Moving Towards Inclusive Education as a Human Right
An analysis of international legal obligations to implement inclusive education in law and policy

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Abstract: Children with disabilities experience ongoing segregation in special education classes or are otherwise excluded from education. This is in spite of the fact that States have a legal obligation to offer an accessible and inclusive education to all learners. Exclusion of any child from education is a violation of international law and a breach of human rights. The provision of inclusive education is an obligation under international law, as well as the means by which to fulfil the additional legal obligation to make education accessible to children with disabilities. Inclusive education is not only an educational system, but an approach and an attitude which addresses the learning needs of all learners and allows for the greatest possible educational opportunities. Inclusive education prevents exclusion and promotes the participation of all children in the educational setting and beyond.

This report provides an interpretation and legal analysis of the right to education, and specifically inclusive education, under the United Nations Convention on the Rights of the Child (“CRC”) and the United Nations Convention on the Rights of Persons with Disabilities (“CRPD”). The rules of interpretation codified in the Vienna Convention on the Law of Treaties are explained and used in this interpretation process. The report discusses the obligations of State Parties, policy makers, and educational professionals to make inclusive education for all learners a reality. The obligations from the Conventions are clarified through an interpretation of the treaty texts and an examination of the works of the treaty body committees. The report also makes recommendations and conclusions relating to the right to inclusive education found in these legally binding instruments.

Keywords: right to education, inclusive education, children with disabilities, UN Convention on the Rights of Persons with Disabilities, UN Convention on the Rights of the Child, non-discrimination, reasonable accommodation
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Executive Summary

Scope of Report

Children with disabilities experience ongoing segregation in special education classes or are otherwise excluded from education. This is in spite of the fact that States have a legal obligation to offer an accessible and inclusive education to all learners. Exclusion of any child from education is a violation of international law and a breach of human rights. The provision of inclusive education is an obligation under international law, as well as the means by which to fulfil the additional legal obligation to make education accessible to children with disabilities. Inclusive education is not only an educational system, but an approach and an attitude which addresses the learning needs of all learners and allows for the greatest possible educational opportunities. Inclusive education prevents exclusion and promotes the participation of all children in the educational setting and beyond.

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Key Messages

The CRC is the most widely ratified binding international human rights instrument in the world. The Convention protects the human rights of children and also provides for specific protections for children with disabilities. The CRC covers an expanse of human rights; however, this report focuses on the right to education. Whilst a right to inclusive education is not explicitly mentioned in the CRC, it is submitted that the goals to be pursued by inclusive education are identified within the Convention, although an explicit link to inclusive education is not made. The right to education for all learners is protected in Article 28. The aims of education addressed in Article 29 include developing the child’s potential, talents and abilities to their fullest potential, developing respect for human rights, and preparing the child for life in a society based on understanding and tolerance. The right to non-discrimination found in Article 2, including non-discrimination in education, provides a basis for equality for all children. Most specifically, the specific protections required for children with disabilities to access education under Article 23 clearly oblige State Parties to enable this group of children to access their rights. Together, these CRC articles set similar goals to those underlying inclusive education: accessibility, individual learning, and equality in education.

Furthermore, the CRC Committee encourages States Parties to implement inclusive education in both its General Comments and Concluding Observations. State Parties are allowed to realise the right to education progressively. This means that they must demonstrate gradual progress and cannot fail to
States Parties should adopt legislation, allocate financial and human resources, take measures to promote inclusion, and train educational professionals and staff to provide inclusive education. These obligations are the responsibility of policy makers and, through national policy, educational professionals. Policy makers have the task of creating the framework to implement inclusive education. This includes both the adoption of policy as well as allocating resources for inclusive education. Educational professionals are responsible for implementing the adopted framework. The Convention and the recommendations from the CRC Committee establish the obligations of the State Parties to achieve inclusive education. The CRC Committee also links the right to education in the CRC to that in the CRPD, which unambiguously demands inclusive education for children with disabilities. This illustrates the connections between human rights instruments.

Whilst the CRC protects the rights of all children, and includes an article addressing the specific rights of children with disabilities, the CRPD provides even more detailed protection for the rights of children with disabilities. In Article 7, the CRPD requires State parties to take all necessary measures to ensure that children with disabilities can enjoy all of their human rights. That Article also empowers children with disabilities, by ensuring their right to express their views on any matter affecting them, thereby moving away from the best interest standard and towards a rights based view. The CRPD recognises the specific support that children with disabilities need in accessing their rights and mandates that State Parties provide such support.

The obligation to provide inclusive education in the CRPD is clear. Article 24 of the Convention establishes a requirement for State Parties to provide an inclusive education at all levels for children with disabilities. The steps needed to implement inclusive education are clarified in the CRPD Committee’s Concluding Observations to State Parties. The obligations within the CRPD are similar to those in the CRC, but are more detailed and clear in regard to inclusive education. State Parties are recommended to adopt legislation, allocate resources, remove all barriers, and provide training for inclusive education. Furthermore, State Parties are criticised for running segregated, special education and recommended to cease support for those systems.

Recommendations

This report argues that State Parties, policy makers, and educational professionals have clear obligations and responsibilities to achieve inclusive education. It is not only important to implement inclusive education from the top-down, but also from the bottom-up. Support, advocacy, and training are needed from both the “top” and the “bottom” in order to enable children with disabilities to access successfully an inclusive education.

One tool which can be used to promote change is strategic litigation. Successful litigation for the education of children with disabilities has centred on the claims that children with disabilities are entitled to reasonable accommodation, equal access to an inclusive school, and non-discrimination. Combined, these claims can create an argument for the implementation of inclusive education. In many situations, children with disabilities are unable to fight for their own rights. Litigation and advocacy by
individuals, Disabled Peoples’ Organisations, and human rights NGOs are powerful tools in assisting these children to obtain their human rights.
1. Introduction

Inclusive education for all learners is a right that has been increasingly recognised in international law in recent years. In particular, the International Covenant on Economic, Social and Cultural Rights ("ICESCR") established education as a human right, while the United Nations Convention on the Rights of Persons with Disabilities ("CRPD"), as well as the earlier United Nations Convention on the Rights of the Child ("CRC"), establish this right to inclusive education. Inclusive education is an “approach and philosophy that underpins educational improvement”\(^1\) and “seeks to address the learning needs of all [...] with a specific focus on those who are vulnerable to marginalisation and exclusion.”\(^2\) It is a "process of addressing and responding to the diversity of needs of all learners by increasing participation in learning, cultures and communities, and reducing exclusion within and from education."\(^3\) Although important for all students, inclusive education is essential for people with disabilities. Nevertheless, in spite of the aforementioned United Nations Conventions, many States still educate at least some children and adults with disabilities in segregated settings, thereby denying persons with disabilities their full right to education. For inclusive education to succeed, barriers to participation in education for people with disabilities must be removed.

Although greatly discussed in academic, political, and pedagogic circles, confusion remains as to what obligations to achieve inclusive education are imposed on State Parties. International law, which holds States responsible for implementing and facilitating human rights, often leaves States without definitions, structures, or a strategy to accomplish the set obligations. This is certainly true in the context of the right to inclusive education.

The goal of this report is to provide a legal analysis and interpretation of the relevant international treaties to better understand and clarify the obligation of State Parties to provide an inclusive education for people with disabilities. The report will begin by briefly discussing how treaties are interpreted. It will both describe the instruments used to interpret treaties and the interpretation approach to be followed. The following section describes the right to education under the International Covenant on Economic, Social and Cultural Rights ("ICESCR") and discusses the obligation of State Parties to realise progressively the right to education. The report then discusses in more detail the relevant provisions of the CRC and the CRPD and the supplementary instruments which can be used to interpret the right of inclusive education as provided for in the two treaties. These supplementary instruments include the General Comments, State Party reports, and Concluding Observations which interpret the right.\(^4\) The report will describe and clarify State Party obligations under the CRC and CRPD pertaining to inclusive education. Also included is a discussion about the obligations of policy makers and educational professionals with regard to achieving inclusive education. The next section will discuss the tool of strategic litigation and

\(^3\) Ibid., 7.
\(^4\) Republic of Guinea v Democratic Republic of the Congo (Judgment) [21] ICJ Rep. 639, where the ICJ acknowledged the weight jurisprudence of independent treaty bodies carries with regard to interpretation of the treaties under which they are established.
how that can be used to further the goal of inclusive education. The final section will provide conclusions and discuss the next steps needed in the implementation of inclusive education.

2. Treaty Interpretation using the Vienna Convention on the Law of Treaties

Before understanding how to implement the rights and obligations found in treaties, the instruments must first be interpreted. This is because “[a]ny application of a treaty, including its execution, presupposes...a preceding conscious or subconscious interpretation of the law.” Interpretation is the vital stepping stone between law on paper and law in practice.

Customary international law provides rules for treaty interpretation, and these rules have been codified or written up in the Vienna Convention on the Law of Treaties (VCLT). Even though codification makes the rules in the VCLT binding on State Parties to that Convention, their status as customary international law allows the rules of interpretation to be applied towards non-parties of the VCLT as well. This means that these interpretation rules can be applied to both the CRC and CRPD, irrespective of whether all State Parties to those Conventions are also Parties to the VCLT.

As specified in the VCLT, the text of a treaty is the primary source and starting point for interpretation. Article 31 (1) of the VCLT provides that a treaty should be interpreted in good faith, in accordance with the ordinary meaning of terms in their context, and in light of the treaty’s object and purpose. Article 31 subparagraphs (2) and (3) elaborate on what to take into account when

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6 Alexander Orakhelashvili, ‘The Recent Practice on the Principles of Treaty Interpretation,’ in Alexander Orakhelshvili and Sarah Williams (eds), 40 Years of the Vienna Convention on the Law of Treaties (British Institute of International and Comparative Law 2010), 117, 119. Furthermore, many international bodies have found that the Vienna Convention on the Law of Treaties stems from customary international law on treaty interpretation. For examples see ICJ Arbitral Award of 31 July 1989 (Judgment) [1991] ICJ Rep 53, para. 48; Loizidou v Turkey App no 15318/89 (ECtHR, 23 March 1995), para. 43; Litwa v Poland App no 26629/95 (ECtHR, 4 April 2000), para. 57, Al-Saadoon and Mufhdi v United Kingdom App no 61498/08 (ECtHR, 2 March 2013), para. 126; Axel Walz C-63/09 ECI (CJ) (6 May 2010), para. 23: Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Advisory Opinion) ITLOS, Seabed Disputes Chamber (1 February 2011), para. 57.
8 Orakhelashvili, (n 6), 119.
9 Oliver Dörr and Kristen Schmalenbach (eds.) Vienna Convention on the Law of Treaties: a commentary (Springer 2012), 541. The text of the treaty is always the starting point as that is what the State Parties have agreed upon. However, even though the text is the primary source of interpretation under Art. 31(1) of the VCLT (n 7), the trend is to take all the elements of Art. 31(1) together in a holistic approach.
10 The context is further elaborated upon in VCLT Art. 31(2) where it provides that the context includes the treaty’s preamble, annexes, agreements relating to the treaty made between all the parties in connection with the conclusion of the treaty and any instrument of the treaty and accepted by the other parties as an instrument related to the treaty. Furthermore, VCLT Art. 31(3) lists other elements that must be taken into account with the context, including subsequent agreements and practices regarding interpretation.
11 VCLT, (n 7), Art. 31(1).
determining the context of the treaty. Subparagraphs (2) and (3) are not in themselves tools but instead clarify what is included within the “context” referred to in subparagraph (1). When making an interpretation using the VCLT, each of the concepts within subparagraph (1) should be considered together holistically because they are all of equal weight in interpretation. A holistic approach is consistent with the vision of the VCLT. The International Law Commission Commentaries on the Draft Articles supports the holistic approach when it states that

...the application of the means of interpretation in the article would be a single combined operation. All the various elements as they were present in any given case would be thrown in the crucible and their interaction would give the legally relevant interpretation.

A brief look at each of the elements mentioned within Article 31 will help illuminate the interpretation process.

First, good faith requires “parties of the treaty to act honestly, fairly, and reasonably, and to refrain from taking unfair advantage.” Next, the ordinary meaning of a term is based on what the parties have actually written instead of the will, discussions, or any agreements made between the parties. Ordinary meaning is described as the “current and normal, regular and usual meaning” of a term. Additionally, in looking at the context of the treaty, the entire text should be consulted. This includes also the treaty’s title, preamble, annexes, and protocols. A further element to be considered is the treaty’s object and purpose. This can be understood through reading the entire text, including the preamble, the substantive provisions, and the title and by determining the type and focus of the treaty. Furthermore, the object and purpose of human rights conventions should be read in an evolutive manner to best promote the rights protected in a long-lasting, progressive way and to ensure

12 These subsections are detailed below.
15 Although listed sequentially below, the elements of interpretation have no order of application. Instead, the elements should be looked at concurrently as a whole.
16 Villiger, (n 13), 109.
17 Dörr and Schmalenbach, (n 9), 541.
18 Villiger, (n 13), 109.
19 VCLT, (n 7), Art. 31(2). The context includes (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty and (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
20 Dörr and Schmalenbach, (n 9), 543.
21 Ibid., 546.
the effectiveness of the treaty.\footnote{Malgosia Fitzmaurice, ‘Dynamic (Evolutive) Interpretation of Treaties and the European Court of Human Rights’ in Alexander Orakhelshvili and Sarah Williams (eds), 40 Years of the Vienna Convention on the Law of Treaties (British Institute of International and Comparative Law 2010) 55, 56, citing Rudolf Bernhardt, ‘Evolutive Treaty Interpretation, Especially of the European Convention on Human Rights’ (1999) 42 GYIL 12, 16-17; Villiger, (n 13), 110.} As a caution, in determining the object and purpose, one cannot contradict the meaning of the text of the treaty where this is clear.\footnote{Dörr and Schmalenbach, (n 9), 547, citing \textit{Federal Reserve Bank of New York v Bank Markazi Iran-United States Claims Tribunal Decision no DEC 130-A28-FT (19 December 2000).}}

Moreover, when looking at the treaty’s context, each treaty must be read within the framework of international law.\footnote{VCLT, (n 7), Art. 31 (3)(c).} Human rights treaties, especially, are connected to each other through the common principles that guide them,\footnote{Andrea Broderick, ‘Interpretation of the Equality and Non-Discrimination Provisions in the CRPD’ \textit{unpublished thesis}, citing Office of the High Commissioner for Human Rights, The United Nations Rights Treaty System: An Introduction to the Core Human Rights Treaties and Treaty Bodies, 20, available at \texttt{<www.ohchr.org/Documents/Publications/FactSheet30en.pdf>}.} “To fully understand a State’s obligations under these treaties, it is necessary to read all the human rights treaties to which the State has become a party as a whole.”\footnote{Office of the High Commissioner for Human Rights, The United Nations Rights Treaty System: An Introduction to the Core Human Rights Treaties and Treaty Bodies, 14, available at \texttt{<www.ohchr.org/Documents/Publications/FactSheet30en.pdf>}.} This suggests that the human rights protected in each treaty are linked to the rights in each other treaty, building on one another towards the full protection of all rights. This is particularly true for treaties such as the CRC and CRPD because one goal of these Conventions is to guarantee universal human rights in the context of specific groups of people, specifically, children and people with disabilities, respectively. The Office of the High Commissioner for Human Rights has further explained that the rights provided in human rights treaties contain “common principles, [that] are interdependent, interrelated and mutually reinforcing,”\footnote{Ibid.} and should complement each other. This commonality should be taken into account during interpretation and utilised to identify further the context of the treaty. The Office of the United Nations High Commission for Human Rights has confirmed that human rights treaties should be read so as to complement each other.\footnote{Ibid.} This means that the interpretation of human rights treaties can be aided through examining the interpretation of similar phrases or rights protected in other treaties.\footnote{Broderick, (n 25).} Therefore, if a treaty is not designed to create a new rule or modify an existing rule of international law,\footnote{One could look at the treaty’s object and purpose to see if it was designed to create new or modify existing international law.} it should be read so as to bolster and further existing international law.

Additionally, Article 31 (3) provides that any subsequent agreements between the parties or practices in the application of the treaty can be used to determine the context of the treaty which, as noted, is itself relevant for interpreting the treaty.\footnote{VCLT, (n 7), Art. 31 (3).} Subsequent agreements and practices are subsidiary, supplementary sources of interpretation and should be used to reveal the overall context of
the treaty. Subsequent agreements are those that help to elucidate the terms of the treaty, while subsequent practice is a pattern of behaviour in applying the treaty. Subsequent practice includes the General Comments and Concluding Observations written by the Treaty Bodies. Although useful, both subsequent practice and agreements should only be used to help in understanding the treaty’s context when these have been agreed upon among all parties.

There are also supplementary means of interpretation provided for in VCLT Article 32, which are second hierarchically to the tools in Article 31. Although the text remains the primary source, supplementary means of interpretation, including reliance on the travaux préparatoires (preparatory works/negotiation archive), and documents related to the circumstances of the treaty’s conclusion, may be pertinent to confirm the meaning resulting from the application of Article 31. Although supplementary means can be used as "evidence to be weighed against any other relevant evidence of the intentions of the parties... [to] furnish proof of the common understanding," there is no occasion to have regard to [supplementary means] if the text ... is sufficiently clear. This distinction demonstrates the hierarchy between the interpretation tools in Article 31 and 32, illustrating that the supplementary tools in Article 32 are secondary to those primary tools in Article 31.

The use of supplementary interpretation tools provided in VCLT Articles 31 (3) and 32 is limited. These may only be used to determine the meaning when the interpretation according to VCLT Article 31 either (a) leaves the meaning ambiguous or obscure or (b) leads to a result which is manifestly absurd or unreasonable. The supplementary means under Article 32 have no hierarchical order but may be consulted with few limitations once invoked. Nevertheless, supplementary means may only be used for clarification or confirmation of terms, as the text of the treaty itself must remain the first and principal source of treaty interpretation.

In reading VCLT Articles 31 and 32, certain approaches to treaty interpretation, which are aligned with the rules of interpretation described above, are distinguished. The approaches are literal, systematic, teleological, and historical. In using the literal interpretation approach, an objective reading

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32 Dörr and Schmalenbach, (n 9), 553.
33 Ibid.
34 VCLT, (n 7), Art. 31 (2).
36 Dörr and Schmalenbach, (n 9), 572, citing SS Lotus’ (Judgment) PCIJ Ser. A. no 10, 16 (1927).
38 VCLT, (n 7), Art. 32; Linderfalk, (n 37), 136.
40 Linderfalk, (n 37), 136.
of the text is required. This approach bases itself on the ordinary meaning of the terms and does not look beyond the text itself. The systematic approach to interpretation is guided by the context of the treaty as a whole. This approach looks at all the text surrounding the treaty, including the preamble, annexes, and any agreement or instrument made between the treaty parties related to the treaty. The next approach is the teleological approach to interpretation. This approach focuses on the object and purpose of the treaty. The teleological approach is favoured when interpreting human rights treaties. It is the favored interpretation approach for human rights treaties. The reasoning behind this favoritism is that the object and purpose of a treaty embody the protected values in human rights treaties. This approach can therefore lead to an interpretation that most closely follows the principles of the treaty itself. Finally, the historical interpretation approach uses supplementary means of interpretation. It looks at the travaux préparatoires, treaty drafts, and other information relating to the circumstances which occurred prior to the treaty’s enactment which help to clarify the parties’ intent. As it is based on supplementary interpretation tools, historical interpretation should not be used alone, and it should only be used to confirm the meaning found through applying the interpretation tools in Article 31. Although each of these four approaches has a different focal point, the VCLT stresses holistic interpretation, so these four approaches of interpretation should be used together when interpreting a treaty.

The following interpretation of the provisions relating to inclusive education in both the CRC and CRPD will use the principles and tools set out in the VCLT. The teleological approach is an appropriate approach to begin the interpretation of the CRC and CRPD as it is the favoured interpretation approach for human rights treaties. Although it is not to be used on its own, this approach uses the object and purpose of a human rights treaty as an embodiment of the treaty parties’ intentions. This interpretation will be accomplished in a holistic fashion so as to “yield an interpretation that is harmonious and coherent and fits comfortably in the treaty as a whole so as to render the treaty provision legally effective.” Subsequent practice with regard to the CRC and CRPD will also be used as a tool to interpret and define the specific obligations within these conventions. This approach is also appropriate when used in line with the teleological approach because it reveals and relies on the practical application of the treaties. Therefore, in the following sections, the interpretation tools provided in the VCLT will be used together to determine the meaning of the right to inclusive education and the State Party obligations surrounding it.

3. Background to the Right to Inclusive Education

42 Arstein-Kerslake, (n 41); Broderick, (n 25).
44 VCLT, (n 7), Arts. 31, 32. See also Broderick, (n 25).
3.1 Education as a Human Right

Inclusive education was not always the international baseline goal for education. However the right to education has been prominent since the first human rights instrument was written.\(^{46}\) The right to education was first made into a binding international legal obligation in the International Covenant on Economic, Social and Cultural Rights ("ICESCR").\(^{47}\) The ICESCR recognises that everyone has the right to education directed towards the full development of the human personality, the sense of dignity, and respecting human rights and fundamental freedoms.\(^{48}\) This right to education should enable all people to participate effectively in a free society, promote understanding, tolerance, and friendship among all types of people, and help maintain peace.\(^{49}\) Education is considered a cultural right, but it is also related to many other human rights because the enjoyment and realisation of other rights is dependent upon education.\(^{50}\) Because of this relationship, the right to education illustrates the indivisibility and interdependence of all human rights.\(^{51}\) "As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can ... obtain the means to participate fully in their communities."\(^{52}\) Education creates opportunities and enables people to enjoy the rights they are entitled to.

The Committee on Economic, Social and Cultural Rights ("CESCR") further explains the right to education in General Comment 13. The CESCR states that education on all levels should be available, accessible, acceptable, and adaptable.\(^{53}\) Availability relates to creating and maintaining functional educational facilities, which include all the materials and resources needed for the education of the learners.\(^{54}\) Education must be accessible to all learners.\(^{55}\) This includes a non-discriminatory education that is physically and economically accessible to all. Acceptability of education refers to the form, content, curricula, and overall substance of education.\(^{56}\) These must be acceptable to give all students a quality education. Finally, education has to maintain adaptability to adjust to the changing and diverse

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\(^{48}\) Ibid., Art. 13(1).

\(^{49}\) Ibid.


\(^{52}\) Ibid.

\(^{53}\) CESCR, General Comment no 13, (n 50), para. 6.

\(^{54}\) Ibid., para. 6(a).

\(^{55}\) Ibid., para. 6(b).

\(^{56}\) Ibid., para. 6(c).
needs of students.\(^{57}\) Education is not a “one-size-fits-all” concept, and because education is a right, it must adapt to the learning needs of students – not the reverse.

As with all other human rights, State Parties have certain obligations to uphold when implementing the right to education. These obligations are succinctly, but directly, described by the CESC within General Comment 13:

The obligation to respect requires States parties to avoid measures that hinder or prevent the enjoyment of the right to education. The obligation to protect requires States parties to take measures that prevent third parties from interfering with the enjoyment of the right to education. The obligation to fulfil (facilitate) requires States to take positive measures that enable and assist individuals and communities to enjoy the right to education. Finally, States parties have an obligation to fulfil (provide) the right to education. As a general rule, States parties are obliged to fulfil (provide) a specific right in the Covenant when an individual or group is unable, for reasons beyond their control, to realize the right themselves by the means at their disposal.\(^{58}\)

The CESC discusses specifically the positive, negative, and mixed nature of the State Party obligations in regard to the right to education. Although the obligations to respect, protect, and fulfil are all of equal weights and need to be performed concurrently, the obligation to fulfil is central to realising economic, social, and cultural rights.\(^{59}\) In fact, the concept of progressive realisation of rights was based on the recognition that States cannot possibly accomplish immediate realisation of those types of rights.\(^{60}\)

3.2 Progressive v. Immediate Realisation of Education

States Parties are obliged to realise elements of the right to education progressively.\(^{61}\) Progressive realisation of rights, including education, is a somewhat controversial matter. Progressive realisation allows State Parties to realise and take measures towards the implementation of rights over a period of time. Certain rights are allowed to be realised progressively, instead of immediately, due to the costs involved and the economic and financial resource restraints that many States face.

\(^{57}\) Ibid., para. 6(d).
\(^{58}\) Ibid., para. 47. See Magdalena Sepúlveda, The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights (Intersentia 2003), Chapters V and VII for a much more detailed discussion on the basic obligations of State Parties to international instruments.
\(^{60}\) Ibid., 113-114.
\(^{61}\) ICESCR, (n 47), Art. 14.
Upon its meaning turns the nature of state obligations. Most of the rights granted depend in varying degrees on the availability of resources and this fact is recognized and reflected in the concept of ‘progressive achievement.’

Progressive realisation reflects “the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights.” States have the obligation to fulfil their international legal obligations to comply with social, cultural, and economic rights to the maximum extent possible in line with their economic constraints. As a State Party to a human rights convention, a State is expected to realise the provisions within it immediately, however progressive realisation is allowed in some cases due to the reality of economic constraints.

The concepts of progressive implementation and realisation require State Parties to undertake steps “to the maximum of available resources, with a view to achieving progressively the full realization of the rights recognized...by all appropriate means, including particularly the adoption of legislative measures.” To undertake steps assumes that progression is made incrementally instead of immediately. The “maximum resources available” for rights realisation is a difficult, subjective phrase. To determine what the maximum amount is, States have to assess their budgets and determine the availability of resources. Resources, of course, include financial means, but they also include the “extent, fairness and efficacy of [the State’s] system of governance, its institutions of administration and its means of dispute-resolution...[and] its basic infrastructure of public amenities” including education. Together, these elements factor into implementation. The obligation for the full realisation of rights presumes that the State Party has sufficient resources to realise those rights, but lack of resources does not allow for inaction.

States have “an immediate obligation to ensure a minimum essential level of enjoyment of each economic, social and cultural right”. If a State fails to meet the core minimum obligations due to lack of available resources, the State “must demonstrate that every effort has been made to use all resources that are at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations.” Resource constraints will not eliminate the obligation of a State because, regardless of its

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64 Craven, (n 59), 133.
65 ICESCR, (n 47) Art. 2 (1).
66 Saul, (n 63), 137.
67 Ibid., 144.
68 Craven, (n 59), 106, 115.
economic resources, a State must maintain respect for human rights.\textsuperscript{71} Even in times of severe resource constraints, whether caused by a recession or other factors, States must still protect the rights of all the members of society, especially those vulnerable to lose access to their rights.\textsuperscript{72}

To determine whether a State has taken adequate steps to use the maximum available resources, certain aspects must be taken into account:

(a) the extent to which the measures taken were deliberate, concrete and targeted towards the fulfilment of economic, social and cultural rights:
(b) whether the State party exercised its discretion in a non-discriminatory and non-arbitrary manner:
(c) whether the State party’s decision (not) to allocate available resources is in accordance with international human rights standards;
(d) where several policy options are available, whether the State party adopts the option that least restricts Covenant rights:
(e) the time frame in which the steps were taken:
(f) whether the steps had taken into account the precarious situation of disadvantaged and marginalized individuals or groups and, whether they were non-discriminatory, and whether they prioritized grave situations or situations of risk.\textsuperscript{73}

Each of these areas can be evaluated to determine whether a State has made adequate progress in the realisation of economic, social, and cultural rights. These factors are all used to determine how the State will implement and meet its obligations. Although some flexibility is allowed, progressive realisation does not allow States to ignore the implementation of rights, and, it requires States to fulfil their international legal obligations. State Parties therefore have the “continuing obligation ‘to move as expeditiously and effectively as possible’ towards the full realization”\textsuperscript{74} of the right to education. Although there is no exact time frame or explicit speed at which a State must implement measures progressively, the European Committee of Social Rights condemned the lack of progress by a State in regard to education for children with disabilities.\textsuperscript{75} Specifically, in the case of \textit{Mental Disability Advocacy Center (MDAC) v. Bulgaria}, the Committee noted that

any progress that has been made has been made has been very slow and mainly concerns the adoption of legislation and polices...with little or no implementation. It would have been


\textsuperscript{72} Sepúlveda, (n58), 314, citing CESCR, General Comment no 3, (n 70), para. 12.

\textsuperscript{73} Saul, (n 63) 149, 159, citing CESCR, Statement: An evaluation of the obligation to take steps to the ‘maximum available resources’ under the Optional Protocol to the Covenant, E/C.12/2007/1 (10 May 2007).

\textsuperscript{74} CESCR, General Comment no 13, (n 50), para. 44, citing CESCR General Comment no 3, (n 70), para. 85.

\textsuperscript{75} \textit{Mental Disability Advocacy Center (MDAC) v Bulgaria}, Complaint No. 41/2007, 3 June 2008 (European Committee of Social Rights), para. 47.
possible to take some specific steps... Progress is therefore patently insufficient at the current rate.\textsuperscript{76}

Therefore, in order to provide evidence of the progressive realisation of rights, States are required to show that progress is being made and describe the steps and processes used to make that progress.\textsuperscript{77}

The obligation to progress, or move forward, presumes that retrogression of the right is a contradiction to progression.\textsuperscript{78} Therefore, regression is a violation of the obligation to realise progressively human rights.\textsuperscript{79} It is explicitly stated by the United Nations Office of the High Commissioner for Human Rights that “States are forbidden from taking regressive steps or measures that diminish the enjoyment of economic, social and cultural rights.”\textsuperscript{80} Overall, if States ignore their obligations by failing to take action or acting in an unreasonable manner, the States will be found to have violated their obligations.\textsuperscript{81} These violations cannot be ignored because “it is more urgent than ever to take these rights seriously and, therefore, to deal with the accountability of governments for failure to meet their obligations in this area.”\textsuperscript{82}

The right to education is predominantly a progressively realisable right. Financial constraints certainly play a part in the full implementation of the right. The positive aspects of the obligations of the right to education, including the obligation to develop and maintain schools systems and ensure that each learner receives an education are core to the right of education.\textsuperscript{83} However, these steps require resources. The positive obligations are progressively realisable, and State Parties have the obligation to take steps to the maximum level of available resources to achieve these positive obligations for education.\textsuperscript{84}

In regards to people with disabilities, progressive realisation requires more than abstention from actions that could have a negative impact on people with disabilities.\textsuperscript{85} Progressive realisation of the rights of people with disabilities requires States to “take positive action to reduce structural disadvantages and to give appropriate preferential treatment to people with disabilities in order to achieve the objectives of full participation and equality within society for all persons with disabilities.”\textsuperscript{86} This means that further resources will be needed in the progressive realisation of the rights of people with disabilities because State Parties may have to spend more to ensure equal access and realisation of

\textsuperscript{76} Ibid. This case was argued based on the rights protected within the Council of Europe, European Social Charter (Revised), ETS 163 (1996).
\textsuperscript{77} Craven, (n 59), 129.
\textsuperscript{78} Ibid., para. 45; Sepúlveda, (n58), 319.
\textsuperscript{79} Saul, (n 63), 151.
\textsuperscript{80} Ibid., citing UN Office of the High Commission for Human Rights, (n 69), 28.
\textsuperscript{81} Saul, (n 63), 165.
\textsuperscript{82} Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht (22-26 January 1997), para. 2.
\textsuperscript{83} Nowak, (n 50) 252, 255.
\textsuperscript{84} Ibid., 255.
\textsuperscript{86} Ibid.
those rights for this group. Using education as an example, the CESCR details that States must ensure that teachers are trained to teach children with disabilities within regular schools and ensure that all necessary equipment and support are available to give learners with disabilities the same opportunity for education.\(^{87}\)

The right to education does, however, have immediately realisable elements. Non-discrimination is an overarching principle of human rights, and it is this principle that should be the crux of implementing economic, social, and cultural rights.\(^{88}\) The right to an education free from discrimination is to be immediately realised. Discrimination in education can range from the blatant denial of educational opportunities to segregation and isolation in education.\(^{89}\) State Parties not only have the obligation to refrain from discriminating in the implementation of the right to education, but also to nullify any existing discriminatory policies or practices surrounding the right. The CESCR describes discrimination based on disability as “any distinction, exclusion, restriction or preference, or denial of reasonable accommodation based on disability which has the effect of nullifying or impairing the recognition, enjoyment or exercise of economic, social or cultural rights.”\(^{90}\) If a person is discriminated against on the basis of disability when trying to access his or her right to education, the State Party is in violation of its legal obligation not to discriminate.

Another immediately realisable element of the right to education is the obligation to take steps.\(^{91}\) The CESCR commented that steps must be deliberate, concrete, and targeted towards the full realisation of the right to education.\(^{92}\) The fact that State Parties have to take steps immediately after becoming party to the instrument works to prevent idleness in implementation. This obligation requires that action be made and directed towards full implementation of the right to education.

The CESCR also referred to the obligation to provide compulsory primary education free of charge as an immediately realisable obligation.\(^{93}\) General Comment 13 of the CESCR clearly interprets this obligation as immediate for State Parties which have the necessary means to implement it.\(^{94}\) However, States which cannot immediately implement this, have to adopt an action plan within two years and specify the number of years needed for implementation of free compulsory primary education.\(^{95}\) Although this obligation seems resolute, the CESCR has only made non-binding suggestions, recommending that the action plan actually be made when, for example, the Netherlands still had not adopted an action plan after more than 10 years.\(^{96}\) The lack of urgency attests that this obligation is not as immediate as CESCR puts forward in General Comment 11, in which the CESCR refers to a two year

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87 Ibid., para. 35.
88 Nowak, (n 50), 258.
89 Ibid., para. 15.
90 Ibid.
91 Sepúlveda, (n 58), 177, citing CESCR, General Comment no 13, (n 50), para. 43.
92 Sepúlveda, (n 58), 177, citing CESCR, General Comment no 13, (n 50), para. 43.
93 Sepúlveda, (n 58), 177.
94 Sepúlveda, (n 58), 178, citing CESCR, General Comment no 13, (n 50), para 15.
96 Sepúlveda, (n 58), 179.
deadline for States to devise and adopt a detailed action plan for progressive realisation of human rights.\footnote{CESCR, General Comment no 11, (n 95), para. 1.}

Together, both the progressive and immediately realisable portions of the right to education create a binding legal obligation that requires State Parties to take action. This right to education is not a new development in the international community. The right to education is one of the first human rights described in the Universal Declaration of Human Rights,\footnote{UDHR, (n 46), Art. 26.} and it continues to be reiterated and strengthened in international instruments.\footnote{ICESCR, (n 47), Art. 13; United Nations Convention on the Elimination of Discrimination Against Women (CEDAW), G.A. Res. 34/80, 34 UN G.A.O.R. Supp. (No. 46) 193, UN Doc. A/34/46, 1249 U.N.T.S. 14, reprinted in 19 I.L.M. 33, (1980), Art. 10; United Nations Convention on the Rights of the Child, G.A. Res. 44/25, U.N. G.A.O.R. 44th Sess., Supp. No. 49, 67, U.N. Doc. A/RES/44/49 (1990), Arts. 28,29 [herein after CRC]; United Nations Convention on the Rights of Persons with Disabilities, G.A: Res. 61/106, 76th plen. mtg., U.N. Doc. A/Res/61/106 (2007) Art. 24[herein after CRPD].} The right to education set out in the ICESCR was meant to apply to all people, however this has been somewhat warped in regards to students with disabilities. The Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities more specifically address the right to education in the context of people with disabilities, and those Conventions require States Parties to provide equal opportunities to realise this right. Specifically, those instruments indicate how the general right to education has developed into a right to inclusive education because, for people with disabilities to exercise the right to education, education must be inclusive.\footnote{Human Rights Council, (n 51), para. 3.} The right to education as discussed within those two instruments will be discussed in full below.

4. **Interpreting Inclusive Education in the CRC**

4.1 **Introduction to the CRC**

The Convention on the Rights of the Child ("CRC") is the most widely ratified international human rights treaty in the world and the first binding United Nations Convention to refer explicitly to the rights of persons with disabilities.\footnote{Currently there are 193 parties to the CRC. <https://treaties.un.org/> accessed 10 July 2014; CRC, (n 99), Art. 23.} The CRC aims to "promote the full enjoyment of all rights in the Convention by all children, through legislation, the establishment of coordinating and monitoring bodies – government and independent – comprehensive data collection, awareness-raising and training and the development and implementation of appropriate polices, services, and programmes."\footnote{UN Committee on the Rights of the Child [herein after CRC Committee], General Comment no 5, General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6), CRC7GC72003/5, (2003) para. 9.}
The CRC integrates civil and political rights with social, economic, and cultural rights to show the indivisibility of those rights.\(^{103}\) The CRC provides “[w]ith regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international cooperation.”\(^{104}\) The CRC Committee has commented that human rights are indivisible and that economic, social, and cultural rights are “inextricably intertwined” with civil and political rights.\(^{105}\) Therefore, to the extent that human rights are justiciable at all, all human rights should be seen as equally justiciable and be respected by States Parties when implementing the Convention.\(^{106}\) Furthermore, all the rights laid out in the CRC should be respected without discrimination of any kind.\(^{107}\)

### 4.2 Inclusive Education in the CRC

This section will analyse whether and how the right to inclusive education is included within the CRC. Inclusive education is not explicitly mentioned in the CRC; however, in light of the right to education mentioned therein, it is submitted in this report that one goal of the CRC is to achieve inclusive education for all children, and especially children with disabilities. Many States still have a long way to go in reaching this goal, but inclusive education is the end aim. Research has shown that inclusive education is the best practice in education for legal, moral, procedural, and philosophical reasons.\(^{108}\) Segregated, special education, on the other hand, separates children based on labels and diagnoses.\(^{109}\) This creates the situation where “students classified as having disabilities are often treated as patients in need of remediation and cure.”\(^{110}\) The United Nations Special Rapporteur on the Right to Education, Vernor Minoz Villalobos, described segregated education by saying that “it is like learning how to play football in an elevator”.\(^{111}\) Although segregated education is still a form of education, it does not present

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\(^{104}\) CRC, (n 99), Art. 4.

\(^{105}\) CRC Committee, General Comment no 5, (n 102), para. 6.

\(^{106}\) Ibid. paras. 6,7.

\(^{107}\) CRC, (n 99), Art. 2.


\(^{110}\) Ibid.

the same opportunities for the development of children and adults as inclusive education. Inclusive education looks to change the education system in order to accommodate, include, and allow the participation of all learners.

The interpretation of the CRC in the context of inclusive education will now be carried out according to the teleological approach, which uses the object and purpose of a human rights treaty to interpret the obligations, the text of the CRC, and the subsequent use and practice of the CRC. The right to education is protected in Article 28 of the CRC.112 This Article obliges States to ensure the right to education for all children.113 The underlying goals to be facilitated by the right to education are provided for in Article 29.114 That Article directs State Parties to provide education that will help the student develop individually and as a person within their society.115 Article 23 provides that States must provide support for children with disabilities in realising their human rights.116 Specifically, it provides that State Parties must ensure that children with disabilities are able to have effective access to and receive education.117 Although the CRC itself establishes the right to education, the CRC Committee has clarified the meaning of the right to education through General Comments and Concluding Observations to State Parties. However, those clarifications are still based on the treaty text itself.

4.2.1 Relevant Treaty Articles

As the rules of interpretation in the VCLT dictate, the first and foremost source of interpretation is the text of the treaty itself. According to the VCLT, the text of the CRC should be read in accordance with its ordinary meaning in the context of the treaty in order to determine the meaning of the rights. Therefore the text of the CRC should be interpreted in accordance with the spirit and guiding principles set out in the CRC.118 The essence of the Convention can be read in the Preamble, which provides that special protections and safeguards for children are needed and that children are entitled to this special care and assistance.119 It further recognises that a child should be brought up in the spirit of peace, dignity, tolerance, freedom, equality, and solidarity.120 Moreover, the Convention has four core principles running throughout the text:121 non-discrimination,122 the best interests of the child,123 the right to life,124 and the respect of the child’s views.125 These principles should be used to guide the interpretation of the Convention. The text of the Articles related to the protection of the education for

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112 CRC, (n 99), Art. 28.
113 Ibid., Art. 28 (1)(a)-(e).
114 Ibid., Art. 29.
115 Ibid., Art. 29 (1)(a)-(e).
116 Ibid., Art. 23.
117 Ibid., Art. 23 (3).
118 Ibid., Preamble.
119 Ibid.
120 Ibid.
121 CRC Committee, General Comment no 5, (n 102), para. 12.
122 CRC, (n 99), Art. 2.
123 Ibid., Art. 3.
124 Ibid., Art. 6.
125 Ibid., Art. 12.
children with disabilities will now be discussed in order to determine State Parties' obligations regarding the right to education for children with disabilities.

The first issue to consider is how the right to education, specifically an inclusive education, is addressed in the CRC. The treaty provides two separate, albeit side-by-side, articles on the education. The first of the two articles, which discusses the right to education, includes requirements for State Parties to

... recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity... [m]ake primary education compulsory and available free to all...[e]ncourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need... [m]ake higher education accessible to all on the basis of capacity by every appropriate means... [and] [m]ake educational and vocational information and guidance available and accessible to all children.\(^\text{126}\)

The text of Article 28 is clear in that it requires State Parties to take action to ensure the right to education for each child. This Article provides that every child has the right to education. Moreover, it also provides that the right to education includes not just a right to a free primary education but also the right to an accessible general, vocational, and higher education. This is important to note because it is an expansion of the right to education previously expressed in international human rights instruments.\(^\text{127}\)

Even though this Article has expanded the content of the right to education, it does not detail the systemic changes needed to make education accessible to all children. This leaves State Parties free to implement the right to education in a way that best fits with their ability and to realise it progressively. Even though implementing the right to education can be achieved progressively and not immediately, progress in implementation must still be made.

From the perspective of children with disabilities, an omission from the text of Article 28 is a specific reference to inclusive education. Although the Article addresses accessibility of education for all children,\(^\text{128}\) it does not provide guidance on how to achieve this or explicitly state that, linked to the obligation to provide accessibility, is the obligation to provide inclusive education.

The second article of the CRC which covers education, Article 29, looks at the direction and goals of education. This Article can act as a guide for State Parties when realising the right to education in that it describes the essence, morals, and aims of education. Again, it does not describe the systemic changes needed to provide education for everyone, but instead only what the education system should be directed towards. It provides that State Parties shall direct education towards

\(^{126}\) Ibid., Art. 28.
\(^{127}\) UDHR, (n 46), Art. 26; ICESCR, (n 47), Art. 13
\(^{128}\) CRC, (n 99), Art. 28(1).
[t]he development of the child’s personality, talents and mental and physical abilities to their fullest potential... [t]he development of respect for human rights and fundamental freedoms... [t]he development of respect for the child’s parents, his or her own cultural identity, language and values...[t]he 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, ethnic, national and religious groups and persons of indigenous origin.\textsuperscript{129}

Article 29 provides for obligations on State Parties by using the word “shall”. This word connotes responsibility. State Parties have the responsibility to ensure that education meets the aims set out in this article. The text of Article 29 reveals that education entails a broader viewpoint and purpose than simply providing learning material at school. This article expands on and makes binding the principles and aims for education as described in earlier human rights instruments.\textsuperscript{130} Education is not merely about the knowledge a student acquires, but, according to Article 29, it should add to the student’s personal development as well facilitating the student’s transition into society.\textsuperscript{131} Article 29 also states that education should support children of all different abilities – aiming to help each child reach their fullest potential.\textsuperscript{132} These aims of Article 29 are the foundation of an inclusive education, even though inclusive education is not elaborated on within the CRC. In line with the goals of Article 29, inclusive education intends to give each and every student a means to participate meaningfully in education in order to develop and eventually participate in society.

Together, the text of these two articles on education lay the groundwork for State Parties when providing education for all children. The articles refer to the basic right to education, the need for accessibility of education for students, and to the underlying goals and principles of education. Although neither article textually mentions inclusive education, the ideas behind inclusive education are supported through the concept of accessibility and teaching students of all abilities so they are able to reach their fullest potential. The obligation to implement an inclusive education system can therefore be read implicitly into the CRC.

One novel aspect of the CRC is that it lays the groundwork for the protection of the rights of specific groups of children. The CRC explicitly refers to the rights and protection of children with disabilities. It was the first binding treaty to mention specifically disability and the need for State Parties to protect children with disabilities. As with other human rights conventions, the CRC demands non-discrimination in the application, assurance, and protection of the rights and freedoms provided within the treaty. In terms of the right to non-discrimination, the CRC explicitly names disability as a protected ground, meaning that State Parties must protect children with disabilities from discrimination.\textsuperscript{133} However, the

\textsuperscript{129} Ibid., Art. 29.

\textsuperscript{130} UDHR, (n 46), Art. 26(2) provides that “[e]ducation shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.”

\textsuperscript{131} CRC, (n 99), Art. 29 (1)(a)-(d).

\textsuperscript{132} Ibid., Art. 29 (1)(a).

\textsuperscript{133} Ibid., Art. 2 (1).
CRC goes further, and dedicates an entire article to the protection of the rights of children with disabilities, which is a group that is in need of empowerment. Article 23 specifies that

States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child’s active participation in the community... recognize the right of the disabled child to special care and shall encourage and ensure the extension [of assistance], subject to available resources, to the eligible child...[and recognize that] the special needs of a disabled child, [and the] assistance extended... be provided free of charge...[and] ensure that the disabled child has effective access to and receives education. 134

Article 23 not only enumerates the specific protections and guarantees that children with disabilities are entitled to receive from State Parties, but it recognises that, to meet these needs, State Parties must ensure support and assistance. Although the text does not give concrete guidance on how to achieve these protections, the article uses language which establishes binding responsibilities that compel State Parties to take action. Most significantly here, State Parties are required to ensure that children with disabilities have effective access to and receive education. 135 Along with the promotion of self-reliance and participation in the community, this article embraces the goals of inclusive education. This article makes clear that children with disabilities need specific assistance and support to access their human rights. It explicitly mentions the right to education and that children with disabilities must be able to access that right. Inclusive education is the means to facilitate that access.

Textually, although the CRC protects the right to education and the rights of children with disabilities, it does not provide explicitly for inclusive education, even though as described above, inclusive education embodies the goals of education as identified in the CRC. Therefore, in order to clarify what the term “education” in the case of children with disabilities means under the CRC, supplementary sources of interpretation must be consulted.

4.2.2 Supplementary Sources of Interpretation

As discussed above in the context of the VCLT, 136 if a treaty term is unclear or there is a need to confirm its meaning, supplementary sources may be referred to once the text has been interpreted in good faith, in accordance with the ordinary meaning of the terms in their context, and in light of the treaty’s object and purpose. The supplementary sources that will be focused on in this report are those relating to subsequent practice of States Parties. Instruments evidencing subsequent practice include General Comments from the CRC Committee and Concluding Observations from the CRC Committee. The reason for this focus on subsequent practice is twofold. First, these types of supplementary means of interpretation elucidate how the treaty is actually being used and understood. Second, although these

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134 Ibid., Art. 23.
135 Ibid., Arts., 23(3), 28(1).
136 See Section 2 of this report above.
materials are not binding per se, they can impact on human rights law and how State Parties implement the treaty.\textsuperscript{137}

4.2.3 CRC Committee General Comments

The purpose of General Comments is for the treaty body or committee to further explain or interpret the rights within the relevant treaty. General Comments are a supplementary form of interpretation and influence the implementation of a treaty and the interpretation of rights within it, thereby affecting international human rights law. The CRC Committee has adopted General Comments to clarify and elaborate on a variety of rights throughout the years. There are three General Comments of the Committee that are relevant to inclusive education. General Comment Number 1 discusses the aims of education,\textsuperscript{138} General Comment Number 5 discusses the general measures of CRC implementation,\textsuperscript{139} and General Comment Number 9 discusses the rights of children with disabilities.\textsuperscript{140}

The first General Comment the Committee adopted concerned the right to education – expressly, the goals of education. In this General Comment, the Committee discussed the significance of Article 29 CRC and how it affects the Convention as a whole. Article 29 “emphasizes the indispensable interconnected nature of the Convention’s provisions” by drawing on the principle that “education” is a concept that extends beyond the walls of a school and that it should offer children the chance to develop their personalities, talents, and abilities and assist them in living a satisfying life and to be able to participate fully within society.\textsuperscript{141} Moreover, the General Comment highlights that education should provide life skills and strengthen each child’s capacity to enjoy all of their human rights.\textsuperscript{142}

In the General Comment, the Committee addresses more explicitly the goal of education and the aim behind Article 29 CRC. It provides that “the key goal of education is the development of the individual child’s personality, talents and abilities, in recognition of the fact that every child has unique characteristics, interests, abilities, and learning needs”.\textsuperscript{143} These are also the values that form the core of inclusive education. In footnote 3 of General Comment 1, the CRC Committee mentions that these concepts are taken from the Salamanca Statement and Framework for Action on Special Needs Education in 1994.\textsuperscript{144} The Salamanca Statement was the first international human rights document to mention explicitly inclusive education for all children.\textsuperscript{145} It is submitted that the reference to the Salamanca Statement within the first General Comment may demonstrate that, in the Committee’s

\textsuperscript{137} Broderick, (n 25).
\textsuperscript{138} CRC Committee, General Comment no 1, Article 29(1): The aims of education. CRC/GC/2001/1 (2001).
\textsuperscript{139} CRC Committee, General Comment no 5, (n 102).
\textsuperscript{140} CRC Committee, General Comment no 9, The rights of children with disabilities. CRC/GC/9 (2007).
\textsuperscript{141} CRC Committee, General Comment no 1, (n 138), paras 2, 6, and 12.
\textsuperscript{142} Ibid., para. 2.
\textsuperscript{143} CRC Committee, General Comment no 1, (n 138), para. 9.
\textsuperscript{145} Ibid., para. 2. The Salamanca Statement provides that “regular schools with this inclusive orientation are the most effective means of combating discriminatory attitudes, creating welcoming communities, building an inclusive society and achieving education for all; moreover, they provide an effective education to the majority of children and improve the efficiency and ultimately the cost-effectiveness of the entire education system.”
view, the right to education under the CRC should be interpreted as including within it a right to inclusive education.

The General Comment also contains a few points of particular interest to students with disabilities and inclusive education. The Committee refers to the idea of individualised education when it specifies that the aims embodied in Article 29 should “take into account the child’s special developmental needs and diverse evolving capacities”. Furthermore, education should be “child-centred, child friendly and empowering”. An individualised education for each child is part of the foundation of inclusive education. It allows each child to grow and progress in the classroom among peers in a way that best allows him or her to reach their full potential.

General Comment 1 also alludes to the idea of inclusive education in the section related to the implementation, monitoring, and review of the CRC. The General Comment refers to specific areas in the education system which require change, something which the CRC text itself fails to do. To fulfil and promote effectively the goals of Article 29 CRC, “requires the fundamental reworking of curricula to include the various aims of education and, the systematic revision of textbooks and other teaching materials and technologies, as well as school policies”. The adaptation of the curricula and other materials to help meet the goals of education can also be seen as a tool to achieve inclusive education for all students. State Parties should direct education towards developing the child’s personality, talents, and mental and physical abilities, developing the child’s respect for human rights and fundamental freedoms, and developing respect, tolerance and friendship among all peoples. These developments are fundamental to inclusive education – giving each child a chance to develop in the education system without discrimination or stigma. Meeting the aims of Article 29 in the CRC can help secure this chance.

At another point, the General Comment specifically mentions that “[d]iscrimination against children with disabilities is also pervasive in many formal educational systems”, and that this discrimination can undermine or destroy the ability of the child to enjoy the right to education. Discrimination in the context of education includes treating any student in a way which separates him or her from the other students and negatively impacts his or her ability to participate in and receive education. This includes depriving a person or a group from access to education, limiting a person or group to an inferior education, establishing or maintaining separate educational systems for certain groups, or inflicting on any person or group conditions which are against their dignity. The right to non-discrimination is found throughout the CRC, and it is important that the Committee stressed the extensiveness of

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146 CRC Committee General, Comment no 1, (n 138), para. 1.
147 Ibid., para. 2.
148 CRC Committee, General Comment no 1, (n 138), para. 18.
149 CRC. (n 99), Art. 29 (a)-(c).
150 CRC Committee, General Comment no 1, (n 138), para. 10.
152 Ibid., Art. 1(a).
153 Ibid., Art. 1(b).
154 Ibid., Art. 1(c). Article 2 of the Convention against Discrimination in Education elaborates that separate educational systems are allowed if the separate systems offer equivalent access to education with teachers of the same qualifications, quality school premises and equipment, and equivalent courses.
155 Ibid., Art. 1(d).
discrimination against children with disabilities in education. Freedom from discrimination is a human right and is considered a civil and political right,\(^\text{156}\) which is immediately realisable. Therefore, freedom from discrimination in education must be ensured in an immediate way. Moreover, because the problem is recognised, eliminating such discrimination is an immediate obligation for State Parties. This immediate realisation is in contrast with rights that must be realised progressively, such as the broader right to education.

The next General Comment of relevance to inclusive education in the context of the CRC is General Comment 5 on the implementation of the Convention. As education is an economic, social, and cultural right, State Parties are under an obligation to implement the right to education with “measures to the maximum extent of their available resources and, where needed, within the framework of international cooperation.”\(^\text{157}\) This allows States to realise such rights progressively. However, as discussed immediately above, the right to non-discrimination in education must be realised immediately. The obligation to ensure non-discrimination requires State Parties “actively”\(^\text{158}\) to identify individual children and groups of children who, in order to access their rights, require “special measures”.\(^\text{159}\) Specifically, the CRC Committee mentions that “the non-discrimination principle does not prevent the taking of special measures to diminish discrimination.”\(^\text{160}\) To elaborate on what special measures may be, the CRC Committee uses language from the Human Rights Committee General Comment 18 on Non-Discrimination.\(^\text{161}\) Within General Comment 18, the Human Rights Committee discusses special measures for the protection from discrimination. One such measure to protect from discrimination is the collection of data in order to identify areas where discrimination exists.\(^\text{162}\) Not only does data help in identifying discrimination, but it also facilitates the implementation of the CRC.\(^\text{163}\) Other steps needed to meet the obligation to ensure non-discrimination may be changing legislation, administration, and resource allocation and implementing educational measures to change attitudes.\(^\text{164}\) These changes all need to be compatible with the Convention and its principles.\(^\text{165}\) The adoption of special measures is a positive obligation, meaning that to meet these obligations States must act, rather than simply refrain from acting or interference.

The first time inclusive education is addressed unambiguously in the context of the right to education in the CRC is in General Comment 9 regarding the rights of children with disabilities. This

\(^{156}\) International Covenant on Civil and Political Rights, 999 UNTS 171 and 1057 UNTS 407 / [1980] ATS 23 / 6 ILM 368 (1967), Arts. 3, 26 [herein after ICCPR]. Although there is no independent right to non-discrimination, the ICCPR widely protects all persons from discrimination based on a protected status. Article 26 prohibits discrimination and guarantees the equal and effective protection against discrimination. This clause widens the scope of discrimination past civil and political rights and into all human rights, including education.

\(^{157}\) CRC Committee, General Comment no 5, (n 102),para. 6.

\(^{158}\) Ibid., para. 12.

\(^{159}\) Ibid., para. 12.

\(^{160}\) Ibid., para. 30.

\(^{161}\) CRC Committee, General Comment no 5, (n 102), para. 12, citing Human Rights Committee, General Comment no 18 (1989), HRI/GEN/1/Rev.6, pp. 147 et seq.

\(^{162}\) Human Rights Committee, General Comment no 18, (n 161), paras 12, 48.

\(^{163}\) CRC Committee, General Comment no 5, (n 102), para. 48.

\(^{164}\) Ibid., paras 12, 18-20.

\(^{165}\) Ibid., para. 1.
instrument dedicates an entire section to inclusive education. The Committee uses the UNESCO definition of inclusive education which looks to inclusive education as a way to meet the needs of all learners through participation, and modifications of content, approaches, structures, and strategies surrounding education in order to remove all barriers to learning for all students. The General Comment clearly states that “[i]nclusive education should be the goal of educating children with disabilities”. It further states that inclusive education will be beneficial for not only children with disabilities but for all students.

Another noteworthy point in General Comment 9 is that the CRC Committee refers to inclusive education as it is provided for in the CRPD. This signifies the push for unity across international human rights instruments. By acknowledging the right to an inclusive education as provided for in the CRPD, the CRC promotes a joint front towards inclusive education for all children, but especially for children with disabilities.

A negative feature of General Comment 9 is that it does not exclusively recommend inclusive education to State Parties. It allows a continuum of services, including segregated education, to be maintained when circumstances do not allow for inclusive education feasibly to be achieved. Furthermore, it states that the “Committee underlines that the extent of inclusion within the general education system may vary”. This is unfortunate as it means that the General Comment does not exclusively promote and recommend State Parties to modify their education systems to provide inclusion for all students. Although General Comment 9 gives suggestions and recommendations on what modifications should be made to achieve inclusive education, it ultimately accepts that State Parties can maintain segregated classrooms and exclusion in some circumstances. Inclusion, according to the General Comment, does not need to be full. Instead, there can be varying levels of inclusion for children with disabilities, ranging from full placement in a regular classroom to partial learning in a special, segregated classroom. The General Comment does not provide guidelines to clarify when and at what level special, segregated education is acceptable.

Despite the wavering attitude of the CRC Committee to the right for all children to have an exclusively inclusive education, the ultimate goal of inclusion is clear. Although only General Comment 9 specifically uses the term “inclusive education,” General Comments 1 and 5 both contain elements supporting the goals of inclusive education. The goal of an accessible, individualised education for each child in accordance with their differing abilities, to promote their fullest potential in an equal, non-discriminatory way is the basis of inclusive education. To read into the CRC a right to inclusive education is therefore not a farfetched claim. Instead, the CRC Committee clearly supports the aim of inclusive education and obliges State Parties to work towards inclusion. The level of inclusion required is

166 CRC Committee, General Comment no 9, (n 140), para. 66, citing UNESCO, ‘Guidelines for Inclusion: Ensuring Access to Education for All’ (UNESCO 2005).
167 CRC Committee, General Comment no 9, (n 140), para. 66.
168 Ibid., para. 67.
169 CRC Committee, General Comment no 9, (n 140), para. 66-67.
170 Ibid., para. 66-67.
171 Ibid., para. 67.
172 Ibid., para. 67.
questionable as observed in General Comment 9; nonetheless, the CRC Committee continues to reprimand State Parties which have not met this goal and encourages this aim to be fulfilled within its Concluding Observations.

4.2.4 CRC Committee Concluding Observations on State Party Reports

Since its entry into force in 1990, the CRC has been ratified by 193 countries. With this number of State Parties, it has “achieved the unprecedented record of becoming a virtually universally accepted human rights treaty”.\(^\text{173}\) This means that a large number of countries have the responsibility to protect, respect, and fulfil the rights provided for within the CRC. As part of its obligations under the CRC, each State Party must make reports to the CRC Committee on its implementation of the Convention. After reading the State Party Reports and performing any further research necessary, the Committee publishes Concluding Observations on the State Party and gives recommendations as to how to better implement and comply with the CRC. The CRC Committee looks at national legislation, policy, and practices to determine if the rights within the CRC are being fully complied with. The Concluding Observations, although soft law, help guide State Parties towards full implementation of the rights within the treaty and therefore have an impact on the interpretation of the treaty.

Over the years, the Concluding Observations have demonstrated reoccurring trends concerning education. One such trend, which is becoming ever more prominent, is that the CRC Committee recommends action to achieve inclusive education in its Concluding Observations. The CRC Committee’s attitude and specifications regarding inclusive education have become more rigorous over the years. This can be observed within the recommendations and criticisms the CRC Committee makes to State Parties. A sample of Concluding Observations from a multitude of State Parties reflects this trend.

The earliest noticeable trend in the Concluding Observations is a subtle suggestion that States Parties should take action to achieve inclusive education. In the early Concluding Observations, the CRC Committee urged and recommended State Parties to include or integrate children with disabilities into the education system and society, and the Committee further expressed concern at the lack of inclusion in some State Parties.\(^\text{174}\) In some cases, it recommended effective access\(^\text{175}\) to, or integration into,
mainstream or regular education as a solution to these concerns.\textsuperscript{176} When a State already had legislation on inclusive education, the Committee recommended that the legislation be implemented fully to ensure inclusive education.\textsuperscript{177} However, the Committee also expressed concern that, even in States where inclusive education was a formal policy goal, children with disabilities were still being placed in segregated schools.\textsuperscript{178} Overall, the early recommendations were rather general about access to education and integration and only mentioned inclusive education in passing, if at all.

The next trend in how the CRC Committee addressed inclusive education was a change. Awareness-raising campaigns about the promotion of rights of children with disabilities, including inclusive education, were sometimes recommended.\textsuperscript{179} Campaigns were recommended to many of the State Parties which were criticised for their lack of inclusion policies and programmes for children with disabilities, and States were urged to encourage the inclusion of children with disabilities in the regular or mainstream education system and society.\textsuperscript{180} With public awareness can come the motivation for change.


\textsuperscript{180} Concluding Observations of the Committee on the Rights of the Child, Colombia, U.N. Doc. CRC/C/15/Add.137 (2000), paras. 50, 51; Concluding Observations of the Committee on the Rights of the Child, Comoros, U.N. Doc. CRC/C/15/Add.141 (2000), paras. 37, 38; Concluding Observations of the
Policy making is also an important step towards inclusive education. Adopting legislation requiring the full and equal participation of children with disabilities in education is the groundwork needed to realise an inclusive education system. In one case, a State Party was criticised due to the widespread discrimination that children with disabilities faced and the absence of an inclusive policy to promote their rights. The State Party was specifically asked to “[a]dopt an inclusive education strategy and...
elaborate a plan of action to increase the school attendance of children with special needs.\textsuperscript{183} State Parties need to include a clear definition of what inclusive education is in the law in order to ensure that proper measures can be taken to fulfil it.\textsuperscript{184} From there, the State Party can work to improve inclusive education and its implementation.\textsuperscript{185}

Some States were commended for establishing programmes to help protect the rights of children with disabilities, but even these State Parties were encouraged to put those programmes into practice and include children with disabilities in an inclusive education system and society.\textsuperscript{186} That encouragement demonstrates that policy without practice is not enough to satisfy international legal obligations. Unfortunately, this was also frequently the case where State Parties had established inclusive education systems, but these systems were inadequate or segregated education systems were still being used.\textsuperscript{187} One relevant example was when the Committee noted Egypt’s integration of inclusive education as a key component in the national education plan reform; however, the Committee also found that there were a very low number of children with disabilities (1.1%) who enjoyed their right to education.\textsuperscript{188} The CRC Committee advised Egypt to strengthen the inclusive education programmes to help promote the self-reliance and participation of children.\textsuperscript{189}

The next trend which can be observed in the Concluding Observations of the CRC Committee is the giving of advice and guidance on how to implement inclusive education. The Committee notes that to implement Article 23 CRC fully, State Parties must provide inclusive education for all children with special educational needs, including children with and without disabilities.\textsuperscript{190} These suggestions go further than integration. It is suggested that State Parties promote and expand quality inclusive education for children with disabilities.\textsuperscript{191} In one case, where inclusion was present, promoting a “high


\textsuperscript{189} Ibid., para. 63(c).


quality” inclusive education was even suggested. The Committee makes the point that for inclusive education to succeed, State Parties must take “measures to enable children with disabilities to have access to regular schools”. In some cases, the Committee even more specifically recommends taking all necessary means to promote inclusive education. Taking measures using all necessary means is an illustration of a positive obligation which requires action. States must act.

State Parties have to create educational opportunities for children with disabilities, make efforts to provide education to all children on an equal footing, and pursue efforts to ensure that children with disabilities may exercise their right to education. To achieve education for children with disabilities, State Parties have to remove any barriers to education. Also needed is the establishment of clear objectives, measures, and a timeline for the implementation of the inclusive education of children with disabilities.

One trend in Concluding Observations that can be observed is the recommendation to allocate resources to achieve inclusive education. The CRC Committee recommends the allocation of sufficient resources and efforts to achieve inclusive education. It has also recommended that State Parties

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increase resources to “create a truly inclusive educational system”.\textsuperscript{201} The Committee recommends giving “priority to the progressive implementation of inclusive education”.\textsuperscript{202} Human, technical, and financial resources must be allocated to achieve inclusive education for children with disabilities. On a basic level, this includes revising the school curricula,\textsuperscript{203} developing individualised education plans for students with disabilities,\textsuperscript{204} and improving school infrastructure.\textsuperscript{205} Regarding the human resources needed to achieve inclusive education, the Committee has expressed concerns that some State Parties are not providing sufficient resources, efforts, or training to equip professionals working with children with disabilities with the necessary knowledge and skills about inclusive education.\textsuperscript{206} State Parties have been urged to allocate resources to meet the needs of children with disabilities, covering the training of professionals, including teachers, social workers, health care professionals, and other professional staff working with children with disabilities in mainstream schools.\textsuperscript{207} The CRC Committee recommends that State Parties provide training to teachers and make schools accessible for children with disabilities.\textsuperscript{208} The Committee has suggested that State Parties provide all the schools “with sufficient numbers of teachers who have skills in inclusive education so that all children with disabilities can enjoy access to

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\textsuperscript{205} Ibid., paras. 71, 72(b).


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high-quality inclusive education” because, without sufficient trained teachers, students with disabilities will not be included.

One element of the training aspect is the need to sensitise the school personnel, children, and the public to inclusive education. Sensitising and awareness-raising are actions which have the goal of ending discrimination. The CRC Committee recommends that State Parties take into account the principles of non-discrimination and accessibility of all services. In one specific case, the CRC Committee expressed concern over the “reluctance of teachers to facilitate inclusion and acceptance of children with disabilities into the regular school system, despite requirements under law.” Even though this reluctance stems from a fear of the unknown and a lack of awareness or training, not giving each child the same opportunity in education is discrimination.

In terms of physical infrastructure, the CRC Committee urges State Parties to “improve, expand build and reconstruct adequate school facilities and infrastructure throughout the State party, and create a truly inclusive educational system welcoming children with disabilities.” To take this idea further, the CRC Committee recommends to “[e]quip schools with the necessary facilities for the inclusive education of children with disabilities.” Without facilities that support inclusive education, inclusive education cannot be effective.

The CRC Committee also recommends greater local community involvement in the process of undertaking efforts to achieve inclusive education. A few State Parties have been encouraged to include children with disabilities in regular schools by “establishing special units in all communities, giving more attention to special training for teachers and making the physical environment, including schools, sports and leisure facilities and all other public areas, accessible for children with disabilities”.

213 UNESCO Convention Against Discrimination in Education, (n 151), Art. 1.
215 Concluding observations of the Committee on the Rights of the Child, Burundi, U.N. Doc. CRC/C/BDI/CO/2 (2010), para. 50(e); See also Concluding Observations of the Committee on the Rights of the Child, Japan, U.N. Doc. CRC/C/JPN/CO/3 (2010), para. 59 (b), (c), (e); Concluding Observations of the Committee on the Rights of the Child, Greece, U.N. Doc. CRC/C/GRC/CO/2-3 (2012), para. 50 (a), (d), where the CRC Committee recommended that Japan equip all schools for inclusive education.
Community involvement can also be a way to combat the stigma and discrimination surrounding disability.

In one case, the State Party Panama was commended for the regulations it had adopted to facilitate inclusive education of students with disabilities, but the Committee still expressed concern about the lack of information and statistical data on the involvement of these students in the education sector. Therefore a positive obligation for State Parties in regard to inclusive education for children with disabilities can be data collection and monitoring.

Another recommendation that can be applied to all States is to “[e]stablish concrete mechanisms to improve equal access of children with disabilities to education...inclusive education should be encouraged... [and] the offer of education for children with disabilities should ...concern the special needs of the child”. This recommendation focuses on the individualised educational needs of the student that need to be supported. The recommendation concerns the general basis for inclusive education: access and support.

One positive point on the implementation of inclusive education involved Nicaragua. In 2010 Nicaragua was commended for its education law that included the principle of inclusive education and resulted in the doubling of the enrolment of children with disabilities in schools. The Committee recommended that this State ensure that the education system is fully able to implement inclusive education by providing appropriate financial, technical, and human resources. Even though the CRC Committee complimented the progress made in achieving inclusive education in the State Party, there were still measures needed to realise fully inclusive education.

Most recently in 2014, Russia was praised for its new education act which includes a provision on inclusive education for children with disabilities. However, the CRC Committee expressed concern at the low percentage of children with disabilities actually in mainstream schools. Russia was recommended to “[e]xpedite the implementation of its legal provisions on inclusive education by training teachers, providing schools with the necessary equipment and sensitising the school personnel, children and the public in general to the rights of children with disabilities, with special attention given

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222 Ibid., para. 61(b).
224 Ibid., para. 49(e).
to children with mental disabilities”.

One interesting point in the more recent Concluding Observations is the CRC Committee’s recommendations to States to ratify the CRPD and especially to implement the right of inclusive education under Article 24 CRPD. The reference to the CRPD and its obligations within CRC Concluding Observations again demonstrates the intersection of the two instruments. Not only are the two treaties working to achieve the rights of children with disabilities, but each is functioning as a tool for the implementation of inclusive education for all children.

The movement of the CRC Committee towards explicitly requiring education to be inclusive is clear. As the years pass and the CRC becomes more engrained in the international community as a universally accepted treaty, it is apparent that inclusive education itself will become more widely recognised as a right that State Parties have the obligation to implement.

4.3 Obligations & Recommendations to Achieve Inclusive Education under the CRC

This section will provide a summary of the responsibilities regarding the right to inclusive education as provided for in the CRC, as elaborated upon by the General Comments and Concluding Observations. For inclusive education to become a reality, the obligations need to be implemented and enforced in both a top-down and bottom-up fashion. This means that not only must State Parties ratify the CRC and act in accordance with their obligations, but also teachers’ and parents’ must support inclusive education for all children. At the level of parents and teachers, there are no direct obligations stemming from the CRC. Nevertheless, it is important that parents and teachers, as well as activists and advocates, are involved in formulating education policy. The support of parents and teachers for inclusive education is not obligatory under the CRC and nor is it in any way enforceable, but it is much needed to advance inclusive education.

In ratifying a treaty, a State Party holds out to the international community that it will comply with and implement that treaty. The State Party can be thought of as a collective community of everything within the State’s boundaries, including everything that falls within the jurisdiction of the government. When ratifying an international agreement, the State takes on the responsibilities for compliance, meaning all of the responsibilities and obligations lie upon its theoretical shoulders. It then can designate other actors who are in turn responsible for implementing the treaty law within the national sphere. The obligations that filter down from the State to the lower levels will be discussed below. Each level is necessary for the implementation and achievement of inclusive education.

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225 Ibid., para. 50(e).
4.3.1 Policy Makers’ Obligations

After a State becomes party to a treaty, obligations from the treaty fall on policy makers. The CRC and the right to education are no different. Policy makers have two main functions which are relevant. Firstly they have the task of adopting laws and policies. In addition, as policy makers hold the purse strings of the State, they have the task of deciding on appropriate resource allocation.

At the core of the obligation imposed on policy makers is the recognition of the right to education without discrimination. Inclusive education should be the goal of education. Most States have an educational structure in place, but to implement full inclusive education, changes in that structure may have to be made. The policy makers have to guarantee that the education system itself is able to implement inclusive education.

Legislation must be adopted or changed for the successful achievement of inclusive education. One component that is vital for the implementation of inclusive education is the inclusion of a definition of inclusive education in the law. Moreover all policies and actions taken to implement human rights, including the right to education, must be made with the best interests of the child in mind. In this respect, specific suggestions are to adopt legislation which requires the full and equal participation of all students in inclusive education and training, to adopt an inclusive education strategy, to create a plan of action to increase school attendance and participation of children with disabilities, and to create clear objectives, measures, and timelines for implementing these policies.

Discrimination is an issue that can partly be addressed through the law. There is an obligation under the CRC to take specific measures to combat discrimination, including in regard to the education

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227 CRC, (n 99), Art. 28.
228 CRC Committee, General Comment no 9, (n 140), para. 66.
230 CRC Committee, General Comment no 5, (n 102), paras 12, 18-20.
235 ICCPR, (n 156), Arts. 3, 26.
of all students. Collecting data, and specifically data that can help identify discrimination, is also an obligation that can be imposed on public authorities by policy makers.

The CRC requires the progressive realisation of the right to education. The CRC Committee has been even more specific in suggesting that State Parties should give “priority to the progressive implementation of inclusive education” over other progressively realised human rights. This means that, to the maximum extent possible, and by taking all necessary measures, resources, including financial, human, structural, and technological, must be allocated toward inclusive education. Although financial resources are important, human resources, i.e. people, are the practical implementers of inclusive education. A sufficient number of teachers and other educational professionals who have skills and training in inclusive education need to be available in all schools to achieve inclusive education. Resource allocation of all types is an important task for the policy makers, as sufficient resources are needed for inclusive education to be successful and for the improvement of the education system for children with disabilities.

Another recommendation from the CRC Committee that slips between the policy makers and educational professionals is the promotion and execution of awareness-raising campaigns about the need for inclusive education for all children. Campaigns can be spearheaded at a higher level and realised by the lower. Awareness of inclusive education and the benefits it brings to all children is instrumental to the full implementation of the right to education.

References:

236 CRC Committee, General Comment no 5, (n 102), para. 30.
237 Human Rights Committee, General Comment no 18, (n 161), para. 5; CRC Committee, General Comment no 5, (n 102), paras 12, 48.
238 CRC, (n 99), Art. 28.
240 CRC Committee, General Comment no 5, (n 102), para. 6.
4.3.2 Obligations of Educational Professional

The direct implementation of educational law and policy is carried out by educational professionals, including teachers, social workers, health care professionals, and other professional staff working with children with disabilities. The international instruments that State Parties bind themselves to, although seemingly distant from the ground level, actually have an effect there. Educational professionals are responsible for implementing the legislation adopted by the policy makers regarding education. If an education system is not inclusive of children with disabilities, changes ultimately have to be made. “If a child can’t learn the way we teach, maybe we should teach the way they learn.”246 This quote exemplifies that changes need to be made in the education process, not in the child.

Similar to policy makers, educational professionals must also keep in mind the goals of education.247 An educator should make education child-centred, child-friendly, and empowering for children.248 If educational professionals adopt this individualised, inclusive perspective on education, they will make the first step towards realising inclusive education for all learners.

In general, education needs to be made accessible.249 Educational professionals should advocate to “improve, expand, build and reconstruct adequate school facilities and infrastructure ... [to] create a truly inclusive educational system welcoming children with disabilities.”250 As a start in many cases, the structural aspects of the school must be reworked or reformatted to allow all children physically to access the school. This reworking includes changes made to the infrastructure of the school.251 This does not apply to every school building, however, as some may already be accessible. Physical accessibility of educational facilities is an important step towards including children with disabilities.

More than the structures may have to be made accessible. There may need to be fundamental changes made in other areas to change the way children are taught in schools in order to give each an

246 Ignacio Estrada <http://www-inst.eecs.berkeley.edu/~ee301/fa08/quotes.html> accessed 10 July 2014
247 CRC, (n 99), Art. 29.
248 CRC Committee, General Comment no 1, (n 138), para. 2.
opportunity to learn. In some cases the curricula may need to be altered, including the textbooks, teaching materials, technologies, and school policies. Modifications to content, approaches, and strategies of teaching and educating students may also be needed to achieve inclusive education. Making these essential changes will help remove the systemic barriers which children with disabilities face in accessing education.

Educational professionals need appropriate resources, skills, and training in order to support children with disabilities and to provide inclusive education. This training should be both pre-service and in-service. This means that preparation for inclusive education should start at the beginning of an educational professional’s training and continue throughout his or her career. This can be achieved through “embedding inclusion, rights and equality throughout all training”. Essentially, in States where the current system is inadequate, educational professional training programmes must be restructured to help each professional prepare for inclusive education.

Furthermore, training, advocacy, and community involvement can lead to sensitisation of the school personnel, children, and the public to inclusive education. Attitudes are a barrier that can only be overcome with knowledge. When inclusive education stops being an unknown, daunting, unreachable concept, educational professionals will in turn react more positively to it. They will then be able to promote, encourage, and expand inclusive education for children with disabilities.

252 CRC Committee, General Comment no 1, (n 138), para. 18.
253 UNESCO, ‘Guidelines for Inclusion’, (n 166).
256 Caton, (n 1) 13.
257 Caton, (n 1). 4.
258 Smith, ‘Preparing Educators for Inclusion,’ (n 255), 211-212.
260 Smith, ‘Preparing Educators for Inclusion,’ (n 255), 209.
4.4 Conclusions

The CRC and its obligations have taken root in the law and practice of State Parties. Not only have many States ratified the Convention but many have adopted and implemented national provisions to fulfil their obligations. The obligation to provide an inclusive education for all learners, especially for children with disabilities, has become more evident through the use and implementation of the Convention. Inclusive education has become more than an unachievable or unrealistic goal. In many cases, State Parties have created inclusive education systems, although they may need strengthening to fulfil this obligation in full. With support, focus, and dedication from policy makers and educational professionals, inclusive education can become a reality.

5. Interpreting Inclusive Education in the CRPD

A dominant problem in the disability field is the lack of access to education for both children and adults with disabilities. As education is a fundamental right for all, enshrined in the Universal Declaration of Human Rights, and protected through various international conventions, this is a very serious problem. In a majority of countries, there is a dramatic difference in the educational opportunities provided for disabled children and those provided for non-disabled children. It will simply not be possible to realize the goal of Education for All if we do not achieve a complete change in the situation.\(^{262}\)

The Convention on the Rights of Persons with Disabilities ("CRPD") facilitates this change. The CRPD is the first binding international human rights treaty that specifically addresses the rights of persons with disabilities. The CRPD is based on respect for inherent dignity, individual autonomy, independence of persons, non-discrimination, full and effective participation, inclusion in society, respect and acceptance of differences, equality of opportunity, accessibility, gender equality, the respect of children's evolving capacities, and the respect of children with disabilities to preserve their identities.\(^{263}\) The general obligations of a State Party to the CRPD are to (i) ensure and promote the full realisation of human rights and fundamental freedoms for all persons with disabilities, (ii) to realise progressively economic, social, and cultural rights, and (iii) to develop and implement legislation and policies to implement the convention.\(^{264}\) These general obligations are relevant because they expand upon the right to education for children with disabilities and hold State Parties accountable for implementing this right. The CRPD facilitates accessible and equal human rights for children with disabilities.

In the same way as was done for the CRC, interpretation of the right to inclusive education in the CRPD will be carried out using the teleological approach of interpretation, the text of the CRPD, and the

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263 CRPD, (n 99), Art. 3.

264 Ibid., Art. 4.
subsequent use and practice of the CRPD. When interpreting the right to education in the CRPD, all these sources will be used in line with the spirit and guiding principles of the Convention as a whole.

5.1 Inclusive Education in the CRPD

The right to education is central to each child’s rights, in that without education other human rights cannot be realised. Children with disabilities have for many years been excluded and segregated from education for various reasons. The CRPD is the first binding international instrument to require specifically inclusive education. Article 24 of the CRPD significantly broadens the scope of the right to education for children with disabilities from only explicitly requiring State Parties to ensure the right to education, to explicitly requiring inclusive education. The right to education for children with disabilities was addressed implicitly in the CRC, but the obligation to provide an inclusive education for children with disabilities made its first overt appearance in the CRPD. The insertion of a reference to “inclusive education” within Article 24 was a revolutionary move towards achieving accessibility and equality in education for children with disabilities.

Inclusive education goes far beyond placing a child with disabilities into a mainstream classroom. An inclusive education system relies upon certain major components: accessibility, quality, community, and enabling children with disabilities to attend mainstream schools with accommodations which allow them an equal opportunity learn. Although each element of inclusive education will take time and resources to implement, participation in the community can be the more difficult component to achieve. Schools are not merely educational spaces but are also a social space in which participation and involvement are essential, and where learning comes not only through the formal curricula but also through the relationships and interactions students have with each other. 266

While inclusion in education has become an international legal obligation under the CRPD, it is important to recognise that there are some arguments raised against inclusive education. There may be a fear that inclusive education is not the best solution for every child because specialised, segregated schools are better equipped to meet certain children’s needs. Especially in the cases of children who are blind, deaf, or deafblind, inclusive education has been questioned. The CRPD text provides that children who are blind, deaf, or deafblind should be provided with education in “the most appropriate languages and modes and means of communication for the individual, and in environments which maximize academic and social development.” Therefore the CRPD does not clearly mandate only inclusive education for children who are blind, deaf, or deafblind but instead indicates that the most beneficial environments for education should be sought. Research shows that inclusive education in the

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265 Social Transition Team, Office of Democracy, Governance and Social Transition of the United States Agency for International Development (USAID), ‘Best Practice in Inclusive Education for Children with Disabilities: Applications for Program Design in the Europe & Eurasia Region’ (2010), 4-5.
268 Sue Stubbs, ‘Inclusive Education Where there are few resources’ (The Atlas Alliance 2008), 92.
269 CRPD, (n 99), Art. 24(3).
school setting as well as the community is the most beneficial for the inclusion of children with disabilities, including children who are blind, deaf, or deafblind. 270

The view that inclusive education may not be appropriate for all children may be correct in many current cases due to long-standing State failure to implement properly inclusive education. However, when the obligation to achieve inclusive education is met – and fulfilled fully for all students – inclusive classrooms are the most beneficial for all students and the positive gains are documented. 271 “Inclusive practices bring clear, unequivocal academic and social benefits for students with and without disabilities, across a variety of age ranges and education disciplines.” 272 In contrast, segregated, special education affirms the outdated medical model of disability, placing the difficulties in learning and the need to be altered on the child instead of on the educational institution. 273 Segregated education “reinforces the hierarchy of difference that treats [people with disabilities] as second class.” 274 Special, segregated education, favouring remedial over sophisticated curricula, lacks the range of opportunities and quality experiences that inclusive education has to offer. 275 Although the CRPD does not directly prohibit segregated education, it does require inclusive education, which as the name implies, is not segregated.

The text of the CRPD regarding the protection of the human rights of children with disabilities and inclusive education is detailed, containing specific obligations for State Parties, and the CRPD Committee’s Concluding Observations give further guidance, clarification, and recommendations for State Parties to fulfil the responsibilities and obligations regarding these rights. As this treaty is relatively recent, no General Comments have been adopted regarding the right to education. Therefore subsequent practice, which can be used to interpret the text of the CRPD, is only available through the Concluding Observations and recommendations adopted by the CRPD Committee. Although the CRPD is not as mature, and does not have as long a history of interpretation at the international and national levels as the CRC, the obligations contain just as much authority as those within the CRC – and with 145 State Party ratifications, most States are bound to uphold and comply with those obligations. 276

5.1.1 Relevant Treaty Articles

The process of interpreting the right to education in the CRPD starts with the text, because it is the first and foremost source of interpretation. In conjunction with the textual approach to interpretation, the teleological approach should be employed, which involves using the guiding principles and following the spirit of the Convention. The guiding principles of the Convention are listed in Article 3 of the CRPD:

a. Respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons;

270 Stubbs, (n 268), 92-94.
271 Smith, ‘Defining Inclusion,’ (n 108), 40. 41
272 Ibid., 41.
273 Roger Slee, The Irregular School – Exclusion, Schooling, and Inclusive Education (Routledge 2011), 76,
275 Baglieri and Shapiro, (n 109), 190.
b. Non-discrimination;
c. Full and effective participation and inclusion in society;
d. Respect for difference and acceptance of persons with disabilities as part of human
diversity and humanity;
e. Equality of opportunity;
f. Accessibility;
g. Equality between men and women;
h. Respect for the evolving capacities of children with disabilities and respect for the right of
children with disabilities to preserve their identities.\(^{277}\)

The guiding principles should be seen as factors which influence the interpretation of the Convention as
a whole. Each article within the CRPD needs to be read with these principles in mind and any
interpretation of the rights should not be in contradiction to these principles.

To start the textual analysis of the right to education, we look to Article 24 of the CRPD. The text of
Article 24 is detailed, addressing the basic goals of the right to education, what State Parties must do to
ensure this right is implemented in full, and the resources needed to fulfil the right.\(^{278}\) More specifically,
it requires that “State Parties recognize the right of persons with disabilities to education. With a view to
realising this right without discrimination and on the basis of equal opportunity, States Parties shall
ensure an inclusive education system at all levels and lifelong learning”.\(^{279}\) The text affirmatively
provides that there is a right to education and, to realise this right, inclusive education must be ensured.
In addition, under the article persons with disabilities must have access to “general tertiary education,
vocational training, adult education and lifelong learning without discrimination.”\(^{280}\) This text establishes
that all educational opportunities need to be provided without discrimination on the ground of
disability. The text forms the basis of the right to education: education must be inclusive and non-
discriminatory at all levels.

Similar to the CRC, after setting out the right to education the CRPD continues by elaborating on
the goals of education. It maintains that education should be directed towards

\[\text{[t]he full development of human potential and sense of dignity and self-worth, and the}
\text{strengthening of respect for human rights, fundamental freedoms and human diversity; [t]he}
\text{development...of [the student’s] personality, talents and creativity, as well as their mental and}
\text{physical abilities...[e]nabling persons with disabilities to participate in a free society.}\]^{281}\n
In contrast to the CRC, which spreads the right to education (Article 28 CRC) and the goals of education
(Article 29 CRC) across two articles, the CRPD includes the rights and goals within a single article, and

\(^{277}\) CRPD, (n 99), Art. 3(a)-(h).
\(^{278}\) See generally CRPD, (n 99), Art. 24.
\(^{279}\) CRPD, (n 99), Art. 24(1).
\(^{280}\) Ibid., Art. 24(5).
\(^{281}\) Ibid., Art. 24 (1)(a)-(c).
thereby more closely links the relevant obligations. Education and its goals become part of the same bundle of obligations and responsibilities for State Parties.

There are further State obligations stated plainly in Article 24 (2) of the CRPD. The article provides that State Parties shall ensure that “[p]ersons with disabilities are not excluded from the general education system ... [and] that children with disabilities are not excluded from free and compulsory primary education...on the basis of disability.” 282 Furthermore, States must ensure that persons with disabilities “can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live”, 283 provide “reasonable accommodation”, 284 the “support required, within the general education system, to facilitate their effective education”, 285 and “individualized support measures...that maximize academic and social development, consistent with the goal of full inclusion.” 286 The obligations within Article 24 (2) are specific and aimed at supporting each child in accordance with their individual needs in accessing and participating in an inclusive education.

The article goes on to assert that State Parties “shall enable persons with disabilities to learn life and social development skills to facilitate their full and equal participation in education and as members of the community.” 287 Communication is integral to participation. To ensure this States must facilitate the learning of sign language, 288 “Braille, alternative scrip, augmentative and alternative modes, means and formats of communication and orientation and mobility skills, and facilitate[ ] peer support and mentoring.” 289 These provisions establish a clear responsibility on State Parties. In order to participate and be included, in both school and society, each child needs to be able to communicate with others.

The CRPD then addresses the required measures that can help to achieve the realisation of the right to education. It articulates that State Parties

shall take appropriate measures to employ teachers, including teachers with disabilities, who are qualified in sign language and/or Braille, and to train professionals and staff who work at all levels of education...incorporat[ing] disability awareness and the use of appropriate augmentative and alternative modes, means and formats of communication, educational techniques and materials to support persons with disabilities. 290

To include a child within education, educational professionals need to communicate with the child. The text clearly directs States as to the human resources which are needed to achieve inclusive education. The requirement to provide trained human resources in education is clear, albeit the amount of human

282 Ibid., Art. 24 (2)(a).
283 Ibid., Art. 24 (2)(b).
284 Ibid., Art. 24 (2)(c).
285 Ibid., Art. 24 (2)(d)
286 Ibid., Art. 24 (2)(e).
287 Ibid., Art. 24 (3).
288 Ibid., Art. 24(b)
289 Ibid., Art. 24 (3) (a).
290 Ibid., Art. 24 (4).
resources is unstated. This directness was lacking in the CRC, but the CRPD makes it clear that trained human resources are needed for inclusive education to be successful.

Unfortunately, some State Parties have made specific reservations to Article 24 regarding inclusive education. Mauritius made a reservation with regard to Article 24 (2) (b) because, although the State Party had a policy of inclusive education, it wanted to keep its special education system as well. 291 Similarly, the United Kingdom made a reservation to enable it to maintain segregated schooling. It reserved “the right for disabled children to be educated outside their local community where more appropriate education provision is available elsewhere”, 292 including in both mainstream and segregated or so-called special schools. Reservations, in general, take away from the spirit of a human rights instrument because the treaty is no longer read as a whole document. The reservations made by Mauritius and the United Kingdom to keep segregated, specialised school alongside inclusive education do not specifically contradict Article 24; however, the principle of inclusion runs throughout the CRPD and cannot be put aside in the realisation of the rights of persons with disabilities. To that effect, “[i]t is debatable whether inclusive education can be fully realised whilst the option to segregate remains.” 293

Nevertheless, reservations can illuminate how Article 24 should be interpreted for those States which have not made a reservation. Both the reservations of Mauritius and the United Kingdom are designed to allow a segregated school system to remain within the State. In light of this it can be argued that, in the absence of such a reservation, Article 24 of the CRPD does not allow for segregated schooling for children with disabilities. In the absence of a specific reservation to Article 24, it can be assumed that a segregated schooling system for children with disabilities is not acceptable under the CRPD, aside from the aforementioned cases of children who are blind, deaf, or deafblind where another environment can better maximise their academic and social development.

A separate CRPD provision that has a direct impact on education is Article 8, regarding awareness-raising. Under the article, State Parties are obliged to adopt immediate, effective, and appropriate measures to “foste[r] at all levels of the education system...an attitude of respect for the rights of persons with disabilities.” 294 This measure goes beyond education for children with disabilities. Raising awareness about the human rights of people with disabilities within the education system is important for the successful implementation of the Convention as a whole, as it helps to eliminate stigma and other attitudinal barriers. This is true for the right to education, as well as for other rights.

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294 CRPD, (n 99), Art. 8(2)(b).
The CRPD contains extensive protections of the rights of children with disabilities extending beyond education. The Preamble of the CRPD states that “children with disabilities should have full enjoyment of all human rights and fundamental freedoms on an equal basis with other children”, and it reminds States of the obligations under the CRC. As mentioned above, the Convention includes within its general principles “[r]espect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.” Additionally, children with disabilities are also to take part in and be consulted regarding the development and implementation of legislation and policies related to the CRPD. Listening to children empowers them. Read together, these provisions in the Preamble and Articles 3 and 4 empower children with disabilities. The CRPD recognises children with disabilities as rights holders who must be respected and consulted, thereby giving them a role to play in determining their futures. An inclusive education will allow them more opportunities in that future.

Most specifically, and similar to the CRC, the CRPD includes an article dedicated to the specific protection of children with disabilities. Article 7 of the CRPD requires that States Parties “shall take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children”, shall consider the best interests of the child, and “shall ensure that children with disabilities have the right to express their views freely on all matters affecting them”. This Article works hand-in-hand with the empowerment of children with disabilities as it imposes a positive obligation on State Parties to ensure that children are able to realise their rights. The article displays the move away from the best interest standard and towards a rights based approach of children. The best interest standard gives policy makers the power to make decisions on issues concerning children and their human rights, as long as these decisions are made in the best interests of the child. The rights based approach shifts the balance of power away from the policy makers and empowers the rights holder, in this case children, in decisions about their human rights. Children with disabilities experience intersectional discrimination, meaning discrimination on the grounds of both their disability and their age, and these provisions provide tools to combat that discrimination.

Taken together, the articles of the CRPD that address the rights of children with disabilities and the right to education lay a powerful basis for inclusive education. The necessary guidance and clarification comes from the CRPD Committee in the Concluding Observations. The CRPD Committee specifically addresses inclusive education and recommends steps States should take to implement the obligations under Article 24 of the CRPD.

295 Ibid., Preamble(r).
296 Ibid., Preamble(r).
297 Ibid., Art. 3(h).
298 Ibid., Art. 4(3).
300 CRPD; (n 209), Art. 7(1).
301 Ibid., Art. 7(2).
302 Ibid., Art. 7(3).
5.1.2 Supplementary Sources of Interpretation

The 145 State Parties to the CRPD have similar responsibilities in reporting to the CRPD Committee as the State Parties to the CRC have to its respective Committee. Within two years of ratification, and then within four years after that, each State Party has to submit a comprehensive report to the CRPD Committee that identifies all the measures taken within the State to meet the obligations under the CRPD. These reports are considered by the Committee which then makes suggestions and recommendations to assist the State Party implement the Convention. These suggestions take the form of Concluding Observations issued by the CRPD Committee. The first Concluding Observation was published in 2011, and only a handful have been published since then. With this in mind, it is clear that the CRPD Committee’s work has not been as globally expansive as the CRC Committee’s, but that does not create a hierarchy between the works of the two Committees.

As mentioned above, the Concluding Observations of the CRPD Committee are a source of subsequent practice which can be used as a supplementary tool to interpret the right to education found in the CRPD. Unlike the CRC, which has had time to take root, no General Comments on the right to education in the CRPD have been adopted. Nonetheless, the CRPD Committee has upheld a fairly steadfast view on the obligations inherent to inclusive education. In short, State Parties need to work harder to achieve inclusive education. This approach can be observed throughout the Concluding Observations, where the CRPD Committee recommends to States how to achieve inclusive education. The Committee stresses that “inclusion is one of the key notions of the Convention and should be especially adhered to in the field of education.” Education is not an equivocal or ambiguous right. Children with disabilities deserve to share in that right equally, in the same way as any other child.

Overall, the CRPD Committee urges State Parties to implement inclusive education by taking positive steps. States should develop a comprehensive education policy for inclusive education. To implement this policy, sufficient budgetary resources need to be allocated. In practice, the inclusive policies need to be followed up with implementation. The CRPD Committee recommends that children with disabilities and their representative organisations be involved in implementing inclusive

303 Ibid., Art. 35 (1), (2).
304 Ibid., Art. 36(1).
education models. This participation is “essential for ensuring the responsiveness, legitimacy and effectiveness of such laws and policies, as well as reflecting the rights of [children] with disabilities to full participation in the life of the community”. The involvement of civil society, including local and international Disabled Peoples’ Organisations and human and children’s rights NGOs, not only strengthens advocacy but also enables people with disabilities to secure their own rights and support. When inclusive education policies and practices are in place in a State, State Parties still need to conduct research into the effectiveness of the inclusion policies and their implementation. To this end, State Parties should set targets to increase the rates of participation and completion of education and training by students with disabilities. From this, data can be collected to see if the targets are, in fact, being reached.

As part of the inclusive policies, children with disabilities are entitled to receive a full compulsory education, and State Parties have a duty to work to ensure this. To achieve this, State Parties should tailor programmes and curricula to the needs of students with disabilities. In addition, State Parties need to remove barriers that prevent people with disabilities from accessing the educational system without discrimination. A more specific obligation is that State Parties should identify and reduce illiteracy among children with disabilities. With inclusive education practices in place and children with disabilities included, literacy should steadily increase.

The transition from a policy on paper to a policy in practice is where implementation begins. The foremost part of making an education system inclusive, is to make it accessible in all aspects. Barriers in the physical environment are the first barriers that must be dismantled for students with disabilities to access the right to education. The removal of these barriers is a prerequisite for the fulfilment of inclusive education because, if students are unable to access the physical school, then other measures will be futile. Accessibility allows all students of all learning abilities to participate meaningfully in education. Accessibility in education begins with an appropriate policy; it is then implemented at the school level; and then further followed up through monitoring, using indicators and other devices.

After the school buildings have been made accessible, the curricula and teaching materials must also be made accessible in order to achieve inclusive education. In addition, the individual cases of students must be examined. Where the general accessibility measures fail to meet individual needs,

311 Social Transition Team, (n 265), x.
313 Ibid.
315 Ibid., para. 37.
316 Ibid.
318 Human Rights Council, (n 51), para. 35.
319 Ibid., para. 40.
individualised support for students must still be offered. This support amounts to reasonable accommodation measures to enable students with disabilities to enjoy the right to education on an equal basis with others. Students with disabilities must be offered reasonable accommodation and adjustments within the general education system. Accommodations and adjustments must be made based on the individual student’s needs and required support within the general education system. The purpose of accommodations are to ensure that each student is able to access education on an equal basis with others. The CRPD Committee elaborates that reasonable accommodations in institutions for learning include “assistive technology and support in classrooms, accessible and adapted educational materials and curricula as well as accessible school environments”. Additionally, reasonable accommodations for education must be provided by the State and not paid for by the parents.

The CRPD Committee has reminded State Parties that the denial of reasonable accommodation is discrimination. This means that reasonable accommodation can be viewed as a civil and political right, and immediately realisable, subject to the disproportionate burden limitation. The factors to be taken into account in determining whether making any particular accommodation would be a disproportionate burden include financial and other costs, the scale and financial resources of the organisation in question, and the possibility of obtaining public funding or other assistance to support the accommodation. If the accommodation does not amount to a disproportionate burden, it must be provided.

The CRPD Committee aligns with the CRC Committee in asserting that human resources are also needed for inclusive education to be implemented. State Parties need to put in place a policy for


322 Human Rights Council, (n 51), para. 41.


training education professionals in inclusive education. Teachers, administrators, and all other educational staff need to be trained to work in inclusive educational systems and settings. Teachers should no longer be trained only to teach in segregated education, instead, teacher training should be directed towards inclusion. Detailed aims to be met by professional educational training are also mentioned. The concept of training is expanded on within the CRPD. The CRPD requires State Parties to “incorporate disability awareness and the use of appropriate augmentative and alternative modes, means and formats of communication, educational techniques and materials to support persons with disabilities” into the training expectations and criteria for educational professionals. Amongst others, there should be teacher training for teachers with disabilities and teachers who use sign language. The provisions related to training in the CRPD aim to facilitate communication between teacher and student and are fundamentally important for inclusive education. Part of inclusion is participation, but without communication this is impossible.

In some Concluding Observations, the CRPD Committee mentions higher education in regard to students with disabilities. The Committee notes that State Parties should take greater efforts to enable students with disabilities to study at universities and other tertiary institutions. This highlights the obligations within Article 24 (5) of the CRPD which provides that State Parties “shall ensure that persons with disabilities are able to access tertiary education, vocational training, adult education and lifelong learning without discrimination on an equal basis with others.” The CRPD does not guarantee the admittance of all students with disabilities into higher education or other tertiary institutions. It does, however, guarantee the chance for admittance without discrimination – the same as for any other student.

In many Concluding Observations, the CRPD Committee expresses concern that children with disabilities are being placed in segregated education and not in inclusive educational settings. To
address this, the Committee suggests reallocating resources from special, segregated education systems to inclusive education in mainstream schools. Unfortunately, there was one wavering moment in the CRPD Committee’s push for inclusive education for children with disabilities in Spain’s Concluding Observations of 2011. The Committee recommended the State Party to “[e]nsure that decisions to place children in a special school or in special classes, or to offer them solely a reduced standard curriculum, are taken in consultation with the parents” and to “[e]nsure that decisions on placing children in segregated settings can be appealed swiftly and effectively.” These two recommendations to the State Party do not explicitly go against inclusive education; however, the recommendations do acknowledge that segregated education can be maintained in certain circumstances and subject to certain safeguards. The problem with this suggestion is that segregated education is not inclusive. Even in its name, segregated education is non-inclusive. In later Concluding Observations, however, the Committee does not reiterate these recommendations. Instead, it expresses concern about the segregation of children with disabilities and urges State Parties to move children with disabilities from special, segregated systems into inclusive school settings.

One State Party in particular impressed the CRPD Committee with its dedication to inclusive education. Sweden was commended for its inclusive education system. In Sweden, only 1.5% of children are instructed outside the inclusive, mainstream schools. It is submitted here that Sweden’s development of an almost entirely inclusive education system can be used as a reference or model for the implementation of inclusive education in other State Parties. Although each State faces varying factors that hinder the implementation of inclusive education, Sweden’s success can remind each State that inclusion is achievable.

To monitor the progression of inclusive education, State Parties are reminded that monitoring inclusion through indicators is necessary. Data collection and the use of indicators for monitoring of the rights within the CRPD are unambiguously required under Articles 31 – 33 CRPD. The Concluding Observations acts as a reminder to the State Parties that this part of the obligation to implement inclusive education cannot be overlooked. The use of research, data, and indicators helps to monitor the effectiveness of inclusive education programmes and compliance with the CRPD.

In conclusion, the main trends observed in the Committee’s Concluding Observations are its general recommendations to implement inclusive policies and practice, to allocate resources for inclusive

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339 Ibid., para. 44(d).
education, to monitor the implementation of inclusive education, and to eliminate discrimination in education. Recommendations of this nature emphasise the State’s burden and positive obligation to act in order to provide inclusive education for children with disabilities.

5.2 Obligations & Recommendations for Inclusive Education under the CRPD

State Parties are responsible for meeting the obligations under the CRPD. Even if States have only signed the Convention and not ratified it, as is the case for the Netherlands at present, each signatory State is still responsible for not acting in a way contrary to the Convention and the human rights provided within it pending ratification. The obligations with regard to education within the CRPD imitate those of the CRC, but are more specific in many regards. The CRPD creates obligations directly, but the Concluding Observations expand upon and clarify those obligations. The responsibilities are passed down to those in charge of implementation of the Convention.

5.2.1 Policy Makers’ Obligations

Policy makers at national level have the bulk of the responsibility when it comes to implementing inclusive education. This is top down implementation, which involves implementation at a high level where the appropriate framework and structure are put into place. This structure is what will be implemented and applied at the practical or local level. National policy makers do not have a direct impact on those who are giving or receiving inclusive education. Instead, national policy makers should facilitate the functioning of the system so that those who are directly involved can operationalise inclusive education. Policy makers also have to set the framework and guidelines for professionals. These guidelines are taken, first, directly from the CRPD itself. In addition, the Concluding Observations give more specific guidelines. The cement of this framework is the acknowledgment that the right to education includes the guarantee of an inclusive education system within the State. This means that, without the belief that education should be inclusive education for children with disabilities, policy makers will be unsuccessful in creating such a situation. In realising the right to education, and specifically inclusive education, it is important that legislators and policy makers keep the goals of education in mind. The goals that education should be aimed at are the full development of human potential, a sense of dignity, and self-worth, and education should enable all persons to participate effectively in a free society.

The main task for policy makers under the CRPD is to create and enforce a comprehensive inclusive education policy. The policies should provide for full compulsory inclusive education, including

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342 As of 10 July 2014, 158 States have signed the CRPD, including The Netherlands, and 145 States have ratified it. For more information see <http://www.un.org/disabilities/> accessed 10 July 2014.
343 CRPD, (n 99), Art. 24(1).
344 Ibid., Art. 24(1)(a).
345 Ibid., Art. 24(1)(c).
347 Ibid.
curricula changes where needed, tailored programmes, and reasonable accommodations provided by the State. The policy must also include sufficient budgetary resources, sufficient human resources trained in inclusive education, implementation strategies, and targets against which to measure the effectiveness of the policies’ implementation.

After the policies are in place, realisation is contingent on the implementation and subsequent practices. Many States already have inclusive policies in place, but in practice there is a gap between policy goals and achievements. This gap stems from the many barriers to inclusive education which have taken root in the education system, along with society in general. These barriers are both attitudinal and physical and related to factors concerning the physical structures of the school, curriculum, educational professionals, communication, socio-economic factors, funding, organisation of the education system and policies. All of these barriers affect the accessibility of education, and policymakers are under a responsibility to address them when creating an inclusive education system.

An important characteristic of inclusive education is that it is not a one-size-fits-all concept. Diversity is the underlying value of inclusive education. A truly inclusive education does not just allow diverse students to be in a classroom with their peers. Instead, an inclusive education welcomes and accommodates all students, knowing that each student has different talents, needs, abilities, and ways of learning. Inclusive education is not simply integration of diverse students into the mainstream classroom, it is the inclusion of all students in an inclusive classroom. Therefore, the implementation of inclusive education must embrace the individualities and diversities of each learner to help them reach their fullest potential in education.

348 Ibid., para. 37.
349 Ibid.
356 Human Rights Council, (n 51), paras. 38-40.
To determine if implementation is successful, data collection and research should be performed. Inclusive education cannot be in any way equated with only enrolment and with the mere construction of a ramp. The evaluation of inclusive education involves in-depth evaluation of different types of data. This can determine if education is truly inclusive. This data collection should measure school admission, assessment and analysis, planning, resource allocation, instruction, intervention, teaching, other school-related activities, evaluation, and transition. Although this information is not sufficient to determine whether inclusive education is successful or not, together such data will help identify any missing information that is relevant to assessing the inclusiveness of education.

A mechanism for training the educational professionals should also be a part of inclusive education policies. As mentioned above, there are general and specific obligations, based on the CRPD and clarified in the Concluding Observations, for training educational professionals in the context of inclusive education. Although it is the professionals’ responsibility and obligation to take part in these trainings, it is the policy makers who can create, implement, and enforce the training.

### 5.2.2 Educational Professionals’ Obligations

As observed above with the CRC, both State Parties and policy makers’ obligations directly affect educational professionals. “In addition to a need to reconcile a history of segregation that permeated public attitudes toward persons with disabilities, school structures, and educational policy, movement towards inclusion presents challenges to professionals in the field of education.” Educational professionals are in charge of the bottom-up implementation of inclusive education. The actual implementation of inclusive education is carried out by educational professionals because these are the people who directly affect the opportunities offered students with disabilities. Therefore, the “human” level of implementation is critical and can result in negative consequences if executed poorly.

The CRPD establishes a specific obligation relating to the human resources needed for inclusive education. Authorities must take “appropriate measures to employ teachers, including teachers with disabilities, who are qualified in sign language and/or Braille, and to train professionals and staff who work at all levels of education.” General training measures are also addressed in the CRPD. Educational professionals including, but not limited to, administrative workers, social workers, school psychologists, teachers, and staff, need to be trained intensively in inclusive education both before and throughout their careers. This training should cover the theory and practice of inclusive education.

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359 European Agency for Development in Special Needs Education, (n 266), 20-22.
360 Ibid., 20.
361 Leonard Cheshire Disability, (n 358).
362 Baglieri and Shapiro, (n 109), 190.
363 CRPD, (n 99), Art. 24(4).
Educational professionals should learn how to convert the theories into practice. The training should link “disability awareness and the use of appropriate augmentative and alternative modes, means and formats of communication, educational techniques and materials” which will help support the individual needs of students with and without disabilities. This training should also include how to work in inclusive education systems, which teaching techniques to use, ways to accommodate students, individualised educational practice, and good pedagogical practices. Individualised educational practices are especially vital in training because these are at the core of realising inclusive education. Training in this area will allow educational professionals to meet the diverse needs of each child to help the child reach their full educational potential. Using the skills and methods learned in training, the educational professionals should adapt the curricula and materials to the needs of students with disabilities, offer reasonable accommodations and adjustments in the general education system, and generally provide an inclusive setting for all children to learn. Curricula planning is the task that teachers must perform to determine the type of subjects the students will learn, to find teaching methods that can enable students to learn, and to assess how the students are learning.

The compliance with CRPD obligations is needed at all levels within a State for inclusive education to be successful and to give each child, with and without disabilities, a chance to reach his or her fullest potential.

5.3 Section Conclusions

The CRPD spearheaded the human rights of people with disabilities through binding, international law. As part of its innovation, the CRPD determines that the right to education for all is actually the right to inclusive education. Education has been a human right and an obligation for State Parties to implement for many years, but now, as codified in the CRPD, this obligation has evolved into a duty to provide inclusive education. As inclusive education is effectively the way for people with disabilities to enjoy their right to education, the CRPD obliges State Parties to create an inclusive education system that supports the right to education for learners with disabilities. Inclusive education is not only beneficial to students with disabilities, though. All learners are diverse and will benefit from individualised educational practices which are essential to inclusive education.

365 Caton, (n 1), 16.
366 CRPD, (n 99), Art. 24(4).
367 Smith, ‘Preparing Educators for Inclusion,’ (n 255), 207-210, 212.
370 Bagliieri and Shapiro, (n 109), 185.
371 Human Rights Council, (n 51), para. 7.
The CRPD is clear regarding the obligation to implement inclusive education, and the CRPD Committee clarifies how State Parties should proceed in making inclusion in education for children with disabilities a reality. Some of the recommendations given by the CRPD Committee are general but others are very specific – giving clear guidance on how to fulfil the obligations. Generally, the obligations relate to policy making, resource allocation, implementation, and monitoring.

To recap, the CRPD obliges States Parties to adopt a policy to achieve inclusive education. To put this policy into practice, both financial and human resources have to be allocated. The “human” side of resource allocation includes providing for ongoing training for educational professionals. Implementation requires the barriers, both structural and attitudinal, to education for people with disabilities be removed. The removal of barriers allows education to be accessible for all children. Accessibility is the starting point for inclusive education. Part of accessibility is to create inclusive classrooms. Therefore, segregated, special educational systems, which do not meet the requirements for inclusive education, are inherently inaccessible and violate the right to inclusive education.

Once schools and facilities are made accessible, education must then adapt to the individual needs of students. That is where the obligation to provide reasonable accommodation and individualised support measures is actuated. Reasonable accommodations are a right and denial of such is considered discrimination.

States have further obligations. Having implemented the inclusive practices, the failures and successes of the implementation have to be monitored. Monitoring provides evidence of the progressive realisation of the right to inclusive education. Education is monitored through research, setting targets, indicators, and data collection. The obligation to monitor is clearly set out in the CRPD and cannot be ignored. 373

In developing or strengthening an inclusive education system, State Parties cannot be passive. The CRPD requires action and measures for the full realisation of the right to inclusive education. As the former Special Rapporteur of the Commission for Social Development for monitoring the implementation of the Standard Rules on the Equalization of Opportunities for Persons with Disabilities, Bengt Lindqvist, stated that

all children and young people of the world, with their individual strengths and weaknesses, with their hopes and expectations, have the right to education. It is not our education systems that have a right to certain types of children. Therefore, it is the school system of a country that must be adjusted to meet the needs of all children. 374

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373 CPRD, (n 99), Arts. 31-33.
Inclusive education for all is the solution for each diverse child to realise the right to education. It is not only a moral obligation to include all children with all learning diversities, but it is also a mandatory, international legal obligation. The CRPD mandates that inclusive education be ensured on all levels, and State Parties must not disregard the obligations to fully realise this right.

6. **Strategy for Change**

One tool that can be used to facilitate the implementation of inclusive education is strategic litigation. Strategic litigation uses the legal system and court judgments to accomplish change. Strategic litigation involves bringing court cases to enforce specific rights where the goal is not just to win the individual case for a complainant, but also to promote broader changes and have a wider effect on society and the law. Strategic litigation can be used to promote compliance with the obligations found in the CRC and CRPD to provide inclusive education. One should note that the CRC and CRPD are not directly enforceable before domestic courts in many jurisdictions, although domestic legislation implementing the Conventions can be relied on directly before such courts. However, in the Netherlands complainants can seek to rely directly on the rights found in the CRC and, once ratified, the CRPD, before Dutch courts. Where permitted, foreign cases that have furthered inclusive education in other jurisdictions can be used as persuasive precedent, i.e. as providing an example which a domestic judge could follow. Moreover, foreign cases can reveal examples of the kinds of arguments which have been successful in other jurisdictions.

Three key arguments can be used to challenge the use of segregated education before courts; namely that segregated education and unequal opportunity of education for children with disabilities amounts to discrimination; that denial of reasonable accommodation in education is a form of discrimination; and that children with disabilities have the right to a reasonable accommodation to allow them to pursue their education. These arguments, used in conjunction with the international obligations under the CRC and CRPD, can create a strong case for the enforcement of the right to inclusive education for children with disabilities.

Anti-discrimination is an immediately realisable right. As discussed above in the context of the ICESCR, CRC, and CRPD, discrimination in education is a violation of international law. The UNESCO Convention against Discrimination in Education defines discrimination in education as “any distinction, exclusion, limitation or preference which … has the purpose or effect of nullifying or impairing equality of treatment in education.” This definition can be relied upon when arguing against segregated education and the denial of reasonable accommodation to children with disabilities.

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376 Strategic litigation can only be used directly to enforce CRC and CRPD obligations if the domestic law allows it, i.e. if the Conventions acquire the status of domestic law once ratified. Domestic law in the Netherlands allows this after a convention has been ratified.
377 UNESCO Convention against Discrimination in Education, (n 151), Art. 1.
As a starting point, the European Committee of Social Rights has addressed the right to education for children with disabilities in the case of *Autism-Europe v. France*.378 The complainant in that case alleged that persons with autism were unable to benefit, as effectively as other citizens, from the right to education.379 The Committee noted that education should be aimed at developing the full personality and physical and mental capacities of children.380 In conclusion, the Committee found that students with autism in France could not exercise effectively their right to education because France had not achieved “sufficient progress in advancing the provision of education for students with autism.”381 This decision illuminates that States have a positive duty to fulfil the right to education of students with disabilities under the European Social Charter.

Segregated schooling can be regarded as a form of discrimination in education, which is in violation of an immediately realisable human right, namely the right to non-discrimination. Unequal treatment on the basis of disability is discrimination.382 Any distinction or exclusion that prejudices a child’s access to equal treatment in education – including separate schooling facilities and limited educational opportunities for a group of students – is discrimination.383 Separate educational facilities have been deemed inherently unequal.384 To separate children from others of a similar age “generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”385 The right to non-discrimination flows through the CRC and CRPD.386 State Parties to these conventions have an active duty to prevent and prohibit discrimination.387

Combining the arguments that segregation amounts to discrimination on the basis of disability and that it also denies children with disabilities equal access to education has already led to successes at the judicial level.388 The Supreme Court of Canada found that “when analysed in its social, historical and political context, the placement of a student with disabilities in a segregated classroom without his or her consent is discriminatory”.389 On the European level, in the case of *Mental Disability Advocacy Center (MDAC) v. Bulgaria*, in which children with disabilities were unable to access education,390 the European Committee on Social Rights held that segregated education constitutes discrimination and violates the right to education. More recently, the European Court of Human Rights (ECtHR) discussed segregated education and discrimination of Roma children in the case of *Horváth and Kiss v. Hungary*.391 The Court found that placing Roma children in a remedial, segregated school was a violation of the right

379 Ibid., para. 50.
380 Ibid., para 49.
381 Ibid., para. 54.
382 CRC, (n 99), Art. 2(1), 1 (b), (c); CRPD, (n 99), Preamble (b), Art. 2.
383 UNESCO Convention against Discrimination in Education, (n 151), Art. 1.
385 Ibid., 494.
386 CRC, (n 99), Art. 2; CRPD, (n 99), Preamble (b), Art. 2, Art. 3(b), Art. 4, Art. 5.
387 CRC, (n 99), Art. 2; CRPD, (n 99), Art. 5.
391 Mental Disability Advocacy Center (MDAC), (n 75).
to education and non-discrimination. The segregated, special schools “might have compounded [the children’s] difficulties and compromised their subsequent personal development instead of helping them integrate into ordinary schools and develop the skills that would facilitate life among the majority population.” Although the case of Horváth and Kiss centred on the segregation of Roma children from the mainstream education system, it is submitted that the arguments mentioned above can also be applied to children with disabilities. These few case examples illustrate how a variety of courts worldwide are holding that segregated education constitutes discrimination.

In the United Kingdom, where a segregated education system runs alongside an inclusive system, the courts have moved slightly away from the “best interest approach” to education for children with disabilities and towards a rights based approach. In the case of Bury Metropolitan Borough Council v SU, the Upper Tribunal (Administration Appeals Chamber) decided against the expert opinions which supported segregated schooling in the best interest of the plaintiff with a disability. The Court held that the child with disabilities could, in fact, be supported in the mainstream setting with reasonable accommodations and should, therefore, not be segregated.

Discrimination in education can also arise from other factors. In particular, schools must provide reasonable accommodations to children with disabilities to enable them to participate in education. To fail to do so where this is not justified on the grounds of a disproportionate burden constitutes discrimination. State Parties to the CRPD have the positive obligation to ensure that reasonable accommodation of the individual learner’s requirements is provided. Students with disabilities must be provided with reasonable accommodations, and the State must establish such a legal duty. The duty to provide for reasonable accommodations is immediately realisable as it falls within the obligation not to discriminate.

Reasonable accommodation in education entails providing the necessary and appropriate modifications and adjustments, that do not impose a disproportionate or undue burden, that enable children with disabilities to enjoy the right to education on an equal basis with others. State Parties to the CRPD are required to ensure reasonable accommodation for individuals with disabilities to enable

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392 Ibid., para. 128.
393 Ibid., para. 127.
395 Ibid., para. 31, 59.
397 CRPD, (n 99), Art. 24 (2)(c), (5).
399 CRPD, (n 99), Art. 2.
400 Ibid., Art. 2.
access to education. However, the obligation to provide individual reasonable accommodations is only activated if the general educational system is not accessible for a particular student. The courts in the following cases held that the educational authorities had to provide students’ with a reasonable accommodation. These judgments illustrate the positive impact of litigation in the area of reasonable accommodation for children with disabilities. In Canada, where inclusive education is becoming more and more embedded, the Supreme Court decision in Moore v. British Columbia (Education) held that schools must adhere to human rights obligations regarding education. Although inclusion is not yet the standard in Canadian education, the Court found that school districts must make accommodations to enable meaningful access to education for all children. When addressing how to provide accommodations, the Court noted, “[i]t is undoubtedly difficult for administrators to implement education policy in the face of severe fiscal limitations, but accommodation is not a question of ‘mere efficiency’, since ‘[i]t will always seem demonstrably cheaper to maintain the status quo and not eliminate a discriminatory barrier.’”

In Wynberg v. Ontario, the Court of Appeals for Ontario found that schools cannot use a “one-size fits-all” approach. Instead, children need individual accommodations. When looking at the type of accommodation requested, the Court noted that it “must weigh the salutary and deleterious effects of the measures... [and] whether the benefits achieved by means ... outweigh its deleterious effects.” The Court found that the limited resources should be distributed after weighing these effects. This approach is in line with the disproportionate burden test. The general conclusion of the Canadian cases discussed here is that accommodations must be made if they do not infringe on the rights of other students and that the benefits outweigh any negative effects. This conclusion, in fact, creates a limitation to the right to reasonable accommodations. However, the educational authorities cannot always use financial arguments to justify failing to make an accommodation. Financial arguments will not be successful unless making the accommodation would amount to a disproportionate burden, or, in the words of the Canadian courts would create a “deleterious effect” that would outweigh the benefits of accommodation.

In the United States, segregated education is widespread and inclusive education is far less common than in Canada. Case law in the United States has resulted in a test to determine whether a court must uphold the right to a reasonable accommodation for a student with disabilities. The test has two parts: whether education in the regular classroom can be achieved with support and accommodations and if not, whether the school has mainstreamed the child to the maximum extent possible. A child can only be educated in segregated, special education if it is established that the

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401 Ibid., Art. 24 (2) (c).
402 Moore, (n 388).
405 Ibid., para. 186.
406 Ibid., para. 188.
407 Ibid., para 186.
409 Daniel R.R, (n355), 1048.
child cannot receive education with accommodations and the school has already mainstreamed the child to the maximum extent possible.

The Federal Court of Appeals in Oberti v. Board of Education concluded that “Congress understood that a fundamental value of the right to public education for children with disabilities is the right to associate with nondisabled peers.” That case emphasised that the standard in the United States is to include children with disabilities in mainstream classes but that this standard can be defeated. In order to rebut the presumption of inclusion and reasonable accommodation, a school district must show either that the child’s disabilities are so severe that he or she will receive little or no benefit from inclusion; that he or she is ‘so disruptive as to significantly impair the education of other children’ in the class, or that the cost of providing an inclusive education will significantly affect other children in the district.

The Oberti court put the burden of proof on the education authorities to show why a student with disabilities could not be taught in an inclusive classroom with accommodations, instead of making the student prove why he or she could be taught there. Even though the curriculum may need to be modified to provide a student with a disability an appropriate education that would confer on him or her benefits and a meaningful experience, this modification alone “is not a legitimate basis upon which to justify excluding a child from such an experience.” If the school district is unable to prove that modifying the curriculum would be too costly, infeasible, or significantly interfere with the education of the other children in the inclusive class, the court should find that the modification and accommodation must be provided.

A further test relating to the right to education of students with disabilities was established by another United States Court of Appeals in Board of Education v. Ross. The Ross court held that for a student with a disability to be educated in a mainstream setting, the student had to prove that his or her mainstream education was or would be satisfactory or that, with the use of reasonable accommodations, it would be satisfactory. Although not clearly defined, “satisfactory education” takes into account the academic and non-academic factors of education. This court put the burden on the student to prove that his or her education in the mainstream school was satisfactory, instead of presuming that an inclusive setting was more beneficial. The two, slightly conflicting tests in Oberti and

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411 Ibid., 1402.
412 Ibid., 1403; See also Rowley v. Bd. of Education of the Hendrick Hudson Central School Dist., 458 U.S. 176 (1982), where the Court discussed that education for children with disabilities must be based on more than attendance in a school.
413 Ibid., 1403, See Roncker v. Walter, 700 F.2d 1058, 1063 (6th Cir. 1983), where the court found that it should determine whether the services which make the segregated placement superior could be feasibly provided in a non-segregated setting.
415 Ross, (n 414), 277.
Ross have not been challenged at the Supreme Court level, so neither is authoritative in the United States yet.

In the European context the Italian Constitutional Court has ruled on the right to a reasonable accommodation in education. The issue in this case was whether the school authorities could set a maximum time limit (number of hours) for the amount of support that children with disabilities could receive in the educational setting. The Constitutional Court held that not only does the Italian Constitution protect the right to education for children with disabilities, but that Article 24 of the CRPD requires an individualised approach to accommodation in education for children with disabilities. Therefore, the action of the school authorities in limiting accommodations and support was in violation of the law as interpreted in light of the CRPD.

The preceding cases reveal how litigation can be used to further the goal of inclusive education. The courts in question have found that certain aspects of inclusive education, including non-discrimination, accommodations, and accessibility, are fundamental rights worthy of protection.

7. Conclusions and Next Steps

Both the CRC and CRPD are important instruments which protect the rights of children with disabilities. The CRC and CRPD strengthen and augment each other. Although children with disabilities are protected by the CRC, the CRPD goes further and obliges and instructs State Parties to ensure that children with disabilities are able to access their rights. In particular, the right to education addressed in the CRC is reinforced by the CRPD. Together, the CRC and the CRPD create and reinforce a compelling and binding requirement for State Parties to implement inclusive education for children with disabilities. Inclusive education itself is the vehicle which allows children with disabilities equal access and opportunities for education. The push for inclusive education began before the adoption of the CRC, was included implicitly in the CRC, and was explicitly stated for the first time in the CRPD. As the CRPD is further implemented at the international and national levels, inclusive education will become more engrained in law and practice.

This report has set out the obligations on State Parties, policy makers, and educational professionals required under both the CRC and CRPD regarding inclusive education. Ratification of these conventions and implementation into the national law are first steps towards achieving inclusive education for all learners. Policy makers will then have a framework within which to formulate specific policy and allocate resources in order to fulfil their responsibilities in realising inclusive education.

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417 Ibid., 42.
Educational professionals have a more hands-on role in implementing inclusive education. Their tasks and efforts directly affect the lives and education of all learners and specifically children with disabilities.

Inclusive education will not be a simple makeover for many of the current education systems. Inclusion is not only integration. More than buildings have to be remodelled for inclusive education to succeed. An overhaul of the law, the education structures, the attitudes, and the teaching techniques may be needed. Of course, not every education system in every State Party is insufficient and non-inclusive. However, until every child with a disability is included and able to participate in education along with his or her peers, there remains work to be done.

One tactic that can be used to further the implementation of inclusive education is strategic litigation. Depending on the State law and setting, strategic litigation can be used to promote widespread changes in law and society. The right of children with disabilities to education is being violated through segregated education and unequal opportunities for education and by the denial of reasonable accommodation in education. Both segregated schooling and unjustified denial of reasonable accommodation amount to discrimination. Children with disabilities have the right to a reasonable accommodation in education, and this right must be respected. Although reasonable accommodations are a right, this right only becomes relevant if the general educational structures are not accessible for a particular student. The greater the degree of accessibility of the educational system and structures, the lesser the need should be for individual accommodations. Court judgments have been successful in addressing discrimination and guaranteeing reasonable accommodations in education for children with disabilities. Focusing on discrimination and reasonable accommodation alone will not guarantee inclusive education but can act as stepping stones in the legal arena towards inclusive education.

Overall, there has been a slow but positive trend towards fulfilling the legal obligations to implement inclusive education. Action at all levels is needed for the full realisation of that right. The obligations and strategies set out within this report, ranging from State Party level action to actions at the level of educational professionals, can contribute to achieving inclusive education. Dedication towards the implementation and fulfilment of these international, legal human rights obligations will help transition inclusive policy into an inclusive reality.
Bibliography

Primary Sources

International Law

Council of Europe, European Social Charter (Revised), ETS 163 (1996)


Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht (22-26 January 1997)


UNESCO Convention against Discrimination in Education. Paris (1960)


Cases

Al-Saadoon and Mufhdi v United Kingdom App no 61498/08 (ECtHR 2 March 2013)


Axel Walz C-63/09 ECJ (CJ) (6 May 2010)

Bd. of Educ. of Twp. High Sch. Dist. No. 211 v. Ross, 486 F.3d 267, 269 (7th Cir. 2007)


Council of Canadians with Disabilities VIA Rail. [2007] 1 S.C.R. 650


Horváth and Kiss v. Hungary App no 11146/11 (ECHR 29 January 2013)

ICJ Arbitral Award of 31 July 1989 (Judgment) [1991] ICJ Rep 53

Litwa v Poland App no 26629/95 (ECHR, 4 April 2000)

Loizidou v Turkey App no 15318/89 (ECHR, 23 March 1995)


Mental Disability Advocacy Center (MDAC) v Bulgaria, Complaint No. 41/2007, 3 June 2008 (European Committee of Social Rights)

Moore v. British Columbia (Education) [2012] SCC 61

Oberti v. Board of Education of the Borough of Clementon School District, 995 F.2d 1216-17 (3d Cir. 1993)


Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Advisory Opinion) ITLOS, Seabed Disputes Chamber (1 February 2011)

Roncker v. Walter, 700 F.2d 1058, 1063 (6th Cir. 1983)


SS ‘Lotus’ (Judgment) PCIJ Ser. A. no 10, 16 (1927)


Secondary Sources

Academic Sources


Craven, Mathew The International Covenant on Economic, Social and Cultural Rights A Perspective on its Development (Oxford University Press 1995)

Dörö, Oliver and Schmalenbach, Kristen (eds.), Vienna Convention on the Law of Treaties: a commentary (Springer 2012)


Fitzmaurice, Malgosia, ‘Dynamic (Evolutive) Interpretation of Treaties and the European Court of Human Rights’ in Alexander Orakhelshvili and Sarah Williams (eds), 40 Years of the Vienna Convention on the Law of Treaties (British Institute of International and Comparative Law 2010)


Giandrecco, Michael, ‘Foundational concepts and practices for educating students with severe disabilities’ in M. Snell & F. Brown (eds.) Instruction of students with severe disabilities 6th (Pearson Prentice Hall 2006)


Lansdown, Gerison, ‘It Is Our World Too!’ (Disability in Action 2001)


Pother, Dianne, ‘But It’s for Your Own Good’ in Margot Young et al., (eds.), Poverty: Rights, Social Citizenship, and Legal Activism. (ABC Press 2007)


Sbolic, Luigi, ‘Supplementary Means of Interpretation’ in Enzo Cannizzaro (ed.), The Law of Treaties: Beyond the Vienna Convention (Oxford University Press 2011)


Smith, Phil, ‘Preparing Educators for Inclusion – What We’re Doing Right, What We’re Doing Wrong’ in Phil Smith (ed.),Whatever Happened to Inclusion? The place of students with intellectual disabilities in education, (Peter Lang Publishing, Inc. 2010)

Stubbs, Sue, ‘Inclusive Education Where there are few resources’ (The Atlas Alliance 2008)


**Treaty Body General Comments and Statements**

Committee on Economic, Social and Cultural Rights, Statement: An evaluation of the obligation to take steps to the ‘maximum available resources’ under the Optional Protocol to the Covenant, E/C.12/2007/1 (10 May 2007)


Human Rights Committee, General Comment no 18, HRI/GEN/1/Rev.6, pp. 147 et seq. (1989)

United Nations Committee on the Rights of the Child, General Comment no 1, Article 29(1): The aims of education, CRC/GC/2001/1 (2001)

United Nations Committee on the Rights of the Child, General Comment no 5, General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6), CRC7GC72003/5 (2003)


**Treaty Body Concluding Observations**


CRC/C/GIN/CO/2 (2013)

CRC/C/15/Add.224 (2004)

CRC/C/GUY/CO/2-4 (2013)

CRC/C/HND/CO/3 (2007)

CRC/C/HUN/CO/2 (2006)

CRC/C/15/Add.115 (2000)

CRC/C/15/Add.228 (2004)


CRC/C/15/Add.90 (1998)


CRC/C/15/Add.125 (2000)

CRC/C/15/Add.213 (2003)

CRC/C/KAZ/CO/3 (2007)

CRC/C/15/Add.160 (2001)

CRC/C/15/Add.51 (1996)


**Reports**


Leonard Cheshire Disability, ‘Barriers to Education – A Note’


Lindqvist, Bengt, ‘Education as a fundamental right’ *Education Update*, (1999) 2(4)


Vernor Minoz Villalobos, ‘Address at the Opening of the UN Forum on Minority Issues’ (Geneva, 15–16 December 2008)

**Other Materials**

Ignacio Estrada (retrieved 15.05.2014 from <http://www-inst.eecs.berkeley.edu/~ee301/fa08/quotes.html>) accessed 10 July 2014

