

STANDARD-SETTING IN UNESCO

Volume I

**NORMATIVE ACTION
IN EDUCATION, SCIENCE
AND CULTURE**

Essays in Commemoration
of the Sixtieth Anniversary of UNESCO

Edited by Abdulqawi A. Yusuf



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CONTENTS

Foreword <i>K. Matsuura</i> , Director-General of UNESCO	11
Introduction <i>A. A. Yusuf</i>	15
PART I METHODS OF ELABORATION AND IMPLEMENTATION OF UNESCO INSTRUMENTS	
Panel 1 <i>Elaborating and Implementing UNESCO's Standard-setting Instruments</i>	
Introduction <i>P. M. Eisemann</i>	25
UNESCO Practices and Procedures for the Elaboration of Standard-setting Instruments <i>A. A. Yusuf</i>	31
Monitoring, Supervision and Coordination of the Standard-setting Instruments of UNESCO <i>L. Boisson de Chazournes</i>	51
UNESCO Dispute Settlement <i>S. von Schorlemer</i>	73

PART II
FROM CONSTITUTIONAL OBJECTIVES
TO LEGAL COMMITMENTS

Panel 2

*Promoting a Peace Founded on
Intellectual and Moral Solidarity*

Introduction <i>F. Francioni</i>	109
An Enduring Legacy For the Knowledge Economy: UNESCO and the International Copyright System <i>R. L. Okediji</i>	113
Strengthening Moral Solidarity: Human Rights, Human Genetics, and the Ethics of Science and Technology <i>H. Gros Espiell</i>	135
UNESCO and the Promotion of Cultural Exchange and Cultural Diversity <i>J. Wouters and M. Vidal</i>	147

Panel 3

*Promoting Dignity, Equality and Mutual Respect
among Human Beings*

Introduction <i>J. Faundez</i>	171
Advancing Education for Justice, Liberty and Peace <i>P. S. Rao</i>	173
Fostering Tolerance and Mutual Understanding among Peoples <i>F. Lenzerini</i>	187
The Protection of Human Dignity in the Face of Scientific and Technological Progress <i>S. El Zein</i>	207

PART III
CONSOLIDATING COLLABORATION AMONG NATIONS
IN EDUCATION, SCIENCE AND CULTURE

Panel 4

Safeguarding the World's Cultural and Natural Heritage

Introduction <i>G. Abi-Saab</i>	219
A Dynamic Evolution of Concept and Scope: From Cultural Property to Cultural Heritage <i>F. Francioni</i>	221
UNESCO and Intangible Cultural Heritage from the Viewpoint of Sustainable Development <i>T. Kono</i>	237
Protecting Natural Heritage and its Transmission to Future Generations <i>C. Redgwell</i>	267

Panel 5

Fostering Access to Education and Knowledge

Introduction <i>P. M. Eisemann</i>	291
The Normative Implications of Education for All (EFA): The Right to Education <i>W. Benedek</i>	295
Ensuring Equal Opportunities in Education <i>A. Fernandez</i>	313
Access to Scientific and Technological Knowledge: UNESCO's Past, Present and Future Roles <i>J. Reichman, P. F. Uhlir, and H. J. Ritch</i>	323

PART IV
IMPACT OF UNESCO STANDARD-SETTING
ON INTERNATIONAL LAW

Panel 6

*Beyond Treaty Law: The Influence of
the Legal Instruments Adopted by UNESCO
on General International Law*

Introduction <i>A. A. Yusuf</i>	349
The Impact of Legal Instruments Adopted by UNESCO on General International Law <i>P. M. Dupuy</i>	351
UNESCO's Role in the Development and Application of International Law: An Assessment <i>N. Schrijver</i>	365
Developing New Intergovernmental Institutions through Simplified Agreements <i>J. Donaldson</i>	385
PART V CONCLUSIONS	
General Conclusions <i>G. Abi-Saab</i>	395
LIST OF CONTRIBUTORS	403
LIST OF ABBREVIATIONS	405
INDEX	409

NORMATIVE ACTION
IN EDUCATION, SCIENCE
AND CULTURE

The Normative Implications of Education for All (EFA): The Right to Education

*Wolfgang Benedek**

I. NORMATIVE OBLIGATIONS UNDER THE RIGHT TO EDUCATION

The right to education is considered a fundamental human right, defined first in Article 26 of the *Universal Declaration on Human Rights* (UDHR) of 1948 and later, with the assistance of UNESCO, in Article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966.¹ The definition of the human right to education given in these instruments emphasizes two major aspects, namely, the content of the right and its purpose, or instrumental nature.

The content focuses on access to different forms of education and on equality in the enjoyment of the right. The purpose is described as 'the full development of the human personality' and 'the strengthening of respect for human rights and fundamental freedoms.' Both elements present the human right to education as an 'empowerment right', enabling its beneficiaries to improve their economic and social situation, and to make full use of their human rights.

The Constitution of UNESCO, as well as its activities, reflects the concerns of the human right to education and emphasizes the ideal of equal educational opportunities for

* The author wishes to express his gratitude for useful information and advice received from Mr. Kishore Singh, from the Secretariat of the Educational Sector of UNESCO.

1. See J. DELBRÜCK, 1992, The Right to Education as a Human Right, *GYIL* 35, pp. 92-104 and M. NOWAK, The Right to Education in the Economic, Social and Cultural Rights, in A. EIDE, C. KRAUSE and A. ROSAS (eds.), 2001, *Economic, Social and Cultural Rights: A textbook*, The Hague, pp. 245-271.

all.² The UNESCO *Convention against Discrimination in Education* (CADE), adopted by the General Conference of UNESCO on 14 December 1960, was the first major legal instrument to implement this right (and constitutional principle) in the context of UNESCO's mandate and action.³ The proposal for drafting such a Convention was contained in the report of the Special Rapporteur of the United Nations Commission on Human Rights, Charles Ammoun, who completed a 'Study of Discrimination in Education' for the Sub-Commission on the Prevention of Discrimination and Protection of Minorities in 1957.⁴

The CADE, which entered into force in 1962, thus came well before other international instruments against specific forms of discrimination, like the *International Convention on the Elimination of All Forms of Racial Discrimination*, adopted in 1965, which also addressed the right to education and training insofar as it was relevant under the prism of discrimination. The UNESCO Convention was drawn up at a time when racial segregation still existed in schools in the United States of America, and apartheid was in effect in South Africa. There have been dramatic improvements in this respect. For example, since the year 2000, South Africa is itself Party to the Convention. As a matter of general evolution, the number of Parties to the Convention reached fifty-one by the end of the 1960s; by the end of the 1970s this number had climbed to sixty-five; and by 1985, to seventy-four. By 2006, the number grew to the current figure of ninety-three Parties.⁵

The *main obligation* of States ratifying the CADE is the elimination and prevention of discrimination, which 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 [...].⁶

According to Article 4, State Parties undertake to formulate and apply national policies to promote equality of opportunity and of treatment. These include, in particular:

- generally available, free and compulsory primary education; secondary education accessible to all; and the possibility of higher education on the basis of individual capacity;
- equivalent standards of education in all institutions of public education;

2. See Paragraph 6 of the Preamble to the Constitution of UNESCO, which speaks of 'believing in full and equal educational opportunities for all'; and Article 1, Paragraph 2(b), which mentions the 'ideal of equality of educational opportunity without regard to race, sex or any distinctions, economic or social.'

3. See Y. DAUDET and K. SINGH, 2001, *The Right to Education: An Analysis of UNESCO's Standard-setting Instruments*, UNESCO, Paris.

4. See UN Doc. E/CN.4/Sub.2/181/Ref.1.

5. See <http://portal.unesco.org/la/convention.asp?KO=12949&language=E> (last visited on 31 December 2006).

6. See Articles 1 and 3 of the *Convention against Discrimination in Education* of 1960, available at: <http://www.unesco.org> (last visited on 11 December 2006).

- appropriate educational methods for persons who have not received or completed their primary education; and
- training for the teaching profession without discrimination.

Article 5 restates:

- that education has to be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms;
- that parents are at liberty to choose private schools provided they meet minimum educational standards; and
- the right of members of national minorities to carry out their own education activities.

According to Article 6, State Parties undertake to pay the greatest attention to any recommendation adopted by the General Conference of UNESCO defining measures against discrimination and ensuring equality of opportunity and treatment in education.

Finally, States commit themselves to giving full information on legislative and administrative action taken for the implementation of the Convention as part of their periodic reports in Article 7.⁷

It is important to note that the same General Conference of UNESCO that adopted the CADE also adopted a *Recommendation against Discrimination in Education*, with identical content. Thus, the obligations of the Convention became immediately operational for all UNESCO Member States, albeit as political and moral commitments rather than as strict legal obligations. The normative implications of this approach will be analysed in Section 3.

However, UNESCO's standard-setting activities related to the right to education did not stop there. A *Recommendation on Technical and Vocational Education* was adopted by the General Conference of UNESCO in 1962, to be replaced by a *Revised Recommendation concerning Technical and Vocational Education* in 1974; and complemented by the *Convention on Technical and Vocational Education* (CTVE), adopted in 1989, which came into force in 1991.⁸ This last Convention topped off with fifteen Parties in 2006, however, so that the Recommendation of 1974, generally applicable to all Member States, is, in its revised form from 2001, factually of larger practical relevance. In its exactly one hundred Paragraphs, the Revised Recommendation of 2001 deals with issues of policy, planning and administration, technical and vocational education with regard to general education, both as preparation for an occupational field and as continuing education, guidance, the learning process, staff issues and international cooperation in a much more comprehensive way than the Convention in its fifteen articles.⁹

7. See, for more detail, Y. DAUDET and P.M. EISEMANN, 2005, *Commentary on the Convention against Discrimination in Education*, Paris, UNESCO.

8. See, for all legal instruments, J. SYMONIDES and V. VOLODIN (eds.), 1999, *UNESCO and Human Rights. Standard-setting Instruments, Major Meetings, Publications*, Paris, UNESCO, 2nd edn, or consult <http://www.unesco.org> (last visited on 11 December 2006).

9. Both instruments are available at: <http://www.unesco.org> (last visited on 11 December 2006).

The Convention commits State Parties to implement programmes for technical and vocational education for young people and adults, essential to both economic and social development, and to the personal and cultural fulfilment of the individual in society. Furthermore, it contains an obligation of non-discrimination and equal access to technical and vocational education, as well as an obligation to pay attention to the special needs of the handicapped and other disadvantaged groups.¹⁰

Additionally, the Convention promotes international cooperation within its scope of application. There are also provisions foreseeing periodic review of the programmes introduced, with attendant reports.¹¹ However, as far as the CTVE is concerned this procedure has never been used. Compared to the *Recommendation against Discrimination in Education*, the *Revised Recommendation concerning Technical and Vocational Education* is much more comprehensive than the CTVE; it gives detailed instructions, for example, for programmes of technical and vocational education. But, like the CTVE, the Recommendation is not yet monitored through UNESCO's Committee on Conventions and Recommendations. Still, the UNESCO Secretariat recently conducted a questionnaire survey on follow-up to the Recommendation.

In addition, various other recommendations related to the right to education have been adopted by UNESCO, including the *Recommendation on the Status of Teachers*, adopted in 1966; the *Recommendation on the Development of Adult Education*, adopted in 1976; or the *Recommendation concerning the Status of Higher Education Teaching Personnel* of 1997.¹²

The obligations laid down in these conventions and recommendations have been further elaborated on, interpreted and concretized in the final declarations of pertinent UNESCO conferences, like the *Ouagadougou Declaration on the Education of Girls* of 1993 and several declarations on human rights education, starting from the *Principles of the International Congress on Teaching of Human Rights* in Vienna (1978) through the *World Plan of Action on Education for Human Rights and Democracy* in Montreal (1993) to the *Dakar Strategies for the Promotion of Human Rights Education in Africa* (1998) and other regional declarations.¹³

With regard to non-discriminatory access to education and equality of educational opportunity, the *World Declaration on Education for All* (EFA), adopted in Jomtien in 1990, and the *Dakar Framework for Action*, adopted by the World Education Forum of UNESCO in April 2000, are of particular importance.¹⁴ UNESCO's normative

instruments are used as a basis for linking its activities with the EFA goals.¹⁵ However, the focus of the human right to education primarily on the right to basic education must be understood in the strategic sense of creating priorities without limiting the full potential of the right, which also includes higher education.¹⁶ Another important development for basic education is the UN General Assembly's *Declaration on the UN Literacy Decade: Education for All (2003-2012)*.¹⁷

The World Education Forum established its own monitoring system to review progress toward the six EFA goals, including achieving universal primary education, in the form of the 'EFA Global Monitoring Report', which focuses on different aspects of education; for example, the quality dimension in the 2005 report.¹⁸

The Dakar goal of ensuring that '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' has been taken over as No. 2 of the eight *Millennium Development Goals* (MDGs), adopted by the UN General Assembly in 2000, to be achieved by 2015. The Dakar goal of eliminating gender disparity in primary and secondary education at all levels by 2005 to 2015 became MDG No. 3. But other MDGs, like the reduction of child mortality and the improvement of maternal health or the fight against HIV and Aids also cannot be achieved without appropriate educational policies. In this context, the 'EFA Flagship Initiatives', like 'the initiative on the impact of HIV/Aids on education' or 'education for rural people', support the achievement of the priority objectives in coordination with other actors.¹⁹

Subsequently, the *World Conference on the Right to and the Rights in Education*, held in Amsterdam in November 2004, in which professional associations were also included, once again appealed to States to adhere to international conventions and treaties in the field of education. It called on international organizations like UNESCO to, *inter alia*, promote 'the principle of non-discrimination in education by encouraging national governments to engage in measures of eliminating discriminatory practices'.²⁰

15. See K. SINGH, A Perspective from UNESCO, Normative Action for Education for all and equality of educational opportunities, in C. J. Russo (ed.), 2003, *Yearbook of Education Law 2004*, Dayton, pp. 300-314.

16. See also the *Convention on the Rights of the Child* of 1989, which speaks in Article 28, Paragraph 1(c) of the obligation to 'making higher education accessible to all on the basis of capacity by every appropriate means.' This has become a binding obligation for all 192 Member States.

17. This is a focus of the EFA Global Monitoring Report 2006, Literacy for Life, Paris, UNESCO, 2005.

18. See EFA Global Monitoring Report 2005, Education for All – The Quality Imperative, Paris, UNESCO, 2004.

19. See the EFA Flagship Initiatives, Multi-partner collaborative mechanisms in support of EFA goals, Paris, UNESCO, 2004.

20. See the *Declaration of Amsterdam on the Right to and the Rights in Education*, 25-30 November 2004, available at: http://www.ineesite.org/core/declaration_of_amsterdam.pdf (last visited on 11 December 2006).

10. See Article 2, Paragraphs 3 and 4 of the *Convention on Technical and Vocational Education* of 1989.

11. See Articles 4 and 7, *ibid.*

12. More on these instruments can be found in SYMONIDES and VOLODIN, *op. cit.*, pp. 150, 245 and 305.

13. *Ibid.*, pp. 404, 343, 390 and 471. On the right to human rights education in general, see G. ALFREDSSON, The Right to Human Rights Education, in A. EIDE, C. KRAUSE and A. ROSAS (eds.), 1995, *Economic, Social and Cultural Rights: A Textbook*, Leiden, pp. 287 ff.

14. See K. SINGH, Universalizing Access to Basic Education: UNESCO Normative Action, in J. DE GROOF and G. LAUWERS (eds.), 2004, *Access and Equality in Education*, Paris, UNESCO, 10, p. 16.

With regard to adult education, both the CADE and the ICESCR contain provisions to promote equality of opportunity in education by encouraging and intensifying, through appropriate methods, the education of persons who have not received or completed primary education. Such persons should be offered the continuation of their education on the 'basis of individual capacity',²¹ usually termed 'fundamental education.' The *Recommendation on the Development of Adult Education*, adopted by the General Conference of UNESCO in 1976,²² was to promote the creation of programmes of adult education. Non-discrimination in adult education and the promotion of the participation of underprivileged and illiterate segments of the population were given particular attention. The relevance of this obligation in relation to women and girls is also reflected in Article 10 Paragraphs (e) and (f) of the UN *Convention on the Elimination of All Forms of Discrimination against Women* of 1979, which requires equality of opportunity in the access to programmes of continuing education and the organization of (specific) programmes for girls and women who left school prematurely. In this context, mention should be made of the *Hamburg Declaration on Adult Learning*, adopted by the Fifth International Conference on Adult Education in 1997, which emphasizes that (basic) education is not a matter of age and that efforts to achieve it should focus on the most vulnerable groups in society.²³

2. MAJOR OBSTACLES TO IMPLEMENTATION OF THE RIGHT TO EDUCATION

In spite of decades of work on the implementation of the right to education, serious problems still exist around the globe, including Europe. For example, discrimination against Roma children prevents access to, and equal opportunities in, education for Roma in several countries.²⁴ In their reports, the previous and present UN rapporteurs on the Right to Education have provided ample material enabling us to identify present and future threats to the right to education, such as an approach to education as traded service.²⁵ For example, the privatization of education may lead to fees for primary education or to discriminatory practices, in particular toward vulnerable groups, in which

case the human right to education would be violated.²⁶ The rapporteurs also criticized certain limitations they experienced that have prevented more substantive work.²⁷

While differentiation in education may be necessary in order to address specific needs, various forms of discrimination, including discrimination based on race, ethnicity, gender, religion, language or social origin, are still to be addressed. Given this background, the CADE has retained its relevance.²⁸

The reports of the Special Rapporteur on the Right to Education, since 2004 Mr. Vernor Muñoz Villalobos, confirm that the introduction of free, compulsory primary education is still inhibited by school fees and other financial constraints, as well as by discrimination, particularly against women and girls.²⁹ Inequality in access to information technology, i.e. the so-called 'digital divide', can also be a major obstacle to the realization of the right to education.³⁰ The World Summits on the Information Society (WSIS) in Geneva and Tunis have focused on this dimension of the right to education, which includes the problem of intellectual property rights.³¹ The nine EFA Flagship Programmes focusing on education in relation to HIV and Aids, Early Childhood Care, Persons with Disabilities, Inclusion, Rural People, Situations of Emergency and Crisis, Resources on Effective School Health, Teachers and Quality of Education, UN Girl's Education Initiative, the UN Literacy Decade and the EFA Monitoring Reports also provide well-illustrated examples of the various problems encountered in achieving full implementation of the right to education.³² It can be taken as a positive development that the obstacles to the implementation of the right to education have drawn increasing international attention.³³

26. See F. COOMANS and A. HALLO DE WOLF, *Privatisation of Education and the Right to Education*, in K. DE FEYTER and F. GÓMEZ ISA (eds.), 2005, *Privatisation and Human Rights in the Age of Globalisation*, Antwerp/Oxford, 229, p. 253.

27. See K. TOMASEVSKI, 2005 *Has the Right to Education a Future within the United Nations? A Behind-the-Scenes Account by the Special Rapporteur on the Right to Education 1998-2004*, *HRLR* 5, pp. 205-237.

28. See A. FERNANDEZ and J. D. PONCI (eds.), 2005, *Education et discrimination, Réflexions sur la Convention concernant la lutte contre la discrimination dans le domaine de l'enseignement de l'UNESCO*, Geneva.

29. See *The Right to Education*, Report submitted by the Special Rapporteur on the right to education, Mr Vernor Muñoz Villalobos, UN Doc. E/CN.4/2005/50 of 17 December 2004. The report for 2006 has developed this focus further.

30. See UNESCO World Report, 2005, *Towards Knowledge Societies*, Paris, UNESCO, p. 30.

31. See C. PEKARI, IP@WSIS, *Negotiating Access to Information and Knowledge in the 21st Century*, in P. SINT and E. SCHWEIGHOFER (eds.), 2006, *KnowRight 2006, Knowledge Rights – Legal, Societal and Related Technological Aspects*, Vienna, pp. 29-37.

32. So far there have been four EFA Global Monitoring Reports: The EFA Global Monitoring Report 2002 focused on Education For All – Is the World on the Track?; the EFA Global Monitoring Report 2003/2004 on Gender and Education for All – The Leap to Equality; the EFA Global Monitoring Report 2005 on Education For All – The Quality Imperative; and the EFA Global Monitoring Report 2006 on Literacy for Life.

33. See, for example, the yearly UNICEF Reports on the State of the World's Children, which regularly have a focus on education. E.g., UNICEF, 2006, *Gender Achievements and Prospects in*

21. See Article 4(c) of the CADE and Article 13, Paragraph (2)(d) of the ICESCR.

22. For the text, see SYMENIDES and VOLODIN, op. cit., p. 245.

23. For the text, see DAUDET and SINGH, op. cit., p. 101.

24. See K. TOMASEVSKI, 2003, *Education Denied, Costs and Remedies*, London, part. p. 153.

25. See *The Right to Education*, reports submitted by the special rapporteurs on the right to education, Katarina Tomasevski, (U.N. Doc. E/CN.4/2004/45 of 15 January 2004) and Vernor Muñoz Villalobos (U.N. Doc. E/CN.4/2005/50 of 17 December 2004); *Girl's Right to Education*, Report submitted by the Special Rapporteur on the right to education, Mr. Vernor Muñoz Villalobos, U.N. Doc. E/CN.4/2006/45 of 8 February, 2006, all available at: <http://www.ohchr.org/english/issues/education/rapporteur/annual.htm> (last visited on 11 December 2006).

However, positive developments, like the rollback of school fees in primary education in Africa, which, albeit originally encouraged by World Bank policies, were in violation of the right to education, can also be reported.³⁴ Examples of good practices, in which States have undertaken serious efforts to address the problems mentioned through both legislation and practice, can equally be cited.³⁵

Several groups have been identified as facing particular problems and obstacles in their access to basic education. They include women and girls, persons belonging to minorities, refugees and migrants, members of indigenous peoples and people with different capacities, and socially and economically disadvantaged groups, which also include demobilized soldiers or marginalized youth. This recognition has led UNESCO, as well as the Special Rapporteurs on the Right to Education, to concentrate on certain target groups, which largely correspond to those just listed. The review of State practice in respect of UNESCO instruments is part of the process of consultation, which will be analyzed more closely with regard to the CADE.

This brings us back to the question of how the legal instruments of UNESCO in the field of education have contributed to the realization of the principles and objectives of UNESCO, and of the kind of impact they have had on the national laws and policies of Member States.

3. NORMATIVE IMPLICATIONS AND WAYS TO STRENGTHEN NORMATIVE IMPACT

3.1. Normative Significance

About the normative significance of the CADE, Hector Gros Espiell has said most everything in the book he devoted to the Convention.³⁶ He rightfully points to international recognition of the Convention, as evidenced by the international conventions of the United Nations and the work of its bodies, as well as by national law. However, there is hardly any judicial practice directly based on the Convention to be reported.³⁷ This may be explicable by the existence of other pertinent conventions

and by the limited familiarity of complainants and courts with the Convention. Accordingly, UNESCO proposes to examine questions related to the 'justiciability' of the right to education and its enforcement both through quasi-judicial mechanisms at the international level and through action at the national level. The Special Rapporteur on the right to education also aims to improve the 'justiciability' of the right to education.³⁸ There are numerous cases to be found, in particular regarding parental choice of schools or minority schools, but hardly any that rely explicitly on the UNESCO convention concern the obligation to provide access to free compulsory education, or discrimination in education.³⁹ Many cases, however, concern the fundamental principle of equality of educational opportunities in education, including the educational rights of minorities.⁴⁰ Gradualism in the obligation to implement economic, social and cultural rights, such as the right to education, may generally create a problem for implementation, but it does not interfere with the obligation of non-discrimination in education, which is effective immediately and fully.⁴¹

The right to education and equality of opportunity is recognized in many national constitutions.⁴² Governments have also undertaken obligations to achieve education for all in the different frameworks already indicated.⁴³ However, it is difficult to establish whether this situation is a result of the CADE, of the provisions of pertinent UN instruments or of the fundamental rights enshrined in national constitutions. Moreover, it has been argued that certain elements of the right to education, such as the obligation to provide free public primary education and the right to equal opportunity in education, can be considered as having become part of *customary law*.⁴⁴ The combined effect of the reaffirmation of the right to education in Articles 13 and 14 of the ICESCR and repeated political commitments can be taken as confirmation

February 2007). The *Tengur* decision has been affirmed by the Judicial Committee of the United Kingdom Privy Council, in its function as Mauritius' highest court of appeal (see *Bishop of Roman Catholic Diocese of Port Louis and Others v. Suttibudeo Tengur and Others*, Privy Council Appeal No. 21 of 2003, Judgment of 3 February 2004, available at: <http://www.privacy-council.org.uk/files/other/bishop%20roman%20catholic-final.rtf>, last visited on 12 February 2007).

38. See The Right to Education, Report by the Special Rapporteur on the Right to Education, Vernor Muñoz Villalobos, U.N. Doc. E/CN.4/2005/50 of 17 December 2004, Paragraphs 51 ff.

39. See, for example, the country studies in J. DE GROOF and G. LAUWERS (eds.), 2004, *Access to and Equality in Education*, Paris, ELA and UNESCO, pp. 152 ff.

40. Thus, there is very rich jurisprudence in India in this area. Cases in a number of other countries also underline the importance attached to the principles enshrined in the CADE. Source: Secretariat of the Educational Sector of UNESCO.

41. Compare General Comment 13 on the Right to Education, para 31. All General Comments of the CESCR are accessible at: <http://www.ohchr.org/english/bodies/cescr/comments.htm> (last visited on 11 December 2006).

42. See D. HODGSON, 1998, *The Human Right to Education*, Aldershot, p. 12 (providing several examples of constitutional provisions).

43. See K. SINGH, UNESCO's Experience on Equality of Education, in J. DE GROOF and G. LAUWERS (eds.), 2004, *Access and Equality in Education*, Paris, UNESCO, pp. 90-108.

44. See HODGSON, op. cit., p. 62.

Education, Paris, UNICEF or the reports of NGOs like HUMAN RIGHTS WATCH, 2005, *Failing our Children, Barriers to the Right to Education*, Washington.

34. See The Right to Education, Report by Muñoz Villalobos, op. cit., Paragraph 23.

35. See 'Right to Education', in W. BENEDEK (ed.), 2006, *Understanding Human Rights, Manual on Human Rights Education*, Vienna, 211, p. 224.

36. See H. GROS ESPIELL, 2005, *Significance of the Convention against Discrimination in Education (1960)*, Paris, UNESCO.

37. One notable instance, however, is that of Mauritius where the Supreme Court took into consideration the Convention in a case involving principles of non-discrimination and parental choice in education; see Supreme Court of Mauritius, *Suttibudeo Tengur vs. The Minister of Education and The States of Mauritius*, Judgment of 13 November 2002, Record No. 77397 (available at: <http://supremecourt.intnet.mu/Entry/dyn/judgment.htm>, last visited on 12

of this thesis, despite the lack of a case in which an international court has confirmed the assertion. Furthermore, in view of the fact that the UN *Convention on the Rights of the Child* (CRC) is applicable to 192 States,⁴⁵ there are only a few imaginable gaps in which customary law may have to be relied upon. But the problem of a reference to 'progressive achievement' only remains in the context of the CRC.⁴⁶

The CADE, the CTVE, the UNESCO *Recommendation concerning the Status of Higher-Education Teaching Personnel* of 1997, the *World Declaration on Education for All* of 1990, the *Dakar Framework of Action* of 2000 and other UNESCO instruments and materials have been referred to in General Comment No. 13 on the Right to Education, prepared by the Committee on Economic, Social and Cultural Rights (CESCR), with contribution from UNESCO. While highlighting the increasingly rights-based approach, also recognized in the EFA Monitoring Report of 2002,⁴⁷ it underlines the importance of constitutional and other legislative action to make the implementation of the right to education more effective. With regard to non-discrimination and equal treatment, explicit reference is made to Articles 2 and 3 of the CADE. The 'failure to repeal legislation which discriminates against individuals and groups, on any of the prohibited grounds, in the field of education' and 'the failure to take measures which address de facto educational discrimination' are given as illustrations of typical violations of the right to education.⁴⁸

As we were reminded by the first meeting of the High-level Group on Education for All, organized by UNESCO in 2001, it is the responsibility of States to meet the obligation to implement the right to education. In keeping with that, the EFA Global Monitoring Report of 2002 highlighted the need to mobilize governments to develop and modernize national legislation to implement the *Dakar Framework for Action* of 2000, which was also endorsed by the second meeting of the High-level Group on Education in Abuja in 2002. Since existing (legal) enforcement mechanisms in the framework of UNESCO are very limited, positive incentives, from technical assistance to capacity building and advisory services, may play a particularly important role. One possibility could be the provision of model laws on the basis of best practices.

3.2. The Sixth Periodic Consultation of UNESCO: A Case-study of UNESCO Monitoring

The Sixth Periodic Consultation of UNESCO on the implementation of the CADE in State practice⁴⁹ provides us with some answers regarding the question of the normative effects of the Convention.

The consultation began in December 1995; results were provided to the Executive Board of UNESCO in March 1999. Discussion focused on the basic education of four population groups, namely, women and girls, persons belonging to minorities, refugees and indigenous peoples.

The responses received from States show less than satisfactory participation: only fifty-six reports were received from the then 86 (1998) Member States of UNESCO, although the deadline had been extended from November 1996 to April 1998. It is also disappointing to see that initially only two, and finally seven NGOs made use of the opportunity afforded to contribute to the consultation.

However, from the fifty-six responses received only thirty came from the contracting Parties of the Convention, whereas twenty-six were based on the Recommendation, fulfilling the obligation spelled out in Article VIII of the UNESCO Constitution. This shows that Member States do not see a large difference between complying with the Convention and complying with the Recommendation, which in this particular case contains the same obligations as the Convention for all Member States.

Compared with previous consultations, the number and the quality of responses continue to be unsatisfactory. For example, during the first consultation, in 1968, sixty-one States reported on implementation although the Convention only had forty-eight Parties at the time.⁵⁰

Additionally, there appears to be no significant difference between legal compliance with the content of the Convention and that of the Recommendation with regard to the adjustment of national constitutions and/or relevant legislation, which are generally reported to be in conformity with international obligations. This raises the question of why Member States have not become Parties to the Convention itself, and should make the UNESCO campaign for new ratifications, mentioned in the Director-General's Introduction, more successful.

The problems reported usually concern implementation in practice, as numerous obstacles still exist to achieving full equality of opportunity for the groups selected for particular consideration. Consequently, States report a variety of measures undertaken to close the gap between existing law and actual practice.

Presently, the *Seventh Consultation of Member States on the Implementation of the Convention and Recommendation against Discrimination in Education (1960)* is under way. Member States received the request for reports in September 2005 with a deadline of

45. See <http://www.unhchr.ch/pdf/report.pdf> (last visited on 11 December 2006).

46. Compare Article 28, Paragraph 1 of the UN *Convention on the Rights of the Child* of 1989.

47. See Education for All: Is the World on Track?, EFA Monitoring Report, Paris, UNESCO, 2002.

48. See General Comment 13 on the Right to Education, op. cit., Paragraph 59.

49. See Examination of the Reports and Responses received in the Sixth Consultation of Member States on the Implementation of the Convention and Recommendation against Discrimination in Education, Doc. 156 EX/21 of 17 March 1999.

50. See DAUDET and EISEMANN, op. cit., pp. 40 f.

1 September 2006.⁵¹ In contrast to past questionnaires, a set of 'Guidelines for the Preparation of Reports'⁵² was supplied, reminding States that the obligation to report under Article 7 of the Convention and of the Recommendation is identical. The reporting period was set for the six-year period of 2000-2005. Specific information has been requested regarding the direct applicability of the Convention in domestic law and its use in domestic courts. Where federal systems exist, it is the responsibility of the central authority to assure implementation by the federal units. In case of conflict, constitutional courts, if such exist, are responsible for enforcing the State's international obligations.

Since 1998, the Convention has only attracted seven new contracting Parties, bringing the number of Parties to ninety-three in 2006.⁵³ Since 2004, there has only been one new ratification and one declaration of acceptance.⁵⁴ In this context, the new guidelines also seek to ascertain whether a Member State intends to adhere to the Convention. This could be the case for Austria, which is presently in the process of preparing its ratification.

With regard to UNESCO's Medium Term Strategy (2002-2007), which identifies several target groups – i.e. vulnerable and disadvantaged groups – with the purpose of 'reaching the unreached', in particular 'the poor, women and girls, rural populations, minorities, refugees, victims of disasters and people with special needs', the focus of the consultation has been changed from the four groups specified in the Sixth Consultation to young girls, the children of low-income groups, the children of immigrants and of migrant workers, and those of minorities and indigenous peoples.

For all these categories, information on pertinent legislation, policies and programmes, and projects is to be provided with regard to non-discrimination in education, equality of educational opportunity, protection of national minority rights, positive measures for the elimination of discrimination, and specific obligations under the Convention and Recommendation regarding parental rights, among others.

The reporting obligations are to be structured according to the articles of the Convention and Recommendation. For this purpose a table has been developed which may be helpful in harmonizing State reports. Also, pertinent resolutions of the Commission on Human Rights concerning the right to education,⁵⁵ which take up the prohibition of discrimination on the grounds contained in the Convention, should be taken into account. This requirement responds to the fact that States also have to report on similar issues under other conventions, in particular the ICESCR. In this context, the guidelines propose that relevant sections of reports prepared under the ICESCR for the

same period be attached to the report.⁵⁶ This not only reduces duplication of reporting, but also links the work of UNESCO with the relevant work of UN human rights bodies. One will note that UNESCO has a practice of assisting the CESCR's discussion of the education part of State reports under the ICESCR through written comments or by being present in meetings as an observer. But the question remains whether the new approach will work to contribute to better coordination, as was suggested by Laurence Boisson de Chazournes.⁵⁷

In 2001, UNESCO and the CESCR established a *Joint Expert Group UNESCO (CR)/ECOSOC (CESCR) on the Monitoring of the Right to Education*. The vice-chairman of the CESCR contributed a paper on the methodology for preparing State reports, in which UNESCO and CESCR expert practices were synthesized.⁵⁸ Reference was made, for example, to the *Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies*, produced by the Office of the High Commissioner for Human Rights in 2002 at the CESCR's request.⁵⁹ The comprehensive methodology, which suggests the use of benchmarks and a SWOT (Strengths, Weaknesses, Opportunities, Threats) analysis, is expected to generate more substantive reports. An informal meeting on the preparation of reports has been organized to assist Members in better understanding their obligations. Nonetheless, there might be a need for technical assistance on the ground.

It has to be noted that States, not Parties to the Convention, are bound by the Recommendation, which contains political and moral obligations. However, the reporting obligation is a legal one based on Article VIII of the UNESCO Constitution. Furthermore, the substantive obligations contained in the Convention and Recommendation are identical to the legal obligations under Articles 13 and 14 of the ICESCR which, as interpreted by General Comment No. 13, has a stronger implementation mechanism. By June 2006, the ICESCR had 153 contracting Parties,⁶⁰ largely UNESCO Member States. Also, through other relevant UN conventions, like the *Convention on the Elimination of all Forms of Racial Discrimination* (Articles 5 and 7), the *Convention on the Elimination of all Forms of Discrimination against Women* (Article 10) and the CRC (Article 29), with 170, 182 and 192 contracting Parties, respectively,⁶¹ certain key obligations (in particular, the obligation of non-discrimination in education) have reached quasi-universal acceptance. This fact should be taken into account by States when reporting on the implementation of their obligations. With regard to children of

51. See UNESCO Dec. CL/3770 of 16 September 2005.

52. See *Guidelines for the Preparation of Reports on the Implementation of the Convention against Discrimination in Education (1960)/Recommendation against Discrimination in Education (1960)*, adopted by the Executive Board, 171 EX/Decisions, Paris, 25 May 2005.

53. See *supra* note 5.

54. Jamaica ratified the Convention in March 2006. In May 2006, Zimbabwe declared that it accepted to be bound by the Convention. See *supra* note 5.

55. See resolutions 2002/23, 2003/19, 2004/25 and 2005/21.

56. See Paragraph 15 of the Guidelines for the Preparation of Reports (2005).

57. See the chapter by L. BOISSON DE CHAZOURNES in this volume.

58. See E. RIEDEL, Methodology for the Preparation of the State Reports, Doc. ED-2005/WS/41.

59. See, for the draft guidelines, <http://www.ohchr.org/english/issues/docs/guidelinesfinal-poverty.doc> (last visited on 11 December 2006). For a summary of the draft guidelines by Paul Hunt, Siddiq Osmani and Manfred Nowak, see <http://www.ohchr.org/english/issues/poverty/docs/SwissSummary1.doc> (last visited on 11 December 2006). At the time of writing the draft guidelines are being revised.

60. See <http://www.unhcr.ch/pdf/report.pdf> (last visited on 11 December 2006).

61. See for all data UNESCO, 2005, Human Rights, Major Instruments, Status as at 31 May 2005, prepared by Vladimir Volodin, Paris, UNESCO.

migrant workers, Article 30 of the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* of 1990 contains the 'basic right of access to education on the basis of equality of treatment with nationals of the State concerned.' However, this Convention has been ratified by only thirty-four Parties,⁶² none of which are among the main countries receiving migrant workers. Its entry into force was delayed until 2003.

3.3. Possibilities for Strengthening the Normative Impact of UNESCO Conventions and Recommendations on the Right to Education

Efforts to strengthen the normative impact of the CADE have been made since its entry into force. However, the 1962 Protocol Instituting a Conciliation and Good Offices Commission to Be Responsible for Seeking a Settlement of Any Disputes which May Arise between State Parties to the Convention against Discrimination in Education proved to be of little use, since States generally have a tendency not to bring interstate complaints.⁶³ Though the Commission has not received a single case to date, State Parties to the Protocol decided in 2003 only to amend certain provisions rather than to terminate it.⁶⁴

The UNESCO Committee on Conventions and Recommendations (CR), originally established as the 'Special Committee to examine the reports of Member States on the implementation of the Convention and Recommendation against Discrimination in Education'⁶⁵ with a mandate including the consideration of communications concerning cases and questions of alleged violations of human rights within UNESCO's field of competence, has dealt with a good number of cases related to education, in particular, as regards the status of teachers, but also as regards discrimination in the equal access to education.⁶⁶ As the CR is also expected to monitor the implementation of several other pertinent recommendations, including those dealing with technical, vocational, and adult education, it might be useful to include relevant obligations in reports, as well as in the analytical evaluation of these reports.

There are hardly any instances of the use of UNESCO legal instruments (in particular, of CADE) before national courts, despite the suggestion of the Special Rapporteur on

the Right to Education that greater use of domestic legal procedures be made.⁶⁷ There are several cases, the segregation of Roma children in schools being one, in which the Convention could have been used, however. The European Roma Rights Centre has filed several such cases, which were partly successful. One case that went to the European Court of Human Rights got a lot of attention, although the Court did not find a violation of Article 14 of the European Convention on human rights, as argued by the applicants.⁶⁸

An assessment of the monitoring procedures related to the UNESCO Convention and Recommendation against discrimination in education reveals serious limitations. As described above, Member State responses in reporting are not fully satisfactory. The CR does not examine or review reports individually; instead, it examines an analytical report prepared by the Secretariat. Thus, reports from State Parties or Member States, if received at all, cannot be debated in order to gain further information about, or to establish dialogue with the reporting State, as is the case with the CESCR. The CESCR also requests information on the educational discrimination of certain groups of children, previously largely identical with the target groups of the UNESCO monitoring process.⁶⁹ This raises the issue of a closer, complementary⁷⁰ cooperation between the CESCR and UNESCO, at present limited to one or two meetings of the joint expert group per year. Accordingly, there is room for improvement of joint supervision, as suggested by Boisson de Chazournes in her contribution.⁷¹ For example, UNESCO could be more involved in the CESCR review of State reports; and information available to the CESCR, even if not formally reported, could be taken into account by UNESCO. UNESCO could also consider setting up a committee to elaborate reviews of country situations on its own, albeit in cooperation with Member States. One example of this practice is that of the European Committee on Racism and Intolerance (ECRI) in the framework of the Council of Europe. In the UNESCO context, this could, at least initially, be completed within the framework of technical assistance and capacity-building programmes.

3.4. The Role of 'Soft law' in Enforcing Legal Obligations

At a time when the importance of standard-setting in the United Nations system has declined,⁷² the main emphasis should be on implementing the standards already adopted, as suggested by the Director-General in his Introduction. In this context, increased

62. See <http://www.unhcr.ch/pdf/report.pdf> (last visited on 11 December 2006).

63. The Protocol entered into force in 1968 and, by 2005, had only 33 Parties (see <http://portal.unesco.org/la/convention.asp?KO=15321&language=E>, last visited on 11 December 2006).

64. See DAUDET and EISEMANN, op. cit., p. 50.

65. See Doc. 71 EX/Decision 32 and Doc. 75 EC/Decision 6.II.

66. From 1978 to September 2005, five hundred and twenty-nine communications were considered by the CR, of which three hundred thirty were settled. As a result of these cases, fifty-five applicants were authorized to leave the State concerned to study or to teach; ten were able to benefit from changes in education laws that were discriminatory of ethnic or religious minorities; fourteen were able to resume their education. Source: Secretariat of the Educational Sector of UNESCO.

67. See The Right to Education, Report by Muñoz Villalobos, op. cit., Paragraphs 51-58 on the justiciability of the right to education.

68. See the Report on the case related to Bulgaria, action undertaken with regard to Greece as well as the case *D.H. and others v. the Czech Republic* before the European Court of Human Rights, at: <http://www.errc.org> (last visited on 11 December 2006). See also the decision of the European Court on Human Rights of 7 February 2006, No. 57.325/00.

69. See HODGSON, op. cit., pp. 224 f.

70. See also SINGH, op. cit., p. 311.

71. See the chapter by L. BOISSON DE CHAZOURNES in this volume.

72. Only few larger projects, which can be expected to deal also with equal access to education, are still uncompleted. They include a *Convention on the Protection and Promotion of the Rights and*

recognition of the relevance of so-called 'soft law' is of central importance. It has been held that 'the effectiveness of international norms tends to depend on factors other than their legal quality'.⁷³ This shows the need for a more holistic approach to the sources of international obligations. As the Convention and Recommendation against discrimination in education demonstrate, there is hardly any difference between the implementation of obligations by States bound by the Convention and that by States bound by the Recommendation. The monitoring mechanism is the same.

The interpretation and concretization of obligations with regard to particular problems or situations is secured through various declarations during international conferences. Their authority depends on the importance of the event and the follow-up mechanism created, partly in tandem with other international organizations and bodies. The resolutions and declarations adopted at international conferences may thus be considered subsequent agreements or practice, in accordance with Article 31 Paragraph 3 of the 1969 *Vienna Convention on the Law of Treaties*.

The indisputable fact that States respect political and moral commitments in a manner similar to legal commitments also results from the need for consensual, yet flexible regulation of problems. This flexibility cannot be provided by conventions that foresee legal obligations. Furthermore, international legal and political commitments share the same problems of implementation in the absence of effective enforcement mechanisms. This means that in either case there is a need to mobilize the political will and resources of States by a more activist approach or by, say, financial incentives and assistance, such as advisory services. The main problem is not the legal quality of the underlying obligation, but the gap between formal and substantive or effective compliance, which, in turn, presupposes activity on the part of the national political process.

Reporting on new legislation cannot be taken as an example of compliance as long as States do not demonstrate that the new legislation is being implemented in practice. Independent sources of information are needed for this purpose. The Council of Europe, for example, has a system of correspondents in all Member States who report on legislative developments. While reliance on NGO shadow reports for various State reporting obligations has become usual practice, such reports do not seem to play a major role in the compliance with UNESCO instruments. The EFA Global Monitoring Report may be able to close part of this gap. Additionally, national UNESCO commissions could play a larger role, as already suggested by the Joint Expert Group.

The trends described above explain, at least in part, the increase of charter-based procedures in the UN human rights system. One example is the activity of the Special Rapporteur on the Right to Education, with a focus on vulnerable groups, which should motivate States to live up to their obligations. These trends also explain the normative

Dignity of Persons with Disabilities, and a *Convention for the Protection of all Persons from Enforced Disappearance*, which has been accepted by the Working Group drafting it in September 2005.

73. See H. P. NEUHOLD, 'The Inadequacy of Law-Making by International Treaties: "Soft Law" as an Alternative?', in R. WOLFRUM and V. RÖBEN (eds.), 2005, *Developments of International Law in Treaty Making*, Berlin, p. 50. See also E. RIEDEL, 1991, 'Standards and Sources. Farewell to the Exclusivity of the Sources Triad in International Law?', *EJIL* 2, pp. 58 ff.

value of broadly based UNESCO activities through various actors and on several levels, as in the *Education for All Framework*, which aims at providing the dynamics to ensure that States take their obligations seriously. Accordingly, implementation appears to be more process-oriented than law-oriented. Better results can be achieved only if an intensive process of implementation accompanies legal regulations.

4. GENERAL CONCLUSIONS

In conclusion, the normative effects of UNESCO standards and instruments with regard to the right to education cannot be easily ascertained. Many references to UNESCO instruments can be found in the literature and in the documents of other international organizations. In addition, a number of States report that they have brought their legislation and, to a lesser extent, their policies in line with UNESCO obligations, whether conventions or recommendations. However, UNESCO lacks a proper evaluation system to review independently what is reported. In the practice of courts or administrative bodies, little evidence can be found regarding the role of UNESCO instruments in educational matters. Most cases are based on national law. Some good practices can be reported from Indonesia, Rwanda, Kenya, Brazil and Cambodia, where UNESCO provided advisory services resulting in constitutional and other legislative amendments.⁷⁴

The overall normative effect is also expected to depend on the Constitution-based activities of the Organization, including international cooperation with other organizations and NGOs, as manifested in the various declarations, programmes of action and guidelines adopted in order to translate the regulatory framework into regulatory activities and the practice of States. For this purpose, national UNESCO commissions and professional associations, as well as other NGOs, can play an important role. For example, NGOs could bring cases of discrimination to national courts or to the CR using the CADE as their legal basis.

Furthermore, though the previously parallel monitoring processes found at UNESCO, the UN and the ILO have increasingly become linked and mutually reinforcing, they can still be improved. By opening itself to the contribution of other organizations, UNESCO can also secure a larger impact for its own standard-setting activities and increase the chances of implementation and compliance in accordance with the principles and objectives of its Constitution. Certain key obligations, like the right of access to free public primary education and the right to equal opportunity in education, can now be considered international customary law. Generally, UNESCO legal instruments in the field of the right to education, whether in the form of conventions or recommendations, should be made better known in order to be taken into greater account. Efforts undertaken in this direction will not remain without results, particularly since 2005, in the context of the seventh Consultation of Member States on the measures taken for the implementation of the Convention and the Recommendation against discrimination in education.

74. Information obtained from the Secretariat of the Educational Sector of UNESCO.