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UNPACKING PHYSICAL ACCESSIBILITY TO PRIMARY EDUCATION UNDER THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: LESSONS FOR SOUTH AFRICA

By

Mpho Liphapang

Submitted in partial fulfilment of the requirements for the degree of Master of Laws by Coursework and Research Report at the University of the Witwatersrand, Johannesburg

October 2023

DECLARATION

I, **Mpho Liphapang**, declare that this Research Report is my own unaided work. It is submitted in partial fulfillment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

I have submitted my final Research Report through TurnItIn and have attached the report to my submission.

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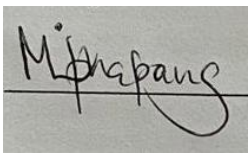
Signed: 

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ABSTRACT

Physical accessibility to primary education is a component of the feature of accessibility under the 4As framework of the UN Committee on Economic, Social and Cultural Rights. Up to the present time, the dimension of physical accessibility in the implementation of a primary education for children, has regrettably been the least engaged subject by human rights scholars, lawyers, and judges alike. This fact is reinforced in two main ways that are immediately apparent, namely (1) the scarcity of focused scholarship and judicial engagements on the subject, and (2) the minimal attention afforded to the content and meaning of physical accessibility when the subject is eventually engaged. These shortcomings have culminated in the emergence and broad acceptance of narrow theorisations of physical accessibility, through which the dimension is generally understood as a sole concern for schools to be situated at geographically convenient and accessible locations for the learners. In this research report, an examination of physical accessibility is undertaken with the aim to uncover its substantive content and meaning under the ICESCR, and to draw lessons on how it can contribute meaningfully to the achievement of a basic education in South Africa.

Key words: Right to primary education, 4As, physical accessibility, ICESCR, South Africa.

TABLE OF CONTENTS

DECLARATION ……..... 2

ABSTRACT …… 3

1. Introduction ……..... 5

2. The right to primary education under the ICESCR ……..... 8

   2.1. Primary education as a right ……..... 8

   2.2. The meaning of the term ‘primary education’ …….. 9

   2.3. Framework for the implementation of primary education ……..... 11

3. Theories of physical accessibility: the problem of ‘locality’ ……. 14

   3.1. The distinction between access to schools and access to education ……..... 15

   3.2. The value of the language of the CESCR ……..... 16

   3.3. The location of schools as an issue of availability ……... 17

4. The substantive content of physical accessibility …….……. 18

   4.1. Rationale for protecting children’s safety ……..... 19

   4.2. Is there a right to safety? …….. 19

5. Physical accessibility in South Africa: lessons from the ICESCR ……. 22

   5.1. The recognition of physical accessibility in South Africa …… 23

   5.2. The application of physical accessibility in South Africa …… 25

   5.3. Physical accessibility in Komape: a going concern ……. 25

6. Conclusion …….. 27

BIBLIOGRAPHY …….. 29

1. Introduction

The importance of the right to primary education at the international level is underscored by the wide spectrum of human rights instruments committed to its protection and realisation,[1] while in South Africa a basic education is guaranteed as a justiciable human right in s 29(1)(a) of the Constitution of the Republic of South Africa, 1996 (Constitution).[2] Under the International Covenant on Economic, Social and Cultural Rights (ICESCR),[3] which provides the background for the focus of this research report, primary education is recognised in art 13(2)(a) as an immediate, free and compulsory right that neither parents, nor guardians, or the State are entitled to withhold from anyone.[4] Coupled with this, the recognition of primary education as a fundamental right is complemented by a framework of the United Nations Committee on Economic, Social and Cultural Rights (CESCR) for the implementation of an

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[1] The right to primary education enjoys extensive protection across a range of international human rights instruments of the United Nations (UN) and regional instruments, including for example, art 26 of Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR), art 28 of Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC), and art 10 of Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW), and art 24 of Convention on the Rights of Persons with Disabilities (adopted 12 December 2006) A/RES/61/106 (CRPD). See also Article 17 of African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (ACHPR). The right to primary education is also guaranteed in regional human rights treaties, some of which are sources of obligations relevant to South Africa on the right to primary education, like art 17 of the ACHPR. This research report focuses only on the ICESCR fn 3 below. For other sources of the right to education see Right to Education 'Right to Education' <https://www.right-to-education.org/sites/right-to-education.org/files/resources-attachments/RTE_International_Instrument_Right_to_Education_2014.pdf>

[2] In s 29(1)(a) the Constitution uses the term 'basic education' instead of 'primary education'. While the two terms are not synonymous, international human rights instruments regularly employ the concepts of 'elementary', 'primary' and 'basic' education interchangeably, and when used in this sense refer to the education provided for children of primary school ages. Also, the protection of the right to education in the Constitution follows an international human rights model. In this research report, unless the context indicates otherwise, the term 'basic education' as used in the Constitution has a corresponding meaning to the term 'primary education' under the international human rights law. For distinctions between the terms 'basic education' and 'primary education' see section 2.1 of this research below. See KD Beiter 'The Protection of the Right to Education by International Legal Instruments' in KD Beiter (ed) *The Protection of the Right to Education by International Law* (2006) 85, 90. See also L Arendse 'The obligation to provide free basic education in South Africa: An international law perspective' (2011) 14 *Potchefstroom Electronic Journal* 97, 98. See further R Hardowar 'Improving domestic enforcement of socio-economic rights through international law: Ratification of the International Covenant on Economic, Social and Cultural rights by South Africa (2009) Unpublished LLM Dissertation, University of Pretoria <http://hdl.handle.net/2263/12677>

[3] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 2200A (XX1) (ICESCR). South Africa signed the ICESCR on 3 October 1994 and ratified it on 12 January 2015.

[4] UN Committee on Economic, Social and Cultural Rights General Comment No. 11 'Substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural Rights' (10 May 1999) E/C.12/1999/4 (CESCR General Comment No. 11) paras 6-7. See also UN Committee on Economic, Social and Cultural Rights General Comment No. 3 'The Nature of States Parties' Obligations' (14 December 1990) E/1991/23 (CESCR General Comment No. 3) para 5. See also The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights of (1987) UN Doc. E/CN.4/1987/17 (Limburg Principles) para 8.

education at all levels.[5] In terms of this framework, States Parties to the ICESCR are required to ensure the achievement of the four interrelated and essential features of availability, accessibility, acceptability and adaptability in their implementation of an education.[6] Of particular importance for this research report is the feature of accessibility, which incorporates three overlapping dimensions, one of which is the dimension of physical accessibility that this research report focuses on.[7]

Up to the present time, the dimension of physical accessibility in the implementation of an education in general, and a primary education in particular, has regrettably been the least engaged subject by human rights scholars, lawyers and judges alike. This fact is reinforced in two main ways that are immediately apparent, namely (1) the scarcity of focused scholarship and judicial engagements on the subject,[8] and (2) the minimal attention afforded to the content and meaning of physical accessibility when the subject is eventually engaged, particularly by human rights scholars.[9] As will be seen in subsequent sections of this research report, these shortcomings have culminated in the emergence and broad acceptance of narrow theorisations of physical accessibility, through which the dimension is generally understood as a sole concern for schools to be situated at geographically convenient and accessible locations for the learners.[10] In this sense, access to schools is problematically synonymised with access to an education. And, while the geographical location of schools is unquestionably an issue that is relevant and of great importance to the realisation of an education, this research report envisions a substantive interpretation of physical accessibility to an education,[11] and it reflects on how a narrow conception of this dimension has been

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[5] UN Committee on Economic, Social and Cultural Rights General Comment No. 13 'Implementation of the International Covenant on Economic, Social and Cultural Rights' (8 December 1999) E/C.12/1999/10 (CESCR General Comment No. 13) para 6.
[6] Ibid paras 6(a)-6(d).
[7] Ibid para 6(b)(ii).
[8] There is generally no scholarship dedicated specifically to the dimension of physical accessibility. Whereas the dimensions of non-discrimination, and to a lesser degree economic accessibility, are substantively engaged across the existing body of human rights scholarship, it is unfortunate that there appears to be little to no appetite for in-depth analysis of the content and meaning of physical accessibility in the implementation of the right to education.
[9] See for example KD Beiter 'Article 13 of the International Covenant on Economic, Social and Cultural Rights: The Right to Education' in KD Beiter (ed) *The Protection of the Right to Education by International Law* (2006) 459, 489. This book by Klaus Beiter provides what is, by far, the most comprehensive account of the protection of the right to education by international law. As will be seen, this book is a seminal contribution on the right to education, and it has been the chief protagonist for a narrow theorisation of *physical accessibility* cited by many in subsequent contribution.
[10] Ibid.
[11] For a discussion of the meaning of a substantive approach see section 4 of this research report below.

unable to offer an accurate account of its meaning and the scope of its application in the implementation of an education in general, and primary education in particular.

In what follows, the focus of this research report falls on the substantive content and meaning of physical accessibility in the implementation of primary education under art 13(2)(a) of the ICESCR, and it accounts for lessons that can be offered by the ICESCR for the development of the dimension in South Africa. Section 2 provides a critical reflection on the nature and meaning of the right to primary education under art 13(2)(a) of the ICESCR, and thereafter discusses the framework of the CESCR for its implementation. Section 3 studies theorisations of physical accessibility with a focus on three key aspects that create complexities, namely (1) the synonymising treatment of access to schools and access to an education, (2) the insufficiency of regard for the language of the CESCR in General Comment No. 13 where physical accessibility is incorporated into the feature of accessibility, and (3) the theoretical and practical encroachments into the domain of the feature of availability. Section 4 offers a substantive interpretation of the content and meaning of physical accessibility to primary education. It extrapolates the dimension of physical accessibility beyond the narrow emphasis on the geographical location of schools, and advocates for its interpretation as a broad concern for the physical safety of learners in the exercise of their right to receive an education at the primary level. Although physical safety for learners in schools is a concern for a wide range of pertinent and specific issues, such as corporal punishment, bullying and sexual violence, this research report considers safety in general terms as a barrier of access to an education. Section 5 discusses the application of physical accessibility in South Africa. It considers two imminent incidences where the physical safety of learners at South African schools was compromised, and the learners tragically lost their lives after falling into pit toilets.[12] These case studies are approached as concerns for the dimension of physical accessibility, and thus offer a suitable site for lessons to be drawn on how a substantive conception of the dimension can contribute meaningfully to the realisation of a basic education in South Africa. Section 6 concludes this research report.

[12] *Komape v Minister of Basic Education (Tebeila Institute of Leadership Education and Governance and Training Equal Education Amicus Curiae)* 2018 JDR 0625 (LP) (*Komape*). See also News 24 'Body of 4-year-old girl found in eastern cape school pit toilet' <https://www.news24.com/news24/southafrica/news/body-of-4-year-old-girl-found-in-eastern-cape-school-pit-toilet-20230309>

2. The right to primary education under the ICESCR

It has already been noted in section 1 above that the right to primary education enjoys extensive protection across a spectrum of international human rights instruments, including the ICESCR which provides the most comprehensive guarantee for the general right to education.[13] In the context of the latter, it is provided in art 13(2)(a) that, 'with a view to achieving the full realization of [the right to education], [p]rimary education shall be compulsory and available free to all'.[14] This codification of primary education as a fundamental right points to some aspects that are of particular importance to its nature and the interests protected through its guarantee under the ICESCR. These features warrant some further consideration.

2.1. Primary education as a right

Perhaps most important to an understanding of primary education as a right, the formulation adopted by the ICESCR to the protection of primary education emphasises the relationship between the general right to an education as recognised in art 13(1) and the guarantees of a free and compulsory primary education as entrenched in art 13(2)(a). With respect to this relationship, Fons Coomans fittingly observes that the right to enjoy a free and compulsory primary education constitutes an indispensable component of the general right to an education, the latter which States have undertaken to realise and fulfil its defined aims.[15] The right to primary education essentially denotes an entitlement to receive an education at the primary level.[16] In the scheme of the ICESCR where the right to an education at other levels is also guaranteed, an individual may be entitled to receive (a) primary education, (b) secondary education, (c) tertiary education, or (d) fundamental education.[17] Compellingly, this interpretation of primary education as a fundamental right is explicitly informed by the

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[13] CESCR General Comment No. 13 (note 5 above) para 2.

[14] This is a formulation of art 13(2)(a) read with art 13(1) and 13(2) in terms of which it is stipulated in art 13(1) that '[t]he States Parties to the [ICESCR] recognize the right of everyone to education', and art 13(2) adds that 'with a view to achieving the full realization of this right: (a) [p]rimary education shall be compulsory and available free to all'.

[15] F Coomans 'In Search of the Core Content of the Right to education' in A Chapman & S Russel (eds) *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (2002) 217, 225.

[16] F Coomans 'Exploring the Normative Content of the Right to Education as a Human Rights: Recent Approaches' (2004) 50 *Person and Right: Journal of foundation of Legal and Human Rights Institutions* 61, 66. This article is a revised and concentrated version of the contribution by Fons Coomans cited in fn 15 above. The structures of the two differ slightly, but preference will be given to this article since it spaces some points separately and it comes with ease when reading.

[17] See ICESCR arts 13(2)(a)-(d). See also Beiter (note 2 above) 9. According to Beiter, fundamental education entails an education for children, youth adults who have not enjoyed the received a primary education.

CESCR in General Comment No. 13 where the heading to paragraphs 6 and 7 specifically reads '[t]he right to receive an education – some general remarks'.[18]

It is worth brief mention that the right to primary education, as an entitlement to receive an education at the primary level, does not negate from the nature of the right to education in general. Given the fact that it forms part of the general right to an education, it cannot be thought in isolation from the nature and aims of the latter.[19] Henceforth, under the ICESCR, it is guaranteed both as a right in itself, and as an essential tool for the realisation of other human rights.[20] When viewed as a fundamental right, the protection of primary education in art 13(2)(a) read with art 14 of the ICESCR imposes strict obligations upon States to prioritise its realisation as an immediate, free and compulsory guarantee for all.[21] In another sense, primary education as a tool of empowerment is considered to be an essential precondition for the realisation and meaningful exercise of other human rights.[22] It follows reason that if primary education is guaranteed, it secures the enjoyment of other freedoms that are necessary for the full development of the human personality, such as dignity.[23]

Now, granted the nature of the right to primary education as an entitlement to receive a primary education, it is necessary to reflect briefly on the meaning of the term 'primary education' in the context of the ongoing discussion. The meaning afforded to the term 'primary education' informs the substance of what it means to receive a primary education.

2.2. The meaning of the term 'primary education'

The CESCR through its General Comment No. 13,[24] directs that the proper interpretation of the term 'primary education' under art 13(2)(a) must be obtained from the World Declaration

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[18] CESCR General Comment No. 13 (note 5 above) paras 6-7.
[19] Coomans (note 16 above) 80.
[20] General Comment No. 13 (note 5 above) para 1.
[21] Arendse (note 2 above) 101. Article 14 of the ICESCR focuses on the implementation of a free and compulsory primary education by States Parties which had not been able to secure such a right in the territories under their jurisdiction at the time of becoming Party to the ICESCR. In these circumstances, States Parties are required to adopt a plan of action for the progressive implementation of the right to primary education. This obligation cannot be negated by States Parties on ground of financial restraints or the lack of financial resources.
[22] M Nowak 'Right to education' in M Nowak (ed) *Human Rights or Global Capitalism: The Limits of Privatization* (2017) 57, 57.
[23] J Delbruck 'The Right to Education as an International Human Right' (1992) 35 *German Yearbook of International Law* 92, 98. The full development of the human personality constitutes a universal aim for the provision of education in all its forms, and at all levels. It covers every dimension of humanity, whether social, intellectual or spiritual.
[24] CESCR General Comment No. 13 (note 5 above) para 9.

on Education for All (EFA),[25] according to which 'primary education' is described as '[t]he main delivery system for the basic education of children outside the family'.[26] The EFA, furthermore, defines the concept of 'basic education' as the basic learning needs of all persons, comprising of both the essential learning tools and the basic learning content required for the full development of the human personality and lifelong learning.[27] In terms of this definition, a basic education constitutes an entitlement that must be enjoyed by children, while primary education refers to a system for the delivery of that entitlement to children of a certain age.[28] Put in another way, primary education in itself is a particular type of system that must be designed, developed and implemented to impart the essential learning tools and the basic learning content to children. In this sense, the meaning of primary education corresponds with the narrow interpretation of the general right to education, which the former Director-General of UNESCO,[29] Amadou-Mahta M'Bow, defines as the systematic imparting of instruction through national, provincial or local systems of education.[30] It refers specifically to the transfer of knowledge, values and skills, as well as securing the social, cultural or intellectual development of children in a systematic way, and within a defined system that applies at the primary level. Thus, the core of the right to receive a primary education as enshrined in art 13(2)(a), can be described as an entitlement of children to a system of free and compulsory primary education. Consequently, the entitlement to such a system engenders corresponding obligations for States to ensure its realisation, the obligations which are comprehensively crystallised by the framework of the CESCR and include the guarantees of physical accessibility to a primary education.

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[25] World Declaration on Education for All (adopted on 9 March 1990 by the World Conference on Education for All held at Jomtien, Thailand) (World Declaration on Education for All or EFA).
[26] Ibid art 5.
[27] Ibid art 1(1).
[28] T McCowan 'Reframing the universal right to education' (2010) 46 *Comparative Education* 509, 512.
[29] The United Nations Educational, Scientific and Cultural Organization (UNESCO) is an of the United Nations which contributes to world peace and security by promoting international corporation in education, science, culture, communication and information. See UNESCO 'UNESCO in brief' <https://www.unesco.org/en/brief>
[30] AM M'Bow 'Introduction' in G Mialaret (ed) *The Child's Right to Education* (1979) 9, 11. In the broad sense, education covers all activities through which knowledge and skills are passed from one generation to the next. It must be pointed out that the operative word that distinguishes between narrow and broad interpretations of education is 'system' or 'systematic'. Whereas the former interpretation (narrow) entails the design or existence of an aim-oriented system, the latter interpretation (broad) is not attached to a systematic approach to the imparting of knowledge, skills, values or essential tools.

2.3. Framework for the implementation of primary education

The framework of the CESCR for the implementation of the right to education, commonly referred to as the '4As', was developed by the former Special Rapporteur of the Commission on Human Rights on the Right to Education, Katarina Tomasevski, to study the obligations of States in respect of the right to education in all its forms and at all levels.[31] It was particularly developed with a focus on the obligations of States flowing from the protection of the rights to receive an education entrenched in art 13(2) of the ICESCR. Since its introduction, the framework has played a critical role as a barometer for measuring the implementation of the right to education by States Parties in their domestic jurisdictions.[32] Notably, the framework distinguishes between four interrelated features that are essential to the implementation of the right to receive a primary education under the ICESCR. These features have already been identified in section 1 above, and they are, namely (a) availability, (b) accessibility, (c) acceptability, and (d) adaptability.[33] Importantly, the feature of accessibility is understood to incorporate three overlapping dimensions which are (i) non-discrimination, (ii) physical accessibility, and (iii) economic accessibility.[34] Owing to the conceptual identification of these features, they are collectively referred to as the 4As of the right to receive an education at all levels, including at the primary level.

In the context of the 4As, the first feature is that of availability, which in its essence becomes a precondition for the relevance of the other features because a system of education must be available before it would have to be accessible, acceptable and adaptable. Availability concerns the provision of educational programmes and infrastructure as components of a primary education system.[35] It emphasises the importance of having a sufficient number of operational educational institutions and programmes to deliver a primary education to children within the territorial jurisdiction of the concerned State.[36] In addition, it engenders the obligations of States to ensure that there is an existing system of primary

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[31] S Kalantry, JE Getgen & SA Koh 'Enhancing Enforcement of Economic, Social and Cultural Rights Using Indicators: A focus on the Right to Education in the ICESCR' (2010) *Human Rights Quarterly* 253, 274.
[32] B Saul, D Kinley & J Mowbray *The International Covenant on Economic, Social and Cultural Rights: Cases, Materials, and Commentary* (2014) 1096.
[33] General Comment No. 13 (note 5 above) para 6. See also K Tomasevski *Human Rights Obligations: Making Education Available, Accessible, Acceptable and Adaptable* (2001) 13.
[34] General Comment No. 13 (note 5 above) para 6(b).
[35] General Comment No. 13 (note 5 above) para 6(a).
[36] S Woolman & M Bishop 'Education' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2013) 57-1, 57-19.

education for children, and its fulfilment may include, but is not limited to, buildings for schools, adequate sanitation, teaching and information technology facilities.

Second, the feature of accessibility safeguards the access of children to a system of primary education,[37] and it ensures that educational institutions and programmes are accessible to all children.[38] It is worth again pointing out that the obligations of States to ensure access to a primary education only become relevant where and when such a system of education has already been established. In these circumstances, where there might not be an existing system of primary education, claims of access to education would inevitably encompass claims for the availability of education. Stu Woolman and Michael Bishop reflect this understanding of the interrelationship between the two features as follows:

> Accessibility requires that once the schools have been built and stocked with teachers and textbooks, learners are able to make use of them … [a]ccessibility requires: (1) that people are not (unjustifiably) turned away; and (2) that appropriate steps are taken to make access easier for persons from groups that were either consigned to inferior institutions or excluded from certain educational institutions altogether.[39]

Further to this, the CESCR considers the feature of accessibility to incorporate three overlapping dimensions.[40] Firstly, the enjoyment of the right to receive a primary education must be without discrimination. Non-discrimination is an established principle of international human rights law, and in the context of the feature of accessibility it prohibits the denial of access to primary education on the basis of any of the prohibited grounds.[41] Secondly, education must be safely accessible, and this concern is one of physical accessibility. According to the CESCR, a system of primary education must be within a safe physical reach for children.[42] As a component of access to primary education, physical accessibility requires the proactive elimination of safety related barriers that inhibit children from enjoying an education. Ensuring its fulfilment entails obligations for States to safeguard the physical safety of children, and may include, developing schools at geographically convenient locations for the learners, providing means of transport where schools are located

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[37] R Nanima & E Durojaye 'Four years following South Africa's declaration upon the ratification of the ICESCR and jurisprudence on the right to basic education: A step in the right direction?' (2019) 23 *Law, Democracy & Development* 270, 274.
[38] CESCR General Comment No. 13 (note 5 above) para 6(b).
[39] Woolman & Bishop (note 36 above) 57-21.
[40] CESCR General Comment No. 13 (note 5 above) para 6(b).
[41] Ibid para 6(b)(i).
[42] Ibid para 6(b)(ii).

at a distance, adopting technological alternatives such as providing online instruction for children.[43] Lastly, accessibility entails that education should be affordable to everyone, and this ideal underline the dimension of economic accessibility.[44] It is important to realise, however, that economic barriers to primary education are of minimal concern since education at this level is a free guarantee as elaborated in section 2.1 above.

The two further essential features of the 4As are acceptability and adaptability. Acceptability specifically concerns the quality and suitability of the education provided by States, and thus emphasises the idea that education should meet certain standards of quality, cultural appropriateness and suitability.[45] It recognises that education should be meaningful and responsive to the needs and aspirations of individuals and communities, and it aims to ensure that the content of an education is relevant and aligned with cultural, social, and economic contexts. In the last place, the 4As acknowledge that educational systems in general, and systems of primary education in particular, should be adaptable and responsive to the changing needs and circumstances of individuals and communities.[46] This intent is reflected in the feature of adaptability, on the basis of which educational frameworks are required to be adequately flexible to accommodate the changing societal demands.

Finally, a particular reading of the 4As has been proposed, in terms of which the nature of obligations to make primary education available, accessible, acceptable and adaptable are classified to underscore their interrelatedness. According to Duncan Wilson,[47] the availability and accessibility of primary education is all about the 'rights to [receive] education', while its acceptability and adaptability focuses on the 'rights in [receiving] education'. On the same subject, Tomasevski adds that the feature of adaptability also relates to an idea of achieving 'rights through [receiving] education'.[48] Concerning the availability and accessibility of primary education, it is accepted that the obligations of States assume a socio-economic character. In this sense, States Parties are required to take measures to fulfil the ideals encompassed within these features. Thus, physical accessibility, as a component of the feature of accessibility, implies proactive measures on the part of States to safeguard the physical safety of learners in the exercise of their rights to receive a primary education.

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[43] Kalantry, Getgen & Koh (note 31 above) 277.
[44] CESCR General Comment No. 13 (note 5 above) para 6(b)(iii).
[45] Nanima & Durojaye (note 37 above) 274.
[46] Ibid.
[47] D Wilson 'Promoting gender equality in and through education' (2004) 34 *Prospects* 11, 12.
[48] K Tomasevski *Human rights in education as prerequisite for human rights education* (2001) 6.

Following from the discussions fleshed out in this section, the next section will focus on the manner in which the dimension of physical accessibility has been theorised upon. The section will illuminate three main complexities created by the approaches followed in delineations of the dimension, pointing to both the problems created by the minimal attention given to the subject, and the flaws emanating from the theoretical treatment of the issues.

3. Theorisations of physical accessibility: the problem of locality

Theorisations of physical accessibility emanating from its recognition by the CESCR in General Comment No. 13 are not a new phenomenon. Since its incorporation as one of the three dimensions of accessibility, the idea that education must be physically accessible has received mention in more than a few discourses and contributions on the right to education in all forms and at all levels. However, as decried in section 1 above, each contribution to the subject has advanced a certain pattern which develops from the treatment that human rights scholars have tended to afford to this dimension. Save for a recent contribution by Faranaaz Veriava and Kate Paterson,[49] in which the scholars offer a distinguishable account of physical accessibility, the usual approach to discussions of this dimension has been disquieting. For example, in an immensely valuable book by Klaus Dieter Beiter,[50] substantive engagements with the dimensions of non-discrimination and economic accessibility as integral components of accessibility are offered. In so far as the contribution concerns the discussion of physical accessibility, however, a paragraph is virtually allocated. The same is true of the exceptional contributions by Woolman and Bishop in Constitutional Law of South Africa, who unfortunately only make a single sentence mention that '[p]hysical accessibility requires that learners are in fact able to travel from their homes to schools'.[51] Nonetheless, a number of scholarly contributions focusing on the 4As can be systematically studied, and the pattern sustains. Consequent to these apparent shortfalls, a narrow theorisation of physical accessibility has prevailed, in terms of which the dimension 'means that schools should be located in a manner that enables all individuals to participate'.[52] This theorisation of physical accessibility creates three main complexities which can be termed 'the problem of locality',

[49] F Veriava & K Paterson 'The right to education' in J Dugard, B Porter, D Ikawa & L Chenwi (eds) *Research Handbook on Economic, Social and Cultural Rights as Human Rights* (2020) 113, 127.
[50] Beiter (note 9 above) 489-490.
[51] Woolman & Bishop (note 36 above) 57-30.
[52] Kalantry, Getgen & Koh (note 31 above) 277.

underscoring the emphasis placed on the geographical locations of schools. These complexities equally call for further examination.

3.1. The distinction between access to schools and access to education

In section 2 of this research report, it made sense that the right to primary education as enshrined in art 13(2)(a) denotes an entitlement to a system of primary education. It has also been established that such a system aims to deliver a basic education to children. In this sense, a system of primary education can be distinguished from the various methods it can adopt for the delivery of an education for children, particularly the method of schooling. The two are not synonymous. As McCowan puts it, '[T]here is a significant amount of each [education and schooling] that lies outside the realm of the other. There is much that goes on in schools that is not education … and much education that does not occur in schools or universities'.[53]

Notwithstanding this, it must be accepted that systems of primary education in the modern day secure the delivery of an education to children through schooling.[54] Ever since school attendance was made compulsory in the 18th century,[55] schools have been a proven method for the delivery of instruction to large numbers of children, and they have seen significant developments throughout the world and continue to enjoy a near universal recognition.[56] Similarly, there are many aspects of both education and schooling that serve common interests,[57] and reliance on schools may be sensible because it simplifies the monitoring of States obligations to realise a primary education for children. In addition, and most compelling, the method of schooling is preferred by the ICESCR in art 13(2)(e) where it is provided that 'a system of schools at all levels shall be actively pursued'.[58] Here, the ICESCR specifically prescribes formal schooling as a method that States must employ to ensure the realisation of the rights contained in art 13(2)(a)-(d).[59] It must be stressed, however, that the preference of the ICESCR does not synonymise primary education with schooling. Instead, the ICESCR distinguishes primary education from schooling by directing

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[53] McCowan (note 28 above) 513.
[54] K Osborne 'Education and Schooling: A Relationship that can Never be taken for Granted' in D Coulter & J Wiens (eds) *Why Do We Educate? Renewing the Conversation* (2008) 21, 22.
[55] Delbruck (note 23 above) 95.
[56] McCowan (note 28 above) 512.
[57] J Mwalimu *Too Much Schooling, Too Little Education: A Paradox of Black Life in White Societies* (1994) 15.
[58] ICESCR art 13(2)(e).
[59] Beiter (note 2 above) 97.

that school systems should be developed at all levels, and in this regard, such systems for the various levels will inherently vary.

In theorising on physical accessibility, the idea that schools must be located at geographically convenient locations for the learners, tends to elevate access to schooling to the status of access to an education. In so doing, fundamental protections for children to access a system of primary education are curtailed, and in this way a narrow approach solidifies. Such an approach erroneously inhibits substantive interpretations of physical accessibility, the latter which may maximise guarantees for the physical safety of children in schools. Notably, the prevailing theorisations on the dimension under discussion are narrow, and as such they are unable to account meaningfully for the differences between physical accessibility to schools on the one hand, and physical accessibility to systems of primary education on the other, the latter which is broad and provides protection for physical accessibility to both the educational infrastructures and the required learning content.

3.2. The value of the language of the CESCR

Another problem which arises follows from the fact that the narrow theorisations on physical accessibility appear to be underpinned by what the CESCR includes as some of the ways in which 'safe physical reach' to an education may be achieved.[60] In General Comment No. 13 the CESCR remarks as follows in respect of the dimension of physical accessibility:

> Education has to be within safe physical reach, either by attendance at some reasonably convenient geographic location (e.g. a neighbourhood school) or via modern technology (e.g. access to a "distance learning" programme).[61]

In light of the language employed by the CESCR, it must be noted that the main focus is on the fact of education being 'within safe physical reach'.[62] This is subsequently complemented by examples and emphasis on some of the ways that a 'safe physical reach' may be achieved, which includes the provision for attendance of school at some reasonably convenient geographical location, or through modern technology. It must be pointed out that this understanding is in line with the approach taken by the CESCR to the other dimensions. In relation to non-discrimination, it is stated 'education must be accessible to all', and this is

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[60] CESCR General Comment No. 13 (note 5 above) para 6(b)(ii).
[61] Ibid.
[62] Ibid.

followed by complementary aspects on how non-discrimination may be achieved.[63] A similar approach is evident in relation to the dimension of economic accessibility, where it is remarked 'education has to be affordable to all', and thereafter a number of complementary examples are offered.[64]

The language employed by the CESCR also demarcates physical safety as an issue of accessibility over acceptability, the latter which concerns 'the form and substance of education, including [the nature of] curricula and teaching methods'.[65] The language of treaty bodies or committees in general, is crucial. The CESCR, as a treaty body is considered an authoritative source for the interpretation of the ICESCR.[66] The General Comments produced by this body are contributed to the shaping of principles of international law and they inform states practices. With this in mind, the prevailing theorisations reflect minimal attention being paid to the language of the CESCR. For one thing, these theorisations have taken little to no regard for the concept of 'safety' as employed in General Comment No. 13.[67]

3.3. The location of schools as an issue of availability

The discussions of this research report in section 2.3 are important for an understanding of the problem of accessibility encroaching into the domain of availability. It must be recalled that the feature of availability as an essential component of the 4As concerns the provision of primary education in the broader sense of a system, and schools in a narrower sense of methods adopted for the delivery of an education. As Woolman and Bishop have explained,[68] the availability of a system of primary education or schools, is a precondition for claims regarding the accessibility, acceptability and adaptability of schools. To reiterate, the feature of availability concerns the provision of educational infrastructures and educational programmes.[69] It highlights the obligations of States to ensure sufficiency in the number of educational institutions and programmes available within its territorial jurisdiction.[70] Thus, concerns for the location of schools is appropriately understood as an issue of availability. On the whole, the coupling of physical accessibility with concerns for the geographical

[63] Ibid para 6(b)(i).
[64] Ibid para 6(b)(ii).
[65] General Comment No. 13 (note 5 above) para 6(c).
[66] K Mechlem 'Treaty Bodies and the Interpretation of Human Rights' (2021) 42 *Vanderbilt Law Review* 905, 929.
[67] CESCR General Comment No. 13 (note 5 above) para 6(b)(ii).
[68] Woolman & Bishop (note 36 above) 57-21.
[69] General Comment No. 13 (note 5 above) para 6(a).
[70] Woolman & Bishop (note 36 above) 57-19.

locations of schools is problematic, not only because it appears to be an issue for the feature of availability, but also because of its troubling treatment of concepts critical to the realisation of the right to primary education, as well as the minimal observance afforded to the language of the CESCR.

4. The substantive content of physical accessibility

Article 13(2)(a) of the ICESCR protects the right of children to receive a free and compulsory primary education.[71] Once States have made systems of primary education available within their territorial jurisdictions, educational institutions and programmes must be accessible to all children.[72] As seen from the discussion in section 3.2 above, the access of children to primary education must be without discrimination,[73] and most importantly it must be safe.[74] It is worth restating that in this sense physical accessibility protects the physical safety of children when they access systems of primary education which have been made available by States. It incorporates the right of children to safety, which is civil and political in its nature, into systems of education at the primary level. In so doing, physical accessibility underscores the interdependence and permeability of human rights.[75] This approach to the dimension of physical accessibility is essentially substantive,[76] and the two most obvious content to read into it is the requirement that children must be safe within systems of primary education in any model they adopt, including schooling, and that the best interests of children must be of paramount importance. In addition, physical accessibility reaffirms the guarantees of access to primary education for children as discussed in section 2.3 above. Thus, the approach draws not only from the underlying principles and values of international human rights law, but also from the social context within which physical accessibility must be realised.[77] A substantive reading of physical accessibility promises maximum protections for the rights of children to primary education under the ICESCR and the international human rights system as a whole.

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[71] CESCR General Comment No. 13 (note 5 above) paras 6.
[72] Ibid para 6(b).
[73] Ibid para 6(b)(i).
[74] Ibid para 6(b)(ii).
[75] C Scott 'The interdependence and permeability of human rights norms: Towards a partial fusion of the international covenants on human rights' (1989) 27 *Osgoode Hall Law Journal* 769, 771-772.
[76] P Craig 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' in R Bellamy (ed) *The Rule of Law and the Separation of Powers* (2005) 95, 124.
[77] C Botha *Statutory Interpretation: An Introduction for Students* (2012) 143.

4.1. Rationale for protecting children's safety

The proposition that the substantive content of physical accessibility contains a guarantee of safety for children is to some extent novel. This is perhaps because the system of international human rights law, particularly the key international human rights instruments constituting the International Bill of Human Rights,[78] do not provide for an explicit guarantee for the right to safety. Rather, as will be seen in section 4.2 below, the protection of safety is implied and often difficult to determine. In the context of the right to primary education, however, the absence of an explicit guarantee for the safety of children in schools is problematic and unfortunate. This is because children are the most vulnerable members of society, and their voices are often left unheard.[79] They generally lack access to sufficient information, or they lack the capabilities necessary to understand a range of implications that concern their safety in schools. Moreover, the social contexts within which they find themselves, such as dilapidated schools, are often not out of their own choice.[80] Equally important, the idea that the physical safety of children in schools must be protected finds some support from the CESCR. In General Comment No. 13, the CESCR has emphasised that physical accessibility must be understood and applied in a manner that ensures 'the best interests of the student [are] a primary consideration'.[81] Whereas a focus on the geographical locations of schools advanced by the prevailing theorisations is appropriately addressed as a concern of availability, it is submitted that a guarantee of safety is in the best interests of children in the context of the right to primary education, and as such it must be imposed upon States to not only safeguard, but to take measures toward its realisation.

4.2. Is there a right to physical safety?

To begin with, there is no explicit right to safety, or a right called 'the right to physical safety' under the international human rights system. The guarantees of safety are rather implicitly contained in international human rights instruments, and there are also declarations that point to a clearer acknowledgement of safety as an interest worthy of legal protection and the status

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[78] The International Bill of Rights comprises of the UDHR, the ICESCR and the International Covenant on Civil and Political Rights (ICCPR) (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171. South Africa signed the ICCPR on 3 October 1994 and ratified it on 10 October 1998. UN Human Rights Office of the High Commissioner <https://www.ohchr.org/en/what-are-human-rights/international-bill-human-rights>

[79] J Vincenten & A Michalsen 'Priorities for Child Safety in the European Union: Agenda for Action (2002) 9 *Injury Control and Safety Promotion* 1, 1.

[80] Ibid 2.

[81] CESCR General Comment No. 13 (note 5 above) para 7.

of a human right. It should be pointed out; however, these propositions are not necessarily stemming from the context of education rights. For example, in a 2003 Disaster Studies Working Paper prepared by John Twigg, the implicit protections of the right to safety from a context of disaster studies are identified.[82] Furthermore, there has also been much clarity provided on the need for the protection of safety in the context of Injury Prevention and Control. The identification of these implicit rights is equally of relevance to the arguments advanced in this research report.

First, safety as a human right finds implicit protection within the rights to security in general. Notably, in art 3 of the UDHR, recognition is afforded to the inalienable rights to life, liberty and security of the person.[83] These rights are further afforded the force of law through their incorporation in different parts of the ICCPR.[84] For example, in art 6 of the ICCPR, the right to life is guaranteed as a broad interest protected against any act or omission intended or expected to cause an unnatural or premature death of another.[85] The broad guarantee of life under the ICCPR arguably cannot withstand without encompassing a guarantee for physical safety, since physical safety is an essential component of life itself. In like manner, references to physical safety as a fundamental right may be drawn from the guarantees of the ICESCR toward an adequate standard of living, specifically the right to adequate housing. In General Comment No. 4, the CESCR underscores the importance of the physical safety of persons by requiring that an adequate standard of housing must exhibit the characteristic of being habitable.[86] It adds in explicit terms that habitability requires guarantees for the physical safety of the occupants.[87] Here, it is worth indicating that the 4As of the right to education as discussed in section 2.3 above were informed by the model observed in General Comment No. 4 by the CESCR.[88] Further to this, the protection of physical safety is implied in the guarantees of adequate food for all persons. Much like the right to life, the availability and accessibility to adequate food carries implications for the physical safety of all people. To be sure, the CESCR in General Comment No. 12 affirms that

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[82] Benfield Hazard Research Centre *Disaster Studies Working Paper 9* (December 2003) 4.
[83] Article 3 of the UDHR.
[84] The right to life is guaranteed in art 6 of the ICCPR, while the rights to liberty and security of the person are enshrined in art 9 of the same instrument.
[85] UN Human Rights Committee General Comment No. 36 'Article 6: Right to Life' (03 September 2019) CCPR/C/GC/36 (HRC General Comment No. 36) para 3.
[86] UN Committee on Economic, Social and Cultural Rights General Comment No. 4 'The right to adequate housing' (13 December 1991) E/1992/23 (CESCR General Comment No. 4) para 8.
[87] Ibid para 8(d).
[88] CESCR General Comment No. 13 (note 5 above) para 6.

access to adequate food is indispensable for the fulfilment of other human rights,[89] such as the right to life. Moreover, physical safety finds mention in the context of labour and work. The ICESCR in art 7 provides explicit protection for the physical safety of workers.[90] The requirements for safe working conditions are a further indication of the value of physical safety within the international human rights system. Additionally, physical safety finds particular protection in the context of the right to health. Article 12 of the ICESCR guarantees the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. This is complemented by General Comment No. 14 of the CESCR, where it is explained that the right to health must be broadly understood to include underlying determinants of good health, such as safe water and food.[91] As such, it may be argued that access to safe water and food extends protection to the physical safety of persons.

It is further worth mentioning that in the context of Injury Prevention and Control, safety is a concern that has been given significant attention. For one, in 2000 the 5th World Conference on Injury Prevention and Control adopted the Delhi Declaration on Peoples' Right to Safety.[92] Through this declaration, a resolve was reached to protect and promote safety in the area of Injury Prevention and Control. The Delhi Declaration then proceeds to define safety as 'a state in which hazard and conditions leading to physical, psychological, and material harm are controlled in order to preserve the health and well-being of individuals and communities'.[93] Following the Delhi Declaration, still within the context of Injury Prevention and Control, the Montreal Declaration on People's Right to Safety was adopted on 15 May 2002.[94] According to Dinesh Mohan, the Montreal Declaration reflected on all the United Nations agreements that had been reached in the area of Injury Prevention and Control, and it made the implicit agreements explicit.[95] In art 1, the Declaration explicitly states, '[s]afety is a fundamental right. It is essential for the attainment of health, peace,

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[89] UN Committee on Economic, Social and Cultural Rights General Comment No. 12 'The Rights to Adequate Food' (12 March 1999) E/C. 12/1999/5 (CESCR General Comment No. 12) para 4.
[90] Article 7 of the ICESCR. See also UN Committee on Economic, Social and Cultural Rights General Comment No. 23 'The Right to Just and Favourable Conditions of Work' (27 April 2016) E/C. 12/GC/23 (CESCR General Comment No. 23) para 25.
[91] UN Committee on Economic, Social and Cultural Rights General Comment No. 14 'The right to the highest attainable standard of health' (11 August 2000) E/C.12 /2000/4 para 11.
[92] Delhi Declaration on Peoples' Right to Safety (adopted 8 March 2000 by the 5th World Conference on Injury Prevention and Control held at New Delhi, India) (Delhi Declaration).
[93] See Delhi Declaration fn 89 above.
[94] Montreal Declaration: People's Right to Safety (adopted 15 May 2002 by the 6th World Conference on Injury Prevention and Control at Montreal, Canada) (Montreal Declaration).
[95] D Mohan 'Safety as a Human Rights - Introduction to Roundtable Discussion: People's Right to Safety' (2003) 6 *Health and Human Rights: An International Journal* 161, 165.

justice and well-being'.[96] It adopts the definition of safety as contained in the Delhi Declaration and proceeds to identify other aspects that are essential to the realisation of people's right to safety.[97]

In short, the absence of an explicit guarantee for the right of children to safety is not fatal. Rather, it can be addressed through the implicit guarantees identified in this section to inform the content of physical accessibility. In particular, these protections illustrate that a reading of physical accessibility as a concern for the safety of learners can be appropriately located within the existing international human rights framework. In the next section, this research report will focus on the recognition and application of physical accessibility in South Africa. Thereafter, recommendations will be made with reference to incidences of children losing their lives after falling into pit toilets at South African schools.

5. Physical accessibility in South Africa: lessons from the ICESCR

Nearly 20 years ago in South Africa, the idea that physical accessibility relates to the safety of children within systems of primary education was expressed by the South African Human Rights Commission (SAHRC). In its 2006 Report of the Public Hearing on the Right to Basic Education, the notion of physical accessibility was said to refer 'to the distance that learners must travel and also their safety when travelling'.[98] This construction of physical accessibility was made against a background which the commission contextualised in its recommendations in the following terms:

> There are unacceptably high levels of violence particularly sexual violence, which has a disproportionate impact on girl-child learners occurring within South African schools. Anti-social activity such as gangsterism and drug usage occurs within some schools. This impacts negatively on the ability of children, particularly the girl-child, to access education in an environment that is acceptable.[99]

Since then, a conception of physical accessibility as a concern for the safety of learners has been revived by Veriava and Paterson through their recent chapter in the Research Handbook on Economic, Social and Cultural Rights as Human Rights, wherein they state amongst other

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[96] Montreal Declaration (note 94 above) art 1.
[97] Ibid art 2.
[98] South African Human Rights Commission *Report of the Public Hearing on the Right to Basic Education* (2006) 12.
[99] Ibid 41.

things, '[s]tudents must be able to arrive safely at schools'.[100] In view of both the theorisations of the SAHRC and Veriava together with Paterson, it is less clear what becomes of physical accessibility once a learner has arrived safely at school. Does the concern for physical safety fall away? Although these contributions affirm the need for the safety of learners to be protected, they do so in a limiting manner. In recent years, this approach has received some endorsement from the courts in South Africa as will be seen below.

5.1. The recognition of physical accessibility in South Africa

It must be remembered that the right to primary education is a justiciable right guaranteed in s 29(1)(a) of the Constitution. The Constitution stipulates that '[e]veyone has the right – (a) to a basic education',[101] and it also guarantees the right of non-State actors to 'establish and maintain, at their own expense, independent educational institutions'.[102] In many ways, the constitutional provisions for the guarantee of primary education in South Africa affirm the ICESCR framework, and there are several reasons for this that are worth brief mention. First, the South African Bill of Rights is, in itself, modelled after the ICESCR on guarantees of socio-economic rights.[103] Second, South Africa's domestic law adopts a friendly approach toward international law,[104] especially the ICESCR. Third, South Africa has ratified the ICESCR,[105] despite the contentious declaration that accompanied its ratification.[106] The declaration focuses on the right to education, and it states that '[t]he Government of the Republic of South Africa will give progressive effect to the right to education, as provided for in Article 13 (2)(a) and Article 14, within the framework of its National Education Policy and available resources'.[107] However, as pointed out in section 1 above, the right to primary education is an immediately enforceable right under the ICESCR, with immediate obligations

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[100] Veriava & Paterson (note 49 above) 127.
[101] Section 29(1)(a) of the Constitution. See also fn 2 above on the synonymous use of the terms 'primary' and 'basic' education and see section 2.2 for a discussion of the relationship between basic education and primary education under the ICESCR.
[102] Section 29(3) of the Constitution.
[103] Hardowar (note 2 above) 17-20. See also *Government of the Republic of South Africa & Others v Grootboom* 2000 11 BCLR 1169 (CC) (*Grootboom*).
[104] See D Tladi 'Interpretation of Treaties in an International Law-Friendly Framework: The Case of South Africa' in H Aust & G Nolte *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence* (2016) 135.
[105] Right to Education 'South Africa Ratifies the International Covenant on Economic, Social and Cultural Rights <https://www.right-to-education.org/news/south-africa-ratifies-international-covenant-economic-social-and-cultural-rights>
[106] L Chenwi 'International Human Rights Law in South Africa' in E de Wet, H Hestermeyer & R Wolfrum (eds) *The Implementation of International Law in Germany and South Africa* (2015) 339, 348.
[107] Right to Education fn 105 above.

for States, and its implementation is generally not subject to progressive realisation as is the case with other Economic, Social and Cultural Rights (ESCR).[108]

Most compelling evidence, the 4As have been widely employed by the courts in South Africa to establish the content of the right to basic education in s 29(1)(a) of the Constitution. Pointing to this, the availability of education is considered as a critical component of the right to basic education. In *Juma Musjid*,[109] the Constitutional Court identified the obligation of States to provide the necessary educational infrastructure and explained that the State has a duty to ensure the availability of schools as a necessary condition for the enjoyment of the right to basic education. Availability has further been attributed to the provision of infrastructure in the form of desks and chairs, as well as educational material, specifically textbooks. In *Minister of Basic Education v Basic Education for All*,[110] the Supreme Court of Appeal of South Africa (SCA) held that the provision of textbooks is a component of the right to basic education, and that the State has a duty to ensure the provision of textbooks for every learner. Similarly, the Court in *Madzozo v Minister of Basic Education* found that the failure by the State to provide desks and chairs to schools constituted a breach of their obligations under the right to basic education as guaranteed in s 29(1)(a) of the Constitution.[111]

Correspondingly, the feature of accessibility has also received significant delineation as a component of the right to basic education in South Africa. In *Textbook Judgment 3*, the SCA affirmed that equal access to education is another critical component of the right to basic education under s 29(1)(a) of the Constitution. The development of the equality jurisprudence in South Africa has been crucial to the guarantee of access to education on the basis of non-discrimination. The right to basic education has been read together with the guarantees of equality enshrined in s 9 of the Constitution.[112] In addition, South African jurisprudence on the right to basic education has recognised the dimension of physical accessibility as a component of the right to a basic education.[113]

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[108] *Governing Body of the Juma Musjid Primary School v Minister of Education* 2011 (8) BCLR 761 (CC) (*Juma Musjid*) para 37.
[109] Ibid para 45.
[110] *Minister of Basic Education v Basic Education for All* 2016 (1) All SA 369 (SCA). This case is commonly known as 'Textbook Judgment 3'.
[111] *Madzodzo v Minister of Basic Education* 2014 (3) SA 441 (ECM).
[112] L Arendse 'Slowly but surely: The substantive approach to the right to basic education of the South African courts post-Juma Musjid' (2020) 20 *African Human Rights Law Journal* 285, 299-301.
[113] *Tripartite Steering Committee v Minister of Basic Education* 2015 (5) SA 107 (ECG) (*Tripartite Steering Committee*).

5.2. The application of physical accessibility in South Africa

The dimension of physical accessibility in South Africa was considered and applied in *Tripartite Steering Committee* as a component of the right to a basic education.[114] The case specifically concerned the determination of whether the right to basic education includes the right for learners to be provided with transport to and from school at the expense of the State, especially those learners who live a determined distance from their schools and who cannot afford the cost of transportation.[115] The court found that the right to transportation forms part of the right to basic education in s 29(1)(a) of the Constitution and explained that:

> [I]n instances where scholars' access to schools is hindered by distance and an inability to afford the costs of transport, the State is obliged to provide transport to them in order to meet its obligations, in terms of s 7(2) of the Constitution, to promote and fulfil the right to basic education.[116]

The approach followed by the court in *Tripartite Steering Committee* is, though plausible, a narrow one. What is evident from the Court's approach toward physical accessibility are the shortfalls identified in section 3 above. The Court's approach does not account for the safety of learners in their exercise of the right to receive an education. In trying to salvage a substantive reading of physical accessibility from this judgment, it may be argued that the Court has acknowledge the fact that the rights of learners to access an education may be inhibited by a range of factors, including transportation. However, this would remain insufficient since there is no emphasis placed on the need for the safety of learners to be protected. A question posed earlier in this section confronts this judgment, what becomes of physical accessibility once the learners have reached the school facilities?

5.3. Physical accessibility in Komape: a going concern

The case of *Komape* arose from the tragic death of five-year-old Michael Komape at a primary school in the province of Limpopo in South Africa.[117] Michael had only been a grade R learner for three days when he fell into a pit toilet situated on the premises of the school. Unfortunately, he could not be saved, and a postmortem examination subsequently revealed

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[114] Ibid.
[115] Ibid para 2.
[116] Ibid para 18-19.
[117] Note 12 above 1-3.

that he had died due to aspiration of foreign material which is consistent with drowning.[118] The tragic passing of Michael was in many ways a concern for the dimension of physical accessibility as theorised in this research report. However, the litigation which subsequently ensued emphasised the obligations of the Department of Basic Education (Department) to make an education system available for children. Of particular importance for purposes of the ongoing discussion is the argument raised against the Department to the effect that, it had breached its constitutional duties relating to the right of children to a basic education as enshrined in s 29(1)(a) of the Constitution.[119] In formulating its judgement, the Court affirmed that the Department had indeed breached its constitutional duties under s 29(1)(a), and it reasoned that '[t]he right to basic education includes provision of adequate and safe toilets at public schools for learners'.[120] The Court further remarked that:

> Society has a substantial interest in the safety of their children when absorbed into the school system and placed in the care of schools and teachers who are charged with upholding the rights of children protected by the Constitution. Its failure to do so touches upon their dignity, safety and health and as such the best interests of every learner attending school in rural Limpopo.[121]

In the first place, the reasoning of the Court in *Komape* reinforced the feature of availability under the 4As, while simultaneously asserting the importance of protecting the safety of children when they are in schools.[122] In respect of the first mentioned assertion, the idea that the provision of adequate and safe toilets at schools, forms part of the content of the right to basic education falls within the scope of availability, on the basis of which States are required to provide a sufficient number of operational educational institutions, which are adequate both in quantity and in quality.[123] In this way, the reasoning in *Komape* affirmed that adequate sanitation forms part of the obligations of States to make primary education available. It can further be noted from the extracts of the judgment as quoted in this section, that the Court remarked on the importance of children's safety a number of times. However,

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[118] Ibid 21.
[119] Ibid 7.
[120] Ibid 63.
[121] Ibid 65.
[122] The concerns about the safety of learners in schools are continuing, with 2023 seeing another case of a child who tragically lost her life after falling into a pit toilet at a school in the Eastern Cape province. The matter is still being investigated by the SAHRC. News 24 'Body of 4-year-old girl found in eastern cape school pit toilet' <https://www.news24.com/news24/southafrica/news/body-of-4-year-old-girl-found-in-eastern-cape-school-pit-toilet-20230309>
[123] Kalantry, Getgen & Koh (note 31 above) 275.

it is less clear what is entailed by the notion of safety in the context of the case. As seen in section 4.2 above, there is no explicit guarantee of safety under the international human rights system, nor is there one such explicit guarantee under the Constitution. It is submitted, thus, that the safety of children in schools, as the court in *Komape* sought to emphasise, can be better guaranteed through a substantive reading of physical accessibility as delineated in this research report. In section 4, it was established that the substantive content of physical accessibility consists in the protection for the physical safety of children in schools, a tool which the Court in *Komape* needed. Henceforth, this research report would propose a shift toward a substantive conception of physical accessibility in South Africa. As shown in section 3, a narrow theorisation of the dimension is unable to account accurately for its content and meaning. Equally, South Africa's approach to physical accessibility presents challenges in the scope of its application. Through a theorisation proposed in this research report, physical accessibility can offer clear and wider protections for children's safety in schools.

6. Conclusion

This research report has offered a substantive examination of the dimension of physical accessibility in the context of the right to receive a primary education. Although confronted with the scarcity of focused scholarship on the subject, the proposed theorisation of physical accessibility as a broad guarantee for the physical safety of children in schools, promises to offer effective responses to the modern-day challenges confronting the physical safety of children in their access to a primary education. In section 2 this research report illuminated the underlying relationship between the guarantees of access to a system of primary education on the one hand and guarantees of access to schools on the other. This focus revealed the broad nature of the right to primary education under the ICESCR and it provided a foundation for the subsequent studies of the CESCR framework for the implementation of the right to education at the primary level. In section 3, it reflected critically on the prevailing theorisations of physical accessibility, and it demonstrated the shortfalls of narrow interpretations of the dimension. In section 4, the substantive content of physical accessibility was proposed with a focus on the protections of physical safety within the international human rights system. In section 5, discussions on the recognition and application of physical accessibility in South Africa were undertaken. In the final analysis a substantive reading of physical accessibility has been proposed. In the South African context, such an approach

promises effective protection for the safety of children in schools against a range of safety related barriers.

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