

COMMENTARY TO GUIDING PRINCIPLES 29-33

While the previous Guiding Principles reiterate state obligations in relation to the right to education generally, Guiding Principles 29-46 affirm the obligations of states in relation to public education specifically.

Principle 29

29. States must respect, protect, and fulfil the right to free, quality, public education. They must provide free, public education of the highest attainable quality to everyone within their jurisdiction as effectively and expeditiously as possible, to the maximum of their available resources. The involvement of private educational institutions does not in any way impair or nullify this obligation.

Commentary

Guiding Principle 29 affirms that states have a duty to provide – and individuals have a corresponding right to receive – public education. As Guiding Principle 17 reflects, states have an obligation under international human rights law to provide public education, even where private educational institutions are also in operation. Prior to Guiding Principle 29, no provision of international human rights law specifically stated that individuals had a right to *public* education. However, an analysis of existing human rights laws and standards confirms the existence of an obligation on states to provide such education, and a corresponding right on the part of individuals to receive it.¹

Article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) guarantees the ‘liberty of parents to choose for their children schools, other than those established by the public authorities’.² This presumes the existence of ‘schools established by the public authorities’ and thus the possibility for parents to choose other (private) schools for their children. In the absence of public schools, this ‘liberty’ would

¹ As noted in Skelton and Mutu’s commentary to Guiding Principles 1 and 4-7, the ‘human rights law and standards’ (Guiding Principle 1) reflected in the Abidjan Principles include both hard and soft international law. This commentary, like theirs, will therefore include reference to ‘soft law’, such as General Comments by treaty bodies like the Committee on Economic, Social and Cultural Rights, as these represent authoritative statements of how the law is, in practice, interpreted; they also tend to crystallize emerging standards. For further detail of the methodology adopted in this commentary regarding the use of soft law, see Ann Skelton and Perekeme Mutu, ‘Principles 1, 4 to 7’ in this commentary, particularly their commentary on Guiding Principle 1.

² International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR), art 13(1).

not require protection, and attending private schools would not be a 'choice' but a necessity. Similarly, the UNESCO Convention against Discrimination in Education refers to the freedom of parents 'to choose for their children institutions other than those maintained by the public authorities',³ and states that private educational institutions are permissible 'if the object of the institutions is ... to provide educational facilities in addition to those provided by the public authorities'.⁴ Within the scheme of these instruments, private education is seen to supplement, but not supplant, public education, which must be provided by public authorities.

This position is supported by article 13(2)(e) of ICESCR, which provides that '[t]he development of a system of schools at all levels shall be actively pursued'.⁵ Given that private institutions, as envisaged under articles 13(3) and (4), necessarily develop on an individual, ad hoc basis, the obligation for states to 'develop a system' of schools would seem to require a public education system. Thus the Committee on Economic, Social and Cultural Rights (CESCR) concludes that 'it is clear that article 13 regards States as having principal responsibility for the direct provision of education in most circumstances'.⁶ That the development of a system of schools requires a public education system is supported by evidence from organizations such as UNICEF that, as a practical matter, '[o]nly the State ... can pull together all the components [of education] into a coherent but flexible education system'.⁷

Further, an education system wholly provided by private operators would be unable to guarantee education consistent with the requirements of international human rights law, in particular, requirements for education to be free⁸ and equally accessible to all without discrimination.⁹ This is because article 13(4) of ICESCR, which limits the extent to which the state can intervene in the operation of private schools, means that the state cannot guarantee that private operators provide education free of charge.¹⁰ Similarly, international human rights law protects the right of national, linguistic or religious minorities to establish schools which accept only, or predominantly, students from those backgrounds,¹¹ such that purely private education systems may not be equally accessible to all without discrimination. In addition, substantial evidence indicates that the provision of education by private institutions exacerbates inequality in enjoyment of the right to education on the basis of sex, socioeconomic status and other factors.¹² As a result,

³ Convention against Discrimination in Education (adopted 14 December 1960, entered into force 22 May 1962) 429 UNTS 93 (Convention against Discrimination in Education), art 5(b).

⁴ *ibid* art 2(c).

⁵ ICESCR, art 13(2)(e).

⁶ CESCR, 'General Comment No 13: the right to education' (1990) E/C.12/1999/10 [48], [53].

⁷ UNICEF, 'The State of the World's Children: Education' (1999) 63.

⁸ ICESCR, art 13(2).

⁹ See ICESCR, art 2(2). See also n 6 [31].

¹⁰ See Jacqueline Mowbray, 'Is there a Human Right to Public Education? An Analysis of States' Obligations in Light of the Increasing Involvement of Private Actors in Education' (2020) 33 *Harvard Human Rights Journal* 121, 147-9.

¹¹ See eg Convention against Discrimination in Education, arts 2(b) and 5(c).

¹² See Mowbray (n 10) 153-61.

compliance with international human rights law requires states to provide public education.¹³

The obligation of states to provide¹⁴ and support public education, even where private education providers are also operating, is also reflected in the comments of UN human rights treaty bodies. So, for example, the CESCR noted in its concluding observations in relation to Kenya that it was ‘concerned that inadequacies in the public schooling system have led to the proliferation of so-called “low cost private schools”¹⁵ and recommended ‘that the State party take all the measures necessary to strengthen its public education sector’.¹⁶ Similarly, the Committee on the Rights of the Child has required states to ‘prioritize the provision of quality, free primary education at public schools over the provision of education at private schools’.¹⁷ In relation to Brazil, the Committee recommended that the State ‘[i]ncrease funds to the education sector in order to strengthen public education’¹⁸ and ‘[p]hase out the transfer of public funds to the private education sector ... by strictly prioritizing the public education sector in the distribution of public funds’.¹⁹ And in relation to Chile, the Committee recommended that the State ‘accelerate the allocation of increased targeted resources to education, in particular in free public schools’.²⁰

Statements of other international bodies affirm the obligation of states to provide public education. The Human Rights Council, for example, has consistently passed resolutions ‘recognizing the significant importance of investment in public education, to the maximum of available resources’.²¹ The Education 2030: Incheon Framework for Action (‘Incheon Framework’), agreed to by representatives of 184 states at the World Education Forum 2015, provides that ‘[g]overnments have the primary responsibility to deliver on the right to education, and a central role as custodians of efficient, equitable and effective

¹³ As discussed further below, the nature of this obligation depends on the level of education. Article 13(2) and article 14 of ICESCR require states to prioritize the provision of compulsory, free primary education; this obligation is not subject to progressive realization and is part of the minimum core obligation of states in relation to the right to education: CESCR, ‘General Comment No 13’ (n 6) [57]. The provision of public education for pre-school, secondary, higher and fundamental education is subject to the requirement of progressive realisation.

¹⁴ In terms of what degree of state involvement is required for the state to meet its obligation to ‘provide’ public education, note the definition of ‘public education’ in Guiding Principle 2. See further Mowbray (n 10) 128-44.

¹⁵ CESCR, ‘Concluding observations on the combined second to fifth periodic reports of Kenya’ (2016) E/C.12/KEN/CO/2-5 [57].

¹⁶ *Ibid* [58]. Similarly, in relation to Morocco, the CESCR ‘recommends that the State party take urgent measures to address the problems of poor-quality public education ... [and] develop an appropriate educational system and programme’: CESCR, ‘Concluding observations on the fourth periodic report of Morocco’ (2015) E/C.12/MAR/CO/4 [48].

¹⁷ UN Committee on the Rights of the Child, ‘Concluding observations on the combined third to fifth periodic reports of Kenya’ (2016) CRC/C/KEN/CO/3-5 [58(b)].

¹⁸ UN Committee on the Rights of the Child, ‘Concluding observations on the combined second to fourth periodic reports of Brazil’ (2015) CRC/C/BRA/CO/2-4 [74(c)].

¹⁹ *ibid* [76(b)].

²⁰ UN Committee on the Rights of the Child, ‘Concluding observations on the combined third to fifth periodic reports of Chile’ (2015) CRC/C/CHL/CO/4-5 [68(b)].

²¹ See UNHRC, ‘Resolution on the Right to Education’ (2019) A/HRC/41/L.26 [3].

management and financing of public education'.²² (Agreements such as these are evidence of state practice in the application of the provisions of human rights treaties, indicating the agreement of the parties regarding their interpretation.)²³ Further, although Sustainable Development Goal 4 (SDG4) and its associated targets²⁴ do not explicitly refer to public education, the UN Special Rapporteur on the Right to Education, Kombou Boly Barry, reporting to the Human Rights Council on implementation of SDG4, noted that an 'essential condition for meeting Sustainable Development Goal 4 targets is for States to allocate the maximum of their available resources to ensuring free, quality, public education for all, as required by international human rights law'.²⁵ The duty to provide public education also finds support in domestic state practice. All states provide some degree of public education,²⁶ and constitutional and legislative provisions in many states commit governments to the creation, funding and maintenance of public education systems.²⁷ This is reinforced by national judicial decisions emphasising the importance of public education, such as the United States Supreme Court decision of *Wisconsin v Yoder* which noted that '[p]roviding public schools ranks at the very apex of the function of a State'.²⁸

²² UNESCO, 'Education 2030: Incheon Framework for Action for the Implementation of Sustainable Development Goal 4: Ensure Inclusive and Equitable Quality Education and Promote Lifelong Learning Opportunities for All' (2015) ED-3026/WS/28 (Incheon Framework) [78].

²³ Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 31(3)(b); Incheon Framework [10].

²⁴ See UNGA 'Transforming Our World: The 2030 Agenda for Sustainable Development' (21 October 2015) UN Doc A/RES/70/1 (SDGs).

²⁵ UNHRC 'Report of the 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' (10 April 2019) UN Doc A/HRC/41/37 [7].

²⁶ See eg Katerina Tomasevski, 'The State of the Right to Education Worldwide: Free or Fee: 2006 Global Report' (August 2006) <https://www.katarinatomasevski.com/images/Global_Report.pdf> accessed 1 August 2024, which presents a detailed analysis of education in every state, revealing that all states have some form of public education).

²⁷ So, for example, art 14 of the Constitution of the Philippines provides: 'The State shall establish and maintain a system of free public education in the elementary and high school levels ...': Jody Heymann, Amy Raub and Adèle Cassola, 'Constitutional Rights to Education and Their Relationship to National Policy and School Enrolment' (2014) 39 *International Journal of Educational Development* 131, 135. Similarly, art 75.19 of the 1994 National Constitution of Argentina provides that educational legislation 'must ensure that the state fulfils its responsibility to provide equal access, with no discrimination of any kind, to a free public education': see The Law Library of Congress, *Constitutional Right to an Education in Selected Countries* (May 2016) <<https://tile.loc.gov/storage-services/service/ll/llgldr/2016479002/2016479002.pdf>> accessed 1 August 2024 (Law Library of Congress Report) 3. The relevant constitutional provisions in France provide that: 'The provision of free, public and secular education at all levels is a duty of the State': see the Law Library of Congress Report, 12. The Law Library of Congress Report, on the right to education in 20 states, revealed that in 13 of the 20 the right to public education was protected (explicitly or implicitly, for example, through provisions requiring free education in public schools). And the state constitutions of all 50 States of the United States explicitly mandate the creation of a public education system: see Emily Parker, *50-State Review: Constitutional Obligations for Public Education* (Education Commission of the States, 2016) <<https://www.ecs.org/wp-content/uploads/2016-Constitutional-obligations-for-public-education-1.pdf>> accessed 1 August 2024. See further Mowbray (n 10) 151-3.

²⁸ *Wisconsin v Yoder* 406 US 205, 213 (1972); UNGA 'Report of the Special Rapporteur on the right to education' (24 September 2014) UN Doc A/69/402 [72].

Since states have an obligation to provide public education, it follows from the requirements of non-discrimination (as found, for example, in article 2(2) of ICESCR), that individuals have a right to access such education on a non-discriminatory basis.²⁹ Indeed, the CESCR has affirmed that ensuring ‘the right of access to public educational institutions and programmes on a non-discriminatory basis’ forms part of the minimum core obligation of states in relation to the right to education.³⁰ This has implications for the state’s obligation to provide public education, in that it must ensure such education is available to all.³¹ Consequently, individuals have a corresponding ‘right’ to public education.³²

The requirement for public education to be ‘free’ reflects the position under international human rights treaties including the Universal Declaration of Human Rights (UDHR) and ICESCR. The UDHR provides that education ‘shall be free, at least in the elementary and fundamental stages’.³³ Article 13(2)(a) of ICESCR provides that ‘primary education shall be ... available free to all’ and article 14 sets out more precise obligations to ensure that states implement ‘the principle of compulsory education free of charge for all’. Article 13(2)(b) provides that secondary education ‘shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education’. Similarly, higher education ‘shall be made equally accessible to all ... in particular by the progressive introduction of free education’. Similar provisions requiring education to be free can be found in the UNESCO Convention Against Discrimination in Education³⁴ and the Convention on the Rights of the Child.³⁵

The relevant provisions of international human rights law prioritise the provision of free education at the primary level: unlike the provision of free secondary and higher education, the obligation to provide free primary education is not subject to progressive realisation and is part of the minimum core obligation of states in relation to the right to education.³⁶ Increasingly, however, states are recognising the importance of the obligation to provide free secondary education, as well as free preschool education. More recent human rights treaties, such as the Convention on the Rights of the Child, put the obligation to provide free secondary education in stronger terms than ICESCR, indicating that the state ‘shall ... take appropriate measures such as the introduction of free

²⁹ See further Mowbray (n 10) 161-4.

³⁰ CESCR, ‘General Comment No 13’ (n 6) [57].

³¹ See *Institute for Human Rights and Development in Africa and Open Society Justice Initiative (on behalf of Children of Nubian Descent in Kenya) v the Government of Kenya*, African Committee of Experts on the Rights and Welfare of the Child, No 002/Com/002/2009 (22 March 2011) [65], in which the African Committee of Experts on the Rights and Welfare of the Child found that the right to education of children of Nubian descent in Kenya had not been ‘effectively recognized and adequately provided for’ because they had ‘been provided with fewer schools’ than the rest of the population.

³² See further Mowbray (n 10).

³³ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) art 26(1).

³⁴ Convention against Discrimination in Education, art 4.

³⁵ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CROC), art 28.

³⁶ CESCR, ‘General Comment No 13’ (n 6) [57].

education',³⁷ and within Europe, article 17(2) of the Revised European Social Charter requires the provision of 'free primary and secondary education'. In 2017, the Committee on the Elimination of All Forms of Discrimination Against Women indicated in its Recommendation 36 on the right of girls and women to education that education 'should be free and compulsory from preschool through secondary school and progressively made free through the tertiary level'.³⁸ Target 4.1 of Sustainable Development Goal 4, adopted by all UN member states in 2015, is for states to '[b]y 2030, ensure that all girls and boys complete free, equitable and quality primary and secondary education', and the commentary to target 4.2 notes that the 'provision of at least one year of free and compulsory quality pre-primary education is encouraged'. Further, 184 states have, in the Education 2030: Incheon Declaration and Framework for Action of 2015, committed to 'ensure access to and completion of quality education for all children and youth to at least 12 years of free, publicly funded, inclusive and equitable quality primary and secondary education' and 'encourage the provision of at least one year of free and compulsory quality pre-primary education'.³⁹ On the basis of this state practice it is clear that states are under an obligation to move 'as expeditiously as possible' towards the provision of free secondary education and, increasingly, free preschool education.

International human rights standards for 'free' education require the elimination of both direct and indirect costs. According to the Committee on Economic, Social and Cultural Rights

Fees imposed by the Government, the local authorities or the school, and other direct costs, constitute disincentives to the enjoyment of the right and may jeopardize its realization. ... Indirect costs, such as compulsory levies on parents (sometimes portrayed as being voluntary, when in fact they are not), or the obligation to wear a relatively expensive school uniform, can also fall into the same category.⁴⁰

This is reflected in the Guidelines on Treaty-Specific Documents to be Submitted by States Parties for periodic monitoring under ICESCR⁴¹ (which require states to provide information on both direct and indirect costs of education), as well as in the monitoring practice of the Committee on Economic, Social and Cultural Rights and the Committee on the Rights of the Child.⁴² Further, under the Incheon Framework for Action, 184 states

³⁷ CROC, art 28(1)(b).

³⁸ Committee on the Elimination of All Forms of Discrimination against Women 'General Recommendation 36 on the right of girls and women to education' (27 November 2017) UN Doc CEDAW/C/GC/36 [36].

³⁹ Education 2030: Incheon Declaration: Towards Inclusive and Equitable Quality Education and Lifelong Learning for All (adopted 21 May 2015, World Education Forum, Incheon, Republic of Korea) (Incheon Declaration) [6].

⁴⁰ CESCR, 'General Comment No 11: Plans of action for primary education (Article 14)' (1999) E/C.12/1999/4 [7]. See also CESCR, 'General Comment No 13' (n 6) [14].

⁴¹ CESCR 'Guidelines on Treaty-Specific Documents to be submitted by States Parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights' (24 March 2009) UN Doc E/C.12/2008/2 [59(b)], [59(c)].

⁴² See eg UN Committee on the Rights of the Child, 'Concluding Observations on the initial report of Tuvalu' (2013) CRC/C/TUV/CO/1 [59(b)]; UN Committee on the Rights of the Child, 'Concluding Observations on

have agreed that providing free education also requires ‘the removal of cost-related barriers to primary and secondary education’.⁴³

The requirement for public education to be ‘*of the highest attainable quality*’ derives from a number of international human rights norms and standards. The Committee on Economic, Social and Cultural Rights has noted that education at all levels ‘shall exhibit the ... interrelated and essential features’ of availability, accessibility, acceptability and adaptability (the so-called ‘4A scheme’),⁴⁴ with one of the criteria for acceptability of education being that education is ‘of good quality’.⁴⁵ The Committee on the Rights of the Child states more explicitly that: ‘Every child has the right to receive an education of good quality which in turn requires a focus on the quality of the learning environment, of teaching and learning processes and materials, and of learning outputs’.⁴⁶ Quality education is also an integral part of Sustainable Development Goal 4, to ‘ensure inclusive and equitable quality education’, with the delivery of ‘quality education’ forming part of targets 4.1, 4.2 and 4.3. And under the Incheon Declaration and Framework for Action, states repeatedly affirm their commitment to quality education. In particular, paragraph 9 of the Incheon Declaration provides:

We commit to quality education and to improving learning outcomes, which requires strengthening inputs, processes and evaluation of outcomes and mechanisms to measure progress. We will ensure that teachers and educators are empowered, adequately recruited, well-trained, professionally qualified, motivated and supported within well-resourced, efficient and effectively governed systems. Quality education fosters creativity and knowledge, and ensures the acquisition of the foundational skills of literacy and numeracy as well as analytical, problem-solving and other high-level cognitive, interpersonal and social skills.

The reference to ‘*the highest attainable*’ quality of education recognises the fact that realisation of the right to education is to be achieved progressively, subject to available resources (see further below).⁴⁷ It also recognises the fact that there is no particular standard of ‘quality’ education to be reached; rather the obligation is to continuously improve standards in education as new resources and knowledge become available.⁴⁸ Guiding Principle 30, discussed below, provides further detail as to the requirements of quality education.

the combined second to fourth periodic reports of Fiji’ (2014) CRC/C/FJI/CO/2-4 [59]; CESCR, ‘Concluding Observations on the sixth periodic report of Colombia’ (2017) E/C.12/COL/CO/6 [63(d)].

⁴³ Incheon Framework [30].

⁴⁴ CESCR, ‘General Comment No 13’ (n 6) [6].

⁴⁵ *ibid* [6(c)].

⁴⁶ UN Committee on the Rights of the Child, ‘General Comment No 1: Article 29(1), The Aims of Education’ (2001) CRC/GC/2001/1 [22].

⁴⁷ See eg ICESCR, art 2(1).

⁴⁸ The standards required ‘will depend upon the conditions prevailing in a particular State party’: CESCR, ‘General Comment No 13’ (n 6) [6].

The requirement for states to provide public education ‘to everyone within their jurisdiction’ reflects the fundamental principle that states owe human rights obligations to those over whom they exercise jurisdiction. This primarily covers those within the territorial jurisdiction of the state. However, in exceptional cases, obligations in relation to economic, social and cultural rights, including the right to education, arise extraterritorially,⁴⁹ including where a state exercises ‘effective control’ over another territory,⁵⁰ or where a state’s acts or omissions bring about foreseeable effects on the enjoyment of rights outside its territory.⁵¹ The extraterritorial obligation of states to respect, protect and fulfil the right to education in situations where they exercise effective control was upheld by the European Court of Human Rights in *Catan v Moldova and Russia*, where the Court found that Russia owed such obligations in relation to education in the ‘Moldavian Republic of Transdnistria’.⁵² The extraterritorial obligation of states where their acts or omissions bring about foreseeable effects on the enjoyment of the right to education outside their territory is reflected in comments of UN treaty bodies, such as the Committee on the Rights of the Child, which has recommended that states ensure that their ‘international development cooperation supports the recipient States in guaranteeing the right to free compulsory primary education for all, by prioritizing free and quality primary education in public schools’.⁵³ This also reflects article 2(1) of ICESCR which provides for ‘international assistance and co-operation’ to achieve full realization of economic, social and cultural rights.

The obligation to provide public education to ‘everyone’ requires states to ensure that public schools are ‘available in sufficient quantity within the jurisdiction of the State party’⁵⁴ such that public education is reasonably available to all.⁵⁵ The precise scope of the obligation which this places on states will depend on context, reflecting the fact that whether the right is found to have been violated or not will depend on the ‘reasonableness’ of the steps taken by the state.⁵⁶ For example, it may be difficult for states to establish schools in particularly remote or inhospitable areas. In this situation, it may be sufficient

⁴⁹ See CESCR, ‘General Comment No 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities’ (2017) E/C.12/GC/24 [10], [25] – [37]; Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (adopted 28 September 2011) (see 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) (Maastricht Principles on Extraterritorial Obligations).

⁵⁰ Maastricht Principles on Extraterritorial Obligations, Principle 9(a).

⁵¹ *ibid*, Principle 9(b).

⁵² *Catan and Others v Moldova and Russia* (2013) 57 EHRR 4.

⁵³ See eg UN Committee on the Rights of the Child ‘Concluding Observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland’ (2016) CRC/C/GBR/CO/5 [18].

⁵⁴ CESCR, ‘General Comment No 13’ (n 6) [6].

⁵⁵ Noting that the ‘4A’ requirement of ‘availability’ means that ‘functioning educational institutions and programmes have to be available in sufficient quantity within the jurisdiction of the State party’: CESCR, ‘General Comment No 13’ (n 6) [6(a)]. See *The Government of Kenya* (n 31) [65], in which the African Committee of Experts on the Rights and Welfare of the Child found that the right to education of children of Nubian descent in Kenya had not been ‘effectively recognized and adequately provided for’ because they had ‘been provided with fewer schools’ than the rest of the population.

⁵⁶ See art 8(4) of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, UNGA Res 63/117 (5 March 2009) and art 10(4) of the Optional Protocol to the Convention on the Rights of the Child, UNGA Res 66/138 (19 December 2011).

if the state offers students from such areas access to transport to allow them to attend public schools some distance away, or the ability to board at public schools in less remote areas.

The requirement for states to provide public education for all '*as effectively and expeditiously as possible, to the maximum of their available resources*' reflects the fundamental requirement in article 2(1) of ICESCR that economic, social and cultural rights be realised 'progressively' and 'to the maximum of ... available resources'. As clarified by the Committee on Economic, Social and Cultural Rights, in its General Comment 3, this requires states 'to move as expeditiously and effectively as possible'⁵⁷ towards the goal of full realisation of these rights.

An important aspect of this obligation is the prohibition on retrogressive steps, that is, measures which would decrease enjoyment of relevant rights.⁵⁸ As the CESCR has noted:

There is a strong presumption of impermissibility of any retrogressive measures taken in relation to the right to education, as well as other rights enunciated in the Covenant. If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the State party's maximum available resources.⁵⁹

This means that states cannot take steps which decrease the availability of public education, except in exceptional circumstances.

Beyond this, moving as 'effectively and expeditiously as possible' towards full realisation of the right to public education requires monitoring the extent of realisation of the right, 'devising strategies and programmes' to realise the right,⁶⁰ and taking steps to achieve full realisation to the 'maximum of available resources'. The question of how to quantify the 'maximum available resources' of the state has been the subject of much scholarship and analysis.⁶¹ However, it is clear that the state must use all resources at its disposal,

⁵⁷ CESCR, 'General Comment No 3 on the nature of State parties' obligations (Art. 2(1))' (1990) E/1991/23 [9].

⁵⁸ *ibid.*

⁵⁹ CESCR, 'General Comment No 13' (n 6) [45].

⁶⁰ CESCR, 'General Comment No 3' (n 57) [11].

⁶¹ See eg Aoife Nolan, 'Budget Analysis and Economic and Social Rights' in Eibe Riedel, Gilles Giacca and Christophe Golay (eds), *Economic, Social and Cultural Rights in International Law: Contemporary Issues and Challenges* (OUP 2014); Rory O'Connell and others, *Applying an International Human Rights Framework to State Budget Allocations: Rights and Resources* (Routledge 2014); Diane Elson, Radhika Balakrishnan and James Heintz, 'Public Finance, Maximum Available Resources and Human Rights' in Aoife Nolan, Rory O'Connell and Colin Harvey, *Human Rights and Public Finance Budgets and the Promotion of Economic and Social Rights* (Hart 2013); Sigrun Skogly, 'The Requirement of Using the "Maximum of Available Resources" for Human Rights Realization: A Question of Quality As Well As Quantity?' (2012) 12 Human Rights Law Review 393.

economic and otherwise, and consider maximising those resources through, for example, 'enforcing progressive taxation schemes'.⁶² The resources available to the state also include 'those available from the international community through international cooperation and assistance'.⁶³ Further, states must prioritise spending on public education over spending to support private education. This is affirmed in concluding observations of UN treaty bodies, which require states to 'prioritize the provision of quality, free primary education at public schools over the provision of education at private schools'.⁶⁴ Guiding Principles 34-41 provide further guidance on the use of maximum available resources to fund public education.

The overarching obligation to '*respect, protect, and fulfil*' the right to public education reflects the established principle that international human rights impose three levels of duties on states: to respect, protect, and fulfil. The obligation to fulfil, in turn, incorporates both an obligation to facilitate and an obligation to provide.⁶⁵ In relation to the right to education, the CESCR has indicated that:

The obligation to respect requires States parties to avoid measures that hinder or prevent 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. The obligation to fulfil (facilitate) requires States to take positive measures that enable and assist individuals and communities to enjoy the right to education. Finally, States parties have an obligation to fulfil (provide) the right to education.⁶⁶

In relation to the right to public education, the obligation to respect requires states to avoid measures which limit enjoyment of the right to public education, such as closing public schools;⁶⁷ increasing direct or indirect costs to attend such schools (such as expensive school uniforms, fees for school materials, or 'voluntary' parent contributions),⁶⁸ or reducing subsidies to defray such costs;⁶⁹ or reducing or failing to increase teaching staff

⁶² CESCR, 'General Comment No 24' (n 49) [23].

⁶³ CESCR, 'General Comment No 3' (n 57) [13].

⁶⁴ UN Committee on the Rights of the Child, 'Concluding observations on the combined third to fifth periodic reports of Kenya' (2016) CRC/C/KEN/CO/3-5 [58(b)]; UN Committee on the Rights of the Child, 'Concluding observations on the combined second to fourth periodic reports of Brazil' (2015) CRC/C/BRA/CO/2-4 [74(c)]; UN Committee on the Rights of the Child, 'Concluding observations on the combined third to fifth periodic reports of Chile' (2015) CRC/C/CHL/CO/4-5 [68(b)].

⁶⁵ See CESCR, 'General Comment No 13' (n 6) [46]; CESCR, 'General Comment No 24' (n 49) [10].

⁶⁶ CESCR, 'General Comment No 13' (n 6) [47].

⁶⁷ See eg *Free Legal Assistance Group and Others v Zaire*, African Commission on Human and People's Rights, Comms 25/89, 47/90, 56/91, 100/93 (October 1995) [48].

⁶⁸ CESCR, 'General Comment No 11' (n 40) [7]. See further UN Committee on the Rights of the Child, 'Concluding Observations on the combined second to fourth periodic reports of Fiji' (2014) CRC/C/FJI/CO/2-4 [59]; CESCR, 'Concluding Observations on the sixth periodic report of Colombia' (2017) E/C.12/COL/CO/6 [63(d)]; CESCR, 'Concluding Observations on the fifth periodic report of Sri Lanka' (2017) E/C.12/LKA/CO/5 [63]; CESCR, 'Concluding Observations on the initial report of Namibia' (2016) E/C.12/NAM/CO/1 [71].

⁶⁹ CESCR, 'Concluding Observations on the third periodic report of Ireland' (2015) E/C.12/IRL/CO/3 [31(c)].

in line with increases in student numbers. The obligation to protect requires states, for example, to make school compulsory, to prevent parents or others interfering with enjoyment of the right to public education (by keeping children, particularly girls, at home or in work). The obligation to fulfil (facilitate) requires states to ensure that sufficient teachers are available to teach in public schools, by creating teacher training colleges and providing financial support for student teachers, as well as taking measures such as providing adequate, accessible transport to enable children to attend available public schools. Finally, the obligation to fulfil (provide) requires states to establish, fund and operate sufficient public schools to meet the needs of the population.

The final sentence of Guiding Principle 29 affirms that *‘the involvement of private educational institutions does not in any way impair or nullify’* the obligation established in the first two sentences. This reflects the fundamental principle of international human rights law that states bear the ultimate responsibility for respecting, protecting and fulfilling the human rights of all individuals under their jurisdiction. The involvement of private actors in activities related to the realisation of these rights does not alter this position.⁷⁰ This is particularly the case with respect to the right to public education, which, by its very nature, can only be provided by the state. The implementation of this principle in practice can be seen in the concluding observations of the Committee on Economic, Social and Cultural Rights in relation to Kenya, where the Committee noted the ‘proliferation’ of private schools,⁷¹ but reiterated that ‘the State has the primary responsibility in ensuring the right to education’ and recommended ‘that the State party take all the measures necessary to strengthen its public education sector’.⁷² The UN Special Rapporteur on the Right to Education, Kishore Singh, has similarly concluded that ‘Governments should ensure that private providers only supplement public education, the provision of which is the Government’s responsibility, rather than supplant it’.⁷³

Principle 30

30. Standards in public education must guarantee the highest attainable quality, and be at least as protective of human rights as the standards applicable to private instructional educational institutions listed under Principle 4. States must continuously raise standards in public education in accordance with their obligation to progressively realise the right to education to the maximum of their available resources.

⁷⁰ See CESCR, ‘General Comment No 24’ (n 49); CESCR, ‘Statement on the obligations of States Parties regarding the corporate sector and economic, social and cultural rights’ (2011) E/C.12/2011/1.

⁷¹ CESCR, ‘Concluding observations on the combined second to fifth periodic reports of Kenya’ (2016) E/C.12/KEN/CO/2-5 [57].

⁷² *ibid* [58].

⁷³ UNGA ‘Report of the Special Rapporteur on the right to education’ (24 September 2014) UN Doc A/69/402 [96].

Commentary

Guiding Principle 30 articulates in greater detail the nature of the obligation in Guiding Principle 29 for states to provide public education of ‘the highest attainable quality’, as well as requirements relating to the broader question of standards in education. The only specific reference to ‘standards’ in education in the relevant human rights treaties appears in articles 13(3) and 13(4) of ICESCR and article 29(2) of the Convention on the Rights of the Child, which allow for private schools to operate free from state interference provided that they meet ‘such minimum educational standards as may be laid down or approved by the state’.⁷⁴ The fundamental requirement of non-discrimination⁷⁵ means that any such standards must also apply to public schools, thus Guiding Principle 30 affirms that ‘standards in public education must ... be at least as protective of human rights as the standards applicable to private instructional educational institutions’. Taking this requirement of non-discrimination a step further, the UNESCO Convention Against Discrimination in Education also requires states to develop a national policy to ‘ensure that the standards of education are equivalent in all public education institutions of the same level, and that the conditions relating to the quality of education provided are also equivalent’.⁷⁶

It is clear from this article of the UNESCO Convention Against Discrimination in Education, and from references to ‘standards’ in other international documents on education, that ‘standards’ in education are related to, but not exactly the same as, issues of quality.⁷⁷ This is reflected in the structure of Guiding Principle 30, which requires standards to ‘guarantee the highest attainable quality’, but also to be ‘protective of human rights’ more broadly.

The meaning of ‘*quality*’ education is not specified in the international human rights treaties themselves, although, as noted in the discussion of Guiding Principle 29 above, one of the criteria for acceptability of education (under the CESCR’s ‘4A scheme’) is that education is ‘of good quality’.⁷⁸ In the Education 2030 Incheon Framework for Action, 184 states noted that there was a need to ‘build greater consensus at the global level as to what specific quality standards and learning outcomes should be achieved across the life course – from early childhood development to adult skills acquisition’.⁷⁹ However, the monitoring work of the UN treaty bodies indicates that these bodies consider quality

⁷⁴ ICESCR, art 13(3). The wording in art 13(4) of the ICESCR and in article 29(2) of the CROC is substantially the same. It is also reflected in domestic legal provisions, such as s 29(3)(c) of the South African Constitution.

⁷⁵ See eg ICESCR, art 2(2).

⁷⁶ Convention against Discrimination in Education, art 4(b).

⁷⁷ See eg Inter-Agency Network for Education in Emergencies (INEE), *INEE Minimum Standards for Education: Preparedness, Response, Recovery* (3 December 2010), which include standards relating to quality ‘teaching and learning’ (Domain 3), as well as standards relating to other matters, such as community participation (Domain 1). See also Incheon Framework [34] which requires states to ‘[d]efine standards and review curricula to ensure quality *and* relevance to the context, including skills, competencies, values, culture, knowledge and gender responsiveness’ [emphasis added].

⁷⁸ CESCR, ‘General Comment No 13’ (n 6) [6(c)].

⁷⁹ Incheon Framework [97].

education to require, in particular, well-trained and qualified teachers,⁸⁰ adequate infrastructure,⁸¹ and good teaching materials.⁸² The Incheon Framework for Action also emphasises the importance of qualified teachers and materials, noting the importance of ‘quality inputs and instructional processes that enable all learners to acquire relevant knowledge, skills and competencies’,⁸³ and concluding that ‘the absence and/or inadequacy of continuous professional development and support for teachers and national standards for the teaching profession are key contributing factors to the low quality of learning outcomes’.⁸⁴ More broadly, the Framework for Action notes that ‘quality also requires systems for managing teachers, governance, accountability mechanisms and strong public financial management’.⁸⁵ As noted in relation to Guiding Principle 29, the reference to ‘*the highest attainable quality*’ of education recognises the fact that realisation of the right to education is to be achieved progressively, subject to available resources, but should be achieved to the highest level possible within existing resource constraints.⁸⁶

The requirement for standards to be ‘*protective of human rights*’ reflects the fundamental proposition in Article 1 of the Universal Declaration of Human Rights that ‘[a]ll human beings everywhere ... are entitled without discrimination to human rights and freedoms’. It can also be seen as a reflection of the fact that all human rights are ‘universal, indivisible and interdependent and interrelated’.⁸⁷ As Guiding Principle 4 affirms, all rights, civil and political, and economic, social and cultural, must be respected in the context of education, just as in other domains of life. As the Committee on the Rights of the Child has stated, ‘[c]hildren do not lose their human rights by virtue of passing through the school gates’.⁸⁸ Thus standards in education must, for example, protect rights to equality by ensuring non-discrimination;⁸⁹ protect freedom of expression for staff and students;⁹⁰ respect the dignity of the individual by prohibiting corporal punishment;⁹¹ and respect the right to health by not exposing children to unsafe learning environments.

⁸⁰ CESCR, ‘Concluding Observations on the third periodic report of the Republic of Moldova’ (2017) E/C.12/MDA/CO/3 [70]; CESCR, ‘Concluding Observations on the sixth periodic report of Colombia’ (2017) E/C.12/COL/CO/6 [64(e)]; CESCR, ‘Concluding Observations on the initial report of Pakistan’ (2017) E/C.12/PAK/CO/1 [79(e)].

⁸¹ CESCR, ‘Concluding Observations on the third periodic report of the Republic of Moldova’ (2017) E/C.12/MDA/CO/3 [70]; CESCR, ‘Concluding Observations on the sixth periodic report of Colombia’ (2017) E/C.12/COL/CO/6 [64(e)].

⁸² CESCR, ‘Concluding Observations on the third periodic report of the Republic of Moldova’ (2017) E/C.12/MDA/CO/3 [70]; CESCR, ‘Concluding Observations on the sixth periodic report of Colombia’ (2017) E/C.12/COL/CO/6 [64(e)]; CESCR, ‘Concluding Observations on the initial report of Pakistan’ (2017) E/C.12/PAK/CO/1 [79(e)].

⁸³ Incheon Framework [32].

⁸⁴ *ibid* [71].

⁸⁵ *ibid* [33].

⁸⁶ See eg ICESCR, art 2(1), as interpreted in CESCR, ‘General Comment No 3’ (n 57).

⁸⁷ The World Conference on Human Rights, ‘Vienna Declaration and Programme of Action’ (adopted 25 June 1993) UN Doc A/CONF.157/23, art. 5.

⁸⁸ UN Committee on the Rights of the Child, ‘General Comment No 1’ (n 46) [8].

⁸⁹ CESCR, ‘General Comment No 13’ (n 6) [31] – [37].

⁹⁰ *ibid* [38] – [40].

⁹¹ *ibid* [41].

The requirement for standards to be ‘protective of human rights’ also reflects the fact that respect for human rights is one of the aims of education under the relevant international human rights treaties. Under article 13(1) of ICESCR, states ‘agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms’. Article 29(1)(b) of the Convention on the Rights of the Child similarly provides that education shall be directed to the ‘development of respect for human rights and fundamental freedoms’. Standards in education must themselves be protective of human rights if education is to achieve these ends.

In providing that standards in public education must be ‘*at least as protective of human rights as the standards applicable to private instructional educational institutions listed under Principle 4*’, this Guiding Principle incorporates the standards set out with respect to private educational institutions under Overarching Principle 4, that is, in Guiding Principles 51-57. Of particular relevance in this context is Guiding Principle 55, which sets out in detail the issues which minimum standards for private educational institutions should address. The effect of Guiding Principle 30 is to require standards for public educational institutions to address those issues also, and, in each case, to be ‘at least as protective of human rights’ as the standards applicable to private institutions.

The final sentence of Guiding Principle 30 reiterates the obligation of states to realise the right to public education progressively to the maximum of available resources.⁹² Requiring states to ‘*continuously raise standards in public education*’ recognises that there is no particular standard to be reached; rather the obligation is to continuously improve standards in education in response to new insights, technologies and resources,⁹³ and to ensure that improvements in educational standards benefit all on the basis of equality. Thus even states with high standards of education are required to commit to increasing resources to improve standards in public education.⁹⁴

Principle 31

31. States must ensure that public education is inclusive. They must ensure that public education accommodates to the greatest possible extent the cultural, linguistic, and other unique traits of different groups in society, such as minorities and indigenous peoples, unless such accommodation conflicts with the aims of education or other standards guaranteed under international human rights law. Public education must safeguard the possibility of pluralism in education; be culturally appropriate; and enable learners to develop their personality and cultural identity and to learn and

⁹² See eg ICESCR, art 2(1), as interpreted in CESCR, ‘General Comment No 3’ (n 57).

⁹³ The standards required ‘will depend upon the conditions prevailing in a particular State party’: CESCR, ‘General Comment No 13’ (n 6) [6].

⁹⁴ See eg CESCR, ‘Concluding Observations on the fifth periodic report of Australia’ (2017) E/C.12/AUS/CO/5 [53], [54]. See also CESCR, ‘Concluding Observations on the seventh periodic report of Finland’ (2021) E/C.12/FIN/CO/7 [46], [47].

understand cultural values and practices of the communities to which they belong, as well as those of other communities and societies. The information or knowledge included in the curriculum must be conveyed in an objective, critical, and pluralistic manner.

Commentary

Guiding Principle 31 applies Guiding Principles 23-28, which affirm state obligations with respect to non-discrimination and equality in education, to the specific context of public education. It reiterates a number of principles that run through international human rights law in general, and in relation to the right to education in particular.

The first sentence of Guiding Principle 31 reflects not only the requirement that public education be guaranteed to all on the basis of equality and non-discrimination,⁹⁵ pursuant to the principles reflected in Guiding Principles 23-28, but also the prohibition on segregation in education, noted in Guiding Principle 25(b). This reflects the prohibition on segregation in education affirmed in the UNESCO Convention Against Discrimination in Education – which specifically prohibits segregation in education,⁹⁶ with the exception of same-sex schools⁹⁷ and separate schools ‘for religious or linguistic reasons’⁹⁸ – and in other statements of international human rights bodies.⁹⁹

The language of ‘*inclusive*’ education appears specifically in the Convention on the Rights of Persons with Disabilities, article 24(2)(b) of which requires states to ensure that persons with disabilities ‘can access an inclusive, quality and free primary education and secondary education’.¹⁰⁰ However, the requirement for education to be inclusive extends to ensure inclusion of all groups, including different racial groups, minorities and indigenous peoples, women, those living in poverty, rural populations, refugees and

⁹⁵ International Covenant on Civil and Political Rights (adopted 19 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 26; ICESCR, art 2(2).

⁹⁶ Convention against Discrimination in Education, art 1 provides: ‘For the purposes of this Convention, the term “discrimination” includes any distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education and in particular: ... (c) Subject to the provisions of Article 2 of this Convention, of establishing or maintaining separate educational systems or institutions for persons or groups of persons’. Article 3 requires states ‘to eliminate and prevent discrimination within the meaning of this Convention’.

⁹⁷ Convention against Discrimination in Education, art 2(a).

⁹⁸ Convention against Discrimination in Education, art 2(b).

⁹⁹ See eg re segregation on the basis of race: International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 1 (CERD), art 3. In relation to education in particular, see CESCR, ‘General Comment No 13’ (n 6) [33]. See also CESCR ‘Guidelines on Treaty-Specific Documents’ (n 41) [63]. Within the European regional human rights system, see eg *Lavida and Others v Greece* App no 7973/10 (ECHR, 30 May 2013).

¹⁰⁰ Convention on the Rights of Persons with Disabilities (adopted 30 March 2007, entered into force 3 May 2008) 2515 UNTS 3 (CRPD). See further Committee on the Rights of Persons with Disabilities, ‘General Comment No 4: Article 24: Right to inclusive education’ (2016) CRPD/C/GC/4.

migrants.¹⁰¹ States have affirmed their commitment to inclusive education in Sustainable Development Goal 4: to ‘ensure inclusive and equitable quality education’.

According to the UN Special Rapporteur on the right to education, Kombou Boly Barry:¹⁰²

Inclusive education provides the same learning environment for students of diverse backgrounds and abilities. Inclusive education often refers to the inclusion of learners with disabilities into a regular classroom environment, but it can also refer to the reintegration of older students who have been out of school for some time and the inclusion of students with different cultural and linguistic backgrounds or, in general, any student who requires additional support to succeed in the education system.

General Comment 4 of the Committee on the Rights of Persons with Disabilities provides further detail on what is meant by ‘inclusive’ education by contrasting ‘integration’ and ‘inclusion’:¹⁰³

Integration is a process of placing persons with disabilities in existing mainstream educational institutions, as long as the former can adjust to the standardized requirements of such institutions. *Inclusion* involves a process of systemic reform embodying changes and modifications in content, teaching methods, approaches, structures and strategies in education to overcome barriers with a vision serving to provide all students of the relevant age range with an equitable and participatory learning experience and environment that best corresponds to their requirements and preferences. Placing students with disabilities within mainstream classes without accompanying structural changes to, for example, organisation, curriculum and teaching and learning strategies, does not constitute inclusion.

While this extract focuses on inclusion for persons with disabilities, the same principles are applicable to ensuring inclusive education for other groups, namely that systemic reform is required to overcome barriers to the participation of these groups in mainstream education.

This requirement to accommodate the particular needs of different groups within mainstream public education is elaborated in the second sentence of Guiding Principle 31. The requirement for public education to accommodate the unique traits of different groups ‘*to the greatest extent possible*’ reflects the fundamental nature of the obligation to ensure inclusive education, while at the same time acknowledging that such accommodation cannot conflict with the aims of education (as set out, for example, in

¹⁰¹ See UNGA ‘Report of the Special Rapporteur on the right to education’ (29 September 2017) UN Doc A/72/496 [30] – [105]. This follows also from the particular guarantees of equality in education on the basis of race (CERD, art 5(v)) and for women (Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW), art 10).

¹⁰² UNGA ‘Report of the Special Rapporteur on the right to education’ (29 September 2017) UN Doc A/72/496 [26].

¹⁰³ Committee on the Rights of Persons with Disabilities, ‘General Comment No 4’ (n 100) [11].

article 13(1) of ICESCR)¹⁰⁴ or other standards guaranteed under international human rights law.

The requirement to accommodate the '*cultural and linguistic traits*' of individuals will be of particular importance for minorities and indigenous peoples, and reflects the obligations of states under article 15(1)(a) of ICESCR in relation to the right to take part in cultural life;¹⁰⁵ the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities¹⁰⁶ (with respect to minorities); and the ILO Indigenous and Tribal Peoples Convention 1989¹⁰⁷ and the UN Declaration on the Rights of Indigenous Peoples¹⁰⁸ (with respect to indigenous peoples). The obligation on states to accommodate the cultural traits of individuals is an aspect of the acceptability and adaptability of education,¹⁰⁹ and requires states to 'respect the cultural specificities' of individuals.¹¹⁰ This includes offering indigenous peoples 'an education in their own culture'¹¹¹ and incorporating 'their histories, their knowledge and technologies, their value systems and their further social, economic and cultural aspirations' into educational programmes,¹¹² which must also 'impart general knowledge and skills that will help children belonging to the peoples concerned to participate fully ... in their own community'.¹¹³ Similarly, states must 'encourage knowledge of the history, traditions, language and culture' of minorities.¹¹⁴

States have particular obligations to take account of the linguistic abilities and heritage of individuals, including especially minorities and indigenous peoples. The language in which education is provided can act as a barrier which prevents those who do not speak that language from accessing, or profiting from, education.¹¹⁵ As a result, states are obliged to provide support to those who do not speak the language in which education is provided, including measures to assist students in learning the dominant language of education.¹¹⁶ The Incheon Framework for Action further provides that: 'In multilingual contexts, where possible and taking into account differing national and subnational

¹⁰⁴ See also CROC, art 29(1); Convention against Discrimination in Education, art 5(1)(a); UDHR, art 26(2).

¹⁰⁵ See CESCR, 'General Comment No 21: Right of everyone to take part in cultural life (art. 15, para. 1(a), of the International Covenant on Economic, Social and Cultural Rights)' (2009) E/C.12/GC/21 [26] – [27].

¹⁰⁶ UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (adopted 18 December 1992) UN Doc A/RES/47/135 (UN Minorities Declaration), arts 4(3) and (4).

¹⁰⁷ International Labour Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries (adopted 28 June 1989, entered into force 5 September 1991) 1650 UNTS 383 (ILO Convention 169), arts 27-9.

¹⁰⁸ UN Declaration on the Rights of Indigenous Peoples (adopted 13 September 2007) UN Doc A/RES/61/295 (UNDRIP), art 14.

¹⁰⁹ See CESCR, 'General Comment No 13' (n 6) [6].

¹¹⁰ CESCR, 'General Comment No 21' (n 105) [27].

¹¹¹ UNDRIP, art 14(3).

¹¹² ILO Convention 169, art 27(1).

¹¹³ *ibid* art 29.

¹¹⁴ UN Minorities Declaration, art 4(4).

¹¹⁵ See eg *Xákmok Kásek Indigenous Community v Paraguay*, Inter-American Court of Human Rights Series C No 214 (24 August 2010) [209], [211] – [212].

¹¹⁶ See eg CESCR, 'Concluding Observations: Liechtenstein' (2006) E/C.12/LIE/CO/1 [36]; CESCR, 'Concluding Observations: France' (2008) E/C.12/FRA/CO/3 [49]; CESCR, 'Concluding Observations: Netherlands Antilles' (1998) E/C.12/1/Add.25 [57].

realities, capacities and policies, teaching and learning in the first or home language should be encouraged'.¹¹⁷ This is particularly the case with respect to minorities and indigenous peoples, as for these groups, states have obligations to offer education in, or of, students' mother tongue 'wherever possible'.¹¹⁸ This requires states to take active measures to provide mother tongue education for these groups, including by recruiting staff who can teach in the relevant languages, and procuring textbooks and other materials in these languages.¹¹⁹

The reference to '*other*' unique traits of individuals which public education must accommodate is deliberately broad, to encompass a range of situations where individuals require particular support to participate in mainstream education. In relation to persons with disabilities, for example, states may be required to adopt a variety of measures including making all spaces wheelchair-accessible; providing assistive devices and software, such as software which can read text aloud and convert speech to text, for students with visual impairment; and providing teachers with equipment to enhance hearing for those with hearing impairments.¹²⁰ In relation to women, the obligations of states may include providing gender-sensitive sanitation facilities; offering safe transport to and from school; and implementing re-entry policies which enable girls who have dropped out of school due to pregnancy to recommence their education.¹²¹ For those living in poverty, reasonable accommodations may include providing books and other learning materials free of charge; offering free school lunches; and developing individual education plans.¹²²

The third and fourth sentences of Guiding Principle 31 reflect more specifically international human rights law requirements concerning the *content* of education. The requirement for public education '*to safeguard the possibility of pluralism in education*' adopts the wording used by the European Court of Human Rights in its jurisprudence,¹²³ and reflects the fundamental principle enshrined in ICESCR, the International Covenant on Civil and Political Rights, and other international human rights treaties, that parents have the freedom 'to ensure the religious and moral education of their children in

¹¹⁷ Incheon Framework [32].

¹¹⁸ ILO Convention 169, art 28 (which refers to education in 'their own indigenous languages or in the language most commonly used by the group to which they belong'); UNDRIP, art 14(3); UN Minorities Declaration, art 4(3). Note also the decisions of the European Court of Human Rights in *Cyprus v Turkey* (2002) 35 EHRR 30 and *Catan and Others v Moldova and Russia* (2013) 57 EHRR 4. The phrasing 'wherever possible' comes from the UN Minorities Declaration, art 4(3). ILO Convention 169, art 28(1) uses the formulation 'wherever practicable' and UNDRIP, art 14(3) 'when possible'.

¹¹⁹ See eg CESCR, 'Concluding Observations: United Nations Interim Administration Mission in Kosovo (UNMIK)' (2008) E/C.12/UNK/CO/1 [31]; CESCR, 'Concluding Observations: Greece' (2004) E/C.12/1/Add.97 [50].

¹²⁰ For more detailed analysis, see Committee on the Rights of Persons with Disabilities, 'General Comment No 4' (n 100).

¹²¹ See UNGA 'Report of the Special Rapporteur on the right to education' (29 September 2017) UN Doc A/72/496 [37].

¹²² *ibid* [55] – [57].

¹²³ See eg *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1976) 1 EHRR 711 [50]; *Folgerø and Others v Norway* (2008) 46 EHRR 47 [84(b)].

conformity with their own convictions'.¹²⁴ It is clear that this extends to encompass philosophical convictions,¹²⁵ as well as questions of cultural identity and values,¹²⁶ with the aim of guarding against indoctrination.¹²⁷ As noted in the European Court of Human Rights case of *Kjeldsen, Busk Madsen and Pedersen v Denmark*, this freedom not only includes the liberty of parents to send their children to private schools which conform to their convictions, but specifically extends to impose an obligation on states 'to ensure, in State teaching, respect for parents' religious and philosophical convictions'.¹²⁸ In fact, as stated in the case of *Folgerø v Norway*: 'In view of the power of the modern State, it is above all through State teaching that this aim [pluralism in education] must be realised'.¹²⁹ According to the Committee on Economic, Social and Cultural Rights, this 'permits public school instruction in subjects such as the general history of religions and ethics if it is given in an unbiased and objective way'.¹³⁰ However, 'public education that includes instruction in a particular religion or belief is inconsistent with article 13(3) unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians'.¹³¹ On the question of sex education, it is open to states to provide such education, provided it is done in a factual and objective way, which does not promote particular views or practices.¹³²

The wording requiring education to be '*culturally appropriate*' and to '*enable learners to develop their personality and cultural identity and to learn and understand cultural values and practices of the communities to which they belong, as well as those of other communities and societies*' is taken from General Comment 21 of the Committee on Economic, Social and Cultural Rights on the right of everyone to take part in cultural life.¹³³ It reflects requirements of international human rights law concerning not only the right to cultural life¹³⁴ but also the right to education. Article 13(1) of ICESCR provides that education 'shall be directed to the full development of the human personality and the sense of its dignity' and 'shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups'. Art 29(1) of the Convention on the Rights of the Child indicates that

¹²⁴ See ICESCR, art 13(3); ICCPR, art 18(4); International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3 (Migrant Workers Convention), art 12(4). See also Convention against Discrimination in Education, art 5(2); Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), First Protocol (opened for signature 20 March 1952, entered into force 18 May 1954) 213 UNTS 262 (ECHR First Protocol), art 2.

¹²⁵ ECHR First Protocol, art 2.

¹²⁶ CROC, art 29(1)(c).

¹²⁷ *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1976) 1 EHRR 711 [53].

¹²⁸ *ibid* [50].

¹²⁹ *Folgerø and Others v Norway* (2008) 46 EHRR 47 [84(b)].

¹³⁰ CESCR, 'General Comment No 13' (n 6) [28].

¹³¹ *ibid* [28]. See further *Folgerø and Others v Norway* (2008) 46 EHRR 47, which found that, without an adequate system of exemptions, the introduction of a subject involving the study of Christianity and other philosophies, which gave particular emphasis to giving pupils a Christian upbringing, was contrary to the requirement to ensure pluralism in public schools under article 2 of Protocol 1 to the ECHR.

¹³² *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1976) 1 EHRR 711. See also *AR and LR v Switzerland* App no 22338/15 (ECHR, 18 January 2018).

¹³³ CESCR, 'General Comment No 21' (n 105) [26].

¹³⁴ ICESCR, art 15(1)(a).

education shall be directed to ‘the development of the child’s personality’,¹³⁵ ‘the development of respect for the child’s parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own’,¹³⁶ and ‘the preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin’.¹³⁷ More generally, the requirement for public education to be ‘culturally appropriate’ is an aspect of the acceptability of education,¹³⁸ and reflects the requirements of the Convention on the Rights of the Child that education be ‘child-centred’ with the goal of ‘development of the individual child’s personality, talents and abilities, in recognition of the fact that every child has unique characteristics’.¹³⁹

The final sentence of Guiding Principle 31 reflects principles of international human rights law regarding the *manner* in which content is to be presented. The wording, that ‘*information or knowledge included in the curriculum must be conveyed in an objective, critical and pluralistic manner*’, is again taken from jurisprudence of the European Court of Human Rights.¹⁴⁰ This emphasises the need for balance and for a critical, scientific approach to the presentation of material. Where there are different views or approaches to particular issues, a balance of these views and approaches must be reflected in the teaching of this material. Similarly, the purpose of instruction must be to provide information, on a neutral and objective basis, and not to influence the views of students. So, for example, a course on world religions cannot give undue emphasis to a particular religion or be conducted with the object of instructing students in a particular religion.¹⁴¹

Principle 32

32. States must ensure that public education is accountable, participatory, inclusive, and transparent. In particular, they must put in place a participatory educational governance system that is representative of all stakeholders, including children and other learners, parents or legal guardians, communities, teaching and non-teaching staff, education unions, and other civil society organisations.

¹³⁵ CROC, art 29(1)(a).

¹³⁶ CROC, art 29(1)(c).

¹³⁷ CROC, art 29(1)(d). See also Convention against Discrimination in Education, art 5(1)(a).

¹³⁸ CESCR, ‘General Comment No 13’ (n 6) [6(c)].

¹³⁹ UN Committee on the Rights of the Child, ‘General Comment No 1’ (n 46) [9].

¹⁴⁰ See *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1976) 1 EHRR 711 [53]; *Folgerø and Others v Norway* (2008) 46 EHRR 47 [84(h)], [102].

¹⁴¹ *Folgerø and Others v Norway* (2008) 46 EHRR 47.

Commentary

Guiding Principle 32 reflects a number of principles that run through the body of international human rights law. It also reflects the commitments of UN member states under Sustainable Development Goal 16, targets for which require states to ‘develop effective, accountable and transparent institutions at all levels’,¹⁴² ‘ensure responsive, inclusive, participatory and representative decision-making at all levels’,¹⁴³ and ‘ensure public access to information’.¹⁴⁴

The requirement to ensure that public education is ‘accountable’ is broader than the principle that states be accountable for violations of international human rights law, but it nonetheless reflects that principle, which has been recognised at both the universal¹⁴⁵ and regional¹⁴⁶ levels as essential for the protection of international human rights. The principle of accountability of the state in relation to the right to education in general is set out in more detail in Guiding Principle 80. Guiding Principle 32 concerns accountability in the specific context of public education.

In accordance with general principles, accountability for violations of human rights in public education may take various forms, including civil or criminal proceedings before courts or other judicial bodies, or administrative or disciplinary action. Victims of violations must have access to effective remedies, including compensation and declaratory relief to prevent violations from recurring.¹⁴⁷ According to the Special Rapporteur on the Right to Education:

Accountability mechanisms must operate promptly, fairly and transparently. They must be able to assess claims of violations, determine responsibility and provide remedies to those who have suffered wrongful treatment. From a governance perspective, it is particularly important that these mechanisms feed into legislative and policy streams, and that systemic and structural issues be identified wherever possible.¹⁴⁸

More generally, accountability in relation to public education requires monitoring to ensure that standards (including not only the requirements of international human rights law, but also educational standards) are met. The requirement for monitoring in relation to the

¹⁴² SDG, target 16.6.

¹⁴³ SDG, target 16.7.

¹⁴⁴ SDG, target 16.10

¹⁴⁵ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UNGA Res 60/147 (21 March 2006).

¹⁴⁶ Guidelines of the Committee of Ministers of the Council of Europe on Eradicating Impunity for Serious Human Rights Violations, adopted by the Committee of Ministers on 30 March 2011 at the 1110th Meeting of the Ministers’ Deputies.

¹⁴⁷ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UNGA Res 60/147 (21 March 2006), especially art 3.

¹⁴⁸ UNHRC ‘Report of the Special Rapporteur on the right to education on governance and the right to education’ (22 November 2018) UN Doc A/HRC/38/32 [68].

realisation of economic, social and cultural rights was emphasised as a key obligation of states by the Committee on Economic, Social and Cultural Rights in its first General Comment.¹⁴⁹ In relation to the right to education, in particular, the Committee has indicated that states are 'obliged to establish and maintain a transparent and effective system which monitors whether or not education is, in fact, directed to the educational objectives set out in article 13(1)'.¹⁵⁰ The Committee has also emphasised the need for states to adopt 'a national educational strategy' which 'should include mechanisms, such as indicators and benchmarks on the right to education, by which progress can be closely monitored'.¹⁵¹ Reaffirming this commitment to monitoring and accountability, under the Incheon Declaration, states commit themselves to 'establish legal and policy frameworks that promote accountability'¹⁵² and to 'develop comprehensive national monitoring and evaluation systems in order to ... ensure accountability'.¹⁵³ Under the Framework for Action, states note that '[a]s the primary responsibility for monitoring lies at the country level, countries should build up effective monitoring and accountability mechanisms'.¹⁵⁴

The requirement for public education to be '*participatory*' reflects the right of all people to participate in the decision-making processes which affect their lives. Under article 25 of the International Covenant on Civil and Political Rights, all citizens have the right 'to take part in the conduct of public affairs'.¹⁵⁵ And according to the Committee on Economic, Social and Cultural Rights:

the international human rights normative framework includes the right of those affected by key decisions to participate in the relevant decision-making processes. The right to participate is reflected in numerous international instruments, including the International Covenant on Economic, Social and Cultural Rights and the Declaration on the Right to Development.¹⁵⁶

Reflecting this principle, under the Incheon Declaration, states have affirmed that they are 'determined to establish legal and policy frameworks that promote accountability and transparency as well as participatory governance ... and to uphold the right to participation of all stakeholders'.¹⁵⁷ The importance of a participatory approach to education has also been emphasised by the Special Rapporteur on the Right to

¹⁴⁹ CESCR, 'General Comment No 1: Reporting by States parties' (1989) E/1989/22, especially [2] – [6]. See also CESCR, 'General Comment No 3' (n 57) [11].

¹⁵⁰ CESCR, 'General Comment No 13' (n 6) [49].

¹⁵¹ *ibid* [52]. See also CESCR, 'General Comment No 11' (n 40) [8].

¹⁵² Incheon Declaration [12].

¹⁵³ *ibid* [18].

¹⁵⁴ Incheon Framework [97].

¹⁵⁵ ICCPR, art 25(a).

¹⁵⁶ CESCR, 'Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights' (2001) E/C.12/2001/10 [12].

¹⁵⁷ Incheon Declaration [12]. See also Incheon Framework [79].

Education, Kombou Boly Barry,¹⁵⁸ who has described participation as ‘a core element of the right to education’.¹⁵⁹

Processes for participation must also be ‘*inclusive*’ and allow, in particular, for participation by groups that may otherwise be marginalised or discriminated against. This reflects the general international human rights principles of equality and non-discrimination, as well as specific obligations contained in a number of international human rights treaties. Article 12 of the Convention on the Rights of the Child, for example, provides that states ‘shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child’. Article 7 of the Convention on the Elimination of All Forms of Discrimination against Women similarly affirms the right of women to ‘participate in the formulation of government policy and the implementation thereof’¹⁶⁰ and ‘participate in non-governmental organizations and associations’;¹⁶¹ and article 29 of the Convention on the Rights of Persons with Disabilities requires states to ‘promote actively an environment in which persons with disabilities can effectively and fully participate in the conduct of public affairs, without discrimination and on an equal basis with others, and encourage their participation in public affairs’. Article 18 of the UN Declaration on the Rights of Indigenous Peoples provides that indigenous peoples ‘have the right to participate in decision-making in matters which would affect their rights’, and article 14 specifically provides that states must act ‘in conjunction with indigenous peoples’ to provide individuals with access to education in their own culture and language.¹⁶² Processes for participation must also prevent discrimination on other prohibited grounds, including poverty and language. Specific measures should be taken to overcome linguistic barriers to participation in public education governance,¹⁶³ and special consideration should be given to engaging ‘poor and poorly educated persons’ who are ‘often either unaware of how to engage in governance systems, or otherwise too concerned with survival to do so’.¹⁶⁴ Possible solutions here could include engagement with civil society and other community groups.¹⁶⁵

The principle of ‘*transparency*’ reflects the right to receive and impart information, embodied in, for example, article 19 of the Universal Declaration of Human Rights and article 19 of the International Covenant on Civil and Political Rights. Both of these instruments affirm the right to ‘seek, receive and impart information and ideas through

¹⁵⁸ UNGA ‘Report of the Special Rapporteur on the right to education’ (29 September 2017) UN Doc A/72/496 [28]; UNHRC ‘Report of the Special Rapporteur on the right to education on governance and the right to education’ (22 November 2018) UN Doc A/HRC/38/32 [54] – [60].

¹⁵⁹ UNHRC ‘Report of the Special Rapporteur on the right to education on governance and the right to education’ (22 November 2018) UN Doc A/HRC/38/32 [54].

¹⁶⁰ CEDAW, art 7(b).

¹⁶¹ CEDAW, art 7(c).

¹⁶² See also CERD, art 5(c); Migrant Workers Convention, art 42(2).

¹⁶³ UNHRC ‘Report of the Special Rapporteur on the right to education on governance and the right to education’ (22 November 2018) UN Doc A/HRC/38/32 [56].

¹⁶⁴ *ibid* [59].

¹⁶⁵ *Ibid* [56].

any media and regardless of frontiers'. This includes 'a right of access to information held by public bodies'¹⁶⁶ and according to the Human Rights Committee:

To give effect to the right of access to information, States parties should proactively put in the public domain Government information of public interest. States parties should make every effort to ensure easy, prompt, effective and practical access to such information. States parties should also enact the necessary procedures, whereby one may gain access to information, such as by means of freedom of information legislation.¹⁶⁷

The principle of transparency also extends beyond the right of access to information to encompass broader requirements of disclosure in relation to public finances and decision-making. Under the UN Convention against Corruption, more than 185 states have accepted obligations to ensure transparency across the public sector, including with respect to public finances¹⁶⁸ and public administration.¹⁶⁹ In particular, article 10 of that Convention requires each state to take measures 'to enhance transparency in its public administration, including with regard to its organization, functioning and decision-making processes'. States also make repeated commitments concerning transparency throughout the Incheon Declaration and Framework for Action, including to 'establish legal and policy frameworks that promote accountability and transparency'.¹⁷⁰

In the context of public education, principles of transparency apply to 'financial and budgetary matters, decision-making bodies, administrative and recruitment mechanisms, and other administrative processes'.¹⁷¹ This requires states to take measures such as: passing freedom of information legislation to ensure the public can access relevant information, including legal provisions for the disclosure of school data;¹⁷² publishing budgetary and financial information in an open and timely manner;¹⁷³ regularly publishing education data and indicators,¹⁷⁴ as well as decisions and meeting minutes of all relevant decision-making bodies;¹⁷⁵ publicly advertising teaching positions and other employment

¹⁶⁶ UN Human Rights Committee 'General Comment No 34, Article 19: Freedom of opinions and expression' (2011) CCPR/C/GC/34 [18].

¹⁶⁷ *ibid* [19].

¹⁶⁸ UN Convention against Corruption (adopted 9 December 2003, entered into force 14 December 2005) 2349 UNTS 41, art 9.

¹⁶⁹ *ibid*, art 10.

¹⁷⁰ Incheon Declaration [12]. See also eg Incheon Framework [28], [79], [80], [85].

¹⁷¹ UNHRC 'Report of the Special Rapporteur on the right to education on governance and the right to education' (22 November 2018) UN Doc A/HRC/38/32 [49].

¹⁷² *ibid* [51]; UNESCO, '10 ways to improve transparency and accountability in education' (28 January 2018) <www.iiep.unesco.org/en/10-ways-promote-transparency-and-accountability-education-4307> accessed 1 August 2024, point 1.

¹⁷³ UNHRC 'Report of the Special Rapporteur on the right to education on governance and the right to education' (22 November 2018) UN Doc A/HRC/38/32 [52].

¹⁷⁴ *ibid* [50].

¹⁷⁵ *ibid* [51].

opportunities in the education sector;¹⁷⁶ and introducing a legal mechanism for addressing grievances of parents and other groups in relation to public education.¹⁷⁷

The second sentence of Guiding Principle 32 applies the general principles in the first sentence to the particular context of educational governance and reiterates the obligation of states to establish a system for public educational governance which allows for the participation of all stakeholders.¹⁷⁸ It also provides a non-exhaustive list of stakeholders who must be represented in such a governance system, and able to participate in the governance of individual educational institutions, as well as in relation to broader issues of education policy and governance. The list of stakeholders, which reflects those whose participation is identified by states in the Incheon Framework for Action as critical for good governance in education,¹⁷⁹ also reflects established provisions of international human rights law, which require the participation of children and other learners;¹⁸⁰ parents or legal guardians;¹⁸¹ communities;¹⁸² teaching and non-teaching staff; education unions;¹⁸³

¹⁷⁶ *ibid* [50].

¹⁷⁷ UNESCO, '10 ways to improve transparency and accountability in education' (28 January 2018) <www.iiep.unesco.org/en/10-ways-promote-transparency-and-accountability-education-4307> accessed 1 August 2024, point 10.

¹⁷⁸ This follows from the principles set out above, to which states affirmed their commitment in the Incheon Declaration, noting their determination to establish systems of 'participatory governance' (para 12). See also the decision of the UN Human Rights Committee in the case of *Waldman v Canada*, UN Doc CCPR/C/67/D/694/1996 (5 November 1999) [2.4], in which the fact that the Roman Catholic schools in that case were directed by 'a publicly accountable, democratically elected board of education', with school boards 'elected by Roman Catholic ratepayers' was an important factor in the Committee's finding that the schools were part of the public education system.

¹⁷⁹ Incheon Framework [79], [80], [81], [84].

¹⁸⁰ CROC, art 12. See also CESCR, 'General Comment No 13' (n 6) [6(c)], which requires education to be acceptable 'to students'; and UNHRC 'Report of the Special Rapporteur on the right to education on governance and the right to education' (22 November 2018) UN Doc A/HRC/38/32 [54], which notes the importance of ensuring that 'the needs of learners are better reflected in education governance mechanisms'. See also concluding observations of the treaty bodies, eg, UN Committee on the Rights of the Child, 'Concluding Observations: Nigeria' (1996) CRC/C/15/Add.61 [38].

¹⁸¹ See those provisions of international human rights law which protect the freedom of parents to ensure the education of their children in conformity with their convictions: ICESCR, art 13(3); ICCPR, art 18(4); Migrant Workers Convention, art 12(4); Convention against Discrimination in Education, art 5(2); ECHR First Protocol, art 2. See also CESCR, 'General Comment No 13' (n 6) [6(c)], which requires education to be acceptable 'to students and, in appropriate cases, parents'; Incheon Framework [79]; UNHRC 'Report of the Special Rapporteur on the right to education on governance and the right to education' (22 November 2018) UN Doc A/HRC/38/32 [73], [77], [84]. See also eg UN Committee on the Rights of the Child, 'Concluding Observations: Tajikistan' (2000) CRC/C/15/Add.136 [43].

¹⁸² See CESCR, 'General Comment No 13' (n 6) [6(d)], which requires education to be 'adaptable' to the needs of different communities; Incheon Framework [79]; UNHRC 'Report of the Special Rapporteur on the right to education on governance and the right to education' (22 November 2018) UN Doc A/HRC/38/32, [56]. See also eg UN Committee on the Rights of the Child, 'Concluding Observations: Tajikistan' (2000) CRC/C/15/Add.136 [43].

¹⁸³ The importance of involving staff and unions in educational governance reflects the principles of both international human rights law and international labour standards, including rights to freedom of association and collective bargaining. See eg ICCPR, art 22; International Labour Organization Right to Organise and Collective Bargaining Convention (adopted 1 July 1949, entered into force 18 July 1951); UNESCO 'Recommendation concerning the Status of Teachers' (5 October 1966), arts 32, 51, 62, 71, 76, 123, 124. Under the Incheon Framework [81], states declare that: 'Teachers and educators, and their organizations, are crucial partners in their own right and should be engaged at all stages of policy-making, planning,

and other civil society organisations.¹⁸⁴ The general principle of international human rights law that individuals should be able to participate in decision-making processes which affect them may also require the participation of other stakeholders, including religious groups, employers' organisations, and professional bodies.

Principle 33

33. States must take all effective measures to address the determinants of access to quality public education, to ensure that individuals have equal access to public education without discrimination or segregation. This includes adopting all effective measures to respect, protect, and fulfil other rights such as the rights to work, social security, food, housing, health, water, and sanitation. Such measures may include desegregating housing policies; infrastructure planning; appropriate public transportation systems; access to adequate food; social protection and employment programmes; legislation that sets the minimum age of marriage at 18 years; child labour prevention policies; measures to modify the social and cultural patterns that lead to stereotypes and prejudices; and measures to ensure the individual's highest attainable standard of physical and mental health.

Commentary

Guiding Principle 33 builds on Guiding Principle 31, which, as noted above, applies Guiding Principles 23-28 (concerning equality and non-discrimination) to the specific context of public education. Whereas Guiding Principle 31 focuses on the structure and content of public education itself, Guiding Principle 33 affirms that state obligations to ensure equality with respect to the right to education extend to addressing background factors which affect the ability of students to access, and profit from, quality public education.

The requirement to adopt '*all effective measures to respect, protect, and fulfil other rights*' reflects both the general principle that all human rights are 'universal, indivisible and interdependent and interrelated',¹⁸⁵ and also, more particularly, the fact that realisation of

implementation and monitoring.' See also UNHRC 'Report of the Special Rapporteur on the right to education on governance and the right to education' (22 November 2018) UN Doc A/HRC/38/32 [115] (see also [54], [73], [77], [84]).

¹⁸⁴ CESCR, 'General Comment No 13' (n 6) [60] indicates that 'efforts for the realization of the right to education should be maintained to improve coherence and interaction among all the actors concerned, including the various components of civil society'. See also UNHRC 'Report of the Special Rapporteur on the right to education on governance and the right to education' (22 November 2018) UN Doc A/HRC/38/32, [56] – [57], [84]; Incheon Framework [80], [97].

¹⁸⁵ The World Conference on Human Rights, 'Vienna Declaration and Programme of Action' (adopted 25 June 1993) UN Doc A/CONF.157/23, art 5.

the right to education is dependent upon the realisation of other rights.¹⁸⁶ Children who are forced to work cannot attend school. Children who are sick or hungry cannot benefit from education in the same way as their peers.¹⁸⁷ High levels of violence against women may prevent girls from attending school. Families whose right to an adequate standard of living is not protected, for example through work rights or rights to social security, may be unable to send their children to school due to direct or indirect costs.

These and other matters can lead to discrimination in enjoyment of the right to education on prohibited grounds including sex, race, national or social origin, age, disability, place of residence, or socioeconomic status.¹⁸⁸ Other factors can result in de jure or de facto segregation in education,¹⁸⁹ with some public schools attended predominantly by students from particular backgrounds. The final sentence of Guiding Principle 33 therefore offers a non-exhaustive list of measures which states must take to address such discrimination and/or segregation.

Where state housing policies, directly or indirectly, result in segregation on prohibited grounds, including race, national or social origin, or socioeconomic status, this can produce segregation in public schools also. For example, schools in areas with high volumes of public housing may predominantly be attended by children from lower socioeconomic groups, new migrants or other disadvantaged minority groups. '*Desegregating housing policies*' is required to address this issue.¹⁹⁰

'*Infrastructure planning*' encompasses a range of measures necessary to ensure equal and non-discriminatory access to public education. At the most basic level, it requires states to ensure that there are sufficient public schools available throughout the state to

¹⁸⁶ See eg *Case of the Girls Yean and Bosico v Dominican Republic*, Inter-American Court of Human Rights Series C No 130 (8 September 2005), in which the state's failure to issue birth certificates to children of Haitian background born in the Dominican Republic, and denial of their right to Dominican nationality, led to one of the children being denied the right to attend school. See also *Institute for Human Rights and Development in Africa and Open Society Justice Initiative v the Government of Kenya*, African Committee of Experts on the Rights and Welfare of the Child, No 002/Com/002/2009 (22 March 2011).

¹⁸⁷ See eg *Xákmok Kásek Indigenous Community v Paraguay*, Inter-American Court of Human Rights Series C No 214 (24 August 2010) [209], [212], noting the adverse impact on the right to education of children failing to attend school due to lack of food and water.

¹⁸⁸ For prohibited grounds of discrimination, see ICESCR, art 2(2), and CESCR, 'General Comment No 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)' (2009) E/C.12/GC/20 [15] – [35]. See also, eg, CEDAW, art 10; CERD, art 5(v).

¹⁸⁹ Contrary to the prohibition on segregation in education, reflected in Guiding Principle 25(b) and discussed above in the context of Guiding Principle 31: see Convention against Discrimination in Education, art 1(c).

¹⁹⁰ It is well-established that the prohibition on discrimination in relation to enjoyment of the right to housing requires states to take action to prevent residential segregation: see eg the decisions of the European Committee of Social Rights in *European Roma Rights Centre v Portugal*, European Committee of Social Rights Complaint 61/2010 (30 June 2011) [41] – [48] and *Centre on Housing Rights and Evictions (COHRE) v Italy*, European Committee of Social Rights Complaint 58/2009 (25 June 2010) [91]. Jurisprudence of the European Court of Human Rights supports desegregation measures as pursuing a legitimate human rights objective: see *Garib v The Netherlands* App no 43494/09 (ECHR, 6 November 2017).

ensure that public education is reasonably available to all,¹⁹¹ regardless of place of residence. It also requires states to ensure that the standard of infrastructure available is the same for all public schools: it is not permissible for schools in the city, for example, to have markedly superior facilities to those in rural areas.¹⁹² Infrastructure planning also requires attention to the adequacy of ‘physical infrastructure, including access to clean water and sanitation facilities’.¹⁹³ Lack of clean water and adequate sanitation affects realisation of the right to education for all, and has a particular impact on menstruating women and girls.¹⁹⁴ A particular aspect of infrastructure planning involves the provision of ‘*appropriate public transportation systems*’, to ensure that children are able to attend school.¹⁹⁵ These should be affordable and equally available to all, without discrimination.¹⁹⁶

Lack of ‘*access to adequate food*’ can be a barrier to children attending schools.¹⁹⁷ States are therefore encouraged to implement programs providing free school meals for children, and other programs to ensure children and their families receive adequate nutrition.¹⁹⁸ More generally, ‘*social protection and employment programmes*’ are necessary to ensure that families enjoy an adequate standard of living, such that their children have food, clothing and other basic needs met in order to attend school.¹⁹⁹ Such programmes also ensure that families do not need their children to work to make money to support the family. These general provisions are complemented by specific prohibitions on *child marriage* and *child labour*, practices which directly affect the ability of children, particularly girls, to attend school.²⁰⁰

‘*Measures to modify the social and cultural patterns that lead to stereotypes and prejudices*’ are specifically required under international human rights treaties,²⁰¹ and are

¹⁹¹ See Guiding Principle 29.

¹⁹² See Convention against Discrimination in Education, art 4(b).

¹⁹³ See eg UN Committee on the Rights of the Child, ‘Concluding Observations on the fifth periodic report of Mongolia’ (2017) CRC/C/MNG/CO/5 [38(d)].

¹⁹⁴ See UNGA ‘Report of the Special Rapporteur on the right to education’ (20 July 2020) UN Doc A/75/178.

¹⁹⁵ UN Committee on the Rights of the Child, ‘Concluding Observations on the fifth periodic report of Mongolia’ (2017) CRC/C/MNG/CO/5 [38(d)]; CESCR, ‘Concluding Observations on the fourth periodic report of France’ (2016) E/C.12/FRA/CO/4 [54(b)]; CESCR, ‘Concluding Observations on the third periodic report of Moldova’ (2017) E/C.12/MDA/CO/3 [72].

¹⁹⁶ See eg CESCR, ‘Concluding Observations on the fifth periodic report of Sri Lanka’ (2017) E/C.12.LKA.CO.5 [63]; CESCR, ‘Concluding Observations on the third periodic report of Moldova’ (2017) E/C.12/MDA/CO/3 [72].

¹⁹⁷ See eg *Xákmok Kásek Indigenous Community v Paraguay*, Inter-American Court of Human Rights Series C No 214 (24 August 2010) [209], [212], noting the adverse impact on the right to education of children failing to attend school due to lack of food and water.

¹⁹⁸ UN Committee on the Rights of the Child, ‘Concluding Observations: Guatemala’ (1996) CRC/C/15/Add.58 [36]; UN Committee on the Rights of the Child, ‘Concluding Observations: Honduras’ (1994) CRC/C/15/Add.24 [31].

¹⁹⁹ See eg UN Committee on the Rights of the Child, ‘Concluding Observations on the combined third and fourth periodic reports of Indonesia’ (2014) CRC/C/IDN/CO/3-4 [57(d)].

²⁰⁰ See eg UN Committee on the Rights of the Child, ‘Concluding Observations on the second periodic report of Zimbabwe’ (2016) CRC/C/ZWE/CO/2 [69(b)]; UN Committee on the Rights of the Child, ‘Concluding Observations on the combined second and third periodic reports of Gambia’ (2015) CRC/C/GMB/CO/2-3 [68(c)]. Re child labour, see CESCR, ‘General Comment No 13’ (n 6) [55].

²⁰¹ See eg CERD, art 7; CEDAW, art 5; CRPD, art 8.

necessary to ensure non-discriminatory access to education for all. In particular, states are required to take steps to address 'negative cultural attitudes' towards education for girls, which may lead parents to keep their girls at home for domestic duties or early marriage, and which may negatively affect the experiences of girls in the classroom.²⁰² Similarly, states are required to address stereotypes and prejudices which may discourage parents from sending disabled children to school,²⁰³ or which may adversely affect the learning experience of children from minority or indigenous backgrounds.²⁰⁴

Finally, states must take '*measures to ensure the individual's highest attainable standard of physical and mental health*'. This includes measures to be taken within schools, for example, the provision of adequate water and sanitation facilities;²⁰⁵ measures to address violence against children;²⁰⁶ and the provision of health care to poor students.²⁰⁷ It also includes broader measures to be taken at a societal level to, for example, protect children, especially girls, from violence on their way to and from school.²⁰⁸

²⁰² See eg UN Committee on the Rights of the Child, 'Concluding Observations on the second periodic report of Zimbabwe' (2016) CRC/C/ZWE/CO/2 [69(b)]; UN Committee on the Rights of the Child, 'Concluding Observations on the combined fifth and sixth periodic reports of Ecuador' (2017) CRC/C/ECU/CO/5-6 [16(b)]; UN Committee on the Rights of the Child, 'Concluding observations on the combined third to fifth periodic reports of Kenya' (2016) CRC/C/KEN/CO/3-5 [58(c)]; CESCR, 'Concluding Observations on the combined second and third periodic reports of Tajikistan' (2015) E/C.12/TJK/CO/2-3 [16].

²⁰³ Committee on the Rights of Persons with Disabilities, 'General Comment No 4: Article 24: Right to inclusive education' (2016) UN Doc CRPD/C/GC/4 [48].

²⁰⁴ See eg UN Committee on the Rights of the Child, 'Concluding Observations: Slovenia' (2013) CRC/C/SVN/CO/3-4 [60(d)]; CESCR, 'Concluding Observations: Rwanda' (2013) E/C.12/RWA/CO/2-4 [8].

²⁰⁵ See UNGA 'Report of the Special Rapporteur on the right to education' (20 July 2020) UN Doc A/75/178; UN Committee on the Rights of the Child, 'Concluding Observations on the fifth periodic report of Mongolia' (2017) CRC/C/MNG/CO/5 [38(d)].

²⁰⁶ UN Committee on the Rights of the Child, 'Concluding Observations on the fifth periodic report of Mongolia' (2017) CRC/C/MNG/CO/5 [38(e)].

²⁰⁷ UNGA 'Report of the Special Rapporteur on the right to education' (29 September 2017) UN Doc A/72/496 [119].

²⁰⁸ UN Committee on the Rights of the Child, 'Concluding Observations on the second periodic report of Zimbabwe' (2016) CRC/C/ZWE/CO/2 [69(d)].