

FROM ASPIRATION TO OBLIGATION:  
THE EVOLVING RIGHT TO EDUCATION  
IN INTERNATIONAL LAW

Master of Arts in Law and Diplomacy Thesis  
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## **Abstract**

The purpose of this paper is to examine the emergence of international legal norms concerning education, the extent to which these norms place obligations on states, and the impact of international organizations on clarifying and strengthening these norms.

A review of international conventions and declarations concerning education reveals: 1) the repetition and gradual acceptance of certain norms on a global scale, including compulsory free primary education and outcomes related to student learning; 2) the steady expansion of educational rights assured under international law, coming at the cost of clarity and obligatory force; and 3) the increasing difficulty of monitoring and enforcing compliance with educational norms.

This paper argues that the operational activities of international organizations have served to clarify several areas of ambiguity in the conventions and declarations by building systems of measurement and developing shared bodies of knowledge. In doing so, they have also influenced the behavior of states to comply with international norms through a mixture of persuasion and acculturation.

On the global level, an aspiration has been clearly expressed for education to serve as the means for the individual to rise above the circumstances of his or her birth. The progress made in clarifying and measuring these norms provides a measure of hope that these aspirations are evolving into realizable international obligation.

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## I. Introduction

Everyone has the right to education.<sup>1</sup>

This right has been affirmed in numerous international conventions, global declarations, regional agreements, and national constitutions. However, the extent to which a State is obligated to provide education for its citizens, the means by which the provision of educational rights can be evaluated and enforced, and the content of a quality education in the twenty-first century are still largely nebulous concepts.

There are myriad problems caused by this lack of legal clarity. Theories of justice, whether construed by Rawls, Locke, Kant, or Confucius, consider the inequality of educational opportunities to constitute a basic failure of society. Beyond the ethical issues lies a distinct set of economic and social problems. Educational attainment serves as a basic market signal of a worker's knowledge and skills. Globalization has boosted international mobility to new extremes creating potential links between employers and workers around the world. However, the lack of consistent regional frameworks for educational qualifications hinders efficiency and growth.

Furthermore, the provision of quality education has numerous positive externalities for society, including better health, increased civic participation, and more responsive governance. Without legal assurance that these benefits are being accrued, development funds spent on educational projects may largely go to waste. Therefore, it is essential to work towards clarifying and strengthening the international laws regarding education.

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<sup>1</sup>Universal Declaration of Human Rights, G.A. Res. 217A, art. 26(1), U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. DOC. A/810 (Dec. 10, 1948) [hereinafter UDHR]

### ***Purpose and Research Questions***

The purpose of this paper is to examine the emergence of international legal norms concerning education, the extent to which these norms place obligations on States, and the impact of international organizations on clarifying and strengthening these norms. To accomplish this purpose, the following research questions are posed:

1. What rights related to education exist in international conventions and declarations? How have these rights developed over time?
2. How have the practices of international and non-governmental organizations contributed to the development of international law on educational rights?

### ***Thesis Statement***

The scope of educational rights assured under international conventions has expanded beyond issues of access into areas of content and quality of education. This expansion has increased the difficulty of monitoring compliance. The operational activities of international organizations have clarified several areas of ambiguity through the institution of measurement systems and construction of shared understandings. These activities have influenced the behavior of states to comply with international law on education.

### ***Approach***

This paper begins by reviewing theories on the expansion of mass education and perspectives on education from the field of international development. This is followed by an appraisal of international legal theory, including rules for the formation of international treaties, and the concept of ‘soft law’.

An analytical framework for assessing the evolution of treaty norms from aspiration to obligation is described and applied in a thorough review of the evolution of treaty language on educational rights. Beginning with the United Nations Charter, a series of international conventions and declarations are examined for the extent of the obligations placed on States Parties and the mechanisms for inducing compliance. The section concludes by delineating notable trends in the treaty language.

This paper proceeds by reviewing ways in which international organizations influence global legal norms. An argument is advanced that building systems of measurement and developing shared bodies of knowledge can provide the ‘substance’ of international law. Evidence for this argument is found in a review of the operational activities of UNESCO, UNICEF, the World Bank Group, the OECD, and the IEA. The practices of each organization are assessed for their impact on the international norms on education as well as their potential for influencing the behavior of states. A brief summary concludes the paper.

### ***Limitations***

This study is an amalgamation of developmental, educational, and legal perspectives. While doing so develops a more nuanced picture of the practical applications of the international norms, there is some depth lost. Furthermore, this analysis takes a broad perspective in both the time period and the international organizations examined. To maintain this breadth, this paper has not comprehensively examined the rulings of international and regional judicial bodies on educational issues. It is hoped that future work might utilize this analysis as a basis and correct these shortcomings.

## **II. Perspectives on Education**

As perhaps the only field in which everyone can claim experience, education is a universal topic of debate. Questions abound on who should be educated, how they should be taught, and for what purpose. The following section reviews theories on the expansion of mass education and perspectives from international development.

### ***The expansion of universal compulsory education***

Education has historically served as a means to maintain social hierarchies. Schooling, often with a heavy religious component, was used by European elites to maintain their hegemonic position in society.<sup>2</sup> One's lot in life was largely determined by the family to which one was born. Gaps in literacy and numeracy may have lengthened the Dark Ages as much as did pestilence and plague.

Europe's feudalism superficially contrasted by imperial China, where a position in the ruling bureaucracy was decided through a series of rigorous examinations on Classical works and composition, seen as demonstrating the purity of heart necessary for virtuous conduct<sup>3</sup>. However, in the East as well as the West, the funds and time required for schooling effectively restricted education of the masses.

Mass education took hold in the latter half of the nineteenth century, with worldwide primary net enrollment increasing from 33 percent in 1870 to about 47 percent in 1950.<sup>4</sup>

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<sup>2</sup> PIERRE BOURDIEU & J. PASSERON. REPRODUCTION IN EDUCATION, SOCIETY AND CULTURE (Sage Publications, 1977)

<sup>3</sup> JOHN FAIRBANK. THE UNITED STATES AND CHINA. (Harvard University Press, 1980)

<sup>4</sup> The Primary Net Enrollment Ratio (NER) measures the proportion of children of primary school age who are enrolled in a formal education program. Benavot & Riddle. *The Expansion of Primary Education 1870-1940: Trends and Issues*. *SOCIOLOGY OF EDUCATION*, Jul., 1988), (191-210). According to the latest data from the World Bank's Database, worldwide primary NER in 2008 was 88.7 percent. (*School Enrollment, Net*) WORLD BANK <http://data.worldbank.org> (last visited Jan. 9, 2012)

Theories abound as to the drivers of this expansion. Some have emphasized the role of education in mitigating conflict between different class and status groups, or the use of mass education for newly independent states to build national identities.<sup>5</sup> There has been consistent agreement on the positive effects of industrialization and urbanization on schooling. As economies industrialize and urban areas expand, the differentiation of economic roles raises demand for educated workers, resulting in an expansion of schooling.<sup>6</sup>

As might be expected, these theories have more or less relevance depending on the country. In France, the primary impetus was the fight for power between the church and the state. In Japan, the desire for industrial success of the Meiji Reformation led to the expansion of schooling. In the USA, mass education was driven in part by the need for a skilled population with an ‘American’ identity to settle the great expanses of territory<sup>7</sup>. However, as the twentieth century passed, the role of international law has begun to play an increasingly important part in the creation of universal norms for education.

### ***Development Rationales for Increasing Access to and Quality of Education***

Little is certain among development practitioners. Should donors build infrastructure or meet basic needs? Are ‘good governance’ conditional loans a step in the right direction or a hypocritical farce? With limited aid dollars, what should be targeted? The main, if not only, area of agreement lies in education. Empirically proven as a component of economic growth, the

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<sup>5</sup> RANDALL COLLINS. 1971. "Functional and Conflict Theories of Educational Stratification." AMERICAN SOCIOLOGICAL REVIEW 36:1002-1019.

<sup>6</sup> See BURTON CLARK. EDUCATING THE EXPERT SOCIETY(Chandler Publishing, 1961); FRED HARBISON & CHARLES MYERS EDUCATION, MANPOWER AND ECONOMIC GROWTH (McGraw-Hill, 1964)

<sup>7</sup> John Boli, Francisco Ramirez & John Meyer. *Explaining the Origins and Expansion of Mass Education* COMPARATIVE EDUCATION REVIEW. Vol. 29, No. 2 May, 1985 (145-170)

opportunity to receive a high-quality education can be considered as both the means and substantive ends of development.

The right to education has been alternatively categorized as a *multiplier right*, enhancing the enjoyment of all individual rights and freedoms when guaranteed and depriving people of that enjoyment when denied or violated<sup>8</sup>; as an *empowerment right* providing “the individual with control over the course of his or her life, and in particular, control over (not merely protection against) the state”<sup>9</sup>; as a *means for societal welfare*, whereby benefits are derived by the community through well-educated citizens; as a *foundation for individual well-being*, as that allows the individual to meet basic needs; and as a *requirement for human dignity*, and thus the moral basis for all human rights<sup>10</sup>.

#### *Economic Rationales: The Role of Education in Poverty Reduction*

With global reach and substantial resources, the World Bank Group<sup>11</sup> has been the pre-eminent actor in development projects in the modern era. The First Article of Agreement purports the Bank to facilitate the investment of capital for productive purposes, to promote private foreign investment and the growth of international trade, to prioritize loans and projects,

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<sup>8</sup> KATARINA TOMASEVSKI. HUMAN RIGHTS OBLIGATIONS IN EDUCATION: THE 4-A SCHEME 7 (Wolf Legal Publishers, 2006).

<sup>9</sup> Jack Donnelly and Rhoda E. Howard. *Assessing National Human Rights Performance: A Theoretical Framework*. Human Rights Quarterly , Vol. 10, No. 2 (May, 1988), pp. 214-248

<sup>10</sup> KLAUS DIETER BEITER. THE PROTECTION OF THE RIGHT TO EDUCATION BY INTERNATIONAL LAW: INCLUDING A SYSTEMATIC ANALYSIS OF ARTICLE 13 OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS 22 (Martinus Nijhoff Publishers, 2006) [Hereafter Beiter, 2006]

<sup>11</sup> What is commonly referred to as the World Bank are two separate organizations: the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA). The World Bank Group, meanwhile, comprises the IBRD and the IDA in addition to the International Finance Corporation (IFC), Multilateral Investment Guarantee Agency (MIGA), and International Centre for Settlement of Investment Disputes (ICSID).

and to pay regard to the effect of international investment on business conditions<sup>12</sup>. While these purposes guide the Bank in its decision-making, the rationales that may be used to select programs and policies are constrained, as only

economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article I<sup>13</sup>

Therefore, solid economic rationales related to poverty reduction may be considered the *sine qua non* of development work. Indeed, World Bank president Eugene Black justified supporting education in 1962 because “nothing is more vital to the economic progress of underdeveloped countries than the development of human resources through widespread education”.<sup>14</sup>

Two theories of change exist for education programs and projects. The first stresses the universal access, while the second prioritizes quality of education over enrollment increases.

### Rationales for Increasing Access

Access to basic levels of education provides people with the tools to make use of technological advances, to participate in government, and to make informed decisions about their lives. Expanding access to education has been linked to economic growth, with correlations between years of schooling completed and higher wages seen in many countries.<sup>15</sup> Cross-

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<sup>12</sup> IBRD. ARTICLES OF AGREEMENT. (Feb. 16, 1989) Art. I <http://go.worldbank.org/0FICOZQLQ0> (last visited Jan. 9, 2012)

<sup>13</sup> Ibid Art. IV Sec. 10

<sup>14</sup> WORLD BANK GROUP. EDUCATION STRATEGY 2020: LEARNING FOR ALL: INVESTING IN PEOPLE'S KNOWLEDGE AND SKILLS TO PROMOTE DEVELOPMENT. <http://go.worldbank.org/DTQZ9EKJW0> (last visited Jan. 9, 2012) [Hereafter WB Education Strategy 2020]

<sup>15</sup> Eric Hanushek. *The Economics of Schooling: Production and Efficiency in Public Schools*. JOURNAL OF ECONOMIC LITERATURE, 24(3) 1986 (1141-1177)

country historical analysis suggests that a 1 percent increase in primary enrolment rates results in increases in GDP by 0.35 percent.<sup>16</sup>

Due to the focus on quantity, a variety of methods for increasing access have been demonstrated, most focusing on reducing direct fees, the actual money charged by the school or community for education; indirect fees, the costs of uniforms, books, and school supplies; and opportunity costs, the need for child labor, particularly in rural farms. One method that has been widely used in recent years are Conditional Cash Transfers (CCTs)<sup>17</sup>, whereby parents are provided with funds or food in exchange for sending children to school.

#### At which level to increase access?

Donors have placed great emphasis on primary and secondary education, leaving tertiary levels as an afterthought. In a review covering 98 countries, social rates of return to investment in primary schooling were the highest (18.9%), followed by secondary (13.1%), and finally tertiary education (10.8%).<sup>18</sup> On the whole, tertiary education has been shown to be more statistically significant among upper income countries than in poor countries.<sup>19</sup> These findings,

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<sup>16</sup> Stevens & Weale. EDUCATION AND ECONOMIC GROWTH. (National Institute of Economic and Social Research, 2003) . Criticisms on the evidence linking access to growth note that years of education are used in cross-country comparisons, thus missing the qualitative differences in those education systems, and that sources other than formal schooling that contribute to human capital are ignored. [HANUSHEK & WÖßMANN. EDUCATION QUALITY AND ECONOMIC GROWTH (World Bank, 2007) [Hereafter Hanushek & Wößman, 2007]]

<sup>17</sup> CCT for education programs have been started in several countries in the last decade, including Brazil, Mexico, Colombia, Indonesia, Honduras, and Bangladesh. In Mexico, fully one fifth of the non-salary expenditures of the Ministry of Education went to CCTs. See REIMERS, SILVA. & TREVINO, WHERE IS THE "EDUCATION" IN CONDITIONAL CASH TRANSFERS IN EDUCATION, (UNESCO, 2007)

<sup>18</sup> G. Psacharopoulos, & H. Patrinos. *Returns to Investment in Education: A Further Update* EDUCATION ECONOMICS 12, no. 2. 2004

<sup>19</sup> WOLFF & GITTLEMAN. *The role of education in productivity convergence: does higher education matter?* In ARK & PILAT, EXPLAINING ECONOMIC GROWTH (North-Holland, 1993)

have been used to justify reductions in support for higher education<sup>20</sup> and place priority on expanding primary-level access.

However, there is a growing body of evidence for increasing support for tertiary education. The wage benefit for tertiary educational attainment is twice that of secondary levels in developing nations.<sup>21</sup> Higher education contributed to the economic growth of Taiwan<sup>22</sup> and South Korea<sup>23</sup>, and has been found to correlate with indicators of good governance.<sup>24</sup> Increased quality of tertiary education raises GDP directly through increases in productivity, and indirectly by increasing the speed of technology adoption.<sup>25</sup>

### Rationales for increasing quality

Studies have found that the quality of the schools and teachers is vitally important for learning outcomes.<sup>26</sup> Student achievement has a stronger impact on earnings than differences in years of schooling; and an increase of one standard deviation in reading and math scores on international exams is associated with an increase of 2 percentage points in annual GDP per capita growth.<sup>27</sup> The returns to quality may be even larger in developing nations.<sup>28</sup>

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<sup>20</sup> From 1995 to 1999, just 7 percent of the World Bank's educational funding went to higher education. BLOOM, CANNING, & CHAN. HIGHER EDUCATION AND ECONOMIC DEVELOPMENT IN AFRICA. (World Bank, 2007)

<sup>21</sup> WORLD BANK/OECD. CROSS-BORDER TERTIARY EDUCATION: A WAY TOWARDS CAPACITY DEVELOPMENT (OECD, 2007)

<sup>22</sup> Lin. *The Role of higher education in economic development: an empirical study of Taiwan case*. JOURNAL OF ASIAN ECONOMICS 12, no. 2, 2004 (355-371)

<sup>23</sup> LEE KYE WOO. BORROWING FROM THE WORLD BANK FOR EDUCATION: LESSONS FROM KOREA AND MEXICO. (Korean Development Institute, 2010)

<sup>24</sup> Bloom, Hartley, & Rosovsky. *Social Benefits of Higher Education* INTERNATIONAL HANDBOOK OF HIGHER EDUCATION 18, no. 1 2004

<sup>25</sup> BLOOM, CANNING, & CHAN. HIGHER EDUCATION AND ECONOMIC DEVELOPMENT IN AFRICA. (World Bank, 2007)

<sup>26</sup> Heyneman, and Loxley. *The Effect of Primary-School Quality on Academic Achievement Across Twenty-nine High and Low-income Countries*. AMERICAN JOURNAL OF SOCIOLOGY 88, no. 6 1983 (1162-1194)

<sup>27</sup> WB Education Strategy 2020 *supra* note 14 at 22

<sup>28</sup> Hanushek and Wößmann, 2007 *supra* note 16 at 1

The case of Uganda may be taken as a cautionary tale for focusing on access above quality. In 1996, the government of Uganda removed primary school fees, followed by an explosion in enrollment. However, the rise in access was not matched by an expansion in quality, and most Ugandan schools failed to fulfill the basic conditions for effective learning.<sup>29</sup> The results saw a short-term spike in enrollments followed by massive dropouts. Indeed, only 22% of the initial 1997 cohort was still in school in 2003.<sup>30</sup> Events such as these have led Gene Sperling, Director of the Center on Universal Education at the Council on Foreign Relations, to declare universal primary enrollment by 2015 (known as Education-For-All) to be “simultaneously the world’s most ambitious and pathetic goal”.<sup>31</sup>

### *Social Development Rationales*

Despite the ubiquity of “GDP per capita” in goal setting and evaluations, development practitioners and theorists are rarely comfortable with setting economic growth as their ultimate goal. Doing so leaves many questions, from the environmental sustainability of development projects to the existence and exercise of civil rights to the inclusion of marginalized populations.

### Societal Benefits of Education

Numerous studies demonstrate that an educated population has benefits to society beyond enhanced work productivity and growth. First among these benefits are increases in children’s health and decreases in child mortality rates<sup>32</sup>, as education provides knowledge of the reasons

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<sup>29</sup> WORLD BANK INDEPENDENT EVALUATION GROUP. FALLOUT FROM THE "BIG BANG" APPROACH TO UNIVERSAL PRIMARY EDUCATION: THE CASE OF UGANDA (World Bank, 2007)

<sup>30</sup> L. Grogan. *Universal Primary Education and School Entry in Uganda* JOURNAL OF AFRICAN ECONOMIES 18, no. 2 2009 (183-211)

<sup>31</sup> Juno Nakamura. *Panel Assess Progress on "Education for All"* THE APPIAN Nov. 1, 2004 (2)

<sup>32</sup> 8.2 million fewer children under the age of 5 died in 2009 as compared to 1970. Fully one-half of this decrease has been attributed to more education of women. [E. Gakidou et al. *Increased Educational Attainment and its Effect on*

for vaccination and avoiding infectious diseases. Moreover, education allows households to cope with economic shocks and exploit new income-generating opportunities<sup>33</sup>, thus decreasing household risk. Finally, education has been linked to greater ability to cope with environmental change, as educated populations tend to adopt more sustainable lifestyles and cope better with extreme weather events.<sup>34</sup>

### Substantive Freedoms and the Capabilities Approach

Perhaps the most eloquently phrased alternative rationale for development lies in Amartya Sen's conception of 'Development as Freedom'. Wedding philosophy with economics, Sen declares that:

Development can be seen...as a process of expanding the real freedoms that people enjoy....Viewing development in terms of expanding substantive freedoms directs attention to the ends that make development important, rather than merely to some of the means that, *inter alia*, play a prominent part in the progress<sup>35</sup>

From this viewpoint, a quality education can serve as both a means and an end. As a means, education allows humans to participate in civil society, to engage in meaningful and remunerative employment; and to have the necessary skill-set to make informed decisions about their own livelihoods; in short, education (as an admittedly idealized concept) provides the path to gaining all other substantive freedoms.

Access to a quality education also stands as a substantive freedom and thus an end in and of itself. Sen's theories form the basis of the 'capabilities approach' utilized by the UNDP, which

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*Child Mortality in 175 Countries between 1970 and 2009: A Systemic Analysis* THE LANCET 376 (9745) 2010 (959-74) *supra* note 11, at 13 ]

<sup>33</sup>E. Frankenberg, J. Smith, & D. Thomas *Economic Shocks, Wealth, and Welfare* THE JOURNAL OF HUMAN RESOURCES, 38(2) 2003 (280-321) *supra* note 11, at 13

<sup>34</sup>B. BLANKESPOOR, S. DASGUPTA, B. LAPLANTE, AND D. WHEELER. ADAPTATION TO CLIMATE EXTREMES IN DEVELOPING COUNTRIES: THE ROLE OF EDUCATION: POLICY RESEARCH WORKING PAPER 5342. (World Bank, 2010) *supra* note 11, at 13

<sup>35</sup>AMARTAYA SEN. DEVELOPMENT AS FREEDOM (Anchor Press, 2000)

sees development as ‘the expansion of people’s freedoms to live their lives as they choose’.<sup>36</sup>

The capabilities approach makes a crucial distinction between freedoms and actions. In terms of education, the opportunity to pursue knowledge and develop skills is a freedom of intrinsic value; the exercise of that freedom, while certainly important for individual and societal well-being, does not alter the value of the freedom itself.

### ***Summary***

As illustrated above, the arguments for the universal right to quality education by development theorists rely primarily on justifications of the economic and social benefits derived from the expansion of educational opportunities. These rationales also contain a distinct sense of the morality and ‘justness’ of the endeavor, with Sen’s evocation of ‘substantive freedoms’ strongly resonating with human rights law.

Unsurprisingly, the ‘social development’ rationales have begun to work their way into the frameworks of international law. As will be discussed in detail, the ‘capabilities rationale’ was institutionalized in the 2000 Dakar Education for All (EFA) Framework, as the firm belief that “all children, young people and adults have the human right to benefit from an education that will meet their basic learning needs.”<sup>37</sup> In this manner, the evolving global legal norms on education both influence and are influenced by the work of international organizations.

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<sup>36</sup> United Nations Development (2009) *Human Development Report 2009: Overcoming barriers: Human mobility and development*

<sup>37</sup> UNESCO. *Education For All: Meeting Our Collective Commitments: Dakar Framework*. ED-2000/WS/27. <http://unesdoc.unesco.org/images/0012/001211/121147e.pdf> (Last visited Jan. 10, 2012) at 8 [Hereafter Dakar Framework]

### **III. Theoretical Background**

The complex evolution of international law is revealed by tracking the usage of phrases over time. From 1950 to 2008, the relative frequency of the phrase ‘international norm’ quadrupled in English-language publications. The frequency of ‘soft law’ increased by one thousand percent over the same time period, trebling ‘UN Charter’ by 2000. Dominant over all of these terms are ‘ICJ’ and “customary law”, each appearing at more than quadruple the frequency of ‘soft law’ in 2000.<sup>38</sup>

What do these trends tell us? To the extent that overall cultural patterns influence legal theory, we see an expanding range of sources used in the process of justificatory discourse, with long-standing authorities gradually incorporating new stakeholders into the debate. According to Harold Koh, international law “comprises a complex blend of customary, positive, declarative, and soft law.”<sup>39</sup> This assortment limits the certainty of identifying concrete international rules by expanding the purview of normative agents involved in creating, interpreting, and using international law to advance their interests.

#### ***Natural Law and Legal Positivism***

The consideration of international law begins with a discussion of natural law and legal positivism. In the former, law is constituted of ‘necessary’ moral and ethical precepts; in the latter, law exists simply by virtue of its obligatory nature. According to legal positivists, “the fact that a policy would be just, wise, efficient, or prudent is never sufficient reason for thinking that

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<sup>38</sup> Jean-Baptiste Michel et al. *Quantitative Analysis of Culture Using Millions of Digitized Books*. SCIENCE (Published online ahead of print: 12/16/2010)

<sup>39</sup> Harold Koh *Why do nations obey international law?* FACULTY SCHOLARSHIP SERIES. Paper 2101(1997) [Hereafter Koh, 1997] at 2630-2631

it is actually the law, and the fact that it is unjust, unwise, inefficient or imprudent is never sufficient reason for doubting it.”<sup>40</sup>

John Austin<sup>41</sup> saw the ultimate source of law as the commands issued by a sovereign with authoritative supremacy, the ability to enforce sanctions, and receiving habitual obedience from the masses. Critics of Austin assert that he dismissed the international law as nothing more than a collection of moral rules.<sup>42</sup> A more apt description would be that the early positivists failed to anticipate the development of a multipolar and inter-connected legal universe. Indeed, Hans Kelsen later put international law at the very top of the global legal order.<sup>43</sup>

H.L.A. Hart analyzed the relationship of law to both morality and coercion. Hart found greater utility in the concept that ‘this is law, but too iniquitous to obey or apply’, as opposed to denying legal validity to immoral laws.<sup>44</sup> This translates to the field of international law by separating a state’s moral and legal obligations; while the two often *may* coexist, international law does not *have to* include morality.

Hart dismissed the necessity of sanctions as akin to a gunman forcing a victim to comply<sup>45</sup> and also abandoned the necessity of a sovereign; instead positing two conditions as both necessary and sufficient for the existence of a legal system:

1. Rules of behavior which are valid according to the system’s ultimate criteria of validity must be generally obeyed

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<sup>40</sup> Greene Leslie. *Legal Positivism* STANFORD ENCYCLOPEDIA OF JURISPRUDENCE (1), <http://plato.stanford.edu/entries/legal-positivism/> (Last visited Jan. 10, 2012)

<sup>41</sup> *Ibid*

<sup>42</sup> See SEAN MURPHY. PRINCIPLES OF INTERNATIONAL LAW. 65 (Thomson West, 2006)

<sup>43</sup> *Ibid*

<sup>44</sup> *Ibid* at 205-206

<sup>45</sup> H.L.A Hart (1994), *THE CONCEPT OF LAW*, 2ND EDITION (Clarendon Press, 1994).[Hereafter Hart, 1994]

2. Rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behavior by its officials.<sup>46</sup>

While noting the lack of the secondary rules in international law, Hart anticipated developments in these areas.<sup>47</sup> The primary question, in Hart's view, was not the extent of international legislative authority in a particular domain, but rather the extent of autonomy which international rules allowed to states.<sup>48</sup>

#### ***Article 38(1) of the Statute of the International Court of Justice***

To identify these international rules, the primary point of departure is Article 38 (1) of the ICJ Statute, which denotes the following sources of international law:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.<sup>49</sup>

The positivist will take heart in the absence of morality as a source of law as well as the (appearance of) clear delineations of what is and is not international law. Even in criticizing its limits, Thirlway concedes that

The definition given in Article 38 of the Statute of the Court has proved to embody a workable structure of recognized law-making processes, and despite... new approaches to international law, that definition seems likely to continue to guide the international community<sup>50</sup>

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<sup>46</sup> *Ibid* at 113

<sup>47</sup> *Ibid* at 237

<sup>48</sup> *Ibid* at 218

<sup>49</sup> Statute of the International Court of Justice art. 38(1), June 26, 1945 [Hereafter ICJ]

<sup>50</sup> Hugh Thirlway. *The Sources of International Law*, in MALCOLM EVANS (Ed.), INTERNATIONAL LAW at 117 (Oxford University Press, 2003) [Hereafter Thirlway, 2003]

## ***International Treaties and Conventions***

The creation and enforcement of binding contracts is an essential basis of domestic legal systems around the world. Similarly, the framework of international law begins with treaties and conventions, basic forms of contracts between states.

The Vienna Convention on the Law of Treaties describes the necessary elements of agreements between states, including treaties adopted within international organizations<sup>51</sup> such as the United Nations. All States party to a treaty must act in ‘good faith’,<sup>52</sup> and “may not invoke the provisions of its internal law as justification for its failure to perform a treaty”<sup>53</sup>. In practice, international conventions come into force when they are ratified by the domestic legislatures of a majority of the signing states. This ‘two-part’ signing and ratification process has been manipulated by states to show initial support for a treaty without being fully bound by its terms<sup>54</sup>.

The need for consent of states leads to the primary paradox of the international legal order. Hurd notes that the explicit rules set forth in treaties can create tension between the enshrined precepts of obligations and sovereignty<sup>55</sup>. Namely, if states are only bound by those rules that they agree to, what happens when they choose to alter the terms of that agreement? Sadly, this is not a mere hypothetical, but raises important questions as to the functioning of

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<sup>51</sup>1969, 1155 U.N.T.S. 331.

<sup>52</sup> *Ibid* Art. 26

<sup>53</sup> *Ibid* Art. 27

<sup>54</sup> Most notably, this has occurred with the United States and the establishment of the International Criminal Court. The United States was among the first to sign the Rome Statute in 2000, but has repeatedly failed to submit the statute for Senate ratification, professing a need to “ensure total protection for our Armed Forces and other U.S. nationals.” [Press Release, US State Department, U.S. Engagement With the ICC and the Outcome of the Recently Concluded Review Conference (June 15, 2010) [http://www.state.gov/g/gcj/us\\_releases/remarks/143178.htm](http://www.state.gov/g/gcj/us_releases/remarks/143178.htm)]

<sup>55</sup> Ian Hurd. International Organizations: Politics, Law, Practice. 7 (Cambridge University Press, 2011) [Hereafter Hurd, 2011]

international law.<sup>56</sup> The strength of a convention thus relies on its ability to bind States Parties to specific obligations.

Despite the potential for shirking, cases of reservations, rewriting, or withdrawal are still somewhat exceptional. By and large, states perform a wide array of contortions to prove that their actions comply with their international commitments,<sup>57</sup> prompting a variety of explanatory theories from international legal scholars. Chayes and Chayes note that the principal source of non-compliance with international conventions is not willful disobedience but a lack of capability, clarity, or priority. Managing compliance therefore requires, *inter alia*, capacity building to ensure that states are able to fulfill their obligations as well as persuasive ‘jawboning’ through iterative discourse to ensure priority is given to meeting international norms.<sup>58</sup> States would engage in this discourse because they are concerned about maintaining their reputations as ‘law-abiding’ nations.<sup>59</sup> Harold Koh, meanwhile, conceptualizes the voluntary obedience of states as a three phase process ending in the internalization of interpretations of international norms into domestic legal systems.<sup>60</sup>

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<sup>56</sup> In 1994, Canada rewrote its commitment to the ICJ to “or concerning conservation and management measures taken by Canada with respect to vessels fishing in” areas of the North Atlantic under dispute with Spain. effectively rewrite its obligations in this way [see Hurd, *supra* note 51 at 10] More threatening to the international legal order was the DPRK’s 2003 withdrawal from the Nuclear-Non-proliferation Treaty

<sup>57</sup> Perhaps the best example of this lies in the United States’ reliance on the 1990 SCR 678 as a legal justification for 2003 use of force in the invasion of Iraq; a strong case may be made that the US did not seek further Security Counsel justifications (after the ambiguous SCR 1441) as a way to maintain the authoritative nature of that body.

<sup>58</sup> Abram Chayes & Antonia Chayes. *The New Sovereignty: Compliance with International Regulatory Agreements.* (Harvard University Press, 1998) [hereafter Chayes & Chayes, 1998]

<sup>59</sup> See Andrew T. Guzman. *A Compliance-Based Theory of International Law* CALIFORNIA LAW REVIEW 90 (2002): 1826-1887.

<sup>60</sup> Koh, 1997 *supra* note 39

## ***Soft Law and Norms***

The need to assess the extent of obligations, to measure compliance, and to enforce international norms exposes weaknesses in the definitions of law provided by Article 38. Arajärvi notes that “neither courts nor scholars have full confidence on what each source – as listed in the Article 38(1) – comprises.”<sup>61</sup>

The possibility exists that conventions, even those considered non-binding, can create a form of ‘international customary law’. Indeed, Article 38 of the Vienna Convention states that “nothing [set forth earlier]...precludes a rule set forth in a treaty from becoming binding on a third State as a customary rule of international law, recognized as such”. Further blurring the lines are the wealth of General Assembly resolutions and other international declarations. Non-binding by definition, these pronouncements may demonstrate a consensus among states as to what constitutes ‘rightful’ practice. Thirlway makes a case for including these under the category of customary law:

States asserted rules stated in such resolutions, and accepted such rules as binding when asserted against them. This would however amount to saying that an international custom had arisen.... It would follow that the scope of custom as a source had become widened to include resolutions.<sup>62</sup>

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<sup>61</sup> In particular, Arajärvi discusses inconsistencies relating to two necessary elements of customary international law expressed by Article 38(1)(b) namely the practice of states and *opinio juris*, the practice and belief that the practice is required by law. She notes that international tribunals have found customary international law to exist based on morally compelling reasons but without the actual practice of states, citing the use of “the demands of humanity and dictates of public conscience” for courts ruling on the illegality of certain atrocities in the Trial Chamber of the International Criminal Tribunal for former Yugoslavia in *Prosecutor v. Kupreškić*, IT-95-16-T, Trial Chamber, 14 January 2000. [Noora Arajärvi. *Is the Article 38(1) of the ICJ Statute Outmoded? Towards a New Theory of Sources in International Law* ASIL Mid-year Meeting, Research Forum Paper. 2011]

<sup>62</sup> Thirlway *supra* note 50 at 138.

The normative nature of these resolutions has given rise to the concept of ‘declarative’<sup>63</sup> or ‘soft’ law, lacking binding obligations yet still influencing the behavior of states and individuals. To the strict positivist, soft law is oxymoronic<sup>64</sup>; if a law is only a law due to its binding authority, then the notion of a spectrum of binding force is laughable. However, the proliferation of GA resolutions, declarations, and other such expressions of international opinion provides evidence that such a spectrum both exists and has an impact on state behavior.

Chinkin identifies the following categories of ‘soft law’<sup>65</sup>:

1. Norms articulated in non-binding form
2. Norms that contain vague and imprecise terms
3. Norms that emanate from bodies lacking international law-making authority
4. Norms directed at non-state actors whose practice cannot constitute customary international law
5. Norms that lack any corresponding theory of responsibility
6. Norms that are based solely upon voluntary adherence

As evidenced by this list, soft law is built on the concept of ‘norms’ affecting state behavior. Chayes and Chayes define norms as “prescriptions for action in situations of choice, carrying a sense of obligation.”<sup>66</sup> Discussions on ‘international norms’ have in fact become the norm in legal circles, ranging from general principles to specific treaties to repeated rules.

The proliferation of these norms has created the need for a means of assessing their relative degree of legalization. Kenneth Abbot et al. present a dimensional theory of the elements

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<sup>63</sup> Hiram E. Chodosh, *Neither Treaty nor Custom: The Emergence of Declarative International Law*, 26 Tex. Int'l L.J. 87 (1991).

<sup>64</sup> JOSÉ E. ALVAREZ. INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS. 48 (Oxford University Press, 2005) [Hereafter Alvarez, 2005]

<sup>65</sup> Christine Chinkin (2000) *Normative development in the international legal system*. In Shelton, Dinah, (ed.) *Commitment and compliance: the role of non-binding norms in the international legal system*. 21-42 (Oxford University Press, 2000)

<sup>66</sup> Chayes & Chayes, 2005 *supra* note 58

of legalization<sup>67</sup>, whereby the ‘legality’ of a soft norm can be defined along three concurrent spectra. These are *obligation*, ranging from expressly non-legal norms to binding rules; *precision*, ranging from vague principles to precise and highly elaborated rules; and *delegation*, ranging from simple diplomatic efforts to the use of an international court or tribunal for adjudication.<sup>68</sup>

The precise delineation of normative standards has become particularly important in bringing aspirational values to a level of practical utility. Orakhelashvili notes that:

The standards of actual conduct of States, whether embodied in binding rules or declaratory standards, are not the same as values. The conduct required or desired in a rule or standard may serve a certain goal and hence the relevant value, but this very fact underlines the distinction just drawn.<sup>69</sup>

Applying the convoluted label of ‘Quasi-Normative Non-Law’, Orakhelashvili lays out several troublesome ‘values’ in need of interpretation: international peace and security; sustainable development; democracy and democratic societies; the security and survival of states; and considerations of humanity. Each lacks an established meaning with clearly defined parameters, despite their inclusion in numerous charters, treaties, resolutions, and conventions.

According to Orakhelashvili, this prevalence raises a serious dilemma, as the “rules of international law provide the legal basis for indeterminate non-law elements and thus make them part of binding international law, yet fall short of defining their meaning and scope.”<sup>70</sup> Therefore, there is a clear need to provide standards by which these ‘non-law’ values can operate within the international legal order, as well as define the limits of their obligatory power.

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<sup>67</sup> Kenneth Abbott et al. *The Concept of Legalization* INTERNATIONAL ORGANIZATION, 54, 3, Summer 2000, 17-35 [Hereafter Abbot et al, 2000]

<sup>68</sup> *Ibid* at 20

<sup>69</sup> ALEXANDER ORAKHELASHVILI. THE INTERPRETATION OF ACTS AND RULES IN PUBLIC INTERNATIONAL LAW 181 (Oxford University Press, 2008)

<sup>70</sup> *Ibid* at 182

#### **IV. The Move from Aspiration to Obligation**

All law begins as an aspiration; representing the idealized expression of how people in a society should (or should not) behave towards each other. For international law, these ideals concern behaviors taken by a state towards other states as well as towards its own citizens. In international treaties, aspirations develop into obligations through *the use of binding language*.<sup>71</sup>

Abbott et al. posit that language denoting the treaty as a convention, articles requiring legal formalities of signature, ratification, and registration of a treaty move a norm further along the obligatory dimension<sup>72</sup>. Of great significance are the actual modifiers attached to specific articles, with ‘shall’ usually representing the highest level of obligation within a convention. The use of such language serves as evidence that the ideal has been transformed into the practical, as no nation could agree that it ‘shall’ do that which is impossible.

As any grammarian can attest, the use of ‘shall’ does not fully imply an obligation<sup>73</sup>, especially when used in reference to progressive measures. However, the *repetition* of such language over time narrows the range of semantic possibilities, thus deepening the obligatory force. Moreover, as one norm is repeated *in a variety of contexts* and *for a variety of purposes*, it *expands into related norms*, each of which strengthens the original obligation.

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<sup>71</sup> The presence of a spectrum of binding language has been established through interpretations of UN Security Council resolutions. In 1971, the ICJ remarked that “the language of a resolution of the Security Council should be carefully analyzed before a conclusion can be made as to its binding effect”. [Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970). Advisory Opinion, ICJ Reports 1971, 53.

<sup>72</sup> Abbot et al, 2000 *supra* note 67

<sup>73</sup> Indeed, there is some debate by legal circles as to the propriety of using ‘shall’. The ABC rule (from Australia, Britain, and Canada) “holds that legal drafters cannot be trusted to use the word *shall* under any circumstances. Under this view, lawyers are not educable on the subject of *shall*, so the only solution is complete abstinence. As a result, the drafter must always choose a more appropriate word: *must, may, will, is entitled to*, or some other expression.” BRYAN GARNER. A DICTIONARY OF MODERN LEGAL USAGE. 940 (Oxford, 2001)

## **V. Analysis of International Conventions and Declarations Concerning Education**

The following section reviews the major international treaties and conventions concerning education, tracing the evolution of certain norms from aspiration to obligation, the introduction of new norms, and, where applicable, the mechanisms for encouraging compliance.

### ***United Nations Charter***

As Article 103 gives the UN Charter precedence over all other treaties, a review of the constitutional document provides a logical starting point for the discussion of international obligations concerning education. The UN Charter mentions education in passing in several places, including as a field of international cooperation for the General Assembly to promote<sup>74</sup> and as an area of interest under which specialized agencies may be created.<sup>75</sup>

The most concrete obligation lies in the sections concerning trustee and non-self-governing territories. Article 73 creates an obligation for United Nations members responsible for these regions “to ensure with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement.”<sup>76</sup> Of course, Article 73 is largely dormant.<sup>77</sup> Still, the presumption contained within the Article is that educational advancement is a worthy end in and of itself, not only a means to political, economic and social progress. Thus, at the time of the Charter’s enactment, education could be categorized as a type of ‘substantive freedom’ to which states could aspire to achieve for all citizens.

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<sup>74</sup> U.N. Charter Art. 13 (b)

<sup>75</sup> *Ibid* Art. 57

<sup>76</sup> *Ibid* Art. 73

<sup>77</sup> 97 states have been removed from the list of non-self-governing territories due to independence or assimilation 17 nations remain on the list. United Nations. *The United Nations and Decolonization*.

<http://www.un.org/en/decolonization/nonselfgov.shtml>. (Last visited Jan. 10, 2012)

### ***Universal Declaration of Human Rights (UDHR)***

Generally considered to be the foundation of international human rights law, the Universal Declaration of Human Rights (UDHR) was intended to “complement the UN Charter with a road map to guarantee the rights of every individual everywhere”.<sup>78</sup> The multicultural nature of the drafting committee<sup>79</sup> provided assurance that the document expressed truly universal values.

Article 26 of the UDHR establishes the fundamental right to education, and is well-worth examining closely

(1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

While providing a basis for succeeding conventions, the idealism of Article 26(1) detracts from its obligatory power. The clarity of the opening declaration is immediately clouded by the call for ‘free’ education. If viewed from the perspective of a developing country, removing costs effectively destroys the provision of education for all. Furthermore, to borrow a phrase from economics textbooks, there is no such thing as a free lunch. Education must be paid for, and public education most often comes from public revenues<sup>80</sup>.

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<sup>78</sup> United Nations. *The Universal Declaration of Human Rights*. [http://www.un.org/en/documents/udhr/hr\\_law.shtml](http://www.un.org/en/documents/udhr/hr_law.shtml) (Last visited Jan. 10, 2012)

<sup>79</sup> The UDHR drafting committee was comprised of Dr. Charles Malik (Lebanon), Alexandre Bogomolov (USSR), Dr. Peng-chun Chang (China), René Cassin (France), Charles Dukes (United Kingdom), William Hodgson (Australia), Hernan Santa Cruz (Chile) and John P. Humphrey (Canada). The committee was chaired by Eleanor Roosevelt (US).

<sup>80</sup> This lack of clarity would persist until the CESCR released General Note 11 in 1999 defining “free” education. See note 103

There is further confusion around the idea of higher education as both ‘equally accessible’ and meritocratic. Decisions on what ‘merit’ entails involve discussions of not only academic potential, but also socioeconomic backgrounds and the dispersion of incomes within a society. It is entirely possible that a wholly merit-based system of admissions to higher education only perpetuates systemic inequities.

Indeed, this has been a rationale for the affirmative action movement in American universities. With the universality of primary and secondary access, higher education degrees become a means of differentiation and the crucial gateway to economic opportunities. Thus, while boldly setting an idealistic vision of education for all, Article 26 (1) fails to capture the nuances of implementing that ideal in the world we live in.

The second clause of Article 26 continues the largely aspirational language for the content of education:

(2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

There is little to criticize in the aims of this clause, though it remains aspirational in the sense that such education is difficult to implement pedagogically, nearly impossible to assess, and only likely to be challenged by those outside of the system. However, given the context of a world still reeling from the shock of the Holocaust, it is understandable that the international community would seek to outlaw education that perpetuates hate.

Indeed, the notion of ending discrimination first voiced here is echoed in many later documents, as is the third and final clause of Article 26:

(3) Parents have a prior right to choose the kind of education that shall be given to their children.

While (theoretically) the most easily contestable in a court of law, this clause does create the possibility of a conflict with the obligations on content provision. If a parent chooses to provide an education of hate, the international-law-abiding state must choose between 26(b) and 26(c). While somewhat fanciful, this type of criticism exposes the inability of Article 26 of the UDHR to create binding obligations on States, much less to enforce compliance.

That said, the UDHR was never meant to stand as an ultimate source of law<sup>81</sup>; but rather as an idealistic vision of how the world is ‘meant to be’. Thus, the logical fallacies and ambiguous statements should be taken not as reasons to discard the declaration, but rather as areas that subsequent conventions would do well to clarify.

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<sup>81</sup> Though claims may be made that the UDHR has become accepted as customary law, this argument is far stronger when incorporating later conventions such as the ICCPR and ICESCR than considering only the UDHR alone.

### ***Convention Against Discrimination in Education***

The first convention to do this, unsurprisingly, came under the auspices of UNESCO<sup>82</sup>.

The preamble of the Convention Against Discrimination in Education (CADE) references the UDHR's statement of the right to education, and then provides more explicit rules in the body of the text. Of particular interest is the definitions provided in Article 1:

For the purposes of this Convention, the term 'discrimination' includes any distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education...

...the term 'education' refers to all types and levels of education, and includes access to education, the standard and quality of education, and the conditions under which it is given<sup>83</sup>.

The inclusion of these definitions moves the CADE towards status as a mandatory authority, as the phrase 'has the purpose or effect of nullifying or impairing equality of treatment in education' institutes a benchmark by which policies and practice may be evaluated in court. Furthermore, the CADE does not permit reservations to be made by Party States<sup>84</sup>, a fairly rare occurrence in international law.

The CADE makes some strides at clarifying the UDHR's areas of ambiguity. For the aforementioned 'meritocratic' miasma, Article 4 (a) of the CADE provides the obligation:

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<sup>82</sup> With a mandate to "contribute to peace and security by promoting collaboration among the nations through education, science and culture" [UNESCO Constitution Art.1(1)] UNESCO provided a forum within which the ambiguity of Article 26 could be clarified into a more binding form of international law. This agenda-setting has been a key contribution of international organizations to the law on education.

<sup>83</sup> UNESCO Convention Against Discrimination in Education. Dec. 15, 1960. Art. 1

<http://unesdoc.unesco.org/images/0011/001145/114583e.pdf#page=118> (Last visited Jan. 10, 2012) [Hereafter CADE]

<sup>84</sup> *Ibid* Art. 9

To make primary education free and compulsory; make secondary education in its different forms generally available and accessible to all; make higher education equally accessible to all **on the basis of individual capacity**; assure compliance by all with the obligation to attend school prescribed by law (emphasis added)

The narrowing from ‘basis of merit’ to ‘basis of individual capacity’ is no small matter, as this choice could be interpreted as restricting states from the type of social tinkering prevalent under affirmative action policies.<sup>85</sup> This choice is a move towards greater clarity, as basing admission on student ability provides, on its face, a purely meritocratic method of allocating university places.

The CADE also tackles the issue of parental rights to choose education, stating in Article 5(b):

it is essential to respect the liberty of parents...to choose for their children institutions other than those maintained by the public authorities but **conforming to such minimum educational standards as may be laid down or approved by the competent authorities**(emphasis added)

The addition of ‘educational standards’ effectively restricts the freedom of parents to freely educate their children. Similar language is used in reference to national minorities,<sup>86</sup> simultaneously allowing the development of minority-led schools while maintaining a semblance of state control over education.

For an international human rights convention to thus restrain individual freedoms (albeit in a convoluted manner) both testifies to and cautions of the potential extent of laws concerning education. The CADE thus represents a move of education from the aspirational realm of individual liberties to what could be characterized as a socialist arena, one where the state is obliged to supply education for its citizens.

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<sup>85</sup> Indeed, the CADE asserts in Article 3(c) that Party States are required “To ensure, by legislation where necessary, that there is no discrimination in the admission of pupils to educational institutions”.

<sup>86</sup> CADE *supra* note 83 art. 5(c)

Indeed, Article 4(a) is also notable for the institution of an obligation on states to ‘assure compliance by all’ with mandatory education. Perhaps a reflection of the economic development rationales prevalent at the time, States saw a shift in obligation from simply providing opportunities to ensuring that those opportunities were taken up by all citizens. Moreover, Article 4 (b) provides a requirement:

to ensure that the standards of education are equivalent in all public education institutions of the same level, and that the conditions relating to the quality of education provided are also equivalent

This clause recognizes that access to education is but the first step; states have obligations to both provide access to and maintain consistency of educational quality across schools and regions. The law on educational rights thus simultaneously becomes clearer and more complicated.

Indeed, wiping off one blur leaves another in its place: the CADE does not delineate how individual capacity will be assessed, nor does it provide guidance on what minimum educational standards may be. While 97 States have signed the CADE, only 47 have in fact ratified the convention. Compliance is ensured only through the periodic submission of reports by Party States<sup>87</sup>, and thus the convention thus still leaves much interpretative work to be done.

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<sup>87</sup> *Ibid* Art. 7

### ***The International Bill of Human Rights***

In 1966, the United Nations adopted the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR), covering nearly all of the rights enshrined in the UDHR. The three documents have become informally known as ‘the International Bill of Human Rights’, and together represent the most developed statement of the legal rights of all citizens of the world. The ICCPR and the ICESCR are nearly universally ratified<sup>88</sup>, and thus reflect a ‘global consensus’ of sorts.

The separation of the ICCPR and ICESCR, often attributed to the divergent ideologies of the Cold War era, is based on the assumption that

political rights were immediate, absolute, justiciable and require[d] the abstention of state action while economic and social rights were programmatic, realized gradually, more political in nature and require[d] substantial resources<sup>89</sup>

This separation led to differing levels of obligation placed upon states by each of the Covenants, as well as separate implementation measures on both domestic and international levels. Most significantly, the ICESCR allows States Parties to incrementally progress over time towards realization of the rights<sup>90</sup>, acting within time periods specified only as ‘reasonable’.<sup>91</sup>

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<sup>88</sup> 167 states have ratified, acceded, or succeeded to the ICCPR; 160 to the ICESR. Notably, the PRC has not ratified the ICCPR and the USA has not ratified the ICESR. Furthermore, the USA has several reservations to the ICCPR.

<sup>89</sup> Kalantry et al. *Measuring State Compliance with the Right to Education Using Indicators: a Case Study of Colombia’s Obligations Under the ICESCR*. CORNELL LAW FACULTY WORKING PAPERS. Paper 52, 5 (2009) [http://scholarship.law.cornell.edu/clsops\\_papers/52](http://scholarship.law.cornell.edu/clsops_papers/52) (last visited Jan. 10, 2012) [hereafter Kalantry et al, 2009]

<sup>90</sup> International Covenant on Economic, Social, and Cultural Rights art. 2(1) Dec. 16, 1966, 993 U.N.T.S. 3 [Hereafter ICESCR]

<sup>91</sup> “While the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant’s entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.” [CESCR General Comment 3 *The nature of States parties obligations (Art. 2, par.1)* 12/14/1990 at para 2] Whatever the status of progression, all rights must be enjoyed without discrimination. [ICESCR *supra* note 90 art. 2(2)]

### ***International Covenant on Civil and Political Rights***

Though the ICCPR does not directly address the right to education, several rights relevant to the issue of segregation in education are incorporated, including the right to “freely pursue their economic, social and cultural development”; the right of the individual to choose, share and manifest his or her religion; and the rights of minorities to enjoy their own culture, to profess and practice their own religion, or to use their own language.

Pressure for compliance with the ICCPR is induced through a variety of formal and informal mechanisms. Several NGOs, such as Human Rights Watch, Freedom House, and Transparency International, perform ‘watchdog’ services on governments. To increase the formal obligatory power, a Human Rights Committee reviews State reports on implementation. In 2006, the HRC made headlines by voicing concerns over the United States, including, *inter alia*:

reports of de facto racial segregation in public schools, reportedly caused by discrepancies between the racial and ethnic composition of large urban districts and their surrounding suburbs, and the manner in which schools districts are created, funded and regulated. The Committee is concerned that the State party, despite measures adopted, has not succeeded in eliminating racial discrimination such as regarding the wide disparities in the quality of education across school districts in metropolitan areas, to the detriment of minority students<sup>92</sup>

The HRC requested that the United States provide information on measures taken to address these problems. This report demonstrates the strong normative power of the ICCPR, as the convention provides a means by which even the world’s only superpower can be criticized for acting inconsistently with international norms.

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<sup>92</sup> Human Rights Committee. *Concluding Observations of the Human Rights Committee on the Second and Third U.S. Reports to the Committee* (2006) at para 24. <http://www1.umn.edu/humanrts/usdocs/hruscomments2.html> (last visited Jan. 10, 2012)

### ***The International Covenant on Economic, Social, and Cultural Rights***

The ICESCR, meanwhile, directly tackles the issue of education as a human right and societal need. Indeed, Article 13 of the ICESCR has been called “the most important formulation of the right to education in an international agreement”.<sup>93</sup>

Article 13 recognizes the “right of everyone to education”, institutes compulsory free education at the primary level, and calls for the “progressive introduction of free education” to be made generally available<sup>94</sup> at secondary levels. The ICESCR also repeats the language of the CADE for higher education on the ‘basis of individual capacity’<sup>95</sup> and freedom of parents to choose, constrained by ‘minimum educational standards’.<sup>96</sup>

While repeating the precepts of ‘tolerance, understanding, and friendship’ of Article 26(b) of the UDHR, Article 13(1) of the ICESCR adds that education must “enable all persons to participate effectively in a free society”, adding the worth of education as a means for individual advancement to previous aspirations for education as a tool to create peace. The implication of this move advances educational rights beyond societal benefits, begins to consider what

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<sup>93</sup> Beiter, 2006 *supra* note 10 at 20

<sup>94</sup> “The phrase “generally available” signifies, firstly, that secondary education is not dependent on a student’s apparent capacity or ability and, secondly, that secondary education will be distributed throughout the State in such a way that it is available on the same basis to all” CESCR *General Comment No. 13 The right to education*, U.N. Doc. E/C.12/1999/10 at para. 13 [hereafter CESCR General Comment 13] While General Comments are not legally binding, they serve the important jurisprudential function of defining and clarifying rights and duties. The Vienna Convention on the Law of Treaties states that “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation” must be considered when construing the treaty. See art. 31(3)(b) of the Vienna Convention, *supra* note 50

<sup>95</sup> The CESCR clarifies that the ‘capacity’ of individuals should be assessed by reference to all their relevant expertise and experience. [*Ibid* at para. 19.] While this could be taken as a further illustration of conflict with affirmative action movements (and thus further hurting marginalized populations), an argument may be made that “relevant experiences” allows for a variety of factors to be taken into consideration. For example, when considering application to higher education institutions that see educational value in a diverse student body, the experiences of a member of a marginalized population take on greater relevance.

<sup>96</sup> ICESCR *supra* note 90 art 13 (3). The CESCR has clarified that “these minimum standards may relate to issues such as admission, curricula and the recognition of certificates” *supra* note 94 at para 27

education does for the individual. This is echoed in the call for “fundamental education” for those unable to complete primary schooling<sup>97</sup>, which demonstrates a growing awareness of the utility of education to engage in meaningful employment.

The ICESCR also asserts that

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<sup>98</sup>

Each of these inclusions expands the scope of international law concerning education while adding new areas of ambiguity. For example, the ‘material conditions of teaching staff’ could be construed to mean teacher salaries, educational resources, or teaching conditions, among others<sup>99</sup>. Furthermore, Article 13 (4) allows:

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

While providing for private and decentralized educational institutions, this clause also acts as a ‘hedge’ against the appearance of an overly intrusive legal order. This looseness, coupled with the aforementioned lack of clarity, confines much of Article 13 to the realm of aspiration.

While these clauses of Article 13 are only loosely binding, Article 14 provides perhaps the most clearly drawn international obligation regarding education:

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<sup>97</sup> ICESCR *supra* note 90 art 13(1) (d)

<sup>98</sup> *Ibid* Article 13 (1) (e)

<sup>99</sup> The CESCR has urged States Parties to “report on measures they are taking to ensure that all teaching staff enjoy the conditions and status commensurate with their role”, and to consider the joint UNESCO-ILO Recommendation Concerning the Status of Teachers (1966) and the UNESCO Recommendation Concerning the Status of Higher-Education Teaching Personnel (1997) [CESCR General Comment 13, *supra* note 94 at 27]

Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.

While a ‘detailed plan of action’ may not appear to set terribly high standard for a state to meet, the CESCR has clarified in General Comments that the plan of action must “cover all of the actions which are necessary in order to secure each of the requisite component parts of the right and … must specifically set out a series of targeted implementation dates for each stage of the progressive implementation of the plan.”<sup>100</sup> States are also not allowed to use an absence of resources as an excuse for failure to create a plan of action, though the international community should provide assistance in these cases.<sup>101</sup> Most significantly, the CESCR provides definitions of ‘compulsory’,<sup>102</sup> and ‘free’,<sup>103</sup> important clarifications for standard-setting. However, there is no guidance on what timeframes would be considered reasonable for the realization of these standards.

Article 14 moves ‘compulsory education free of charge for all’ from an aspirational value to a legal obligation for states to fulfill<sup>104</sup>. While a triumph of sorts for the evolution of the

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<sup>100</sup> CESCR *General Comment 11: Plans of Action for Primary Education*. (para 8) E/C.12/1999/4]

<sup>101</sup> *Ibid.* para 9, 10

<sup>102</sup> “The element of compulsion serves to highlight the fact that neither parents, nor guardians, nor the State are entitled to treat as optional the decision as to whether the child should have access to primary education” *Ibid* para. 6

<sup>103</sup> “The right is expressly formulated so as to ensure the availability of primary education without charge to the child, parents or guardians. Fees imposed by the Government, the local authorities or the school, and other direct costs, constitute disincentives to the enjoyment of the right and may jeopardize its realization. They are also often highly regressive in effect. Their elimination is a matter which must be addressed by the required plan of action. Indirect costs, such as compulsory levies on parents (sometimes portrayed as being voluntary, when in fact they are not), or the obligation to wear a relatively expensive school uniform, can also fall into the same category. Other indirect costs may be permissible, subject to the Committee's examination on a case-by-case basis.” *Ibid* para 7

<sup>104</sup> While other factors have been at play, this obligation may have played a role in the continued failure of the USA to ratify the ICESCR. In a landmark case, the US Supreme Court acknowledged the “undisputed importance of education” but judged that education was neither explicitly nor implicitly protected by the Constitution. [San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 35 (1973)], leading one analyst to note that “[in the

educational rights doctrine, it is worth noting that this obligation, first adopted by the UN in 1966, was still the main development goal related to education at the turn of the century.<sup>105</sup>

Given the allowance of ‘progressive realization’, compliance with the ICESCR has been more difficult to assess than with the ICCPR. To mitigate the problem of ‘everlasting progression’, whereby a State perpetually submits plans for realizing the ICESCR rights without ever making true progress, Philip Alston introduced the concept of ‘minimum core obligations’. These are basic entitlements related to each ICESCR right, “in the absence of which a state party is to be considered to be in violation of its obligations”.<sup>106</sup>

The CESCR ultimately articulated five minimum core obligations with respect to Article 13:

1. to ensure the right of access to public educational institutions and programmes on a non-discriminatory basis;
2. to ensure education conforms to the objectives set out in article 13(1) [of the Covenant]
3. to provide free and compulsory primary education
4. to adopt and implement a national education strategy which includes provision for secondary, higher and fundamental education; and
5. to ensure free choice of education without interference from the State or third parties, subject to conformity with “minimum educational standards”<sup>107</sup>

The CESCR has also created indicators for the right to education through the ‘4-A Right to Education Framework’.<sup>108</sup> However, the responsibility of measuring progress by these indicators

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eyes of the American legal system] education is not a right granted to individuals by the Constitution or a right recognized in individuals because they are human” [James A. Gross *A Human Rights Perspective On U.S. Education: Only Some Children Matter* CATHOLIC UNIVERSITY LAW REVIEW 2 (2001)]. However, the right to education is guaranteed in many state constitutions in the USA [see Kalantry et al, 1994 *supra* note 94 at 10], under the Supreme Court’s recognition that “it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.” [Brown v. Board of Education of Topeka, 347 U.S. 483, 493 (1954)]  
<sup>105</sup> The Millennium Development Goal 2a aims to “ensure that, by 2015, children everywhere, boys and girls alike, will be able to complete a full course of primary schooling”.

<sup>106</sup> Philip Alston, *Out of the Abyss: The Challenges Confronting the New U.N. Committee on Economic, Social and Cultural Rights*, 9 HUM. RTS. Q. 332, 353 (1996).

<sup>107</sup> CESCR General Comment 13, *supra* note 94 at para. 57. There is some debate that additional elements must be included among the core obligations for education, including the provision of special facilities for persons with educational deficits such as girls in rural areas or working children; the quality of education; and the right to receive an education in one’s native language. [see Kalantry et al, 2009 *supra* note 89 at 28]

has not yet been passed on the States Parties, and difficulty remains in assessing compliance, particularly in determining if failure to meet a minimum core obligation is due to lack of resources or lack of will.

Indeed, while States Parties must submit periodic reports both the Economic and Social Council and UNESCO<sup>109</sup>, the requirements of the reports for Articles 13 and 14 concern measures taken to realize the rights,<sup>110</sup> not progress made on the realization of the rights themselves. Indicators demonstrating the success of these measures are not a required part of the report.<sup>111</sup> Furthermore, the CESCR has bemoaned “a situation of persistent non-reporting by States parties [which] undermines one of the foundations of the Covenant.”<sup>112</sup>

A promising step towards ensuring compliance was the 2008 adoption of an Optional Protocol, instituting an individual complaint mechanism to address state violations of economic, social and cultural rights.<sup>113</sup> However, as only five States have ratified the Protocol,<sup>114</sup> much work still remains to be done to effectively assess progress, let alone enforce compliance.

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<sup>108</sup> Availability, accessibility, acceptability and adaptability. Katarina Tomasevski. *The Right to Education, Preliminary Report of the Special Rapporteur Submitted in Accordance with Commission on Human Rights resolution 1998/33 U.N. Doc. E/CN.4/1999/49* (1999)

<sup>109</sup> ICESCR *supra* note 90 Art. 16 (2)

<sup>110</sup> *Guidelines On Treaty-Specific Documents To Be Submitted By States Parties Under Articles 16 And 17 Of The International Covenant On Economic, Social And Cultural Rights*. U.N. Doc E/C.12/2008/2 (2009). at para. 58

<sup>111</sup> As will be discussed in the operational activities section, UNESCO monitors and evaluates progress towards the realization of compulsory free primary education, thereby placing outside pressure on states to comply.

<sup>112</sup> CESCR *Report on the forty-fourth and forty-fifth sessions*. U.N. Doc. E/C.12/2010/3(2010) Para. 40

<sup>113</sup> Human Rights Education Associates, *Historic Adoption of Optional Protocol for Economic, Social and Cultural Rights*. (2008) [http://www.hrea.org/index.php?base\\_id=2&language\\_id=1&headline\\_id=8361](http://www.hrea.org/index.php?base_id=2&language_id=1&headline_id=8361) (last visited Jan. 10, 2012)

<sup>114</sup> United Nations. *Status of Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (2012) [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-3-a&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4&lang=en) (last visited Jan. 10, 2012)

### ***Convention on the Elimination of All Forms of Racial Discrimination***

The dawning of the post-colonial era pushed racial issues to the forefront of international discussions. While initial discussions revolved around the composition of a joint convention on both racial and religious tolerance, the Convention on the Elimination of All Forms of Racial Discrimination (CERD) represented the most acceptable document for all parties. The CERD adds specific obligations of equality and non-discrimination<sup>115</sup> to the rights laid out in the ICCPR and the ICESCR. These obligations are set for the right to education in Article 5(e)(v). While narrower in scope, an important note is that the CERD rights are not allowed to be ‘progressively realized’, but instead take immediate effect on the States Parties.

176 States are party to the CERD, including the United States<sup>116</sup>. The CERD is enforced by three means: 1) an ‘early-warning’ mechanism whereby the CERD Committee sends notification to State Parties in danger of violating the treaty; 2) allowing State Parties to voice complaints against other State Parties<sup>117</sup>; 3) an individual complaints mechanism<sup>118</sup>, which greatly raises the potential for monitoring and inducing compliance with CERD provisions.<sup>119</sup>

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<sup>115</sup> The exact language used is “States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law” International Convention on the Elimination of All Forms of Racial Discrimination. **U.N. Doc. A/6014 (1966)** at Art. 5 [hereafter CERD]

<sup>116</sup> The USA signed the treaty with the reservations that “The Constitution of the United States contains provisions for the protection of individual rights, such as the right of free speech, and nothing in the Convention shall be deemed to require or to authorize legislation or other action by the United States of America incompatible with the provisions of the Constitution of the United States of America.” [UN Treaty System. *Reservations to the CERD*. [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-2&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en) (Last visited Jan. 10, 2012)]

<sup>117</sup> CERD *supra* note 115 Art. 11; These complaints are reviewed by the CERD Committee and , if a resolution is not reached, may be passed to the ICJ (Art. 22). However, numerous states have expressed reservations that they do not recognize Article 22 as an acceptance of the ICJ’s mandatory jurisdiction

<sup>118</sup> *Ibid* Art.14

<sup>119</sup> 54 States recognize the competence of the Committee under Article 14 [*The United Nations Human Rights Treaties*(2011) [http://www.bayefsky.com/complain/cerd\\_statesparties.php](http://www.bayefsky.com/complain/cerd_statesparties.php) (Last visited Jan. 10, 2012)]

As of March 2011, 45 cases have been dealt with under the individual complaints mechanism<sup>120</sup> though only two to date have involved education. In 2001, a citizen of the Netherlands of Surinamese origin contested that he was discriminated against while training at the Netherlands Police Academy. The CERD Committee found no evidence to substantiate his claims.<sup>121</sup>

In 2007, a carpentry student contended that, as a consequence of the Copenhagen Technical School's discriminatory practice, he was not offered the same possibilities of education and training as his fellow students and no remedies were allegedly available to address this situation effectively. The student contended that Danish legislation does not offer effective protection which had led to the dismissal of his claims.

The CERD found a violation of articles 2 (1) (d); 5(e)(v); and 6 of the CERD by the State party and ordered adequate compensation to be paid. However, the CERD also found that "it is not the Committee's task to decide in abstract whether or not national legislation is compatible with the Convention but to consider whether there has been a violation in the particular case"<sup>122</sup> This stance means that the Committee would not consider complaints made against discriminatory educational policy by an individual, only when a direct personal violation has been made.

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<sup>120</sup> 17 have been deemed inadmissible, 4 are living cases, in 14 cases no violation was found, and in 10 cases a violation was found. *The majority of complaints involve problems finding employment or racially-sensitive remarks made by public officials . Status of communications dealt with by CERD under Art. 14 Procedure* [www2.ohchr.org/english/bodies/docs/CERDSURVEYArt14.xls](http://www2.ohchr.org/english/bodies/docs/CERDSURVEYArt14.xls) (Last visited Jan. 10, 2012)

<sup>121</sup> **E. I. F. v. The Netherlands, Communication No. 15/1999, U.N. Doc. CERD/C/58/D/15/1999 (2001).**

<sup>122</sup> Murat Er v. Denmark, Communication no. 40/2007, U.N. Doc. CERD/C/71/D/40/2007 (2007).

### ***Convention on the Elimination of All Forms of Discrimination Against Women***

While the International Bill of Human Rights ostensibly provided a comprehensive delineation of basic human rights, “the fact of women's humanity proved insufficient to guarantee them the enjoyment of their internationally agreed rights”.<sup>123</sup> The United Nations GA thus found it necessary to codify rights specifically pertaining to women.

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDW) aims “to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education”, and thus obligated equal access to the same educational resources and opportunities<sup>124</sup>. Furthermore, Article 5(b) of the CEDW requires States Parties to take all appropriate measures to ensure family education recognized the common responsibility of men and women in raising children. Given the context of the feminist movement and the advent of ‘gender mainstreaming’ in development organizations, these requirements were hardly revolutionary. However, they do continue the trend of international law intruding into the content and methods of national education systems.

This trend is epitomized by Article 10 (c) of the CEDW, which requires States Parties to take all appropriate measure to ensure:

The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim, and, in particular, by the revision of textbooks and school programmes and the adaption of teaching methods

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<sup>123</sup> *History of the Convention on the Elimination of All Forms of Discrimination Against Women* <http://www.un.org/womenwatch/daw/cedaw/history.htm> (last visited Jan. 10, 2012)

<sup>124</sup> *Convention on the Elimination of All Forms of Discrimination Against Women*. U.N.T.S. vol. 1249, p. 13 (1979) Art. 10 (a), (b), (d) (e) [Hereafter CEDW]

On its face, this article appears quite commonsensical, requiring only small adjustments to bring what is taught in line with what is right. However, from the viewpoint of an educator, alterations of textbooks, school programs, and teaching methods represent changes in the very nature of education itself. Longstanding routines, ways of organizing classrooms, and learning activities would need to be assessed for their ‘gender-sensitivity’.

Moreover, if done without descending to superficiality, the process necessarily involves changes to the value systems that constitute our most central identities.<sup>125</sup> The roles that a man and a woman are expected to play in society are often a part of ethnic and cultural heritages, and attempts by the international community to disrupt those roles could be seen as a form of cultural imperialism. Of course, the fact that a gender role is traditional does not automatically make it morally justifiable, and cultural patterns that inhibit basic human rights are deserving of alteration.<sup>126</sup> Still, the additions to the corpus of international law on education made by the CEDW affect all aspects of education within a society, and thus potentially represent the most intrusive obligation<sup>127</sup> placed upon States Parties.

That said, the obligations contained within the CEDW only have weight inasmuch as a system of monitoring compliance is instituted. The CEDW requires States Parties to submit reports on “the legislative, judicial, administrative or other measure which they have adopted to give effect to the provision of the present Convention and on the progress made in this

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<sup>125</sup> Behaviors are considered to be the most superficial portions of our identity, and therefore the easiest to change. Attitudes are a step ‘deeper’ and people tend to be more recalcitrant in altering these. Values are the most difficult. [See, for example, Grube et al (1994), *Inducing Change in Values, Attitudes, and Behaviors: Belief System Theory and the Method of Value Self-Confrontation*. JOURNAL OF SOCIAL ISSUES, 50: 153–173]

<sup>126</sup> The preamble of the CEDW is quite clear on this point: “a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women” [CEDW *supra* note 124]

<sup>127</sup> Notably, there is no “hedge” put on these obligations as in Article 13(4) of the ICESCR

respect”<sup>128</sup> one year after the treaty enters into force and then every four years afterwards<sup>129</sup>.

These reports may indicate impediments to the fulfillment of obligations under the CEDW<sup>130</sup>.

The CEDW Committee may then make recommendations to the General Assembly concerning the State Parties reports<sup>131</sup>, while the ‘specialized agencies’ may also report on the implementation of the CEDW in areas falling within the scope of their activities.

These requirements are (fairly) standard for an international convention, and, like most conventions provide little in the way of enforcement. However, like the ICESCR, the CEDW has an optional protocol, which entered into force in 2000, that enables the Committee to receive and consider complaints from individuals and groups, providing domestic alternatives have been exhausted. Additionally, the protocol creates an inquiry procedure, “enabling the Committee to initiate inquiries into grave or systematic violations of women’s rights”<sup>132</sup>. As of 2011, 103 States are parties to the Optional Protocol<sup>133</sup>. Of the 18 cases submitted<sup>134</sup>, none have concerned the right to education.

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<sup>128</sup> CEDW *supra* note 124 Art. 18(1)

<sup>129</sup> *Ibid* Art. 18 (1) (a) and (b)

<sup>130</sup> *Ibid* Art. 18(2)

<sup>131</sup> *Ibid* Art. 21

<sup>132</sup> *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women* (2000) <http://www.un.org/womenwatch/daw/cedaw/protocol/> (last visited Jan. 10, 2012)

<sup>133</sup> Bangladesh, Belize, Colombia, and Cuba ratified the Protocol with the reservation that they do not recognize the competence of the Committee under Articles 8 and 9, thus removing possibility of the inquiry procedure. *Ibid*

<sup>134</sup> 6 have been found inadmissible, In 2 cases no violation was found, and in 10 cases a violation was found.

[*Optional Protocol to the Convention on the Elimination of Discrimination against Women - Jurisprudence* <http://www2.ohchr.org/english/law/jurisprudence.htm> (last visited Jan. 10, 2012)]

### ***Convention on the Rights of the Child***

The Convention on the Rights of the Child (CRC) represented the culmination of efforts to secure human rights specifically for children begun by Eglantyne Jebb, the founder of Save the Children. Jebb's initial document was endorsed by the League of Nations in 1924 as the World Child Welfare Charter, and eventually adopted as a General Assembly Declaration in December of 1959. However, these proclamations were not enforceable by international law.

In 1989 a much expanded version was adopted, with fifty-four articles that address the human rights that children are entitled to have. Under the CRC, a child is defined as "every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier".<sup>135</sup> The CRC has a similar allowance of progressive realization as the ICESCR, noting that:

...with regard to economic, social and cultural rights, States Parties shall undertake such [legislative, administrative, and other]measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.<sup>136</sup>

Thus, the rights on education contained within the CRC should be taken with a degree of realism as to the universality of their implementation.<sup>137</sup>

Article 28 (1) provides what have by now become the usual suspects: compulsory free primary education, accessible secondary education (including both general and vocational), and higher education accessible on the basis of capacity. The CRC does break new ground by

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<sup>135</sup>*Convention on the Rights of the Child*, 1577 U.N.T.S. 3 (20 November 1989) Article 1 [Hereafter CRC]

<sup>136</sup>*Ibid* Art. 4

<sup>137</sup>Indeed, Article 28(1) notes that the right of the child to education shall be achieved “progressively and on the basis of equal opportunity”

establishing the right of disabled children to education<sup>138</sup> and asserting that school discipline must be consistent with the child's human dignity.<sup>139</sup> While novel to the corpus of international law on education, these clauses are wholly consistent with the principles of human rights.

Another interesting addition comes with the call to “[t]ake measures to encourage regular attendance at schools and the reduction of drop-out rates”.<sup>140</sup> The implied obligation here is that State Parties must not only provide the opportunity to be educated, but must also actively work to ensure that students remain in school. Reflecting the rationale of societal benefits derived from educated citizens, this clause is akin to saying that the state must both put vegetables on the child's plate and ensure that he eats them. At any rate, the ideological locus of the CRC is moved away from libertarian concepts of human rights and towards a more socialist perspective.

The CRC takes the concept of education's positive externalities to a global level in Article 28(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.

This clause is noteworthy because it is the first instance within the international law on education in which States Parties undertake obligations to take action beyond their territorial borders, benefiting individuals who are not their citizens. From a sociological standpoint, the inclusion in a convention on the rights of children implies a responsibility of all States towards all children, a global form of *in loco parentis*.

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<sup>138</sup> CRC *supra* note 135 Art. 23 (3)

<sup>139</sup> *Ibid* Art. 28(2)

<sup>140</sup> *Ibid* Art. 28(1)(e)

Article 29 of the CRC reviews the content and goals of education<sup>141</sup>. This article revisits ground covered by Article 26(2) of the UDHR, 5(1)(a) of the CADE and 13(1) of the ICESCR, namely “the development of the child's personality, talents and mental and physical abilities to their fullest potential”,<sup>142</sup> as well as respect for human rights and tolerance for other cultures. However, the CRC goes a step further, including several new avenues for educational goals. Respect for cultural identity and national values<sup>143</sup> and preparation for “responsible life in a free society”<sup>144</sup> are broad-reaching goals, yet have a strong degree of universal acceptability. More contentious (and most ambiguous) is the “development of respect for the natural environment”,<sup>145</sup> which could be interpreted through conservationist, business, or even socio-cultural lenses<sup>146</sup>.

The CRC also contains several articles with interesting correlates to education, including the right of the child to freedom of expression<sup>147</sup>, the right to seek, receive and impart information and ideas of all kinds<sup>148</sup>, and the right to freedom of thought, conscience, and religion<sup>149</sup>. When considered from an educational perspective, these rights fit into constructivist

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<sup>141</sup> These goals come with ‘hedging’ language, namely: No part of Articles 28 or 29 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”

<sup>142</sup> *Ibid* Art. 29(2)

<sup>143</sup> *Ibid* Art. 29 (1)(a)

<sup>144</sup> *Ibid* Art. 29 (1) (c)

<sup>145</sup> *Ibid* Art. 29 (1) (d)

<sup>146</sup> *Ibid* Art. 29 (1) (e)

<sup>147</sup> As will be discussed in detail, the work of UNESCO, among others, in the Education-for-Sustainable-Development movement has filled in many of the gaps left by this clause.

<sup>148</sup> *Ibid* Art. 13 (1)

<sup>149</sup> *Ibid* Art. 13(1). The CRC allows the limitation of the exercise of this right: 13(2) (a) For respect of the rights or reputations of others; or (b) For the protection of national security or of public order, or of public health or morals.

<sup>149</sup> *Ibid* Art. 14(1)

theories<sup>150</sup> of how schools should be run, which are often at odds with the precepts of core knowledge<sup>151</sup>, pushes for standardized testing, and the development of skills for employment<sup>152</sup>. These issues are at the very heart of debates on the form and purpose of schooling, and the CRC makes an interesting addition to the fray.

The CRC Committee has contributed to this debate by calling on all States Parties to formally incorporate Article 29 provisions into their education policies, revising curricula and teaching materials if necessary.<sup>153</sup> Furthermore, the Committee notes the need to realign teaching methods with the principles of the CRC, and to consider education as a holistic concept, embracing “the broad range of life experience and learning processes which enable children ...to develop their personalities, talents, and abilities”<sup>154</sup>

Most importantly, the Committee delineates the basic skills needed for every child:

not only literacy and numeracy but also life skills such as the ability to make well-balanced decisions; to resolve conflicts in a non-violent manner; and to develop a healthy lifestyle, good social relationships and responsibility, critical thinking, creative talents, and other abilities which give children the tools needed to pursue their options in life.

This listing may seem basic and broad, but it represents a legal interpretation of the rights expressed in the CRC, and thus creates an obligation for states to fulfill.

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<sup>150</sup> See, for example, ELEANOR DUCKWORTH "THE HAVING OF WONDERFUL IDEAS" AND OTHER ESSAYS ON TEACHING AND LEARNING. ( Teachers College Press, 2006)

<sup>151</sup> See E.D. HIRSH. CULTURAL LITERACY: WHAT EVERY AMERICAN NEEDS TO KNOW (Vintage, 1988); THE SCHOOLS WE NEED: AND WHY WE DON'T HAVE THEM (Anchor, 1999)

<sup>152</sup> See, for example, Lee Harvey. "New Realities: The Relationship between Higher Education and Employment" TERTIARY EDUCATION AND MANAGEMENT. Vol 6, 1, 2000 (3-17),

<sup>153</sup> CRC Committee. *General Comment No. 1: Article 29(1) The Aims of Education*. U.N. Doc. CRC/GC/2001/1 (2001) para 17,18 [hereafter CRC General Comment No. 1]

<sup>154</sup> Ibid para. 2

Further education-related clauses within the CRC concern health and mass media. States Parties must take measures to educate “all segments of society” in basic health and nutrition,<sup>155</sup> as well as develop education and services for family planning.<sup>156</sup> While the former fits with the rationale of positive externalities and social benefits of education;<sup>157</sup> the latter introduces complications that potentially impinge on both cultural and religious norms. The CRC thus extends the realm of international law on education into exceedingly volatile areas.

Finally, the CRC sees mass media as important to imparting information but also potentially dangerous. Therefore, the CRC encourages “the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being”.<sup>158</sup> This call for guidelines seems particularly prescient as we move deeper into the ‘Information Age’, yet it also requires continual updating given the rapid dissemination of new forms of media.

The CRC is the most widely ratified of the conventions discussed here, with only the United States and Somalia absent from States Party to the convention. States Parties are subject to reporting requirements every five years<sup>159</sup> on the status of child rights and the progress of implementation, and receive recommendations and technical assistance from the CRC Committee, UNICEF, and other specialized agencies. Optional Protocols on ending child participation in armed conflict<sup>160</sup> and banning child sale and prostitution<sup>161</sup> have been widely

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<sup>155</sup>CRC supra note 135 Art. 24 (a)

<sup>156</sup> *Ibid* Art. 2(f) and 24(b)

<sup>157</sup> See note 30-32

<sup>158</sup>CRC supra note 135 Art 17 (e)

<sup>159</sup> *Ibid* Art. 44(b)

<sup>160</sup> UN General Assembly *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict*, 25 May 2000, A/RES/54/263

accepted by the international community<sup>162</sup>. A Third Optional Protocol allows children and/or their representatives to file individual complaints for violations of CRC rights. This protocol was adopted by the UN in December of 2011, and will be voted on in 2012.<sup>163</sup>

The CRC Committee, realizing that the “aims and values reflected in [Article 29] are stated in quite general terms and their implications are potentially very wide ranging”<sup>164</sup>, requires States Parties to regularly report on their progress in realizing educational rights. Notably, the Committee encourages the use of surveys and assessments of “the quality of the learning environment, of teaching and learning processes and materials, and of learning outputs”<sup>165</sup>, as well as the establishment of a national review procedure to respond to complaints that educational policies and practices are consistent with article 29(1).<sup>166</sup> While carefully crafted as suggestions, not commands, these provisions shape the norm on how an educational system should be run in the twenty-first century.

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<sup>161</sup> UN General Assembly, *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, 25 May 2000, A/RES/54/263

<sup>162</sup> 143 States are party to the First Optional Protocol, 131 States are party to the Second Optional Protocol. [United Nations Treaty Database. *Status of Treaties*. <http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en> (Last visited Jan. 10, 2012)]

<sup>163</sup> Child Rights International Network. *UN Adopts Complaints Mechanism for Children* (2011) <http://www.crin.org/resources/infoDetail.asp?ID=26980> (Last visited Jan. 10, 2012)

<sup>164</sup> CRC General Comment No. 1 *supra* note 153 para. 17

<sup>165</sup> *Ibid* para. 22

<sup>166</sup> *Ibid* para. 25

## ***World Declaration on Education for All***

This declaration was the result of a multiyear collaborative process of discussion between policymakers, educators, and development organizations. Regional committees drafted preliminary documents, which were combined into a comprehensive declaration at a 1990 meeting in Jomtien, Thailand. Signed by representatives of 155 countries and 150 international organizations, the Jomtien Declaration “represent[s] a worldwide consensus on an expanded vision of basic education and a renewed commitment to ensure that the basic learning needs of all children, youth and adults are met effectively in all countries”.<sup>167</sup> UNESCO, UNICEF, the World Bank, and the UNDP were the primary drivers behind the Declaration.

The Jomtien Declaration acknowledges the failure to meet the basic rights to education of Article 26(1) of the UDHR, and makes a commitment to action on three levels: 1) direct action within individual countries; 2) cooperation among groups of countries sharing certain characteristics and concerns; and 3) multilateral and bilateral cooperation in the world community.<sup>168</sup> Specific frameworks for designing targets and action plans are provided at each level.

While putting a priority on equitable access to education, and gender equity in particular,<sup>169</sup> the Jomtien Declaration expands the vision of educational rights through the introduction of a new focal lens:

Whether or not expanded educational opportunities will translate into meaningful development...depends on whether people...incorporate useful knowledge,

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<sup>167</sup> UNESCO. *World declaration on education for all and framework for action to meet basic learning needs adopted by the World Conference on Education for All: Meeting Basic Learning Needs*.

[http://www.unesco.org/education/pdf/JOMTIE\\_E.PDF](http://www.unesco.org/education/pdf/JOMTIE_E.PDF) (last visited Jan. 10, 2012). [hereafter EFA]

<sup>168</sup> *Ibid* Framework for Action (1)

<sup>169</sup> *Ibid* Art. 3 (3)

reasoning ability, skills, and values. The focus of basic education must, therefore, be on actual learning acquisition and outcomes, rather than exclusively upon enrolment, continued participation in organized programmes and completion of certification requirements...It is, therefore, necessary to define acceptable levels of learning acquisition for educational programmes and to improve and apply systems of assessing learning achievement<sup>170</sup>

Like most of the additions reviewed above, this focus on learning may hardly seem radical. Still, it represents a shift away from concerns about ensuring access to education (regardless of the quality) and towards issues of educational quality. This shift in turn introduces new complexities in terms of assessing progress and compliance with the commitments made by the EFA signatories. It is relatively simple to count the number of children in a classroom; it is far more difficult to determine the amount of learning taking place.

Further complicating the issue is the Jomtien Declaration's broadening of the scope of basic education to include early childhood care; supplementary alternative programs; adult literacy programs; and the use of technology and media to transmit information.<sup>171</sup> As 'an integrated system', these components have strong potential to enhance educational opportunities; however, the obligatory power is reduced by the sheer range of possible variations.

Additionally, the Jomtien Declaration's ambit expands beyond the education sector, calling for "suitable economic, trade, labour, employment and health policies [which] will enhance learners' incentives and contributions to societal development",<sup>172</sup> and ensure that "all learners receive the nutrition, health care, and general physical and emotional support"<sup>173</sup> necessary to realize the benefits of education. While these statements have merit, they effectively turn the Declaration into an aspiration for society.

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<sup>170</sup> *Ibid* Art. 4

<sup>171</sup> *Ibid* Art 5

<sup>172</sup> *Ibid* Art 8

<sup>173</sup> *Ibid* Art 6

It is difficult to analyze the Jomtien Declaration on a spectrum of hard and soft law, as the document itself defies easy classification. A hybrid of aspirational goals, ‘soft’ obligations on the various signatories, and guiding principles for operation, the Jomtien Declaration certainly does not constitute a legally binding document in any formal sense. There is no obligation on the signatories beyond the action plans they set themselves; moreover, the document calls on the international community not to ensure compliance, but rather to provide support. Still the CESCR takes the view that State Parties to the IESCR are required to ensure that education conforms to the aims and objectives of Article 13(1) as seen in the “contemporary interpretation” expressed in the Jomtien Declaration.<sup>174</sup>

The real impact on international law of the Jomtien Declaration is not so much in the content as its purpose. By bringing a plethora of stakeholders<sup>175</sup> to the negotiation table, the right to education was irrevocably moved from a state obligation to a global responsibility<sup>176</sup>. A new norm of cooperation was thus established.

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<sup>174</sup> The Convention on the Rights of the Child, the Vienna Declaration and Programme of Action and the Plan of Action for the United Nations Decade for Human Rights Education are also mentioned as contemporary interpretations. [CESCR General Comment 13 *supra* note 94 para 5]

<sup>175</sup> The core sponsors of the EFA Declaration were the UNDP, UNESCO, UNICEF, and the World Bank, demonstrating the evolving autonomous nature of these organizations as more than simply the combination of states.

<sup>176</sup> Article 10 asserts that “[m]eeting basic learning needs constitutes a common and universal human responsibility”(1) and that “the world community, including intergovernmental agencies and institutions, has an urgent responsibility to alleviate the constraints that prevent some countries from achieving the goal of education for all”(2)

### ***The Dakar Framework for Action***

The ‘Education for All’ movement has promulgated numerous fora within which international norms on the right to education have been interpreted, clarified, and justified. Most notable among these conferences was the 2000 World Education Forum in Dakar, Senegal. More than 1000 participants, including representatives of 164 governments, affirmed the following goals:

- 1) Expanding and improving comprehensive early childhood care and education, especially for the most vulnerable and disadvantaged children
- 2) Ensuring that by 2015 all children, particularly girls, children in difficult circumstances and those belonging to ethnic minorities, have access to, and complete, free and compulsory primary education of good quality.
- 3) Ensuring that the learning needs of all young people and adults are met through equitable access to appropriate learning and life-skills programmes
- 4) Achieving a 50 per cent improvement in levels of adult literacy by 2015, especially for women, and equitable access to basic and continuing education for all adults.
- 5) Eliminating gender disparities in primary and secondary education by 2005, and achieving gender equality in education by 2015, with a focus on ensuring girls’ full and equal access to and achievement in basic education of good quality.
- 6) Improving all aspects of the quality of education and ensuring excellence of all so that recognized and measurable learning outcomes are achieved by all, especially in literacy, numeracy and essential life skills.<sup>177</sup>

By adding more tangible and quantifiable targets, the Dakar Framework provides a much stronger means of assessment (and therefore greater chance for compliance) of the Jomtien Declaration and related educational rights. Additionally, the recognition of UNESCO as responsible for coordination and maintaining momentum provided a means of delegation to further harden the norms. However, as the norms are expressed within a declaration and not a binding convention, the goals themselves are still more aspirational than obligatory.

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<sup>177</sup>Dakar Framework *supra* note 37

## **Summary**

There are three remarkable trends in the body of law examined above: 1) The repetition and gradual acceptance of certain norms on a global scale; 2) The steady expansion of educational rights assured under international law, coming at the cost of clarity; related to 3) The rising difficulties in defining, let alone monitoring, compliance.

The first trend speaks to the power of the UDHR and the thoughtfulness of the drafting committee. The language of Article 26 is repeated in every meaningful convention. This may appear trivial, as the repeated norms are fairly uncontested: compulsory free primary education, accessible secondary and higher education, education that develops humans to their fullest potential, respect for human rights and tolerance, and the right of parents to choose education for their child. These points are justifiable from a wide variety of lenses, with benefits accruing to both individuals and society; therefore, it would be surprising if they were not included in the international law on education.

However, there is something decidedly non-trivial about the establishment of these rights under international law; namely, the growing consensus that all nations have a ‘soft’ requirement, not a binding legal obligation, to ensure these rights are upheld globally. This consensus has been institutionalized in the Jomtien Declaration and the Dakar Framework for Action, as well as the General Comments of the CESCR and the Millennium Development Goals<sup>178</sup>, illustrating global recognition that the rights delineated above will not be realized

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<sup>178</sup> Target 2a: Ensure that, by 2015, children everywhere, boys and girls alike, will be able to complete a full course of primary schooling;

Target 3a: Eliminate gender disparity in primary and secondary education preferably by 2005, and at all levels by 2015

merely from States assuming obligations, but rather from the international community taking on a collective responsibility.

The second notable trend is the expansion of the territory covered by the international conventions on education. What began as a relatively simple expression of universally held beliefs about the right to education has expanded to include legal obligations to ensure education for health, family planning, and the environment. The initial push for equality of educational opportunities, as seen in the CERD and CEDW, has been gradually supplemented with concerns over quality of learning outcomes and educational quality.

That said, merely repeating calls for education “directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms”<sup>179</sup> does not provide any clarity about what such a program of education entails. Furthermore, the wide aspirations of the Jomtien Declaration expand the potential sphere of influence for international law on education, but fail to provide clear definitions of the content of such expansion. Therefore, the growth of international law on education is best defined as a growth in soft law, meaning an ever-widening series of aspirations with ever-loosening degrees of obligation.

The final trend, related to the second, is the growing impossibility to monitor and enforce compliance with the numerous conventions and declarations. The ICCPR, ICESCR, CERD, CEDW, and CRC all have varying degrees of development of enforcement mechanisms and levels of jurisprudence; these mechanisms are often hindered by the reluctance of State Parties to recognize their competency. Moreover, as educational rights are often included under the

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<sup>179</sup> UDHR *supra* note 1 Art. 26 (2)

umbrella of ‘progressive realization’, conceptual difficulties arise in assessing the intent and effort of State Parties to make progress towards their obligations for education. The Office of the United Nations High Commissioner for Human Rights (OHCHR) has proposed the use of indicators to measure human rights obligations, recognizing that “there may be a need for further refinement or re-clubbing of the identified attributes of human rights to better reflect the treaty-specific concerns.”<sup>180</sup>

With Article 26 of the UDHR as a primary source, the OHCHR reviewed the various treaty provisions and identified four attributes of the right to education: 1) universal primary education; 2) accessibility to secondary and higher education; 3) curricula and educational resources; and 4) educational opportunity and freedom. These attributes are then used to map out a series of input, process, and outcome indicators, which would appear to have value in determining compliance of a nation with the right to education.

However, because the proposed indicators of the right to education are not tied to a particular treaty, they cannot provide accurate indications of the level of compliance or noncompliance with specific treaty norms<sup>181</sup>. While substantial work has been done to create usable indicators linked to specific treaty language on education, the continued expansion and conceptual looseness of such language provides a Sisyphean aspect to such endeavors.

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<sup>180</sup> OHCHR, *Report on Indicators for Promoting and Monitoring the Implementation of Human Rights*, U.N. DOC. HRI/MC/2008/3 (7)

<sup>181</sup> See Kalantry et al, 2009 *supra* note 89

## **VI. The Role of International Organizations**

As detailed in the prior analysis, the expanding ambit of international law on education has created a series of increasingly inchoate norms. Each carries a degree of obligatory force, but all lack concrete mechanisms for measuring and inducing compliance. International organizations (IOs) have filled these gaps, thus developing the soft law on education into a more potent form. The following section will review the operational activities<sup>182</sup> of several prominent IOs for their contribution to the international law on education.

This paper argues that building systems of measurement and developing shared bodies of knowledge can provide more ‘substance’ for obligations stemming from international norms. This more precisely defined content ‘hardens’ soft law and induces compliance through a mixture of coercion, persuasion, and acculturation,<sup>183</sup> with the latter two of far greater value in the educational arena.

### ***Background***

The delegation of functions to IOs is a longstanding tradition in international law.<sup>184</sup> IOs are heavily involved in researching, debating, and creating the frameworks and measurement systems that provide substance to international norms. Alvarez considers this process of standard-setting to be “law-making by subterfuge”, especially when carried out through materials

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<sup>182</sup> Separate from treaty-making and other normative functions performed by IOs, operational activities may be defined as “the programmatic work of international organizations carried out as part of their overall mission or in fulfillment of a specific mandate.” [Johnstone,2011 *Supra* note 73 at 160]

<sup>183</sup>Ryan Goodman and Derek Jinks. *How to Influence States: Socialization and International Human Rights Law* DUKE LAW JOURNAL, Vol. 54, No. 3 (Dec., 2004), 621-703 at 625 [Hereafter Goodman & Jinks, 2004]

<sup>184</sup> Abbot et al. 2000, *supra* note 67

that do not explicitly purport to set behavioral norms, such as action-based policy programs, modes of assessment or enforcement, and conditions attached to loans.<sup>185</sup>

Alvarez highlights several instances in which IOs have contributed to the development of legal norms<sup>186</sup>, noting that “the ambiguity about the legal status of much of the work of the UN specialized agencies often stems from...a conscious effort to side-step the question of binding effect in favor of standard-setting that intentionally lies along a spectrum of authority from binding to non-binding.”<sup>187</sup> The ‘technocratic’ influences of IOs can blur positivist distinctions between obligatory and non-obligatory norms, as recommendations by the ILO, WHO, and IAEA, among others, fill the gaps within aspirational treaty language with “elaborate, context-specific, and changing implementation details”<sup>188</sup>. In particular, the Guidelines issued by the World Bank serve as “particularly potent institutional law”, given their compulsory power as a means to access the Bank’s economic resources.

Alvarez further describes the ‘hardening’ effect of the categorization of World Bank Guidelines into mandatory operational standards and persuasive good practices. He notes that it is possible to ‘shoehorn’ the Guidelines into the sources of law delineated in Article 38 of the ICJ Statute, “to the extent they encourage or compel states to adopt certain norms as a matter of national law, they are helping to implement treaty norms, solidify state practice that may

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<sup>185</sup> Alvarez, 2005 *supra* note 64 at 204

<sup>186</sup> The WTO Agreement on Technical Barriers to Trade grants privileged status to international standards produced by the ISO, with the assumption that government standards adhering to ISO regulations are “presumptively legitimate”; the FAO/WHO Codex Alimentarius sets standards for maximum limits on pesticides, food hygiene, food additives, and labeling, with market pressures rendering its standards binding in practice; and the ICAO’s Standards and Recommended Practices are universally followed, despite lacking legal binding according to the ICAO’s charter (excepting the Rules of the Air over the High Seas) *Ibid* at 218

<sup>187</sup> *Ibid* at 221

<sup>188</sup> *Ibid* at 223

generate custom, or encourage the development of general principles of law”<sup>189</sup>. However, Alvarez contends that the Guidelines are unique in that they emerged from “a diffuse normative process involving iteration, elaboration, and application of norms among a much wider set of actors than Art. 38 presumes.”<sup>190</sup>

Moreover, IOs serve a key role in inducing compliance with international law. Jinks and Goodman see “three distinct mechanisms whereby states and institutions might influence the behavior of other states: coercion, persuasion, and acculturation”.<sup>191</sup> Acculturation “the general process by which actors adopt the beliefs and behavioral patterns of the surrounding culture”<sup>192</sup> is an apt descriptor for the internationalization of norms related to education, as changes in schools come hand-in-hand with changes in cultures.

Goodman and Jinks provide an example of acculturation in the increase in the number of constitutional provisions that included the right to education. The adoption of these provisions over time did not correlate with urbanization, national wealth, or technical capacity, and the probability of newly established states adopting these provisions increased over time. These findings suggest that “[n]ational constitutions do not simply reflect processes of internal development,” but rather “reflect legitimating ideas dominant in the world system at the time of their creation.”<sup>193</sup> IOs serve as a key propagation mechanism for these ideas; particularly in the field of education, given the transnational nature of knowledge and need for information-sharing across boundaries.

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<sup>189</sup> *Ibid* at 248

<sup>190</sup> *Ibid*

<sup>191</sup> Goodman & Jinks, 2004 *supra* note 183 at 626

<sup>192</sup> Acculturation fosters behavioral changes through internally and externally imposed pressures to assimilate, and encompasses ‘microprocesses’ such as mimicry, identification, and status maximization. *Ibid* at 625

<sup>193</sup> John Boli-Bennett & John W. Meyer, The Ideology of Childhood and the State: Rules Distinguishing Children in National Constitutions, 1870-1970, 43 AM. SOC. REV. 797, 804 (1978), in *Ibid* at 626

A key caveat is that the operational activities of an IO are not, in and of themselves, sufficient for soft law to harden. There must be an acceptance of the practice as a form of law, evidenced through the process of debate and argumentation over the norms formulated as a result of the IO practice.<sup>194</sup> The focused and intensified debate within IOs can serve to enhance authority, increase the transparency of norms, and more concretely define ‘good’ behaviors<sup>195</sup>; thus strengthening obligation and compliance.

### ***The importance of measurements***

Measurement has been the subject of much epistemological inquiry, with fascinating perspectives drawn from fields of philosophy, quantum physics, psychology, and sociology. One particularly useful theory is operationism, which has the central principle that:

the concepts investigated in science are constituted by the operations used to measure them, thereby confusing what is measured with how it is measured and denying the logical independence of what is known from the process of knowing it<sup>196</sup>

Operationism thus establishes that quantifying and classifying provides the substance of a concept<sup>197</sup>; thus the *process and form by which compliance is measured* effectively creates the substance of the law itself. It is possible to identify processes of measurement throughout the international legal order, beginning with the assessment of the extent of autonomy allowed to states advanced by Hart.

A useful illustration can be found in the use of Internal Revenue Service (IRS) forms for individual income tax returns in the United States. As any unlucky soul undergoing an audit can

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<sup>194</sup> IAN JOHNSTONE. THE POWER OF DELIBERATION: INTERNATIONAL LAW, POLITICS, AND ORGANIZATIONS, 180 (Oxford University Press, 2011) [Hereafter Johnstone, 2011]

<sup>195</sup> Chayes & Chayes, 2005 *supra* note 58

<sup>196</sup> Joel Mitchell. *The logic of measurement: A realist overview* Measurement 38 (2005) 285–294, 286

<sup>197</sup> Amore radically ontological perspective would hold that measurement is in fact necessary for existence, though this is an existential bridge too far for application to the field of international law.

attest, compliance with tax laws is determined by the measurement process contained within these forms. Examples of measurement systems abound at the international level, from the OECD's categorization of Official Development Assistance<sup>198</sup> to the exacting emissions standards required under the Kyoto Protocol.

Asserting that a state is or is not in violation of the law requires a means of benchmarking what compliance entails and then conducting assessments relative to those benchmarks. This is analogous to the move from the creation of a norm requiring safe driving to the institution of set speed limits and the use of regular radar to monitor compliance. The measurement system itself thus constitutes a necessary component of international law.

Of course, the concept of measurement is hardly a novel addition to legal theory; the entire legal profession is an ongoing debate over how to define and assess human behavior. Still, as most criticisms of soft law rely on the ambiguity of their construction and content, the implementation of systems of measurement serves to harden those norms. As mentioned earlier, the precision of a norm's content is an important dimension of its legalization.<sup>199</sup> These *precise and specific definitions* are in fact the first steps of indicator development in modern monitoring and evaluation techniques. Moreover, the *use of third parties*, often international organizations, to conduct the measurements adds to dimension of delegation<sup>200</sup>, thereby hardening the norm.

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<sup>198</sup> The OECD defines ODA as “Flows of official financing administered with the promotion of the economic development and welfare of developing countries as the main objective, and which are concessional in character with a grant element of at least 25 percent (using a fixed 10 percent rate of discount). By convention, ODA flows comprise contributions of donor government agencies, at all levels, to developing countries (“bilateral ODA”) and to multilateral institutions. ODA receipts comprise disbursements by bilateral donors and multilateral institutions. Lending by export credit agencies—with the pure purpose of export promotion—is excluded.” [IMF, 2003, External Debt Statistics: Guide for Compilers and Users – Appendix III, Glossary, IMF, Washington DC.] Members of the OECD Donor Committee are evaluated for their disbursements according to this metric, and have (largely) failed to live up to their previous pledges.

<sup>199</sup> Abbot et al, 2000 *supra* note 67

<sup>200</sup> *Ibid*

### ***Influencing states through the development of shared understandings***

The power of measurements to create the substance of law also provides a mechanism for influencing states to comply with that law. As Peter Haas noted:

The epistemological impossibility of confirming access to reality means that the group responsible for articulating the dimensions of reality has great social and political influence<sup>201</sup>

Of course, some deny that ‘influence’ without the threat of force can be related to law. As realist IR scholars continually trumpet, the international system is anarchic, with no supranational body holding a monopoly on enforcement of the law. This anarchy may be used to deny the existence of international law. However, just as Hart artfully removed the necessity of morality in his conception of law, we can remove the need for enforced compliance from our own definition of international law on education.

Law may include that which needs to be enforced, but it also includes that which is accepted as the basic function of the state. For example, it is commonly accepted that a state provides infrastructure for its citizens. The provision of this infrastructure cannot be forced upon a state by outside parties, but it still remains as an obligation to be fulfilled. In practice, most prominently through the actions of the International Labor Organization (ILO). The ILO, regarded as possessing the most effective monitoring system among functional organizations<sup>202</sup>, has the authority to take “such action as it may deem wise and expedient to secure compliance”.<sup>203</sup> However, the ILO has not taken coercive measures to for compliance, instead

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<sup>201</sup> Peter Haas. *Introduction: Epistemic Communities and International Policy Coordination*. INTERNATIONAL ORGANIZATION, Vol. 46 (Winter 92), pp. 1-20. **23**

<sup>202</sup>MARGARET KARNS AND KAREN MINGST, INTERNATIONAL ORGANIZATIONS: THE POLITICS AND PROCESSES OF GLOBAL GOVERNANCE (2d ed., 2009) [Hereafter Karns and Mingst, 2009]. Pg 80

<sup>203</sup> ILO Constitution. Art. 33

aiming to build the capacity to comply through technical assistance programs.<sup>204</sup> This does not make the ILO

Even in the most hardened realist depiction of the world, it is in the interest of states to provide an education of relevance and quality for their citizens. Therefore, it is not international law which is ‘epiphenomenal’ to the educational obligations of the state, but rather the notion of inducing compliance by force that becomes superfluous.

In the educational arena, the influence of international organizations on state behavior is largely a process of persuasion and acculturation, simply because coercive action has little place in fulfilling educational obligations. The ability of IOs to create and disseminate a Gramscian ‘hegemony of ideas’ provides the fine-grained content of the law on education, and thus the presence and development of shared understanding is critical to the hardening of international norms. When IOs provide research-based and non-ideological information as to the content and process of education, states develop a *shared understanding* of what it means to be fulfilling their educational obligations. This consensus is a constitutive element of social structures,<sup>205</sup> thus forming one basis for the definitions of ‘good behaviors’ at the foundation of the legal system.

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<sup>204</sup> Karns and Mingst, 2009 *supra* note 202 at 75

<sup>205</sup> Alexander Wendt. *Constructing International Politics*. INTERNATIONAL SECURITY Vol 20, No. 1 71-81 (Summer 1995) at 73

## VII. Analysis of Selected International Organizations

The analysis of each IO begins with a rationale for selection of the particular IO, followed by a description its activities in the field of education. The relation of these activities to specific treaty language will be discussed in terms of the substance that they add to the norm, their role in strengthening the obligation placed on states, and the mechanisms they introduce for inducing compliance.

### ***United Nations Educational, Scientific, and Cultural Organization (UNESCO)***

UNESCO was formed in November of 1945, with the goal of establishing “the ‘intellectual and moral solidarity of mankind’.<sup>206</sup> The Constitution of UNESCO provides a mandate for the organization to collaborate “in the development of educational activities”, advance non-discrimination and equality of educational opportunities, and suggesting educational methods to “prepare the children of the world for the responsibilities of freedom.”<sup>207</sup>

Over the years, UNESCO has sparked tensions within the international community<sup>208</sup>; however, the organization remains as the main driver for coordinating, implementing, and monitoring the Jomtien Declaration<sup>209</sup> and the Dakar Framework<sup>210</sup>, as well as one of the UN bodies responsible for ensuring the educational provisions of the ICESCR.<sup>211</sup>

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<sup>206</sup> UNESCO History <http://www.unesco.org/new/en/unesco/about-us/who-we-are/history/> (last visited Jan. 10, 2012)

<sup>207</sup> UNESCO Constitution Art. 2(b)

<sup>208</sup> Primarily as a response to UNESCO’s anti-apartheid stance, South Africa withdrew from UNESCO from 1957 to 1994. Citing an anti-Western bias as well as financial wastage, the United States of America withdrew between 1985 to 2003, the United Kingdom of Great Britain and Northern Ireland from 1986 to 1997 and Singapore from 1986 to 2007. More recently, the USA has withdrawn funding from UNESCO (through has not officially withdrawn from the organization) in response to the acceptance of Palestine as a member.

<sup>209</sup> EFA *supra* note 167 at 17

<sup>210</sup> Dakar Framework *supra* note 37 Art. 19

<sup>211</sup> See note 109

### *The Education-For-All Development Index*

UNESCO has long been a leader in the EFA movement<sup>212</sup>, and its work in measuring access to education has added strength to the international norms. While free compulsory primary education was established through Article 26 of the UDHR and Article 13 of the ICESCR, the enforcement of this provision has been hindered by measurement difficulties that have yet to be fully addressed in either the reporting requirements or CESCR General Comments.

These difficulties are decidedly non-trivial, as several thorny questions arise in terms of the thresholds for the fulfillment of obligations. For example, is the obligation for free compulsory education fulfilled when a State Party has provided enough classroom space and teachers to reasonably accommodate the school-age population? Alternatively, is the standard met when a reasonable percentage of students are enrolled in primary school, when those students complete their primary education, or when they transfer to secondary education? Does the quality of the education matter at all for meeting the legal obligation?

As explained previously, the Dakar Framework has done much to advance thinking on these questions, and UNESCO has contributed through the development of the EFA Development Index (EDI). The EDI is “a composite index that provides an overall assessment of a country’s education system in relation to the EFA goals.”<sup>213</sup> Of course, making these measurements is challenging, particularly in the developing world. Therefore, the EFI currently focuses on the four most easily quantifiable EFA goals from the Dakar Framework:

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<sup>212</sup> In 1948, UNESCO first recommended that Member States make free primary education compulsory and universal. *Supra* note 206

<sup>213</sup> UNESCO. *EFA Development Index* (2011) <http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/ED/pdf/gmr2011-efa-development-index.pdf> (Last visited Jan. 10, 2012) [hereafter EFI]

EFA Goal		Measured by
2	Universal primary education	Primary adjusted net enrollment ratio <sup>214</sup>
4	Adult literacy	Literacy rate for those aged 15 and above
5	Gender parity and equality	Gender-specific EFA index <sup>215</sup>
6	Quality of education	Students' survival rate to grade 5

Nations are ranked according to these indicators and grouped into ‘high, medium, and low’ EFI categories. UNESCO publishes these rankings in annual EFA Monitoring Reports centered on a notable challenge to education-for-all.

There is, of course, some discrepancy between these the EFA goals and the exact language used in the treaties. Furthermore, the principle of ‘progressive realization’ makes it difficult to set benchmarks for any of these indicators. Indeed, as UNESCO admits:

Only 127 countries have the data required to calculate the EDI. Many countries are still excluded, among them a number of countries in conflict or post-conflict situations and countries with weak education statistical systems. This fact, coupled with the exclusion of [EFA] goals 1 and 3, means the EDI does not yet provide a fully comprehensive and global overview of Education for All achievement<sup>216</sup>

What is the worth, then, of these attempts at quantification and measurement? From a legal standpoint, the relevance of an international law (or any law, for that matter) is dependent on the extent to which breaking that law affects outcomes of the law-breaker. In this view, states conform to international law because they are concerned about direct sanctions as well as reputational damage from violations.<sup>217</sup> Kenneth Roth, former director of Human Rights Watch, has written:

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<sup>214</sup> Net Enrollment Ratio measures the proportion of children of primary school age who are enrolled in a formal education program.

<sup>215</sup> This index averages the gender parity indexes of the primary and secondary gross enrolment ratios and the adult literacy rate

<sup>216</sup>EFI *supra* note 213 Annex 1

<sup>217</sup> See Andrew T. Guzman. *A Compliance-Based Theory of International Law* CALIFORNIA LAW REVIEW 90 (2002): 1826-1887.

...to shame a government effectively...clarity is needed around three issues: violation, violator, and remedy. We must be able to show persuasively that a particular state of affairs amounts to a violation of human rights standards, that a particular violator is principally or significantly responsible, and that a widely accepted remedy for the violation exists.<sup>218</sup>

The EFI provides this clarity for both the violation and the violator by demonstrating the failure to provide education for all within a particular State. Therefore, by monitoring and publishing annual reports on the level of compliance, UNESCO creates a clear incentive for a State to demonstrate that it is an honorable member of the international community, reliably upholding its international (and domestic) commitments.<sup>219</sup> Otherwise, these states run the risk of being considered, at best, educationally-backward; at worst, uncaring and despotic.

For aid-dependent states, this would affect the ability to secure needed funding from donors and loans from development banks. For emerging economies, this would affect the ability to attract international investment and trade agreements. Moreover, the EFI provides a means by which states can set benchmarked targets in their action plans, fulfilling their obligation under Article 14 of the ICESCR.

UNESCO's actions show the desire of the international community to measure and publish compliance and progress towards fulfillment of the treaty obligations. In 2011, UNESCO, in its role as a facilitator and organizer, made a frank recommendation for spending on education:

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<sup>218</sup> Kenneth Roth *Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization.*: HUMAN RIGHTS QUARTERLY, Vol. 26, No. 1 (Feb., 2004), pp. 63-73

<sup>219</sup> See, for example, ROBERT AXELROD, THE EVOLUTION OF COOPERATION (Basic Books, 1984) A counter to the 'reputational consequences' argument notes that States have multiple reputations, and thus "the reputational consequences of a state's noncompliance with a given treaty are...limited by the history of its cooperative relationships with the other member states". [George Downs & Michael Jones. *Reputation, Compliance, And International Law*. JOURNAL OF LEGAL STUDIES, vol. XXXI 7 (January 2002)]. However, it is difficult to conceptualize a reputation which would not be damaged by a failure to provide education for its citizens.

We urge national governments, with which the principal responsibility rests, supported by parliamentarians, to allocate at least 6% of GNP and/or at least 20% of public expenditure to education.<sup>220</sup>

While these spending recommendations may not be practical<sup>221</sup>, they demonstrate that UNESCO is setting measurable standards by which nations may be assessed for their efforts towards realization of educational rights for their citizens.<sup>222</sup> This paper does not claim that UNESCO's monitoring standards fully provide the substance of the law on education.<sup>223</sup> However, as these standards become more developed and widely used, they begin to create a system of accountability for the progressive realization of rights, thus 'filling-in' gaps in the international law.

#### *Education for Sustainable Development (ESD)*

In the last two decades, the movement of millions out of poverty, particularly in China and India, has been cause for both celebration and concern. As the process of industrialization has, to date, been extremely resource-intensive, the global community has become increasingly aware that the planet cannot sustain a global population maintaining 'first-world' rates of consumption. This bleak outlook has given birth to the concept of 'sustainable development',

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<sup>220</sup>UNESCO *Tenth Meeting of the High-Level Group on Education for All* (EFA) 22-24 March 2011 Jomtien, Thailand U.N. Doc. ED-11/HLG-EFA/2

<sup>221</sup> Of 116 countries with data available in 2008, only 21 devoted more than 19.5 percent of public expenditures to education. The world average was 15 percent [World Bank Statistical Database, <http://data.worldbank.org/> (2012)].

<sup>222</sup> UNESCO is also making these calls on a global level: "We call on the international community to deliver on its political and financial commitments, including replenishment of the EFA Fast-Track Initiative (FTI), and to fill the estimated US \$16 billion financing gap in order to achieve core EFA goals in low-income countries".[*supra* note 206] Doing so fulfills the goal of international cooperation expressed in the Jomtien Declaration and Dakar Framework; and resonates with the obligation for States to contribute "to the elimination of ignorance and illiteracy throughout the world" in the Convention on the Rights of the Child, Article 28(3)

<sup>223</sup> For UNESCO's activities, much of the debate necessary for institutionalizing of norms (See note 73) has come during annual EFA meetings and reports, with the main criticism formed on the narrowing of the vision of EFA to "to a simple emphasis upon putting more children into school" [. EFA Forum Secretariat, *Mid-Decade Meeting of the International Consultative Forum on Education for All*, 16-19 June 1996, Amman, Jordan. (1996)] UNESCO is adapting activities in the face of this criticism. However, it is worth noting that, as the second MDG expressly targets primary enrollments, there is an international consensus on this indicator.

defined in 1987 by the UN as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."<sup>224</sup>

Sustainable development has, perhaps inevitably, found its way into the corpus of international law on education, most notably through the aforementioned call in the CRC for education to develop "respect for the natural environment".<sup>225</sup> This call has been reflected in the EFA movement, with the Jomtien Declaration recognizing that "education can help ensure a safer, healthier, more prosperous and environmentally sound world"<sup>226</sup> and the Dakar Framework noting that education "should provide skills for living and for developing...the preservation and care of the environment."<sup>227</sup> However, while the conventions on education recognize the importance of ESD, they do not provide guidance on the standards by which it might be enacted.

UNESCO has played a central role in the environmental education movement. In coordination with the United Nations Environment Program, UNESCO spearheaded the Stockholm Declaration of 1972<sup>228</sup>, the Belgrade Charter of 1975<sup>229</sup>, and the Tbilisi Declaration

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<sup>224</sup> World Commission on Environment and Development. *[Our Common Future, Chapter 2: Towards Sustainable Development](#)* U.N. Doc A/42/427 The concept was further developed in the United Nations World Summit in 2005 as the "interdependent and mutually reinforcing pillars" of economic development, social development, and environmental protection, with culture later added as a fourth pillar. [UN World Summit Outcome Document. U.N. Doc. A/RES/60/1]

<sup>225</sup> CRC *supra* note 135 Art.29 (1) (e)

<sup>226</sup> EFA *supra* note 167, Preamble

<sup>227</sup> Dakar *supra* note 37 Regional Frameworks of Action, 3, (6)

<sup>228</sup> The 1972 Declaration of the United Nations Conference on the Human Environment, known as the Stockholm Declaration, provided 26 principles "to inspire and guide the peoples of the world in the preservation and enhancement of the human environment."

<sup>229</sup> The Belgrade Charter was the outcome of the 1975 International Workshop on Environmental Education held in Belgrade, Serbia. The Belgrade Charter adds goals, objectives, guiding principles, and audiences for environmental education programs to the Stockholm Declaration. [The Belgrade Charter, Adopted by the UNESCO-UNEP International Environmental Workshop, October 13–22, 1975]

of 1977<sup>230</sup>. These three documents have guided the course of environmental education. The Tbilisi Declaration became the basis for the ESD provisions of 1992's Agenda 21, "a comprehensive plan of action to be taken globally, nationally and locally by organizations of the United Nations System, Governments, and Major Groups in every area in which human impacts on the environment".<sup>231</sup>

Agenda 21 proposes that governments integrate environment and development as cross-cutting issues into all levels of education; countries set up national advisory bodies –to coordinate environmental education; educational authorities conduct pre-service and in-service training programs on environmental education; and schools "involve schoolchildren in local and regional studies on environmental health, including safe drinking water, sanitation and food and ecosystems"<sup>232</sup>.

To ensure that these provisions were implemented, the UN has declared the years 2005–2014 to be the 'UN Decade of Education for Sustainable Development', with UNESCO given primary responsibility as the lead actor.<sup>233</sup> The ESD movement sees a clear need to mobilize educational resources to create a more sustainable future. From this perspective, universal access to education ensures widespread understanding of the dangers inherent in resource-dependent growth. According to UNESCO, ESD promotes the revision of educational systems that support

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<sup>230</sup> The 1977 Intergovernmental Conference on Environmental Education was convened by UNESCO in Tbilisi, Georgia. This was the first intergovernmental conference to emphasize the role of education in improving the global environment. The Tbilisi Declaration laid out the role, objectives, and characteristics of environmental education, including further goals and principles. UNESCO, *Intergovernmental Conference on Environmental Education* Tbilisi, USSR. (October 1977) [http://www.gdrc.org/uem/ee/EE-Tbilisi\\_1977.pdf](http://www.gdrc.org/uem/ee/EE-Tbilisi_1977.pdf)

<sup>231</sup> United Nations Program of Action from Rio. (Agenda 21) UNCED) Rio de Janeiro, Brazil (June 1992) Art. 36(1) Agenda 21 was strongly reaffirmed at the World Summit on Sustainable Development held in Johannesburg, South Africa in 2002

<sup>232</sup> *Ibid* Art. 36.5 (b)(c)(d)(e)

<sup>233</sup> UNESCO. *Leading the agenda for ESD*. <http://www.unesco.org/new/en/education/themes/leading-the-international-agenda/education-for-sustainable-development/three-terms-one-goal/> (Last visited Jan. 10, 2012)

unsustainable societies, thus affecting legislation, policy, finance, curriculum, instruction, learning, and assessment.<sup>234</sup>

The ESD movement has added a wealth of information to the ambiguity of the environmental obligation contained within the CRC. The publications and programs of UNESCO<sup>235</sup> (as well as other actors) provide a means of fulfilling this obligation and assessing the level of compliance.

There are reputational incentives to comply with the standards contained within these programs; particularly important given the high tension of debates between North and South on cutting emissions. ESD is a (relatively) painless way for a State to prove that it takes environmental issues seriously, even if the State has failed to ratify the Kyoto Protocol. Moreover, in the wake of growing awareness of climate change and finite resources, many States have the additional incentive of introducing environmental education as a means of ensuring sustainable growth.<sup>236</sup>

As the environmental movement carries its own normative weight, the impact of the ESD movement on international laws on education is best categorized as an inadvertent clarification of the ambiguity. However, those clarifications have provided the means by which States can fulfill their obligations and ensure a sustainable future for their citizens.

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<sup>234</sup> The four ‘main thrusts’ of ESD are: 1) Improving access and retention in quality basic education; 2) Reorienting existing educational programs from early childhood education to university to include knowledge, skills, perspectives and values related to sustainability; 3) Increasing public understanding and awareness of sustainability through community awareness and informal education; 4) Providing training to public and private sector employees to make decisions and perform their work in a more sustainable manner. *Ibid*

<sup>235</sup> See, for example, UNESCO’s Framework for the UN DESD International Implementation Scheme (ED/DESD/2006/PI/1), the Education for Sustainable Development Toolkit, the CD-Rom Teaching and Learning for a Sustainable Future, and the Asia-Pacific Guidelines for the Development of National ESD Indicators

<sup>236</sup> This is particularly true in the case of China, which has seen per capita energy use skyrocket from 866 kilograms in 2000 to 1,598 kilograms in 2008 (World Bank, World Development Indicators)

### ***United Nations Children's Fund (UNICEF)***

UNICEF<sup>237</sup> was created by the UN General Assembly in 1946 to provide emergency food and healthcare to children following the devastation of World War II. In 1953, UNICEF became a permanent part of the United Nations system, with a mandate to provide long-term humanitarian and developmental assistance to children and mothers in developing countries.

UNICEF has evolved to focus on “the protection of children’s rights, to help meet their basic needs and to expand their opportunities to reach their full potential.”<sup>238</sup> UNICEF uses the Convention on the Rights of the Child to guide its operational activities, and thus every strategy, framework, and project conducted by UNICEF, at least in theory, represents an institutional interpretation of the CRC. There is some precedence for this role, as the UN General Assembly stated in 1959 that aid provided through UNICEF constituted a ‘practical way of international co-operation’ to carry out the aims of the Declaration of the Rights of the Child.<sup>239</sup>

Moreover, UNICEF was specifically assigned a role in implementation in the CRC,<sup>240</sup> and therefore has the legal responsibility to participate in the consideration of States Parties' reports; provide expert advice on the implementation of the CRC; submit reports on implementation to the Committee on the Rights of the Child; and respond to requests by the Committee for technical advice or assistance to a State Party.

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<sup>237</sup> UNICEF has played a major role in the Education-for-All movement, including partnering with UNESCO for the conferences leading to the Jomtien Declaration. UNICEF has played a catalyzing role in establishing access to basic education as a global obligation, and has played key roles in the education-related MDGs and formation of Standards for Education in Emergencies, Chronic Crises and Early Reconstruction. This section will attempt to review those operational activities wherein UNICEF is the main or only leader.

<sup>238</sup> UNICEF. *UNICEF's Role in the CRC Monitoring Process*. [http://www.unicef.org/crc/index\\_30214.html](http://www.unicef.org/crc/index_30214.html) (Last visited Jan. 10, 2012)

<sup>239</sup> UNICEF. *History*. [http://www.unicef.org/about/who/index\\_history.html](http://www.unicef.org/about/who/index_history.html) (Last visited Jan. 10, 2012)

<sup>240</sup> CRC supra note 135 Art. 45

### *Education for Child Nutrition, Maternal Health, and Family Planning*

While UNICEF has a strong presence throughout the education development world<sup>241</sup>, its work in health, nutrition, and family planning best illustrates the role of the organization in contributing to international law. As mentioned earlier, provisions of the CRC oblige States Parties to educate all segments of society in basic health and nutrition<sup>242</sup>, and develop education and services for family planning<sup>243</sup>. UNICEF has taken the lead in interpreting these provisions into operational activities.

Even before the CRC was adopted, UNICEF had provided solid research on health and nutrition for children. The *1982-83 State of the World's Children Report* launched the Child Survival and Development Revolution, which placed special emphasis on child growth monitoring to recognize under-nutrition, oral re-hydration therapy to treat diarrhea, breastfeeding, and immunization against six vaccine-preventable diseases. UNICEF subsequently added three more components—food supplementation, family spacing and female education—in response to concerns that the ‘GOBI’ measures were too narrow in focus.<sup>244</sup>

As State Parties to the CRC took up the obligation to provide health education, the ‘GOBI-FFF’ measures became the functional equivalent of an extension of the CRC provisions. UNICEF, in partnership with the WHO, provided donors and ministries with simple, relatively

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<sup>241</sup> In 1965, education made up 43 percent of UNICEF’s assistance to Africa, and has continued to be a major portion of UNICEF’s disbursements and projects. UNICEF has played a major role in the Education-for-All movement. UNICEF’s priorities in education have been ensuring gender equality and access to basic education, fitting with the MDGs. UNICEF is also a lead actor in the provision of education in emergencies, including the formation of Minimum Standards for Education in Emergencies, Chronic Crises and Early Reconstruction

<sup>242</sup> CRC supra note 135 Art 24 (a)

<sup>243</sup> *Ibid* Art. 2(f) and 24(b)

<sup>244</sup> Allan Rosenfield and Caroline J. Min, *A History of International Cooperation in Maternal and Child Health*. MATERNAL AND CHILD HEALTH, Part 1, 3-17, (2009)

low-cost ways to meet their obligations for health and education.<sup>245</sup> Included in these ways was 'Facts for Life', a booklet on basic health by UNICEF, WHO and UNESCO. 'Facts for Life' comprises 13 essential messages on how to best care for children and mothers.<sup>246</sup> More than one million copies were circulated in 40 languages in 1989, rising to more than 15 million copies delivered via print, video, radio, and other media in 215 languages today.<sup>247</sup>

This near-universal uptake has given the 'Facts for Life' and other information related to health from UNICEF the resemblance of customary international law, recognized as a source of law by the ICJ<sup>248</sup>. Customary international law is derived from the practice of States<sup>249</sup> acting out of the belief that they are obligated to do so, and can be discerned by:

widespread repetition by States of similar international acts over time (State practice); Acts must occur out of sense of obligation; Acts must be taken by a significant number of States and not be rejected by a significant number of States<sup>250</sup>

The first and last of these elements are obviously fulfilled by UNICEF's health-related knowledge base. States have adhered to the GOBI-FFF and Facts of Life mandates for

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<sup>245</sup> *Ibid*

<sup>246</sup> The messages explain the benefits of spacing births, prenatal care, providing a learning environment, feeding with breastmilk, weighing children, immunizations, good hygiene practices, protecting against malaria, preventing HIV infections, and other basic health tips. [UNICEF. *Facts for Life Pamphlet* <http://www.unicef.org/uzbekistan/FFL-Eng.pdf> (Last visited Jan. 10, 2012)]

<sup>247</sup> *Supra* note 239

<sup>248</sup> ICJ *supra* note 49 Article 38(1)(b)

<sup>249</sup> "To international lawyers, the practice of states' means official governmental conduct reflected in a variety of acts, including official statements at international conferences and in diplomatic exchanges, formal instructions to diplomatic agents, national court decisions, legislative measures or other actions taken by governments to deal with matters of international concern." [Buergenthal & Maeier, PUBLIC INTERNATIONAL LAW IN A NUTSHELL, (West, 2002) 22-23]. In this context, the practice of states is seen in the disbursement of educational materials and the integrations of GOBI-FFF and the Facts of Life into national health policies.

<sup>250</sup> Shabtai Rosenne *PRACTICE AND METHODS OF INTERNATIONAL LAW* 55 (Oceana, 1984). This interpretation has been affirmed by the European Union Guidelines of 23 December 2005 on Promoting Compliance with International Humanitarian Law (IHL) [2005] OJ C327/04 at para. 7: 'Customary international law is formed by the practice of States which they accept as binding upon them'.

well over a quarter of a century; moreover, the international community has almost universally accepted the measures.<sup>251</sup>

It is, of course, nearly impossible to assess if countries are following UNICEF's advice out of a sense of obligation or for reasons of good governance, morality, or economics. The best case that legal responsibility is influencing the decision of states lies in the aforementioned provisions of the CRC.<sup>252</sup> As the most-universally ratified human rights treaty, the CRC places obligations on nearly every nation in the world.<sup>253</sup> States seeking to fulfill their obligations under the CRC to educate families on matters related to child health have turned to GOBI-FFF and 'Facts for Life' for guidance, thus endowing these standards with the semblance of customary international law.

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<sup>251</sup> What criticism has come has, unsurprisingly, been in the area of family planning. The Vatican has periodically withdrawn donations from UNICEF on reports that funds were used to finance sterilizations and abortion, as well as UNICEF's endorsement of "good quality abortion services" at the 1987 International Conference on Better Health for Women and Children. UNICEF has also been criticized for its financial endorsement of the PRC's one-child policy.

UNICEF has responded to these charges with a blanket statement that simultaneously professes neutrality on the abortion debate while expressing steadfast support for improving the well-being of children and women:

As a matter of policy, approved by its Executive Board, UNICEF does not advocate any particular method of family planning, believing this to be a matter best decided by people themselves in accordance with their needs, values and preferences. As a matter of practice, UNICEF does not provide contraceptive supplies. UNICEF has never provided support for abortion and it continues to be the long-standing UNICEF policy not to support abortion as a method of family planning. However, as part of its mandate for improving the well-being of children and women, UNICEF is actively involved in advocacy and practical action for the reduction of under-five mortality and maternal mortality, for the support of breastfeeding, for the education of girls and raising the age of marriage, and for supporting women in their multiple roles. All of these make a major and direct contribution towards the integrated approach to family planning and population issues.

UNICEF, *The Progress of Nations* 1995 8 June 1995.

<sup>252</sup> A more concrete proof would entail an examination of ratifications of the CRC and the enactment of policies utilizing UNICEF's advice, along with analysis of the details of internal discourse related to policymaking within each state. While this examination is outside of the bounds of this paper, the rise of global family planning and children's health initiatives in the last two decades provides at least circumstantial evidence of the role of the CRC in altering the behavior of states.

<sup>253</sup> Additionally, if taken as an expression of either "international custom, as evidence of a general practice accepted as law or the general principles of law recognized by civilized nations", the CRC stands as a persuasive authority regardless of ratification.

## ***The World Bank Group***

The World Bank Group, founded in the famous Bretton Woods Conference of 1944, is the preeminent actor in the development world. The World Bank is mandated to promote “long-term economic development and poverty reduction by providing technical and financial support to help countries reform particular sectors or implement specific projects”.<sup>254</sup> The Bank drives the global development agenda, particularly in the education sector. Since its first education project building secondary schools in Tunisia in 1962, the World Bank Group has invested \$ 69 billion globally in more than 1,500 education-related projects, providing more than \$5 billion in 2010 alone.<sup>255</sup>

### *Guiding the Development of Education Systems*

There are two sets of ambiguity related to the development of education systems within the international conventions and declarations. The first lies in the oft-repeated norm that:

Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace<sup>256</sup>

While certainly a laudable goal, there is quite simply not much that an education minister can do with this direction when designing an education master plan or a national curriculum; much less a teacher composing daily lesson plans. What does this direction look like on a tangible and measurable level? How can a nation know if it is complying with this direction?

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<sup>254</sup> IMF. *The IMF and the World Bank* (2011) <http://www.imf.org/external/np/exr/facts/imfwb.htm> (Last visited Jan 10, 2012)

<sup>255</sup> WB Education Strategy 2020 *supra* note 14 at 7; In contrast, 2010 official development assistance devoted to education from all OECD countries totaled \$11.1 billion in 2010 [OECD Statistical Database, 2012)

<sup>256</sup> UDHR *supra* note 1 Art. 26(2). As explored earlier, this language is repeated almost verbatim in Article 5(1)(a) of the CADE; Article 13(1) of the ICESCR); and Article 29(1) of the CRC

The second set of ambiguity comes from the shift away from the right to access to education and towards a right to learning from education.<sup>257</sup> Similar to the uncertainty related to direction, measuring and enforcing compliance with a State's responsibility for learning is rife with conceptual and definitional problems. Without means for structuring and reporting, the soft obligation entailed by the 'focus on learning' will dissipate into an ephemeral aspiration, leaving a sizeable gap in its wake.

The World Bank has placed itself directly in this gap with its Education Strategy 2020, "a framework for World Bank Group investments in education over the next 10 years".<sup>258</sup> The self-proclaimed pillars of this strategy are to invest early; invest smartly; and invest for all.<sup>259</sup> While past strategies prioritized 'basic education for all', the centerpiece of the new strategy is 'learning for all', involving a more holistic view of education systems.

The potential for this new approach to affect international norms on education is illustrated by the System Assessment and Benchmarking for Education Results (SABER). SABER is a system that:

assesses a country's institutional capacity and policies related to specific dimensions of its education system<sup>260</sup>; diagnoses its strengths and weaknesses against global standards, best practices, and the performance of comparator countries; and guides reforms aimed at improving learning for all<sup>261</sup>

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<sup>257</sup> As discussed, this shift was concretely expressed in Article 4 of the Jomtien Declaration: "The focus of basic education must, therefore, be on actual learning acquisition and outcomes"

<sup>258</sup> WB Education Strategy 2020 supra note 14 at 54

<sup>259</sup> The Strategy paper explains: "First, foundational skills acquired early in childhood make possible a lifetime of learning; hence the traditional view of education as starting in primary school takes up the challenge too late. Second, getting value for the education dollar requires smart investments—that is, investments that have proven to contribute to learning. Quality needs to be the focus of education investments, with learning gains as a key metric of quality. Third, learning for all means ensuring that *all* students, not just the most privileged or gifted, acquire the knowledge and skills that they need" *Ibid* at 5

<sup>260</sup> Areas include teacher policies and management, assessments of student learning and achievement, education financing, equity and inclusion, monitors and information, private provision, and quality assurance

<sup>261</sup> WB Education Strategy 2020 supra note 14 at 61

While still in pilot stages, SABER effectively provides a concrete answer to the question of compliance with the direction of an education system and focus on learning. In 2009, one-half of new World Bank education projects included support for assessment activities, mostly supporting large-scale evaluations of student achievement<sup>262</sup> that are necessary for SABER's effectiveness. If (or perhaps 'when' is more appropriate<sup>263</sup>) fully integrated into the global education development system, SABER will represent an inescapable arm of the law, providing undeniable evidence of a government's culpability in failing to meet its educational obligations.

Of course, the Bond-villain connotations of the name aside, there is nothing obliquely sinister about SABER. The project is expressly aimed at supporting the improvement of education systems, not at punishing wrongdoers. Additionally, there are reflections of 'progressive realization' in the implementation plan, as the Bank proudly notes that SABER will be applied with consideration of each country's starting point and constraints.

Still, the 'Lotus principle'<sup>264</sup> of international law holds that sovereign states are only free to act as long as they do not contravene an explicit prohibition, meaning no restriction has been authoritatively established.<sup>265</sup> While certainly not prohibitive in any conventional sense, the implementation of SABER as a comprehensive diagnostic tool adds a layer of restriction on States' freedom in terms of educational policymaking and planning.

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<sup>262</sup> *Ibid* at 63

<sup>263</sup> A 2011 East Asia Conference on SABER included the World Bank, UNESCO, the Government of Indonesia's Ministry of National Education, the Government of the Kingdom of the Netherlands, the European Commission's *Basic Education Capacity Trust Fund*, the Education Program Development Fund, the Government of Korea, the Asian Development Bank, the *Russia Education Aid for Development* program, and the United Kingdom.

<sup>264</sup> The Lotus Principle is derived from the case of the S.S. Lotus before the International Permanent Court of Justice. *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7), and has gained fame as a landmark case for public international law. For an explanation (and critique), see IAN BROWNLIE. PRINCIPLES OF PUBLIC INTERNATIONAL LAW 301 (Oxford University Press, 2003).

<sup>265</sup> Michael Glennon. *Why the Security Council Failed* FOREIGN AFFAIRS, 23 (May/June 2003) [Hereafter Glennon]

### *The ‘Knowledge Bank’*

This restriction takes on greater authority through the capacity of the World Bank to research and publish best practices on development.<sup>266</sup> Knowledge production has become an asset to the Bank, and “it is generated and used in highly strategic ways”<sup>267</sup> to provide justifications for development projects. The Education Strategy 2020 aims to build a high quality knowledge base for education reforms at the global level. To meet this mission, the Bank has greatly expanded its portfolio of education impact evaluations, with findings “synthesized at the global level and used to guide reforms and inspire innovations in other countries”.<sup>268</sup>

Indeed, the ability of the Bank to compile and produce research studies is startlingly vast, with estimates ranging from 18,000 to 20,000 distinct published works.<sup>269</sup> Over 90 percent of the Bank’s research articles fall under the headings of ‘economics’ or ‘planning and development’. In these fields, the Bank has published more than any university except for Harvard.<sup>270</sup> In the field of ‘economics and education’, the Bank has published more than any other research institute.<sup>271</sup>

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<sup>266</sup>MICHAEL GOLDMAN. IMPERIAL NATURE: THE WORLD BANK AND STRUGGLES FOR SOCIAL JUSTICE IN THE AGE OF GLOBALIZATION. (Yale University Press, 2005). at 156 [Hereafter Goldman, 2005]

<sup>267</sup>*Ibid* at 179

<sup>268</sup> WB Education Strategy 2020 supra note 14 at 41

<sup>269</sup> Analysts calculated 9,077 journal articles, 4,672 book chapters, 3,730 working papers, 1,953 books, 506 edited volumes, and 113 conference proceedings, though there was some possibility of double-counting. 45 percent of material written by World Bank Authors is actually published elsewhere, most often in scholarly journals. [Ravallion & Wagstaff *The World Bank’s Publication Record Policy* Research Working Paper 5374. World Bank (2010)]

<sup>270</sup> The Bank published over 3,500 articles in these fields, as compared to an average of 2,500 across 13 comparator Universities; Harvard published 4,400. The Bank has been criticized by Prof. Angus Deaton of Princeton as having a “long tail of undistinguished work that is directed towards, and appears in, the second tier field journals, or in (some of the) conference volumes”. *Ibid* However, this is true of all research institutions, including universities.

<sup>271</sup> The Bank published 223 articles in this field; Harvard is second with 161. *Ibid*

The creation of an education ‘knowledge bank’ is one means of realization for CRC Article 28(3)<sup>272</sup> on international cooperation in education. To push an analogy onto decidedly thin ice, for a policymaker, this amassed knowledge of the Bank has functional similarities to the assembled body of case law for a jurist. This is particularly true in the field of education, where the sharing of best practices and innovations is a constitutive element of professional activity. The research findings of the World Bank have the potential to serve as the definitive body of evidence for how education is planned, conducted, and assessed; these research activities thus take on a persuasive authority to influence State behavior.

This interpretation may overstate the Bank’s power, as there are many norm entrepreneurs<sup>273</sup> acting in the field of international education. In fact, the Bank’s capacity to produce authoritative knowledge has been characterized as a response to the successes of growing alternative-development movements.<sup>274</sup> Moreover, the Paris Declaration of 2005 and the Accra Plan of Action of 2008 have brought about a ‘harmonization’ of aid that (in theory) allows recipient countries greater control over how aid funds are spent, and the Bank itself explicitly supports the autonomy of local actors.

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<sup>272</sup> “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”

<sup>273</sup> A norm entrepreneur is an individual or organization that works to develop “collective explanations for the proper behavior of actors with a given identity”. Norm entrepreneurship follows three stages: 1) Attention is called to issues and States are persuaded to embrace a norm; 2) A critical mass of leaders persuaded to follow the norm is formed; 3) The norm is internalized and institutionalized, States follow the practice automatically. [See Ian Johnstone, *The Secretary General as norm-entrepreneur* in CHESTERMAN (Ed.) SECRETARY OR GENERAL?, (Cambridge University Press, 2006)]. In the field of international education, there are many stakeholders with the potential to serve as norm-entrepreneurs. However, the ability of the World Bank to build a coalition of these stakeholders may be unmatched.

<sup>274</sup> Goldman, 2005 *supra* note 266 at 179

However, the World Bank's ability to marshal and direct resources ensures that substantive amounts of aid will fit with its overall strategy.<sup>275</sup> While the development field is increasingly crowded with new actors,<sup>276</sup> the World Bank may still be safely characterized as the global development hegemon.<sup>277</sup>

Writing about the UN Security Council, Michael Glennon has said:

International legal order, if it is to function effectively, must reflect the underlying dynamics of power, culture, and security. If it does not—if its norms are again unrealistic and do not reflect the way states actually behave and the real forces to which they respond—the community of nations will again end up with mere paper rules<sup>278</sup>

Following this rationale, the World Bank may well be the closest thing to a sovereign power<sup>279</sup> in the education development arena. As global development projects, by and large, follow the

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<sup>275</sup> The Global Education Partnership (formerly known as the Education For All Fast Track Initiative) has assisted low-income countries achieve the education MDGs. More than \$2.1 billion has been transferred to 46 countries [*Global Education Partnership* <http://www.globalpartnership.org/about-us/partnership-structure/>]. The World Bank has played a key management role in the supervision of EFA FTI grants, and is the supervisor of the majority of projects. Though recent reforms have introduced new partners, it is likely that the World Bank, as trustee of the funds, will continue to play a managerial role.

<sup>276</sup> See Adele Harmer and Lin Cotterrell. *Diversity in donorship: the changing landscape of official humanitarian aid*, HPG REPORT 20, Humanitarian Policy Group, Overseas Development Institute, September 2005

<sup>277</sup> Critics of this hegemony have equated the World Bank to Western views of development. "Development has relied exclusively on one knowledge system, namely, the modern Western one. The dominance of this knowledge system has dictated the marginalization and disqualification of non-Western knowledge systems" [ARTURO ESCOBAR, *ENCOUNTERING DEVELOPMENT: THE MAKING AND UNMAKING OF THE THIRD WORLD*. (Princeton University Press, 1995) 13] While these criticisms are not wholly without merit, the Bank's Education Strategy 2020 is much better characterized as technocratic than ideological.

<sup>278</sup> Glennon *supra* note 265 at 31

<sup>279</sup> Indeed, the World Bank Group has a longstanding policy of requiring sovereign immunity from the countries with which it deals. Other multilateral agencies in the education field, while sharing goals of universal access to basic education and improved quality, take different approaches in response to specific challenges: The Asian Development Bank emphasizes inclusiveness and skill development, while promoting innovative models; the Inter-American Development Bank focuses on early-childhood development, teacher quality, and the school-to-work transition; The African Development Bank emphasizes higher education reform and secondary level math and science teaching. The European Union embraces a range of interventions from early childhood to skills development. Bilateral agencies, such as USAID or DFID, tend to focus on specific aspects of an education system, such as DFID's priority focus on equality of education for all. [WB Education Strategy 2020 *supra* note 14 at 71] These bilateral agencies are often constrained by foreign policy objectives. Furthermore, the numerous levels of partnerships with the World Bank mean that the strategies and recommendations of the above agencies often draw upon the Bank knowledge base.

research-based recommendations of the Bank, these recommendations take on a normative power that cannot be denied.

Finally, it is well worth noting that the construction of the Bank's Education Strategy 2020 followed a process with similarities to the creation of a formal treaty. The conceptualizing and drafting process comprised two phases of internal and external consultations with governments, private sector representatives, educators, students, development practitioners, and civil society. The discursive method, whereby input and comments from stakeholders representing 115 nations "honed the messages and specific directions of the strategy",<sup>280</sup> resulted in a document that, if not globally affirmed, is at least globally accepted.

The World Bank's Education Strategy 2020 envisions 'an education system as a network of accountability relationships' existing between governments, education providers, households and communities. Through the provision of knowledge and measuring of results, these accountability relationships reach into the realm of international law, with diagnostic and advisory powers that, while a theoretical reach, at least resonate with positivist theories of sovereign legal power.

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<sup>280</sup> WB Education Strategy 2020 supra note 14 at 32

### ***The Organization for Economic Cooperation and Development and the International Association for the Evaluation of Educational Achievement***

The Organization for Economic Cooperation and Development (OECD) was officially established in 1961, following the success of the Organization for European Economic Cooperation (OEEC) in reconstructing Europe through the Marshall Plan<sup>281</sup>. Today, 34 OECD member countries “regularly turn to one another to identify problems, discuss and analyze them, and promote policies to solve them”<sup>282</sup>. The OECD takes on numerous roles in the international community, including monitoring official bilateral aid flows, providing a forum for best practices, and compiling statistics on a wide range of social and economic issues.

The International Association for the Evaluation of Educational Achievement (IEA) is an international cooperative of research institutions which conducts large-scale comparative studies of educational achievement and other aspects of education. Under the auspices of UNESCO, the IEA was founded in 1958 with the aim of better understanding how policies and practices impact education systems. The founders of the IEA “viewed the world as a natural educational laboratory, where different school systems experiment in different ways to obtain optimal results in the education of their youth”.<sup>283</sup> Since its founding, the IEA has conducted more than 30 studies on cross-national achievement.

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<sup>281</sup> OECD History [www.oecd.org/history](http://www.oecd.org/history) (Last visited Jan 10, 2012)

<sup>282</sup> OECD members are Australia, Austria, Belgium, Canada, Chile, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, South Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, The Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States. The OECD also has close relations with Russia, Brazil, China, India, Indonesia, and South Africa, and thus can ‘bring to the table’ 40 countries that account for 80% of world trade and investment. [OECD Members and Partners [http://www.oecd.org/pages/0,3417,en\\_36734052\\_36761800\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/pages/0,3417,en_36734052_36761800_1_1_1_1_1,00.html) (Last visited Jan 10, 2012)]

<sup>283</sup> IEA History [http://www.iea.nl/brief\\_history.html](http://www.iea.nl/brief_history.html) (Last visited Jan 10, 2012)

### *Measuring learning outcomes*

As the EFA movement and World Bank Education Strategy 2020 demonstrate, the international community has committed to demonstrable learning gains, and the evaluation of an education system by what students know has become the new norm. While a consensus has formed on ‘learning for all’, there is no legal standard that dictates what students should be learning.

Human rights conventions are remarkably effusive about the equality of education, the purpose of education, and the goals of education. However, there is little guidance on the actual, day-to-day content, much less the means of transmitting that content. Different pedagogical systems place more or less priority core knowledge, socialization, creative thinking, critical analysis, problem-solving, and, more lately, the ability to use technology and develop skills for democratic participation and global citizenship. Numerous conventions use the language of “minimum educational standards as may be laid down or approved by the State”<sup>284</sup>; yet there is nothing tangible on what those standards entail in terms of actual subjects to be taught or levels at which to teach them.<sup>285</sup>

The OECD and IEA<sup>286</sup> have each made efforts to fill in the gap on these standards through the propagation of educational assessments:

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<sup>284</sup> ICESCR *supra* note 90 Art. 13(3).

<sup>285</sup> The CESCR General Comment 13 notes only that “these standards must be consistent with the educational objectives set out in article 13 (1)” [*supra* note 99 para. 29]

<sup>286</sup> There are other actors involved with international assessments of student achievement, including the Latin American Laboratory for Assessment of the Quality of Education, the Southern and Eastern Africa Consortium for Monitoring Educational Quality, and many of the regional development banks and other international organizations. However, the assessments conducted by the OECD and IEA are by far the most prominent and have had the most impact on education systems.

Organization	Assessment Name	Age Group	Knowledge and Skills Evaluated	Assessments given (first year)	Participants (Latest)
OECD	Programme for International Student Assessment (PISA)	15 year-olds	General competencies in reading, mathematics and science	Every 3 years (2000)	75 Countries/Economies (2009-10)
IEA	Trends in International Mathematics and Science Study (TIMSS)	4 <sup>th</sup> and 8 <sup>th</sup> Grade Students	Content and cognitive domains in mathematics and science	Every 4 years (1995)	63 countries (2011)
IEA	Progress in International Reading Literacy Study (PIRLS)	4 <sup>th</sup> Grade Students	Reading literacy achievement	Every 5 years (2001)	50 Countries (2011)

The OECD also launched the Programme for the International Assessment of Adult Competencies (PIAAC) in 2011. 5,000 interviews of adults aged 16-65 years were conducted in each of 25 participating countries. The PIAAC tests literacy and numeracy skills and the ability to solve problems in technology-rich environments, seeking “to measure the skills and competencies needed for individuals to participate in society and for economies to prosper”.<sup>287</sup>

While not yet universally applied, these assessments have already become trusted as valuable evaluative tools. In particular, the TIMSS and PISA examinations collect contextual information that facilitates analysis of various socioeconomic factors and policies on student achievement.<sup>288</sup> The analytical value of these tests ensures that the international community continues to push for more countries to participate.

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<sup>287</sup> OCED. *Programme for the International Assessment of Adult Competencies*. [www.oecd.org/piaac](http://www.oecd.org/piaac) (Last visited Jan. 10, 2012)

<sup>288</sup> As a small selection, see M West *Class-size effects in school systems around the world: Evidence from between-grade variation in TIMSS* EUROPEAN ECONOMIC REVIEW Elsevier (2006); L Wößmann, *The effect heterogeneity of central examinations: evidence from TIMSS, TIMSS-Repeat and PISA*. EDUCATION ECONOMICS (2005); Taylor & House. *The Effects of Homework Activities and Teaching Strategies for New Mathematics Topics on Achievement of Adolescent Students in Japan: Results from the TIMSS 1999 Assessment* INTERNATIONAL JOURNAL OF INSTRUCTIONAL MEDIA, v31 n2 Spr 2004

Moreover, these assessments influence the behavior of states through the process of acculturation. The main element of acculturation is a State's identification with a particular reference group that generates pressures to conform.<sup>289</sup> The PISA, TIMSS, and PIRLS assessments provide both reference groups and, crucially, rankings within those groups that create internal and external pressures on States. The assessments have already been used by several States as the basis for educational reforms; poor performance by American students on the 2009 PISA relative to other 'rich countries' has sparked intense scrutiny of educational policies and practices in the USA.<sup>290</sup> Of course, assessments have long been the driver of educational reforms. Still, as the process of acculturation compels education policymakers worldwide to 'peek inside' the classrooms of other states, the significance of comparative assessments performed on an international scale has increased greatly.

The PISA, TIMSS, and PIRLS tests provide a lens for comparisons of the effectiveness of various teaching methods and educational systems. However, they also affect the content that is taught in schools systems. 'Teaching to the test' is an implicit mandate in classrooms around the world, and thus the content of the assessments affects choices on curriculum in both tested countries and those seeking assurance of 'international quality'. Harold Koh has written that:

for transnational lawyers, incorporating [public international law] concepts into domestic legal practice has become our equivalent of internalizing the global metric system into the American system of weights and measures<sup>291</sup>

A case may be made that these international assessments are fast approaching the status of the metric system; as the predominant means of measuring student achievement, they 'fill in' the gaps of international law on the content of education.

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<sup>289</sup> Goodman & Jinks, 2004 *supra* note 183 at 625

<sup>290</sup> WB Education Strategy2020 *supra* note 14 at 39

<sup>291</sup>Harold Koh, *The Globalization of Freedom* 26 YALE J. INT'L L. 305 (2001)

The main factor keeping the TIMSS, PISA, and PIRLS exams from achieving this status is the relative narrowness of the knowledge and skills that they test. The World Bank notes that “comparable measures of important skills, such as problem solving, teamwork, and communication, are still notably absent from international assessments.”<sup>292</sup> While the PISA test provides an optional questionnaire on *computer* familiarity, none of the international exams assess the ability of students for the technological literacy and cognitive skills that are valued in the modern global economy.<sup>293</sup> Doing so on anything close to a universal basis would demonstrate a shared understanding among states that these assessments provide the substance of international norms obliging the provision of a quality and relevant education.

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<sup>292</sup> WB Education Strategy2020 supra note 14 at 38

<sup>293</sup> See FRANK LEVY & RICHARD J. MURNANE. THE NEW DIVISION OF LABOR: HOW COMPUTERS ARE CREATING THE NEXT JOB MARKET (Princeton, 2005)

### VIII. Conclusion

UNESCO's monitoring functions, the GOBI-FFF standards propagated by UNICEF, the World Bank's SABER initiative and 'knowledge bank', and the international assessments of the OECD and the IEA have each served to clarify several areas of ambiguity in the body of international law on education, and also to influence the behavior and ability of states to comply with these international norms. The creation of systems of measurement and the development of shared understandings on what education entails has advanced the evolution of aspirational norms into assessable, supportable, and achievable obligations.

While these are positive developments, it is worth noting that the practices of IOs have the most significance for the worst off. Those states who fail to meet UNESCO's EFI benchmarks, demonstrate low progress according to the SABER initiative, or achieve lower scores on the international assessments are also those with the highest rates of poverty<sup>294</sup>, rampant unemployment, and less functional systems of governance.<sup>295</sup> Most of the operational activities described in this paper do little more than describe the existence of global inequity for educational opportunities. Even when they do take steps to make improvements, the end results have not yet approached a leveling of the global playing field.

On the global level, an aspiration has been clearly expressed for education to serve as the means for the individual to rise above the circumstances of his or her birth. Despite the progress made through both international conventions and the work of multinational organizations, this goal is far from realization.

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<sup>294</sup> In the PISA 2009 results, "the scores of almost every...low- and middle-income country or region were in the bottom half of results, with many lagging far behind the OECD average". WB Education Strategy2020 supra note 14 at 25

<sup>295</sup> Collier & Dollar. *Development effectiveness: what have we learnt?*. THE ECONOMIC JOURNAL, 114: F244–F271. (2004)

Questions of the sort pursued in this paper often remain as intellectual puzzles, impacting lives only when norms are tested or boundaries pushed. Indeed, the most universal concepts in international law may be ambiguity and imperfection; norms for State behavior are largely ambiguous, by design and by evolution; and the enforcement of compliance for States takes place through a variety of imperfect mechanisms.

However, the field of education requires special attention for two interconnected reasons. First, educational rights affect every life, every day. Decisions on how the state should provide education for children, what instructors should cover in the classroom, and how an education system should be assessed are decisions that alter the course of both individual lives and societal development. Moreover, decisions made by one State increasingly affect the world as a whole, thus moving educational rights from the realm of domestic jurisdiction to the arena of international law.

Secondly, education is “both a human right in itself and an indispensable means of realizing other human rights”.<sup>296</sup> Whether categorized as enabler rights, multiplier rights, or fundamental rights, educational rights are the path by which a healthy society is built, and thus take on paramount importance.

Determining if a violation of an educational right has taken place is problematic; affixing responsibility and a means of redress will be even more so. However, the difficulty of this endeavor does not change its necessity. If the international community cannot get educational rights ‘right’ then little else matters.

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<sup>296</sup>CESCR General Comment No. 13 *supra* note 99 at para. 1