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Transcending Rhetoric: Redressing Discrimination In Education In Bulgaria and Israel Through Affirmative Action

Shaleeta Washington*

I. Introduction

The Universal Declaration of Human Rights declares: “Everyone has the right to education.”¹ The Convention Against Discrimination in Education further provides that a child’s education shall not be subject to discriminatory measures by the state.² Yet despite the general recognition by the international community that the right to education is indeed one of the fundamental human rights and is a part of customary international law,³ millions of children throughout the world are deprived of an education.⁴ The international community has also condemned the practice of discrimination through several international treaties and conventions,⁵ and numerous states either have constitutions prohibiting

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1. G.A. Res. 217 A(III), U.N. Doc. A/810, art. 26 (1948) [hereinafter Universal Declaration].

2. Convention Against Discrimination in Education, 429 U.N.T.S. 93, art. 2, opened for signature December 15, 1960 (entered into force May 22, 1962) [hereinafter Education Convention].

3. See, e.g., Connie de la Vega, *The Right to Equal Education: Merely a Guiding Principle or Customary International Legal Right?*, HARV. BLACKLETTER L.J. 37 (1994) [hereinafter de la Vega] (arguing that the United States is bound to provide an equal education to its citizens because the right to education is a part of customary international law); see generally, Julius Chambers, *Adequate Education for All: A Right, An Achievable Goal*, 22 HARV. C.R.-C.L. L.REV. 55 (1987).

4. United Nations Educational, Scientific and Cultural Organization, *Right to Education*, at <http://portal.unesco.org/education/ev.php> (last visited October 30, 2003) [hereinafter UNESCO].

5. See, e.g., International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, U.N. Doc. A/6316 (1966), art. 2, opened for signature December 19, 1966 (entered into force March 23, 1976) [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3, 6 I.L.M. 360, art. 2, opened for signature December

discrimination or have enacted legislation to accomplish that goal.⁶

This comment suggests that members of the international community have often simply paid lip service not only to the anti-discrimination provisions found in international law, but also to the anti-discrimination measures in their own domestic legislation and constitutions. At times, the international community's objections to discriminatory practices are mere rhetoric because despite the anti-discrimination measures that have been implemented, millions of children still receive substandard educations simply because of their race, religion, nationality, ethnicity, wealth, or sex.⁷

In addition to discrimination, globalization and world economics have played a part in the quality of education that a child receives because many states have experienced recent economic hardships.⁸ The combination of discriminatory practices and cutbacks in state budgets because of economic setbacks has lessened the quality of education children receive in the international community.⁹ Throughout the world, an estimated 125 million children will not receive a quality education this year,¹⁰ and over 100 million children will not even have access to primary education.¹¹ It is likely those numbers will increase, as a slumping economy has forced numerous states to reduce spending in education.¹²

19, 1966 (entered into force January 3, 1976) [hereinafter ICESCR]; Universal Declaration, *supra* note 1.

6. For example, the Equal Protection Clause found in the United States Constitution provides that no one shall be deprived of the equal protection of the laws, U.S. CONST. amend. XIV, § 1. Similarly, Canada's Constitution provides that "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 15(1). The state of Romania, as well as other states too numerous to name in the scope of this comment, also has a nondiscrimination clause in its Constitution. ROM. CONST. art. 4 § 2 ("Romania is the common and indivisible homeland of all its citizens, without any discrimination on account of race, nationality, ethnic origin, language, religion, sex, opinion, political adherence, property, or social origin."). *Id.*

7. See UNESCO, *supra* note 4; United Nation's Children Fund, *Girls' Education*, at <http://www.unicef.org/girlseducation/index.html> (last visited October 30, 2003) [hereinafter UNICEF].

8. See UNESCO, *supra* note 4.

9. *Id.*

10. United Nation's Children Fund, *Girls' Education: The Big Picture*, at http://www.unicef.org/girlseducation/index_bigpicture.html (last visited October 30, 2003).

11. UNESCO, *supra* note 4.

12. For example, in an effort to control its deficit, Japan's Cabinet recently approved cutting government spending in education. Mari Yamaguchi, *Japan's Cabinet Approves Draft Budget*, Associated Press, available at http://biz.yahoo.com/ap/041220/japan_budget_4.html. Similarly, in the United States, across the nation, states have been

Discrimination abounds in all sectors of society, both private and public, and no state has yet been able to completely counter the affects of discrimination in the realm of public education.¹³ Even with nondiscrimination measures in place, historical injustices have often left minorities at a disadvantage.¹⁴ Nor has any state offered a model solution to the problems facing the world's more vulnerable constituents—children from ethnic minority backgrounds. However, States should not ignore their obligations under international law, and especially their own domestic legislation. If a state provides a compulsory, free education to its children, it cannot, in turn, subject its ethnic minorities to discriminatory measures in supplying this basic human right, wherein the state's minority population—certainly the people who would benefit the most from a good education—receive an education that is of substantially less quality than their ethnic majority counterparts.

The consequences of receiving a substandard education in comparison to a state's ethnic majority are devastating because the effects of discrimination in education are recurring and self-perpetuating.¹⁵ Generations of uneducated or less educated families will produce subsequent generations who will also have fewer educational opportunities.¹⁶ Yet many of life's choices begin and end with education. "As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty, and obtain the means to participate fully in their communities."¹⁷

Education is also a necessity for the exercise of many human rights, including the right to choose employment and the right of political expression.¹⁸ The more educated have access to meaningful employment opportunities and a chance to have a better quality of life. This reality rings true throughout the world.

forced to reduce spending in education because of budgetary limitations. See Joseph Van Harken, *Budgets Cut Student Experience*, CNN.com/Education, available at <http://www.cnn.com/2003/EDUCATION/08/13/sprj.sch.cuts/>. Numerous other states throughout the international community have experienced the budget cuts, as well.

13. See Human Rights Watch, *Promises Broken*, at <http://www.hrw.org/campaigns/crp/promises/education.html> (last visited February 14, 2005) [hereinafter *Promises Broken*].

14. See, generally, Wendell L. Griffen, *Race, Law, and Culture: A Call to New Thinking, Leadership, and Action*, 21 U. ARK. LITTLE ROCK L. REV. 901 (1999).

15. Human Rights Watch, *Second Class: Discrimination Against Palestinian Arab Children in Israel's Schools*, at <http://www.hrw.org/reports/2001/israel2/> (last visited January 23, 2004) [hereinafter *Second Class*].

16. *Id.*

17. UNESCO, *supra* note 4.

18. *Second Class*, *supra* note 15; also see UNESCO, *supra* note 4.

But the benefits of education do not stop with an increased annual income. Even one's health improves with increased schooling; moreover, statistics have shown that educated women produce healthier children and have lower rates of infant mortality than their less-educated counterparts.¹⁹ Educated women also have significantly lower rates of HIV infection.²⁰

With or without scientific studies, the advantages of education are well known, and it is difficult to deny the importance of receiving a good education. But countless children are being left behind through no fault of their own.²¹ There are a number of factors contributing to why some children are discriminated against and are subsequently given a substandard education: race, religion, nationality, gender, sexual orientation, and wealth.²² Frequently these factors are interrelated and many children end up experiencing discrimination on several levels.²³

This comment does not discuss all of the aforementioned factors, but provides a brief synopsis of the condition of public education in the international community, with specific reference to the education received by ethnic minorities.²⁴ Section II explores how several international human rights treaties have included the right to education in their provisions, while Section III addresses the issue of whether the right

19. UNICEF, *supra* note 7.

20. *Id.*

21. Because the long-term effects of discrimination in education are cyclical, generations of minority students are frequently trapped in a revolving door of poverty. It is difficult to break free from the ongoing cycle of poor quality education and poverty; so countless minorities are constantly exposed to poor schooling, thereby producing poor grades or a substandard education. This substandard education is passed on to subsequent generations because decent employment opportunities are generally not available. Cruelly, and through no fault of their own, the minorities are stereotyped as "dumb." See, Emil Cohen, *The Roads Before Romani Education: Thoughts After a Public Debate*, European Roma Rights Center, available at <http://www.errc.org/cikk/php?cikk=1644> (last visited February 14, 2005) (noting the "vicious circle" of poverty and inferior educations).

22. See Education Convention, *supra* note 2, at art. 1 (noting that 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 or treatment in education").

23. See generally, Lisa A. Crooms, *Indivisible Rights and Intersectional Identities or, "What Do Women's Human Rights Have to Do With the Race Convention?"*, 40 HOWARD L.J. 619 (1997) (noting that in the United States, women of color are discriminated against on numerous accounts); accord, Vienna Declaration and Programme of Action, U.N. DOC. A/CONF.157/24 (Part I) at 20 (1993) (emphasizing that all human rights are universal, indivisible, interdependent, and interrelated, especially with respect to minorities, migrant workers, women, children, freedom from torture, and the right to education).

24. This comment will only address the right to education for primary and secondary schooling.

to education has joined the principle of nondiscrimination as a part of customary international law. This section will also briefly examine the structure and some of the relevant provisions of three international treaties: (1) the International Covenant on Civil and Political Rights ("ICCPR"); (2) the International Covenant on Economic, Social and Cultural Rights ("ICESCR"); and (3) the Convention on the Rights of the Child ("Child's Covenant"). I will argue that with the passage of the above-named international treaties, states are bound to provide a quality, free education to all of their people regardless of their race, gender, national origin, birth, or wealth.

Sections IV and V explore the plight of two ethnic minorities: the gypsy in Bulgaria and the Palestinian Arabs residing in Israel. In each of these states, the respective governments have actively discriminated against its minority populace in the field of education despite being parties to several international treaties specifically prohibiting such practices.²⁵

Section VI examines how the guiding principle of affirmative action can be used to help level the playing field between minorities and the predominant ethnicity in states. Both Bulgaria and Israel have enacted affirmative action-type legislation in order to address the inequities of their public education systems. However, in both states, the legislation has either not been effectively implemented, or, in the case of Israel, has been seriously misguided. In other words, the two states have provided a classic example of governments simply paying lip service to addressing a wrong without actually taking strong measures to combat the injustice.

Customary international human rights and the conventions that codify those principles provide an authoritative guide for states to follow when implementing their educational policies and legislation.²⁶ But the international community has widely failed to follow these provisions, and minorities have suffered as a result and generally receive a substandard education in comparison to the states' ethnic mainstream. This comment argues that under international law, Bulgaria and Israel, as well as the rest of the international community, are obligated to resolve their discriminatory practices, and that affirmative action measures (a

25. Bulgaria has signed and ratified the ICCPR (including the First Optional Protocol), the ICESCR, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Rights of the Child, and the Convention against Discrimination in Education. Maxine Sleeper, *Anti-Discrimination Laws in Eastern Europe: Toward Effective Implementation*, 40 COLUM. J. TRANSNAT'L L. 177, 205 n.45 (2001). Israel has signed and ratified the ICESCR and the Convention on the Rights of the Child. Jorene Soto, *The Application of Education Rights in the Occupied Territories*, 13 FLA. J. INT'L L. 211, 220 (2001). Israel has also signed the ICCPR and the ICESCR.

26. de la Vega, *supra* note 3, at 41-45.

policy authorized by international law) are one of the keys to fixing a history of injustice. Simply paying lip service to the problems facing minorities within their borders is in violation of Bulgaria and Israel's obligations under international law.

II. The Right to Education in International Law

The right to education is found in numerous treaties throughout international law. The Universal Declaration of Human Rights expressly declares that everyone is entitled to an education.²⁷ The ICESCR, as well as the Child's Convention both recognize that children should be provided a compulsory, free primary education.²⁸ Secondary education should be made available to all students, with states gradually making secondary education free to students as well.²⁹

Although the right to an education is enshrined in the above treaties, the treaties are silent on what exactly constitutes a quality education. Cultural relativity prevents the international community from establishing standards that are set in stone. For example, diverse cultures place different emphases on education and what should be taught to students. It would also be unreasonable for wealthier states to set the criterion by which the rest of the world should abide. The public school systems of wealthy states can be a target for which poorer states can hope to attain, but they cannot become binding standards. The treaties recognize the inequalities amongst the international community, and therefore provide that a state is bound to implement the treaty provisions to the "maximum of its available resources."³⁰ As a result, the basic, minimum education standards will vary from state to state.

But despite the varying minimum education standards throughout the international community, there is one facet of education that cannot be given any leeway: the prohibition on discrimination in education. The Child's Convention directs all state parties to provide education on the "basis of equal opportunity."³¹ Furthering the principles of equal opportunity and nondiscrimination, both the Child's Convention and the ICESCR provide that parties to the respective treaties must implement the rights embodied therein without regard to an individual's "race, colour, sex, language, religion, political or other opinion, national, ethnic, or social origin, property, disability, birth or other status."³² So

27. Universal Declaration, *supra* note 1, at art. 26.

28. ICESCR, *supra* note 5, at art. 13; G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49 (1989) [hereinafter Child's Convention].

29. ICESCR, *supra* note 5, at art. 13; Child's Convention, *supra* note 28.

30. ICESCR, *supra* note 5, at art. 2(1); Child's Convention, *supra* note 28, at art. 4.

31. Child's Convention, *supra* note 28, at art. 28(1).

32. *Id.* at art. 2; Article 2 of the ICESCR provides remarkably similar language.

not only must states make education available on an equal basis, but they also must ensure that there are adequate remedies available to those minorities who are discriminated against by the state.³³

Even before the Child's Convention and the ICESCR came into force, the international community, recognizing that many children were being discriminated against in their schooling, adopted the Convention Against Discrimination in Education in 1960.³⁴ Whereas the Child's Convention and the ICESCR use a general definition of discrimination so that it can be placed in context of all of the treaties' provisions, the Convention Against Discrimination in Education further defines what kind of behavior constitutes discrimination in education as:

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 of nullifying or impairing equality of treatment in education and in particular . . . [o]f depriving any person or group of persons of access to education of any type or at any level; [and] [o]f limiting any person or group of persons to education of an inferior standard.³⁵

All distinctions based on students' identities are not prohibited by international law. The international community sanctions the use of separate public educational systems for language or religious reasons.³⁶ So long as the separate systems are elective (i.e., the students can opt to attend the "regular" public schools), and offer the same level of education as the other government-funded schools, such practices are not considered discriminatory.³⁷

With such numerous references to the right to education found in international covenants, a question arises as to how binding these provisions are to states. Amongst international law, and particularly

ICESCR, *supra* note 5, at art. 2(2).

33. *General Comment 9, The Domestic Application of the Covenant*, Committee on Economic, Social and Cultural Rights, 19th Sess., U.N. Doc. E/C.12/1998/24 (December 3, 1998), paras. 2, 9.

34. Education Convention, *supra* note 2.

35. *Id.* at art. 1.

36. *Id.* at art. 2(b).

37. *Id.* Note the distinction between what international law provides for in the Education Convention and the systems of segregation and apartheid practiced by the United States and South Africa, respectively, which were generally denounced by the international community. In the cases of the United States and South Africa, these two states did not give its oppressed peoples an option in which schools they could attend. Furthermore, the two states segregated its schools based on race, not for sex, religious, or linguistic reasons—the permitted forms of segregation under the Education Convention, so long as the enrollment at the schools are optional and the quality of education is equal to the other schools.

within human rights law, there is a "hierarchy" of rights.³⁸ Laws and rights that are considered fundamental and are generally followed by most states constitute customary international law and are binding upon all states.³⁹ Therefore, it is necessary to examine whether the right to education has made its way to the small group of human rights that are deemed a part of customary international law.

III. The Right to Education and Customary International Law

There is no single, governing body authorized to create law binding upon all international actors. However, there are sources available from which the rules may be extracted. Article 38(1) of the Statute of the International Court of Justice ("ICJ") is an authoritative statement as to the sources of international law.⁴⁰ It provides that the ICJ shall use, "international conventions, whether general or particular, establishing rules expressly recognised by the contesting states; international custom, as evidence of a general practice accepted as law; [and] the general principles of law recognised by civilized nations."⁴¹

Customary laws are "practices and beliefs that are so vital and intrinsic a [sic] part of a social and economic system that they are treated as if they were laws."⁴² The main evidence of customary law is to be found in the actual practices of states,⁴³ and the ICJ has suggested that a customary rule must be based on a "constant and uniform usage."⁴⁴ Such a practice need not be perfectly constant or perfectly uniform in order for it to qualify as proof of customary law. In the *Nicaragua*⁴⁵ case, the ICJ held:

It is not to be expected that in the practice of States the application of the rules in question should have been perfect. . . . The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct

38. Whether there is truly a hierarchy of human rights is debatable. Some argue that classification of human rights "generations" (wherein first generation rights are civil and political rights, second generations rights are those contained within the ICESCR, and the third generation rights are collective ones) is a false premise because all human rights should be regarded as fundamental and inherently important.

39. See generally, de la Vega, *supra* note 3.

40. *Id.* at 41-42.

41. Statute of the International Court of Justice, art. 38(1)(a), (b), (c).

42. BLACK'S LAW DICTIONARY 391 (7th ed. 1999).

43. See generally, de la Vega, *supra* note 3, at 41.

44. *Asylum (Colom. v. Peru)*, 1950 I.C.J. 266 at 277.

45. *Nicaragua (Nicar. v. U.S.) (Merits)*, 1986 I.C.J.

inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.⁴⁶

Therefore, it is only major inconsistencies in state practice that will prevent a particular arrangement from becoming customary international law.⁴⁷

With so many states in the international community and differing practices between states and regions, it is uncertain how states regard customary international law in the hierarchy of international law sources. While some scholars downplay the role customary law has to offer in the international arena,⁴⁸ others argue that customary international law is even more important than treaties because it is of universal application.⁴⁹

A. *The International Bill of Rights*

In 1976, the ICCPR and the ICESCR came into force.⁵⁰ Collectively, these two treaties are known as the International Bill of Rights⁵¹ and were drafted to transform the principles of basic human rights originally formulated by the Universal Declaration of Human Rights⁵² into binding rules of law that all states are obliged to follow.⁵³

The ICCPR asserts that all states parties must undertake to ensure certain human rights within their borders.⁵⁴ Included among these rights and relevant to the right of education is the provision that declares state legislation, "shall prohibit any discrimination and guarantee to all

46. *Id.* at 98, para. 186.

47. *See id.*

48. *See, e.g.,* WOLFGANG FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 121-23 (1963). *See also, I. DE LUPIS, THE CONCEPT OF INTERNATIONAL LAW*, 112-16 (1987).

49. A. D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 12 (1971).

50. ICCPR, *supra* note 5; ICESCR, *supra* note 5.

51. *See generally*, John Humphrey, *The International Bill of Rights: Scope and Implementation* 17 WM. & MARY L. REV. (1975) and *South West Africa Cases, Second Phase*, 1966 I.C.J. Reports 18 at 293 (Judge Tanaka, dissenting opinion) (enunciating his view that there was a customary international law prohibiting discrimination based on race).

52. *See generally* Universal Declaration, *supra* note 1.

53. The Vienna Declaration and Programme of Action adopted on June 25, 1993, at the UN Conference on Human Rights referred to the Universal Declaration of Human Rights as its source of inspiration, 32 I.L.M. (1993) at 1661. The International Law Association adopted a resolution in 1994 in which it noted that the "Universal Declaration of Human Rights is universally regarded as an authoritative elaboration of the human rights provisions of the United Nations Charter" and that "many if not all of the rights elaborated in the Universal Declaration of Human Rights are widely recognised as constituting rules of customary international law," *Report of the Sixty-Sixth Conference, Buenos Aires* at 29 (1994).

54. ICCPR, *supra* note 5, at art. 2.

persons equal and effective protection against discrimination on any ground. . . ."⁵⁵ So state parties to the Covenant are required to ensure that their laws effectively prohibit discrimination. Although not specifically mentioned, state constitutions and statutes dealing with education should be covered by the ICCPR's nondiscrimination provision.

A Human Rights Committee was established under Part IV of the ICCPR,⁵⁶ and the treaty provides that states parties are required to submit periodic reports to the Committee, whereby the states provide information on the measures adopted to give effect to the rights recognized in the Covenant.⁵⁷ Although the Optional Protocol to the ICCPR extended the powers of the Human Rights Committee,⁵⁸ the Covenant lacks any real teeth because the Committee is not a court with the power to produce binding decisions, nor does it have an enforcement mechanism. Although the Covenant's provisions are codified customary international law, besides a state's own goodwill to fulfill its obligations, outside political pressure from the international community is the only way to help ensure a state's compliance with the law.

The ICESCR provides that each state party must guarantee the rights articulated in the treaty, including the right to self-determination (Article 1), the right to work (Articles 6, 7), and the right to education (Article 13).⁵⁹ Like the ICCPR and other human rights treaties, the ICESCR disallows discrimination with respect to all of the provisions contained therein. Therefore, parties to the ICESCR are not permitted to discriminate against their students based on their race, religion, gender, or other similar immutable characteristics because the right to education is expressly dealt with in its provisions.⁶⁰

There is a mandatory reporting system for state parties to abide by

55. *Id.* at art. 26.

56. *Id.* at art. 28.

57. *Id.* at art. 40. The article further provides that "[t]he Committee . . . shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties." *Id.*

58. Article 2 of the Optional Protocol stipulates that "individuals who claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the Committee for consideration." Optional Protocol to the International Covenant on Civil and Political Rights, *entered into force* March 23, 1976, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302 (1966).

59. *See* ICESCR, *supra* note 5, at arts. 1, 6, 7 & 13.

60. *Id.* at art. 2(2). An immutable characteristic is a trait that "either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to change." *Matter of Acosta*, 19 I. & N. Dec. 211, at p. 53 (1985).

under the ICESCR.⁶¹ States parties are obliged to send reports to the Committee on Economic, Social and Cultural Rights detailing the steps they have taken to implement the provisions of the treaty.⁶² However, like the ICCPR, the Committee on Economic, Social and Cultural Rights also does not have any bite because of the international community's lack of an enforcement procedure.

B. The Convention on the Rights of the Child

The Child's Convention was adopted by the United Nation's General Assembly in November of 1989 and entered into force on August 3, 1990.⁶³ The Child's Convention is an integral document containing some of the fundamental human rights of children. Some of the primary reasons behind the creation of the Child's Convention were to provide safeguards for children throughout the international community because of children's particular vulnerabilities, and to pay respect to the fact that, as human beings, children have an "inherent dignity" and are also entitled to certain "inalienable rights."⁶⁴

The Child's Convention picks up where the International Bill of Rights leaves off. Some of the provisions contained in the Child's Convention are similar to those in the International Bill of Rights and other human rights treaties.⁶⁵ But other rights, such as the convention's adoption provision, are exclusive to children's needs.⁶⁶ The Convention's articles addressing education are similar to those found in the ICESCR, but go further in that they also focus on the aims or goals of education.⁶⁷ Like the International Bill of Rights, the convention established a committee to which states are to report.⁶⁸

C. The Treaties as Evidence of Education's Place in Customary International Law

The International Bill of Rights, the Child's Convention, and other human rights treaties providing for the right to education without

61. ICESCR, *supra* note 5, at art. 16.

62. *Id.* Unlike the International Covenant on Civil and Political Rights, this Covenant did not establish a separate committee. Therefore, under Articles 16-25 of the International Covenant on Economic, Social and Cultural Rights, states parties are obliged to send periodic reports to the United Nations Secretary General, who, in turn, submits the reports to ECOSOC.

63. Child's Convention, *supra* note 28.

64. *See generally id.* (preamble).

65. *Id.*; compare generally ICESCR, *supra* note 5 and ICCPR, *supra* note 5.

66. *See* Child's Convention, *supra* note 28, at art. 21.

67. *Id.* at art. 28; compare ICESCR, *supra* note 5, at art. 13.

68. Child's Convention, *supra* note 28, at art. 43.

discrimination are binding on the states that are parties to the respective treaties.⁶⁹ Again, the statute of the ICJ recognizes that international treaties, as well as the general principles of law accepted by nations are considered evidence of customary law.⁷⁰ As of 1992, over one hundred states were party to the International Bill of Rights.⁷¹ In 1993, one hundred twenty-eight states had ratified the Child's Convention.⁷² The overwhelming acceptance of these treaties and the provisions concerning the enjoyment of the right to education without discrimination contained therein provide evidence that the right to education has become a part of customary international law.⁷³ Furthermore, the entry into force of the Convention Against Discrimination in Education coupled with the adoption of the International Bill of Rights provides added indication that states have specifically embraced the principle of the right to education without discrimination.⁷⁴ State constitutions and legislation establishing public education systems for the citizens of the states also present confirmation that the right to education is a part of customary law.⁷⁵

But are states that have not signed or ratified any of the above treaties bound by the provisions contained therein? The Vienna Convention on Treaties answers this question in the affirmative.⁷⁶ The Vienna Convention acknowledges that a treaty may become "binding upon a third state as a customary rule of international law."⁷⁷ Even those few states that have not ratified the above treaties are still bound by the covenants' particular provisions that are representative of custom because, as this comment argues, the right to an education free from discrimination is included as one of the rights enshrined in customary international law.

Both the states of Bulgaria and Israel are parties to the International Bill of Rights, as well as the Convention on the Rights of the Child.⁷⁸ Therefore, their provisions are binding upon the two states. Neither Bulgaria nor Israel entered reservations to the above treaties.⁷⁹ Yet in spite of their obligations to adhere to the treaties' provisions, the two

69. See generally de la Vega, *supra* note 3, at 43-44.

70. Statute of the International Court of Justice, art. 38(1)(a), (b), (c).

71. See ICCPR, *supra* note 5 (ratifications); also see ICESCR, *supra* note 5 (ratifications).

72. de la Vega, *supra* note 3, at 46.

73. *Id.* at 45-46.

74. See *id.*

75. *Id.* at 48-49.

76. See Vienna Convention On the Law of Treaties, *opened for signature* May 23, 1969, art. 38, 1155 U.N.T.S. 331.

77. *Id.*

78. See ICCPR, *supra* note 5 (ratifications); ICESCR, *supra* note 5 (ratifications); and Child's Convention, *supra* note 28 (ratifications).

79. *Id.*

states have violated the nondiscrimination clauses of the international treaties with respect to their ethnic minorities. The disparate treatment allocated to the gypsies and Palestinian Arabs have been well documented by such non-governmental organizations like Human Rights Watch and Amnesty International.⁸⁰ Although the gypsies and Palestinian Arabs comprise relatively small percentages of their respective state's populations, the effects of the discrimination hurt not only the ethnic minorities, but also the entire state.⁸¹

IV. The Plight of the Bulgarian Gypsies

A. *The Bulgarian Education System*

The Republic of Bulgaria ("Bulgaria") is a parliamentary republic that is governed by the principles of democracy,⁸² in which the government controls and maintains the state's schools.⁸³ Taken together, Articles 2 and 28 of the Child's Convention, which Bulgaria ratified on April 11, 1991,⁸⁴ provide that education should be free, compulsory, and equally available to all of the children of a given state.⁸⁵ Pursuant to its international obligations under the Child's Convention,⁸⁶ the state of Bulgaria has acted to provide the basic educational mechanisms stated in the treaty.⁸⁷ Both the National Educational Act of 1992⁸⁸ and Bulgaria's

80. I am indebted to these two particular human rights non-governmental organizations for the excellent and detailed treatment given to this issue. See, *Second Class*, *supra* note 15; see generally, Amnesty International, at www.amnesty.org (last visited January 17, 2004).

81. Continued segregation, for example, would foster more prejudice and discrimination, which could lead to tensions between the two ethnic groups. See, Cohen, *supra* note 21.

82. United States Department of State, *Country Reports on Human Rights Practices—2001*, at <http://www.state.gov/g/drl/rls/hrrpt/2001/nea/8262.htm> (last visited January 20, 2004) [hereinafter *Country Reports 2001*].

83. BULG. CONST. art. 53 § 6.

84. Child's Convention, *supra* note 28 (ratifications). This treaty entered into force for Bulgaria on July 3, 1991. Committee on the Rights of the Child, Initial Reports of States Parties due in 1993: Bulgaria, U.N. Doc. CRC/C/8/Add.29 (October 12, 1995), para. 1 [hereinafter *Bulgaria Report*].

85. See Child's Convention, *supra* note 28, at arts. 2, 28.

86. Pursuant to Bulgaria's Constitution, international law is supreme. Article 5(4) of the Bulgarian Constitution provides that "any international instruments which have been ratified by the constitutionally established procedure, promulgated and having come into force with respect to the Republic of Bulgaria, shall be considered part of the domestic legislation of the country. They shall supersede any domestic legislation stipulating otherwise." BULG. CONST. art. 5(4).

87. Bulgaria Report, *supra* note 84, paras. 2-8.

88. BULG., Nat. Educational Act (1992) [hereinafter *NEA*].

constitution stipulate that all citizens are entitled to education.⁸⁹ The two documents also provide that the right to education cannot be limited by the following factors: race, nationality, sex, ethnic and social origin, religion and social status.⁹⁰

The Constitution of Bulgaria provides that the state shall advance the education of its citizens by opening and financing an appropriate number of schools based on the state's needs.⁹¹ The Constitution, as well as the National Education Act of 1992, set forth that the state's educational system is to be free for all of its citizens, and the curriculum should be taught in the Bulgarian language, the official language of the state.⁹² However, although the public education is free for its citizens, the children are required to pay for their books, which has predictably posed problems for the state's poorer families who cannot afford the additional financial burden of school supplies.⁹³

Bulgaria allows some flexibility for parents as to the manner in which to educate their children. For instance, parents may choose to commence their child's education at either age six or seven.⁹⁴ Furthermore, parents have the option of enrolling their children in state-supported kindergartens between the ages of three and six.⁹⁵ The Constitution also allows the citizens of Bulgaria to create additional, private schools, so long as the schools conform to the state's standards.⁹⁶ Despite this flexibility vested in parents, children are still legally obligated to attend school up to the age of sixteen, with economic sanctions imposed on those parents of children who fail to attend

89. For instance, the Bulgarian Constitution declares:

- (1) Everyone shall have the right to education.
- (2) School attendance up to the age of 16 shall be compulsory.
- (3) Primary and secondary education in state and municipal schools shall be free. . . .
- (6) The state shall promote education by opening and financing schools. . . . It shall exercise control over all kinds and levels of schooling.

BULG. CONST. art. 53 § 6.

90. See NEA, *supra* note 88; also see BULG. CONST. art. 6.

91. BULG. CONST. art. 53.

92. BULG. CONST. art. 53; also see, generally, NEA, *supra* note 88.

93. U.S. Department of State, *Country Reports on Human Rights Practices—2002: Bulgaria*, available at <http://www.state.gov/g/drl/rls/hrrpt/2002/18358.htm> (last visited February 12, 2005) [hereinafter *Country Reports 2002*]. For an article discussing more of the overall, general problems facing the Bulgarian educational system, see Maria Antova et al., *Education for Human Rights, Peace, Stability, and Democracy: Status, Problems, Perspectives in Country Reports on Education: Bulgaria*, available at http://www-gewi.kfunigraz.ac.at/csbsc/country_reports/Education_Bulgaria.htm (last visited February 12, 2005).

94. NEA, *supra* note 88, at art. 7, paras. 1, 2.

95. Bulgaria Report, *supra* note 84, para. 198.

96. *Id.* at para. 7.

school.⁹⁷

The Bulgarian educational system is comprised of kindergartens, schools, and auxiliary schools, all of which are run by the state or its municipalities.⁹⁸ The educational structure is further divided into two categories, general and professional.⁹⁹ The state's general educational program has three stages consisting of primary, basic, and secondary education.¹⁰⁰ Students are required to attend school until the age of sixteen.¹⁰¹

Following completion of basic education, the child enters into secondary education. Students are not required to complete all of their secondary schooling, as children can leave school upon reaching the age of sixteen.¹⁰² If students choose to continue, the completion of the secondary education is wholly funded by the state of Bulgaria.¹⁰³

Bulgaria has instituted a separate organization within the governmental apparatus to oversee the education system. This establishment, the Ministry of Education, Science and Technologies, provides "monitoring and methodological guidance" to the various schools within the state.¹⁰⁴ The Ministry of Education, pursuant to Article 29 of the Child's Convention, is charged with ensuring that the Bulgarian goals of education are carried out.¹⁰⁵ These goals include, "mastering the basics and laws of human knowledge, learning human and national values, virtues and culture, development of the individual and encouraging the child's creativity, spiritual, physical and social development and a healthy way of life of the child."¹⁰⁶

B. The Principle of Nondiscrimination

Article 2, paragraph 1 of the Child's Convention sets forth one of the general principles of customary international law—the concept of nondiscrimination.¹⁰⁷ As a party to the Child's Convention, Bulgaria is required to ensure by "all appropriate measures" that all of the rights provided for in the Convention are applied on an equal basis to all children within its borders.¹⁰⁸ Although there has been no legislation

97. *Id.* at para. 211.

98. *Id.* at para. 197.

99. *Id.* at para. 200.

100. *Id.* at para. 201.

101. BULG. CONST. art. 53 § 2.

102. *Id.*

103. *Id.*

104. Bulgaria Report, *supra* note 84, para. 14.

105. *Id.* at paras. 214-15.

106. *Id.* at para. 214.

107. Child's Convention, *supra* note 28, at art. 2.

108. *Id.* at art. 2.

broadly making discrimination against children illegal,¹⁰⁹ the Bulgarian Constitution does contain several provisions generally denouncing inequities between its citizens. For instance, Article 6 provides:

(1) All persons are born free and equal in dignity and rights.

(2) All citizens shall be equal before the law. There shall be no privileges or restriction of rights on the grounds of race, nationality, ethnic self-identity, sex, origin, religion, education, opinion, political affiliation, personal or social status or property status.¹¹⁰

The National Education Act of 1992 continues this common theme by expressly providing for equality of opportunity in education amongst the children of Bulgaria.¹¹¹ Furthermore, distinctions in the quality or quantity of education between students on account of their "race, nationality, sex, ethnic or social origin, religion or social status," are also prohibited by the National Education Act.¹¹² However, despite these provisions, there are no special governmental bodies within the state of Bulgaria that have the authority to investigate complaints or punish those who violate the anti-discrimination principles.¹¹³ Because Bulgaria lacks such an institution, many acts of discrimination are not addressed.¹¹⁴

Despite the provisions in the Bulgarian Constitution, the state's international obligations under the Child's Convention, the ICESCR, and Bulgaria's general duty to prevent discrimination under customary international law, discrimination still exists against some of the more vulnerable citizens of the state—its ethnic minority, the gypsies.¹¹⁵ The state's initial report to the Committee on the Rights of the Child in 1995 even admits that the Bulgarian government has received reports of

109. See Maxine Sleeper, *Anti-Discrimination Laws in Eastern Europe: Toward Effective Implementation*, 40 COLUM. J. TRANSNAT'L L. 177, 190 (2001); see also Human Rights Watch World Report 2002: Bulgaria, *Human Rights Developments*, available at <http://www.hrw.org/wr2k2/europe6.html> (last visited February 13, 2005) [hereinafter *Human Rights Developments 2002*].

110. BULG. CONST. art. 6.

111. NEA, *supra* note 88, at art. 4.

112. *Id.*

113. Sleeper, *supra* note 103, at 191. Individuals can enforce the anti-discrimination provisions found in Bulgaria's Constitution and domestic legislation by filing actions before a court of law. *Id.*

114. See *id.* at 189.

115. *Country Reports 2002*, *supra* note 93 (noting the discrimination and violence perpetuated against the Roma); *Human Rights Developments 2002*, *supra* note 109 (discussing several incidents of police brutality directed against the Roma); see also Human Rights Watch World Report 2001: Bulgaria, *Human Rights Developments*, available at <http://www.hrw.org/wr2k1/europe/bulgaria.html> (last visited February 12, 2005) [hereinafter *Human Rights Developments 2001*] (again documenting physical abuse of the Roma by state authorities).

discrimination against children from credible sources, including the media, non-governmental organizations, and law enforcement agencies.¹¹⁶ The gypsy population has been especially affected by such discriminatory measures, and their fundamental human rights continue to be affected on a daily basis, even though the Bulgarian government has acknowledged the problem.¹¹⁷

C. *The Gypsy Struggle in Bulgaria*

The gypsies, also known as Roma,¹¹⁸ have had a long and troubled history throughout all of the European states¹¹⁹ because of ethnic discrimination by both states and private actors and because of the ethnic majority's fears of the Romani culture.¹²⁰ The percentage of Roma actually living in Bulgaria is unclear because the Roma have traditionally been a nomadic people.¹²¹ Some individuals believed to be Roma have also simply refused to disclose their ethnic identity to outsiders for fear of persecution, leading to further confusion as to what their actual numbers are in Bulgaria.¹²² According to a 1992 census, 288,000 citizens out of a possible 8.5 million citizens identified themselves as Romani, making the minority ethnic group less than four percent of the population.¹²³ Throughout Europe, the Roma have historically been socially marginalized and entrenched in poverty.¹²⁴ The Roma living in Bulgaria have endured the same fate, as discrimination in the public schools and in the workplace have left disproportionate numbers of

116. *Country Reports 2001*, *supra* note 82.

117. *See generally*, *Country Reports 2002*, *supra* note 93.

118. *Promises Broken*, *supra* note 13.

119. It is believed that the Romani ancestry left northwest India sometime around 1000 A.D. By 1200, the Roma were present in the Byzantine Empire. By the middle of the fourteenth century, the Roma had been enslaved throughout southeastern Europe. The enslavement of the Roma lasted for over five hundred years, ending in 1856. Following their emancipation from slavery, the Roma were prohibited from settling down. Consequently, some of the Roma became nomadic, wandering from town to town, state to state. All across Europe, including Bulgaria, because the non-Romani Europeans wanted to annihilate the Romani culture, the Roma encountered expulsion from cities and states, enslavement, physical abuse, torture, and death. Fred Bertram, *The Particular Problems of (the) Roma*, 3 U.C. DAVIS J. INT'L L. & POL'Y. 1, 3-4 (1997).

120. Library of Congress Country Studies, *Bulgaria*, at [http://memory.loc.gov/cvibin/query/r?frd/cstdy:@field\(DOCID+bg0007\)](http://memory.loc.gov/cvibin/query/r?frd/cstdy:@field(DOCID+bg0007)) (last visited November 17, 2004).

121. *Id.*

122. Human Rights Watch, *Children of Bulgaria: Police Violence and Arbitrary Confinement*, at www.hrw.org/summaries/s.bulgaria969.html (last visited January 24, 2004) [hereinafter *Children of Bulgaria*].

123. *Id.* Other statistics place the ethnic composition of Bulgaria as follows: Bulgarian 83.6%, Turk 9.5%, Roma 4.6%, and other 2.3%. Library of Congress, *supra* note 105.

124. *See generally*, Bertram, *supra* note 117.

Roma unemployed¹²⁵ and in dire economic straits.¹²⁶ As a result of the poverty experienced by many Roma, they have sometimes turned to crime in order to support themselves.¹²⁷ Unfortunately, this has made the Bulgarian ethnic majority further associate the Roma with crime.¹²⁸

The segregated neighborhoods, away from the Bulgarian ethnic majority, in which most of the Roma live, have also contributed to discrimination against them. The schools in these neighborhoods are of poor quality, and afford the Roma an education of inferior quality when compared to other government-run schools.¹²⁹ An estimated seventy percent of school-aged Romani children are segregated in Bulgaria.¹³⁰ The Romani children are either segregated in the Romani neighborhood schools (which have been officially labeled as “schools for children with inferior lifestyle and culture”),¹³¹ or they are isolated from the mainstream Bulgarian children by being placed in separate classrooms within a school.¹³² More than half of the Romani children’s windows in their neighborhood schools are covered by cardboard.¹³³

Programs initiated by the state to address the socio-economic problems experienced by the Roma have not had a significant impact on increasing the interactions between the Roma and the rest of Bulgarian society.¹³⁴ Indeed, the government has often contributed to the problem by building additional, segregated neighborhoods for the Roma,¹³⁵ thereby adding to the cycle of less educated generations raising future generations of less educated individuals.

125. In some regions of Bulgaria, the unemployment rate is nearly one hundred percent (100%). Sleeper, *supra* note 25, at 181.

126. Library of Congress, *supra* note 105. Because of the historical discrimination and abuse directed toward the Roma, the Romani have significantly lower life expectancies, literacy rates, and standards of living than their non-Romani counterparts. Bertram, *supra* note 117, at 8.

127. *Children of Bulgaria*, *supra* note 120.

128. *Id.*

129. Library of Congress, *supra* note 105. Up until 1992, in stark contrast to the public schools for the Bulgarian ethnic majority, the Romani schools’ curricula emphasized vocational training. In 1992, the Bulgarian government introduced a standard curricula to the Romani neighborhood schools, but the curricula offered to the Romani children was still of a lesser quality than that given to the non-Romani children. Donka Panayotova, *Successful Romani School Desegregation: The Vidin Case*, in European Roma Rights Center, available at <http://www.errc.org/cikk.php?cikk=1630> (last visited February 14, 2005) [hereinafter *The Vidin Case*].

130. Jack Greenberg, *Brown v. Board of Education: An Axe in the Frozen Sea of Racism*, 48 ST. LOUIS L.J. 869, 871 (2004).

131. *The Vidin Case*, *supra* note 126.

132. *Id.*

133. Greenberg, *supra* note 128, at 872.

134. Cohen, *supra* note 21 (noting that recent desegregation efforts have only affected a small number of Romani children).

135. *Id.*

There have been credible reports that the quality of education offered to Romani children is inferior in comparison to the other Bulgarian students.¹³⁶ The depressed socio-economic status of the Roma along with the rampant discrimination in the educational system have led to the Roma having low levels of literacy and high drop-out rates.¹³⁷ Compounding the problem, because of the widespread poverty of the Roma, many Romani children missed considerable amounts of school simply because they could not afford shoes and other basic school supplies.¹³⁸ Although there are no accurate figures, the illiteracy rate for the Roma is believed to be significantly higher than that of the Bulgarians and Turks, the two other major ethnicities in the state.¹³⁹ Only five percent (5%) of Romani children graduate from secondary school.¹⁴⁰ Less than one percent (1%) of the Romani population in Bulgaria has graduated from college.¹⁴¹

The Bulgarian government is not ignorant of the educational problems faced by the Roma. In 1996, the Ministry of Education acknowledged the difficulties experienced by the Roma in their schools and credited the cause of the problems to a lack of funding in the educational system.¹⁴² Moreover, following the submission of Bulgaria's report to the Committee on the Elimination of Racial Discrimination, the Bulgarian government was further put on notice when the Committee expressed concern regarding the discrimination still being faced by the Roma in many of their human rights, including their right to an education.¹⁴³

136. *Country Reports*, *supra* note 75.

137. Literacy is defined as those age 15 and over who can read and write. In Bulgaria, the overall percentage of literate adults is estimated to be 98.6%. CIA, *The World Factbook: Bulgaria*, at <http://www.cia.gov/cia/publications/factbook/geos/bu.html> (last visited October 24, 2003).

138. *Country Reports 2002*, *supra* note 92.

139. Library of Congress, *supra* note 105.

140. Greenberg, *supra* note 128, at 872. Another report notes that the percentage of Romani children who complete secondary education is less than eight percent (8%). See *Country Reports 2002*, *supra* note 92.

141. *Country Reports 2002*, *supra* note 92.

142. U.S. Department of State, *Country Reports on Human Rights Practices—2000: Bulgaria*, available at <http://www.state.gov/g/drl/rls/hrrpt/2000/eur/705.htm> (last visited February 12, 2005) [hereinafter *Country Reports 2000*]. Since 1991, Bulgaria has been transitioning from a communist to an open, market economy. The transition has not been a smooth one, as the country has experienced recessions and a sluggish economy. See, *Country Reports 2002*, *supra* note 112; see also, Antova, *supra* note 92. Because of the sluggish economy, funding for education is limited by budgetary constraints. *Country Reports 2002*, *supra* note 112.

143. See Sleeper, *supra* note 25, at 189. The Committee further noted that the Bulgarian government should take more positive actions with respect to fighting discrimination by creating a special governmental body that would have the sole purpose of addressing racism and discrimination concerns faced by its people. *Id.*

Further complicating the Roma struggles in their educational endeavors is the fact that Romany, their native language, has no alphabet or written language and public school classes are conducted in Bulgarian.¹⁴⁴ Language barriers faced by the Roma in the state school system cannot be completely attributed to Bulgaria, simply because the Roma speak a language different than the official language of the state. However, Bulgaria has actively contributed to the discrimination against the Roma in other ways. Romani children are excessively confined to schools designated for mentally disabled children.¹⁴⁵ For a small fraction of the Bulgarian population, Romani children comprise a high percentage of the students forced to attend these "special schools." Romani children are also disproportionately sent to Educational Boarding Schools at a court or prosecutor's discretion.¹⁴⁶ Although the students live in prison-like conditions,¹⁴⁷ the Bulgarian government considers placement in the Educational Boarding Schools as part of a child's regular education as opposed to some type of punishment.¹⁴⁸ Indeed, the Ministry of Education even oversees the operation of the Educational Boarding Schools.¹⁴⁹ Regardless of how the Educational Boarding Schools are classified, the collective actions of the Bulgarian government have harmed the educational and social development of the Roma and, as a result, stymied their potential for economic growth.¹⁵⁰

The international community has pressured the Bulgarian government to change its discriminatory practices with respect to the Roma.¹⁵¹ The European Union, in particular, has urged Bulgaria to amend its practices because integration is crucial in order to gain

144. *Id.*

145. *Promises Broken*, *supra* note 104. The Bulgarian government has justified the Romani children's placement in such institutions because of their inadequate knowledge of the Bulgarian language. See Sleeper, *supra* note 25, at 181-182.

146. It is believed that the Roma comprise approximately 50% of the Educational Boarding Schools population. *Children of Bulgaria*, *supra* note 107.

147. The Educational Boarding Schools, formerly known as Labor Education Schools, have been described as penal institutions. However, the Bulgarian government does not consider the Educational Boarding Schools to be prisons. *Country Reports 2002*, *supra* note 92. The living conditions at the Educational Boarding Schools are poor, and staff members frequently lack proper training and qualifications. Consequently, the children suffer, as they are subjected to harsh treatment while at the Educational Boarding Schools. For example, reports have surfaced that indicate the children's heads are shaved and their meals reduced as punishment. Furthermore, the children are severely beaten and placed in solitary confinement for extended periods of time. *Id.*

148. Bulgaria Report, *supra* note 77.

149. *Id.*

150. See generally *Country Reports 2002*, *supra* note 92.

151. See Jack Greenberg, *Brown v. Board of Education at Fifty: Have we Achieved Its Goals?*, 78 ST. JOHN'S L. REV. 259, 260 (2004) [hereinafter *Brown at Fifty*].

acceptance into the European Union.¹⁵² Because Bulgaria would very much like to become a part of the European Union and acquire all of the benefits associated with membership in the E.U., the Bulgarian government recently began the process of integrating the Romani children with the Bulgarian ethnic majority in regards to their schooling.¹⁵³

In April 1999, Bulgaria's Council of Ministers adopted the "Framework for a Program for Equal Integration of Roma in Bulgarian Society."¹⁵⁴ The statute provided that the Bulgarian government would have one year in which to draft and adopt the implementation phase of the Act.¹⁵⁵ However, after a year had passed, the state of Bulgaria had failed to adopt an implementation phase.¹⁵⁶ Since Bulgaria was still having budgetary concerns,¹⁵⁷ integration of the Roma within Bulgarian society, including its public schools, had to be primarily sponsored through local and international nongovernmental organizations and projects.¹⁵⁸

On September 15, 2000, approximately three hundred (300) Romani children from a Romani neighborhood were bused to public schools within the town of Vidin¹⁵⁹ in an effort to comply with the Framework for a Program for Equal Integration of Roma in Bulgarian Society statute.¹⁶⁰ Despite the history of discrimination and violence against the Romani, the integration has been relatively smooth and successful.¹⁶¹ By 2002, approximately 2400 Romani children had been introduced into public schools in Bulgaria.¹⁶²

However, despite the success of the Vidin Project, the program has had its share of critics.¹⁶³ One Romani M.P. called the Vidin Project a failure, and a representative from the European Union noted that the

152. *Id.* On September 5, 2001, a European Parliament resolution noted the progress Bulgaria had made toward European Union membership, but also expressed concern about the lack of improvement in the living conditions of the Roma. *Human Rights Developments 2002*, *supra* note 108.

153. *Id.*

154. Sleeper, *supra* note 25, at 191.

155. *Id.*

156. *Id.*

157. *See Country Reports 2002*, *supra* note 92.

158. *See Country Reports 2000*, *supra* note 140.

159. For a general discussion of how the Vidin Project was implemented and what its goals and objectives were, *see generally*, *The Vidin Case*, *supra* note 127.

160. Sleeper, *supra* note 25, at 193; *see also Country Reports 2000*, *supra* note 140.

161. *Brown at Fifty*, *supra* note 149, at 259.

162. *Id.*; *see also* Greenberg, *supra* note 128, at 869. The program has since been expanded to include the cities of Montana, Pleven, Stara Zagora, Sliven, and Khaskovo. *Country Reports 2002*, *supra* note 92.

163. *See generally*, Cohen, *supra* note 132 (discussing the pros and cons of the Vidin Project and Bulgarian integration efforts).

Bulgarian government should evaluate the impact of the program around the country.¹⁶⁴ The chief source of opposition to the integration movement came from teachers and administrators in the Romani neighborhood schools, because they feared that they would lose much-needed state funding as more Romani children leave the schools.¹⁶⁵ Some Roma expressed a fear that by assimilating more into the mainstream Bulgarian society, they would lose their cultural identity.¹⁶⁶ The ever-present poverty of the Roma also proved to be a concern, as Romani parents were apprehensive that their children would notice the vast socio-economic differences between the Roma and the Bulgarian ethnic majority.¹⁶⁷

V. The Plight of the Palestinian Arabs in Israel

A. *The Israeli Educational System*

Education in Israel is compulsory and free from the age of three (kindergarten) until grade ten.¹⁶⁸ The Israeli government continues to provide free schooling for students choosing to continue their secondary education until twelfth grade.¹⁶⁹ The state school system is divided into kindergarten, primary, and secondary classes, but recent legislation has slightly altered the makeup of the public school system.¹⁷⁰ Kindergarten is now mandatory and free from the ages of three to six.¹⁷¹ However, parents wishing to send their children to kindergarten at two years of age are free to do so.¹⁷²

The Israeli government operates two distinct and separate school systems—one for the Jewish children and the other one for the Palestinian Arabs (“Palestinian”).¹⁷³ As a result, nearly all of Israel’s school-aged children have little or no contact with students from different ethnic backgrounds.¹⁷⁴ But the Convention Against Discrimination in Education, of which Israel is a party, authorizes the maintenance of separate school systems for religious or linguistic

164. *Country Reports 2002*, *supra* note 92.

165. Greenberg, *supra* note 128, at 875.

166. *Id.*

167. *The Vidin Case*, *supra* note 127.

168. *Second Class*, *supra* note 15.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *See id.*

purposes,¹⁷⁵ so in this technical regard, Israel is in compliance with international law. Although there are two separate school systems upheld by the state, Israeli law actually permits Jewish and Palestinian students to enroll in each other's schools if so desired.¹⁷⁶ However, because enrollment is based on residency, and most Palestinians tend to live in settlements or neighborhoods isolated from the Jewish population, very few Palestinian children attend Jewish public schools.¹⁷⁷

The Israeli schools, which are supervised by the Ministry of Education,¹⁷⁸ are further divided into state secular and state religious schools.¹⁷⁹ Palestinian children are excluded from the state religious schools, while children from all ethnicities are welcome in the secular schools.¹⁸⁰

Israel has never opposed the educational rights provisions contained in the various United Nations' treaties,¹⁸¹ and the state of Israel has passed legislation central to the infrastructure of the educational system that reflect its general commitment to education. The two main statutory laws governing Israel's schools are the Compulsory Education Law (1949)¹⁸² and the State Education Law (1953).¹⁸³ The latter statute sets forth the purposes of the Israeli educational system as one, "base[d] [on] elementary education in the state on the values of Jewish culture and . . . on love of the homeland and loyalty to the state and the Jewish people."¹⁸⁴ Although the statute also goes on to promote equality and tolerance, the legislation's emphasis on the Jewish people, as opposed to the *Israeli* people, signifies how the Israeli government has marginalized the Palestinians. This is especially true in the realm of education.

B. Discrimination Against Palestinians in Israel

Palestinians lived in the area of Israel for many years before the official state of Israel was founded in 1948.¹⁸⁵ Consequently, the

175. Education Convention, *supra* note 2, at art. 2.

176. *Second Class*, *supra* note 15.

177. *Id.*

178. *Id.* (providing that some of the Ministry of Education's duties include the upkeep of school buildings and overseeing the education budget allocations).

179. *Id.*

180. *Id.*

181. Soto, *supra* note 25, at 220.

182. ISR., Compulsory Education Law (1949).

183. ISR., State Education Law (1953). For a general history and background of Israeli educational laws, see The Library of Congress, *Country Studies: Israel (Education)*, available at <http://lcweb2.loc.gov/frd/cs/iltoc.html> (last visited February 14, 2005).

184. *Second Class*, *supra* note 15.

185. Frances Raday, *Self-Determination and Minority Rights*, 26 FORDHAM INT'L L.J. 453, 479 (2003).

Palestinians constitute an indigenous minority, comprising nearly twenty percent (20%) of the population.¹⁸⁶ Israeli legislation purports to grant Palestinian children education services on the same level as Jewish children.¹⁸⁷ Yet despite this professed educational equality, the schools for Palestinian children lack many of the basic supplies and facilities that are readily found in the schools for the Jewish students,¹⁸⁸ although Palestinian children only constitute approximately twenty-five percent of the schoolchildren in Israel.¹⁸⁹ Even with fewer children for the government to manage, the Palestinian schools are still in need of over 2500 more classrooms in order to adequately accommodate the students, and as a result have larger class sizes than the average Jewish school.¹⁹⁰

Israeli legislation makes kindergarten mandatory for three-year-old children.¹⁹¹ Yet despite this legislation, the state has failed to build kindergarten facilities in many Palestinian communities.¹⁹² Consequently, Palestinian children's kindergarten attendance is roughly half that of their Jewish counterparts.¹⁹³ Budget allocations are also indicative of discrimination.¹⁹⁴ In its Report to the Committee on the Rights of the Child, Israel admitted that the money spent per Palestinian student was only sixty percent of the money allocated to each Jewish child.¹⁹⁵

The Palestinian curriculum is not spared from the Israeli discrimination. The Israeli government acknowledges that the Palestinian children have the same agenda and curriculum as the Jewish students because all students are required to take the Israeli matriculation exams (*bagrut*) at the conclusion of their secondary schooling.¹⁹⁶ But the Palestinian children are required to study the Jewish religion and other mandatory subjects from outdated Jewish books that are often poorly translated into Arabic.¹⁹⁷ Although separate schools for religious and

186. *Id.*

187. *Id.* at 485-86.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.* In July 2000, the High Court of Justice ruled that the Ministry of Education's Department of Education and Welfare for Assistance to Weaker Pupils should allocate its educational budget for the Palestinian children in proportion to their percentage of the Israeli population. Therefore, if Palestinian children comprise twenty-five percent (25%) of the student population, then twenty-five percent (25%) of the budget should be allotted to the Palestinian students. See Raday, *supra* note 164, at 490.

196. *Second Class*, *supra* note 15.

197. *Id.*

linguistic reasons are valid under international law,¹⁹⁸ forcing the study of other religions while using badly translated books violates the spirit of the Convention Against Discrimination in Education.

Recognizing the discrimination faced by the Palestinian children in the realm of education, the international community has repeatedly reprimanded Israel for its inequitable and biased educational system.¹⁹⁹ The United Nations General Assembly has passed several resolutions providing that Israel should respect international law as it pertains to the educational rights of the Palestinian children.²⁰⁰ Although the United Nations General Assembly's contentions that Israel's policies violated international law are correct, Israel largely ignored the resolutions because it perceived the United Nations as a collection of nations hostile toward Israel and the Jewish people.²⁰¹

The numerous disadvantages faced by the Palestinian children have dire consequences for their educations and futures. Palestinian students are more inclined to drop out of school, and if they make it through secondary school, they are less likely to pass the *bagrut*.²⁰² There is an recognized gap between the educational achievements of Palestinian and Jewish students.²⁰³ Thirty-five percent (35%) of Palestinians in Israel receive matriculation certificates, as compared to the forty-six percent (45%) received by Jewish students.²⁰⁴ The uphill battle Palestinian children are forced to climb because of Israel's discriminatory and political practices²⁰⁵ has closed the door on generations of Palestinians for seeking better employment opportunities and improving their quality of life.

VI. Affirmative Action in International Law

Not all discriminatory practices are regarded as negative or harmful in international law.²⁰⁶ Affirmative action can largely be considered

198. Education Convention, *supra* note 2, at art. 2.

199. See Soto, *supra* note 25, at 224-25.

200. *Id.* at 224.

201. See *id.* at 225.

202. *Id.*

203. Raday, *supra* note 164, at 489.

204. *Id.* at 489-90.

205. The ongoing conflicts between the Israeli government and the Palestinians have had quite a negative impact on Palestinian children's ability to attend school on a regular basis. Curfews imposed on Palestinian neighborhoods and settlements, have caused some students to miss months of school. *Country Reports*, *supra* note 75.

206. For instance, Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination provides:

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal

“positive discrimination.” For purposes of this comment, affirmative action will be defined as “the implementation of special temporary measures that address the structural and individual realities of discrimination while simultaneously recognizing the legal/political space for differences in multicultural societies.”²⁰⁷ International law has embraced this concept in several of its treaties. For instance, Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination (“Race Convention”) specifically addresses affirmative action measures and guarantees that:

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure . . . equal enjoyment or exercise of human rights and fundamental freedoms, *shall not be deemed racial discrimination*, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.²⁰⁸

Article 2 of the Race Convention further provides:

States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objective for which they were

enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, 5 I.L.M. 352, art. 1(4), opened for signature March 7, 1966 (entered into force January 4, 1969) [hereinafter Race Convention]. In other words, so long as the measures are temporary and last only as long as they are needed, such measures will not constitute discrimination.

207. Celina Romany & Joon-Beom Chu, *Affirmative Action in International Human Rights Law: A Critical Perspective of Its Normative Assumptions*, 36 CONN. L. REV. 831, 833 (2004).

208. Race Convention, *supra* note 204, at art. 1(4). The Convention on the Elimination of all Forms of Discrimination Against Women contains a similar provision. See Convention on the Elimination of All Forms of Discrimination Against Women, 1249 U.N.T.S. 13, 19 I.L.M. 33, art. 4, opened for signature March 1, 1980 (entered into force September 3, 1981).

taken have been achieved.²⁰⁹

As ethnic minorities in their respective states, both the Roma and the Palestinians qualify for protection under the Race Convention and other international instruments that contain anti-discrimination provisions that protect various minorities.²¹⁰

Both Bulgaria and Israel have a long way to go before their respective ethnic minorities attain the same level of academic achievement as the states' ethnic majorities; therefore, affirmative action could be an effective solution. A useful way to combat a history of discrimination is to counter it with special measures favoring the oppressed that are aimed at balancing the ethnic inequalities prevalent in the society. In the race for obtaining a quality education, a group of traditionally marginalized people can never catch up to the ethnic majority when the oppressed begin the race fifty yards behind.

With respect to education, the environments that students learn in play a major role in increasing the students' quality of education. Larger and more meaningful percentages of the education budget should be allocated to improving the quality of the schools, facilities, and books of the marginalized children. But it is difficult to make any positive changes without knowing the actual needs of the children. Therefore, the existing state educational departments' leadership should be restructured to include more minorities for a diverse collection of ideas.

Bulgaria and Israel have thus far simply paid lip service to the above ideals surrounding affirmative action. Both states have admitted that minorities within their borders have faced prolonged discrimination in the field of education. Both Bulgaria and Israel have formed various committees and passed legislation in order to combat the problem. However, these measures have, so far, been largely ineffective because the two states have implemented the provisions in a protracted and uninspiring fashion.

In 1992, Bulgaria passed the National Education Act that generally banned any kind of discrimination based on a child's, "race, nationality, sex, ethnic or social origin, religion or social status"²¹¹—a provision that certainly encompasses the gypsies' struggles against discrimination by the state. Four years later, in 1996, the Bulgarian Ministry of Education held round-table discussions addressing how to further assimilate the Roma into the Bulgarian educational scheme.²¹² Non-governmental

209. Race Convention, *supra* note 204, at art. 2.

210. See, e.g., Bertram, *supra* note 117, 33 (arguing that the Roma should be recognized as a minority in Europe).

211. NEA, *supra* note 80, at art. 4.

212. *Country Reports*, *supra* note 75.

organizations, as well as other interested institutions were invited to share their ideas and express any concerns on behalf of either the government or the Roma.²¹³ Even the World Bank has become involved in trying to improve the lot of the Bulgarian Roma.²¹⁴ Yet despite the state's seemingly genuine commitment to its cause, the Bulgarian efforts appear to be mere rhetoric because the Bulgarian government has repeatedly blamed its lack of aggressive enforcement of its legislation on its small budget.²¹⁵ I submit that recent efforts at integrating the Roma into Bulgarian society appear to be based on an attempt to gain membership into the European Union; they are not based on an sincere commitment on behalf of the Bulgarian government to improve the Roma situation and living conditions.

Israel has not fared any better. Despite acknowledgment of the problems facing Palestinian students, the Israeli government has failed to keep any of its promises to rectify the situation. To date, legislation has not been passed specifically prohibiting discrimination by the government,²¹⁶ even though the international treaties to which Israel is a party specifically declare that states, "shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized" in the covenant.²¹⁷

The few Israeli attempts at correcting the situation have also been misguided. Indeed, some of the efforts at correcting the Palestinian discrimination have been applied in a discriminatory manner, but in favor of the Jewish schools.²¹⁸ For example, the Israeli Ministry of Education developed an index of educational disadvantage in order to better allocate the state's resources and give more money to the schools in the most need.²¹⁹ But the Ministry of Education applies two different sets of standards to the Jewish and Palestinian schools.²²⁰ Schools who are found to be in the most need will receive the corresponding funding from the state.²²¹ A problem arises with this particular technique because the Palestinian schools—the schools in most need of funding—are compared to each other instead of the Jewish schools. So some of the

213. *Id.*

214. The World Bank gave the Bulgarian government USD \$14.4 million in order to combat the problem of ethnic discrimination in the state's educational system. World Bank, *Bulgaria: Education Modernization Project*, at <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20027252~menuPK:34471~pagePK:40651~piPK:40653~theSitePK:4607,00.html> (last visited December 10, 2003).

215. See *Country Reports 2002*, *supra* note 92.

216. *Second Class*, *supra* note 15.

217. Child's Convention, *supra* note 22, at art. 4.

218. *Second Class*, *supra* note 15.

219. *Id.*

220. *Id.*

221. *Id.*

“better” Palestinian schools receive no funding, even though they are still largely inferior to the Jewish schools.²²²

VII. Conclusion

The attempts made by Bulgaria and Israel to correct the continuing discrimination against their respective minorities leaves much to be desired. Both states have placed the bulk of the blame for not further addressing the matter on budgetary restraints²²³ because economics is always a surefire way in which to defer responsibility. However, pointing the finger at a limited budget is an inadequate excuse for allowing discrimination to continue. In Bulgaria and Israel, despite supposed budgetary constrictions, the ethnic majorities enjoy many of the educational privileges and facilities that are denied the minorities.²²⁴ However, affirmative action is also compatible with limited budgets. A restructuring of the wealth allotted to predominant groups would suffice in helping to correct the historical injustices heaped upon ethnic minorities. A temporary restructuring of the budgetary allotments for educational improvements of the ethnic minorities is permitted under the Race Convention.²²⁵

Affirmative action is certainly not a solution without its faults.²²⁶ But discrimination in education leaves too many children with too few options in life. Without a quality education, windows of opportunity are lost and hope for a brighter future is quick to fade away. Affirmative action is a means to an end. Not a perfect means in any way, shape or form, but it at least provides a beginning. It is doubtful that all prejudices based on immutable characteristics, such as race and national origin, can be eradicated with affirmative action.²²⁷ However, affirmative action can “help to ensure that traditionally marginalized sectors of society have access to the same opportunities as those in the mainstream.”²²⁸

The right to education is a part of international customary law and is

222. *Id.*

223. See Bulgaria Report, *supra* note 77; and see, *Second Class*, *supra* note 15.

224. See *Country Reports 2002*, *supra* note 92; see also *Second Class*, *supra* note 15.

225. See Race Convention, *supra* note 204, at art. 1(4).

226. See generally, Erwin Chemerinsky, *Making Sense of the Affirmative Action Debate*, 22 OHIO N.U. L. REV. 1159 (1996) (discussing the pros and cons of affirmative action, with an emphasis on affirmative action in the United States). For instance, critics point out that society should move toward a color blind society, that affirmative action stigmatizes minorities, and that affirmative action exacerbates racial tensions). *Id.*

227. See Marjorie Cohn, *Affirmative Action and the Equality Principle in Human Rights Treaties: United States' Violations of Its International Obligations*, 43 VA. J. INT'L L. 249, 271 (2002).

228. *Id.*

interconnected with several other human rights. Both Bulgaria and Israel, as parties to a number of international treaties, profess to be advocates of human rights. It is time for these two states to fully adhere to their obligations under international law and tackle its oppressive practices. In an age of mounting discrimination and human rights abuses, paying lip service to the principles of international humanitarian law is simply not enough. After all, actions speak louder than words.