

# Bringing The Right to Education into The 21<sup>st</sup> Century

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## ABSTRACT

*Education is not only foundational to children's development, it also helps children realize the full range of their human rights. Yet, the international law mandate on the right to education has changed little since 1948. This static state has left the right to education unfulfilled for millions of children. This Article argues that it is time to update the legal mandate on education, and in particular with respect to pre-primary and secondary education. The Article starts by explicating the limitations of the current mandate on the right to education and then evaluates whether so-called "soft law," or non-binding measures, may have helped fill the gaps in existing treaty law on education rights. The Article uses a combination of manual review and computational text analytics to examine discussions of education in the Concluding Observations of the Committee on the Rights of the Child from 1993 to 2020. The Committee's Concluding Observations evaluate States Parties' progress in meeting their obligations under the U.N. Convention on the Rights of the Child and, as such, serve as a primary vehicle for advancing the implementation of human rights. Finding that non-binding measures are insufficient in practice, the Article concludes that the international community needs to agree to an updated legal mandate on education that ensures all children have access to an equitable start, can complete secondary education, and can develop to their full potential.*

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## INTRODUCTION

Education is foundational to children's development and lifelong prospects. Education is also central to children's rights because it has a multiplier effect—that is, education helps situate children to secure a breadth of other rights during childhood and subsequently as adults.<sup>1</sup> Though the right to education is vital to children's healthy development and to the fulfillment of many other rights, human rights law's requirements regarding children's education have not evolved significantly since the adoption of the Universal Declaration of Human Rights in 1948. It is time for that to change.

This Article examines the two key aspects of the right to education—pre-primary/preschool<sup>2</sup> education and secondary education—under international human rights law. It highlights the weakness of States' obligations with respect to secondary education and the lack of express obligations regarding preschool. The Article then examines whether non-binding (or “soft law”) measures have filled the gaps in the mandate on the right to education. As a case study, the Article examines the reporting process under the U.N. Convention on the Rights of the Child (CRC),<sup>3</sup> the most comprehensive treaty on children's rights and the most widely-ratified human rights treaty.<sup>4</sup> This Article investigates the extent to which

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1. Jonathan Todres, *Making Children's Rights Widely Known*, 29 MINN. J. INT'L L. 109, 129 (2020); KATARINA TOMASEVSKI, HUMAN RIGHTS OBLIGATIONS IN EDUCATION: THE 4-A SCHEME 7 (2006).

2. Throughout, we use “preschool” and “pre-primary” interchangeably.

3. U.N. Convention on the Rights of the Child (CRC), Nov. 20, 1989, 44 U.N.T.S. 25. Similar to other human rights treaties, the CRC requires that states parties submit on a regular basis (within two years of ratification and every five years thereafter) “reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made on the enjoyment of those rights.” *Id.* at art. 44(1). States Parties reports must also “indicate factors and difficulties, if any, affecting the degree of fulfilment of the obligations under the present Convention [and] shall also contain sufficient information to provide the Committee with a comprehensive understanding of the implementation of the Convention in the country concerned.” *Id.* at art. 44(2).

4. THE OXFORD HANDBOOK OF CHILDREN'S RIGHTS LAW 1–2 (Jonathan Todres & Shani M. King eds., 2000).

the Committee on the Rights of the Child (CRC Committee), in its evaluation of States Parties' progress toward meeting their treaty obligations,<sup>5</sup> presses States to make progress on pre-primary and secondary education, thereby also advancing the mandate of children's rights law. By evaluating the outcomes of the reporting process—which is widely recognized as a central component of human rights law implementation<sup>6</sup>—we can assess whether non-binding measures are adequately advancing human rights law on education. We conclude that such soft law measures, while important, are insufficient and that the time has come for States to commit in a legally binding document to ensuring all children can access preschool and attend and complete secondary education so that they can develop to their full potential. Given the near-universal ratification of the CRC,<sup>7</sup> a new optional protocol to the CRC on the right to education could offer the greatest opportunity for a reinvigorated push for universal access to education for all children at all levels.<sup>8</sup>

### I. STATES' OBLIGATIONS ON THE RIGHT TO EDUCATION

The right to education has been recognized since the beginning of the modern international human rights movement. The Universal Declaration of Human Rights, the cornerstone of international human rights law, recognizes that

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5. *Concluding Observations, CHILD RIGHTS CONNECT*, <https://crrereporting.childrightsconnect.org/convention-on-the-rights-of-the-child-concluding-observations/#:~:text=What%20are%20the%20concluding%20observations,for%20every%20State%20under%20review> (Concluding Observations are issued at the conclusion of each review of a state party and they are “a public document, which indicates the progress achieved by the reviewed State, the Committee’s main areas of concern and recommendations to the State to improve the implementation of the Convention on the Rights of the Child”).

6. Benjamin Mason Meier & Yuna Kim, *Human Rights Accountability Through Treaty Bodies: Examining Human Rights Treaty Monitoring for Water and Sanitation*, 26 DUKE J. COMP. & INT'L L. 141, 155 (2015) (“Rather than a bureaucratic exercise, [the reporting] process creates opportunities for governments, NGOs, and civil society to learn from past reviews and engage in substantive debates regarding national priorities, successes, and obstacles in implementing human rights.”); Anne Gallagher, *Ending the Marginalization: Strategies for Incorporating Women into the United Nations Human Rights System*, 19 HUM. RTS. Q. 283, 306 (1997) (“The reporting system is the basic *raison d’être* of all treaty bodies and represents their best chance to affect the practices and attitudes of individual states.”).

7. Every U.N. Member State is party to the CRC, except the United States. *See Convention on the Rights of the Child: Status of Ratifications*, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg\\_no=IV-11&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-11&chapter=4&clang=_en) (last visited Dec. 16, 2022) (noting that there are 196 states parties to the CRC; the United States signed the treaty in 1995, but remains the only country yet to ratify the treaty).

8. There are currently three optional protocols to the CRC covering (1) the sale and sexual exploitation of children, (2) children in armed conflict, and (3) a communications procedure. *See* G.A. Res. 54/263, Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (May 25, 2000); G.A. Res. 54/263, Optional Protocol on the Involvement of Children in Armed Conflict (May 25, 2000); G.A. Res. 66/138, Optional Protocol on a Communications Procedure (Jan. 27, 2012).

“[e]veryone has the right to education.”<sup>9</sup> Subsequent treaties, including most notably the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the CRC, cemented the right to education in legally binding instruments.<sup>10</sup> Further highlighting the importance of education, other treaties—including the Convention on the Rights of Persons with Disabilities (CRPD), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), and Convention against Discrimination in Education—require that States eliminate discrimination in education.<sup>11</sup>

While this consistent recognition of the right to education is important, the obligation on States has changed little over the decades. From the adoption of the Universal Declaration in 1948 to this date, States’ foundational obligation has been to ensure that primary school is free and compulsory for all.<sup>12</sup> The ICESCR and CRC reiterate this mandate.<sup>13</sup> In contrast, there are weaker to non-existent express obligations on pre-primary and secondary education.<sup>14</sup> The Article takes each of these two issues in turn.

First, neither the CRC nor the ICESCR expressly mentions preschool or pre-primary education.<sup>15</sup> One might argue that education should be understood as a lifelong process and, thus, that preschool could be read into the general “right to education.” However, both treaties explicitly mention the other three stages of

9. G.A. Res. 217 (III)A, Universal Declaration of Human Rights (UDHR), art. 26(1) (Dec. 10, 1948).

10. International Covenant on Economic, Social and Cultural Rights (ICESCR), art. 13(2)(b), Dec. 16, 1966, 993 U.N.T.S. 3; CRC, *supra* note 3, art. 28(1)(b).

11. See Convention on the Rights of Persons with Disabilities, art. 24, Dec. 6, 2006, 2515 U.N.T.S. 3; Convention on the Elimination of All Forms of Discrimination Against Women, art. 10, Dec. 18, 1979, 1249 U.N.T.S. 1; G.A. Res. 2106 (XX); International Convention on the Elimination of All Forms of Racial Discrimination, art. 5(e)(v), Dec. 21, 1965, 660 U.N.T.S. 195; Convention Against Discrimination in Education, art. 1, Dec. 14, 1960, 429 U.N.T.S. 93. Further, the Convention Against Discrimination in Education includes the same mandate that is found in the ICESCR and CRC, requiring states parties “[t]o make primary education free and compulsory; make secondary education in its different forms generally available and accessible to all; make higher education equally accessible to all on the basis of individual capacity; assure compliance by all with the obligation to attend school prescribed by law;” *Id.* art. 4(a).

12. UDHR, *supra* note 9, art. 26(1) (“Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory.”); see also CRC, *supra* note 3, art. 28(1)(a).

13. ICESCR, *supra* note 10, art. 13(2)(a); CRC, *supra* note 3, art. 28(1)(a). See also Convention Against Discrimination in Education, *supra* note 11, art. 4(a).

14. The “right to education” includes all education that would enable the child to develop to their full potential. Based on evolving understanding of child development science, that should now be understood as including early childhood education (most often framed as a year of preschool), primary school education, and secondary school education.

15. While the ICESCR and CRC are silent on early childhood education, there are sporadic references in other international instruments. See *Report of the Special Rapporteur on the right to education, Koumbou Boly Barry*, U.N. General Assembly, U.N. Doc. A/77/324, ¶ 27 (Sept 2, 2022) (“At present, legal obligations under international human rights law to provide [early childhood care and education] are not explicit and are captured piecemeal in multiple instruments.”).

education: primary, secondary, and higher education. Their silence regarding preschool therefore casts doubt on its inclusion.<sup>16</sup> Moreover, the drafting history does not include any statements suggesting that pre-primary education was a consideration.<sup>17</sup> When these treaties were drafted, preschool enrollment was much lower,<sup>18</sup> and the body of literature on the science of child development and early childhood was less developed. Today, while enrollment in pre-primary education remains relatively low,<sup>19</sup> the science is clear on how important early childhood education is to not only the academic success of children but also more broadly to their healthy development.<sup>20</sup>

Second, although the CRC and ICESCR expressly address secondary education, the obligations on States Parties with respect to secondary education are weaker than those imposed for primary school education. The two treaties require only that States make secondary education “available and accessible” to all children.<sup>21</sup> For example, the CRC mandates that States Parties:

Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need.<sup>22</sup>

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16. ICESCR, *supra* note 10, art. 13(2); CRC, *supra* note 3, art. 28(1).

17. See Office of the U.N. High Commissioner for Human Rights, *Legislative History of the Convention on the Rights of the Child*, vols. I & II, HR/PUB/07/1 (Jun. 29, 2007). The only comments addressing preschool include a comment submitted by Norway that “[c]hildren, including children of preschool age, shall have full opportunity of play, social activities and recreation, as a means to ensure their full mental and physical development” and a comment submitted by Venezuela proposing an obligation on states to “Introduce free and compulsory primary education as early as possible, as well as overall care for the child of preschool age;” *Id.*, vol. II at 635, 648. In both cases, the proposed language did not make it into the final approved draft. *See id.*

18. See *School Enrolment, Preprimary (% gross)*, THE WORLD BANK <https://data.worldbank.org/indicator/SE.PRE.ENRR> (last accessed Dec. 18, 2023) (finding gross pre-primary school enrollment in 1990 was 29 percent when the CRC was adopted; and only 16 percent in 1970, four years after the ICESCR was adopted).

19. See UNICEF, *Early Childhood Education*, DATA.UNICEF.ORG (June 2023), <https://data.unicef.org/topic/early-childhood-development/early-childhood-education/> (“Globally, only around 4 in 10 children are attending early childhood education programmes”).

20. See UNICEF, *A World Ready to Learn: Prioritizing Quality Early Childhood Education* UNICEF GLOBAL REPORT, 8 (Apr. 2019), <https://www.unicef.org/media/57926/file/A-world-ready-to-learn-advocacy-brief-2019.pdf> (“Pre-primary education is an integral component of early childhood development, which refers to all the essential policies and programmes required to support the healthy development of children from birth to 8 years of age, including health, nutrition, protection, early learning opportunities and responsive caregiving.”). *See also* The Urban Child Institute, *Pre-K Matters: Children Are the Key to Our Community’s Economic Future*, <http://www.urbanchildinstitute.org/resources/policy-briefs/pre-k-matters> (visited Dec. 12, 2022).

21. See CRC, *supra* note 3, art. 28. *See also* UDHR, *supra* note 9, art. 26(1) (“Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.”)

22. CRC, *supra* note 3, art. 28(1)(b).

This mandate for secondary education, which falls short of requiring free secondary education for all children, reflects the state of the world at the time the CRC was drafted in the 1980s.<sup>23</sup> In 1989, when the CRC was adopted, only 51 percent of children of secondary school age were enrolled in school.<sup>24</sup> In addition, resource constraints in numerous countries, particularly in the Global South, made it likely that many States simply could not provide free secondary education to all children in the near term.<sup>25</sup> Specifically, many countries still had high numbers of children who did not complete primary school.<sup>26</sup> As such, increasing the minimum requirements originally set forth in the Universal Declaration may not have been a viable option more than thirty years ago. However, today there is broad consensus on the critical role that education beyond primary school can play in helping young people develop to their full potential and break the cycle of poverty.<sup>27</sup>

## II. THE NEED FOR LEGAL MANDATES TO EVOLVE

Now, more than three decades after the adoption of the CRC, it is widely recognized both that preschool/pre-primary education is vital to ensuring all children have a meaningful opportunity to benefit from schooling,<sup>28</sup> and that, conversely, having only a primary school education can significantly limit skill development, job prospects, lifetime earning potential, and other markers of

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23. The ICESCR's language has a stronger push for free secondary education, but neither the CRC nor the ICESCR actually mandate free secondary education. *See* ICESCR, *supra* note 10, art. 13(2)(b) ("Secondary education ... shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education").

24. UNICEF, *State of the World's Children 1989*, UN-iLibrary (Dec. 1989), <https://www.un-ilibrary.org/content/books/9789210597357/read>.

25. Office of the U.N. High Commissioner for Human Rights, *Legislative History of the Convention on the Rights of the Child*, Vol. II, at 634 (2007) (noting that Malawi expressed concerns about "the meaning of compulsory education in a country which has limited resources"); *see also id.* at 645 (noting that Bangladesh expressed concerns over the cost of "compulsory free education").

26. *See* UNICEF, *State of the World's Children, 1989*, at 100–101, <https://www.un-ilibrary.org/content/books/9789210597357/read> (finding that the "[m]edian percent of grade enrollment completing primary school: Very high U5MR (over 170) countries: 39%. . .High U5MR (95–170) countries: 65%. . .Middle U5MR (31–94) countries: 67%. . .Low U5MR (30 and under) countries: 95%." In contrast, "[s]econdary school enrollment ratio (M/F): Very high U5MR (over 170) countries: 18/8...High U5MR (95–170) countries: 39/27...Middle U5MR (31–94) countries: 56/56...Low U5MR (30 and under) countries: 83/82").

27. Joel E. Cohen, *Why We Need to Focus on Secondary Education*, WORLD ECONOMIC FORUM (Dec. 19, 2014), <https://www.weforum.org/agenda/2014/12/why-we-need-to-focus-on-secondary-education/>.

28. *See* UNICEF, *supra* note 20, at 11 ("Quality pre-primary education sets the stage for a positive transformation in learning outcomes throughout a child's lifetime. Successful students move more efficiently through the education system, which makes investing in quality early learning opportunities cost-effective, lessening the need for remedial efforts and resources to make up for lost learning"); *see also* Max Roser & Esteban Ortiz-Ospina, *Education Spending*, *Our World In Data* (2016), <https://ourworldindata.org/financing-education>.

socio-economic and human development.<sup>29</sup> In many cases, a primary school education alone does not break the cycle of poverty nor does it ensure that children will grow to their full potential.<sup>30</sup>

Although many countries have made important progress in terms of expanding pre-primary education<sup>31</sup> and increasing secondary school enrollment,<sup>32</sup> significant work remains to ensure every child can fully realize their right to education. In the absence of a strong legal mandate, governments may not take the steps necessary to secure the education rights of all children, from pre-primary through secondary education.

Therefore, human rights law, and specifically children's rights law, must evolve. In particular, the express mandate of children's rights law needs to reflect the current societal understanding of "education." Two important changes are necessary.

First, there needs to be a critical shift in our understanding of when genuine education—that is, education that enables children to develop to their full potential—begins. Both the CRC and the ICESCR, adopted more than thirty years and fifty years ago, respectively, enshrined that every individual has a right to education.<sup>33</sup> However, fifty, or even thirty, years ago, a meaningful "education" may have been understood as beginning with primary school. Since then, child

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29. See *Median Weekly Earnings \$606 for High School Dropouts, \$1,559 for Advanced Degree Holders*, U.S. BUREAU OF LABOR STATISTICS (2019), <https://www.bls.gov/opub/ted/2019/median-weekly-earnings-606-for-high-school-dropouts-1559-for-advanced-degree-holders.htm> (reporting that individuals who do not finish high school earn significantly less than those who do); see also Tim Stobierski, *Average Salary by Education Level* (Jun. 2, 2020) <https://www.northeastern.edu/bachelors-completion/news/average-salary-by-education-level/>.

30. See generally Adam M. Lavecchia, Philip Oreopoulos, Robert S. Brown, *Long-Run Effects from Comprehensive Student Support: Evidence from Pathways to Education 2–3* (2019), <https://docs.iza.org/dp12203.pdf>.

31. See *School Enrolment, Preprimary (% gross)*, THE WORLD BANK <https://data.worldbank.org/indicator/SE.PRE.ENRR> (showing an increase in pre-primary enrollment from 29% in 1990 to 61% in 2020); see also Department of Children, Equality, Disability, Integration and Youth, *Early Childhood Care and Education (ECCE) or Free Preschool*, GOV'T OF IRELAND (last updated Sep. 9, 2021), <https://www.gov.ie/en/publication/d7a5e6-early-childhood-care-and-education-ecce-or-free-preschool/> (explaining that the ECCE program is a free "universal two-year preschool" program). But see Alison Earle, Natalia Milovantseva & Jody Heymann, *Is Free Pre-primary Education Associated with Increased Primary School Completion? A Global Study*, 12 INT'L J. CHILD CARE & EDUC. POL'Y 13 (2018). <https://doi.org/10.1186/s40723-018-0054-1> (noting that "progress toward increasing pre-primary provision and enrollment has been slow and uneven. For example, while the global average pre-primary education gross enrollment rate reached 50% in 2011, it was only 18% in sub-Saharan Africa").

32. See *School Enrollment, Secondary (% gross)*, THE WORLD BANK, <https://data.worldbank.org/indicator/SE.SEC.ENRR> (in 2019, 76% of secondary school-aged children were enrolled globally, though the COVID-19 pandemic has eroded some of the progress made).

33. CRC, *supra* note 3, art. 28(1); ICESCR, *supra* note 10, art. 13(1).

development science has shown that early childhood development is critical, necessitating recognition that education starts before primary school.<sup>34</sup>

Second, there needs to be full recognition of the importance of secondary education to children's development. Both the CRC and the ICESCR suggest that States should progress toward and ultimately achieve free secondary school education.<sup>35</sup> While primary education is an essential building block, with its emphasis on literacy and other foundational skills, secondary education is necessary for people to thrive in the twenty-first century.<sup>36</sup> Secondary education can achieve several aims, including "preparing young people for productive employment, forming responsible citizens, selecting candidates for higher education, preparing students to become healthy parents, helping youth to develop socially, [and] teaching mathematics, science and social studies."<sup>37</sup> And the benefits of a secondary education are broad, as Bede Sheppard explains:

Children with [a] secondary education are more likely to find work as adults, earn more, and escape or avoid poverty. They are more likely to use modern technologies. The children of parents with a secondary education are more likely to benefit themselves from a secondary education. It can reduce childhood deaths because children with higher education levels are more likely to have a healthy diet and seek medical care, and girls with secondary education are less likely to have children early. High quality secondary education promotes resilience and healthy development in adolescents, and protects mental health.<sup>38</sup>

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34. See, e.g., Janell Ross & Amy Sullivan, *How Everything We Know About Early Childhood Has Changed Since Head Start Was Founded*, THE ATLANTIC (Apr. 18, 2014), <https://www.theatlantic.com/politics/archive/2014/04/how-everything-we-know-about-early-childhood-has-changed-since-head-start-was-founded/430833/> (discussing how thinking and understanding of education has evolved over time). In our discussion of preschool education, we do not insist that preschool education must occur outside the home. For many children, home-based learning provides appropriate opportunities for education and development that positions them well when starting primary school. However, other families and communities may lack the resources to provide similar opportunities. Therefore, while this article focuses on ensuring *universal access to preschool*, the specific form and content of early childhood education are beyond the scope of this article.

35. ICESCR, *supra* note 10, art. 13(2)(b) ("Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and *in particular by the progressive introduction of free education*" (emphasis added)); CRC, *supra* note 3, art. 28(1)(b) ("Encourage the development of different forms of secondary 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;" (emphasis added)).

36. Benjamin Alvarez, *Secondary Education: Critical Policy Issues*, INTER-AMERICAN DEVELOPMENT BANK, <https://publications.iadb.org/publications/english/document/Secondary-Education-Critical-Policy-Issues.pdf>

37. *Id.* at 6.

38. Bede Sheppard, *It's Time to Expand the Right to Education*, 40 NORDIC J. HUM. RTS. 96, 103 (2022).



Given that it often takes years to develop new international treaties or new optional protocols to existing treaties, and subsequently secure widespread ratification, one might assume that other steps short of a new treaty—that is, “soft law”—could be utilized to press countries to guarantee each child a free and compulsory education through secondary school.<sup>39</sup> Indeed, the international community agreed in 2015 through the Sustainable Development Goals (SDGs) that governments would “[b]y 2030, ensure that all girls and boys complete free, equitable and quality primary and secondary education leading to relevant and effective learning outcomes.”<sup>40</sup> That goal is unlikely to be met, especially given the impact of the COVID-19 pandemic.<sup>41</sup>

Without a legal mandate that ensures access to preschool/pre-primary education and free secondary education for all children, child advocates and children themselves are left to rely on human rights treaty bodies and other institutions to press governments to make progress on children’s education rights. The Committee on the Rights of the Child (CRC Committee)—the treaty body tasked with overseeing implementation of the CRC—is well positioned to play a leading role in urging governments to make free preschool education accessible to all and to secure free secondary education for all children.<sup>42</sup> Ultimately, if States and international monitoring bodies like the CRC Committee are acting as gap-fillers by effectively reading governments’ obligations under human rights law as requiring universal preschool and free and compulsory secondary education, then additional treaty law might not be necessary. In other words, the soft law work of treaty bodies like the Committee on the Rights of the Child might obviate the need to expand the hard law mandate on the right to education.

To test this hypothesis, we used a combination of manual review and computational techniques to examine the text of the Concluding Observations issued by the CRC Committee. Treaty bodies, including the CRC Committee,

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39. See *id.* at 111–12 (discussing a range of soft law options). While some might argue for a new General Comment on the right to education, our prior research suggests that the impact of General Comments may be limited. Charlotte S. Alexander & Jonathan Todres, *Evaluating the Implementation of Human Rights Law: A Data Analytics Research Agenda*, 43 U. PA. J. INT’L L. 1, 49–51 (2021).

40. U.N. Dep’t of Econ. and Soc. Aff., Sustainable Development Goals, *Target 4.1* (2015), <https://sdgs.un.org/goals/goal4>.

41. See *Urgent, Effective Action Required to Quell the Impact of COVID-19 on Education Worldwide*, THE WORLD BANK (Jan. 22, 2021), <https://www.worldbank.org/en/news/immersive-story/2021/01/22/urgent-effective-action-required-to-quell-the-impact-of-covid-19-on-education-worldwide>; *The Global Education Crisis Is Even Worse Than We Thought—Here’s What Needs to Happen*, WORLD ECONOMIC FORUM, (Jan. 16, 2022), <https://www.weforum.org/agenda/2022/01/global-education-crisis-children-students-covid19/> (highlighting educational impacts such as school closings or reductions in hours during the pandemic).

42. General Comments provide another avenue to move human rights law forward, though they have not gone so far as to call for free secondary education. See, e.g., U.N. Committee on the Rights of the Child, *General Comment No. 20 on the Implementation of the Rights of the Child During Adolescence*, ¶ 68 U.N. Doc. CRC/C/GC/20, (2016) (“States are encouraged to introduce widely available secondary education for all as a matter of urgency”).

issue Concluding Observations after every review of a State Party,<sup>43</sup> assessing the State's progress in implementing and complying with the treaty's obligations and outlining a set of recommendations for the State to better secure the rights of individuals subject to its jurisdiction.<sup>44</sup> While there are other stages in the reporting process—e.g., the List of Issues and in-person dialogue with the State Party—when the Committee may raise any issue, including education, we focus on the Concluding Observations because they represent the final, formal evaluation of the State and the Committee's official recommendations to the State Party. Our review of the Concluding Observations evaluated the extent to which the CRC Committee (a) has addressed access to preschool/pre-primary education and (b) has pressed States Parties to move toward and achieve free secondary education for all children. Our dataset includes the Concluding Observations of the Committee on the Rights of the Child from 1993, the first year the CRC Committee began issuing Concluding Observations, through 2020. A total of 558 Concluding Observations were included in our dataset, which we assembled by downloading all available CRC Concluding Observations from the United Nations' publicly available treaty bodies database.<sup>45</sup>

We then used the search terms listed in Appendix A to identify every instance in which the CRC Committee discussed preschool/pre-primary education, and the terms listed in Appendix B to identify every instance in which the CRC Committee discussed secondary education, during this 28-year period (1993–2020). Specifically, we wrote code using the R programming environment and the text analytics package, *Quanteda*, to extract a window of forty words on either side of each search term, allowing for variation in the capitalization of search terms and hyphenation. We developed the search term list by gathering potential search terms and their synonyms from a review of the Concluding Observations and from other expert knowledge. We chose the word window size through an iterative process of experimenting with windows of various sizes. We then manually classified each word window as pertaining to one of six “codes” list below for pre-primary education and eight “codes” listed below for secondary education, representing different topics of discussion by the CRC Committee.<sup>46</sup>

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43. Each state party to the CRC is required to submit a report to the Committee within two years of ratification and every five years after that. *See* CRC, *supra* note 3, art. 44(1). The reporting process effectively builds in a mandatory monitoring and evaluation process into all major human rights treaties. Alexander & Todres, *supra* note 39, at 5.

44. Alexander & Todres, *supra* note 39, at 5–6, 10–13.

45. *U.N. Treaty Body Database*, U.N. OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en) (last visited June 15, 2022). For this study, we did not include Concluding Observations issued by the Committee under the first two Optional Protocols to the CRC (on the sale of children, child prostitution, and child pornography, and on the involvement of children in armed conflict, respectively), as we presume that those documents typically would not include detailed discussion of pre-primary or secondary education.

46. Each reference was coded manually and separately by two research assistants and then checked manually by Jonathan Todres.

Our findings suggest that the lack of express language in the CRC on preschool/pre-primary education has led to it being overlooked at times, and the soft obligation with respect to secondary education has not translated into a strong push for free, universal secondary education.

### III. FINDINGS

#### A. *Preschool*

Over the 28-year period covered by our set of Concluding Observations, we identified 1,033 references to preschool or early childhood education (Table 1; see Appendix A for the list of search terms), including both substantive references to the topics and miscellaneous references/false positives, as noted below. These appeared in 332 Concluding Observations, or 59 percent of the Concluding Observations issued by the CRC Committee during our period of study. As explained above, we manually categorized these references to early childhood and preschool education as follows:

#### Codes:

1. Committee calls for universal preschool/pre-primary education or for all children or equivalent.
2. Committee calls for more preschool/pre-primary education, but short of universal, just a general push for more.
3. Committee notes the inadequacy of current preschool coverage or lack of access to it for many children.
4. Committee commends progress by the state (*e.g.*, noting increased preschool enrollment or noting the opening of new preschool facilities).
5. Committee discusses early childhood care without express discussion of preschool/pre-primary education (early childhood care might mean education but does not necessarily, as it could also be daycare or other childcare arrangements).
6. Miscellaneous references, including false positives (*e.g.*, names of programs, or when “early childhood” is an adjective for other issues, such as “early childhood diseases”).

When we remove the miscellaneous references (*i.e.*, code 6),<sup>47</sup> there are 677 references across 296 Concluding Observations over the 28-year period (Table 1).

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47. For examples of Code 6 mentions of “preschool” and “early childhood” not related to education, see U.N. Committee on the Rights of the Child, *Concluding Observations on the Combined 2nd to 4th Periodic Reports of Guinea-Bissau*, U.N. Doc. CRC/C/GNB/CO/2–4, ¶ 53(e) (2013) (“Introduce targeted interventions to prevent the undernourishment of infants and preschool children...”); U.N. Committee on the Rights of the Child, *Concluding Observations on the Combined 5th and 6th Periodic Reports of Bosnia and Herzegovina*, U.N. Doc. CRC/C/BIH/CO/5–6, ¶ 34(a) (2019) (“Allocate adequate human and financial resources to fully implement policies and

Further, when we remove references to early childhood care and focus only on preschool or early childhood *education*, we find that from 1993 through until the end of 2020, the CRC Committee has expressly addressed access to, or enrollment in, preschool education in 49 percent of its Concluding Observations (275 COs, Table 2, codes 1–4 any). In other words, in just over half of its Concluding Observations, the CRC Committee did not address access to preschool or early childhood education.

**Table 1. References to Preschool or Early Childhood Education**

| Code                              | Number of References | Percent of References (N=1033) | Number of COs with Reference | Percent of COs (N=558) |
|-----------------------------------|----------------------|--------------------------------|------------------------------|------------------------|
| 1 (universal pre-primary)         | 30                   | 3%                             | 30                           | 5%                     |
| 2 (more pre-primary)              | 225                  | 22%                            | 186                          | 33%                    |
| 3 (lack of coverage)              | 199                  | 19%                            | 162                          | 29%                    |
| 4 (commends progress)             | 100                  | 10%                            | 88                           | 16%                    |
| 5 (early childhood care)          | 123                  | 12%                            | 78                           | 14%                    |
| 6 (miscellaneous/false positives) | 356                  | 34%                            | 189                          | 34%                    |

**Table 2. Concluding Observations with Substantive Reference to Preschool or Early Childhood Education (Clustered by Reference Type)**

| Code Cluster  | Number of COs with Reference | Percent of COs (N=558) |
|---|------------------------------|------------------------|
| 1–4 any (any preschool education)                                       | 275                          | 49%                    |
| 5 (early childhood care)  | 78                           | 14%                    |
| 5 only; no 1–4 (early childhood care <i>but no</i> preschool education) | 21                           | 4%                     |
| 5 and 1–4 (early childhood care <i>and</i> preschool education)         | 57                           | 10%                    |
| 1–4; no 5 (preschool education <i>but no</i> early childhood care)      | 218                          | 39%                    |

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programmes that make available high-quality early childhood health services for all children in the State party”).

Moreover, in only about 5 percent of Concluding Observations did the CRC Committee expressly call for States Parties to make preschool/pre-primary education universal or to ensure access to all children (those references appeared in thirty Concluding Observations) (Table 1, code 1).<sup>48</sup> In addition, 33 percent of Concluding Observations<sup>49</sup> include a call for more preschool education but stop short of urging coverage for all.<sup>50</sup> Further, in 29 percent of Concluding Observations, the CRC Committee notes that coverage is inadequate or there are access issues for some children.<sup>51</sup>

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48. See, e.g., U.N. Committee on the Rights of the Child, *Concluding Observations on the Combined 3rd and 4th Periodic Reports of Uzbekistan*, adopted by the Committee at its 63rd session, U.N. Doc. CRC/C/UZB/CO/3–4, ¶ 60(c) (2013) (“Provide high quality accessible and preferable free early childhood care and education for all children up to school age”); U.N. Committee on the Rights of the Child, *Concluding Observations on the Initial Report of Nauru*, U.N. Doc. CRC/C/NRU/CO/1, ¶ 51(a) (2016) (“The Committee recommends that the State party: Further strengthen its efforts to improve access to quality education for all children including preschool, secondary and higher education”); U.N. Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention, Concluding Observations: Burundi*, U.N. Doc. CRC/C/BDI/CO/2, ¶ 65(b) (2010) (“Make quality early childhood education and preschool accessible to all children including children growing up under poor and disadvantaged living conditions”).

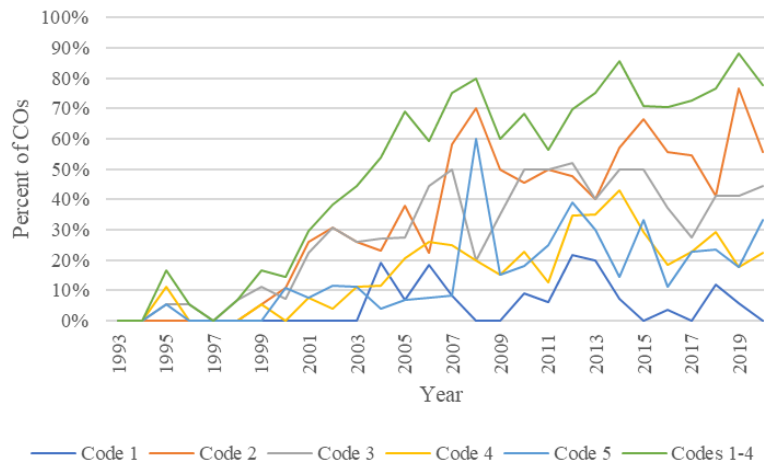
49. In reporting that 33 percent of Concluding Observations have a code 2 reference (more preschool), and 29 percent have a code 3 reference (lack of coverage)—see accompanying text *infra* notes 49 and 51—we note that some Concluding Observations contain references to both. As explained earlier, 49 percent of Concluding Observations have a reference to any of codes 1–4, meaning that some Concluding Observations include discussion of inadequate coverage and a call for more preschool.

50. See, e.g., U.N. Committee on the Rights of the Child, *Concluding Observations on the Combined 3d and 4th Periodic Report of Portugal*, U.N. Doc. CRC/C/PRT/CO/3–4, ¶ 40 (2014) (“The Committee further recommends that the State party strengthen the system of family benefits and child allowances and other services such as counselling services and accessible early childhood education and care to support families affected by the current economic crisis, single-parent families, families with two or more children, families with children with disabilities, and families living in persistent poverty”); U.N. Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention, Concluding Observations: Sierra Leone*, U.N. Doc. CRC/C/SLE/CO/2, ¶ 65(b) (2008) (“Expand access to education including early childhood education to all regions of the State party”); U.N. Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention, Concluding Observations: Ecuador*, U.N. Doc. CRC/C/15/Add.262, ¶ 60(a) (2005) (“the Committee recommends that the State party: Increase expenditure on education in particular in primary pre-primary and secondary education”).

51. See, e.g., U.N. Committee on the Rights of the Child, *Concluding Observations on the Combined 5th and 6th Periodic Reports of Panama*, U.N. Doc. CRC/C/PAN/CO/5–6, ¶ 33(a) (2018) (“the Committee is concerned about Slow progress in educational coverage at the preschool and basic levels”); U.N. Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention, Concluding Observations: Hungary*, U.N. Doc. CRC/C/HUN/CO/2, ¶ 49 (2006) (“the Committee is concerned that the quality of schools suffers from regional disparities and that access to preschools is reportedly limited in regions where poverty is high and Roma population is dominant”); U.N. Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention, Concluding Observations: Australia*, U.N. Doc. CRC/C/AUS/CO/4, ¶ 76 (2012) (“the Committee is concerned that the majority of early childhood care and education in the State party is provided by private profit-driven institutions resulting in the services being unaffordable for most”).

We also investigated the distribution of the CRC Committee's comments about preschool education across time, as one might speculate that Committee references to early childhood education would increase as the science of child development advanced and became more widely known. Two notable jumps in references to early childhood education occurred—around 2001 and 2006/2007. From around 2001 on, the Committee's focus on preschool education has fluctuated between 30% to 88% of Concluding Observations issued in any given year (*see* codes 1–4, designated by the green line in Figure 1). The data suggest a general increase up until about 2007, followed by fluctuations since then, though consistently appearing in the majority of Concluding Observations in each year.

**Figure 1. Percent of Concluding Observations with Substantive Reference to Preschool or Early Childhood Education, Per Year**



We next examined the CRC Committee's discussion of preschool/pre-primary education across regions. While there are variations in the total number of Concluding Observations in each region that mention preschool education, these variations are driven in large part by the differences in the underlying number of States Parties (and thus, Concluding Observations issued) across regions (*e.g.*, there were 114 Concluding Observations issued for states parties in Sub-Saharan Africa over the 28-year period, while fourteen were issued for Central Asia). Given this variation, we tracked the percentage of Concluding Observations per region, rather than absolute number, that mentioned pre-primary or early childhood education. We found a high of 86 percent in Central Asia (that made any mention of access to, and enrollment in, pre-primary education; Table 3, codes 1–4) and a low of 34 percent of Concluding Observations in Northern,

Southern, and Western Europe.<sup>52</sup> Table 3 shows some differences across regions, but additional research would be needed to identify possible reasons for this variation. As an initial matter, we note that other than for States Parties in Central Asia, the CRC Committee addressed pre-primary education in 34 to 61 percent of Concluding Observations in each region.

**Table 3. Percent of Concluding Observations with Substantive Reference to Preschool or Early Childhood Education, Per Subregion**

| Subregion                          | Code 1 | 2   | 3   | 4   | 5   | 1-4* |
|------------------------------------|--------|-----|-----|-----|-----|------|
| Central Asia                       | 7%     | 57% | 50% | 21% | 21% | 86%  |
| Eastern Asia                       | 0%     | 29% | 8%  | 17% | 21% | 50%  |
| Eastern Europe                     | 0%     | 42% | 35% | 23% | 16% | 55%  |
| Latin America and the Caribbean    | 3%     | 24% | 26% | 20% | 20% | 46%  |
| Northern Africa                    | 12%    | 35% | 41% | 18% | 6%  | 53%  |
| Northern America                   | 33%    | 33% | 33% | 0%  | 33% | 33%  |
| Northern, Southern, Western Europe | 5%     | 23% | 24% | 11% | 10% | 34%  |
| Oceania                            | 9%     | 45% | 36% | 18% | 6%  | 61%  |
| South-eastern Asia                 | 3%     | 52% | 31% | 10% | 17% | 55%  |
| Southern Asia                      | 7%     | 36% | 32% | 7%  | 18% | 46%  |
| Sub-Saharan Africa                 | 5%     | 39% | 30% | 18% | 13% | 57%  |
| Western Asia                       | 12%    | 31% | 31% | 15% | 10% | 48%  |

Note: Northern America includes only one country (Canada) for which there were only 3 total Concluding Observations. The United States is not a party to the CRC, and Mexico is grouped in the Latin America and the Caribbean region.

\* Represents percent of Concluding Observations with substantive reference to one or more of codes 1-4.

Thus, the overall picture presented by our analysis of the text of Concluding Observations indicates that while pre-primary education is expressly addressed more often than it was in the very early days of the CRC, it is still mentioned in only about half of the reviews of State Parties, albeit in the majority of Concluding Observations in recent years. In addition, we found that calls for universal pre-school education are infrequent (5 percent of Concluding Observations). We return to these findings below in connection with our discussion of the need for an expanded hard law mandate on education, given the sparsity of the Concluding Observations' soft law pronouncements.

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52. While we include the Northern America region in Table 2, we did not count it in this narrative, because it includes only one country (Canada) for which there were only 3 total Concluding Observations. The United States is not a party to the CRC, and Mexico is grouped in the Latin America and the Caribbean region.

### B. Secondary Education

Over the 28-year period covered by our set of Concluding Observations, we identified 695 references to secondary education. These appeared in 321 Concluding Observations, or 57.5 percent of the Concluding Observations issued by the CRC Committee in that period. As explained above, we manually categorized these references to secondary education as follows:

**Codes:**

1. Committee expressly calls for, or commends, free secondary education
2. Committee expressly calls more broadly for free primary and secondary education
3. Committee notes fee-related barriers (*e.g.*, school fees, costs of textbooks)
4. Committee notes non-fee related barriers, low enrollment, drop-out rates, and similar factors (*e.g.*, inadequate access for kids with disabilities, etc.; inadequate numbers of facilities or teachers)
5. Committee urges removal of various fees or more resources to address costs
6. Committee calls for other measures to improve enrollment (*e.g.*, reduce drop-out rates, improve access, etc.)
7. Committee commends progress by the state (short of free universal coverage)
8. Miscellaneous references, including false positives (*e.g.*, other mentions unrelated to access or enrollment, such as a call for human rights education in secondary schools).

When we remove references unrelated to access to and enrollment in secondary education (*i.e.*, code 8),<sup>53</sup> 528 references to secondary education remain across 275 Concluding Observations over the 28-year period. That is, the CRC Committee has expressly addressed access to, or enrollment in, secondary education in 49.3 percent of its Concluding Observations from the date it started issuing them through the end of 2020. This means that in just over half of the Concluding Observations it has issued, the Committee did not address access to secondary education.

Focusing on the 528 references that address access to and/or enrollment at the secondary education level, we found that fewer than 9 percent of those references expressly called for States Parties to make secondary education free for

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53. For examples of Code 8 mentions of “secondary education” not related to this study, see U.N. Committee on the Rights of the Child, *Concluding Observations: Norway*, U.N. Doc. CRC/C/15/Add.263, ¶ 16 (Sep. 21, 2005) (“The Committee regrets in this regard that human rights is only taught in schools as an optional subject in upper secondary education”); U.N. Committee on the Rights of the Child, *Concluding Observations on the Fourth Periodic Report of Eritrea*, U.N. Doc. CRC/C/ERI/CO/4, ¶ 59(d) (Jul. 2, 2015) (“Ensure that secondary school students do not have to undertake obligatory military training”).



all children (Table 4, codes 1 and 2).<sup>54</sup> Those references appeared in forty-six Concluding Observations, meaning that in only 8 percent of the Concluding Observations did the CRC Committee expressly call on States Parties to ensure free secondary education.

Roughly 45 percent of the references to secondary education addressed barriers to secondary education (Table 4, codes 3 and 4), although only 4 percent of those references expressly addressed financial barriers (Table 4, code 3).<sup>55</sup> Finally, 35 percent of the CRC Committee's references to secondary education involved calling for the removal of barriers to secondary education (Table 4, codes 5 and 6), though only 3 percent of these references called on States Parties to address/remove financial barriers (Table 4, code 5).

**Table 4. Substantive References to Secondary Education**

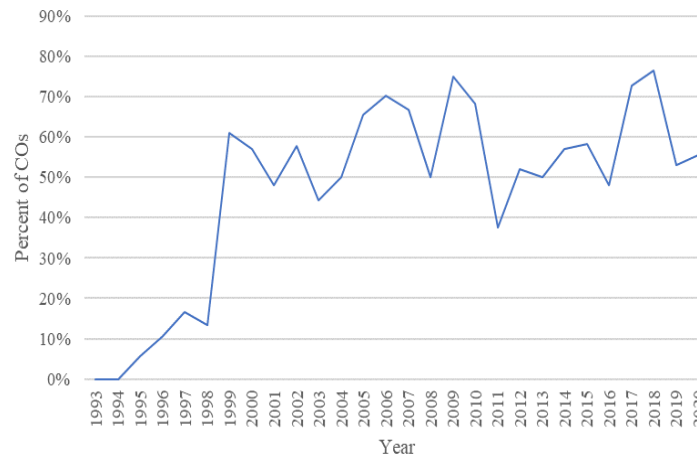
| Code                               | Number of References | Percent of References (N=528) | Number of COs with Reference | Percent of COs (N=558) |
|------------------------------------|----------------------|-------------------------------|------------------------------|------------------------|
| 1 (free secondary)                 | 13                   | 3%                            | 12                           | 2%                     |
| 2 (free primary and secondary)     | 34                   | 6%                            | 34                           | 6%                     |
| 3 (financial barriers)             | 22                   | 4%                            | 21                           | 4%                     |
| 4 (other barriers, low enrollment) | 215                  | 41%                           | 171                          | 31%                    |
| 5 (removal of fees)                | 17                   | 3%                            | 17                           | 3%                     |
| 6 (other measures)                 | 170                  | 32%                           | 135                          | 24%                    |
| 7 (commends progress)              | 57                   | 11%                           | 50                           | 9%                     |

54. See, e.g., U.N. Committee on the Rights of the Child, *Concluding Observations: Uzbekistan*, U.N. Doc. CRC/C/UZB/CO/2, ¶ 56 (Jun. 2, 2006) (“The Committee welcomes the information that public education is free and compulsory until the completion of secondary education”); U.N. Committee on the Rights of the Child, *Concluding Observations on the Combined 3rd to 5th Periodic Reports of Nepal*, U.N. Doc. CRC/C/NPL/CO/3–5, ¶ 58 (Jul. 8, 2016) (“Committee welcomes the constitutional provisions on free and compulsory basic education and free secondary education”); U.N. Committee on the Rights of the Child, *Concluding Observations: Kenya*, U.N. Doc. CRC/C/KEN/CO/2, ¶ 58(b) (Jun. 21, 2007) (“Undertake measures to provide secondary education free of cost”).

55. See, e.g., U.N. Committee on the Rights of the Child, *Concluding Observations on the Combined 3rd and 4th Periodic Reports of Slovenia*, U.N. Doc. CRC/C/SVN/CO/3–4, ¶ 60 (Jul. 8, 2013) (“the Committee is also concerned that the passage of the Fiscal Balance Act in 2012 has resulted in the introduction of new education fees and removal of scholarships that were available for students at secondary level school”); U.N. Committee on the Rights of the Child, *Concluding Observations: Trinidad and Tobago*, U.N. Doc. CRC/C/TTO/CO/2, ¶ 59(c) (Mar. 17, 2006) (expressing concern over “[t]hat fact that approximately one third of the school-aged population do not attend secondary school”).

We also looked at the distribution of the CRC Committee's comments about secondary education across time. One might speculate that in the early years of the CRC, the Committee's work would have focused more on primary education, as many countries still needed to make significant progress to meet the obligation to provide free and compulsory primary education to all children.<sup>56</sup> Accordingly, we might expect that references to, and discussion of, secondary education would increase over time. One might also posit that the adoption of the SDGs, which included the target of free secondary education by 2030, would have led to a push on secondary education after 2015, the year the SDGs were issued.<sup>57</sup> However, other than the low rates of references to secondary education in Concluding Observations from 1993 to 1998, the CRC Committee's focus on secondary education has fluctuated between 38 to 76 percent of Concluding Observations issued in any given year (see Figure 2), suggesting no obvious time trend or post-SDGs effect.

**Figure 2. Percent of Concluding Observations with Substantive Reference to Free Secondary Education, Per Year**



56. See *Primary Completion Rate, Total (% of relevant age group)*, UNESCO INSTITUTE FOR STATISTICS, THE WORLD BANK, <https://data.worldbank.org/indicator/SE.PRM.CMPT.ZS> (last visited Nov. 20, 2023) (reporting an 81% completion rate in 1989, the year the CRC was adopted). The overall rate somewhat masks the fact that in certain regions, far fewer children attended and completed primary school at the time the CRC was adopted; See, e.g., *Primary Completion Rate, Total (% of relevant age group) – Sub-Saharan Africa*, UNESCO INSTITUTE FOR STATISTICS, <https://data.worldbank.org/indicator/SE.PRM.CMPT.ZS?locations=ZG> (last visited Nov. 20, 2023) (finding 54 percent of children in the region completed primary school in 1989, the year the CRC was adopted).

57. See *The 17 Goals, 4: Quality Education*, THE GLOBAL GOALS (2015), <https://www.globalgoals.org/goals/4-quality-education/> (Target 4.1 of the SDGs calls for free primary and secondary education, while Target 4.2 calls for states to “[b]y 2030, ensure that all girls and boys have access to quality early childhood development, care and pre-primary education so that they are ready for primary education.”).

We then examined the CRC Committee’s discussion of secondary education across regions. As with pre-primary education, while there are variations in the total number of Concluding Observations in each region that mention secondary education, these differences are driven in large part by the variations in the underlying number of States Parties (and thus Concluding Observations issued) across regions. Tracking the percentage of Concluding Observations per region that mentioned access to or enrollment in secondary education, we find a high of 64 percent in Central Asia and a low of 31 percent in Northern, Southern, and Western Europe.<sup>58</sup> Table 5 shows some differences across regions, suggesting the CRC Committee might be more likely to address secondary education when reviewing States Parties from the Global South. However, further research would be needed to test that proposition. As a preliminary matter, we note that even in regions of the Global South, where the CRC Committee may be more likely to address access to secondary education, it does so in fewer than two-thirds of its Concluding Observations for those regions.

**Table 5. Percent of Concluding Observations with Substantive Reference to Secondary Education, Per Subregion**

| Subregion                          | Code 1 | 2   | 3   | 4   | 5   | 6   | 7   | 1-7* |
|------------------------------------|--------|-----|-----|-----|-----|-----|-----|------|
| Central Asia                       | 7%     | 7%  | 14% | 29% | 0%  | 14% | 21% | 64%  |
| Eastern Asia                       | 0%     | 4%  | 8%  | 25% | 0%  | 38% | 0%  | 42%  |
| Eastern Europe                     | 10%    | 10% | 0%  | 19% | 3%  | 13% | 3%  | 45%  |
| Latin America and the Caribbean    | 1%     | 8%  | 1%  | 37% | 2%  | 29% | 16% | 60%  |
| Northern Africa                    | 0%     | 0%  | 6%  | 24% | 6%  | 29% | 12% | 35%  |
| Northern America                   | 0%     | 0%  | 0%  | 0%  | 0%  | 0%  | 0%  | 0%   |
| Northern, Southern, Western Europe | 1%     | 5%  | 4%  | 21% | 0%  | 10% | 8%  | 31%  |
| Oceania                            | 0%     | 12% | 9%  | 36% | 12% | 27% | 12% | 55%  |
| South-eastern Asia                 | 0%     | 0%  | 0%  | 28% | 0%  | 21% | 10% | 41%  |
| Southern Asia                      | 7%     | 0%  | 0%  | 36% | 0%  | 36% | 14% | 61%  |
| Sub-Saharan Africa                 | 3%     | 9%  | 5%  | 39% | 8%  | 33% | 4%  | 61%  |
| Western Asia                       | 2%     | 4%  | 4%  | 31% | 0%  | 21% | 6%  | 48%  |

Note: Northern America includes only one country (Canada) for which there were only 3 total Concluding Observations. The United States is not a party to the CRC, and Mexico is grouped in the Latin America and the Caribbean region.

\* Represents percent of Concluding Observations with substantive reference to one or more of codes 1–7.

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58. While we include the Northern America region in Table 2, we did not count it in this narrative because it includes only one country (Canada) for which there were only 3 total Concluding Observations. The United States is not a party to the CRC, and Mexico is grouped in the Latin America and the Caribbean region.

Finally, we grouped some of our more granular coding into broader categories, enabling investigation of the frequency with which the CRC Committee addressed clusters of related topics (Table 6). In doing so, we found that the Committee's Concluding Observations call for free secondary education (either specifically, or generally with respect to all levels of education) in 8 percent of Concluding Observations (Table 6, codes 1 and 2). With respect to only the Concluding Observations, in which the CRC Committee addresses access to or enrollment in education, the Committee calls for free secondary education (again, either specific to secondary education, or in a general call for free education) in 17 percent of Concluding Observations.

Considering all 558 Concluding Observations, the CRC Committee addresses barriers in 32 percent of Concluding Observations and calls on States Parties to address and remove specific barriers in 26 percent of cases (Table 6).

**Table 6. Concluding Observations with Substantive Reference to Secondary Education (Clustered by Reference Type)**

| Cluster                                 | Sum of COs with any cluster mention | Percent of COs w/ code mention (N=275) | Percent of all COs (N=558) |
|---|-------------------------------------|--|----------------------------|
| 1 and 2 (all free secondary references) | 46                                  | 17%                                    | 8%                         |
| 3 and 4 (all barriers/low enrollment)   | 180                                 | 65%                                    | 32%                        |
| 5 and 6 (calls for progress)            | 147                                 | 53%                                    | 26%                        |
| 7 (commends progress)                   | 50                                  | 18%                                    | 9%                         |

Note: the totals in the first data column of this table add up to more than 275 because it is possible for some Concluding Observations to have more than one reference to secondary education that fit, for example, code 3 and code 5.

#### IV. DISCUSSION

Our findings indicate that the CRC Committee engages States Parties on the issues of pre-primary and secondary education in about half of its Concluding Observations.<sup>59</sup> In addition, it expressly calls for universal preschool/pre-primary education in about 5 percent of Concluding Observations and free secondary education in about 8 percent of Concluding Observations. We also found in selected cases that the CRC Committee acknowledged the SDGs' standard of free secondary education, but stopped short of expressly pressing governments to meet that goal.<sup>60</sup>

59. This does not preclude the possibility that the CRC Committee raised the issues of pre-primary and secondary education either in the List of Issues or in the public session with the State Party, but as the Concluding Observations represent the treaty body's official assessment of the State Party and its formal recommendations, we focus on the Concluding Observations.

60. See, e.g., U.N. Committee on the Rights of the Child, *Concluding Observations on the Combined 3d to 5th Periodic Reports of Bulgaria*, U.N. Doc. CRC/C/BGR/CO/3-5, ¶ 49 (Nov. 21,

While we can determine when the CRC Committee speaks to pre-primary and secondary education and what it addresses or urges States Parties to do, this research does not explain why the Committee makes these choices. For example, the CRC Committee might choose not to address secondary education in States Parties that already have universal or near-universal secondary school enrollment.<sup>61</sup> In other instances, the CRC Committee may choose to prioritize other children's rights violations it assesses as more pressing. As our research did not extend to assessments of all 196 States Parties' on-the-ground progress on pre-primary and secondary education, we cannot evaluate specific choices at this

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2016), <https://www.ohchr.org/en/documents/concluding-observations/crcbgrco3-5-concluding-observations-combined-third-fifth>. The Committee acknowledges the SDGs mandate and helpfully makes tailored recommendations to ensure children in marginalized communities have better access, but it does not call on the government to provide *free* education:

[W]ith reference to Sustainable Development Goals 4.1 and 4.2 on ensuring that, by 2030, all girls and boys complete free, equitable and quality primary and secondary education and have access to quality early childhood development, care and pre-primary education, the Committee recommends that the State party:

- (a) Further strengthen its efforts to improve access to quality education in rural areas and in small towns, including access to preschool and secondary and higher education;
- (b) Develop programmes with monitoring and evaluation mechanisms to reduce dropout rates;
- (c) Facilitate the participation and inclusion of Roma children in education at all levels—including preschool education—raise awareness of teachers and staff of psychological and pedagogical counselling centres about the history and culture of Roma people and ensure the use of non-verbal and culturally sensitive tests;
- (d) Ensure the full enjoyment of the right to education by asylum-seeking children, regardless of their status, length of stay or residence, on equal footing with all other children in the country.

*Id.* ¶ 49; see also U.N. Committee on the Rights of the Child, *Concluding Observations on the Initial Report of Nauru*, U.N. Doc. CRC/C/NRU/CO/1, ¶ 51 (Oct. 28, 2016), <https://www.ohchr.org/en/documents/concluding-observations/crcnruc1-concluding-observations-committee-rights-child-initial>, in which the Committee again highlights the SDGs, but does not call on the State to ensure or make progress toward free pre-primary or secondary education:

[T]aking note of targets 4.1 and 4.2 of the Sustainable Development Goals to ensure that by 2030, all girls and boys complete free, equitable and quality primary and secondary education, and have access to quality early childhood development, care and pre-primary education, the Committee recommends that the State party:

- (a) Further strengthen its efforts to improve access to quality education for all children, including preschool, secondary and higher education;
- (b) Develop programmes, along with monitoring and evaluation of such programmes, to reduce dropout rates;
- (c) Ensure the full enjoyment of the right to education by asylum-seeking children on an equal basis with all other children in the country;
- (d) Establish campaigns within schools to prevent bullying and violence against all children.

*Id.* ¶ 51.

61. According to UNESCO, approximately 57 percent of States have introduced free secondary education. See *Sustainable Development Goals: 4.1.7 Number of years of (a) free and (b) compulsory primary and secondary education guaranteed in legal frameworks*, UNESCO INSTITUTE FOR STATISTICS, <http://data.uis.unesco.org/>.

stage. However, given the foundational nature of education, we believe the low rate at which pre-primary and secondary education are discussed (in only about half of the CRC Committee's Concluding Observations) highlights a potential gap and opportunity. That is, if international law does not have an express requirement to make pre-primary education available to all and does not mandate free secondary education, and the Committee on the Rights of the Child is not regularly pressing for these measures, then there is limited pressure on States to make progress on pre-primary or secondary education. In light of this potential gap, there is an opportunity to review and strengthen efforts to advance children's education rights at the pre-primary and secondary school level, specifically through reconsideration of the mandate on education in human rights law.

As we have noted in prior research,<sup>62</sup> the treaty bodies, including the CRC Committee, typically use diplomatic language in their Concluding Observations. The use of diplomatic language raises two potential issues. First, one might speculate that a call to remove certain barriers to education is intended as a diplomatic push toward universal free secondary education or pre-primary education. However, because the CRC Committee does not consistently articulate that pre-primary education is encompassed in the right to education, or that the expectation is free secondary education, or it only calls for universal pre-primary education or free secondary education in a small number of Concluding Observations (5 and 8 percent of COs, respectively), it is hard to argue that States are being pressed to secure *free* secondary education for every child or that preschool is being recognized as a right for all children.

Second, it is important to recognize that the CRC Committee's Concluding Observations have multiple audiences in addition to governments. Accordingly, the use of more subtle language, rather than expressly pushing States to implement free preschool or free secondary education, might leave children and civil society advocates with weaker language to draw upon when lobbying governments to make progress on children's education rights.

Overall, this review of the CRC Committee's Concluding Observations highlights that without a legal mandate, it is more challenging for both the CRC Committee and non-governmental organizations to press States to make progress on human rights.<sup>63</sup> Therefore, soft law, or non-binding measures, may not be

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62. Alexander & Todres, *supra* note 39 at 55–57 (“Indeed, although diplomatic criticisms that express “concern” or “deep concern” might resonate with government officials from the relevant states parties, they may fall short of conveying, with sufficient clarity, the level of urgency that NGOs and local communities rely on when seeking to “mobilize shame” and press governments to improve their human rights practices.”); René Provost, *Anne Bayefsky's The UN Human Rights [Treaty] System in the 21st Century*, 47 MCGILL L.J. 693, 694 (2002) (book review) (noting that across the human rights treaty bodies, the “committees’ concluding observations are always framed in tame diplomatic language no matter how egregious the violations of human rights . . .”); Cosette D. Creamer & Beth A. Simmons, *The Proof is in the Process: Self-Reporting Under International Human Rights Treaties*, 114 AM J. INT’L L. 1, 31 (2020) (“Since confrontation and harsh exhortation are likely to lead to backlash, treaty bodies are often careful to maintain a respectful posture toward states parties, using diplomatic and increasingly technical language.”).

63. Although it is possible for the Committee to make recommendations beyond the legal mandate of the CRC (*e.g.*, the Committee has addressed child marriage in its Concluding

adequate to fill the gap in substantive international human rights law on education rights. Rather, further progress on education might require strengthening the human rights law mandate on education.

## V. ADDRESSING THE RESOURCES QUESTION

In calling for human rights law on education to evolve, we recognize the concern that resource constraints in certain countries would make an enhanced mandate on pre-primary or secondary education unattainable.<sup>64</sup> Although resource limitations must be considered, we do not believe they should prevent the law from evolving. We offer four considerations in response to this concern.

First, from a pragmatic perspective, any change to the legal mandate on education rights to include access to pre-primary education and free secondary education—like all economic, social, and cultural rights—will impose an obligation of “progressive realization” that, in the case of the CRC, requires States to use the “maximum extent of available resources.”<sup>65</sup> While this flexible standard has been criticized for allowing States too much leeway,<sup>66</sup> it should alleviate concerns that States would be expected to achieve full compliance immediately upon acceptance of a new legal mandate.<sup>67</sup> However, by undertaking a *legal* obligation, States would be expected to show demonstrable progress toward free pre-primary and secondary education, and in doing so, the mandate can spur full realization of this right more quickly than is currently occurring.<sup>68</sup>

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Observations, even though the issue is not covered in the CRC), the absence of a legal mandate leaves the Committee with less of a basis for making such recommendations.

64. Such concerns are not new; when the CRC was drafted in the 1980s, developing countries expressed concerns about an immediate mandate on economic, social, and cultural rights, leading to incorporation of the progressive realization standard for economic social and cultural rights in Article 4 of the CRC. See “Considerations 1989 Working Group (1989)”, in SHARON DETRICK ET AL., THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: A GUIDE TO THE “TRAVAUX PRÉPARATOIRES” 155 (1992) (reporting that the delegations of Brazil, India, Venezuela, Libya, and Algeria opposed deletion of the words “in accordance with their available resources” due to concerns over limited resources).

65. See CRC, *supra* note 3, art. 4 (“With 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 co-operation.”). On progressive realization, see, for example, Office of the United Nations High Commissioner for Human Rights, *Frequently Asked Questions on Economic, Social and Cultural Rights* 13–14 (Dec. 2008), <https://www.ohchr.org/sites/default/files/documents/publications/factsheet33en.pdf>.

66. See KATHARINE G. YOUNG, THE FUTURE OF ECONOMIC AND SOCIAL RIGHTS 654–83 (2019).

67. Many States’ compliance on civil and political rights, which are immediate obligations not tied to States’ available resources, is imperfect at best, yet that does not prevent States from accepting the mandate and pursuing compliance.

68. See, e.g., Douglass Cassel, *Does International Human Rights Law Make a Difference*, 2 CHI. J. INT’L L. 121, 128 (2001) (“Because international human rights law is expressed as law, it generates increased expectations of compliance. This gives human rights claimants stronger ground to demand compliance....”). Improvements in human rights is, in reality, often driven by multiple factors, but human rights law plays an important role. As Cassel writes:

Second, existing mandates on economic, social, and cultural rights establish a clear role for the international community to support the realization of rights of individuals in low-resource countries. For example, the CRC mandates that “States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, *within the framework of international co-operation.*”<sup>69</sup> Therefore, we believe a legal mandate for free secondary education or for universal pre-primary education could help provide the impetus for the international community to coalesce around the goal of securing education for all children.<sup>70</sup>

Third, the international community has agreed through the SDGs to push for free secondary education.<sup>71</sup> In this regard, even amidst ongoing concerns about resource limitations, the international community has recognized the critical nature of ensuring access to pre-primary and free secondary education. If States support these goals, then we believe it is appropriate that they demonstrate their commitment to this obligation by accepting a legal mandate.<sup>72</sup>

Fourth, all rights, including civil and political rights, require resources to be realized.<sup>73</sup> For example, voting rights do not simply impose negative

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Where rights have been strengthened the cause is usually not so much individual factors acting independent—whether in law, politics, technology, economics, or consciousness—but a complex interweaving of mutually reinforcing processes. What pulls human rights forward is not a series of separate, parallel cords, but a “rope” of multiple, interwoven strands. Remove one strand, and the entire rope is weakened. International human rights law is a strand woven throughout the length of the rope. Its main value is not in how much rights protection it can pull as a single strand, but in how it strengthens the entire rope.

*Id.* at 123. In addition, a legal mandate could open the door to more effective monitoring of the “progressive realization” standard, including through the use of such tools as human rights budget analysis. *See, e.g.,* OLIVIER DE SCHUTTER, THE FUTURE OF ECONOMIC AND SOCIAL RIGHTS 527–623 (2019); Fundar, Int’l Human Rights Internship Program & Int’l Budget Project, *Dignity Counts: A Guide to Using Budget Analysis to Advance Human Rights* (2004), <https://internationalbudget.org/wp-content/uploads/Dignity-Counts-A-Guide-to-Using-Budget-Analysis-to-Advance-Human-Rights-English.pdf>.

69. CRC, *supra* note 3, art. 4.

70. *See, e.g., Global Campaign for Education, STRATEGIC FOCUS AREAS: FINANCING EDUCATION*, <https://campaignforeducation.org/en/what-we-do/strategic-focus-areas> (last visited Dec. 15, 2023).

71. *See supra* note 57, establishing “free, equitable and quality primary and secondary education” for all children by 2030 as a goal.

72. Moreover, States are already obligated to ensure there is no discrimination in implementation of education rights. Jonathan Todres, *Rights Relationships and the Experience of Children Orphaned by AIDS*, 41 U.C. DAVIS L. REV. 417, 467 (2007) (“although poorer countries may take time to progressively implement education rights, they may not tolerate discrimination at any stage in the implementation of these or other economic, social, and cultural rights”).

73. *See* Jonathan Todres, *Making Children’s Rights Widely Known*, 29 MINN. J. INT’L L. 109, 134 (2020) (“All rights—from voting rights to health rights—require resources to fully realize”); *see also* Joy Gordon, *The Concept of Human Rights: The History and Meaning of Its Politicization*, 23 BROOK. J. INT’L L. 689, 712 (1998) (footnote omitted) (“Civil and political rights are neither self-



obligations on States to refrain from interfering with voting, but they also require States to allocate resources to building and maintaining election infrastructure. Resource limitations are not an acceptable excuse for falling short on the implementation of civil and political rights because the value of civil and political rights is widely recognized.<sup>74</sup> Given the lifelong consequences of lack of access to education, it is time to recognize the true value of education and give higher priority to ensuring every child's education rights.

#### CONCLUSION

The law on education rights has changed relatively little since 1948 when the Universal Declaration was adopted. Without a strong legal mandate on free secondary education, progress has lagged. And without any express mandate for universal pre-primary education in treaty law, it is too easily overlooked. Given the importance of education for the fulfillment of all human rights, we believe it is time for the international community to make guaranteeing full education rights for all a priority. The international community can demonstrate that priority by committing to a legal mandate that guarantees every child access to education from the pre-primary stage through secondary school.<sup>75</sup> Such a mandate could be implemented through a variety of vehicles. However, given the near-universal support for the Convention on the Rights of the Child,<sup>76</sup> a new optional protocol on the right to education offers the greatest potential for enabling every individual to secure their right to an education and to be able to reach their full potential.<sup>77</sup>

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generating nor free of costs; they 'need legislation, promotion and protection and this requires resources.'").

74. See, e.g., CRC, *supra* note 3, art. 4 (imposing an immediate and full obligation on states parties with respect to civil and political rights).

75. A number of children's rights experts have similarly called for an expanded legal mandate. See, e.g., Human Rights Watch, *A Call to Expand the International Right to Education* (Jun. 6, 2022), <https://www.hrw.org/news/2022/06/06/call-expand-international-right-education>; see also UNESCO, TASHKENT DECLARATION AND COMMITMENTS TO ACTION FOR TRANSFORMING EARLY CHILDHOOD CARE AND EDUCATION (Nov. 16, 2022), <https://www.unesco.org/sites/default/files/medias/fichiers/2022/11/tashkent-declaration-ecce-2022.pdf> (expressing support for "[e]xamin[ing] the feasibility, suitability and necessity of enshrining the right to ECCE in an international normative instrument").

76. Every country in the world is party to the CRC, with one exception—the United States. U.N. Treaty Collection, Convention on the Rights of the Child, *Status of Ratifications*, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=_en) (last visited July 5, 2022) (196 countries have ratified or acceded to the CRC; only the United States has not).

77. An optional protocol could also address other vital issues in education that were not addressed in the CRC, ICESCR, or other human rights law to date including, importantly, access to preschool education. See Sheppard, *supra* note 38, at 17–18. We recognize that the CRC applies only to children, and therefore in the short-term, an optional protocol to the CRC would not reach adults who were not able to realize their right to pre-primary or secondary education. However, the almost-universal acceptance of the CRC makes it a powerful tool for advancing education.

**Appendix A: Preschool/Early Childhood Education Search Terms**

| <b>Search Terms</b>   |
|---|
| early childhood (includes early-childhood, early childhood) |
| early-development   |
| early development   |
| early-developmental   |
| early developmental   |
| early-year  |
| early-years   |
| early year  |
| early years   |
| preprimary  |
| preprimaries  |
| pre-primary   |
| pre-primaries   |
| preschool   |
| preschools  |
| pre-school  |
| pre-schools   |
| preschooler   |
| preschoolers  |
| pre-schooler  |
| pre-schoolers   |

**Appendix B: Secondary Education Search Terms**

| <b>Search terms</b>             |
|---------------------------------|
| elementary and secondary        |
| elementary as well as secondary |
| gymnasium                       |
| gymnasiums                      |
| high school                     |
| high schooler                   |
| high schoolers                  |
| high schools                    |
| highschool                      |
| high-school                     |

| <b>Search terms</b>          |
|------------------------------|
| high-school                  |
| highschooler                 |
| high-schooler                |
| high-schooler                |
| highschoolers                |
| high-schoolers               |
| high-schoolers               |
| highschools                  |
| high-schools                 |
| high-schools                 |
| lycee                        |
| lycees                       |
| lyceum                       |
| lyceums                      |
| primary and secondary        |
| primary as well as secondary |
| secondary education          |
| secondary level              |
| secondary school             |
| secondary schools            |
| secondary-education          |
| secondary-level              |
| secondary-school             |
| secondary-schools            |
| senior high                  |
| senior highs                 |
| senior-high                  |
| senior-highs                 |