

Identifying Violations of the Right to Education

*Fons Coomans**

Introduction

It is generally acknowledged that the right to education falls within the category of economic, social and cultural rights. Compared to other rights, such as the right to food or the right to adequate housing, the right to education has always been underexposed. A main feature of the right to education is its mixed character. On the one hand, it affords individuals a claim against the State in respect of receiving education. Realisation of this right requires an effort on the part of the State to make education available and accessible; it implies positive State obligations. This may be called the social dimension of the right to education. On the other hand, the right to education embraces a freedom dimension. There is the freedom of individuals to choose between State-organised and private education, which can be translated, for example, in parents' right to ensure their children's moral and religious education according to their own beliefs. From this also stems the freedom of natural persons or legal entities to establish their own educational institutions. This freedom dimension requires of the State that it conduct a policy of non-interference in private matters; it implies negative State obligations. Both dimensions can be found in Articles 13 and 14 of the International Covenant on Economic, Social and Cultural Rights (hereafter: the Covenant) and in Articles 28 and 29 of the Convention on the Rights of the Child (hereafter: the Convention).¹

* Centre for Human Rights, Maastricht University, the Netherlands.

¹ See also the UNESCO Convention against Discrimination in Education (1960), and a number of regional instruments, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 2 of the First Protocol, 1952), Protocol to the American Convention on Human Rights (Article 13 Protocol of San Salvador, 1988), African Charter on Human Rights and Peoples' Rights (Article 17,

In this article, I will attempt to identify violations of the right to education based on a comprehensive survey of the concluding observations on the implementation of the right to education by State Parties, adopted by the Committee on Economic, Social and Cultural Rights (CESCR) and the Committee on the Rights of the Child (CRC). Because of the absence of a General Comment on the right to education and scarce national or international case law, there are hardly any concrete criteria to assess a State's performance in this field.² To trace violations of the right to education, I will refer now and then to reports submitted by Special Rapporteurs of the United Nations Commission on Human Rights and to interventions by the OSCE High Commissioner on National Minorities directed at governments, as auxiliary sources. As a framework for identifying violations of the right to education, I will use the section of the Limburg Principles devoted to violations of economic, social and cultural rights and focus on the obligations for State Parties arising from the instruments discussed earlier.³

1. General Observations

It should be borne in mind that, in comparison to other rights laid down in the Covenant and the Convention, the provisions on the right to education are comprehensive and concrete, setting out the steps to be taken by States in realising the right to education. In performing their duties under these instruments, States do have a margin of discretion in selecting the means to achieve the level of realisation prescribed by the treaties.⁴ In particular this is the case for the social dimension of the right

1981).

² The UNESCO Complaints Procedure established in 1978 deals, *inter alia*, with alleged violations of the right to education. Due to the confidential nature of this procedure, and consequently the lack of information about the substance of complaints, it is, unfortunately, of little help for the purpose of the present study. See about this procedure, D. Weissbrodt and R. Farley, 'The UNESCO Human Rights Procedure: An Evaluation', *Human Rights Quarterly*, Vol. 16, 1994, pp. 391-415.

³ The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, published in UN Doc. E/CN.4/1987/17, Annex and in the *Human Rights Quarterly*, Vol. 9, 1987, pp. 122-135. See in particular Principle No. 72.

⁴ Limburg Principles No. 71.

to education. Because of the huge costs involved in setting up and maintaining an educational system, State authorities at the central, regional and local level are the major actors in implementing the right to education. But one should not overlook the role played by private organisations in many countries in realising this right: these organisations establish and direct educational institutions based on specific ideas and convictions, operating with, or without, governmental (financial) support. This freedom of education does not imply an obligation for the State to subsidise private educational institutions, but where a State does support private schools, it must do so in a non-discriminatory way. Private educational institutions must conform to minimum (educational) standards laid down by the State.

There is a well-known difference between the norm ('everyone has the right to education'; non-discrimination and equal opportunity with respect to education) and the reality in many countries. The degree of realisation of the right to education is not only dependent on governmental policy and measures, it is also influenced by structural factors dominant in a given society. Structural factors include socioeconomic and cultural development and the economic condition of the family (the need to raise additional income through child labour), discrimination against marginal and vulnerable groups within society, parents' attitudes towards education, as influenced by occupation, class, religion, social and cultural traditions, geographical factors (differences between the (urban) centre and peripheral or remote regions) and demographic factors (composition and growth of the population). These factors have an impact on the level of literacy, access to education, enrolment, drop-out and repetition rates.⁵ These structural problems amount to, what may be called, forms of static discrimination.⁶ These structural factors should be taken into account when assessing the record of States in implementing the right to education.

⁵ See Kate Halvorsen, 'Notes on the Realization of the Human Right to Education', *Human Rights Quarterly*, Vol. 12, 1990, pp. 341-364, at pp. 357-362.

⁶ See A.D. Ammoun, *Study of Discrimination in Education*, UN Doc. E/CN.4/Sub.2/181/Rev.1, 1957 (UN Sales No. 57.XIV.3), at pp. 4-5. This study was written in preparation of the UNESCO Convention against Discrimination in Education, adopted by the General Conference of UNESCO on 15 December 1960.

2. Failure to Take Steps

A State Party is in violation of the Covenant, if it fails to take a step which it is required to take under the Covenant (Principle No. 72 of the Limburg Principles). The CESCR has emphasised that Article 2(1) implies that each State Party must begin to take steps within a reasonably short period of time after the Covenant's entry into force for the State concerned: 'such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.'⁷ A clear example of a step prescribed by the Covenant is Article 14. According to this provision, each State Party which, at the time of becoming a Party, has not (yet) been able to secure free compulsory primary education for all, undertakes to work out and adopt, within two years, a detailed plan of action for the progressive implementation of compulsory and free education. It is an obligation prescribing specific conduct. The *raison d'être* of this provision is 'that every State, no matter how tight its financial situation might be or how low its present level of primary school facilities, must make immediate and carefully planned moves to ensure the availability of primary education, as a matter of right, to all.'⁸ In one case, the CESCR noted that the report of a State Party (Rwanda) did not contain any evidence of the existence of a plan of action for the implementation of free and compulsory education, in conformity with Article 14. According to the Committee, this article was quite unequivocal about establishing a two-year timetable for such a plan.⁹ In the concluding observations on El Salvador, the CESCR noted that child labour had a negative influence on the implementation of Articles 13 and 14 and criticised the Government for its 'apparent lack of action' to

⁷ The nature of States Parties obligations (Article 2(1)), General Comment No. 3 of the CESCR, UN Doc. E/1991/23, Annex III, para. 2. See also Limburg Principles No. 16.

⁸ Ph. Alston, 'The International Covenant on Economic, Social and Cultural Rights, United Nations', *Manual on Human Rights Reporting*, New York, 1991, UN Doc. HR/PUB/91/1, pp. 39-78, at p. 68.

⁹ CESCR, Report on the Third Session (6-24 February 1989), Economic and Social Council, Official Records, 1989, Supplement No. 4, UN Doc. E/1989/22, para. 190. See also the Concluding Observations on the report of The Gambia, UN Doc. E/C.12/1994/9, para. 17.

remedy that situation.¹⁰ In other cases, however, the CESCR did not expressly refer to Article 14, although primary education was neither compulsory nor free.

3. Failure Promptly to Remove Obstacles in Order to Permit the Immediate Fulfilment of a Right

This principle refers to discrimination *de jure* in education, as well as to acts which imply forms of active discrimination. An example of discrimination *de jure* is the educational system during the era of Apartheid in South Africa.¹¹ Acts of 'active discrimination' refer to discriminatory practices which result from a policy evidently intended to originate, maintain or aggravate such practices in education.¹² Article 1 of the UNESCO Convention against Discrimination in Education lays down a definition of the concept of discrimination within the context of education: it includes any distinction, exclusion, limitation or preference, which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education, in particular: (a) of depriving any person or group of persons of access to education of any type or at any level; (b) of limiting any person or group of persons to education of an inferior standard. In order to eliminate and prevent forms of active discrimination, States Parties to this UNESCO Convention undertake to take specific measures.¹³ It is

¹⁰ Concluding Observations on El Salvador, UN Doc. E/C.12/1/Add.4, para. 22.

¹¹ Violations of Human Rights in South Africa, Report of the *Ad Hoc* Working Group of Experts on Southern Africa, UN Doc. E/CN.4/1989/8, paras 399-413.

¹² Ammoun, *op.cit.* (note 6), at pp. 4-5.

¹³ Article 3 lists the measures required: (a) to abrogate any statutory provisions and any administrative instructions and to discontinue any administrative practices which involve discrimination in education; (b) to ensure, by legislation where necessary, that there is no discrimination in the admission of pupils to educational institutions; (c) not to allow any differences of treatment by the public authorities between nationals, except on the basis of merit or need, in the matter of school fees and the grant of scholarships or other forms of assistance to pupils and necessary permits and facilities for the pursuit of studies in foreign countries; (d) not to allow, in any form of assistance granted by the public authorities to educational institutions, any restrictions or preference based solely on the ground that pupils belong to a particular group; (e) to give foreign nationals

submitted that these are obligations of conduct which leave little or no discretion to a State; these obligations have an immediate effect.¹⁴ Some examples can be given which, in my view, amount to a failure by the State promptly to remove obstacles in this field. A number of cases deals with discrimination against girls and women with lower school enrolment and attendance and a lower level of literacy as compared to boys. States have thus failed to take active measures in order to realise equality of treatment between boys and girls with respect to access to education.¹⁵

In some countries, there is discrimination on religious grounds. In Iran, for example, members of the Bahai minority are denied access to university education.¹⁶ In one case, the CESCR observed that the Government of a State Party had been unable to prevent or had been unwilling to redress discrimination against the Gypsy minority in education. The Government in question had failed to adopt an active non-discrimination policy in order to increase the participation in educational activities of the minority members.¹⁷ With respect to the educational opportunities of children of Albanian nationality within the public school system of the FYROM (Macedonia), the High Commissioner on National Minorities of the OSCE held that further efforts were required to increase

resident within their territory the same access to education as that given to their own nationals. For an analysis of this Convention see W. McKean, *Equality and Discrimination under International Law*, Clarendon Press, Oxford, 1983, at pp. 128-135.

¹⁴ See Limburg Principles Nos 35 and 37. See also CESCR, General Comment No. 3, *op.cit.* (note 7), para. 1.

¹⁵ See the Concluding Observations of the Committee on the Rights of the Child, Report on the Twelfth Session (20 May-7 June 1996), UN Doc. CRC/C/54, para. 161 (Nepal), Report of the Committee on the Rights of the Child, General Assembly, Official Records – Fifty-first Session, Supplement No. 41, UN Doc. A/51/41, para. 761 (Senegal). See also the Concluding Observations of the CESCR, UN Doc. E/C.12/1994/5, para. 24 (Morocco), UN Doc. E/C.12/1994/6, paras 9 and 17 (Iraq), UN Doc. E/C.12/1/Add.5, para. 23 (Guinea).

¹⁶ UN Doc. E/C.12/1993/7, para. 11 (Iran). According to a directive of the Iranian Supreme Cultural Council of the Revolution, Bahais should be expelled from the universities, either at the time of the admission procedure, or during their studies, as soon as it becomes apparent that they are Bahais. See *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief*, Report by Mr Abdelfattah Amor, Special Rapporteur, UN Doc. E/CN.4/1996/95/Add.2, para. 63.

¹⁷ UN Doc. E/C.12/1994/4, paras 12, 15 and 16 (Romania).

the percentage of Albanian pupils continuing their education at secondary school level.¹⁸ The Minister of Foreign Relations of the FYROM replied that his Government was making efforts to provide continued education for a great number of persons of Albanian nationality, by allowing quotas in a number of secondary schools.¹⁹ It is submitted that the setting of quotas for pupils of the Albanian minority does not contribute to effective equality, and, in consequence, is discriminatory. The right to education implies after all a right of equal access to the existing public educational institutions.

In a number of other countries, a practice emerged to deny the right to education to asylum-seekers, because they were considered illegal immigrants. In one case, the CESCR considered this situation inconsistent with the obligations under the Covenant.²⁰ In two other situations, the CRC questioned the compatibility of this practice with Articles 2 and 3 of the Convention.²¹

An example of a failure by a State Party to the Convention promptly to remove an obstacle is the persistence of forms of corporal punishment in schools. A number of countries has been criticised for not having taken appropriate measures to combat and prevent these practices in public as well as private schools. The CRC was of the view that the continued practice of corporal punishment proved not to be compatible with the provisions of Article 28(2) of the Convention.²² This article provides for the obligation of a State Party to ensure that school discipline is administered in a manner consistent with the child's human dignity and in

¹⁸ See the letter, dated 16 November 1994, of the OSCE High Commissioner on National Minorities to the Minister for Foreign Affairs of the FYROM, reproduced in *Helsinki Monitor*, Vol. 6, No. 1, 1995, pp. 115-116.

¹⁹ See the letter, undated, of the Minister of Foreign Affairs of the Republic of Macedonia to the OSCE High Commissioner on National Minorities, reproduced in *Helsinki Monitor*, Vol. 6, No. 2, 1995, at p. 90.

²⁰ UN Doc. E/C.12/1994/19, para. 28 (Great Britain, with respect to Hong Kong).

²¹ UN Doc. A/51/41, *op.cit.* (note 15), para. 447 (Denmark), para. 585 (Belgium).

²² UN Doc. CRC/C/54, *op.cit.* (note 15), para. 88 (Zimbabwe) and UN Doc. A/51/41, *op.cit.* (note 15), paras 384 (Poland), 482 (the United Kingdom) and 563 (Canada). The European Court on Human Rights rendered two judgments relating to the use of corporal punishment both in public and in private schools in the United Kingdom; see *Campbell and Cosans*, 25 February 1982, Pub. ECHR Series A, Vol. 48 and *Costello-Roberts*, 23 March 1993, Pub. ECHR, Series A, Vol. 247-C.

conformity with the Convention. This obligation must be characterised as an obligation to respect the child's right to education; it requires of the State to abstain from interference with the exercise of this right by pupils and parents, which is closely related to the right to be free from degrading treatment or punishment.

4. Failure to Implement without Delay a Right which a State Party is Required to Provide Immediately

A State Party is in violation of the Covenant, if it fails to implement without delay a right which it is required to provide immediately (Limburg Principles No. 72, para. 3). In my view, Article 13(2)(a) of the Covenant, which provides for the realisation of compulsory and free primary education, is a right which a State Party must provide immediately. The following reasons can be given for this qualification. The obligation contained in subparagraph 2(a) is imperative, unconditional, clearly defined and without reference to progressiveness. Subparagraphs 2(b) and 2(c), on the contrary, contain conjugations of the verb 'to make'; this reinforces their progressive character.²³ In contradistinction, it should be mentioned here that Article 28(1)(a) of the Convention contains an element of progressive implementation, because it obliges States to *make* primary education compulsory and available to all, at no costs for the latter. It should be emphasised, however, that according to Article 41 of the Convention, the provision guaranteeing the highest degree of protection for the child will prevail. The fact that the obligation of Article 13(2)(a) of the Covenant, to provide compulsory and free primary education to all, is of an immediate character is also underscored by Article 14, discussed above, which requires any State Party which has not yet satisfied this obligation to take very precise measures towards that goal.²⁴ General Comment No. 3 of the CESCR also stresses that each State Party to the Covenant has a minimum obligation to ensure the

²³ See Fons Coomans, 'Clarifying the core elements of the right to education', in: Fons Coomans and Fried van Hoof (eds), *The Right to Complain about Economic, Social and Cultural Rights*, SIM Special No. 18, SIM, Utrecht, 1995, pp. 9-26, at p. 14.

²⁴ See Alston, *op.cit.* (note 8), at p. 67.

satisfaction of minimum essential levels of each right. The Committee adds that if a significant number of people is deprived of, *inter alia*, the most basic forms of education, the State in question *prima facie* has failed to discharge its obligations under the Covenant.²⁵ As a consequence, States must, as a matter of priority, allocate sufficient financial and other resources to guarantee the right to primary education. If, due to limited financial means, choices must be made between different levels or types of education, priority must be given to the realisation of primary education.²⁶

Some examples may illustrate violations of the right to compulsory and free primary education. According to the UN Special Rapporteur on the situation of human rights in Zaire, only two percent of the national budget is earmarked for education. The Zairian Government has failed to provide free primary education and to maintain schools. It has been reported that about 75 percent of the school-going part of the population fail to attend school. Authorised private schools lack the minimum infrastructure, but fees for these schools are 5 to 12 times higher than those for State schools.²⁷ The Zairian Government abolished free education in order to cope with the economic and financial difficulties it encountered in managing and funding the educational sector. The Government had no plan to reintroduce free education.²⁸ After considering Zaire's report on the implementation of Articles 13-15,²⁹ members of the CESCR were of the view that Zaire's failure to secure primary education free of charge was in contravention of Articles 13 and 14 of the Covenant.³⁰ One member of the Committee stated that 'the provision of such education was an obligation which remained incumbent upon a State Party whatever economic system it had adopted'.³¹ With regard to the educational

²⁵ General Comment No. 3, *op.cit.* (note 7), para. 10.

²⁶ Compare Limburg Principles No. 25 and 28.

²⁷ Report on the situation of human rights in Zaire, Report by Special Rapporteur Mr Roberto Garretón, UN Doc. E/CN.4/1996/66, para. 109.

²⁸ Additional information submitted by States Parties to the Covenant, UN Doc. E/1989/5, at pp. 9-10 (Zaire).

²⁹ UN Doc. E/1982/3/Add.41.

³⁰ CESCR, Report on the Second Session (8-25 February 1988), Economic and Social Council, Official Records, 1988, Supplement No. 4, UN Doc. E/1988/14, para. 297.

³¹ UN Doc. E/C.12/1988/SR.19, para. 10.

situation in Kenya, the CESCR observed that the obligation of Article 13(2)(a) applies in all situations, including those in which local communities are unable to furnish buildings, or where individuals are unable to afford any costs associated with school attendance.³² Finally, in a number of States, school enrolment rates and literacy rates are among the lowest in the world; in some States, vulnerable groups are the victims of the absence of concrete measures by governments; in a few States, the educational situation has even regressed over a number of years.³³

5. Wilful Failure to Meet a Generally Accepted International Minimum Standard

A State Party is in violation of the Covenant, if it wilfully fails to meet a generally accepted international minimum standard of achievement which it is capable of meeting (Limburg Principles No. 72, para. 4). With respect to the right to education, some norms may be characterised as minimum standards. The first is the right of access to the existing public educational institutions, in a non-discriminatory way. Another minimum standard is respect for the free choice of education, for example, between public and private education, or the right of parents to determine the religious and moral education of their children.³⁴ A third minimum norm is the right of individuals or groups to establish their own educational institutions, including the right of members of minorities to be taught in their mother

³² Concluding Observations on Kenya, UN Doc. E/C.12/1993/6, para. 18.

³³ Report on the human rights situation in Haiti by Mr Adama Dieng, independent expert, UN Doc. E/CN.4/1996/94, para. 71; CESCR, Concluding Observations on Mexico, UN Doc. E/C.12/1993/16, para. 7; CESCR, Concluding Observations on Mali, UN Doc. E/C.12/1994/17, para. 15; Report on the human rights situation in the Republic of Equatorial Guinea by Mr Alejandra Artucio, Special Rapporteur, UN Doc. E/CN.4/1996/67, para. 66.

³⁴ Compare General Comment No. 22 (1993) on Article 18 of the International Covenant on Civil and Political Rights, adopted by the Human Rights Committee. The Committee noted 'that public education that includes instruction in a particular religion or belief is inconsistent with article 18.4 unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians' (para. 6). This General Comment is reproduced in the Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.2, at pp. 35-38.

tongue at institutions outside the system of public education. These standards belong to the core content of the right to education.³⁵ A final minimum standard is the requirement that the purposes of educational policy in a given State must be in accordance with the principles of pluralism and respect for human rights as laid down in Article 13(1) of the Covenant.

Several examples of violations of these minimum standards can be identified from the consideration of State reports by the CESCR and CRC. In Iran, for example, members of the Bahai and Kurdish minority were denied the right to education, because they belonged to a minority not recognised by the authorities.³⁶ After the Islamic revolution in 1979, private education was abolished in Iran; only three minorities were allowed to establish their own schools, namely Jews, Christians and Zoroastrians.³⁷ Some members of the CESCR wondered whether there was real free choice of education in a strongly Islamic country.³⁸ Consequently, Islam takes a dominant place in the school curriculum. Another example dealing with private education is the following: as late as 1994, it was not possible for members of minorities to establish private schools in Albania, although this country is a party to the Covenant.³⁹ There have been reports of progressive exclusion of the teaching in other languages than Serbian, such as Bulgarian, in the Federal Republic of Yugoslavia (Serbia and Montenegro).⁴⁰

In some countries, the State has a major influence on the contents of education. This is especially so in countries with a one-party system. The

³⁵ See Fons Coomans, *Core Contents of the Right to Education*, Academic Freedom 4, World University Service, London/Amsterdam, 1996, pp. 3-8, at pp. 6-7.

³⁶ UN Doc. E/C.12/1990/SR.45, para. 10. See also the report of Amor, *op.cit.* (note 16).

³⁷ UN Doc. E/C.12/1990/SR.42, para. 50.

³⁸ One member of the CESCR observed: 'If 98 per cent of the population was Muslim and favoured religious instruction, that was well and good. The Committee's task however, was to ascertain whether the right of the remaining 2 per cent of the population to have instruction in another religion, or to have no religious instruction at all, was being safeguarded.' UN Doc. E/C.12/1990/SR.43, para. 38.

³⁹ See the letter, dated 2 November 1994, of the OSCE High Commissioner on National Minorities to the Acting Minister of Foreign Affairs of the Republic of Albania, reproduced in *Helsinki Monitor*, Vol. 6, No. 1, 1995, pp. 107-111, at p. 110.

⁴⁰ Report of the Committee on the Rights of the Child (UN Doc. A/51/41), *op.cit.* (note 15), para. 892.

ruling party will promote and integrate its political ideas in education.⁴¹ Pluralism, the ratio behind the freedom of education, will clearly be lacking in such cases. One example is the situation in Zaire where all education must be provided under the supervision and in conformity with the ideals of the ruling 'People's Movement for the Revolution'.⁴² This is contrary to the idea that instruction in public schools be given in a neutral and objective way.⁴³

6. Deliberate Retarding or Halting of the Progressive Realisation of a Right

According to the Limburg Principles (No. 72, para. 6), a State is in violation of the Covenant, if it deliberately retards or halts the progressive realisation of a right, unless it is acting under a 'limitation' permitted by the Covenant or it does so due to a lack of available resources or *force majeure*. Although not expressly, this paragraph also embodies the idea that reversing existing levels of realisation of a right, without sufficient justification, amounts to a violation. In its General Comment on Article 2(1), the CESCR stated that

'any deliberately retrogressive measures (...) would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.'⁴⁴

It is submitted that this paragraph of the Limburg Principles must be read in the light and context of the General Comment just quoted. This would mean that the justification requirement plays an important role when assessing the nature of a State's Party conduct. In this respect, I agree with Craven when he observes:

⁴¹ See the 'Comments' made by B. Simma in: Coomans and Van Hoof (eds), *op.cit.* (note 23), at p. 29.

⁴² UN Doc. E/1989/5, *op.cit.* (note 28), at pp. 6 and 9.

⁴³ See the General Comment adopted by the Human Rights Committee, *op.cit.* (note 34), at para. 6.

⁴⁴ General Comment No. 3, *op.cit.* (note 7), para. 9.

‘Certainly some adverse effects may flow from well-intentioned measures [by governments], but where retrogressive measures were the result of deliberate policy, the Committee would do better to consider it a *prima facie* violation of the Covenant in the absence of further justificatory evidence. It would then be for the State concerned to show that there were sound reasons for adopting the policy at issue.’⁴⁵

In many cases, States merely refer to a lack of financial resources or to the difficult economic situation as a reason for retrogressive measures, without further justification. This kind of reasoning should be characterised as insufficient to justify retrogressive measures: it is too permissive and lacks specific grounds for each separate retrogressive measure. In addition, States taking retrogressive measures do not, as rule, define these as limitations within the meaning of Article 4 of the Covenant.

Turning now to retrogressive measures in the educational field, it must be remembered that paragraph 2 of Article 13 of the Covenant contains an express reference to progressiveness in respect of making secondary and higher education available and accessible to all. Measures which detract from this aim are *prima facie* not in conformity with a State's obligations under the Covenant. A survey of State reports and concluding observations shows one type of retrogressive measures often resorted to by States, namely the (re-)introduction or raising of fees for primary, secondary and higher education. In one particular case, the CESCR expressly concluded that the re-introduction of fees at the tertiary level constitutes a deliberate retrogressive step.⁴⁶ This amounts to a violation of Article 13(2)(c). In another case, the CESCR noted with particular concern the intention of the Government of Belarus to introduce fees for education in the tenth and eleventh grades of secondary education.⁴⁷ When considering the report by the Republic of Korea, the CESCR denounced the absence of a progressive introduction of free secondary

⁴⁵ M.C.R. Craven, *The International Covenant on Economic, Social and Cultural Rights – A Perspective on its Development*, Oxford, 1995, at p. 132.

⁴⁶ Concluding Observations on Mauritius, a State Party which failed to submit a report, UN Doc. E/C.12/1994/8, para. 16.

⁴⁷ CESCR, Report on the Seventh Session (23 November-11 December 1992), Economic and Social Council, Official Records, 1993, Supplement No. 2, UN Doc. E/1993/22, para. 78.

and higher education. This would have been due given the strength of the Korean economy.⁴⁸ If the raising of fees were to have negative effects on the accessibility of education for members of vulnerable groups, then there would be a *prima facie* violation.⁴⁹ In one case, the CESCR inquired about the implications of a university tax for the implementation of Article 13. The answer given by the representative of the State (Trinidad and Tobago) indicated, in my view, that such a measure could have a negative impact upon the accessibility of higher education. The State's representative said that students who could not pay the university tax were entitled to request a low-interest bank loan to be reimbursed upon completion of their studies.⁵⁰ It can be argued that the prospective of a debt burden is a serious obstacle for students from low-income groups to embark on a university study.⁵¹

The case of Japan is special, because the Government of this State has made a reservation on Article 13(2)(b) and (c), namely the right not to be bound 'in particular by the progressive introduction of free education.'⁵² In Japan, many students attend private educational institutions. In general, private education is more expensive than the public education system. According to the Japanese Government, it is not able to pay fully for the system of private education. For this reason, the Government introduced fees, not only for private secondary and higher education, but also for

⁴⁸ CESCR, Concluding Observations on the Republic of Korea, UN Doc. E/C.12/1995/3, para. 13.

⁴⁹ CRC, Concluding observations on Zimbabwe, UN Doc. CRC/C/54, *op.cit.* (note 15), para. 85.

⁵⁰ UN Doc. E/1989/22, *op.cit.* (note 9), paras 304 and 306.

⁵¹ The (re-)introduction of fees is not limited to developing countries. In a number of Western countries the same development is taking place. The Netherlands raised fees for students 16 years and older attending any type of education, and, in addition, the annual raising of university tuition fees. Another example is Switzerland where the Canton of Zurich intends to introduce school fees amounting to between 800 to 1,200 Swiss Francs annually for students attending 'Maturitätsschulen'; see *Mensch + Recht, Quartalszeitschrift der Schweizerischen Gesellschaft für die Europäische Menschenrechtskonvention*, September 1996, at pp. 1-3.

⁵² Status of the International Covenant on Economic, Social and Cultural Rights and Reservations, Withdrawals, Declarations and Objections under the Covenant, UN Doc. E/C.12/1993/3/Rev.1, at p. 14.

public education.⁵³ This reasoning can be criticised, because the Japanese Government is shifting the high costs of private education on to students who attend public educational institutions. These students are not able to enjoy private education for financial reasons, but they have to pay fees to maintain the system. In my view, this system of burden-sharing is not justified. States have a primary responsibility to maintain a system of public education which should be accessible to all. It may not put up financial obstacles which hinder the achievement of equal accessibility. In addition, it could be argued that the position of the Japanese economy is sufficiently strong to allow students attending public education to be exempted from paying fees. However, Japan's reservation complicates the situation.

Another retrogressive measure in the educational field is reducing the budget for education. However, it is not self-evident that a reduction of this budget entails a violation of the right to education and that the Government has acted wilfully. In most cases, supervisory bodies lack sufficient, detailed and reliable information to reach such a conclusion. If, however, a reduction of the education budget were to imply a government giving priority to other policy choices not contributing to a progressive realisation of other social rights, it may be concluded that such a policy practice is contrary to the Covenant. This is even more so the case if such a policy were to result in a decline of the living conditions of the vulnerable parts of the population. Examples of a clear violation in this area are rare. In the case of Guinea, the CESCR concluded that the Government of this State was clearly not prepared to increase the education budget in order to deal with the serious shortage of teachers.⁵⁴ In another case, the CRC noted that the very high level of external debt and the requirements of structural adjustment programmes have resulted, *inter alia*, in a reduction of the education budget. These measures have adversely affected the availability of adequate school facilities. The CRC

⁵³ See the report of Japan, UN Doc. E/1982/3/Add.7, para. 7 and the consideration of this report by the Sessional Working Group of Governmental Experts, the predecessor of the CESCR, UN Docs E/1982/WG.1/SR.12, paras 47, 57 and 64, and E/1982/WG.1/SR.13, para. 12.

⁵⁴ Concluding Observations on Guinea, UN Doc. E/C.12/1/Add.5, para. 23. This State failed to submit a report.

has called upon the Government of Jamaica to provide adequate safety nets for vulnerable and poor children so as to avoid further deterioration of their rights.⁵⁵ In the latter case, it is doubtful, in my view, whether a violation has occurred in view of the State's serious economic and financial problems, which to a certain extent were beyond its control.

A clear example of a State deliberately retarding the progressive realisation of the right to education is India. In this country, society is characterised by a strong traditional hierarchic structure and discrimination against specific social groups, in particular the untouchables, scheduled tribes, women, members of minorities and the handicapped. The Indian Government and ruling elite give priority to the education of boys over girls. In addition, the Government did not pursue an active policy to promote education of all groups and failed to place more emphasis on the elimination of child labour. The national education budget hardly represented three percent of the Gross National Product. Members of the CESCR observed that, according to many sources, there was a growing disparity between the access to educational opportunities of the rich and the poor in India. Only a very limited number of students from low-income families enrolled in institutes of higher education. There was also a qualitative gap between the public and the private sector: private education was of a much higher standard and usually only accessible to the upper castes. Fees for the private sector were high; people from low-income groups were not able to pay for private education.⁵⁶ It has been argued that the lack of progress in making education accessible to all and the irresolute measures against child labour in India are not so much the result of the difficult economic and financial situation of the country. This situation can be better explained by the belief systems

⁵⁵ UN Doc. A/51/41, *op.cit.* (note 15), paras 407, 417 and 422, Concluding Observations on Jamaica.

⁵⁶ See the report by the Indian Government on the implementation of the CESCR, UN Doc. E/1988/5/Add.5 and the assessment of this report by the CESCR, UN Doc. E/C.12/1990/SR.16 and SR.17. See also the Report of the CESCR on the Fourth Session (15 January-2 February 1990), Economic and Social Council, Official Records, 1990, Supplement No. 3, UN Doc. E/1990/23, paras 212-230.

of the State bureaucracy and the upper and middle classes in India.⁵⁷ Central to these beliefs is

‘the Indian view of the social order, notions concerning the respective roles of upper and lower social strata, the role of education as a means of maintaining differentiations among social classes ...’⁵⁸

Social mobility is limited due to the hierarchic organisation of society which does not allow the mixing of castes. As a result, it is hardly possible for members of the lower castes to attain educational institutions and professions which by tradition are intended for the upper castes.⁵⁹ The education system has been an instrument for maintaining the social *status quo*: those in control of the education system give low priority to mass education as evidenced by the low investment in primary education as compared to other developing countries. They are indifferent to the implementation of compulsory education and to the elimination of child labour.⁶⁰

7. Failure to Fulfil an Obligation to Realise the Right to Education

Prima facie non-observance of treaty obligations on the realisation of economic, social and cultural rights by a State Party does not necessarily imply that a violation has taken place. This section deals with situations which, in my view, are no clear-cut violations, but rather failures on the part of States to fulfil their programmatic obligations under the Covenant. States may pursue unsatisfactory policies without committing a violation. For example, the policy pursued by a State may not be in conformity with the progressive implementation of a right within the meaning of Article 2(1) of the Covenant.⁶¹ ‘The obligation to fulfil’ requires a State to take

⁵⁷ See M. Weiner, *The Child and the State in India – Child Labor and Education Policy in Comparative Perspective*, Princeton University Press, Princeton, 1991.

⁵⁸ *Ibidem*, at p. 5.

⁵⁹ See Malavika Karlekar, ‘Education and Inequality’, in: A. Bêteille (ed.), *Equality and Inequality, Theory and Practice*, Oxford University Press, Dehli, 1983, pp. 182-243.

⁶⁰ Weiner, *op.cit.* (note 57), at p. 6, pp. 186-190.

⁶¹ Coomans and Van Hoof (eds), *op.cit.* (note 23), at pp. 213, 214 and 229.

positive measures with a view to ensuring the effective realisation of rights. It should be characterised as a programme obligation implying a long-term course. It will generally call for a financial input by the State.⁶² When 'failing to fulfil' the obligation, a State is prepared to realise a right, but is not able to do so, because of a lack of human or material resources. This does not mean that a difficult economic or financial situation would absolve a State from its obligations under the Covenant; the CESCR has emphasised that 'even where the available resources are demonstrably inadequate, the obligation remains for a State Party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances.'⁶³ Usually, the CESCR appreciates these problems (foreign debt burden, cuts in government spending caused by adjustment agreements with the international financial institutions), but at the same time it underlines the obligations imposed on States Parties to the Covenant, whatever their level of development.⁶⁴

Problems with regard to the realisation of the right to education do not only occur in developing States, but also in States which are in transition from a planned economy to a market economy. In one case, illustrative for the approach taken by the CESCR, the Committee

⁶² See A. Eide, *Report on the Right to Adequate Food as a Human Right*, UN Doc. E/CN.4/Sub.2/1987/23, paras 66-71.

⁶³ CESCR, General Comment No. 3, *op.cit.* (note 7), para. 11.

⁶⁴ CESCR, Report on the Fifth Session (26 November-14 December 1990), Economic and Social Council, Official Records, 1991, Supplement No. 3, UN Doc. E/1991/23, para. 156 (Concluding Observations on Ecuador). In the case of Guinea, the CESCR was of the view that the Guinean Government had not given enough priority to schooling and education in the structural adjustment agreement, UN Doc. E/C.12/1/ Add.5, para. 23 (Concluding Observations on Guinea).

noted that the period of political and economic transition in which Hungary currently found itself made it extremely difficult for the Hungarian Government to take the steps necessary to achieve the full realisation of the rights enshrined in Articles 13 and 15, and even forced it to take some retrogressive measures. Although the Committee arrived at the overall impression that the Government of Hungary was making a serious effort to preserve its considerable achievements in the field of education and culture under the difficult circumstances of the present period of political and economic transition, it nevertheless remained concerned that cultural life in Hungary would be negatively affected by the severe financial strictures and until private initiatives had filled the void left by the partial withdrawal of the State (...) In view of the magnitude of the changes involved in the transition process in which Hungary was engaged, the Committee wished to place special emphasis upon the need to ensure that special attention was paid to the right to education and culture of the most vulnerable and disadvantaged members of Hungarian society.¹⁶⁵

Many developing countries are currently not able to implement the obligations resulting from the social dimension of the right to education. For these countries, these standards are now a maximum, rather than a minimum. In the majority of these countries, a coherent system of schools of all levels in urban and non-urban regions, and training facilities for teachers are yet to be developed and implemented. In addition, transportation facilities for pupils and the supply of teaching materials are largely inadequate. In short, due to a lack of human and financial resources, the educational infrastructure is underdeveloped. Usually, supervisory bodies have difficulty in identifying a lack of political will on the part of governments, when they find an inadequate realisation of the right to education. In a number of cases, governments have failed to take active measures or have failed to allocate sufficient budgetary means for education to the detriment of members of vulnerable and marginal groups in society. High illiteracy and drop-out rates are indicative of a lack of insufficient educational opportunities. This situation becomes even more

⁶⁵ CESCR, Report on the Seventh Session (23 November-11 December 1992), Economic and Social Council, Official Records, 1993, Supplement No. 2, UN Doc. E/1993/22, paras 152-154, (Concluding Observations on Hungary). See also CESCR, General Comment No. 3, *op.cit.* (note 7), para. 12.

serious if the native languages of the majority are not used in education.⁶⁶ The CESCR and CRC are critical of this situation, in particular where there has been a lack of progress, but the conclusion that such a deficient situation violates States' treaty obligations has not been drawn.⁶⁷

8. Concluding Remarks

In the opinion of the CESCR, the main function of Concluding Observations is to focus 'on the extent to which the situation in [a State Party] in terms of the realization of the rights contained in the Covenant was satisfactory.'⁶⁸ Generally speaking, supervisory bodies in the field of human rights use diplomatic formulations to express their opinion that a State Party has not complied with its obligations under the treaty in question. Clearly, there is a certain reluctance and hesitance to label as violations inadequate and unsatisfactory situations. It should be emphasised, however, that the sections on 'principal issues of concern' and on 'suggestions and recommendations' of the Concluding Observations in a number of cases may indicate that the supervisory body has come to the conclusion that a violation has taken place, although this conclusion is not expressed.⁶⁹ In a few cases only, the CESCR and CRC arrived at the conclusion that a State Party's conduct was not in conformity with the provisions of Articles 13 and 14 of the Covenant and Articles 28 and 29 of the Convention, respectively (discriminating against minorities in education; discrimination on the grounds of religion or belief, social status or sex; failing to introduce and maintain compulsory and free

⁶⁶ In Suriname, teaching is in Dutch only; there is no teaching in Sranam Tongo which is spoken by most Surinamese, UN Doc. E/C.12/1995/6, para. 15. In Mauritius, Kreol and Bhojpuri, the only languages spoken by the large majority of the population, are not used in the educational system, UN Doc. E/C.12/1994/8, para. 17.

⁶⁷ CESCR, Concluding Observations on Mali, UN Doc. E/C.12/1994/17, para. 15, Guatemala, UN Doc. E/C.12/1/Add.3, para. 22, Guinea, UN Doc. E/C.12/1/Add.5, para. 23. CRC, Concluding Observations, UN Doc. A/51/41, *op.cit.* (note 15), para. 180 (Honduras), para. 211 (Indonesia), para. 263 (Paraguay), para. 303, 311 (Argentina), para. 351 (Colombia), para. 546 (Nicaragua), para. 635 (Sri Lanka).

⁶⁸ CESCR, Report on the Seventh Session, *op.cit.* (note 47), para. 263.

⁶⁹ See Audrey R. Chapman, 'A "Violations Approach" for Monitoring the International Covenant on Economic, Social and Cultural Rights', *Human Rights Quarterly*, Vol. 18, 1996, pp. 23-66, at pp. 48-49.

primary education; denying access to educational institutions to asylum-seekers; using corporal punishment in schools; introduction of fees). The supervisory bodies did not use, however, the term 'violation' in this regard, but used more masked and soft language.

The course these bodies follow when assessing State reports on the implementation of the right to education is not a straight one: there is no clearly discernible approach towards discussing the realisation of the right to education, although much attention is paid to the realisation of free and compulsory primary education and to the educational situation of vulnerable and marginal groups in society. One of the CESCR's handicaps in this respect is the lack of a General Comment on the right to education which may facilitate the assessment of a State's performance.⁷⁰ Another problem which the supervisory bodies have to deal with is the lack of detailed and reliable information provided by NGOs and UNESCO on the educational situation in a given country. This makes it difficult to conduct an in-depth study of the educational situation and to draw general conclusions. From the cases discussed in the preceding paragraphs, it can be concluded that the CESCR seems to take a rather strict approach towards States where implementation of the right to primary education is concerned. This is in contrast to the CRC's more 'soft' approach. Generally speaking, this Committee only expresses (deep) concern about inadequate or insufficient measures taken by governments to improve the educational situation.⁷¹

Where the core or minimum content of the right to education is not complied with by a State Party, it is obvious, in my view, that a *prima facie* violation did occur. It can be concluded that violations of the freedom dimension of the right to education are more readily identifiable,

⁷⁰ Craven characterises the approach followed by the CESCR as flexible, because not on every occasion does the Committee make an assessment as to whether a State Party is complying with its obligations under the Covenant. This is, among other things, dependent upon the availability of reliable NGO information. See M. Craven, 'Towards an unofficial petition procedure: a review of the role of the UN Committee on Economic, Social and Cultural Rights', in: K. Drzewicki, C. Krause, A. Rosas (eds), *Social Rights as Human Rights*, Institute for Human Rights – Åbo Akademi, Turku/Åbo, 1994, pp. 91-113, at pp. 102-103.

⁷¹ Examples are the concluding observations on the reports of Honduras and the Philippines, *op.cit.* (note 15), paras 180 and 327.

because they generally imply a State obligation not to interfere with the exercise of this freedom by individuals and groups. Violations of the social dimension are more difficult to identify, because of the State's discretion in the matter. It should not be overlooked, however, that the social dimension also implies minimum core obligations from which a State cannot run away.⁷² Crucial for the assessment of a State's performance is the nature of the problems in the educational field and the character and effects of the measures a State has taken in order to cope with these problems. In developing countries, the basic infrastructure and resources for an educational system are often inadequate or wanting and the realisation of the right to (primary) education is given a low priority. Many developed States, on the other hand, have an extensive and high-level educational system, which is difficult to maintain because of the huge costs involved. Consequently, these States feel tempted to take retrogressive steps. One of the great challenges for the CESCR and CRC that monitor the implementation of the right to education, is to distinguish between State violations of the right to education and State failures to fulfil the obligations resulting from the right to education. In my view, the latter do not constitute violations. For a fair assessment to be made, a supervisory body must take the economic and financial situation of a country into account and examine whether the Government in question has taken concrete measures towards progressive realisation and actual progress has been made and, finally, consider the effects of a State's policy on members of marginal and vulnerable groups. It is consequently too simple to label unsatisfactory practices concerning the realisation of the right to education, without the necessary distinction, as violations of this right.⁷³

⁷² CESCR, General Comment No. 3, *op.cit.* (note 7), para. 10.

⁷³ See, for example, the second interim report on the question of the impunity of perpetrators of human rights violations, by Mr El Hadji Guissé, Special Rapporteur, UN Doc. E/CN.4/Sub.2/1996/15, paras 113 and 114.