

Principles 1, 4 to 7: Scope, Application, and Interpretation¹

International human rights law confers on everyone the right to be provided with free primary education, and access to secondary and higher education. The state bears the obligation to provide such education. However, the increasing involvement of various private actors in the provision, management, and funding of education, has affected the enjoyment of this right and has raised pertinent issues such as social justice, availability of free education and equal access to quality education. The commodification of education has accountability and human rights implications. These realities form the backdrop to the Abidjan Principles.

In February 2019, education experts, researchers, academic scholars, and civil society organizations from around the globe converged in Abidjan, Ivory Coast for the final phase of deliberations on a set of guidelines on states' obligations to provide public education to regulate private education. This was the culmination of a four-year consultative process, which resulted in the adoption of 97 Guiding Principles on the Human Rights Obligations of States to Provide Public Education and to Regulate Private Involvement in Education, which are known as 'the Abidjan Principles'.

The motivation for drafting these guiding principles arose in the context of the growing involvement of various private actors in the provision, management, and funding of education, which in turn raises the imperative for states to act on their obligations to provide and fund public education and to regulate the actions of private education service providers. It was noted that there was a paucity of attention being paid to this area, including by treaty bodies.² Although private actors in education are a diverse sector, with varied motivations, a growing proportion of them are driven by commercial interest, with little recourse to accountability or human rights implications. The dominance of private actors in the provision of public goods such as education raises social justice issues, including barriers to the availability of free education, and equal access to quality education. The Abidjan Principles were developed to reaffirm, consolidate and interpret the existing state obligations under international law to guarantee the right to education, to delineate state obligations to provide public education and their obligations to regulate the involvement of private actors in education. They do not seek to establish new legal obligations but rather to provide 'a contemporary interpretation' of existing standards.³

¹ Professor Ann Skelton is the UNESCO Chair in Education Law in Africa, at the Faculty of Law, University of Pretoria, South Africa, as well as a member of the UN Committee on the Rights of the Child. Dr. Perekeme Mutu is a post-doctoral research fellow with the UNESCO Chair in Education Law in Africa, in the Department of Private Law, University of Pretoria, South Africa.

² Aoife Nolan 'Privatization and economic and social rights' (2018) 40 Human Rights Quarterly 815.

³ Magdalena Sepúlveda Carmona, 'Human Rights Guiding Principles: A Forward Looking Retrospective' in Frank Adamson, Sylvain Aubry, Mireille de Koning and Delphine Dorsi (eds) *Realizing the Abidjan Principles on the Right to Education: Human Rights, Public Education and the Role of Private Actors in Education* (Edward Elgar 2021) 27.

This chapter provides a commentary on Guiding Principle 1, and Guiding Principles 4 to 7. These Principles are overarching general provisions, and are relevant to an understanding of the full set of Principles.

The analysis of Guiding Principle 1 examines what is meant by the claim that the Guiding Principles 'outline' existing current human rights law, and explores what is meant by 'human rights law and standards' and what is included in 'education'.

This is followed by an analysis of Guiding Principles 4 to 7, which indicate how the Principles should be applied and interpreted. Guiding Principle 4 explains that the Guiding Principles are intended to be applied and interpreted within the context of the primary obligations of states to respect, protect and fulfil all human rights – understood within a universal and indivisible rights conceptualization. Furthermore, they are applicable within the geographical boundaries of states, but some aspects are also applicable extraterritorially. The importance of the right to education within the broader human rights context is flagged in Guiding Principle 5, with particular attention to child labour, migration and armed conflict. Finally, according to Guiding Principles 6 and 7 the Abidjan Principles must be interpreted by all role players in a manner that does not undermine rights, and does not result in a less favourable treatment to rights holders than would be available under domestic or international law.

In order to illustrate aspects of the analysis, the chapter draws on examples derived from binding international treaties, as well as soft-law documents such as general comments, concluding observations and decisions from communications procedures of treaty bodies.

Principle 1: Scope

These Guiding Principles outline human rights law and standards applicable in the context of the involvement of private actors in education

Guiding Principle 1 indicates that the Principles set out existing human rights law and standards with regard to education, and clarifies that the focus is on the context where private actors are engaged in the delivery of education. Guiding Principle 1 can be broken into two parts for the purpose of analysis. First, what is included in 'human rights law and standards'; and second, what is encompassed by the word 'education'? The aspect of what is included in the term 'involvement of private actors' is dealt with in a separate chapter, concerning Guiding Principles 2 and 3.

'Human rights law and standards' includes hard and soft international law, ranging from binding treaty provisions, soft law issued by international and regional treaty bodies,

such as General Comments, through to instruments developed by non-state actors, which have gained recognition in international law.⁴ Formal international law, based on Article 38 of the Statute of the International Court of Justice, confines hard law, for the purposes of the court deciding ‘international law’ to that which is state made and binding, and its features have been defined as obligation (states or other actors are bound by the rule), precision (the rules unambiguously define the required conduct) and delegation (third parties have been granted authority to implement, interpret and apply the rules).⁵ Soft law is more difficult to define. Olsson has identified ‘Treaty soft law’, ‘Non-binding soft law’ and ‘Non-state soft law’.⁶ However, several authors have pointed out that the contours of hard law and soft law are blurred and are constantly developing.⁷ Unlike hard law, which is developed by states, soft law may be developed either by states – for example, UN General Assembly resolutions, or by experts such as treaty bodies – as in the case of General Comments. The preamble to the Abidjan Principles describes the document as ‘an authoritative statement that consolidates the developing legal framework and reaffirms the existing obligations of states in guaranteeing the right to education as prescribed under human rights law’. The words ‘consolidates’ and ‘affirms’ clarify that the Principles do not aim to establish any new standards, but rather to draw together what is already available from a wealth of sources. Magdalena Sepúlveda Carmona points out that the drafting of Guiding Principles present dilemmas for drafters in striking the correct balance between capturing emerging international obligations in a progressive manner on the one hand, while on the other hand, if they are over-cautious they run the risk of understating the rights and diluting obligations. Leaning too far either way may result in undermining the credibility of the document.⁸ The author argues that various drafting strategies and processes can be employed to avoid this, and she identifies the following ‘determinants of legitimacy’ – independence and diversity of the legal drafters and signatories, rigour, persuasiveness and practicality of the principles themselves, and the validation process. She concludes that the Abidjan Principles meet these determinants.⁹ Sepúlveda Carmona’s theorized analysis is important, because the legitimacy of the Abidjan Principles have already been criticized by a private sector role player, the Global Schools Forum, which commissioned a legal opinion on the Principles. The legal opinion argues that the Abidjan Principles are not an accurate statement of international law and that they are biased against private provision of education.¹⁰ This divergence rests in part on how one defines ‘human rights law and standards’, and as

⁴ Examples include Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, adopted on 26 January 1991, Maastricht Principles on Extraterritorial obligations of States in the Area of Economic, Social and Cultural Rights, adopted on 28 September 2011.

⁵ Kenneth Abbot, and others, ‘The Concept of Legalization’ (2000) 54 *International Organisation* 401.

⁶ Ilhami Alkan Olsson, ‘Four Competing Approaches to International Soft Law’ (2013) 58 *Scandinavian Studies in Law* 177.

⁷ Upendra Baxi ‘The Softening of Hard Law and the Hardening of Soft Law: An Extended Synopsis’ in Daniel Bradlow and David Hunter (eds) *Advocating Social Change through International Law: Exploring the Choice Between Hard and Soft International Law* (Brill-Nijhoff 2020).

⁸ Sepúlveda Carmona (n 3) 41.

⁹ *ibid* 48.

¹⁰ Global Schools Forum, ‘The Abidjan Principles are not an accurate statement of the requirements of international law’ (2020) <<https://www.globalschoolsforum.org/page/AbidjanPrinciples-internationallaw>> accessed 15 January 2023. The site is the links to the legal opinion by Ben Emmerson QC).

explained above, the drafters of the Abidjan Principles adopted a broad interpretation which includes soft and hard international law, and on some aspects relies on emerging standards. The entire human rights legal system is in constant development, which is all the more reason why gathering updated ideas into a set of Guiding Principles is a useful exercise.

It is clear that international law recognizes that the state bears the primary responsibility of providing education.¹¹ The liberty of parents and guardians, individuals and private entities to establish and direct educational institutions is provided for in Article 13(3) and (4) of the International Covenant on Economic, Social and Cultural Rights (ICESCR). However, that liberty is subject to compliance with minimum standards set by the state to which all private educational institutions must comply.¹² Failure by states to ensure that private educational institutions comply with these minimum educational standards as stipulated in Articles 13(3) and (4) will constitute a violation of the right to education.¹³ The Convention on the Rights of the Child (CRC) and the UNESCO Convention against Discrimination in Education (UNESCO Convention) contain similar provisions. Article 29(2) of the CRC provides that no part of this article should be interpreted as interfering with the liberty of individuals and private entities to establish and direct educational institutions,¹⁴ and that such education must comply with the minimum standards prescribed by the state.¹⁵ Article 2(c) of the UNESCO Convention focuses more on the intention of the education provider, namely that the object of the establishment or maintenance of private educational institutions should not be to secure the exclusion of any group, but to 'provide educational facilities in addition to those provided by the public authorities'.¹⁶

Although international human rights law allows space for private actors this does not necessarily mean that international human rights law is neutral on how the relevant rights should be delivered. Article 8 of the Committee on Economic, Social and Cultural Rights (CESCR), the body that monitors the implementation of ICESCR General Comment No 3¹⁷ states that the Covenant is neutral as to the form of government required to implement economic, social and cultural rights. It is not based on the need for or desirability of a capitalist or socialist system or any particular approach or system. Nolan states that 'privatization is neither inevitably in violation of, or in compliance with,

¹¹ UN Committee on Economic, Social and Cultural Rights (CESCR), 'General Comment No 3: The Nature of States Parties' Obligations (1990) UN Doc E/1991/23; CESCR, 'General Comment 13: The Right to education' (1999) UN Doc E/C.12/1999/10 [43]. Jaqueline Mowbray, 'Is There a Right to Public Education?' in Frank Adamson, Sylvain Aubry Mireille de Koning and Delphine Dorsi (eds) *Realizing the Abidjan Principles on the right to education: Human rights, public education and the role of private actors in education* (Edward Elgar 2021) 56.

¹² Article 29(2) of the Convention on the Rights of the Child (adopted 20 November 1989, entry into force 2 September 1990) 1577 UNTS 3.

¹³ *ibid*

¹⁴ *ibid*

¹⁵ *ibid*.

¹⁶ Article 2(c) of the Convention against Discrimination in Education (adopted 14 December 1960, entry into force 22 May 1962).

¹⁷ Article 8 of the International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entry into force 3 January 1976) 993 UNTS 3.

the international ESR [economic and social rights] framework'.¹⁸ However, Nowak argues that the Covenant is not neutral on the issue of privatization, as it requires a certain level of public infrastructure in order to allow everyone to enjoy their basic rights, and that states create the conditions that empower people to emerge from poverty.¹⁹ The CRC Committee, in its General Comment No 5,²⁰ emphasized that the enabling of the private sector to provide services 'does not in any way lessen the state's obligation to ensure for all children within its jurisdiction the full recognition and realization of all rights in the Convention'.²¹

The CRC Committee went on to stress that it is also the state's obligation to ensure that non-state actors operate in accordance with the CRC's provisions. Essentially, the Abidjan Principles follow a neutral approach in the sense that they fully recognize the liberty of parents and others to establish and maintain private institutions, but they are firmly framed within an integrated human rights approach which places primary responsibility for the right to education on states, and which is critical of actions or inactions that threaten the right to education for all children on a non-discriminatory basis.

The freedom to establish and maintain private educational institutions in the context of international law is granted on the basis of certain underlying assumptions. It is anchored in the idea of freedom of religion and culture, and grants the liberty to choose education that conforms to their religious and cultural belief. It also serves as a protection mechanism against an authoritarian state or a state that neglects its obligation to provide access to quality education that is acceptable.²² Such liberty has created the space for non-profit education providers; many of which have good intentions and are in fact providing education for poor and marginalized communities where the state is simply failing to provide public education.²³ Private sector involvement often fills an underserved demand for education where states are unwilling or unable to meet the requirements of their commitment. This aspect of the discussion is dealt with in detail in a separate chapter in this Commentary.

UN Special Rapporteurs on the right to education have observed that while the freedom to allow parents and private institutions to establish and maintain private education is based on noble intentions as shown above, it has also created a situation where commercial entities have identified a gap in what they see as the market and have taken advantage of it by commodifying learning and taking quality education out of the reach of many. The impact of the commercialization of learning on the enjoyment of the right to education has raised concerns for human rights mechanisms and

¹⁸ Nolan (n 2) 858.

¹⁹ Manfred Nowak 'Human rights or Global Capitalism: The limits of Privatization' (PUP 2017) 3 and 49.

²⁰ CRC Committee, 'General Comment No 5 on General Measures of Implementation of the Convention on the Rights of the Child' (2003) UN Doc CRC/GC/2003/5.

²¹ *ibid* [44].

²² Ann Skelton, 'Abidjan principles on the right to education' (21 March 2019, *Norrag Blog*) <<https://www.norrag.org/abidjan-principles-on-the-right-to-education-by-ann-skelton/>> accessed 16 September 2022.

²³ *ibid*.

bodies.²⁴ The former UN Special Rapporteur on the right to education, Kishore Singh, stressed in his report to the UN General Assembly in 2014 that the introduction of private, for-profit educational systems has had several implications.²⁵ This includes widening disparities in access to education and the aggravation of inequalities through the structural education of certain groups.²⁶ The former UN Special Rapporteur on the right to education, Boly Barry, viewed regulation of private service providers in education as essential. She presented the Abidjan Principles to the UN Human Rights Council in her 2019 Report, describing them as ‘a landmark consolidation’ of the relevant standards and jurisprudence.²⁷

The CESCR also expressed its view on the implications of the increasing role played by private actors in the provision of education.²⁸ In its concluding observations for Chile, Kenya, Pakistan, UK, Morocco and Uganda among other countries, the CESCR raised concerns about the growing involvement of private actors in education and the resulting effect of segregation or discrimination.²⁹ It recommended that states carry out the necessary supervision for the effective implementation of the right to education. This Guiding Principle reiterates the fact that an education system wholly provided by private operators would be unable to guarantee education consistent with the requirements of international human rights law. Therefore, it remains the state’s obligation to guarantee and monitor the realisation of right to education where private actors are involved in the provision of education.

These perspectives are not only shared by the UN Special Rapporteurs and UN Treaty Bodies, they have also been expressed by states parties through resolutions, and while resolutions are soft law instruments, they do indicate the emerging standards as developed by states parties themselves.

For example, in 2016 the UN Human Rights Council urged states to put in place a regulatory framework for education providers, including private role players, which should be guided by international human rights obligations and should address ‘any negative impacts of the commercialization of education’.³⁰ In 2019 the UN Human Rights Council noted the Abidjan Principles, and urged states to give full effect to the right to education including though development adequate standards for the involvement of private actors and institutions in education, and to support compliance with such standards. The Council also asked states to consider setting an accountability framework aligned with human rights, applicable to both public and

²⁴ The Global Initiative for Economic, Social and Cultural Rights, ‘Human rights bodies statements on private education’ (2017) <<https://www.gi-escr.org/concluding-observations-private-education>> accessed 13 September 2022.

²⁵ UN Special Rapporteur on the right to education, ‘Privatization and the Right to Education’ (2015) A/69/402.

²⁶ *ibid.*

²⁷ UN Special Rapporteur on the right to education ‘the implementation of the right to education and Sustainable Development Goal 4 in the context of the growth of private actors in education’ (2019) A/HRC/41/37 Para 3.

²⁸ CESCR, ‘Concluding Observations: Chile’ (2015) UN Doc E/C.12/CHL/CO/4.

²⁹ *ibid.*

³⁰ UN Human Rights Council Resolution, ‘The Right to Education’ (2016) UN Doc A/HRC/32/L.33, 2(e).

private providers, and to assess the impact of private educational institutions to allow for iteration of the standards.³¹ Later in the same year, during a UN Human Rights Council social forum on the promotion and protection of the rights of children and youth through education, the UN High Commissioner for Human Rights at that time, Michelle Bachelet, made a statement in which she underscored that the principle of public education must be upheld, and she welcomed the Abidjan Principles.³²

In similar vein, the African Commission on Human and Peoples' Rights, in its Resolution 420 of 2019, reaffirmed that 'States Parties are the duty bearers for the protection and fulfilment of economic, social and cultural rights, in particular the right to health and education without discrimination, for which quality public services are essential'.³³ The resolution recalls the state parties' concern that the privatization of essential services is 'a constraint to the realization of economic, social and cultural rights', and therefore has called on state parties to ensure that privatisation in education does not exacerbate discrimination against children's access to quality education.³⁴ The resolution does also note the positive impact that private actors can have, 'in their contribution' to the realization of these rights. The preamble expressly considers the relevant norms and standards, including the Abidjan Principles, and the UN Human Rights Council resolutions on education.

Some recognition of the Abidjan Principles in the Inter-American system has also been achieved. The Special Rapporteurship on Economic, Social Cultural and Environmental Rights (REDESCA) of the Inter-American Commission on Human Rights (IACHR) recognised the Abidjan Principles as a "valuable specialized source of interpretation" of state obligation to the right to education within the framework of the Inter-American system.³⁵ The Abidjan Principles also received recognition from the UN Independent Expert on the Effect of Foreign Debts, Juan Bablo Bohoslavsky.³⁶ He observed that the consequence of over indebtedness of states is their inability to provide social services, such as education. Therefore, state look to the private sector to provide education services. Bohoslavsky, added that the Abidjan Principles as a source of international law will provide the needed guidance on access to public education.³⁷ These endorsements all add to the legitimacy of the Abidjan Principles,

³¹ UN Human Rights Council Resolution: 'The right to Education: Follow-up to Human Rights Council Resolution 8/4' (2019) UN Doc A/HRC/41/L.26.

³² *ibid.*

³³ African Commission on Human and Peoples' Rights '420 Resolution on States' Obligation to Regulate Private Actors Involved in the Provision of Health and Education Services' (2019) UN Doc ACHPR/Res 420 (LXIV).

³⁴ *ibid.*

³⁵ Right to Education Initiative 'Abidjan Principles Recognised by the Special Rapporteur on Economic, Social, Cultural and Environmental Rights of the Organisation of American States' (2020) <<https://www.right-to-education.org/news/abidjan-principles-recognised-special-rapporteur-economic-social-cultural-and-environmental>> accessed 16th March 2023.

³⁶ *ibid.*

³⁷ Right to Education Initiative 'The Abidjan Principles Receive Recognition by UN Independent Expert on Foreign Debt' (2020) < <https://www.right-to-education.org/news/abidjan-principles-receive-recognition-un-independent-expert-foreign-debt>> accessed 16th March 2023.

and to the acceptance of the claim that they make to be a compilation of human rights law and standards on the right to education and the need for regulation.

With regard to the question of what levels of education are included within the scope of the Abidjan Principles, the intention is that it applies to pre-primary, primary, secondary; technical, and vocational education and training; adult education; and formal and non-formal education. Article 26(1) of the Universal Declaration of Human Rights (UDHR) provides that 'everyone has the right to education'.³⁸ The provision went further to place an obligation on the state to make education free and compulsory, at least in the elementary and fundamental stages. It also requires states to make technical and professional education generally available and higher education to be made equally accessible to all based on merit. This provision is replicated in other international human rights instruments. Article 13(2) of the ICESCR requires states parties to recognise the right to education of learners within their jurisdiction, to achieve the full realization of:

- (a) primary education that is made compulsory and available free to all;
- (b) secondary education in its different forms, including technical and vocational secondary education, that will be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education; and
- (c) higher education that will be made equally accessible to all, based on capacity, by every appropriate means, and in particular by the progressive introduction of free education.³⁹

Article 28 (1) of the CRC requires states parties to recognize the right of the child to education and to achieve this right progressively, based on equal opportunity. They shall, in particular:

- (a) make primary education compulsory and available free to all;
- (b) encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
- (c) Make higher education accessible to all based on capacity by every appropriate means;
- (d) make educational and vocational information and guidance available and accessible to all children;
- (e) take measures to encourage regular attendance at schools and the reduction of drop-out rates.⁴⁰

³⁸ Article 26(1) of the Universal Declaration of Human Rights (1948) 217 A(III).

³⁹ Article 13(2) of the International Covenant on Economic, Social and Cultural Rights.

⁴⁰ Article 28(1) of the Convention on the Right of the Child.

Pre-primary education is not expressly mentioned in any of the binding UN human rights instruments, ICESCR, CRC and the Convention on the Rights of Persons with Disabilities (CRPD) but since the adoption of these treaties, international awareness has grown that early childhood education is fundamentally important.⁴¹ The broad acceptance of this by states is evidenced by the adoption of Sustainable Development Goal 4.2 which commits states to ensure that all children have access to quality early childhood development, care and pre-primary education to prepare them for primary education.⁴² A study by Fredman and others of the Concluding Observations of the treaty bodies for the ICESCR, the CRC and the CRPD, indicates that the Treaty Bodies interpret the right to education as including pre-primary education.⁴³ The authors of the study point out that this may, in part, be located in the inclusion in these treaties of the requirement that the right to education should be ‘directed towards the full development of the child’s personality, talents and abilities’. The Abidjan Principles expressly include all phases of education, and paragraph 9 observes that the right to education ‘applies from birth’. The right to adaptable lifelong education includes pre-primary education.

Principle 4: Application and Interpretation

These Guiding Principles are intended to be applied and interpreted in the context of States’ obligations to respect, protect and fulfil all human rights, including civil, cultural, economic, political, and social rights, both within their territories and extraterritorially.

This Guiding Principle dealing with ‘application and interpretation’ focuses on the primary obligation of states to ‘respect’, protect and fulfil’ all human rights – viewed within a vision of human rights as universal, interdependent and interrelated.⁴⁴ The final clause of the Principle with the geographical reach of those obligations upon states, and proceeds from the assumption that states bear responsibility towards persons within their territory, but that they also bear some obligations beyond those geographical boundaries. Each aspect will be dealt with in turn.

The Vienna Declaration and Programme of Action stated clearly that ‘[h]uman rights and fundamental freedoms are the birth right of all human beings; their protection and promotion is the first responsibility of governments’.⁴⁵ The acceptance by the international community of the indivisibility and interdependence of rights was an

⁴¹ Pia Britto and others, ‘Nurturing Care: Promoting Early Childhood Development’ (2017) 389 *Lancet*, British Edition, 91–102.

⁴² UN General Assembly, ‘Transforming Our World: the 2030 Agenda for Sustainable Development’ (2015) UN Doc A/RES/70/1, Goal 4.

⁴³ Sandra Fredman and others, ‘Recognizing Early Childhood Education as a Human Right in International Law’ (2022) 22(4) *Human Rights Law Review* 1.

⁴⁴ This phrase appears in section 5 the Vienna Declaration and Programme of Action, adopted unanimously by 171 states at the World Conference on Human Rights, held in Vienna in 1993.

⁴⁵ UN General Assembly, ‘Vienna Declaration and Programme of Action’ (1993) UN Doc A/CONF.157/23.

important step in ensuring full acceptance that social, economic and cultural rights are not a lesser category of rights, and that they are justiciable. Nowak views the Vienna Conference in 1993 and the ensuing Declaration to be a turning point away from an earlier era in which many states were resistant to the idea that economic, social and cultural rights created binding effects subject to judicial review. He explains that, after the 1993 World Conference, human rights theory developed three types of state obligations which were originally applicable to economic, social and cultural rights, but are now applied to all human rights. He refers, of course to what Nolan calls 'the tripartite typology' of respect, protect, and fulfill.⁴⁶ This typology is clearly stated in the Maastricht Guidelines on Violations of Economic, Social, and Cultural Rights, which observes that state failure to perform any one of these three obligations amounts to a violation of such right.⁴⁷ CESCR in General Comment No 13 affirms that ICESCR imposes these three forms of obligation on the state.⁴⁸ In the context of the right to education, states are obligated to respect, protect and fulfill the right to education.⁴⁹ The obligation to respect requires the state to avoid measures that will impede the enjoyment of the right to education. The obligation to protect requires states parties to take measures that prevent third parties from interfering with the enjoyment of the right to education. This includes ensuring that private education providers do not impede the enjoyment of the right to education. The obligation to fulfill requires states parties to take positive measures to enable individuals to enjoy the right to education. This includes provision of classrooms learning materials, teachers and other elements needed to enjoy the right to education.

The obligation of the state to protect the right to education and the obligation to regulate the involvement of private actors in the provision of education has come under scrutiny in a number of countries. For example, the CRC Committee has indicated strong links between privatization of education and inequality in its Concluding Observations to Morocco, where concern was expressed about the rapid expansion of private education, especially at the primary level, without the necessary supervision as required by international human rights law, resulting in the perpetuation of inequality in the enjoyment of the right to education.⁵⁰ The CESR has also sought information from Morocco about the development of private education and the impact of privatization on the education system.⁵¹ In October 2014, the CRC Committee asked Ghana to provide detailed information on the rationale behind the increase in fees for private education, which limits access to quality education for children who cannot pay private school fees.⁵²

⁴⁶ Nolan (n 2) 832.

⁴⁷ The Maastricht Guidelines on Extraterritorial obligations of States in the Area of Economic, Social and Cultural Rights, adopted on 28 of September 2011 [6].

⁴⁸ CESCR, 'General Comment 13' (n 11) [46]-[47].

⁴⁹ *ibid.*

⁵⁰ CRC Committee, 'Concluding Observations: Morocco' (2014) UN Doc CRC/ C/MAR/CO/3-4 [6].

⁵¹ CESCR, 'Concluding observations of the Committee on Economic, Social and Cultural Rights: Morocco' UN Doc E/C.12/1994/5.

⁵² CRC Committee, d, 'List of Issues: Ghana' (2014) UN Doc CRC/C/GHA/Q/3-5 [14].

The obligation of states to protect, promote, fulfill the right to education and to regulate the provision of education by private actors is not limited to a state's geographical territory, but also extends to its extraterritoriality. The Maastricht Principles on Extraterritorial Obligations of States in the area of Economic Social and Cultural Rights⁵³ were adopted to fill the protection gap created by the fact that the standard approach of human rights obligations being limited to state's geographical territory provides insufficient rights protection⁵⁴ in a world in which the scale of cross-border activity, including international trade, foreign investments, international diplomacy and aid has hugely increased in the past 50 years.⁵⁵ The Maastricht Principles on ETOs provides that the state has obligations to respect, protect and fulfil economic, social, and cultural rights in any of the following situations:

- (a) Situations over which it exercises authority or effective control, whether or not such control is exercised in accordance with international law;
- (b) Situations over which states acts or omissions bring about foreseeable effects on the enjoyment of economic, social, and cultural rights, whether within or outside its territory; and
- (c) Situations in which the state, acting separately or jointly, whether through its executive, legislative or judicial branches, is in a position to exercise decisive influence or to take measures to release economic, social, and cultural rights extraterritorially, in accordance with international law.⁵⁶

Nolan⁵⁷ has observed that UN Treaty Bodies have not tackled privatization head on. She points out, however, the CRC Committee's General Comment No 16 on State Obligations Regarding the Business Sector on Children's Rights, in which the CRC Committee emphasized the fact that privatization of services for children, including education, is increasing. The CRC Committee stressed that states retain the obligation to respect, protect and fulfil children's rights, even in the context of privatized services. The CRC Committee noted that business enterprises increasingly operate on a global scale and in a complex environment, and stressed that states have the obligation to ensure children's rights within their jurisdiction, which is not limited to their territory.⁵⁸

⁵³ The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, adopted on 28 September 2011.

⁵⁴ Sepúlveda Carmona (n 3) 30. See further Olivier De Schutter and others, 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic Social and Cultural Rights' (2012) 34 Human Rights Quarterly 1084–1169.

⁵⁵ Daniel D Bradlow and David B Hunter, 'Introduction: Exploring the Relationship Between Hard and Soft International Law and Social Change' in Daniel Bradlow and David Hunter (eds) *Advocating Social Change through International Law: Exploring the Choice Between Hard and Soft International Law* (Brill-Nijhoff 2020) 1.

⁵⁶ The Maastricht Principles on Extraterritorial obligations of States in the Area of Economic, Social and Cultural Rights, adopted on 28 September 2011.

⁵⁷ Nolan (n 2).

⁵⁸ Other cases in which the CRC Committee has developed its jurisprudence on extra-territorial jurisdiction are *LH v France* (2020) UN Doc CRC/C/85/D/79/2019-CRC/C/85/D/109/2019 dealing with children of foreign fighters in camps in Syria; and *Sacchi and Others v Germany* (2021) UN Doc CRC/C/88/D/107/2019.

The issue of states' extraterritorial obligations in the context of privatization of education came to the fore in the review of the UK's fifth periodic report to the CRC Committee. The CRC Committee raised concern about the UK funding of low-fee, private and informal schools run by for-profit business enterprises in recipient states.⁵⁹ The CRC Committee observed that the rapid increase in the number of such schools may affect the standard of education, leading to less investment in free and quality public schools, and deepening inequalities in the recipient country, as children who cannot afford to pay school fees are left behind. The CRC Committee recommended that the UK should provide support through international cooperation to the recipient states to guarantee the right to free and compulsory primary education for all, by prioritizing free and quality education in public schools. The Committee urged the UK to stop funding for-profit private schools.

Principle 5: Complemented by Other Human Rights

The fulfilment of States' obligations with respect to the right to education must be complemented by their other human rights obligations, as well other applicable international legal obligations, including in international humanitarian law, international refugee law, and international criminal law.

Guiding Principle 5 continues with the themes of indivisibility and interdependence of all human rights.⁶⁰ Guiding Principle 5 reflects the view that the realization of the right to education must be achieved within the broader context of the realization of other human rights. It is dependent on states to eradicate all barriers that impede the enjoyment and realization of the right to education.

A general example of this inter-dependence is the link between child labour and children's right to education. Article 1 of the International Labour Organisation Minimum Age Convention, obliges states to ensure the effective abolition of child labour.⁶¹ One of the aims of this Convention is to abolish child labour that will interfere with the compulsory education or for which they are too young. It is self-evident that efforts to achieve education for all children in a particular state will be ineffective unless similar efforts are made to eradicate child labour for children who are below the age of compulsory schooling.

The issue of migration also affects the access to education of children. Statistics regarding child migration reveal that over 65 million children around the world were

⁵⁹ CRC Committee, 'Concluding Observations: UK (2016) UN Doc CRC/C/GBR/CO/5.

⁶⁰ The United Nations Vienna Declaration and Programme of Action, Adopted by the World Conference on Human Rights in Vienna on 25 of June 1993.

⁶¹ International Labour Organization, Minimum Age Convention C138.

forcefully displaced in 2015.⁶² The implication for those affected are often long-lasting and impact different aspects of life, including education.⁶³ To ameliorate the impact of the displacement on the right to education of refugees, Article 22 of the Convention Relating to the Status of Refugees, urges state parties to accord refugee's access to elementary school.⁶⁴ The CRC Committee, in a Joint General Comment issued with the Committee on the Rights of Migrant Workers and their Families, states as follows:

*All children in the context of international migration, irrespective of status, shall have full access to all levels and all aspects of education, including early childhood education and vocational training, on the basis of equality with nationals of the country where those children are living.*⁶⁵

The CRC Committee, dealing with an individual communication under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, has found that migrant children, regardless of their parents' migration status, have a right to education, and ordered Spain to enrol the child immediately, and to ensure non-repetition through systemic remedial measures.⁶⁶ A particularly relevant aspect of the case was that the child, AEA, was attending an unregulated private education centre called the Residence for Muslim Moroccan Students in Melilla. It was argued that AEA would therefore not be able to obtain a proper diploma – and that this would place him in a situation of social exclusion. Although the non-regulation of the private education centre was not the focus of the case, it does indicate that the Spanish government was not properly regulating private education in the enclave of Melilla, contrary to the requirements of international law. It would appear that the government was content to allow such centres to offer a sub-standard education, while impeding the right to education for migrant children in Spanish state schools. A better awareness of the regulatory requirements – as provided for in international law and set out in the Abidjan principles, would prevent this kind of neglect.

Insight into the emerging international law standards on education and children in armed conflict can be obtained by examining the review, in March 2019, by the CRC Committee of the Syrian Arab Republic. The Committee expressed extreme concern about 'the overwhelming negative impact of armed conflict on the right to education'.⁶⁷ It noted in particular, the shortage of teachers and the extensive damage that had been done to schools. Moreover, the CRC Committee was particularly concerned about the number of children and personnel killed and injured as a result of attacks on schools. A further focus of the Committee was on the lack of accreditation for children enrolled

⁶² United Nations High Commissioner for Refugees 'Global Trends Forced Displacement in 2015' <<https://www.unhcr.org/576408cd7.pdf>> accessed 16 January 2023.

⁶³ Sonja Fransen, Carlos Vargas-Silva and Melissa Siegel, 'The Impact of Refugee Experiences on Education: Evidence from Burundi' (2018) 8(6) IZA Journal of Development and Migration 2.

⁶⁴ Article 22 of the Convention Relating to the Status of Refugees 1958.

⁶⁵ CRC Committee, and UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, 'Joint General Comment No 4 s and N. 23: Human Rights of Children in the Context of International Migration in Countries of Origin, Transit, Destination and Return' (2017) UN Doc CMW/C/GC/4-CRC/C/GC/23 [59].

⁶⁷ CRC Committee, 'Concluding Observations: Syrian Arab Republic' (2019) UN Doc CRC/C/SYR/CO [43].

in schools in areas controlled by non-state armed groups, which prevented them from writing exams. Most dire is the situation in the northeast part of Syria where Kurdish-led authorities established a separate curriculum, preventing 800,000 children from continuing their education. The recommendations called for immediate cessation of attacks on schools and called on the state party to 'take prompt measures to ensure that all parties to the conflict respect schools as protected objects',⁶⁸ including through enacting legislation and military directives prohibiting and sanctioning attacks on schools and their use for military purposes. The recommendations also called for the prioritization of teacher training and recruitment, and for the rehabilitation of schools to be a key aspect of reconstruction effort. Very relevant for the current discussion, the CRC Committee proposed that the state should: include temporary and transitional learning opportunities to children who have missed years of schooling; support children living in areas under the control of non-state armed groups in gaining access to national examinations and receiving their education accreditation. In order to resolve the huge problem of children living in the Kurdish controlled northeast part of the country, the CRC Committee proposed that dialogue and other peace building measures be taken to enable children to have access to the national curriculum and to return to schools. Although this example is very different from the usual challenges faced by states with regard to private education, there are similar issues such as the importance of regulation and accreditation.

Principles 6 and 7: Principle Do Not Limit International Human Rights Law and Standards

These Guiding Principles should not be interpreted or applied in a manner that would serve to limit, restrict, or otherwise undermine the rights recognised under international human rights law and standards, or any domestic law rights that are consistent with international human rights law.

Nothing in these Guiding Principles should be interpreted as limiting, restricting, or undermining any of the respective obligations or responsibilities that States, international organisations, and private actors, such as transnational corporations and other business enterprises, may have under human rights law and standards, whether these are contained in international (including regional), constitutional, or other national laws; or standards which are in conformity with international human rights law.

⁶⁸ *ibid* [44].

Guiding Principles 6 and 7 are very similar; both relating to the fact that these Guiding Principles must not be used to interpret rights and obligations more narrowly than international or domestic law. For example, if a state provides free tertiary education, these Guiding Principles cannot be used by the state to justify backtracking on that. The phrasing of both Guiding Principle 6 and 7 draws on several international human rights instruments and reinforces the interpretative elements of these instruments. For example, Article 5 (1) of the ICESCR stipulates that nothing in the present Covenant may be interpreted as suggesting to states or groups that they may engage or act in a manner that destroys any of the rights and freedom recognised in this covenant. It also means that the limitations provided for in the ICESCR remain the applicable standard for limitation – further limitations would not be permissible.

A similar provision is provided in the CRC. Article 41 provides that nothing in the Convention shall affect any provisions which are more conducive to the realization of the rights of the child and which may contain either in the laws of a state party or international law in force for that state. The interpretative clause of Guiding Principles 6 also draws on the provisions of the Maastricht Principles on the Extraterritorial Obligations of the state in the area of Economic, Social, and Cultural Rights. Principle 43 of the Maastricht Principles provides that nothing in these principles should be read as ‘limiting or undermining any legal obligation or responsibilities that state, international organisations and non-state actors, such as transnational corporations and other business enterprises’, may be subject to under international human rights law.’⁶⁹ The main purpose of these paragraphs is to ensure that no aspect of the Principles is interpreted by any role player in a manner that prejudices provisions of domestic law or any other legal instruments (whether already in force or still to be enforced), under which more favourable treatment would be obtained.

⁶⁹ Principle 43 of the Maastricht Guidelines on the Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights (2013).