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Author(s): Sarah Horsch Carsley and S. Garnett Russell

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EXPLORING THE ENFORCEABILITY OF REFUGEES' RIGHT TO EDUCATION: A COMPARATIVE ANALYSIS OF HUMAN RIGHTS TREATIES

SARAH HORSCH CARSLEY AND S. GARNETT RUSSELL

ABSTRACT

Three international treaties form the backbone of refugees' legal right to education: the UN Convention on the Rights of the Child, the 1951 Convention Relating to the Status of Refugees, and the International Covenant on Economic, Social, and Cultural Rights. Nevertheless, a wide gap persists between these favorable international laws and the actual school enrollment of refugee children. This paper presents an empirical analysis of the so-called policy-practice gap in refugee education in order to answer two fundamental questions: (1) What enforcement mechanisms are present in the three international treaties that form the backbone of refugees' right to education? (2) How do these enforcement mechanisms differ from the enforcement mechanisms in four other international human rights treaties that do not focus specifically on refugees or education? The authors find that the three treaties that address refugees' right to education are some of the least enforceable in international human rights law. We posit that this finding may be explained by the historic lack of priority given to economic, social, and cultural rights in international law and argue that the unenforceability of the right to an education contributes to the policy-practice gap in refugee education in a direct and significant way.

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INTRODUCTION

Under international law, all refugee children have the legal right to education, yet only 63 percent of refugee children worldwide attend primary school and only 24 percent attend secondary school (UN High Commissioner for Refugees 2019). Refugees' binding legal right to education is firmly rooted in three international human rights treaties, of which every UN member state has ratified or acceded to at least one: the UN Convention on the Rights of the Child (CRC), the 1951 Convention Relating to the Status of Refugees (Refugee Convention), and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).¹ Because they have been widely ratified, these three treaties, which contain the most comprehensive expressions of refugees' right to education, form the backbone of those rights under international law.² Furthermore, unlike nonbinding declarations or policy documents such as the Universal Declaration of Human Rights (UDHR), the New York Declaration for Refugees and Migrants (NY Declaration), and the Global Compact on Refugees, these three treaties represent binding commitments under international law. As such, the ratifying countries can be held accountable if they violate the provisions of the treaty, at least in theory.³ However, despite the strong legal protections provided by these treaties, refugee students' school enrollment rates are abysmal compared to those of their nonrefugee peers.⁴ Recent studies in the field of education in emergencies (EiE) have revealed an extensive policy-practice gap in refugee education (Mendenhall, Russell, and Buckner 2017; Buckner, Spencer, and Cha 2017; Dryden-Peterson 2016), and researchers in the field have begun to explore the complex reasons for this disparity.

1 The United States is now the only UN member nation that has failed to ratify the CRC. Although the US has not yet ratified the CRC or the ICESCR and is therefore not bound to the terms of those treaties, its ratification of the 1951 Refugee Convention/1967 Protocol does give refugee children within its borders a legally binding right to a primary education. Therefore, between the CRC on the one hand and the Refugee Convention on the other, all current UN member nations—including the US—are covered by an international treaty that grants refugee children the legally binding right to a primary education.

2 Other binding laws also grant certain refugees the right to education. At the international level, these laws include the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Rights of Persons with Disabilities, and the Convention on the Elimination of All Forms of Racial Discrimination. At the regional level, they include the African (Banjul) Charter on Human and Peoples' Rights. We acknowledge the importance of these laws within the education in emergencies landscape but do not consider them part of the backbone of refugees' right to education because they either have not been widely ratified or only extend the right to education to a select group of refugees.

3 Some scholars argue that the UDHR has entered international customary law due to its widespread acceptance over the last 70 years and has thereby acquired binding legal status, but this argument is more theoretical than pragmatic, as most nations only accept select portions of the UDHR. It is unlikely that heavily polarized and politicized issues, such as the right to education as it applies to refugees, would be acknowledged as a portion of the UDHR that has entered international customary law (see Hannum 1998).

4 While 91 percent of children worldwide are enrolled in primary school and 84 percent are enrolled in secondary school, only 63 percent of refugee children are enrolled in primary school and 24 percent in secondary school (UNHCR 2019).

We hypothesize that refugees' right to education is less enforceable than other human rights enshrined in international law. We explore this hypothesis by conducting a content analysis that systematically reviews and compares the enforcement provisions of the Refugee Convention, CRC, and ICESCR with those of four other international human rights treaties that do not specifically focus on refugees or education: the Convention on the Elimination of Discrimination Against Women (CEDAW), the Convention on the Elimination of Racial Discrimination (CERD), the International Covenant on Civil and Political Rights (ICCPR), and the Convention Against Torture (CAT). We find that the laws granting refugees the right to education in the three foundational treaties are some of the least enforceable international human rights laws in existence. We contend that the inability to enforce refugees' right to education under international law is an intrinsic weakness that contributes to the policy-practice gap in refugee education. In presenting this finding, we provide an analysis that is missing from the current literature in the fields of education, sociology, and law.

This article contributes empirical evidence to further understanding of the policy-practice gap in refugee education and attempts to reconcile the unambiguous legal rights that exist on paper with the negligible compliance rates in practice. We focus on what we believe is a key reason for the policy-practice gap: the unenforceability of the CRC, Refugee Convention, and ICESCR. We define unenforceability as the inability to enforce a law that has already been enacted, due to the absence or inadequacy of enforcement mechanisms in the legislation. Our research addresses two fundamental questions: (1) What enforcement mechanisms are present in the three international treaties that form the backbone of refugees' right to education? (2) How do the enforcement mechanisms in these three treaties differ from those in the four other international human rights treaties that do not specifically focus on refugees or education?

We employ neo-institutional theory, which asserts that globalization has contributed to the spread of cultural norms across the world (Meyer et al. 1997), to explain two distinct phenomena that arise in our study. This theory helps us understand how the phenomenon of certain language, such as that used in the UDHR, is diffused almost identically into international, regional, and local law in vastly different cultures around the globe. This isomorphism of language and ideas helps us conceptualize the importance of the similarity (or dissimilarity) of specific enforcement provisions used by the seven international human rights treaties we analyze here (see Meyer et al. 1997). The second phenomenon, the concept of decoupling—that is, the disconnect between intention and practice (Meyer and Rowan 1977; Bromley and Powell 2012)—contributes to our discussion

on the disparity of refugees' legal rights on the one hand, which are so optimistically protective, and the actual school enrollment figures of refugee children on the other hand, which are so decidedly grim.

We use the concept of decoupling to approach the policy-practice gap in refugee education from a new angle. Rather than attributing the gap to various problems that have prevented the law from trickling down to the implementation level (see, e.g., Schriewer 1990; Brunsson 2002), we argue that the law itself hampers implementation, thereby contributing extensively to the gap. Although a substantial body of prior research has investigated the general enforceability of human rights treaties (see, e.g., Hathaway 2002, 2007; Hafner-Burton, Tsutsui, and Meyer 2008; Essary and Theisner 2013; Koh 1996; McCrudden 2015), this study is one of the first to empirically investigate the enforceability of refugees' right to education.⁵ In this article, we focus exclusively on the provision of formal education, as that is what international treaties specifically refer to (see Appendix 1).

This article proceeds as follows. In the second section, we show how international law regulates the education of refugees and discuss the strengths and weaknesses of current regulations. In the third section, we discuss the literature from the fields of law, sociology, and education. In the fourth section, we discuss neo-institutional theory, isomorphism, and decoupling. The final three sections set out our methodology, findings, and discussion.

INTERNATIONAL LAW AND REFUGEE EDUCATION

At present, three international treaties form the backbone of refugees' right to education and provide the legal basis for the EiE field.⁶ These three treaties—the CRC, Refugee Convention, and ICESCR—have been widely ratified, are legally binding in all ratifying nations or States Parties, and contain the most comprehensive expression of refugees' right to education.⁷ Like all international human rights treaties, these three are essentially contracts signed and ratified by countries around the world, which thereby committed to abide by the terms of

⁵ A handful of other papers or reports, such as the “UN Special Rapporteur on the Right to Education,” address the subject of enforcing refugees' right to education; however, these papers either contain little more than a tangential reference to enforceability or are not empirical. As an example of the former, see the report on urban refugees by Mendenhall et al. (2017). As an example of the latter, see the paper by Willems and Jonas (2017) that contains certain legal remarks about enforcing refugees' right to education under international law.

⁶ As mentioned in footnote 2, other international and regional laws also grant refugees the right to education.

⁷ “States Parties” refers to all entities that have ratified a given treaty.

the contracts (Henkin et al. 2009). Before signing on the proverbial dotted line and committing to the terms of the contract, a State Party has the opportunity to make certain exceptions; this is typically to ensure that ratifying the treaty will not create a conflict with their existing domestic laws (Henkin et al. 2009). In international human rights law, these exceptions are known as Reservations, Understandings, and Declarations, and they are published along with the ratifying nation's signature in the UN annals (Chung 2016). With or without such exceptions, the treaties are theoretically binding on States Parties, which means that any ratifying state can be held accountable if it violates the terms of contract.

Because international human rights treaties are legally binding, certain measures are taken to ensure that States Parties comply with the terms. One such measure is to form a treaty committee to monitor its implementation, which is usually formed at the time a treaty enters into force. While each treaty committee has slightly different powers, all are tasked with the general oversight of periodic reports the States Parties are required to submit, and with the publication of general comments that help clarify specific treaty provisions and resolve any confusion a State Party might have about their obligations under the treaty (Helfer and Slaughter 1997). The general comments give treaty committees the opportunity to clarify the provisions of the law and ensure that they remain relevant to modern geopolitical circumstances (Henkin et al. 2009). We argue that these committees' power has been particularly important in recent years, as the Committee on the Rights of the Child, a body of experts that monitors and reports on the implementation of the CRC, and the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families have worked together in unprecedented ways to bolster the rights of migrant and refugee children. Specifically, Paragraph 59 of Joint General Comment No. 4 (2017) of the latter committee and Paragraph No. 23 (2017) of the former define States Parties' obligation to protect the right to education of children in their countries of origin and, for those involved in international migration, in their countries of transit, destination, and return:

All children in the context of international migration, irrespective of status, shall have full access to all levels and all aspects of education, including early childhood education and vocational training, on the basis of equality with nationals of the country where those children are living.⁸

8 Joint General Comment No. 4 (2017).

These joint general comments explicitly reference the language and ideas raised in vital nonbinding policy documents, such as the July 2018 report of the UN Special Rapporteur on the right to education and the 2016 NY Declaration, thereby bringing innovative ideas about refugee rights into the realm of binding law and underscoring the importance of the treaty committees. The publication in 2017 of Joint General Comment No. 4 by the Committee on the Rights of the Child means that all States Parties to the CRC are required to provide access to education for all migrant and refugee children living within their borders, regardless of their formal migration status.

Despite these promising commitments, refugees' right to education remains on tenuous ground. All international human rights law, including the three core treaties on refugee education, is fraught with enforcement challenges, and what it demands in theory is rarely reflected in the actual outcomes. One reason for this is that enforcing the terms of international human rights treaties is uniquely difficult. To begin with, there are few market or political forces that pressure states to comply with the treaties they have ratified (see Goodman and Jinks 2004). In other words, Country A rarely has reason to shoulder the costs of intervention when Country B violates a human rights treaty. Accordingly, the pressures that typically stop the violation of other treaties, such as nuclear disarmament, are inadequate in the case of human rights (see Goodman and Jinks 2004). In addition, international human rights treaties tend to include unusually weak compliance and enforcement provisions (see Hathaway 2002), which means that, although they are technically legally binding, they tend more toward "soft law" than other international treaties in that they are "essentially unenforceable through traditional means" (Hathaway 2007, 592). World Trade Organization treaties, which typically include substantial legal sanctions for violations (see Hathaway 2007), offer a point of comparison.

Two other issues threaten to make refugees' right to education less enforceable than other international human rights: a particularly ineffective Refugee Convention, and the systematic demotion by the US and other Western Bloc nations of social, cultural, and economic rights, including education. The Refugee Convention has many shortcomings in the EiE context in particular, including the following: (1) it only covers individuals deemed to be refugees as defined by the Refugee Convention and therefore fails to cover asylum seekers, internally displaced persons, migrants, individuals without formal documentation, and people who are fleeing violence, such as civil war; (2) it only covers refugees within the territory of nations that have ratified the Refugee Convention; (3) it only protects refugees' right to a primary education; (4) it makes no recommendations or assurances

about the quality of education that should be provided to refugees; and (5) it has no treaty committee to monitor and enforce its implementation. These are significant limitations for the EiE field, whose educators and other actors frequently serve displaced communities whose residents have uncertain or mixed refugee status, often in countries that have not signed the Refugee Convention or have signed it but with significant exceptions.

The historic deprioritization of economic, social, and cultural rights under international human rights law has a direct impact on the enforceability of ICESCR and may have a spillover effect on certain provisions of the CRC;⁹ this leaves at least two if not all three backbone treaties in a relatively weaker position than the treaties centered on civil and political rights. Historically, and as a living artifact of the Cold War, countries in the West have tended to favor civil and political rights, such as freedom of speech and the right to a fair trial, over economic, social, and cultural rights, such as the right to education and clean water (Alston 2009; Roth 2004; Plant 2003; Eide, Krause, and Rosas 2001). Meanwhile, countries of the former Soviet Union have pushed for economic, social, and cultural rights to be given the same weight as civil and political rights under international human rights law (Alston 2009; Roth 2004; Plant 2003; Eide et al. 2001). Evidence of the priority given civil and political rights in the West is the fact that the United States, which ratified the ICCPR in 1992, has yet to ratify ICESCR. Although both documents were drafted in 1954, many legal scholars and human rights activists argue that social, cultural, and economic rights were deprioritized and remain subordinate (Alston 2009). They highlight the extreme differences in diction between the ICCPR, which prohibits countries from taking certain actions—for example, imposing the death penalty on children under age 18 (ICCPR article 6)—and ICESCR, which requires countries to take certain actions, such as the demand that States Parties take appropriate steps to safeguard the right to work (ICESCR article 6; Alston 2009). These differences may seem subtle, but in practice they are significant: it is usually obvious when a country violates a right, but it is often not apparent that a country has failed to enforce one, which makes it difficult to determine whether a country has done enough to fulfill its treaty obligations (Howlett 2004; Roth 2004; Eide et al. 2001). Moreover, ICESCR undercuts its own enforceability by requiring States Parties to “take steps”

9 As one example of how the expression of some social, cultural, and economic rights in the CRC has less linguistic force than their civil and political counterparts, compare the language in Article 28(1)(e) commanding that States Parties “take measures” to encourage school attendance to the language found in Article 19(1) demanding that States Parties “take all appropriate legislative, administrative, social and educational measures” to protect children from violence.

toward the “full realization” of economic, social, and cultural rights; the ICCPR contains no such wording (UN General Assembly 1966a, 1966b).

THE EIE POLICY-PRACTICE GAP

In this section, we review the literature from the fields of international law and sociology to demonstrate the failed enforceability and implementation of international human rights laws. This literature lays the groundwork for our study by demonstrating that the enforceability of these laws is a widespread problem. We then review the education literature that discusses the policy-practice gap in refugee education to demonstrate that no prior study has attributed this gap to the unenforceability of the laws governing the EiE field. Our review suggests that the failed enforceability and implementation of international human rights laws might contribute to the policy-practice gap in refugee education.

THE LEGAL AND SOCIOLOGICAL LITERATURE ON ENFORCEMENT AND IMPLEMENTATION PROBLEMS

The legal and sociological literature highlight the pervasive enforceability and implementation problems in international human rights law, which may contribute to the EiE policy-practice gap. Legal research in particular has determined that flawed enforceability is a primary reason for human rights abuses in nations that have ratified international human rights treaties.

Some argue that treaty committees use cookie-cutter language steeped in Western values (Essary and Theisner 2013). As a result, although treaty committees' primary job is to interpret the treaty language and provide clear advice and next steps for States Parties, they often fail to fulfill this purpose because concern for efficiency and fairness leads them to recommend actions that are contextually inappropriate and unhelpful. This limits the effectiveness of the treaty committees and their recommendations.

A quantitative analysis of compliance problems in international human rights law in five distinct areas—genocide, torture, civil liberty, fair and public trials, and political representation of women—finds that numerous parties to human rights treaties violate their obligations as a matter of course (Hathaway 2002). To remedy this, Hathaway recommends a stronger treaty enforcement system,

along with the implementation of treaty entry requirements, tiered membership, and provisions for removal. Higher tiers would be reached only after completing a successful period of treaty compliance.

An empirical analysis of the States Parties to human rights treaties finds extensive decoupling between the policies countries agree to by ratifying a treaty and their actual human rights practices (Tsutsui and Hafner-Burton 2005). Nevertheless, we conclude that, by legitimizing human rights, these treaties carry expectations and requirements for the ratifying nations, which in general have a positive impact despite any decoupling of policy-practice by the signatories. Hafner-Burton et al. (2008), who conducted a cross-nation quantitative analysis, conclude that regimes with poor human rights records often sign a human rights treaty for its legitimating effects and to demonstrate a symbolic commitment, despite having no intention of complying. These studies demonstrate that, despite its net positive effect, international law is often not implemented or enforced.

THE EDUCATION LITERATURE AND THE POLICY-PRACTICE GAP

To establish that there is a clear gap between policy and practice in refugee education, the EiE literature uses international human rights law as the benchmark for policies that are not fully implemented and identifies flaws in the laws (Mendenhall et al. 2017; Dryden-Peterson 2016). Although EiE scholars fall short of blaming the policy-practice gap on human rights law, they do attribute it to the complex and challenging environment facing host country governments, school administrators, and refugees (see Mendenhall et al. 2017; Buckner et al. 2017; Dryden-Peterson 2016).

In a mixed-methods study, Mendenhall et al. (2017) identify a severe policy-practice gap in education services for urban refugees. They find that many countries' policies provide for refugee education on paper but implementation fails due to limited space in government schools, government inability to monitor compliance, poor understanding of the policies, and rising xenophobia. Buckner et al. (2017) describe the policy-practice gap in Lebanon, which they attribute to a misalignment between the national education policy, which is generally favorable toward refugees, and other national policies that severely penalize them, such as not issuing work visas to refugees. In an empirical analysis of global education policy documents issued from 1951 to 2016, Dryden-Peterson (2016) draws attention to the stark difference between aspirational policies and the actual

experiences of refugee children. While these three studies clearly identify a gap between policy and practice in refugee education and identify various factors that contribute to this gap, none points to the unenforceability of the laws as a contributing factor.

The report of the UN Special Rapporteur (2018) on the right to education also identifies the gap between policy and practice in the EiE field, first by cataloguing the international laws and agreements that mandate education for refugees and then by listing numerous “issues and challenges” that prevent refugees from receiving any education. This list of issues and challenges notably omits any mention of problems with the enforceability of the laws, focusing instead on other barriers, such as bureaucracy and child labor. Another publication, a handbook titled *Protecting Education in Insecurity and Armed Conflict* (Hausler, Urban, and McCorquodale 2012), provides a comprehensive overview of the relevant international legal instruments that protect education in the midst of conflict. While this handbook gives lawyers and EiE professionals helpful insights into the ways international human rights, humanitarian, and criminal law interact to protect children’s right to education in conflict settings, it does not offer an empirical analysis of the implementation or enforcement of these laws.

INTERNATIONAL HUMAN RIGHTS TREATIES AND NEO-INSTITUTIONAL THEORY

Having established the EiE policy-practice gap and the possibility that unenforceable international laws could be contributing to it, we now look to the neo-institutional literature to apply the ideas of isomorphism and decoupling. Neo-institutional theory posits the diffusion of global norms linked to human rights, justice, and the individual via international nongovernmental organizations and intergovernmental organizations, such as the United Nations (see Boli and Thomas 1997; Meyer et al. 1997). According to neo-institutionalist scholars, the isomorphism of global norms such as international human rights is the result of three forces: mimesis, coercion, and normalization (Meyer et al. 1997; DiMaggio and Powell 1983). Mimetic forces encourage the adoption of global norms to reduce risk in the face of uncertainty; coercive forces demand the adoption of global norms in order to obtain certain benefits from the international community, such as financial support; and normative forces encourage the adoption of global norms in order to build international legitimacy (DiMaggio and Powell 1983). Isomorphism helps to explain the global rise of human rights as codified by a

series of international treaties and broadly adopted by nations around the globe over the last 60 years. At a more granular level, it offers insights into why certain portions of the text of human rights treaties are identical, or nearly so.

According to neo-institutionalist scholars, isomorphism goes hand-in-hand with the phenomenon known as decoupling, whereby gaps between policy and practice will naturally occur as a new world culture evolves, particularly where global norms are at odds with a nation's political reality (Meyer and Rowan 1977). Bromley and Powell (2012) distinguish between two types of decoupling in the literature: policy-practice decoupling, whereby policies are violated or not implemented, and means-ends decoupling, whereby policies are implemented but the outcomes do not reflect the policies' original objectives. Other studies provide explanations for decoupling. Schriewer (1990), for instance, demonstrates that some countries intend to implement certain policies they adopt but lack the technical expertise or financial resources to do so. Brunsson (2002) argues that some countries become parties to global policies and treaties in order to avoid scrutiny and gain legitimacy. Both explanations may apply to the decoupling that occurs in the context of international human rights and refugee education.

We posit that certain textual differences, specifically with regard to the enforcement mechanisms used by human rights treaties, are particularly meaningful when they are understood contextually, considering the highly isomorphic nature of other treaty provisions.

METHODOLOGY

This study addresses the research questions with a two-part analysis. We first conduct a content analysis (Krippendorff 2012) of seven human rights treaties, beginning with the three backbone treaties of refugee education—the Refugee Convention, CRC, and ICESCR—followed by four international human rights treaties unrelated to refugee education—CEDAW, CERD, ICCPR, and CAT. The last four treaties in our analysis were purposively selected because they are widely referenced in international human rights law, their adoption dates have a wide timespan, and their subject matter is varied. Our initial content analysis focused exclusively on identifying the enforcement mechanisms included in all seven treaties (see Table 1).

Table 1: The Seven Human Rights Treaties Examined in This Study

Name of Treaty	Date Entered into Force	Rights Protected
1951 Convention Relating to the Status of Refugees (Refugee Convention)	1951	Civil, political, social, cultural, and economic rights of refugees
Convention on the Rights of the Child (CRC)	1990	Civil, political, economic, social, and cultural rights of all children
International Covenant on Economic, Social, and Cultural Rights (ICESCR)	1966	Economic, social, and cultural rights of all humans
Convention on the Elimination of Discrimination Against Women (CEDAW)	1979	Civil, political, economic, social, and cultural rights of all women
Convention on the Elimination of Racial Discrimination (CERD)	1965	Civil, political, economic, social, and cultural rights of minority and indigenous populations
International Covenant on Civil and Political Rights (ICCPR)	1966	Civil and political rights of all humans
Convention Against Torture (CAT)	1984	Civil and political rights of all humans, specifically the right to be free from torture and other inhumane treatment

Our content analysis revealed two types of enforcement mechanisms in the treaties: consequences and enforcement entities. We define “consequences” as any enforcement mechanism that serves as a check/balance on the States Parties’ implementation of a treaty; we define “enforcement entity” as an individual or set of individuals a treaty identifies as the intended enforcer of a consequence. Using NVivo software, we coded the seven treaties inductively in order to catalogue the types of consequences and enforcement entities mentioned (see Tables 2 and 3).

We subsequently conducted a comparative analysis of the enforcement mechanisms revealed by the content analysis, comparing the three treaties granting refugees the right to education—the Refugee Convention, CRC, and ICESCR—with the four other treaties. In our comparative analysis of the seven treaties, we used the coded treaty provisions from our content analysis to compare the incidence of consequences and enforcement entities. This permitted us to analyze the relative

enforceability of the three treaties granting refugees the right to education, using the other four treaties as the point of comparison.

FINDINGS

CONSEQUENCES FOR TREATY VIOLATIONS

The texts of the seven human rights treaties under examination contained a total of 17 different types of consequences, which we define as treaty provisions intended to penalize states that violate a treaty they have ratified (see a summary in Table 2). These provisions appear to serve three distinct purposes: (1) to permit the invasion of a sovereign country to establish external checks and balances; (2) to generate media attention; and (3) to allow legal action to be taken against a country that violates a treaty. All 17 consequences serve more than one of these purposes.

Table 2: The Consequences Named in the Seven Treaties Examined in This Study

Consequence		Type of Action Allowed		
		External Checks on Sovereignty	Media Attention	Legal Action
C1	Treaty committee conducts confidential inquiry	X		
C2	Treaty committee demands information/written explanations	X		
C3	Treaty committee gives comments, suggestions, or recommendations to the violating State Party	X		
C4	Treaty committee includes summary of inquiry in annual report	X	X	
C5	Treaty committee report (ordinary course)	X	X	
C6	Treaty committee shares findings and recommendations with other States Parties	X		
C7	Treaty committee submits special report	X		
C8	Treaty committee visits the violating State Party	X	X	
C9	Treaty committee may establish an ad hoc conciliation commission	X		X

Consequence		Type of Action Allowed		
		External Checks on Sovereignty	Media Attention	Legal Action
C10	Findings and recommendations shared with other UN bodies	X	X	
C11	UN General Assembly commissions special study	X	X	
C12	The violating State Party must submit information/report to the treaty committee, UN body, or another State Party	X		
C13	The violating State Party may refer a dispute to the International Court of Justice	X	X	X
C14	Any State Party may make a complaint to the treaty committee about another State Party	X		X
C15	Any State Party may make a complaint to another State Party	X		
C16	Individual within the jurisdiction of a State Party may make a complaint to the treaty committee	X		X
C17	The treaty committee shares reports with and/or invites UN specialized agencies to report on implementation of treaty provisions	X	X	

The first provision of all 17 consequences—the right to invade a sovereign country to establish external checks and balances—overrides the legal principle that every sovereign nation can do whatever it wants to its own citizens within its own borders (Katzenstein 2014; Koh 1997). Of course, all international law encroaches on a nation’s sovereignty to some extent; by ratifying a treaty and promising to take (or not take) specific actions, a nation gives another nation or group of nations the power to intervene if it violates the treaty. However, some forms of encroachment are more severe than others. For example, giving a nation the right to sue another in the International Court of Justice is a more severe encroachment on the country being sued than, say, a treaty committee writing an annual report in which it makes certain recommendations to the violating State Party. The degree of encroachment on the sovereignty of States Parties varies significantly in the 17 consequences.

The second provision, which 7 of the 17 consequences serve, is to generate media attention by calling out countries that have violated the provisions of a treaty. Negative media attention may prompt a country’s own citizens to pressure state officials to return to compliance, and it can call attention to a country’s noncompliance in broader circles, leading other nations, trade groups, aid donors, and the UN to punish the violating country in multiple creative ways, such as withholding funds from the violating country, changing entry requirements for citizens of the violating country, implementing sanctions or tariffs against the violating country, or sending in UN peacekeepers.

The third provision, which 4 of the 17 consequences serve, allows legal action to be taken against a violating country. This is the most severe consequence found in the treaties surveyed. The type of legal action found ranges from decisions made in perijudicial settings at the committee level to full-blown lawsuits at the international level, either of which could demand that violators pay financial damages or even serve jail time in the most extreme cases. Notably, this third type of consequence necessarily entails a significant violation of a nation’s sovereignty and often generates negative media attention as well. Because of its severity, this type of consequence tends to apply solely to nations that voluntarily adopted an optional treaty protocol that included accepting this type of punishment, which made it legally binding.

ENFORCEMENT ENTITIES

Enforcement entities are the individuals and groups who are supposed to enforce the consequences written into treaties. Fourteen different enforcement entities were identified in the seven human rights treaties analyzed. The enforcement entities can be grouped into four distinct categories: (1) States Parties to a treaty, (2) UN bodies, (3) individual citizens, and (4) courts of justice (see summary in Table 3).

Table 3: The Enforcement Entities Named in the Seven Treaties Examined in This Study

Enforcement Entity		Type of Enforcement Entity			
		States Parties	UN Bodies	Individual Citizens	Courts of Justice
A	State Party	X			
B	All States Parties	X			
C	Treaty committee		X		
D	Ad hoc conciliation commission (formed by treaty committee)		X		

Enforcement Entity		Type of Enforcement Entity			
		States Parties	UN Bodies	Individual Citizens	Courts of Justice
E	Other UN bodies		X		
F	UN Commission on Human Rights		X		
G	UN General Assembly/UN Secretary-General		X		
H	International Court of Justice				X
I	UN funds, programs, and specialized agencies		X		
J	UN Economic and Social Council		X		
K	UN High Commissioner for Refugees		X		
L	Individual within the jurisdiction of a State Party			X	
M	Arbitrator				X
N	UN Commission on the Status of Women		X		

The States Parties category, representing 2 of 14 of the enforcement entities, includes the countries that have ratified a particular treaty. In some cases, when one State Party violates a treaty provision, other States Parties are given the authority to enforce the provision while applying specified consequences.

The UN bodies category, representing 9 of 14 of the enforcement entities, includes the UN organs given the authority to enforce the consequences written into a treaty. UN bodies, the most prevalent type of enforcement entity named in the treaties surveyed, range from highly specialized groups such as treaty committees to general entities such as the UN General Assembly.

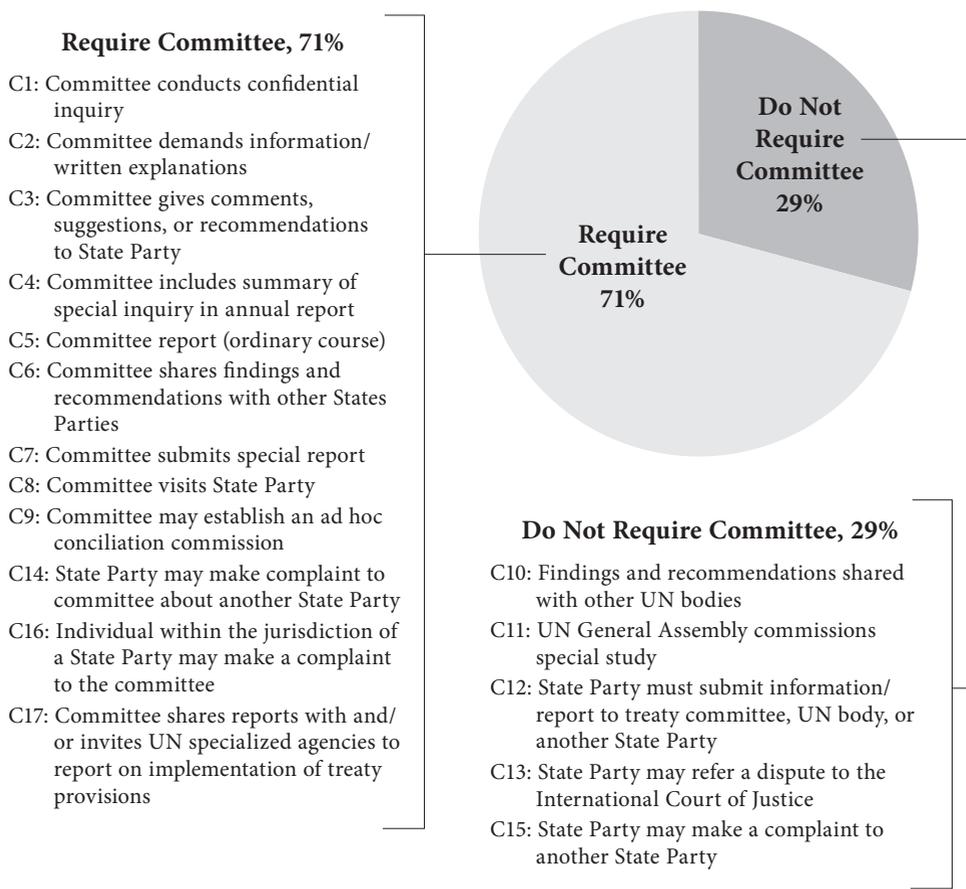
The individual citizens category, representing 1 of the 14 enforcement entities, includes citizens of a State Party that has violated a treaty provision. This applies in nations that have ratified an optional protocol to a treaty that gives citizens the right to make a formal complaint to the treaty committee when their rights have been violated by their country and that country has failed to acknowledge or remedy the violation.

The courts of justice category, representing 2 of the 14 enforcement entities, includes enforcement by the International Court of Justice and by arbitrators a treaty committee has appointed to resolve a dispute.

THE IMPORTANCE OF TREATY COMMITTEES

Although fourteen enforcement entities are named in the seven treaties surveyed, six of them rely on treaty committees as the predominant enforcer. Only the Refugee Convention lacks a treaty committee. Moreover, Figure 1 illustrates that 12 of the 17 consequences require a treaty committee to enforce them. In other words, in the absence of a treaty committee, only five consequences remain viable if a State Party is noncompliant.

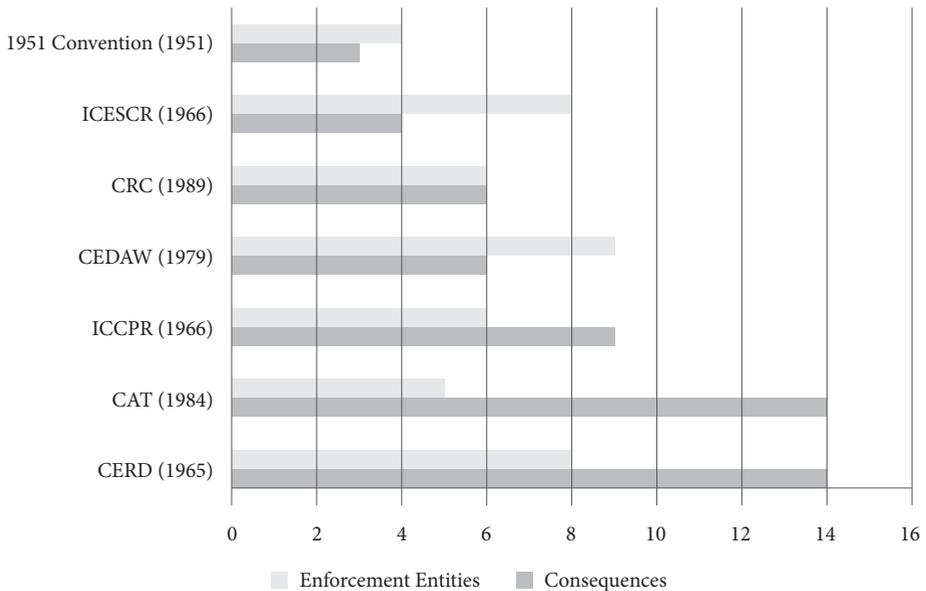
Figure 1: Percentage of Consequences that Require Enforcement by a Treaty Committee



WEAKER ENFORCEMENT ABILITY FOR REFUGEE EDUCATION

Figure 2 shows the number of consequences and enforcement entities named in each treaty analyzed. After we catalogued and added up these enforcement mechanisms, we ranked them from those having the fewest to the most enforcement mechanisms. Using the number of enforcement mechanisms as a proxy for a treaty’s enforceability, this ranking indicates that CERD, which names fourteen consequences and eight enforcement entities, is the most enforceable of the seven treaties. The Refugee Convention, which names only three consequences and four enforcement entities, is the least enforceable treaty; it is followed by the CRC and the ICESCR, which means that the three treaties that form the backbone of refugees’ right to education are the least enforceable.

Figure 2: Number of Consequences and Enforcement Entities Named in Each Treaty



DISCUSSION

Despite the isomorphism evident in language and structure across the human rights treaties analyzed, the different enforcement mechanisms contribute to a decoupling between intent and application and, ultimately, to the policy-practice gap in refugees’ legal right to education. This study provides empirical evidence

of the relative lack of enforceability of the three treaties that form the backbone of refugees' right to education, as other human rights treaties include more consequences and enforcement entities.

While this study does not determine the underlying reasons for the different enforcement mechanisms used by each treaty, it does reveal a familiar pattern that was first identified by the literature in the field of international law, as mentioned earlier. In general, the treaties protecting civil and political rights have stronger enforcement mechanisms than those protecting social, cultural, and economic rights and are therefore more enforceable (see Roth 2004; Plant 2003; Eide et al. 2001). However, the pattern our study reveals is markedly different from the conventional pattern of deprioritized economic, social, and cultural rights. The Refugee Convention, which protects refugees' economic, social, and cultural rights as well as their civil and political rights, has the fewest enforcement mechanisms of the seven treaties in our study, making it the least enforceable under international law, as noted above. CERD, which protects the economic, social, and cultural rights as well as the civil and political rights of racial minorities, has the most enforcement mechanisms of the seven treaties. CRC and CEDAW, which protect economic, social, and cultural rights as well as the civil and political rights of children and women, respectively, fall into the middle of the group. It seems unlikely, therefore, that the relative unenforceability of the three backbone treaties of refugee education can be fully attributed to the historic deprioritization of social, cultural, and economic rights. Some might in fact argue that the pattern we have found reveals the deprioritization of women, children, and refugees, with refugees on the bottom rung of that ladder.

We argue that the relative unenforceability of the three refugee education treaties makes them more prone to decoupling than other international human rights treaties. The weak enforcement provisions of these treaties permit extensive differences between the policies the States Parties enact on paper and the actual practices experienced by refugees seeking an education within a party's borders. While myriad factors contribute to the policy-practice gap that afflicts the field of EiE, the relative unenforceability of the core treaties is certainly one of them, as it creates an environment that allows for noncompliance.

The differences we observed in the enforceability provisions of the seven treaties we analyzed are particularly notable, given the isomorphic nature of human rights treaties in general (Alston 2009) and the pervasive borrowing of language among treaty provisions in the human rights arena, particularly with regard to the treaty monitoring process (see Essary and Theisner 2013). One might

expect that the language used in the most recent human rights treaties would simply borrow and/or build on the language from older treaties (see Essary and Theisner 2013), but this is not the case in the treaties we analyzed. Though drafted simultaneously in 1954, the ICCPR and ICESCR include dramatically different enforcement mechanisms (see Figure 2 for an overview). Furthermore, when arranged in order of the date each of the seven treaties was adopted, no discernible pattern of increasing or decreasing enforceability emerges. In other words, if isomorphism over time could explain the type and occurrence of the enforcement mechanisms used in the treaties examined in this study, we would expect to see them become stronger or weaker with time, or to fluctuate, but no pattern of any kind appeared. This suggests that more is at play in the drafting of human rights treaties than isomorphism and provides some evidence that the enforceability provisions in the three treaties on refugees' right to education were intended to be weak. Future research on historical narratives and policy analysis would be needed to support this claim.

Accordingly, this study contributes important evidence to support a rethinking of the laws that undergird the EiE field. The unenforceability of the three backbone treaties granting refugees the right to education may encourage refugees and their advocates to consider relying on all three treaties in unison when the right to education for refugees, asylum seekers, and migrants is being ignored or violated, as the CRC and ICESCR both have treaty committees to monitor their implementation. And while treaty committees are far from perfect, they do protect refugees and their advocates by legally mandating that countries in violation of a treaty submit annual reports on designated topics and by specifying how the violating countries can improve their implementation of treaty requirements. Treaty committees also provide an avenue for those working in the EiE arena to communicate their grievances to leaders of national education systems.

Our study also illustrates the relative unenforceability of the CRC and ICESCR compared to other international human rights treaties, which emphasizes the enforcement and compliance problems of international human rights law in general and points to the importance of alternatives. This unenforceability should inspire a closer look at the validity of the legal hierarchy that puts international law above regional laws and nonbinding policies. For example, the Committee on the Rights of the Child adopted provisions from the NY Declaration, which demonstrates that discussions among EiE and other humanitarian professionals can be wrapped into existing international law, an example of “trickle-up” law. Moreover, an initiative like the 2017 Djibouti Declaration—a nonbinding compact among Horn of Africa nations that protects refugees' right to education, among

other things—points to the importance of regional actors’ drawing attention and resources to certain issues. The nonbinding NY Declaration and the Global Compact on Refugees have both drawn attention to the importance of providing quality education for all refugee children.

More research is needed to understand whether other factors make the three refugee education treaties the least enforceable human rights treaties—for instance, whether refugees have been systematically deprioritized under international law due to xenophobia or other widespread prejudice. With the current poor enforceability of international laws that protect refugees’ right to education, we suggest that EiE actors consider lobbying the Committee on the Rights of the Child to draft an optional protocol to the CRC that clearly presents a robust set of EiE rights that are bolstered by strong enforcement and compliance provisions, such as individuals’ ability to make formal complaints to the Committee on the Rights of the Child and, in turn, the Committee’s ability to recommend sanctions in the event of noncompliance. Such a provision would provide other tangible benefits, even in the face of enforceability challenges.

Most importantly, it would help to simplify the legal underpinnings of the EiE field by consolidating the most powerful language of the binding and nonbinding laws and policies arising out of communities at the international, regional, and national levels. Furthermore, such a provision would be linked to CRC, which already champions the full spectrum of social, cultural, and economic rights, as well as their civil and political counterparts. This would help to shape new expectations and conversations about EiE between States Parties, donors, and other relevant parties. One could imagine an optional protocol on EiE yielding results similar to the CRC’s optional protocol on the involvement of children in armed conflict, which has enjoyed considerable success and has been ratified by 168 nations.

In sum, whatever path they pursue in order to close the policy-practice gap, EiE actors must work steadfastly to improve the enforceability of laws that guarantee refugees the right to education. Until such laws become more enforceable, compliance will remain substandard and the policy-practice gap in refugee education will persist.

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**APPENDIX 1: THREE INTERNATIONAL LAW TREATIES.
THE BACKBONE OF REFUGEES' RIGHT TO EDUCATION**

Treaty	Treaty Article(s) Concerning EiE	Treaty Text	Accompanying General Comments
1951 Convention Relating to the Status of Refugees (Refugee Convention)	22	<p>Public Education</p> <p>1. The Contracting States shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education.</p> <p>2. The Contracting States shall accord to refugees treatment as favourable as possible, and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, with respect to education other than elementary education and, in particular, as regards access to studies, the recognition of foreign school certificates, diplomas and degrees, the remission of fees and charges and the award of scholarships</p>	N/A
Convention on the Rights of the Child (CRC)	22	<p>1. States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.</p>	<p>Joint General Comment No. 3 (2017) of the Committee on the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration</p>

(continued)

<p>Convention on the Rights of the Child (CRC)</p>	<p>22</p>	<p>2. For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organisations or nongovernmental organisations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention.</p>	<p>Joint General Comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration</p>
	<p>28</p>	<p>1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:</p> <ul style="list-style-type: none"> (a) Make primary education compulsory and available free to all; (b) 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; (c) Make higher education accessible to all on the basis of capacity by every appropriate means; (d) Make educational and vocational information and guidance available and accessible to all children; (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates. 	<p>Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return</p>

(continued)

	28	<p>2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.</p> <p>3. States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.</p>	<p>Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return</p>
	29	<p>1. States Parties agree that the education of the child shall be directed to:</p> <p>(a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;</p> <p>(b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;</p> <p>(c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;</p>	<p>General Comment No. 1 (2001) of the Committee on the Rights of the Child on the Aims of education</p>

(continued)

	<p>29</p>	<p>(d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;</p> <p>(e) The development of respect for the natural environment.</p> <p>2. No part of the present article or Article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.</p>	<p>General Comment No. 1 (2001) of the Committee on the Rights of the Child on the Aims of education</p>
<p>International Covenant on Economic, Social and Cultural Rights (ICESCR)</p>	<p>13</p>	<p>1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.</p> <p>2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:</p> <p>(a) Primary education shall be compulsory and available free to all;</p>	<p>General Comment No. 13 (1999) of the Committee on Economic, Social and Cultural Rights on the Right to education</p>

(continued)

<p>International Covenant on Economic, Social and Cultural Rights (ICESCR)</p>	<p>13</p>	<p>(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;</p> <p>(c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;</p> <p>(d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;</p> <p>(e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.³ The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.</p> <p>4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph I of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.</p>	<p>General Comment No. 13 (1999) of the Committee on Economic, Social and Cultural Rights on the Right to education</p>
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Sources: UN General Assembly (1951); UN General Assembly (1966a); UN General Assembly (1966b)