings of co-operation and assistance.

Our focus in this paper is on the right to education rather than solely on the right to the development of the child. This is because the right to education is found in all three treaties. Although all three treaties refer to the full development of the personality of the child as one of the objectives of the right to education, only the CRC has a separate provision on States' obligations in relation to the development of the child. Given that the same right is referred to in several different treaties, it is of value in itself to ensure coherence in its interpretation.¹³ The paper also makes an important contribution through the interdisciplinary nature of its approach, drawing on cutting-edge social science evidence to support the interpretation of the right to education and development in widely ratified Conventions.

Part I explains the method used to reach this conclusion. Part II describes the results of our examination of the text, General Comments and COs. It also briefly surveys State responses to COs. Part III concludes by demonstrating the importance of a new or revised General Comment to reflect the right and its correlative obligations. The overall purpose is to provide clarity to ensure that the development, education and health of children (from birth to pre-school) are given necessary priority, particularly for the most marginalized and disadvantaged children, including children with disabilities. Because of the continuity between child development and learning and because early child development (ECD) and early childhood education (ECE) are often used to refer to the preschool period in general, here we refer to ECCE together.

2. METHOD

Interpretation of international human rights treaties is clearly a contested space. While States cannot be expected to be bound by words they have not agreed to, the high level of abstraction necessary to ensure that a treaty is applicable across a wide variety of jurisdictions and endures over time means that the terms of a treaty are inevitably open-textured. Tobin argues that this means that the act of interpretation cannot mean the attribution of a single definitive meaning, but is instead an act of persuasion: 'an attempt to convince the relevant interpretative community that a particular meaning from within a suite of potential meanings is the most appropriate interpretation to adopt.'¹⁴ While States are clearly central to this interpretative community, he argues that this extends to a broad range of non-state actors with an interest in the implications of the interpretation, including international organizations, monitoring bodies and civil society organizations. The criteria for persuasiveness, in his view, are that the proposed meaning be principled, clear and practical, coherent and consistent with the system of international law, and sensitive to the nature of the socio-political context within individual states and the international legal order.¹⁵

The usual starting point is the method of interpretation set out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties. Article 31 requires a treaty to be interpreted in good faith in accordance with the ordinary meaning of its terms in their context and in the light of the object and purpose of the relevant treaty;¹⁶ while Article 32 allows recourse to be had

¹³ *Legal Consequences for States of the Continued Presence of South Africa in Namibia* 1971 ICJ 6 (International Court of Justice).

¹⁴ Tobin, 'Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation' (2010) 23 *Harvard Human Rights Journal* 201, 207.

¹⁵ *Ibid.*, p 214.

¹⁶ United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, Article 31 para 1; *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2019 (II)*, p 598, para 106.

to supplementary means of interpretation when Article 31 leaves the meaning ambiguous or obscure or leads to a manifestly absurd or unreasonable result.¹⁷ The paper first considers the wording of the right to education in the CRC, ICESCR and CRPD, respectively, according to the elements set out in Article 31 of the Convention. Since ECCE is not expressly mentioned as part of the right to education in the three treaties, it is necessary to examine the object and purpose of each Convention, and specifically the purposes set out in the right to education itself. The paper specifically relies on the advances in the scientific evidence on the development of the child and the role of ECCE to support the interpretation of the express objective that education should further the full development of the child. This also informs the approach to the *travaux préparatoires* per Article 32. The fact that the drafters included a set of objectives specific to the right to education which emphasize the full development of the child and the other objectives as explicit aims demonstrates their recognition that advances in the scientific evidence on child development should continue to inform the interpretation of the right to education in these instruments. This is in accord with the evolutionary interpretation set out by the ICJ in the *Navigational Rights* case, in which it referred to ‘situations in which the parties’ intent upon conclusion of the treaty was, or may be presumed to have been to give the terms used—or some of them—a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things developments in international law.’¹⁸

At the second stage, we examined the interpretation of the text by the committees of experts, known as ‘treaty bodies’, appointed by the UN to monitor the implementation by States Parties of their obligations under the treaties. In international law, the work of treaty bodies is persuasive authority and is aimed at positively influencing States Parties to improve their compliance.¹⁹ Treaty bodies distil their interpretation of the provisions of respective human rights treaties and publish them in the form of ‘General Comments.’ We examined General Comment No. 7 of 2005,²⁰ (CRC GC7), on Implementing Child Rights in Early Childhood, issued by the Committee on the Rights of the Child (CCRC) in relation to the CRC, which specifically refers to early childhood education. We also examined General Comment No. 4 of 2016,²¹ (CRPD GC4), on the Right to Inclusive Education issued by the Committee on the Rights of People with Disabilities (CCRPD) in relation to the CRPD; and General Comment No.13 of 1999,²² (CESCR GC13), on The Right to Education, issued by the Committee on Economic, Social and Cultural Rights (CESCR) in relation to the ICESCR.

At the third stage we examined the COs of the relevant treaty bodies in response to States Parties’ reports on compliance with the respective treaties. States Parties are required to submit periodic reports (usually every four or five years) to the relevant treaty body on its implementation of the rights. The reports must set out the measures taken by the State to give effect to the treaty, and also mention any difficulties encountered. The committees also receive information from other sources such as national human rights institutions, civil society organizations, other UN or intergovernmental entities, and professional and academic institutions. Based on this information, the treaty body publishes its COs, in which it acknowledges positive steps towards implementation taken by the State, but also identifies areas of concern and makes recommendations as to what needs to be done to give full effect to the treaty’s provisions. In subsequent reports, State parties should set out the concrete measures they have taken to

¹⁷ Vienna Convention, above n. 24, Article 32.

¹⁸ *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)* (2009) ICJ Rep 13 (International Court of Justice) at [64]; Bjorge, *The Evolutionary Interpretation of Treaties* (OUP 2014).

¹⁹ Mechlem, ‘Treaty Bodies and the Interpretation of Human Rights’ (2009) 42 *Vanderbilt Journal of Transnational Law* 45.

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Ibid.*

implement previous recommendations.²³ We have used these COs to demonstrate how the treaty bodies give content to the right to ECCE, and to argue that it is time to draw them all together to give clear guidance to States parties on their responsibilities in this respect.

We analysed all the COs (a total of 264) issued by the CCRC ($n = 120$), the CESCR ($n = 71$) and the CCRPD ($n = 73$) from January 2015 until March 2020 (the last reports submitted at the time of analysis). We chose this five-year period because States are required to report on their compliance within two years of their initial ratification and thereafter every five years. We focused on the most recent five years because we were interested in the Committees' assessment of States' compliance in the most recent round of reporting.

We initially searched for all references to 'Education' as COs have a section for education and references to ECCE are most commonly in this section. In order to ensure relevant comments placed in other sections were not missed, we also searched for 'SDG 4.2', 'Preschool', 'Kindergarten', 'Early Childhood Education' and 'Childcare'. We then examined in more detail the context in which these appeared to undertake our qualitative assessment. Under these search terms we found consistent topics on which committees commented across COs. These were divided into two main categories 'Concerns and Recommendations' and 'Marginalised Groups'. Under 'Concerns and Recommendations', the committees commented on six main elements: 1) human, 2) financial and 3) technical resources, 4) appropriate strategy/policy, 5) quality and 6) access. Under Marginalised Groups, we divided these into 1) rural/island/poor, 2) gender, 3) refugee/migrant/internally displaced, 4) street children, 5) imprisoned children, 6) children with disabilities and 7) indigenous/Roma/other ethnic minorities. We also found that 'private education' often arose as a specific barrier facing marginalised groups and we therefore included this as a category within marginalised groups. This is not an exhaustive list, but includes the groups most frequently referred to.

3. INTERPRETING THE CONVENTIONS

A. Texts of the Convention on the Rights of the Child, International Covenant Economic, Social and Cultural Rights and Convention on the Rights of Persons with Disabilities

While all three Conventions recognize the right to education and make specific mention of primary and secondary education, none of them expressly refer to ECCE.²⁴ Under Articles 28 and 29 CRC, States Parties recognize the right to education, which should be achieved progressively and on the basis of equal opportunity. Article 28 makes specific mention of primary, secondary and higher education as well as educational and vocational information and guidance; but early childhood education is not expressly mentioned.²⁵ The formulation of the right to education under the ICESCR is very similar to that under the CRC. Article 13(2) specifically mentions primary, secondary, higher and fundamental education (for those who have not received or completed primary education) but does not expressly refer to ECCE. A similar pattern is found in the CRPD. Under Article 24 of the CRPD, States Parties must recognise the right of persons with disabilities to inclusive lifelong education with a view to realising equal opportunity. Again, only primary and secondary education are expressly mentioned.

Nevertheless, the right to education in all three Conventions stands out in that they include a specific provision as to the purpose and objectives of the right to education, and again all three follow a similar pattern. All the Conventions state that the right to education should be directed towards the full development of the child's personality, talents and abilities, and

²³ The United Nations, 'The United Nations Human Rights Treaty System, Fact Sheet No. 30' (United Nations, 2012).

²⁴ *Ibid.*

²⁵ CRC, Article 28.

to the preparation of the child to participate in society. Under Article 29(1)(a) CRC, States Parties agree that the education of the child shall be directed to ‘the development of the child’s personality, talents and mental and physical abilities to their fullest potential.’²⁶ Article 29(1)(d) further declares that education should be directed to “the preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples”²⁷ Similarly, Article 13(1) ICESCR specifies that education “shall enable all persons to participate effectively in a free society”.²⁸ Article 13(2), as in the CRC, states that the guiding principle is that, inter alia, “education shall be directed to the full development of the human personality and the sense of its dignity”²⁹ This is further reflected in the CRPD, which requires States Parties to “ensure an inclusive education system at all levels and lifelong learning be directed to (a) [T]he full development of human potential and sense of dignity and self-worth . . . [and] (b) [T]he development of persons with disabilities of their personality, talents and creativity, as well as their full mental and physical abilities, to their fullest potential”.³⁰

There is a mounting body of evidence which establishes incontrovertibly that learning begins at birth and the most fundamental learning happens in the first few years of life.³¹ Evidence shows clearly that high-quality early learning is associated with linguistic, cognitive, social, emotional and regulatory skills that predict lifelong functioning in all developmental domains.³² Similarly, the benefits of the inclusion of children with disabilities in ECCE are well supported in the literature and intervention during this period has the greatest impact for those most disadvantaged.³³ Preschool attendance is known to support transitions to school, and its absence both detracts from the value of primary education and exacerbates inequalities between children who have had more opportunities for learning at home than others.³⁴ In effect, ignoring ECCE undermines the right to education more broadly. Moreover, the reference to ‘lifelong learning’ in the CRPD, although usually regarded as referring to adult education, provides an important textual anchor to an interpretation which regards education as beginning at birth.

Interpreting the terms of the treaty according to their ordinary meaning in the context of each treaty, there is therefore a strong argument that the right to ECCE is implicit in the right to education in each of these Conventions. Although the content of that right is not specified, each treaty makes the objective clear: that education should always be directed to the development of the child to their full potential.³⁵ This is reinforced by Art 6(2) of the CRC, which provides

²⁶ CRC, Article 29(1)(a).

²⁷ CRC, Article 29 (1)(d).

²⁸ ICESCR, Article 13(1).

²⁹ ICESCR, Article 13(2).

³⁰ CRPD, Article 24.

³¹ Britto and others (n 2).

³² *ibid*; Reynolds and others, ‘Educational Effectiveness Research (EER): A State-of-the-Art Review’ (2014) 25 *School Effectiveness and School Improvement* 197; Shafiq, Devercelli and Valerio, ‘Are There Long-Term Benefits from Early Childhood Education in Low- and Middle-Income Countries?’ (2018) 26 *Education Policy Analysis Archives* 122; Gorey, ‘Early Childhood Education: A Meta-Analytic Affirmation of the Short- and Long-Term Benefits of Educational Opportunity.’ (2001) 16 *School Psychology Quarterly* 9.

³³ Betts and Lata, ‘Inclusion of Children with Disabilities: The Early Childhood Imperative.’ (magazine: UNESCO Policy Brief on Early Childhood 2009) 46; Shonkoff and others, ‘An Integrated Scientific Framework for Child Survival and Early Childhood Development’ (2012) 129 *PEDIATRICS* e460; Irwin, ‘Early Child Development: A Powerful Equalizer.’ [2007] World Health Organization’s Commission on the social determinants of health, <http://www.who.int/social_determinants/resources/ecd_kn_report_07_2007.pdf>.

³⁴ Cebolla-Boado, Radl and Salazar, ‘Preschool Education as the Great Equalizer? A Cross-Country Study into the Sources of Inequality in Reading Competence’ (2017) 60 *Acta Sociologica* 41.

³⁵ This conclusion is supported by Courtis and Tobin, ‘Art 28 The Right to Education’ in J. Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (2019), 1065. Notably, the issue is not dealt with by Saul, Kinley and Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials* (2014), Chap 15; nor by Anastasiou, Gregory and Kauffman, ‘Art.24 Education’ in Bantekas, Stein and Anastasiou (eds), *UN Convention on the Rights of Persons with Disabilities: A Commentary* (2018) apart from a brief reference to the travaux.

that States Parties must ensure the survival and development of the child to the maximum extent possible. The CCRC has stated that the right to survival and development can only be implemented in a holistic manner pulling together the rights to health and security, education and play.³⁶ Under the CRC, therefore, ECCE can be seen as one of the specific and potentially more directly implementable rights furthering the object of the duty to ensure the right to survival and development of the child. Notably, however, in all three Conventions, the right to education supports the intrinsic value of learning, not merely the instrumental way in which education supports other elements of development.³⁷

This interpretation is further supported by the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which is the only Convention to expressly mention pre-school education. In this Convention, States are required to ensure equality between men and women in, inter alia, preschool education.³⁸ Discrimination against women and girls at a variety of levels has an impact on early childhood development. To some extent this is direct, in terms of less access to early childhood development services³⁹, but largely it is indirect. Maternal education is one of the most reliable predictors of child development outcomes globally,⁴⁰ and yet there remain challenges to achieving equal opportunities to education for girls. In many countries families still have a 'preference for educating their sons',⁴¹ or see "girls" education is a burden on families⁴². For older girls, a lack of gender sensitive sanitation facilities in schools is a common issue⁴³ and pregnant girls are often made to drop out of school⁴⁴, while not being protected from factors that make them more vulnerable to pregnancy such as child marriage and sexual assault in schools.⁴⁵ The availability of ECCE is also crucial to the ability of women with small children to participate in the paid workforce on equal terms with men.

It could be argued that the conclusion that ECCE is included in the right to education is undermined by the *travaux préparatoires*. In both the CRC and the CRPD drafting process, an earlier draft included a reference to early childhood and pre-school education. One of the drafts put to the Working Group on a draft CRC (incorporating suggested revisions by UNESCO and the technical review of the Secretariat) did include an additional provision according to which States would be under a duty to facilitate the provision of ECCE. This provision did not appear in the draft submitted to the Group by the drafting group established by the Chairman, and later adopted by the Working Group. The report of the Working Group on 2 March 1989 does not explain why it was omitted, except by a broad reference to a desire to maintain consistency with

³⁶ CRC General Comment no 7 on implementing the rights in early childhood.

³⁷ See further Peleg, *The Child's Right to Development* (2019).

³⁸ CEDAW, Article 10(a).

³⁹ Committee on the Rights of the Child, Concluding Observations Regarding Malawi, 03 February 2017, CRC/C/MWI/CO/3-5, para 38.

⁴⁰ Augustine, Cavanagh and Crosnoe, 'Maternal Education, Early Child Care and the Reproduction of Advantage' (2009) 88(1) *Social Forces* 1; Kalil, Ryan and Corey, 'Diverging Destinies: Maternal Education and the Developmental Gradient in Time with Children' (2012) 49(4) *Demography* 1361; Jeong, McCoy and Fink, 'Pathways Between Paternal and Maternal Education, Caregivers' Support for Learning, and Early Child Development in 44 Low-and Middle-Income Countries' (2017) 41 *Early Childhood Research Quarterly* 136.

⁴¹ Committee on the Rights of the Child, Concluding Observations Regarding Senegal, 07 March 2016, CRC/C/SEN/CO/3-5, para 59.

⁴² Committee on Economic, Social and Cultural Rights, Concluding Observations Regarding Niger, 4 June 2018, E/C.12/NER/CO/1, para 57.

⁴³ Committee on the Rights of the Child, Concluding Observations Regarding Eritrea, 02 July 2015, CRC/C/ERI/CO/4, paras 59-60; Committee on the Rights of the Child, Concluding Observations Regarding Mozambique, 27 November 2019, CRC/C/MOZ/CO/3-4, para 41.

⁴⁴ Committee on the Rights of the Child, Concluding Observations Regarding Cabo Verde, 27 June 2019, CRC/C/CPV/CO/2, paras 76-77; Committee on Economic, Social and Cultural Rights, Concluding Observations Regarding Cabo Verde, 27 November 2018, E/C.12/CPV/CO/1, para 64.

⁴⁵ Committee on the Rights of the Child, Concluding Observations Regarding Cameroon, 06 July 2017, CRC/C/CMR/CO/3-5, P11; Committee on the Rights of the Child, Concluding Observations Regarding Mozambique, 27 November 2019, CRC/C/MOZ/CO/3-4, P12; Committee on Economic, Social and Cultural Rights, Concluding Observations Regarding Kenya, 06 April 2016, E/C.12/KEN/CO/2-5, para 59.

the corresponding provision in ICESCR.⁴⁶ A similar pattern can be seen in the drafting records of the CRPD, where the reference to access to early childhood and pre-school education was dropped without explanation.⁴⁷ This illustrates the problematic nature of a sole reliance on the *travaux* to determine the meaning of a term.⁴⁸ It is certainly difficult to establish from this alone that the drafters intended to exclude ECCE from the right to education in perpetuity. As argued above, the endorsement of the full development of the child and the other objectives as explicit aims demonstrates an acknowledgement by the drafters that advances in the scientific evidence on child development should continue to inform the interpretation of the right to education in these instruments. Exclusion of an express reference to ECCE does not preclude inclusion of ECCE in due course where, as here, the wording of the aims of the treaty demonstrates an intention on the part of the drafts for an evolutionary understanding of a treaty.⁴⁹ This is bolstered by the express reference in Art 6(2) CRC to States Parties' duty to ensure the development of the child to the maximum extent possible.

B. General Comments

Although the views of the monitoring committees are not conclusive authority as the meaning given to a treaty term, they are nevertheless persuasive and are important sources of guidance to States Parties in carrying out their obligations. The inclusion of ECCE in the right to education is most clearly developed by the CCRC. In its 2005 General Comment No. 7 (implementing child rights in early childhood), the CCRC emphasizes that 'the Committee interprets the right to education during early childhood as beginning at birth and closely linked to young children's right to maximum development'.⁵⁰ It also sets out States' responsibilities in taking measures to both support parents' role as children's first educators, and to provide programmes to complement parents' role. In particular, the Committee calls on States Parties to ensure that all young children receive education in the broadest sense which acknowledges a key role for parents, wider family and community, as well as the contribution of organized programmes of early childhood education provided by the State, the community or civil society institutions'.⁵¹

The 2016 General Comment adopted by the CRPD declares that State parties should 'ensure access to quality early childhood development care and pre-primary education, together with the provision of support and training to parents and caregivers of young children with disabilities'.⁵² In 1999 CESCRC adopted a General Comment on The Right to Education.⁵³ Although this does not contain any express reference to early education, it does refer to basic education, of which primary education is the main, but not the sole component.⁵⁴ There is growing recognition that 'basic education' begins at birth and includes ECCE.⁵⁵

C. Concluding Observations

This conclusion is further supported by the COs issued by the relevant monitoring bodies. Analysis of the COs issued by the CCRC from January 2015 to March 2020 clearly demonstrates that the monitoring bodies regard ECCE as part of the right to education. Of the 120 COs issued

⁴⁶ Economic and Social Council Report of the Working Group on a Draft Convention on the Rights of the Child, 2 March 1989, E/CN.4/1989/48, paras 458–470.

⁴⁷ Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities (UN General Assembly), A/60/266 17 August 2005 para 38.

⁴⁸ Tobin, 223.

⁴⁹ Bjorge, *supra* n 18, chapter 1.

⁵⁰ CRC, GC7 para 28.

⁵¹ CRC, GC7 para 30. This conclusion is further supported by Courts and Tobin. p 1061.

⁵² CPRD, GC4 para 67.

⁵³ CESCRC, GC13 article 13.

⁵⁴ CESCRC, GC13 para 9.

⁵⁵ UNESCO, 'World Declaration on Education for All' (1990).

Table 1. Summary statistics of the number and proportion of early childhood education and care references in each category in the COs for the CRC, the CESCR and the CRPD

	CRC (%)	CESCR (%)	CRPD (%)
N	120	71	73
ECCE	96 (80.00)	35 (49.30)	22 (30.14)
SDG 4.2	35 (36.46)	0 (0)	0 (0)
Financial resources	51 (53.13)	7 (20.00)	6 (27.27)
Human resources	24 (25.00)	0 (0)	2 (9.10)
Access	70 (72.92)	22 (62.86)	12 (54.55)
Quality	34 (35.42)	5 (14.29)	3 (13.64)
Technical resources	15 (15.63)	0 (0)	0 (0)
Strategy/Policy	37 (38.54)	1 (2.86)	2 (9.09)
Disability	19 (19.79)	0 (0)	NA (NA)
Rural/Poor	30 (31.25)	10 (28.57)	2 (9.09)
Girls	7 (7.29)	1 (2.86)	1 (4.55)
Indigenous/Ethnic group	14 (14.58)	6 (17.14)	0 (0)
Imprisoned	5 (5.21)	0 (0)	0 (0)
Private education	10 (10.42)	14 (40.00)	1 (4.55)
Refugees/Migrant	3 (3.13)	2 (5.71)	0 (0)
Street children	1 (1.04)	0 (0)	0 (0)

The number indicates the frequency of references to ECCE in relation to each category. The figure in brackets shows the percentage of references relative to the total number of reports for ECCE, and relative to the number of reports including ECCE for all other categories.

in this period, 96 (80 per cent) referred to the provision or lack of provision of ECCE services. Analysis of the COs issued by the CESCR during the same period shows that of the 71 COs issued, 35 (49 per cent) referred to the provision of ECCE services. So far as the CCRPD of that period is concerned, 22 out of 73 COs referred to ECCE. There was a marked change after the adoption of the General Comment in 2016: before its adoption, six out of 27 COs referred to ECCE (22 per cent) whereas after its adoption, 16 out of 46 COs made such a reference (35 per cent) (see Table 1).

In their engagement with States Parties in relation to the right, treaty bodies also set out the expectations of States in relation to compliance. The findings and recommendations are specific to each State Party. Our analysis of the COs therefore refers to illustrative examples from different reports in order to point to more general patterns. We consider these comments and the accompanying state obligations under four broad headings: (i) Age range for ECCE; (ii) quality; (iii) affordability and accessibility, and (iv) equality and non-discrimination. It should be stressed that the treaty bodies regard themselves as setting out the broad principles, leaving it to individual states to determine how to achieve these principles in the specific context of their own jurisdictions.

(i) Age Range for ECCE

While the CCRC tends to interpret preschool as a service to be provided from the age of three years,⁵⁶ it also regards services prior to this as important. For example, in its COs on El Salvador, 'the Committee recommends that the State party increase access to early childhood care for children under 2 years old and to preschool education for children under 6 years old'.⁵⁷

⁵⁶ Committee on the Rights of the Child, Concluding Observations Regarding Japan, 05 March 2019, CRC/C/JPN/CO/4-5, para 40; Committee on the Rights of the Child, Concluding Observations Regarding Hungary 07 February 2020, CRC/C/HUN/CO/6, para 35.

⁵⁷ Committee on the Rights of the Child, Concluding Observations Regarding El Salvador, 05 October 2018, CRC/C/SLV/CO/5-6, para 44.

Other observations suggest early childhood services exist on a continuum. For example, in its COs on Gabon, the Committee recommends that the State ‘invest in early childhood education on the basis of a comprehensive and holistic policy of early childhood care and development for children under 3 years of age.’⁵⁸ Similarly, in its COs on Oman, the Committee expresses its concerns about ‘... The low level of integrated ECCE, specifically for children up to three years old.’⁵⁹ The COs for Mongolia, Antigua and Barbuda recommend that States ‘allocate sufficient financial resources for the development and expansion of early childhood education, based on a comprehensive and holistic policy of early childhood care and development.’⁶⁰ The COs from Mexico recommend that the state party should ‘develop and expand early childhood education from birth, on the basis of a comprehensive and holistic policy of early childhood care and development.’⁶¹ Read together, multiple recommendations appear to reflect that the CCRC seems to consider early education rights as part of a general strategy from birth to primary school.

(ii) Quality ECCE

The CCRC consistently stresses the importance of *quality* ECCE. Notably, it aligns quality standards with SDG 4.2, with 37 per cent of the COs referring to ECCE explicitly linked to SDG 4.2 (35/96). For example, in relation to the Solomon Islands, the Committee stated:

Taking note of target ... 4.2 of the SDGs on ensuring that all girls and boys ... have access to quality early childhood development, care and pre-primary education, the Committee recommends that the State Party: ... (j) Provide resources to improve the quality and number of early childhood education centres.⁶²

Furthermore, references by the CCRC to the SDGs have increased from 0 per cent in 2015 to 67 per cent in only the first 3 months of 2020.

However, the CCRC also goes beyond the SDGs in specifying the characteristics of quality ECCE. Most importantly, it has recognised that quality childhood development services should respect a child’s need for cognitive stimulation, emotional support, good nutrition and a sanitary environment. In other words, the right to ECCE is not only about the quality of the curriculum, but extends to the experience as a whole, including sanitation, nutrition and sufficient attention from caregivers. For example, the COs for Vanuatu and Georgia point to the need for better water and sanitation coverage in ECCE centres particularly in rural areas.⁶³ The CCRC also stresses the needs for an adequate ratio of caregivers to children in kindergartens and a systematic monitoring of these services to ensure quality. This approach is epitomized in the COs for the Democratic Republic of Korea, which state

⁵⁸ Committee on the Rights of the Child, Concluding Observations Regarding Gabon, 09 June 2016, CRC/C/GAB/CO/2, para 55 and 56.

⁵⁹ Committee on the Rights of the Child, Concluding Observations Regarding Oman, 29 January 2016, CRC/C/OMN/CO/3-4, para 57.

⁶⁰ Committee on the Rights of the Child, Concluding Observations Regarding Mongolia, 12 July 2017, CRC/C/MNG/CO/5, para 38; Committee on the Rights of the Child, Concluding Observations Regarding Antigua and Barbuda 02 June 2017, CRC/C/ATG/CO/2-4, para 50.

⁶¹ Committee on the Rights of the Child, Concluding Observations Regarding Mexico, 10 June 2015, CRC/C/MEX/CO/4-5, para 56.

⁶² Committee on the Rights of the Child, Concluding Observations Regarding Solomon Islands, 02 February 2018, CRC/C/SLB/CO/2-3, para 45.

⁶³ Committee on the Rights of the Child, Concluding Observations Regarding Vanuatu, 04 October 2017, CRC/C/VUT/CO/2-4, para 45; Committee on the Rights of the Child, Concluding Observations Regarding Georgia, 03 February 2017, CRC/C/GEO/CO/4, para 36.

Taking note of target 4.2 of the SDGs on ensuring that all girls and boys have access to quality early childhood development, care and pre-primary education, the Committee recommends that the State party ensure an adequate ratio of caregiver-to-child in nurseries and kindergartens to provide quality care and the critical psychosocial support and stimulation needed, and ensure access to appropriate food and nutrition and water and sanitation facilities.⁶⁴

A similar approach is taken in relation to Uruguay, where the CCRC expresses its concern at the low number of ECCE services available in the country, but also about the quality of these services. As well as an increase in the provision of ECCE to all children, it recommends that all providers should be registered and supervised on the basis of specific criteria.⁶⁵

Crucially, the treaty bodies do more than setting standards for quality. They also consistently recommend concrete actions States Parties should take to achieve these standards. They consistently require States to improve or uphold quality, access, financial support, human and technical resources as well as developing progressive policies and collecting quality data.

(iii) *Affordable and Accessible*

Affordability and accessibility are emphasized by all the committees as a key element of the right to ECCE. Financial barriers are usually direct (e.g. private education or other fee-paying arrangements) or indirect (e.g. costs of uniforms, transport etc) for individual families; as well as underinvestment by governments. The CCRC points to financial barriers to early childhood education in ten (10 per cent) of the COs in which ECCE is mentioned and underinvestment in 51/96 (53 per cent). Under the ICESCR, of the 35 reports in which early ECCE is mentioned, in 26 (74 per cent) the CESCR requires the State to improve either quality, access, financial support, teacher training or technical resources. Access is the most frequently mentioned, in 22 (63 per cent) of the observations (e.g. Colombia⁶⁶), followed by quality in five (14 per cent) (e.g. South Africa⁶⁷). The CCRPD similarly directs States to improve the quality and inclusiveness of ECCE, including the requirement for greater financial resources (6/22 reports) and human resources (2). It also recommends greater attention to strategy (2) and better quality (3).

This raises the question of whether ECCE should be free, as is the case in relation to the right to basic education in both the CRC and the ICESCR, or whether it is sufficient that it should be affordable. Generally, the CCRC requires ECCE to be 'affordable' or 'free' in the alternative, although in relation to high-income countries it supports plans for free kindergartens.⁶⁸ Notably, too, the CCRC does not set its face against private provision, but requires such provision, as with State facilities, to be affordable or free. This is summed up in relation to Uruguay, where the CCRC recommends that the State should increase 'the availability of early childhood care and education for all children, by providing free or affordable early childhood care, whether through State-run or private facilities'.⁶⁹

The CESCR similarly recognizes the ongoing barriers to childhood development resulting from socio-economic disadvantage. It expresses its concern about financial barriers in 14 (40

⁶⁴ Committee on the Rights of the Child, Concluding Observations Regarding Democratic Republic of Korea, 23 October 2017, CRC/C/KOR/CO/5-6, para 49.

⁶⁵ Committee on the Rights of the Child, Concluding Observations Regarding Uruguay, 5 March 2015, CRC/C/URY/CO/3-5, para 60.

⁶⁶ Committee on Economic, Social and Cultural Rights, Concluding Observations Regarding Colombia, 19 October 2017, E/C.12/COL/CO/6, para 64.

⁶⁷ Committee on Economic, Social and Cultural Rights, Concluding Observations Regarding South Africa 29 November 2018, E/C.12/ZAF/CO/1, para 70.

⁶⁸ Committee on the Rights of the Child, Concluding Observations Regarding Japan, 05 March 2019, CRC/C/JPN/CO/4-5, para 40.

⁶⁹ Committee on the Rights of the Child, Concluding Observations Regarding Uruguay, 05 March 2015, CRC/C/URY/CO/3-5, para 60.

per cent) of the 34 COs which mentioned ECCE. To these are added less conspicuous barriers, such as requirements to produce birth certificates or identity documents as a condition of entry. This means that in some countries, low birth registration rates are an obstacle to preschool enrolment.⁷⁰ These types of structural barriers are most commonly faced by disadvantaged families and migrant households. Notably, however, such barriers are not confined to Lower or Lower Middle-Income countries. For example, in relation to Denmark, the CESCR concludes that

The Committee is concerned that education outcomes for children from disadvantaged socioeconomic backgrounds remain lower than for the rest of the population, in spite of the measures taken by the State party, such as the facilitation of their access to high-quality day care, which provides an environment that helps develop their language skills. It is also concerned that refugee children are not automatically enrolled in school (art. 13).⁷¹

(iv) Equality and Non-discrimination

The rights to equality and non-discrimination form a central pillar of all three Conventions discussed here.⁷² This right provides crucial support for the implied right to ECCE in the Conventions. This is because ECCE, where available, is limited to the more privileged young children either in access or quality. This means that, regardless of whether ECCE is a self-standing right, it should be available in a non-discriminatory manner.

All three committees have put the rights to equality and non-discrimination centre-stage in formulating the right to ECCE, often under the headings of accessibility and affordability. In 81 (84 per cent) of the CCRC's COs mentioning ECCE, the Committee expresses concern that, while there is some provision, it is only available for more privileged young children⁷³ and many observations note a specific concern for the proportion of children not attending preschool.⁷⁴ The CESCR is similarly concerned with equality and non-discrimination and regularly expresses the Committee's concern that while there is some provision, it is uneven in both access and quality.⁷⁵ For example, both Committees highlight regional disparities. In 30/96 (31 per cent) COs, the CCRC refers to a higher risk of missing out on ECCE for children living in rural, island or poorer communities. However, this is not limited to remoter areas. In industrialised countries, issues are also noted in urban areas where demand outweighs supply.⁷⁶ The CESCR refers to regional disparities in 10 (29 per cent) of the observations, concerning both a lack of resources and poor quality for groups living in less prioritised regions. For example, in relation to Kazakhstan, the Committee expresses concern that 'A significant number of children do not have access to early education and that there are large regional disparities in

⁷⁰ Committee on the Rights of the Child, Concluding Observations Regarding Angola, 01 June 2018, CRC/C/AGO/CO/5-7, para 18.

⁷¹ Committee on Economic, Social and Cultural Rights, Concluding Observations Regarding Denmark, 12 November 2019, E/C.12/DNK/CO/6, para 66.

⁷² CRC, Article 2(1); ICESCR, Article 2(2); CRPPD, Articles 3(2), 5-7.

⁷³ Committee on the Rights of the Child, Concluding Observations Regarding Marshall Islands, 27 February 2018, CRC/C/MHL/CO/3-4, para 36; Committee on the Rights of the Child, Concluding Observations Regarding Estonia, 08 March 2017, CRC/C/EST/CO/2-4, para 44.

⁷⁴ Committee on the Rights of the Child, Concluding Observations Regarding Cabo Verde, 27 June 2019, CRC/C/CPV/CO/2, para 76; Committee on the Rights of the Child, Concluding Observations Regarding Bosnia and Herzegovina, 05 December 2019, CRC/C/BIH/CO/5-6, para 39.

⁷⁵ Committee on Economic, Social and Cultural Rights, Concluding Observations Regarding Ecuador, 14 November 2019, E/C.12/ECU/CO/4, para 55; Committee on Economic, Social and Cultural Rights, Concluding observations South Africa, 29 November 2018, E/C.12/ZAF/CO/1, paras 70-71.

⁷⁶ Committee on the Rights of the Child, Concluding Observations Regarding Japan, 05 March 2019, CRC/C/JPN/CO/4-5, para 40; Committee on the Rights of the Child, Concluding Observations Regarding Serbia, 07 March 2017, CRC/C/SRB/CO/2-3, para 54.

access to and the quality of education'.⁷⁷ In its COs on Israel, the CESCR is similarly concerned at the 'the shortage of classrooms and kindergartens in Bedouin neighbourhoods'.⁷⁸ Other marginalized groups include refugees, asylum seekers and migrant children, mentioned in 3/96 (3 per cent) of the CCRC's COs and in 2 (6 per cent) of the CESCR's observations relating to ECCE. For example, the CESCR recommends that Norway 2020 'Extend the right to preschool education to asylum-seeking children living in reception centres'.⁷⁹ In relation to Israel 2019, it expresses concern at the 'proliferation of poor-quality and unsupervised private kindergartens that are attended mostly by children of asylum seekers'.⁸⁰ Street children (1/96 1 per cent)⁸¹ and those imprisoned with mothers (5/96 5 per cent, e.g. Colombia and Zimbabwe)⁸² are also included by the CCRC as overlooked for pre-primary education, together with indigenous children and specific ethnic groups (14/96 15 per cent, e.g. Suriname and Mexico)⁸³ such as Roma children, gypsy and traveler children. This is also a concern in six (17 per cent) CESCR observations where indigenous people and ethnic minorities are left out of preschool education (e.g. Ecuador).⁸⁴

Gender disparities are a further point of concern for both the CCRC and the CESCR. The CCRC points to gender discrimination against girls in pre-primary in seven COs (7 per cent) (e.g. Senegal)⁸⁵. In addition, the UK CO states that boys from low-income families often leave preschool without the expected level of language development, hindering future schooling attainment.⁸⁶ Similarly, the CESCR has referred to persistent gender stereotypes as a barrier to pre-school education. In its COs concerning Slovakia 2019, the committee states:

The Committee is concerned by the low rate of enrolment of children in preschool education. This low enrolment rate is the result of the low investment in preschool education, limited levels of support to families and the persistence of stereotypes regarding gender roles. The Committee reminds the State party of the importance of combating stereotypes and investing in the early years in terms of preparing children to achieve good educational outcomes (arts. 10 and 13).

Importantly, the CESCR and the CCRC are concerned with the relationships between children's rights to quality ECCE, women's labour rights and rights to parental leave.⁸⁷ For example, in its COs on Ukraine 2020, the CESCR recommends that the government should 'promote women's full participation in the labour market, including by developing adequate

⁷⁷ Committee on Economic, Social and Cultural Rights, Concluding Observations Regarding Kazakhstan, 29 March 2019, E/C.12/KAZ/CO/2, para 48.

⁷⁸ Committee on Economic, Social and Cultural Rights, Concluding Observations Regarding Israel, 12 November 2019, E/C.12/ISR/CO/4, para 62.

⁷⁹ Committee on Economic, Social and Cultural Rights, Concluding Observations Regarding Norway, 02 April 2020, E/C.12/NOR/CO/6, para 45.

⁸⁰ *Ibid.*

⁸¹ Committee on the Rights of the Child, Concluding Observations Regarding Malawi, 06 March 2017, CRC/C/MWI/CO/3-5, para 38.

⁸² Committee on the Rights of the Child, Concluding Observations Regarding Colombia, 06 March 2015, CRC/C/COL/CO/4-5, para 54; Committee on the Rights of the Child, Concluding Observations Regarding Zimbabwe, 7 March 2016, CRC/C/ZWE/CO/2, para 55.

⁸³ Committee on the Rights of the Child, Concluding Observations Regarding Suriname, 09 November 2016, CRC/C/SUR/CO/3-4, para 36; Committee on the Rights of the Child, Concluding Observations Regarding Mexico, 10 June 2015, CRC/C/MEX/CO/4-5, para 54.

⁸⁴ Committee on Economic, Social and Cultural Rights, Concluding Observations Regarding Ecuador, 14 November 2019, E/C.12/ECU/CO/4, para 55.

⁸⁵ Committee on the Rights of the Child, Concluding Observations Regarding Senegal, 07 March 2016, CRC/C/SEN/CO/3-5, para 59.

⁸⁶ Committee on the Rights of the Child, Concluding Observations Regarding United Kingdom of Great Britain and Northern Ireland, 12 July 2016, CRC/C/GBR/CO/5, para 72.

⁸⁷ Committee on Economic, Social and Cultural Rights, Concluding Observations Regarding Liechtenstein, 03 July 2017, E/C.12/LIE/CO/2-3, para 21.

and affordable day-care solutions and encouraging men to use their right to paternity leave and paid parental leave'. Similarly, the Committee concludes that Slovakia 2019 should consider, in consultation with the relevant stakeholders, including families from across different geographical areas and ethnic and socioeconomic groups, how to effectively balance provisions for parental leave, investment in preschool education and support for families to balance family and working responsibilities.

As mentioned above, a particularly problematic issue is that pregnant girls are often required to leave school.⁸⁸ Yet they are not protected from factors that make them more vulnerable to pregnancy, particularly child marriage and sexual assault in schools.⁸⁹ This is an issue which is of concern to both the CESCR and CCRC, which call on States to provide the services necessary to enable pregnant adolescents to continue their education.⁹⁰ They recognise that this is at least partly dependent on the support they are given to look after their children. The committees urge that mothers, in particular adolescent mothers, be given parenting support and childcare facilities.⁹¹ This parenting support remains important for women for whom a lack of education, economic independence and childcare support either from fathers⁹² or society⁹³, negatively impacts on parenting ability and child development.

One of the most commonly mentioned marginalised groups are children with disabilities. In 20 per cent (19/96) of the CRC's COs in which references are made to ECCE, the Committee emphasises that ECCE should be made inclusive for children with disabilities, including 'psychosocial' disabilities. This is of course the central concern of the CRPD. Of its 22 COs which refer to ECCE, the CCRPD is concerned at a lack of accessibility in 12 COs. Importantly, the CCRPD consistently finds that some children with disabilities are more likely to be subject to discrimination in relation to ECCE than others. The CCRPD emphasises the right of children with disabilities to inclusive ECCE. It recommends that states should redirect budgets from special education to support inclusive mainstream schooling⁹⁴ to ensure the reasonable accommodation of people with disabilities⁹⁵ and establish legislation to that effect.⁹⁶ The CCRPD is particularly concerned by the lack of regulation in private day-care centres.⁹⁷

⁸⁸ Committee on the Rights of the Child, Concluding Observations Regarding Cabo Verde, 27 June 2019 CRC/C/CPV/CO/2, para 77; Committee on Economic, Social and Cultural Rights, Concluding Observations Regarding Cabo Verde, 27 November 2018, E/C.12/CPV/CO/1, para 64.

⁸⁹ Committee on the Rights of the Child, Concluding Observations Regarding Cameroon, 06 July 2017, CRC/C/CMR/CO/3-5, para 39; Committee on the Rights of the Child, Concluding Observations Regarding Mozambique, 27 November 2019, CRC/C/MOZ/CO/3-4, para 41; Committee on Economic, Social and Cultural Rights, Concluding Observations Regarding Kenya, 06 April 2016, E/C.12/KEN/CO/2-5, para 59.

⁹⁰ Committee on Economic, Social and Cultural Rights, Concluding Observations Regarding Uganda, 08 July 2015, E/C.12/UGA/CO/1, para 36.

⁹¹ Committee on the Rights of the Child, Concluding Observations Regarding Botswana, CRC/C/BWA/CO/2-3, 26 June 2019, para 53; Committee on the Rights of the Child, Concluding Observations Regarding Rwanda, 28 February 2020, CRC/C/RWA/CO/5-6, para 38; Committee on the Rights of the Child, Concluding Observations Regarding Kenya, 29 January 2016, CRC/C/KEN/CO/3-5, para 40.

⁹² Committee on the Rights of the Child, Concluding Observations Regarding Cote d'Ivoire, 12 July 2019, CRC/C/CIV/CO/2, para 38; Committee on the Rights of the Child, Concluding Observations Regarding Zimbabwe, 07 March 2016, CRC/C/ZWE/CO/2, para 49.

⁹³ Committee on the Rights of the Child, Concluding Observations Regarding Montenegro, 22 June 2018, CRC/C/MNE/CO/2-3, para 48; Committee on the Rights of the Child, Concluding Observations Regarding Gabon, 09 June 2016, CRC/C/GAB/CO/2, para 41.

⁹⁴ Committee on the Rights of Persons with Disabilities, Concluding Observations Regarding Ecuador, 21 October 2019, CRPD/C/ECU/CO/2-3, para 44.

⁹⁵ Committee on the Rights of Persons with Disabilities, Concluding Observations Regarding Lithuania, 11 May 2016, CRPD/C/LTU/CO/1, paras 45–46; Committee on the Rights of Persons with Disabilities, Concluding Observations Regarding Armenia, 08 May 2017, CRPD/C/ARM/CO/1, paras 41–42.

⁹⁶ Committee on the Rights of Persons with Disabilities, Concluding Observations Regarding Bosnia and Herzegovina, 02 May 2017, CRPD/C/BIH/CO/1, para 42.

⁹⁷ Committee on the Rights of Persons with Disabilities, Concluding Observations Regarding Mauritius, 30 September 2015, CRPD/C/MUS/CO/1, para 3.

Moreover, discrimination and inequality are intersectional, so that barriers to access are cumulative and increasingly complex. For example, in its COs on Ecuador, the CESCR stated:

While the Committee takes note of the increased access to and quality of education as a result of the progressive increase in investment and of multi-year education policies, it is concerned at the stalled increase in preschool education coverage, the persistence of disparities between rural and urban areas and the higher dropout rate among low-income groups, indigenous peoples, people of African descent and Montubio people (art. 14).⁹⁸

The CCRPD finds intersectional discrimination for children with disabilities from rural communities (2) and girls (1).

(v) State Responses

States have been active in responding to their ECCE responsibilities. Many have developed policies over the last 10 years and the committee frequently recognises these efforts. These include, in Lesotho, the National Policy on Integrated Early Childhood Care and Development (2013) and the increases in the availability of preschool places;⁹⁹ the Early Childhood Care, Development and Education Policy in Zambia;¹⁰⁰ the National Policy Framework for ECCE 2010 in Ethiopia;¹⁰¹ and the National Action Plans for ECCE from 2013 in the Seychelles.¹⁰² In Botswana the Committee commends 'the review of the Early Childhood Care and Education Policy in 2015 and the development of an early childhood curriculum and teacher training programme'.¹⁰³ In Angola the CCRC recognises 'the State party's efforts regarding education and training, which led to a sharp increase in the number of students attending preschool',¹⁰⁴ and in South Africa the CRCC notes improved access to early childhood education meaning it is now benefiting 88 per cent of children aged 5 and 6 years.¹⁰⁵ These policies are being backed with financing in many States, such as in Colombia where the committee 'welcomes the increased budget allocated to early childhood development'.¹⁰⁶

States are interpreting ECCE as an integral part of their education policies and provision, demonstrating that they are not resisting the interpretation proffered here. For example in the CRCC COs for Saint Vincent and the Grenadines welcome 'the substantial efforts made under the education revolution', including the proclamation of the Education Act (2006) in 2015, which established universal access to primary and secondary education for children between 5 and 16 years of age, and the provision of early childhood education and care to the majority of children between 3 and 5 years of age'.¹⁰⁷ In Mexico the committee notes that 'the educational

⁹⁸ Committee on Economic, Social and Cultural Rights, Concluding Observations Regarding Ecuador, 14 November 2019, E/C.12/ECU/CO/4, para 55.

⁹⁹ Committee on the Rights of the Child, Concluding Observations Regarding Lesotho, 01 June 2018, CRC/C/LSO/CO/2, para 53.

¹⁰⁰ Committee on the Rights of the Child, Concluding Observations Regarding Zambia, 29 January 2016, CRC/C/ZMB/CO/2-4, para 53.

¹⁰¹ Committee on the Rights of the Child, Concluding Observations Regarding Ethiopia, 10 June 2015, CRC/C/ETH/CO/4-5, P2.

¹⁰² Committee on the Rights of the Child, Concluding Observations Regarding Seychelles, 9 February 2018, CRC/C/SYC/CO/5-6, P2.

¹⁰³ Committee on the Rights of the Child, Concluding Observations Regarding Botswana, 26 June 2019, CRC/C/BWA/CO/2-3, para 45.

¹⁰⁴ Committee on the Rights of the Child, Concluding Observations Regarding Angola, 01 June 2018, CRC/C/AGO/CO/5-7, para 34.

¹⁰⁵ Committee on Economic, Social and Cultural Rights, Concluding Observations Regarding South Africa, 01 November 2016, E/C.12/ZAF/CO/1, para 70.

¹⁰⁶ Committee on the Rights of the Child, Concluding Observations Regarding Colombia, 04 February 2015, CRC/C/COL/CO/4-5, para 13.

¹⁰⁷ Committee on the Rights of the Child, Concluding Observations Regarding Saint Vincent and the Grenadines, 03 February 2017, CRC/C/VCT/CO/2-3, para 54.

reform undertaken in 2013 aimed at ensuring quality education from preschool to senior high school'.¹⁰⁸

States also integrate ECCE within parental policies. For example in Singapore the committee welcomes 'the increase in preschool places, the introduction of a second mandatory week of paternity leave and measures taken to support low-income families and divorced parents.'¹⁰⁹ In Poland implementation of the 'Family 500 plus' programme has come with efforts to increase the number of childcare facilities.¹¹⁰ The result of these policies is a global increase in the number of children in pre-primary education from 34 per cent in 2000 to 61 per cent in 2019.¹¹¹ The UNESCO SDG monitoring system estimates that the number of children in the world provided with at least one year of pre-primary education in 2020 was around 75 per cent, with rates ranging from 13.4 per cent in countries like Djibouti to 99.7 per cent in countries like Thailand.¹¹² However, in the last 5 years improvements are estimated to be slowing due to population growth but also emergencies and humanitarian crises.¹¹³

4. GOING FORWARD: PROGRESSIVE REALISATION AND MAXIMUM AND MINIMUM AVAILABLE RESOURCES

It is clear that even before the COVID-19 pandemic, many States were struggling to provide ECCE, and this was most pronounced for groups of children who are marginalized. This has been exacerbated by widespread service closures during the pandemic. However, the need to protect the advances that have been made as well as to push for further equality in provision will be important for the long-term recovery of nations. Under all three Conventions, States Parties must take steps to implement the rights recognized to the maximum of their available resources, and where needed, through international assistance and co-operation.¹¹⁴ There is a recognition in the treaties that the full realization of the right might not be possible immediately. Instead, the obligation is to take steps progressively to realize the right. States which have better resources are expected to move more quickly towards realization of the right, as is reflected in the COs discussed above.

However, some steps must be taken immediately, regardless of resource constraints. These include the duty to guarantee that the right to education will be exercised without discrimination of any kind (including on grounds of gender, disability, race or national, ethnic or social origin). In addition, States have a 'specific and continuing obligation to move as expeditiously as possible towards the full realization' of the right to education.¹¹⁵ Conversely, if any deliberately retrogressive measures are taken, the State Party must prove that this is only after the most careful consideration of all alternatives and in the context of the full use of the State Party's maximum available resources.¹¹⁶

In the light of the clear evidence of the personal, social and global costs of failing to provide ECCE, the calculation of the cost of ECCE should reflect not just the upfront costs, but

¹⁰⁸ Committee on the Rights of the Child, Concluding Observations Regarding Mexico, 10 June 2015, CRC/C/MEX/CO/4-5, para 55.

¹⁰⁹ Committee on the Rights of the Child, Concluding Observations Regarding Singapore, 31 May 2019, CRC/C/SGP/CO/4-5, P8.

¹¹⁰ Committee on Economic, Social and Cultural Rights, Concluding Observations Regarding Poland, 7 October 2016, E/C.12/POL/CO/6, para 32.

¹¹¹ UNICEF, Pre-primary Education, April 2021, accessed March 2022 <https://data.unicef.org/topic/education/pre-primary-education/>.

¹¹² UNESCO, Sustainable Development Goals Data, accessed March 2022 <http://data.uis.unesco.org/index.aspx?queryid=3718>.

¹¹³ UNICEF, *Ibid*.

¹¹⁴ CRC, art 4; ICESCR art. 2(1); CRPD art 4(2).

¹¹⁵ CRC GC 13, para 44.

¹¹⁶ CESCR GC 13 para 45.

the longer-term benefits.¹¹⁷ This has been thrown into relief by the Covid-19 pandemic. McCoy et al. estimate that Covid related disruptions of ECCE between March 2020 and February 2021 resulted in a massive 10.75 million additional children falling 'off track' in their early development. This in turn was estimated to result in a present discounted value of as much as USD 308.02 of earnings lost in adulthood, with further burdens due to ongoing closures also forecasted. Most problematically, projected developmental and learning losses were predominantly found in low and lower middle-income countries, intensifying global inequalities.¹¹⁸

All of this takes place in the context of the undertaking by States Parties to provide international assistance and co-operation for the full realization of the right to education, which appears in all three Covenants.¹¹⁹ To achieve universal coverage for high-quality pre-primary education, needed funds are about \$31.2 billion annually.¹²⁰ However, financing for pre-primary education remains a low priority for both governments and the donor community. According to UNESCO's educational expenditure data, low-income countries spent less than 5 per cent of their educational budgets on pre-primary programmes, about 0.26 per cent of their GDP.¹²¹ International donors only contributed 2 per cent (\$106 million in 2014) of their spending on basic education to pre-primary programmes.¹²² Yet UNICEF calls for donors to spend 10 per cent of their education budgets on ECCE.

There is still significant equivocation about the nature of the duty of international cooperation and assistance, for example under Art 2(1) ICESCR.¹²³ The CESCR has declared on several occasions that it is particularly incumbent on States parties and other actors in a position to assist, to provide 'international assistance and cooperation, especially economic and technical which enable developing countries to fulfil their core obligations.'¹²⁴ However, the question remains whether this includes an obligation to devote 0.7 per cent of GNP to international development assistance, a long-standing commitment set in place under the auspices of the UN in 1970, and reiterated in 2002.¹²⁵ Sepúlveda concludes that there cannot be said to be a general obligation of this sort under Article 2(1) ICESCR. However, the Committee regularly recommends that States review their budget allocations with a view to increasing their contributions to achieve the target of 0.7 per cent GNP.¹²⁶ In the meanwhile, the Committees appear to focus more on urging States Parties to look for technical assistance. Thus, where States Parties might not have sufficient resources, many of the CCRC's COs suggest the State Party refer to UNICEF and the UNESCO for technical assistance. In relation to Iraq, the CCRC recommended that the State:

¹¹⁷ McCoy and others, 'Global Estimates of the Implications of COVID-19-Related Preschool Closures for Children's Instructional Access, Development, Learning, and Economic Wellbeing.' (2021) *Child Development*.

¹¹⁸ Ibid.

¹¹⁹ ICESCR, Art 2(1); CRC, Art 4; CRPD Art 4(2); CESCR GC 13 para 56; CRC GC 5 (2003), paras 7, 60.

¹²⁰ UNESCO, 'Pricing the Right to Education: The Cost of Reaching New Targets by 2030.' (2015) Education for All Global Monitoring Report Policy Paper 18.

¹²¹ Roser and Ortiz-Ospina, 'Pre-Primary Education' [2017] *Our World Data* accessed 6/25/2020.

¹²² Putcha and others, 'Financing Early Childhood Development: An Analysis of International and Domestic Sources in Low- and Middle-Income Countries.' (Results for Development 2016) <<https://r4d.org/resources/financing-early-childhood-development-analysis-international-domestic-sources/>>.

¹²³ Karimova, 'The Nation and Meaning of "International Assistance and Cooperation" under the International Covenant on Economic, Social and Cultural Rights' in Riedel, Giacca and Golay (eds), *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges* (2014).

¹²⁴ CESCR GC No. 14 para 45; GC No. 15, paras 37–38; GC No. 18, paras 29–30; and see also CESCR GC No 3 para 13.

¹²⁵ UN Doc. A/CONF.198/11, para 42.

¹²⁶ Sepúlveda, 'Obligations of "International Assistance and Cooperation" in an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2006) 24 *Netherlands Quarterly of Human Rights* 271.

(d) Increase financial support to families living in poverty and undertake campaigns to instil awareness among parents of the importance of sending their children, particularly girls, to school; (e) Call upon partners to provide increased humanitarian funding for education, and adequately equip schools with books and sufficient appropriate teaching and learning materials.¹²⁷

It is to be hoped that giving greater attention to ECCE as an integral part of the right to education will encourage State spending and development aid to achieve universal and equitable ECCE, and that Treaty Bodies specifically direct that overseas development aid be earmarked for ECCE.

5. CONCLUSION

This paper sought to investigate (i) whether the aims expressed in the three treaties are sufficient to include a legally binding right to ECCE in international human rights law (ii) whether this right has been recognized by UN monitoring bodies; (iii) what the content of the rights and obligations are and (iv) how these align with the SDGs.

In the light of the strong evidence on the importance of ECCE for the full development of the child's personality and the ability to participate fully in society, both of which are stated aims of the three treaties, we have argued that ECCE from birth is an implicit element of the right to education in these Convention. With respect to recognition of this right, the opinions of the relevant treaty bodies are persuasive authority as to the meaning of the terms of the treaties in international law. We found that both in the GCs and in a substantial body of COs of each treaty body, there was a clear recognition of ECCE as part of the right to education. Importantly, ECCE is being referenced in the COs across Conventions for the same countries (e.g. Slovakia) highlighting how fundamental ECCE is for the exercising of a number of different rights.

A careful analysis of all the COs of the three treaty bodies between 2015 and March 2020 allowed us to spell out the ways in which the treaty bodies have formulated the content of the right and their recommendations as to how to fulfil it. These recommendations include psychosocial support for families as well as cognitive stimulation, adequate sanitation, a clean and safe environment and nutrition for young children. ECCE provision must be accessible and affordable, and this must take into account hidden barriers to access such as birth registration or lack of transportation. Provision must be equal and non-discriminatory. This means that it should be distributed fairly, including to children from marginalized groups, such as children of asylum seekers and migrants, street children, children of specific ethnic minorities and children in prisons. It also means structuring provision so it is inclusive of children with disabilities as well as those who speak minority languages and have cultures and traditions that differ from the mainstream, such as indigenous people.

The COs regularly mention SDG 4.2, aligning achievement of the right to education with the development goals and the political commitment, by 2030, to ensure that all girls and boys have access to quality early childhood development, care and pre-primary education so that they are ready for primary education. However, whereas the SDG indicators measure achievement of the right by aggregate indicators, the treaty bodies' approach is more focused on making specific recommendations to States Parties, including providing institutional investments, teacher training, monitoring of quality, and financial support, and inclusive policies for marginalized children and their families.

The central importance of ECCE has been thrown into relief by COVID-19. It has highlighted in particular the importance of parental engagement in early childhood learning experiences, and the need to support parents in this role. Notably the CCRC recognized this aspect of children's rights in its 2005 General Comment, when it set out States' responsibilities in taking

¹²⁷ Committee on the Rights of the Child, Concluding Observations Regarding Iraq, 04 February 2015, CRC/C/IRQ/CO/2-4, P16.

measures to both support parents' role as children's first educators, and to provide programmes to complement parents' role. The CESCR is also concerned with the relationships between children's rights to quality ECCE, and women's labour rights and rights to parental leave.

In conclusion, it is more important than ever, as we emerge from the pandemic, that States recognize their responsibilities to respect, protect and fulfil the right to early childhood education and development. It should also be clear to States what these responsibilities are. By drawing together the recommendations concerning the responsibility of States, this paper has attempted to set out a roadmap for States to draw on in developing their policies and priorities. This strongly suggests that it is time for the treaty bodies to issue a new or amended general comment to this effect. As we made clear, the development and educational needs of young children and support for their families are critical but frequently overlooked. Alerting States, and civil society, to these responsibilities can assist in holding them to account. At this particular time, it is critical that wealthier States take their responsibilities seriously to share the global financial burden. Education and development for young children is a common global responsibility, which affects everyone in our interconnected and interdependent world. These flow directly from States' commitments under international human rights law to provide education directed to 'the development of the child's personality, talents and mental and physical abilities to their fullest potential'.¹²⁸

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¹²⁸ CRC Article 29(1)(a), ICESCR Article 13(2), CRPD Article 24.