

# Is There a Human Right to Public Education? An Analysis of States' Obligations in Light of the Increasing Involvement of Private Actors in Education

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## ABSTRACT

In recent decades, there has been a rapid increase in the involvement of private actors in education. Of particular concern is the rise of for-profit providers of education in developing countries, a phenomenon which often has an adverse effect on the development of public education systems in those States. Against this background, this article asks whether there is a right to public education under international human rights law, such that States are required to ensure that public education is available for all, regardless of the existence of private educational institutions. The recently adopted Abidjan Principles on the Right to Education, which have been endorsed by human rights bodies including the Human Rights Council and the Special Rapporteur on the Right to Education, declare for the first time the existence of such a right to public education. But what is the legal basis for such a right? To answer this question, this article first explores how “public education” is understood within international human rights law, before turning to consider the scope of States’ obligations to provide such education. I argue that a doctrinal analysis of the legal provisions which protect the right to education (in particular, Article 13 of the International Covenant on Economic, Social and Cultural Rights, and Articles 28 and 29 of the Convention on the Rights of the Child), read in light of the relevant *travaux préparatoires* and subsequent interpretation by treaty bodies and in State practice, indicates that States are obligated to provide public education. This conclusion is supported by consideration of the practical context within which the relevant legal principles must take effect. I then consider

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the scope of this obligation to provide public education. Noting in particular States' obligations of non-discrimination, I find that States are obligated to make public education reasonably available to all within their jurisdiction. On this basis, I conclude that there is a right to public education in international human rights law, and in the final part of the article explore the nature of this right and its implications for State and private involvement in the sphere of education.

## INTRODUCTION

In recent decades, there has been a rapid increase in the involvement of private actors in education.<sup>1</sup> The UN Special Rapporteur on the right to education, Kishore Singh, has referred to the “explosive growth of privatized education, in particular for-profit education, taking advantage of the limitations of Government capacities to cope with rising demands on public education.”<sup>2</sup> The Special Rapporteur, and others, have raised a number of concerns regarding the effects of this development on human rights, and, in particular, the right to education.<sup>3</sup> Against this background, the question of the scope of States' obligations to provide public education, as a matter of international human rights law, has emerged as an important issue. In particular, scholars have begun to ask the question of whether there is a human right to public education.<sup>4</sup>

The recently adopted Abidjan Principles on the Right to Education,<sup>5</sup> which have been endorsed by human rights bodies including the Human Rights Council<sup>6</sup> and the Special Rapporteur on the Right to Education,<sup>7</sup> declare for the first time that there is a human right to public education. But is there a legal basis for such a right in international human rights law? Or are the Abidjan Principles progressively developing the law in this re-

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1. Kishore Singh (Special Rapporteur on the Right to Education), *Report to the UNGA on the Right to Education*, ¶ 32, U.N. Doc A/69/402 (Sept. 24, 2014) [hereinafter the 2014 report of the Special Rapporteur].

2. *Id.*

3. See generally the 2014 report of the Special Rapporteur, *supra* note 1. See also MANFRED NOVAK, HUMAN RIGHTS OR GLOBAL CAPITALISM: THE LIMITS OF PRIVATIZATION, 57-66 (University of Pennsylvania Press, 2017); Sylvain Aubry and Delphine Dorsi, *Towards a Human Rights Framework to Advance the Debate on the Role of Private Actors in Education*, 42 OXFORD REVIEW OF EDUCATION 612, 618-624 (2016).

4. See, e.g., Aubry and Dorsi, *supra* note 3, at 620.

5. *Guiding Principles on the Human Rights Obligations of States to Provide Public Education and to Regulate Private Involvement in Education (The Abidjan Principles)*, 8 INTERNATIONAL HUMAN RIGHTS LAW REVIEW 117 (2019); See in particular Principle 17.

6. Human Rights Council Resolution on the Right to Education, U.N. Doc A/HRC/41/L.26, Preamble (July 9, 2019) (“Noting the development by experts of guiding principles and tools for States, such as the Abidjan principles on the human rights obligations of States to provide public education and to regulate private involvement in education”).

7. Koumbou Boly Barry (Special Rapporteur on the Right to Education), *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*, 9-21, U.N. Doc A/HRC/41/37 (April 10, 2019).

spect? This article explores this question. It begins by providing an overview of the provisions of international human rights law which protect the right to education. I then ask the preliminary question of what is meant by “public education” in the context of international human rights law, with particular reference to systems which seem to involve both public and private elements, such as charter schools and schools operating under partnership arrangements. Next, I consider whether States have an obligation to provide such education under international human rights law. Having concluded that they do, I then seek to flesh out the nature and extent of this human rights obligation to deliver public education. I conclude that States’ obligations with respect to the right to education, read together with the prohibition on discrimination in the enjoyment of human rights, require States to make public education reasonably available to all within their jurisdiction. On this basis, I conclude that there is a human right to public education, and in the final part of this article I explore the nature of this right under international human rights law and its implications for State and private involvement in the sphere of education.

## I. THE RIGHT TO EDUCATION UNDER INTERNATIONAL HUMAN RIGHTS LAW

The right to education was first recognized in 1948 in the Universal Declaration of Human Rights (UDHR).<sup>8</sup> Article 26 of the UDHR provides:

1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
3. Parents have a prior right to choose the kind of education that shall be given to their children.<sup>9</sup>

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8. Douglas Hodgson, *Education, Right to, International Protection*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, ¶ 7, [www.mpepil.com](http://www.mpepil.com).

9. G.A. Res. 217 (III) A, *Universal Declaration of Human Rights*, (Dec. 10, 1948), art. 26 [hereinafter UDHR].

In 1960, the UNESCO Convention Against Discrimination in Education imposed binding obligations on States with respect to education.<sup>10</sup> While the Convention does not speak in terms of a “right to education”, it does require States to make “primary education free and compulsory” and secondary and higher education “accessible to all”.<sup>11</sup> Thus Article 4 of the Convention provides:

The States Parties to this Convention undertake furthermore to formulate, develop and apply a national policy which, by methods appropriate to the circumstances and to national usage, will tend to promote equality of opportunity and of treatment in the matter of education and in particular:

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

(b) 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;

(c) To encourage and intensify by appropriate methods the education of persons who have not received any primary education or who have not completed the entire primary education course and the continuation of their education on the basis of individual capacity;

(d) To provide training for the teaching profession without discrimination.<sup>12</sup>

The right to education was subsequently included in the International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 13 of which provides:

1. The States Parties to the present Covenant recognize the right of everyone to education. They 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. They

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10. See Hodgson, *supra* note 8, ¶ 11.

11. UNESCO Convention Against Discrimination in Education, *opened for signature* Dec. 14, 1960 429 U.N.T.S. 93, (entered into force May 22, 1962), art. 4(a).

12. *Id.* art. 4.

further agree that education 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, and further the activities of the United Nations for the maintenance of peace.

2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:
  - (a) Primary education shall be compulsory and available free to all;
  - (b) Secondary education in its different forms, including technical and vocational 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;
  - (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;
  - (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;
  - (e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.
3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.
4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph I of this article and to the requirement that the education given in such in-

stitutions shall conform to such minimum standards as may be laid down by the State.<sup>13</sup>

Other binding international human rights instruments protect the right to education with respect to particular groups, such as racial minorities,<sup>14</sup> women,<sup>15</sup> persons with disabilities<sup>16</sup> and migrant workers.<sup>17</sup> With respect to children, Articles 28 and 29 of the Convention on the Rights of the Child (CRC) provide for the child's right to education. Article 28 provides as follows:

1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

(a) Make primary education compulsory and available free to all;

(b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;

(c) Make higher education accessible to all on the basis of capacity by every appropriate means;

(d) Make educational and vocational information and guidance available and accessible to all children;

(e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.

2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.

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13. International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3, art. 13 (entered into force Jan. 3, 1976) [hereinafter ICESCR].

14. See International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Dec. 21, 1965, 660 U.N.T.S. 1, art. 5(e)(v) (entered into force Jan. 4, 1969).

15. *Convention on the Elimination of All Forms of Discrimination Against Women*, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13, art. 10 (entered into force Sept. 3, 1981).

16. Convention on the Rights of Persons with Disabilities, *opened for signature* Mar. 30, 2007, 2515 U.N.T.S. 3, art. 24 (entered into force May 3, 2008).

17. International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, *opened for signature* Dec. 18, 1990, 2220 U.N.T.S. 3, arts. 30, 43(1)(a) (entered into force Jul. 1, 2003).

3. States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.<sup>18</sup>

Article 29 of the CRC further provides:

1. States Parties agree that the education of the child shall be directed to:

(a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;

(b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;

(c) 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;

(d) 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;

(e) The development of respect for the natural environment.

2. No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.<sup>19</sup>

18. Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, art. 28, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) [hereinafter CRC].

19. *Id.* art. 29.

The right to education is also protected in regional human rights systems.<sup>20</sup> For the purposes of this paper, however, I shall focus on the legal provisions with respect to the right to education which operate at the international level, and will not focus on the particularities of the right within regional systems of human rights protection.

With the exception of the UDHR, all the instruments noted above are binding on States parties to them. Building on these binding statements of the law, States' obligations with respect to the right to education have also been interpreted and elaborated by the international human rights bodies responsible for administering these treaties and ensuring State compliance with the right to education. Throughout this article, I will draw on findings of these human rights bodies as evidence to support my arguments concerning the right to public education. In particular, I will refer to the concluding observations of the Committee on Economic, Social and Cultural Rights (CESCR) and the Committee on the Rights of the Child, and to reports and findings of the UN Special Rapporteur on the Right to Education. While these are not formally binding, they are persuasive as authoritative statements by the international bodies responsible for monitoring State compliance with the right to education. They also play a critical role in the development of international human rights law, bearing in mind that human rights treaties are "living instruments", the interpretation of which will change over time.<sup>21</sup> I will, therefore, draw on statements of these human rights bodies to clarify the interpretation and application of the legal provisions, and to suggest the direction in which international human rights law is developing, in response to the threat which the growth of private providers poses to the human right to education.

## II. HOW CAN PUBLIC EDUCATION BE DEFINED, IN THE CONTEXT OF INTERNATIONAL HUMAN RIGHTS LAW?

None of the provisions of international law which establish the right to education specifically provide for a right to public education. In fact, they do not use the term "public education" at all, with the exception of the

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20. See Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Mar. 20, 1952, 213 U.N.T.S. 262, art. 2 (entered into force May 18, 1954); European Social Charter (revised), *opened for signature* May 3, 1996, 2151 U.N.T.S. 277, art. 17 (entered into force Jul. 1, 1999); *Charter of Fundamental Rights of the European Union* 2010 O.J. (C83) 389, art. 14 (proclaimed by the Commission, 7 December 2000: 2000 O.J. (C364) 1); Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, *opened for signature* Nov. 17, 1988, O.A.S. Treaty Series No. 69, art.13 (entered into force Nov. 16, 1999); African Charter on Human and Peoples' Rights, *opened for signature* Jun. 27, 1981, 1520 U.N.T.S. 217, art. 17(1) (entered into force Oct. 21, 1986); and African Charter on the Rights and Welfare of the Child, *opened for signature*, Jul. 11, 1990, O.A.U. Doc. CAB/LEG/24.9/49 (1990), art. 11 (entered into force Nov. 29, 1999).

21. See *Tyrer v. United Kingdom*, Appl. No. 5856/72, Eur. Ct. H.R. (ser. A, no 26), ¶ 31 (1978).



UNESCO Convention Against Discrimination in Education, which refers to “public education institutions”<sup>22</sup> but does not define or otherwise explain the term. In order to determine the extent of States’ obligations to provide public education, as a matter of international human rights law, it is, therefore, necessary first to define the term “public education.”

In what follows, I first consider general definitions of public and private education, before considering how these concepts are treated in the context of international human rights law specifically. Through this analysis, I identify a number of factors which may be relevant to determining whether a particular institution is public or private, namely: the purpose of the institution, who established it, who controls it, who funds it, and whether the State classifies it as public or private. I then turn to consider particular types of arrangements which raise difficult questions in terms of classification as public or private, namely charter schools, schools operating under partnership arrangements, and State voucher programs, and consider how these are likely to be treated for the purposes of international human rights law.

#### A. *Public and private education – general definitions*

The distinction between public and private is a complex and difficult one in many contexts. This holds true in relation to education. It is difficult to adopt a comprehensive definition of “public education” due to differences in national education systems and understandings of “public” and “private.”<sup>23</sup> Further there are different elements involved in delivering education services (for example funding, staff recruitment, administration and management, teaching, maintenance of facilities and curriculum development), some of which may be public and some of which may be private.<sup>24</sup> For example, are religious or community schools public or private, when the facilities belong to the church or community, but the teachers are paid by the State? What about the situation where schools receive full State funding, but are administered by an independent school board? As Kitaev has noted, “the differences between public and private schools are often blurred, in particular in international comparisons.”<sup>25</sup> In a similar vein,

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22. UNESCO Convention Against Discrimination in Education, *supra* note 11, art. 4(b).

23. See, e.g., Dominique Custos, *Secularism in French Public Schools: Back to War? The French Statute of March 15, 2004* 54(2) AMERICAN JOURNAL OF COMPARATIVE LAW 337 (2006) (discussing the emphasis of secularism as a characteristic of public schools in France); see, e.g., Alison Mawhinney, *A Discriminating Education System: Religious Admission Policies in Irish Schools and International Human Rights Law* 20(4) INTERNATIONAL JOURNAL OF CHILDREN’S RIGHTS 603 (2012) (discussing how the overwhelming majority of public schools are run by religious organizations in Ireland).

24. See, e.g., Fons Coomans and Antenor Hallo de Wolf, *Privatization of Education and the Right to Education*, in PRIVATIZATION AND HUMAN RIGHTS IN THE AGE OF GLOBALISATION, 229, 243-50 (Koen de Feyter and Felipe Gómez Isa eds.) (Intersentia, 2005). See also Igor Kitaev, *Private Education in Sub-Saharan Africa: A Re-Examination of Theories and Concepts Related to Its Development and Finance*, at 41-43 (UNESCO, 1999).

25. Kitaev, *supra* note 24, at 42.

James has spoken of “a continuum of public and private funding and control”, and has concluded that the “definition of ‘private’ is by no means clear-cut in situations where many ‘private’ schools are heavily funded and regulated by the state.”<sup>26</sup>

A number of definitions of “private education” have been proposed.<sup>27</sup> According to Coomans and Hallo de Wolf:

{t}he term is usually reserved to denote formal schooling that has been established on private initiative by individuals or groups without direct governmental involvement, is privately funded, sponsored and managed, and operates autonomously from and not under direct control of the state. In other words, private education operates independently of the public education system.<sup>28</sup>

Similarly, UNESCO has proposed to consider schools “private” where they meet any of the following three criteria: they have private ownership; they have private management; or the majority of funding and expenditure comes from private sources.<sup>29</sup> However, in relation to its work on the Sustainable Development Goals, the UNESCO Institute for Statistics has adopted a narrower definition of a private educational institution as an “[i]nstitution that is controlled and managed by a non-governmental organization (e.g. a church, a trade union or a business enterprise, foreign or international agency), or its governing board consists mostly of members who have not been selected by a public agency.”<sup>30</sup>

It is clear, then, that while there is no settled definition of “private education”, issues of ownership, management and funding are significant to the question of whether an institution is public or private. In particular, the question of who manages and controls the institution seems especially important.

### *B. Public and private education in international human rights law*

For the purposes of this article, however, the critical issue is not how public and private education can be defined in a general sense. Rather, it is

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26. Estelle James, *Private Finance and Management of Education in Developing Countries: Major Policy and Research Issues* (UNESCO, 1991) at 2. For further discussion of the range of ways in which the boundaries between public and private become blurred in the context of education, see Coomans and Hallo de Wolf, *supra* note 24, at 244.

27. See, e.g., Coomans and Hallo de Wolf, *supra* note 24, at 243; Kitaev, *supra* note 24, at 43-4.

28. Coomans and Hallo de Wolf, *supra* note 24, at 243.

29. See Kitaev, *supra* note 24, at 43-4.

30. See UNESCO Institute for Statistics, *Glossary*, <http://uis.unesco.org/node/334761> [http://perma.cc/A73H-SJLB]. The Glossary defines “public educational institution” as an “[i]nstitution that is controlled and managed directly by a public education authority or agency of the country where it is located or by a government agency directly or by a governing body (council, committee etc.), most of whose members are either appointed by a public authority of the country where it is located or elected by public franchise.” UNESCO Institute for Statistics, *Glossary*, <http://uis.unesco.org/node/334766> [http://perma.cc/B6DZ-PK8Y].

necessary to consider how public and private education are understood within international human rights law. On this issue, very little, if anything, has been written. Commentary on the issue of private education and its human rights implications (for example, by the Special Rapporteur on the right to education) has tended simply to assume a general understanding of what is meant by “private education,”<sup>31</sup> or has spoken more generally about the dangers of “privatization” of education.<sup>32</sup>

The starting point for understanding how public and private education are understood for the purposes of international human rights law is to look at those provisions of international human rights law which protect the right to education,<sup>33</sup> particularly Article 13 of ICESCR and Articles 28 and 29 of the CRC, which provide the most detailed articulation of the right. Most of these make no reference to either public or private education. However, there are references to the possibility of individuals and bodies establishing educational institutions other than those provided by the State.<sup>34</sup>

Thus Article 13(3) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides that:

The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State . . . .<sup>35</sup>

Article 13(4) goes on to provide that:

No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall

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31. See, e.g., Kishore Singh (Special Rapporteur on the Right to Education), *Protecting the Right to Education against Commercialization*, especially ¶ 65-68, U.N. Doc A/HRC/29/30 (June 10, 2015).

32. *Id.* especially ¶ 40-46. See also the 2014 report of the Special Rapporteur, *supra* note 1; NOVAK, HUMAN RIGHTS OR GLOBAL CAPITALISM, *supra* note 3; Coomans and Hallo de Wolf, *supra* note 24. It should be noted that the phenomenon of “privatization”, understood in general terms as the “transfer of assets, management, functions or responsibilities previously owned or carried out by the state to private actors” (Coomans and Hallo de Wolf, *supra* note 24, at 241) is related to, but distinct from, the question with which this paper is concerned, namely the proliferation of private schools. This paper is concerned with the effects, as a matter of human rights law, of private schools *per se*, whether established as a result of processes of privatization or otherwise.

33. See *supra* Part I.

34. See ICESCR, *supra* note 13, art. 13(3)-(4); see also CRC, *supra* note 18, art. 29(2); UNESCO Convention Against Discrimination in Education, *supra* note 11, arts. 2(c), 5(1)(b)-(c).

35. ICESCR, *supra* note 13, art. 13(3).

conform to such minimum standards as may be laid down by the State.<sup>36</sup>

Article 13(4), which needs to be read in conjunction with Article 13(3),<sup>37</sup> effectively protects the right of individuals and bodies to establish private schools.<sup>38</sup> It was not included in the original draft of the Covenant submitted by the Commission on Human Rights, but was added later as:

The view was expressed that, while paragraph 3 acknowledged the existence of private schools, the article should explicitly recognize, in a new paragraph, the liberty of individuals and bodies to establish and direct educational institutions.<sup>39</sup>

In a similar vein, Article 29(2) of the CRC provides:

No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.<sup>40</sup>

And the UNESCO Convention against Discrimination in Education, Article 5 states:

(b) It is essential to respect the liberty of parents and, where applicable, of legal guardians, firstly to choose for their children institutions other than those maintained by the public authorities but conforming to such minimum educational standards as may be laid down or approved by the competent authorities . . . ;

(c) It is essential to recognize the right of members of national minorities to carry on their own educational activities, including the maintenance of schools . . . .<sup>41</sup>

The UNESCO Convention against Discrimination in Education, Article 2(c), further provides that, when permitted in a State, “[t]he establishment or maintenance of private educational institutions” will not constitute discrimination within the meaning of Article 1 of this Convention “if the

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36. ICESCR, *supra* note 13, art. 13(4).

37. See Committee on Economic, Social and Cultural Rights, *General Comment No. 13 on the Right to Education (Art. 13)*, ¶ 29, U.N. Doc E/C.12/1999/10 (Dec. 8, 1999) [hereinafter *General Comment 13*].

38. *Id.* ¶ 30.

39. Carlos Manuel Cox (Rapporteur, Peru), *Draft International Covenants on Human Rights: Report of the Third Committee*, ¶ 37, U.N. Doc A/3764 (Dec. 5, 1957).

40. CRC, *supra* note 18, art. 29(2).

41. UNESCO Convention Against Discrimination in Education, *supra* note 11, art. 5(1)(b)-(c).

object of the institutions is not to secure the exclusion of any group but to provide educational facilities in addition to those provided by the public authorities . . . .”<sup>42</sup>

These provisions assume a distinction between education which is provided “by the public authorities”<sup>43</sup> and education which is not. Although only the UNESCO Convention against Discrimination in Education uses the word “private” to describe non-State educational institutions,<sup>44</sup> it is clear from the *travaux préparatoires* of ICESCR, for example, that the phrase “schools, other than those established by the public authorities” was understood to cover private schools.<sup>45</sup> However, a suggestion to amend the wording of Article 13(3) from “schools, other than those established by the public authorities” to “private schools” was not accepted.<sup>46</sup> This seems to reflect a concern on the part of the drafters to leave the language of Article 13(3) more open, that is, to include in the category of “schools, other than those established by the public authorities”<sup>47</sup> a wider variety of educational institutions than those considered, in some countries at least, to amount to “private” on a narrow definition.<sup>48</sup> This wide approach to “non-public” education seems also to be reflected in the more recent work of the Special Rapporteur, who includes a variety of “[n]ot-for-profit, NGO, community

42. *Id.* art. 2(c).

43. ICESCR, *supra* note 13, art. 13(3); UNESCO Convention Against Discrimination in Education, *supra* note 11, arts. 2(c), 5(1)(b). These instruments do not define “public authorities”. Nor do they indicate what is meant by “schools, other than those established by the public authorities”. It is therefore necessary to look at the application and interpretation of these provisions by international human rights bodies in order to clarify their meaning: see the discussion *infra*, Part II(B)(1)-(6).

44. UNESCO Convention Against Discrimination in Education, *supra* note 11, art. 2(c).

45. See, e.g., U.N. GAOR, 12th Sess., 3rd Committee, Agenda Item 33, 780th Meeting, *Draft International Covenants on Human Rights*, ¶ 7 (India), U.N. Doc A/C.3/SR.780 (Oct. 14, 1957); U.N. GAOR, 12th Session, 3rd Comm., Agenda Item 33, 782nd mtg., *Draft International Covenants on Human Rights*, ¶ 18 (Belgium), ¶ 40 (Australia), ¶ 52 (Israel), U.N. Doc A/C.3/SR.782 (Oct. 16, 1957). Similarly, in relation to the CRC, see UN Economic and Social Council, *Report of the Working Group on a Draft Convention on the Rights of the Child*, ¶ 476, U.N. Doc E/CN.4/1989/48 (March 2, 1989).

46. Compare Carlos Manuel Cox (Rapporteur, Peru), *Draft International Covenants on Human Rights: Report of the Third Committee*, ¶ 23, U.N. Doc A/3764 (Dec. 5, 1957), with ICESCR, *supra* note 13, art. 13(3).

47. ICESCR, *supra* note 13, art. 13(3).

48. Although the *travaux* do not explicitly state why the drafters preferred the language of “schools, other than those established by the public authorities”, it is clear that they were concerned for parents to have the widest possible freedom to choose education for their children (including home schooling: see U.N. GAOR, 12th Sess., 3rd Committee, Agenda Item 33, 779th mtg., *Draft International Covenants on Human Rights*, ¶ 15 (Ireland), U.N. Doc A/C.3/SR.779 (Oct. 11, 1957)) and that they were sensitive to differences in national education systems, which parties emphasized (see, e.g., U.N. GAOR, 12th Sess., 3rd Committee, Agenda Item 33, 782nd mtg., *Draft International Covenants on Human Rights*, ¶ 59 (Indonesia), U.N. Doc A/C.3/SR.782 (Oct. 16, 1957); U.N. GAOR, 12th Session, 3rd Committee, Agenda Item 33, 780th mtg., *Draft International Covenants on Human Rights*, ¶ 9 (India), ¶ 29 (Japan), ¶ 32 (Ecuador), U.N. Doc A/C.3/SR.780 (Oct. 14, 1957); U.N. GAOR, 12th Session, 3rd Committee, Agenda Item 33, 785th mtg., *Draft International Covenants on Human Rights*, ¶ 29 (Denmark), U.N. Doc A/C.3/SR.785 (Oct. 21, 1957)). This suggests that they deliberately rejected the narrower term “private schools” in favour of the broader, more inclusive language of “schools, other than those established by the public authorities”.

and religious schools”,<sup>49</sup> with different levels of State involvement in their activities, in the category of “non-State providers of education.”<sup>50</sup>

The decision of the UN Human Rights Committee in *Waldman v. Canada* is instructive here.<sup>51</sup> In that case, the Human Rights Committee found that the State’s policy of funding Roman Catholic schools, but not those of other religions (such as the Jewish schools which the complainant’s children attended) constituted unlawful discrimination.<sup>52</sup> In reaching this conclusion, the Committee was required to consider whether the Catholic schools in question, which were funded by the State, were public or private.<sup>53</sup> This was because Canada argued that the difference in funding arrangements for Catholic and Jewish schools was due to the fact that the former were public schools whereas the latter were private.<sup>54</sup> The Committee ultimately avoided deciding this issue directly.<sup>55</sup> Nonetheless, the Committee’s analysis on this point is useful.

The Committee initially appears to suggest that the schools in question are neither public nor private but “separate”.<sup>56</sup> The Committee notes that “[t]he Roman Catholic separate school system is not a private school system.”<sup>57</sup> However, it stops short of describing it as public, noting instead that it is “[l]ike the public school system.”<sup>58</sup> This suggests, consistent with the *travaux* discussed above, that there may be a third category of educational institutions which are neither public nor private, but which nonetheless fall into the broad category of “non-public” for the purposes of international human rights law. Later in the decision, however, the Committee appears to accept that the Roman Catholic schools in question are “incorporated as a distinct part of the public school system”,<sup>59</sup> suggesting that they are, in a sense, public schools.

The precise nature of these distinctions between public, private and, possibly, “non-public” are explored further below. In general terms, however, it seems that the category of “non-public” would capture both schools which are clearly private, in the sense of being wholly independent from the

49. See the June 2015 report of the Special Rapporteur, *supra* note 31, ¶ 66.

50. *Id.* ¶ 65-68. The UN Human Rights Committee decision in *Waldman v. Canada*, which is discussed further below, may also support this approach, given that the Committee appears to suggest that the Roman Catholic schools at issue in that case were neither public nor private, but “separate”: see *Arieh Hollis Waldman v. Canada*, Communication No. 694/1996, U.N. Doc. CCPR/C/67/D/694/1996 (Nov. 5, 1999) ¶ 2.4 [hereinafter *Waldman v. Canada*].

51. *Waldman v. Canada*, Communication No. 694/1996, U.N. Doc. CCPR/C/67/D/694/1996 (Nov. 5, 1999).

52. *Id.* ¶ 10.6.

53. *Id.* ¶ 10.3.

54. *Id.*

55. The Committee found simply that “if a State party chooses to provide public funding to religious schools, it should make this funding available without discrimination”: *Waldman v. Canada*, *supra* note 50, ¶ 10.6.

56. *Id.* ¶ 2.4.

57. *Id.*

58. *Id.*

59. *Id.* ¶ 10.3.

State, and other schools which are not entirely private, but nonetheless lack the necessary State control to be classified as “public” in the strict sense. However, as the *Waldman* case suggests, these schools may be capable of being considered as “part of the public school system.”<sup>60</sup> This is an important point, to which I will return later. For the moment, however, it is enough to note that *Waldman* contains some analysis that may be useful in assessing whether an educational institution should be considered “public” for the purposes of international human rights law.<sup>61</sup> In what follows, I draw on this analysis, as well as a detailed review of the legal provisions, *travaux*,<sup>62</sup> other case law and statements from relevant bodies, such as the Special Rapporteur, to suggest a number of factors which may be relevant to determining whether an educational institution is “public” or not. In particular, I consider the purpose of the institution, who established it, who controls it, who funds it, and whether the State classifies it as public or not. None of these factors, in isolation, can be considered decisive. Taken together, however, they can help to build up a picture of whether a particular entity is likely to be considered public for the purposes of international human rights law.

1. *Purpose: is the institution for-profit, or does it pursue education as a public good?*<sup>63</sup>

Institutions which are run for the profit of private individuals or corporations are not public institutions. This conclusion is supported by substantial State practice,<sup>64</sup> treaty body practice,<sup>65</sup> and statements by bodies such as

60. *Id.*

61. Although international human rights law has not traditionally been concerned with the nature of a school as public or private, but simply with whether it provides education consistent with the requirements of ICESCR and other relevant instruments, the particular facts of *Waldman v. Canada* required the Human Rights Committee to consider the nature of the schools in question and whether they should be categorized as public or private. *Waldman v. Canada* is therefore an important case to consider in this context.

62. I focus, in particular, on the *travaux* of ICESCR, as it is clear from the *travaux* of the CRC that the drafting committee sought, in relation to Articles 28 and 29, to reflect the legal position as represented in ICESCR: see, e.g., UN Economic and Social Council, *Report of the Working Group on a Draft Convention on the Rights of the Child*, ¶ 461, U.N. Doc E/CN.4/1989/48 (March 2, 1989).

63. I use the term “public good” here as understood by economists, as a good which benefits all, such that excluding one person from the good does not benefit another. See MANCUR OLSEN, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965) (outlining the concept of public goods and noting the difficulty of collective action to provide such goods). For more recent discussions of this idea, see, e.g., *Critical Review of International Social and Political Philosophy*, (2018) (which considers the contemporary relevance of the concept of public goods for theorizing about social justice and inequality). The Special Rapporteur on the Right to Education, Kishore Singh, also uses the term in this way in relation to the right to education: see the June 2015 report of the Special Rapporteur, *supra* note 31, ¶ 62.

64. See the June 2015 report of the Special Rapporteur, *supra* note 31, ¶ 69-85, which considers State practice abolishing for-profit education (¶ 78-79), as well as strict regulation of such education.

65. The CESCR, for example, in its Concluding Observations, consistently treats for-profit education providers as private. See, e.g., CESCR, *Concluding Observations: Pakistan*, ¶ 81, U.N. Doc E/C.12/PAK/CO/1 (July 20, 2017); CESCR, *Concluding Observations: Philippines*, ¶ 55, U.N. Doc E/C.12/PHL/

the Special Rapporteur.<sup>66</sup> On the other hand, institutions whose primary aim is to fulfil a public function – to provide education as a public good and in the interests of society as a whole – are more likely to be considered public for the purposes of international human rights law.<sup>67</sup> To use the words of the UN Special Rapporteur on the right to education, Kishore Singh, there is a distinction between “for-profit schools” and “those valuing education as a public good and a social cause.”<sup>68</sup>

## 2. *Who established the institution?*

The relevant legal provisions, such as Article 13 of ICESCR, set up a distinction between schools “established” by public authorities and “schools, other than those established by the public authorities.”<sup>69</sup> This suggests that an important factor in determining whether a school is public or not, for the purposes of international human rights law, is who establishes, that is, who founds or sets up, the school. Was the school established on the initiative of the State, as part of its public service obligations, or did the impetus for establishing the school come from another source, for example, private individuals, community groups or religious organizations? In the case of the former, this strongly suggests that the institution is a public one. In the case of the latter, in the absence of other relevant factors, the institution is likely to be considered private.

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CO/5-6 (Oct. 26, 2016); CESCR, *Concluding Observations: Lebanon*, ¶ 10, U.N. Doc E/C.12/LBN/CO/2 (Oct. 24, 2016). The Committee on the Rights of the Child follows a similar approach: *see, e.g.*, Committee on the Rights of the Child, *Concluding Observations: Chile*, ¶ 67-68, U.N. Doc CRC/C/CHL/CO/4-5 (Oct. 30, 2015).

66. *See, e.g.*, the June 2015 report of the Special Rapporteur, *supra* note 31, ¶ 68; and the 2014 report of the Special Rapporteur, *supra* note 1, ¶ 106.

67. *See* Kishore Singh (Special Rapporteur on the Right to Education), *Report to the UNGA on the Right to Education*, U.N. Doc A/70/342 (August 26, 2015), ¶ 38. Determining the primary aim of a particular institution will not always be straightforward. Relevant matters to be considered may include the purpose of the institution, as set out in its constitution and founding documents; whether it charges fees to students; and whether profits are returned to shareholders or reinvested in the institution. From the perspective of international human rights law, schools which charge fees and return profits to shareholders will not be considered to have as their primary aim the fulfilment of a public function, and will be considered as private. This is evident from the practice of the CESCR, for example, in its concluding observations, which consistently treat for-profit education providers as private, *see* CESCR, *supra* note 62.

68. *See* the June 2015 report of the Special Rapporteur, *supra* note 31, ¶ 68. This does not mean that all schools “valuing education as a public good” will be public schools. As the Special Rapporteur notes, many will be “non-State providers of education”: ¶ 65-8. However, it is clear that those which are “for-profit” and do not value education as a public good will not be considered to be public schools, as a matter of international human rights law: *see supra* note 62.

69. ICESCR, *supra* note 13, art. 13(3). *See also, e.g.*, ICESCR, *supra* note 13, art. 13(4), which refers to “[t]he liberty of individuals and bodies to establish and direct educational institutions”; CRC, art. 29(2), *supra* note 18, which refers to “[t]he liberty of individuals and bodies to establish and direct educational institutions”; and UNESCO Convention against Discrimination in Education, *supra* note 11, art. 2(c), which refers to “[t]he establishment or maintenance of private educational institutions.”



### 3. *Who maintains/controls/directs the institution?*

The relevant legal provisions also set up a distinction between schools which are directed or controlled by public authorities and those which are directed or controlled by private individuals or bodies. Thus Article 13(4) of ICESCR, which, as noted above, complements the provisions of Article 13(3), provides for the liberty of individuals and bodies not only to “establish” but also to “direct” educational institutions.<sup>70</sup> Article 29(2) of the CRC also provides for the liberty to both “establish” and “direct” educational institutions.<sup>71</sup> And the UNESCO Convention against Discrimination in Education refers to the “maintenance” of private educational institutions<sup>72</sup> and the right of national minorities to “carry on” their own educational activities.<sup>73</sup>

These provisions protect the freedom of individuals and groups to direct non-State educational institutions, and thus prohibit the State from intervening in the operation of these institutions, subject to certain exceptions.<sup>74</sup> The legal framework, therefore, enforces a distinction between public and private (or non-public) schools based on the degree and type of control which the State can exercise over their operation. In this way, the relevant legal provisions make the question of control relevant to the distinction between public and private.

The significance of control to the question of whether an entity is public or private seems to be confirmed by the decision in *Waldman*. In concluding that “[t]he Roman Catholic separate school system is not a private school system[,]”<sup>75</sup> the Committee in that case placed emphasis on the fact that these schools were directed by:

a publicly accountable, democratically elected board of education. Separate School Boards are elected by Roman Catholic rate-payers, and these school boards have the right to manage the denominational aspects of the separate schools. Unlike private schools, Roman Catholic separate schools are subject to all Ministry guidelines and regulations.<sup>76</sup>

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70. ICESCR, *supra* note 13, art. 13(4).

71. CRC, *supra* note 18, art. 29(2).

72. UNESCO Convention against Discrimination in Education, *supra* note 11, art. 2(c). *See also* UNESCO Convention against Discrimination in Education, *supra* note 11, art. 2(b), which refers to the “maintenance” of separate educational institutions for religious or linguistic reasons, and art. 5(c), which recognizes the right of minorities to carry on their own educational activities, “including the maintenance of schools”.

73. UNESCO Convention against Discrimination in Education, *supra* note 11, art. 5(c).

74. Thus, ICESCR, art. 13(4) provides that the liberty is “[s]ubject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.” ICESCR, *supra* note 13, art. 13(4).

75. *Waldman v. Canada*, *supra* note 50, ¶ 2.4.

76. *Id.* In a similar vein, the decision of the Human Rights Committee in *Blom v. Sweden* suggests that entitlement to public funds depends on the degree to which a school is “subject to State supervi-

The fact that the schools were subject to control by the State (“subject to all Ministry guidelines and regulations”) and a publicly appointed school board seems to have been an important factor in the Committee finding that they were not private: it made the Catholic schools “like the public school system.”<sup>77</sup>

Against this background, when determining whether an institution is public or private, important questions include: Who dictates the terms on which the educational institution operates? Where do the applicable policies and procedures come from? Who drafts them? Are the principals and teachers appointed by the State, or are they appointed by private or community organizations? Are they democratically accountable? Who decides on course content and curriculum? The greater the degree of control by the State over the operation of the school and the appointment of teachers and managers, the more likely that the school will be considered to be public rather than private.

#### 4. *Who funds the institution?*

The question of funding is related to, but separate from, the question of control. While the entity which funds a school may also be the entity which directs or controls it, this is not always necessarily the case. Charter schools in the United States, for example, are controlled by private management organizations, but are funded by the State.<sup>78</sup> The source of funding for the school is therefore an additional factor to be considered when determining whether a school is likely to be classified as public or private for the purposes of international human rights law.

The significance of the source of funding to the question of whether a school is private or not was emphasized in the *Waldman* case. In finding that the Roman Catholic school system was not private, the Committee specifically noted that “[l]ike the public school system it is funded through a publicly accountable, democratically elected board of education[,]”<sup>79</sup> and this seems to have been an important factor in the Committee’s decision that the school was not private.<sup>80</sup> Similarly, case law in the United States

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sion”: see *Carl Henrik Blom v. Sweden*, Communication No. 191/1985, U.N. Doc CCPR/C/32/D/191/1985 (April 4, 1988) ¶ 10.3 [hereinafter *Blom v. Sweden*].

77. *Waldman v. Canada*, *supra* note 50, ¶ 2.4. This is consistent with UNESCO’s definition of a “public educational institution” as one that is “controlled and managed directly by a public education authority or agency of the country where it is located or by a government agency directly or by a governing body (council, committee etc.), most of whose members are either appointed by a public authority of the country where it is located or elected by public franchise”: See *supra* note 30.

78. See Toni Verger et al, *Unpacking PPPs’ Effects on Education: What Research on Vouchers, Charters and Subsidies Tells us*, in BACKGROUND PAPERS TO THE ABIDJAN PRINCIPLES (forthcoming 2021, Edward Elgar) at 8. See also Nowak, *Human Rights or Global Capitalism*, *supra* note 3, at 61; and Coomans and Hallo de Wolf, *supra* note 24, at 247.

79. *Waldman v. Canada*, *supra* note 50, ¶ 2.4.

80. This funding arrangement is the first piece of evidence the Committee points to in order to support the statement that “[t]he Roman Catholic separate school system is not a private school system”: *Waldman v. Canada*, *supra* note 50, ¶ 2.4.

suggests that even where governments relinquish a certain amount of control over the management of a school (as in the case of charter schools), this “[d]oes not preclude [such] schools from being regarded as public [ ] due to their public funding.”<sup>81</sup>

This does not, however, mean that all schools which receive public funding are public schools. As the Committee went on to note in *Waldman*, private schools in Canada may nonetheless receive a certain amount of State funding.<sup>82</sup> Similarly, it is clear from the *travaux préparatoires* of ICESCR that a number of States considered schools to which they provided funding still to be private schools.<sup>83</sup> This suggests that the question of funding may be secondary to other factors, in particular that of control, as discussed above.

##### 5. *How does the State classify the institution?*

The above analysis demonstrates that there are no “bright lines” between public and private education for the purposes of human rights law.<sup>84</sup> While a number of factors may be relevant to how a particular institution is classified, none are decisive, and much will depend on the particular facts and context.<sup>85</sup> At this point it is worth remembering that educational systems and frameworks will differ from State to State. This point was stressed repeatedly by the drafters of Article 13, with different States at pains to emphasize the national peculiarities of their educational systems.<sup>86</sup> It is thus clear from the *travaux* that what amounts to “private” or “public” education may differ from State to State, and that State parties accepted that these differences would continue.<sup>87</sup>

Against this background, it seems likely that international bodies will give a large degree of deference to States in deciding how to classify their

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81. See Coomans and Hallo de Wolf, *supra* note 24, at 255. Overall, however, the situation with charter schools is more complex, as discussed further below: See *infra*, Section II.C.1.

82. *Waldman v. Canada*, *supra* note 50, ¶ 2.5. Similarly, in the case of *Blom v. Sweden*, *supra* note 76, the Human Rights Committee considered a Swedish scheme where the State provided subsidies to support students at private schools, such subsidies not depriving the schools in question of their private nature.

83. See, e.g., U.N. GAOR, 12th Sess., 3rd Committee, Agenda Item 33, 780th mtg., *Draft International Covenants on Human Rights*, ¶ 7 (India), U.N. Doc A/C.3/SR.780 (Oct. 14, 1957).

84. See *supra* Section II.B.1-4. See also e.g., *Waldman v. Canada*, *supra* note 50.

85. See *supra* Section II.B.1-4.

86. See, e.g., U.N. GAOR, 12th Session, 3rd Committee, Agenda Item 33, 782nd mtg., *Draft International Covenants on Human Rights*, ¶ 59 (Indonesia), U.N. Doc A/C.3/SR.782 (Oct. 16, 1957); U.N. GAOR, 12th Session, 3rd Committee, Agenda Item 33, 780th mtg., *Draft International Covenants on Human Rights*, ¶ 9 (India), ¶ 29 (Japan), ¶ 32 (Ecuador), U.N. Doc A/C.3/SR.780 (Oct. 14, 1957); U.N. GAOR, 12th Session, 3rd Committee, Agenda Item 33, 785th mtg., *Draft International Covenants on Human Rights (Denmark)*, ¶ 29, U.N. Doc A/C.3/SR.785 (Oct. 21, 1957).

87. This reflects the findings of the general literature. See, e.g., Aga Khan Foundation, *Non-State Providers and Public-Private-Community Partnerships in Education*, (UNESCO, 2007), <https://unesdoc.unesco.org/ark:/48223/pf0000155538> (noting that the answers to difficult questions about whether institutions are public or private “vary greatly from one country to another” (at 6)).

educational institutions.<sup>88</sup> As a result, a final, and perhaps decisive, factor to be considered in determining whether a school is public or private is how the institution is classified by the State itself. If the State considers a particular institution to form part of its public education system, then international human rights law would not generally look beyond that classification. This approach is evident in the case of *Waldman*, where the Human Rights Committee ultimately seems to defer to Canada's categorization of the separate Roman Catholic schools as "[i]ncorporated as a distinct part of the public school system . . . ."<sup>89</sup> It is also evident in other decisions, where the Human Rights Committee accepts the particularities of the State system in question and does not look behind the State's categorization of schools;<sup>90</sup> and in the practice of the treaty bodies.<sup>91</sup>

## 6. Conclusion

Although no international human rights treaties define the term "public education", provisions such as Article 13 ICESCR and Article 29 CRC assume a distinction between schools which are established and operated by public authorities, and those which are not.<sup>92</sup> In identifying which of these categories a particular school falls into, relevant factors will include the purpose of the institution; who established it; who controls and directs it; where its funding comes from; and how it is classified within the State in which it operates. Of these factors, two seem to be of particular importance: who controls the operation of the school, and how it is classified by the State.

Although these factors may assist in determining whether a school is "public" or not for the purposes of international human rights law, the process of applying these factors to reach a conclusion in relation to a particular school remains difficult. This is complicated by the fact that the *travaux* of ICESCR and the *Waldman* case<sup>93</sup> raise the possibility that, con-

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88. This reflects Guideline 8 of the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997), which provides that "[S]tates enjoy a margin of discretion in selecting the means for implementing their respective obligations." International Commission of Jurists, *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, 26 January 1997. (For the authoritative version of the Guidelines with commentary see Victor Dankwa, et al., *Commentary to the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, 20 Hum. Rts. Q. 705 (1998). On this "margin of discretion", sometimes described as the "margin of appreciation", see generally ANDREW LEGG, *THE MARGIN OF APPRECIATION IN INTERNATIONAL HUMAN RIGHTS LAW: DEFERENCE AND PROPORTIONALITY* (2012).

89. *Waldman v. Canada*, *supra* note 50, ¶ 10.3.

90. See, e.g., *Blom v. Sweden*, *supra* note 76.

91. See, e.g., CESCR, *Concluding Observations: Pakistan*, ¶ 81-82, U.N. Doc E/C.12/PAK/CO/1 (July 20, 2017), where the Committee specifically acknowledges the State's approach in discussing its Basic Community Education Schools program. I am not aware of any concluding observations in which the treaty bodies have challenged a State's categorization of its schools.

92. See ICESCR, *supra* note 13, at art. 13(3)-(4); CRC, *supra* note 18, at art. 29(2); UNESCO Convention Against Discrimination in Education, *supra* note 11, arts. 2(c), 5(1)(b), 5(1)(c).

93. See *Waldman v. Canada*, *supra* note 50.

trary to the assumption that schools are either public or private, there may be a third category of schools, which are neither public nor private but “separate.”

The *Waldman* case side-stepped some of the difficulties associated with this classification process by concluding that the Roman Catholic schools in that case formed “[a] distinct part of the public school system.”<sup>94</sup> This reference to the “public school system” may be significant. It suggests that it may be possible to avoid some of the uncertainties as to whether a particular school is “public” or “private” in a narrow sense, by asking the broader question of whether a school is “part of the public system” of education. That is, a school which might meet some of the criteria for a “private” school may nonetheless be part of the public school system, and therefore considered as “public education” for the purposes of international human rights law.<sup>95</sup> In the next part of this article, I adopt this broader perspective on the question of what constitutes public education for the purposes of international human rights law, applying the factors listed above to assess whether a particular school forms part of the public education system of a State.

### *C. Application to particular types of schools*

Although there are a range of school systems that combine elements of public and private, in what follows, I will focus on three common types, namely charter schools, schools operating under partnership arrangements (such as those in the Netherlands and Belgium), and voucher programs. In each case, I will apply the previous analysis, with a view to assessing whether such schools are likely to constitute “part of the public school system”, and are therefore capable of being considered “public education” for the purposes of international human rights law. For the sake of the argument I have focused only on the general characteristics of each system, as discussed further below. It is important to note, however, that each school is unique and much will depend on the particular circumstances and context of the individual school.

#### *1. Charter schools*

According to Verger and others, charter schools are “relatively autonomous schools that are publicly funded, but usually privately managed and exempted from following certain public regulations.”<sup>96</sup> Nowak notes that these schools are “usually established on the initiative of private individuals

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94. *Id.* ¶ 10.3, 10.5.

95. Such an approach reflects Coomans and Hallo de Wolf’s definition of a private school as one which “operates independently of the public education system”. See Coomans and Hallo de Wolf, *supra* note 24, at 243.

96. See Verger et al., *supra* note 78, at 8. See also Nowak, *Human Rights or Global Capitalism*, *supra* note 3, at 61; see also Coomans and Hallo de Wolf, *supra* note 24, at 247.

or groups, headed by private boards, and a significant number are managed by EMOs [educational management organizations], usually for-profit entities.”<sup>97</sup>

Charter schools therefore display a number of characteristics which we would associate with private schools for the purposes of international human rights law: they may be for profit; they are often established by private individuals or groups; and they are privately managed and controlled, and exempted from certain public regulations. Although charter schools are publicly funded, which might suggest that they should be characterized as public, the relevance of this public funding is likely to be secondary to the fact that they are privately controlled, given the central importance of control to the distinction between public and private for the purposes of international human rights law. It therefore seems that charter schools are likely to constitute private schools for the purposes of international human rights law. The only exception to this would be in cases where the States in which they operate treat the charter schools as part of their public school system. To determine whether this is the case would require a close analysis of the law of the relevant State, which is beyond the scope of this article. However, there are some suggestions that in some States of the United States (where charter schools are most common), charter schools are treated as a particular form of public school.<sup>98</sup> If this were the case, then international human rights bodies may defer to this characterization on the part of the State and treat these schools as part of the public school system, and therefore as a form of “public education.”

## 2. *Schools under partnership arrangements*

The education systems of a number of States include schools like those in Canada, discussed in the *Waldman* case:<sup>99</sup> schools which are fully funded by the State, but are operated by religious or community groups. As highlighted in the *Waldman* case, these schools are subject to strict control by public authorities,<sup>100</sup> and they form a substantial part of the education system in the State: in Ireland, for example, almost all schools are run by religious organizations (predominantly the Catholic church), but funded by the State.<sup>101</sup> Similarly, in both the Netherlands and Belgium the majority

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97. Nowak, *Human Rights or Global Capitalism*, *supra* note 3, at 61.

98. See generally Michael Nacliero, *Accountability through Procedure? Rethinking Charter Schools Accountability and Special Education Rights*, 117 Colum. L. Rev. 1153 (2017) (regarding the legal framework for charter schools). As noted above, Coomans and Hallo de Wolf refer to case law from some States which suggests that charter schools are not necessarily precluded from being regarded as public “due to their public funding.” Coomans and Hallo de Wolf, *supra* note 24, at 255.

99. *Waldman v. Canada*, *supra* note 50.

100. *Id.* ¶ 2.4.

101. See, e.g., Miho Taguma et al, *OECD Reviews of Migrant Education: Ireland*, 18-19 (Dec. 2009).

of schools are operated by religious or community groups but are funded by the State.<sup>102</sup>

On the one hand, these schools are not for-profit and they pursue education as a public good; they are also fully funded by the State. On the other hand, they are established and directed by private entities (usually religious groups).<sup>103</sup> Yet they remain accountable to the State and the community through school boards and other management structures in much the same way as public schools.<sup>104</sup> And these schools appear not only to be integrated into the State system, but in fact to form an integral part of that system. The analysis in the *Waldman* case is useful here, as the Roman Catholic schools under consideration in that case operated under such arrangements. As noted above, in that case, the Human Rights Committee seems to have concluded that the schools were neither public schools nor private schools, strictly speaking, but were “part of the public school system.”<sup>105</sup> Applying this reasoning, I think it is likely that schools operating under such arrangements could constitute part of the public school system, particularly if this is how they are classified by the State itself. They could therefore be considered as providing public education.

### 3. *Voucher programs*

Voucher programs involve the State providing each student a set amount of money (a “voucher”) which they can then use to purchase education at any school of their choice (public or private). As Verger and others point out, there is great diversity in the types of voucher systems implemented by States,<sup>106</sup> but they all have in common the fact that they provide State funding for students to attend private schools if they wish. Voucher systems have been used in a range of countries, including notably Chile,<sup>107</sup> Colombia<sup>108</sup> and Sweden.<sup>109</sup>

If voucher systems allow students to attend private schools, does this make these schools part of the public school system? There might be an

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102. See OECD, *Netherlands 2016: Foundations for the Future*, 29-30 (May 25, 2016); see Claire Shewbridge et al., *OECD Reviews of Evaluation and Assessment in Education: School Evaluation in the Flemish Community of Belgium 2011*, 18-19 (2011).

103. See *supra* notes 99-102 and accompanying text.

104. *Waldman v. Canada*, *supra* note 50, ¶ 2.4. See also, e.g., NAT'L CTR. ON EDUC. AND THE ECON., *Netherlands: Governance and Accountability* [http://ncee.org/what-we-do/center-on-international-education-benchmarking/top-performing-countries/netherlands-overview\\_\\_trashed/netherlands-governance-and-accountability/](http://ncee.org/what-we-do/center-on-international-education-benchmarking/top-performing-countries/netherlands-overview__trashed/netherlands-governance-and-accountability/).

105. *Waldman v. Canada*, *supra* note 50, ¶ 10.3.

106. Verger et al., *supra* note 78, at 5-7.

107. See, e.g., Gregory Elacqua, *The Impact of School Choice and Public Policy on Segregation: Evidence from Chile*, 32 *Int'l J. of Educ. Dev.* 444 (2012) (discussing the impact of voucher systems in Chile on racial and socioeconomic inequality).

108. See, e.g., Joshua Angrist, et al., *Long-Term Educational Consequences of Secondary School Vouchers: Evidence from Administrative Records in Colombia*, 96 *Am. Econ. Rev.* 847, 847 (2006).

109. Nihad Bunar, *Choosing for Quality or Inequality: Current Perspectives on the Implementation of School Choice Policy in Sweden*, 25 *J. of Educ. Pol'y* 1, 7 (2010).

argument that, by making private schools accessible to all, the vouchers incorporate private schools into the public system.<sup>110</sup> However, the schools remain under private control and management, with the State unable to exercise control over the schools beyond that necessary to ensure that minimum requirements are met. In addition, the schools may be for-profit, have been established by private entities, and continue to be classified as private schools by the States concerned. (In fact, the very purpose of voucher programs is to allow the private sector and market forces to play a greater role in the delivery of education.)<sup>111</sup> In light of these factors, these schools cannot be considered as part of the public school system, and therefore cannot be considered as providing public education for the purposes of international human rights law.

### III. DOES INTERNATIONAL HUMAN RIGHTS LAW REQUIRE STATES TO PROVIDE PUBLIC EDUCATION?

Having established some general criteria for determining whether entities will be considered as part of the public education system for the purposes of international human rights law, let me now turn to the substantive question of the scope of States' obligations to deliver such education. In what follows, I will first consider whether there is any obligation on States to provide public education at all. Having concluded that there is such an obligation, I then consider the scope of that obligation, before discussing issues relating to the corresponding right to public education.

#### A. *Is there an obligation on States to provide public education?*

As a matter of international human rights law, is there an obligation on States to provide public education? Or would it be possible for a State to comply with its obligations under relevant human rights instruments without providing public education, but simply ensuring that private education within its jurisdiction met the requirements of, for example, Article 13 of ICESCR?<sup>112</sup>

It is clear from the scheme of the treaty provisions that it was envisaged by the drafters of ICESCR and other instruments that public education provided by States would be the dominant form of education. The distinction between Article 13(2) of ICESCR on the one hand, and Articles 13(3) and (4) on the other, noted above, assumes the existence of public education as "the norm," such that the possibility for education other than that pro-

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110. See Angela Slate Rawls, *Eliminating Options through Choice: Another Look at Private School Vouchers*, 50 *Emory L. J.* 363, 363 (2001).

111. Verger et al, *supra* note 78, at 5.

112. That is, in particular, that primary education is free and compulsory, while secondary and higher education is accessible to all, see ICESCR, *supra* note 13, at art. 13(2); and that education is directed to the ends set out in ICESCR, *supra* note 13, at art. 13(1).



vided by the State needs to be protected as an exception.<sup>113</sup> An analysis of the *travaux préparatoires* of ICESCR confirms that this was indeed the assumption of the drafters, and that private education was seen as additional or supplementary to public education.<sup>114</sup>

However, the view of the Committee on Economic, Social and Cultural Rights (CESCR) is that the Covenant as a whole “[n]either requires nor precludes any particular form of government or economic system being used as the vehicle [to deliver the rights contained in the Covenant], provided only that it is democratic and that all human rights are thereby respected.”<sup>115</sup> Similarly, many of the obligations in the Covenant, including the obligation to fulfil the right to education, are considered “obligations of result” rather than “obligations of conduct,” meaning that States have a choice as to how they are to achieve the relevant outcomes.<sup>116</sup> These ideas have traditionally been understood as supporting the possibility for States to allow their obligations to be fulfilled by private providers, including in relation to the right to education. This could ultimately allow States to fulfil their obligations solely through private providers and offer no public education at all, as argued by Nowak in 2001:

Under international law the right to receive education is directed at the state and therefore only obliges governments to provide for adequate educational facilities. This does not mean, however, that all schools, vocational training institutions, and universities, must be established and maintained by the government alone. If there are sufficient private facilities, the state may fulfil its obligations even without its own schools.<sup>117</sup>

In a similar vein, Coomans and Hallo de Wolf have argued that international human rights law allows States to transfer their obligations to private providers, through processes of privatization.<sup>118</sup> This conclusion seems to be supported by the CESCR in its General Comment 24, which notes that “[p]rivatization is not per se prohibited by the Covenant, even in areas such as the provision of . . . education . . . where the role of the public sector has

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113. See ICESCR, *supra* note 13, at arts. 13(2), 13(3)-(4).

114. See, e.g., the discussion around the obligation to make primary education free, in which States confirmed that this was only the case in respect of public schools, and in doing so, confirmed the central role of public schools: U.N. GAOR, 12th Sess., 786th mtg. ¶ 1, U.N. doc A/C.3/SR.786 (Oct. 22, 1957); U.N. GAOR, 12th Sess., 787th mtg. ¶ 46-55, U.N. doc A/C.3/SR.787 (Oct. 22, 1957). See also, e.g., U.N. GAOR, 12th Sess., 782nd mtg. ¶ 59, U.N. doc A/C.3/SR.782 (Oct. 16, 1957); U.N. GAOR, 12th Sess., 785th mtg. ¶ 26, U.N. doc A/C.3/SR.785 (Oct. 21, 1957).

115. CESCR, *General Comment No. 3 on the Nature of State Parties' Obligations (Art. 2(1))*, ¶ 8, U.N. Doc E/1991/23 (Dec. 14, 1990) [hereinafter General Comment 3].

116. See Coomans and Hallo de Wolf, *supra* note 24, at 238.

117. Manfred Nowak, *The Right to Education*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK, 257 (Asbjørn Eide et al eds., Martinus Nijhoff 2nd ed, 2001). Nowak seems to have changed his view on this issue since then, however: see Nowak, *Human Rights or Global Capitalism*, *supra* note 3, at 57-66.

118. Coomans and Hallo de Wolf, *supra* note 24, at 256.

traditionally been strong.”<sup>119</sup> Similarly, the Committee on the Rights of the Child in its General Comment 16 notes that:

Business enterprises and non-profit organizations can play a role in the provision and management of services such as . . . education . . . that are critical to the enjoyment of children’s rights. The Committee does not prescribe the form of delivery of such services . . .<sup>120</sup>

However, a close analysis of the relevant legal materials<sup>121</sup> suggests that, under international human rights law today, there is an obligation on States to provide public education, regardless of the role of private providers in the field. This follows both from a strictly theoretical legal analysis of the relevant law, as well as from the practical application of these legal principles in the contemporary education environment. In what follows, I consider each of these in turn.

### 1. *Human rights and private education – legal/theoretical analysis*

There are a number of arguments which support the position that States are under a legal obligation to provide some sort of public education. First, there is a textual argument that the wording of the relevant legal provisions assumes, and therefore requires, States provide public education. So, for example, Article 13(3) ICESCR guarantees the freedom of parents “to choose for their children schools, other than those established by the public authorities.”<sup>122</sup> The reference to “choice” in this context makes clear that there must also be public education, that is, “schools established by the public authorities.” If there were no such schools, then the “choice” referred to in 13(3) would not, in fact, be a choice, but a necessity.

Similarly, the UNESCO Convention against Discrimination in Education refers to the liberty of parents “[t]o choose for their children institutions other than those maintained by the public authorities . . . .”<sup>123</sup> The Convention also explicitly states that private educational institutions are permissible “[i]f the object of the institutions is . . . to provide educational facilities in addition to those provided by the public authorities . . . .”<sup>124</sup> This suggests that, under the Convention, private education may supple-

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119. CESCR, *General Comment No. 24 on State Obligations under the ICESCR in the Context of Business Activities*, ¶ 21, U.N. Doc E/C.12/GC/24 (Aug. 10, 2017) [hereinafter *General Comment 24*].

120. Committee on the Rights of the Child, *General Comment No. 16 on State obligations regarding the Impact of the Business Sector on Children’s Rights*, ¶ 33, U.N. Doc CRC/C/GC/16 (April 17, 2013).

121. Including the texts of the relevant international instruments, as set out in Section I, their *travaux préparatoires*; decisions of international supervisory bodies, such as the CESCR and the Committee on the Rights of the Child, as well as the work of bodies such as the UN Human Rights Council and the UN Special Rapporteurs, and State practice.

122. See ICESCR, *supra* note 13, art. 13(3).

123. UNESCO Convention Against Discrimination in Education, *supra* note 11, art. 5(1)(b).

124. *Id.* art. 2(c).

ment, but not supplant, public education, which must continue to be provided by public authorities.

Secondly, Article 13(2)(e) of ICESCR provides that “[t]he development of a system of schools at all levels shall be actively pursued . . . .”<sup>125</sup> This reference to “development of a system” strongly suggests public education, given that private institutions, as envisaged under Articles 13(3) and (4), necessarily develop on an individual, ad hoc basis. The *travaux préparatoires* of ICESCR indicate that this provision was added to the original text proposed by UNESCO, pursuant to an amendment suggested by Romania.<sup>126</sup> Although a number of States felt that this amendment did not add anything to the other provisions in Article 13(2),<sup>127</sup> it was nonetheless adopted,<sup>128</sup> suggesting that it draws out an obligation implicit in the rest of Article 13(2),<sup>129</sup> for States to develop a public education system. This is certainly how the provision is interpreted by the CESCR in General Comment 13, where the Committee draws from that provision the proposition that “[i]t is clear that article 13 regards States as having principal responsibility for the direct provision of education in most circumstances.”<sup>130</sup> This conclusion, 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.”<sup>131</sup>

Thirdly, under Article 13(4) of ICESCR, States cannot interfere in the operation of private schools, except to ensure that the operation of those schools complies with Article 13(1) ICESCR and that “[t]he education given in such institutions shall conform to such minimum standards as may be laid down by the State.”<sup>132</sup> This is because Article 13(4) specifically protects the “[l]iberty of individuals and bodies to establish and direct educational institutions . . . .”<sup>133</sup> It is clear from the *travaux* that this provision was designed to protect private institutions from interference by the State

125. ICESCR, *supra* note 13, art. 13(2)(e).

126. Carlos Manuel Cox (Rapporteur, Peru), *Draft International Covenants on Human Rights: Report of the Third Committee*, UNGA, ¶ 45, U.N. Doc A/3764 (Dec. 5, 1957).

127. *Id.* (“Some representatives opposed this amendment as being too detailed and merely repeating what was implicit in the rest of article 14 [ultimately article 13]”). See also, e.g., the comments of the Indian representative in: U.N. GAOR, 12th Sess., 3rd Committee, Agenda Item 33, 785th mtg., *Draft International Covenants on Human Rights*, ¶ 25, U.N. Doc A/C.3/SR.785 (Oct. 21, 1957) (“That sub-paragraph was unnecessary as the same ideas were expressed elsewhere.”).

128. Carlos Manuel Cox (Rapporteur, Peru), *Draft International Covenants on Human Rights: Report of the Third Committee*, ¶ 48(m), U.N. Doc A/3764 (Dec. 5, 1957).

129. *Id.* ¶ 45, which refers both to the obligation being “implicit” in the rest of the article, and to the fact that “[o]ther representatives maintained that such measures ought to be specifically mentioned.”

130. See General Comment 13, *supra* note 37, ¶ 48. See also General Comment 13, *supra* note 37, ¶ 53.

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

132. See ICESCR, *supra* note 13, art. 13(4).

133. See ICESCR, *supra* note 13, art. 13(4).

and to guarantee their independence, including academic freedom.<sup>134</sup> As McBeth summarises, “the state must monitor the standards of private education . . . but it must not interfere in the delivery of education by private entities provided those standards are met.”<sup>135</sup> This means that, in respect of private education providers, the extent to which the State can exercise control over their activities is more limited than with respect to public institutions. Indeed, as we saw in II.B.3 above, the degree of control exercised by the State is a critical factor in distinguishing between public and private schools for the purposes of international human rights law.<sup>136</sup> Critically, this means that there may be aspects of a State’s obligations under Article 13(2) ICESCR which the State cannot force private providers to fulfil. For example, Article 13(2) provides that primary education shall be “available free to all,”<sup>137</sup> and secondary and higher education shall be “accessible to all,”<sup>138</sup> which means in part that it is affordable to all.<sup>139</sup> However, the State cannot require private schools to be “free to all” or affordable to all, because, under Article 13(4), State intervention in the operation of private schools is limited to ensuring compliance with Article 13(1) and ensuring that minimum educational standards are met, and does not extend to ensuring compliance with Article 13(2). As McBeth concludes:

It is therefore unlikely that a state could discharge its duty to make education accessible by requiring private operators to provide free schooling to those who could not otherwise afford the fees, rather than maintaining a parallel government education system that is free (in the case of primary school) or affordable (in the case of secondary and higher education). . . .<sup>140</sup>

Similarly, the State cannot interfere where private providers offer schools to meet the needs of, for example, a particular national or linguistic minority, and therefore accept only, or predominantly, students from that back-

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134. See U.N. GAOR, 12th Sess., 3rd Committee, Agenda Item 33, 779th mtg., *Draft International Covenants on Human Rights (Ireland)*, ¶ 14, U.N. Doc A/C.3/SR.779 (Oct. 11, 1957).

135. McBeth, *Privatizing Human Rights: What Happens to the State’s Human Rights Duties When Services are Privatized?*, 5 MELBOURNE J. OF INT’L. L. 133, 138 (2004).

136. See *supra* Section II.B.3.

137. ICESCR, *supra* note 13, art. 13(2)(a).

138. ICESCR, *supra* note 13, art. 13(2)(b)-(c).

139. General Comment 13, *supra* note 37, ¶ 6(b)(iii).

140. McBeth, *supra* note 135, at 138. Even where the State offers private schools financial assistance or subsidies to cover the cost of offering education that is free/affordable to all, there is still an argument that the State cannot compel private schools to accept such an offer, as this matter does not concern the school’s compliance with Article 13(1) or minimum standards for “the education given in such institutions” (which, it is clear from the *travaux* and General Comment, is intended to cover the delivery of education and issues such as curriculum and academic standards). This conclusion is supported, at least in relation to minority schools, by jurisprudence of the Supreme Court of India. See, e.g., *Pramati Educational and Cultural Trust & Others v Union of India & Ors*; Writ Petition No. 416 of 2012 (in which the Supreme Court of India, applying a provision of the Indian Constitution which reflected Article 13(4) of ICESCR, found that even private minority schools which were aided by the State could not be compelled to offer free education to children belonging to disadvantaged groups).

ground.<sup>141</sup> Under the UNESCO Convention against Discrimination in Education, these selective admission practices do not constitute unlawful discrimination, and are specifically protected.<sup>142</sup> Similarly, the right to freedom of religion,<sup>143</sup> read together with the right to establish private educational institutions, protects the rights of religious groups to establish their own schools and accept only, or predominantly, students who observe that religion. However, while individually such schools are permissible, an education system made up entirely of such schools would *as a whole* risk being discriminatory, if, for example, this would result in greater educational opportunities for individuals from some backgrounds and not others.<sup>144</sup> As a result, in order to ensure that the education system as a whole offers equal opportunities to all, the State needs to maintain overall control of the system and have public education available to meet the needs of groups whose needs may not be met by private providers.<sup>145</sup> Once again, “only the State” can “pull together” an education system that fully complies with Article 13.<sup>146</sup>

Fourthly, this interpretation of the relevant legal provisions (that is, that they require States to develop and maintain a public education system) is supported by recent treaty body practice, as well as practice of other international bodies. So, for example, the Committee on Economic, Social and Cultural Rights noted in its concluding observations in relation to Kenya that it was “[c]oncerned that inadequacies in the public schooling system have led to the proliferation of so-called ‘low cost private schools’ . . . .”<sup>147</sup>

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141. ICESCR, *supra* note 13, art. 13(4); UNESCO Convention Against Discrimination in Education, *supra* note 11, art. 2(b). See, e.g., *Society for Unaided Private Schools of Rajasthan v. Union of India & Another* (2012) 6 SCC; Writ Petition (C) No. 95 of 2010 (in which the Supreme Court of India, applying a provision of the Indian Constitution which reflected Article 13(4) of ICESCR, found legislation requiring private, minority schools to reserve 25% of their places for students from disadvantaged backgrounds to be invalid, on the basis that it violated the right of minority groups to establish and administer private schools). See also *Pramati Educational and Cultural Trust & Others v Union of India & Ors*; Writ Petition No. 416 of 2012 (which confirmed that private, minority schools could not be required to reserve a proportion of their places for students from disadvantaged backgrounds, as this would violate the right of minority groups to establish and administer private schools).

142. See UNESCO Convention Against Discrimination in Education, *supra* note 11, art. 5(c). See also UNESCO Convention Against Discrimination in Education, *supra* note 11, art. 2(b).

143. See, e.g., *International Covenant on Civil and Political Rights*, opened for signature Dec. 19, 1966, 999 U.N.T.S. 171, art. 18 (entered into force 23 March 1976).

144. See, e.g., Alison Mawhinney’s description of the situation in Ireland: Mawhinney, *supra* note 23 (discussing the way in which religious admission policies of schools in Ireland result in discrimination against particular groups). Although this article describes schools which are treated as “public” by the Irish State, they are operated by religious organizations, and thus the study demonstrates the risks which would be arguably even more pronounced in the case of truly private schools.

145. Even if the State managed to “curate” a system where the offerings of different private providers put together ensured that there were equal educational opportunities for all, the State’s limited control over the decisions of private providers to establish or to close schools would put this system under constant threat. As a result, the State could only guarantee equal educational opportunities for all through a public education system.

146. See UNICEF, *The State of the World’s Children: Education* (1999), *supra* note 131 at 63.

147. See CESCR, *Concluding Observations: Kenya*, ¶ 57, U.N. Doc E/C.12/KEN/CO/2-5 (April 6, 2016).

and recommended “[t]hat the State party take all the measures necessary to strengthen its public education sector.”<sup>148</sup> Similarly, the Committee on the Rights of the Child has required States to “[p]rioritize the provision of quality, free primary education at public schools over the provision of education at private schools . . . .”<sup>149</sup> So in relation to Brazil, the Committee recommended that the State “[i]ncrease funds to the education sector in order to strengthen public education . . . .”<sup>150</sup> 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 . . . .”<sup>151</sup> And in relation to Chile, the Committee recommended that the State “[a]ccelerate the allocation of increased targeted resources to education, in particular in free public schools . . . .”<sup>152</sup>

It is clear from these statements by the relevant treaty bodies that they consider both that international human rights law requires States to have a public education system, and that the funding and development of this system should be prioritized so that no inequalities develop between public and private education. As Coomans and Hallo de Wolf have put it, “[t]he creeping development of an impoverished public education system must be avoided.”<sup>153</sup> As a result, States not only have an obligation to maintain public education systems, they have an obligation to maintain *robust* public education systems.<sup>154</sup>

These conclusions by the treaty bodies are supported by those of the UN Special Rapporteur on the right to education, Kishore Singh. In his report on public-private partnerships, he concludes:

The corrosive impact of public-private partnerships in education needs careful consideration. It must not lead to public disinvestment in education to the advantage of the private sector; nor must the State relinquish responsibility for providing quality public education.<sup>155</sup>

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148. *Id.* ¶ 58. Similarly, in relation to Morocco, the Committee “[r]ecommends that the State party take urgent measures to address the problems of poor-quality public education . . . [and] develop an appropriate educational system and programme . . . .” See CESCR, *Concluding Observations: Morocco*, ¶ 48, U.N. Doc E/C.12/MAR/CO/4 (Oct. 22, 2015).

149. Committee on the Rights of the Child, *Concluding Observations: Kenya*, ¶ 58(b), U.N. Doc CRC/C/KEN/CO/3-5 (March 21, 2016).

150. Committee on the Rights of the Child, *Concluding Observations: Brazil*, ¶ 74(c), U.N. Doc CRC/C/BRA/CO/2-4 (Oct. 30, 2015).

151. *Id.* ¶ 76(b).

152. Committee on the Rights of the Child, *Concluding Observations: Chile*, ¶ 68(b), U.N. Doc CRC/C/CHL/CO/4-5 (Oct. 30, 2015).

153. Coomans and Hall de Wolf, *supra* note 24, at 257.

154. See CESCR *supra* note 148; Committee on the Rights of the Child *supra* notes 149-152. I will say more about how this affects the scope of States’ obligations with respect to the right to education, particularly with respect to the allocation of resources, below: see discussion *infra* Section III.B.

155. See the August 2015 report of the Special Rapporteur, *supra* note 67, ¶ 122.

And in his report on privatization and the right to education, he concludes:

Governments should ensure that private providers only supplement public education, the provision of which is the Government's responsibility, rather than supplant it . . . . It is important to ensure that States do not disinvest in public education by relying on private providers.<sup>156</sup>

The obligation of States to provide public education is also reinforced by statements of other international bodies. The Human Rights Council, for example, has in recent years consistently passed resolutions “[r]ecognizing the significant importance of investment in public education, to the maximum of available resources . . . .”<sup>157</sup>

Fifthly, there is State practice to suggest that the provision of public education may be regarded as an obligation of States under international law. All States provide some degree of public education.<sup>158</sup> Further, there is substantial State practice, in the form of constitutional provisions, legislation, and judicial decisions, through which States have accepted a legal obligation to provide public education.<sup>159</sup> More than 80% of national constitutions guarantee the right to education,<sup>160</sup> and two-thirds of these guarantee the right to free education, at least at primary level.<sup>161</sup> In light of the discussion above regarding constraints on the ability of the State to require private providers to offer free education,<sup>162</sup> this suggests a legal obligation on the State to provide public education; certainly there are no documented examples of States fulfilling their constitutional obligation to provide free education through the exclusive use of private providers. More significantly, many constitutions explicitly impose obligations on States to

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156. See the 2014 report of the Special Rapporteur, *supra* note 1, ¶ 96.

157. See Human Rights Council Resolution on the Right to Education, U.N. Doc A/HRC/32/L.33, ¶ 3 (June 29, 2016); Human Rights Council Resolution on the Right to Education, U.N. Doc A/HRC/35/L.2, ¶ 3 (June 16, 2017).

158. See, e.g., Katerina Tomaševski, *The State of the Right to Education Worldwide: Free or Fee: 2006 Global Report* (August 2006), [http://www.katarinatomasevski.com/images/Global\\_Report.pdf](http://www.katarinatomasevski.com/images/Global_Report.pdf) [https://perma.cc/EK3K-9B4Y] (which presents a detailed analysis of education in every state, revealing that all states have some form of public education).

159. See *infra* Section III.A.2.

160. 81% in 2011, according to Jody Heymann et al., *Constitutional Rights to Education and Their Relationship to National Policy and School Enrolment*, 39 *International Journal of Educational Development* 131, 135 (2014); 82% in 2014, according to: *Accountability from a Human Rights Perspective: The Incorporation and Enforcement of the Right to Education in the Domestic Legal Order*, 32-34, (2017), paper commissioned for the 2017/8 Global Education Monitoring Report, *Accountability In Education: Meeting Our Commitments*, [http://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/RTE\\_Accountability\\_from\\_a\\_human\\_rights\\_perspective\\_2017\\_en.pdf](http://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/RTE_Accountability_from_a_human_rights_perspective_2017_en.pdf) [https://perma.cc/WH4C-NRP3].

161. Heymann et al., *supra* note 158, at 135.

162. See *supra* text accompanying note 140, which makes the argument that the State cannot compel private schools to offer free education, as to do so would be contrary to Article 13(4) of ICESCR.

provide public education.<sup>163</sup> The Library of Congress's review of the right to education in 20 States<sup>164</sup> revealed that in 14 of the 20 the right to public education was protected in constitutions or in other fundamental legislation,<sup>165</sup> and a further three constitutions did not specifically mention public education but did guarantee free education.<sup>166</sup> It is also worth noting that the State constitutions of all 50 States of the United States explicitly mandate the creation of a public education system.<sup>167</sup>

National legislation and judicial decisions also impose obligations on States to provide public education. So, for example, in Lebanon, education is to be "freely available in the public schools . . . ."<sup>168</sup> In Mexico, the General Education Law goes further than this and specifically provides that the government must allocate no less than 8% of the country's GDP to public education.<sup>169</sup> In South Africa, the South African Schools Act 1996 provides that the State "must fund public schools from public revenue . . . ."<sup>170</sup> And legislation in Israel requires the State to provide free public education to all children aged three to seventeen.<sup>171</sup> More generally, the UN Special Rapporteur on the right to education, Kishore Singh, has noted national legislation in a number of countries that outlaws for-profit schools, stating for example, "[n]ational legislation and policies in Finland give paramount importance to education as a public function of the State and as a

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163. See, e.g., the Constitution of the Philippines, which provides: "The State shall establish and maintain a system of free public education in the elementary and high school levels . . ." (SALIGANG BATAS NG PILIPINAS, (Constitution of the Republic of the Philippines), 1987, art. 14, § 2(2)); the 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" (CONSTITUCIÓN NACIONAL DE LA REPÚBLICA ARGENTINA, May 1, 1853, *as amended*, Aug. 22, 1994, art. 75.19); and 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" (CONSTITUTION FRANÇAISE DU 27 OCTOBRE 1946, Preamble, which is incorporated by reference into the current French Constitution: CONSTITUTION FRANÇAISE DU 4 OCTOBRE 1958, Preamble).

164. The Law Library of Congress, *Constitutional Right to an Education in Selected Countries*, 3, Report of May 2016 ("Law Library of Congress Report"), <https://www.loc.gov/law/help/constitutional-right-to-an-education/constitutional-right-to-education.pdf> [<https://perma.cc/WH4C-NRP3>].

165. The Law Library of Congress Report, *supra* note 164, indicates that the right to education is protected, either explicitly or implicitly (through, for example, provisions requiring free education in public schools) in the following States: Argentina (*see* the Law Library of Congress Report, 3), Egypt (8), France (12), Greece (19), Israel (24), Italy (25), Lebanon (29), Mexico (30), New Zealand (31), Nicaragua (34), Russia (37), South Africa (40), Sweden (42), and Turkey (45).

166. Namely, the constitutions of Brazil (*see* the Law Library of Congress Report, *supra* note 164, 5), India (21), and Japan (27).

167. See the excellent study of these constitutional provisions prepared for the Education Commission of the States: Emily Parker, *50-State Review: Constitutional Obligations for Public Education* (Education Commission of the States, 2016), at 1. <https://www.ecs.org/wp-content/uploads/2016-Constitutional-obligations-for-public-education-1.pdf> [<https://perma.cc/HY8T-8XY9>].

168. Legislative Decree No. 134 of 1959, *as amended* in 2011 by Law No. 150 of 2011, Al-Jaridah Al-Rasmiyah No. 39, Aug. 8, 2011, art. 49 (Lebanon).

169. Ley General de Educación [General Law of Education], *as amended*, July 13, 1993, art. 2, D.O. (Mexico).

170. See South African Schools Act 84 of 1996, § 34(1) (S. Afr.) (emphasis removed).

171. See Compulsory Education Law, 5709-1949, SEFER HA-HUKIM 5709 No. 26, p. 287, § 7 (Isr.).



public good.”<sup>172</sup> This reflects comments in national judicial decisions, such as the historic case of *Brown v Board of Education*, where the US Supreme Court found that “[e]ducation is perhaps the most important function of state and local governments,”<sup>173</sup> and *Wisconsin v Yoder*, where the Supreme Court noted that “[p]roviding public schools ranks at the very apex of the function of a State.”<sup>174</sup>

As the first UN Special Rapporteur on the right to education, Katarina Tomaševski, concluded in 2002, “[e]ducation as a governmental responsibility and public service continues to enjoy the support of the overwhelming majority of Governments in the world.”<sup>175</sup> Taken together with the factors outlined above, this suggests that the international community views the provision of a public education system, and investment in that system “to the maximum of its available resources . . . .”<sup>176</sup> as an international obligation of states.<sup>177</sup>

Overall, then, a legal analysis of the relevant provisions of international human rights law, read in light of the *travaux* of the relevant instruments, the practice of international bodies, and State practice, strongly suggests that international human rights law requires States to provide public education, regardless of the extent to which education is also offered by private providers. But does an analysis of how these legal principles apply *in practice* support such a conclusion?

## 2. Human rights and private education – practical application of the legal principles

The nature and scope of human rights can only be determined in the context of a particular factual situation, that is, through application of these rights in practice. As provided in Guideline 8 of the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, understandings of the “scope, nature and limitation of economic, social and cultural rights” develop in part through “application of legal norms to concrete cases and situations.”<sup>178</sup> As a result, the content of the rights protected under international human rights instruments can change over time, in response to changes in the social and economic context within which these rights take

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172. See the June 2015 report of the Special Rapporteur, *supra* note 31, ¶ 78.

173. See *Brown v. Board of Education of Topeka*, 347 U.S. 483, 493 (1954).

174. See *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972); see also the 2014 report of the Special Rapporteur, *supra* note 1, ¶ 72.

175. Katarina Tomaševski (Special Rapporteur), *Report on the Right to Education*, ¶ 21, U.N. Economic and Social Council, U.N. Doc E/CN.4/2002/60, (Jan. 7, 2002).

176. ICESCR, *supra* note 13, art. 2(1).

177. It is also relevant to note, in this context, that the Human Rights Council urges States to “put[ ] in place a regulatory framework that . . . addresses any negative impact of commercialization of education . . . .”; See, e.g., Human Rights Council Resolution on the Right to Education, U.N. Doc A/HRC/35/L.2, ¶ 2(e) (June 16, 2017).

178. *Maastricht Guidelines*, *supra* note 88, Guideline 8.

effect.<sup>179</sup> For these reasons, to determine whether States have an obligation to provide public education, it is necessary to consider not only the legal principles, but also their practical application in the contemporary environment. Such an analysis supports the conclusion that States are under an obligation to provide public education, because as a practical matter it would be very difficult, if not impossible, for States to comply with international human rights law without providing a degree of public education. This is because a purely private system would pose a number of problems from a human rights perspective.

*a. Equality and non-discrimination*

International human rights law requires that the right to education is guaranteed on the basis of equality, in that discrimination with respect to the enjoyment of rights under ICESCR, including the right to education, is expressly prohibited by Article 2(2).<sup>180</sup> Similarly, Article 2(1) of the CRC prohibits discrimination with respect to the rights outlined in the CRC,<sup>181</sup> including the right to education, and the UNESCO Convention against Discrimination in Education specifically requires States to eliminate and prevent discrimination with respect to education.<sup>182</sup>

However, there is significant evidence that private education increases inequality and discrimination. The Special Rapporteur on the right to education, Kishore Singh, has found that the increased use of private providers “[i]n education cripples the universality of the right to education as well as the fundamental principles of human rights law by aggravating marginalization and exclusion in education and creating inequities in society.”<sup>183</sup> It does so in different ways, depending on the type of private education in question and the broader educational and social context of the State within which it is offered.

Elite private schools, which charge significant fees and offer high quality education, are accessible only to those who have the capacity to pay.<sup>184</sup> The existence of such schools therefore raises concerns from the perspective of equality of educational opportunity unless there is a robust, high-quality public education alternative. So, for example, in its concluding observations on Pakistan in 2017, the CESCR expressed concern about “[t]he reinforcement of social segregation in education caused by the privatization of edu-

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179. Thus human rights treaties are often referred to as “living instruments”, the interpretation of which will change over time. For one of the earliest articulations of this concept, see the decision of the European Court of Human Rights in *Tyner v. United Kingdom*, Appl. No. 5856/72, Eur. Ct. H.R. (ser. A, no 26), ¶ 31 (1978).

180. ICESCR, *supra* note 13, art. 2(2).

181. CRC, *supra* note 18, art. 2(1).

182. See UNESCO Convention Against Discrimination in Education, *supra* note 11, arts. 3 and 4. See also the 2017 report of the Special Rapporteur, *supra* note 7 (discussing the need to prevent discrimination and promote equity and inclusion in education, as a matter of international human rights law).

183. See the 2014 report of the Special Rapporteur, *supra* note 1, ¶ 41.

184. *Id.* ¶ 44-6.

cation, as high-income families send their children to high-quality private schools while low-income families have to send their children to underfunded public primary schools . . . .”<sup>185</sup> And in relation to Morocco: “The Committee notes with concern that the State party has a two-speed education system with a striking difference in level between public and private education which denies equal opportunities to low-income sectors of society.”<sup>186</sup> This is clearly contrary to international human rights law, as the CESCR notes in its General Comment 24:

The provision by private actors of goods and services essential for the enjoyment of Covenant rights should not lead the enjoyment of Covenant rights to be made conditional on the ability to pay, which would create new forms of socioeconomic segregation. The privatization of education illustrates such a risk, where private educational institutions lead to high-quality education being made a privilege affordable only to the wealthiest segments of society . . . .<sup>187</sup>

So-called “low-cost private schools” also raise concerns regarding economic accessibility and discrimination on the basis of socioeconomic status. These schools are often introduced in communities which lack public education facilities.<sup>188</sup> They therefore tend to function as substitutes for free public education, and their introduction can hinder State progress towards providing free, quality public education for all. The CESCR specifically highlights this issue when it expresses concern about UK development assistance to private education providers in developing countries:

The Committee is particularly concerned about the financial support provided by the State party to private actors for low cost and private education projects in developing countries, which may have contributed to undermining the quality of free public education and created segregation and discrimination among pupils and students . . . .<sup>189</sup>

The concern regarding such providers is that they exploit, or even contribute to, inadequacies in public education systems, particularly in developing States, effectively supplanting free public education for particular

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185. CESCR, *Concluding Observations: Pakistan*, ¶ 81(e), U.N. Doc E/C.12/PAK/CO/1 (July 20, 2017).

186. CESCR, *Concluding Observations: Morocco*, ¶ 30, U.N. Doc E/C.12/MAR/CO/3 (Sept. 4, 2006). See also CESCR, *Concluding Observations: Morocco*, ¶ 47, U.N. Doc E/C.12/MAR/CO/4 (22 October 2015); CESCR, *Concluding Observations: Lebanon*, ¶ 60, U.N. Doc E/C.12/LBN/CO/2 (Oct. 24, 2016); CESCR, *Concluding Observations: Australia*, ¶ 53, U.N. Doc E/C.12/AUS/CO/5 (July 11, 2017).

187. CESCR, General Comment 24, *supra* note 119, ¶ 22.

188. In relation to the Philippines, for example, the CESCR notes that these schools have proliferated “owing to inadequacies in the public school system . . . .” See CESCR, *Concluding Observations: The Philippines*, ¶ 55(b), U.N. Doc E/C.12/PHL/CO/5-6 (Oct. 26, 2016).

189. CESCR, *Concluding Observations: UK*, ¶ 14, U.N. Doc E/C.12/GBR/CO/6 (July 14, 2016).

communities with for-fee education. This means that individuals in these communities can only access education by paying fees, with the resulting potential for discrimination on the basis of socioeconomic status. Thus, in relation to Kenya, the CESCR has expressed concern that the “[p]roliferation of so-called ‘low-cost private schools’ [ ] has led to segregation or discriminatory access to education, particularly for disadvantaged and marginalized children . . . .”<sup>190</sup>

The involvement of private providers in the delivery of education can also exacerbate discrimination against women and girls in relation to access to education. As the UN Special Rapporteur on the right to education, Kishore Singh, notes, this is because “families prioritize the education of boys over girls” such that “girls are less likely to be enrolled in private education owing to parents’ perceived return on the costs of educating girls compared to that of boys.”<sup>191</sup> Thus in its concluding observations on Uganda in 2015, the CESCR expressed concern in relation to the increasing “gap in access to quality education resulting from the increase in the provision of private education, disproportionately affecting girls . . . .”<sup>192</sup>

It could be argued that voucher programs, such as those described in II.C.3 above, could be used to prevent these forms of discrimination in access to education by private providers, because the State provides the money for parents and students to attend private schools.<sup>193</sup> In practice, however, voucher programs tend to lead to increased segregation on the basis of social or racial group.<sup>194</sup> This also raises concerns about unequal treatment and discrimination.<sup>195</sup>

There is thus substantial evidence that increased provision of education by private providers exacerbates inequality and discrimination on the basis

190. CESCR, *Concluding Observations: Kenya*, ¶ 57, U.N.doc E/C.12/KEN/CO/2-5 (April 6, 2016). See also Committee on the Rights of the Child, *Concluding Observations: Peru*, ¶ 61(c), U.N. Doc CRC/C/PER/CO/4-5 (March 2, 2016).

191. See the 2014 report of the Special Rapporteur, *supra* note 1, ¶ 47.

192. CESCR, *Concluding Observations: Uganda*, ¶ 36(c), U.N. Doc E/C.12/UGA/CO/1 (July 8, 2015).

193. This argument is usually framed in terms of vouchers facilitating “school choice”: See, e.g., comments by United States Secretary of Education, Betsy DeVos, that vouchers “provide meaningful support to enable students to attend the institution of their choice” (reported in Aria Bendix, *Do Private-School Vouchers Promote Segregation?*, *The Atlantic* (Mar. 22, 2017), <https://www.theatlantic.com/education/archive/2017/03/do-private-school-vouchers-promote-segregation/520392/> [https://perma.cc/C2FU-G4SZ]).

194. See, e.g., Elacqua, *supra* note 107 (discussing how vouchers in Chile have increased segregation on the basis of socioeconomic status); see, e.g., Eric J. Brunner, Jennifer Imazeki and Stephen L. Ross, *Universal Vouchers and Racial and Ethnic Segregation*, 92(4) *THE REVIEW OF ECONOMICS AND STATISTICS* 912 (which finds that a universal voucher system is likely to increase racial and ethnic segregation). See also 2014 report of the Special Rapporteur, *supra* note 1, ¶ 46.

195. See the 2014 report of the Special Rapporteur, *supra* note 1, ¶ 46. See further Aubry and Dorsi, *supra* note 3, at 618-20. It should also be noted that it is not possible to address the problem of discrimination by the State funding all private schools, such that no fees are payable, as international human rights law prevents States from interfering in the operation of private schools, such that the State could neither force these schools to accept funding nor prevent elite private schools from charging additional fees: see the discussion *supra* at note 140.

of socioeconomic status, sex, and social group. As a result, there are serious concerns that a *purely* private State education system would violate rights to equality and non-discrimination.<sup>196</sup> Consequently, there is a strong argument that States must retain a robust, high quality public education system in order to ensure equality of access to educational opportunity for all.

*b. Free education*

The right to education requires that primary education be available “free to all,”<sup>197</sup> and that free education be progressively introduced at other levels of education.<sup>198</sup> In the case of an education system which consisted solely of private schools, guaranteeing this element of the right would require the State to fund private providers to provide free education. As noted above, Article 13(4) of ICESCR may limit the extent to which this can, in fact, be done in compliance with international human rights law.<sup>199</sup> Further, since the State cannot discriminate between private providers in terms of funding,<sup>200</sup> this would mean that the State would be required to fund *all* providers, including private schools that had not previously been subsidized by the State. As Nowak suggests, it is difficult to see how this could be done in a way which makes economic sense for the State.<sup>201</sup> As a result, complying with the legal requirement to provide education free to all is likely to be difficult in the absence of a public education system. Certainly this is the view of commentators such as Hodgson, who conclude that “[t]he obligation to supply free education to children implies that each nation must establish a free public education system in order to place a basic education within the reach of the great majority of children.”<sup>202</sup>

*c. The “4A scheme”*

Education at all levels is required to exhibit four “interrelated and essential features,” namely availability, accessibility, acceptability and adaptability.<sup>203</sup> There is evidence that, if education were exclusively provided by private schools, this would pose problems in respect of a number of elements of this “4A scheme.” While private providers may increase the availability of schools, they raise a number of concerns from the perspective of

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196. See CESCR, General Comment 24, *supra* note 119, ¶ 22: “The provision by private actors of goods and services essential for the enjoyment of Covenant rights should not lead the enjoyment of Covenant rights to be made conditional on the ability to pay, which would create new forms of socio-economic segregation. The privatization of education illustrates such a risk, where private educational institutions lead to high-quality education being made a privilege affordable only to the wealthiest segments of society.”

197. ICESCR, *supra* note 13, art. 13(2)(a).

198. ICESCR, *supra* note 13, art. 13(2)(b)-(c).

199. See the discussion *supra* at note 140.

200. Nowak, *Human Rights or Global Capitalism*, *supra* note 3, at 64, drawing on, for example, *Waldman v. Canada*, *supra* note 50, ¶ 10.6.

201. Nowak, *Human Rights or Global Capitalism*, *supra* note 3, at 64.

202. Hodgson, *supra* note 8, ¶ 7.

203. General Comment 13, *supra* note 37, ¶ 6(a)-(d).

accessibility. The concept of accessibility requires that “educational institutions and programmes have to be accessible to everyone, without discrimination . . . .”<sup>204</sup> This requires both physical and economic accessibility. As noted above, there is significant evidence that increasing the number of private providers of education leads to increased discrimination in terms of access to education, and has particular implications for economic accessibility.<sup>205</sup> Physical accessibility of education may also be adversely affected by an increase in private schools, because for-profit schools are more likely to be established in major urban areas, where services can be most easily and cheaply provided and where large numbers of students provide maximum profit. Most private providers are unlikely to establish schools in remote or difficult to access areas, which require increased costs to provide education to fewer students. Thus, in its concluding observations on Kenya, for example, the CESCR noted the negative impact of the proliferation of “low-cost private schools” on access to education for children living in “arid and semi-arid areas . . . .”<sup>206</sup>

Acceptability of education requires that “the form and substance of education, including curricula and teaching methods, have to be acceptable (e.g. relevant, culturally appropriate and of good quality) to students . . . .”<sup>207</sup> However, one of the major concerns surrounding the role of private actors in education has been the way in which low-fee private schools, in particular, have affected quality in education. The Special Rapporteur on the right to education, Kishore Singh, has cited numerous examples of low-fee private schools which do not comply with government guidelines or follow the national curriculum, and which employ unqualified instructors.<sup>208</sup> The CESCR has expressed similar concerns in its concluding observations regarding the poor quality of low-fee private schools.<sup>209</sup> The concern here is that private providers, driven to make profits, seek to provide education for the lowest cost, ignoring government guidelines and employing unqualified teachers. Conversely, “[t]he top-performing education systems in the world, in Asia, Europe and North America, are predominantly public systems.”<sup>210</sup> This has led the Special Rapporteur to observe that “[t]he highest-quality education, for the lowest cost, universally available for all,

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204. *Id.* ¶ 6(b).

205. Except, of course, where the State funds these schools so that they are free, which, as discussed above, may create both practical difficulties for the State and the potential for other forms of discrimination. See *supra* Section III(A)(2)(b).

206. CESCR, *Concluding Observations: Kenya*, ¶ 57, U.N. Doc E/C.12/KEN/CO/2-5 (April 6, 2016).

207. See General Comment 13, *supra* note 37, ¶ 6(c).

208. See the June 2015 report of the Special Rapporteur, *supra* note 31, ¶ 45, 70-1.

209. CESCR, *Concluding Observations: Pakistan*, ¶ 81(c), U.N. Doc E/C.12/PAK/CO/1 (July 20, 2017); CESCR, *Concluding Observations: The Philippines*, ¶ 55(c), U.N. Doc E/C.12/PHL/CO/5-6 (Oct. 26, 2016).

210. See the August 2015 report of the Special Rapporteur, *supra* note 67, ¶ 140.

will always come from an effective public system.”<sup>211</sup> Private schools which operate according to particular religious philosophies or other ideologies may also raise concerns from the perspective of acceptability of education, if students who do not share those beliefs are forced to attend these schools because of a lack of available public education.

Private schools may also pose problems from the perspective of adaptability of education. Adaptability means that “education has to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings.”<sup>212</sup> The concern here is that private providers who operate on a for-profit basis have an incentive to roll out the same educational program across a number of different schools, and even across different States, without taking account of local needs. Acknowledging this concern, the Committee on the Rights of the Child recommended in its concluding observations on Brazil that the State “[s]top the purchase of standardized teaching and school management systems by municipalities from private companies”, which “include teaching and teacher training materials and school management packages that may not be adequately customized for effective use.”<sup>213</sup>

#### *d. Commodification of education*

Finally, there is a general concern that, in a system which consists exclusively of private providers, education will be viewed as a commodity rather than as a public good.<sup>214</sup> As numerous scholars have shown, including the first UN Special Rapporteur on the right to education, Katerina Tomaševski, the commodification of education is generally inconsistent with the right to education.<sup>215</sup> This is because if education is treated as a commodity, to be bought and sold, then it is generally only available to those with capacity to pay. This is inconsistent with the view of education as a right, to be provided to all, and not purchased as part of a commercial transaction. As the UN Special Rapporteur, Kishore Singh, concludes, “[p]rivate providers undermine the right to education, both as an entitlement and as empowerment.”<sup>216</sup>

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211. *Id.* ¶ 141. Of course, such a public education system needs to be well-financed, as discussed further below: see *infra* Section III(B)(2).

212. See General Comment 13, *supra* note 37, ¶ 6(d).

213. Committee on the Rights of the Child, *Concluding Observations: Brazil*, ¶ 75-76, U.N. Doc CRC/C/BRA/CO/2-4 (Oct. 30, 2015).

214. See, e.g., Jason Blakely, *How School Choice Turns Education Into a Commodity*, *The Atlantic* (Apr. 17, 2017), <https://www.theatlantic.com/education/archive/2017/04/is-school-choice-really-a-form-of-freedom/523089/> [<https://perma.cc/QDP3-85GZ>]. See also the 2002 report of the Special Rapporteur, *supra* note 172, ¶ 20; the June 2015 report of the Special Rapporteur, *supra* note 31, ¶ 40-42.

215. See the 2002 report of the Special Rapporteur, *supra* note 172, ¶ 20; see also the June 2015 report of the Special Rapporteur, *supra* note 31, ¶ 40-42.

216. See the June 2015 report of the Special Rapporteur, *supra* note 31, ¶ 42. This reference to education as entitlement and empowerment is a reference to the generally understood nature of education as “both a human right in itself and an indispensable means of realizing other human rights.” CESCR General Comment 13, *supra* note 37, ¶1. Education is something to which all are entitled,

### 3. Conclusion

In this section, I have sought to establish, as a first step to determining whether there is a human right to public education, whether States are obliged to provide public education at all, as a matter of international human rights law. This involves asking the question whether a system where education is provided purely by private providers would be compatible with international human rights law: if so, then States have no obligation to provide public education; if not, then States have an obligation to provide at least some level of public education. This is, in some respects, a theoretical question, as no State currently operates a system where education is provided solely by private entities, nor have any States announced their intention to move towards such a system. However, privatization of education is a growing phenomenon, and the extent to which education is provided by private institutions is substantially increasing, in both developed and developing States.<sup>217</sup> In his 2015 report entitled “Protecting the Right to Education Against Commercialization,” the UN Special Rapporteur on the Right to Education, Kishore Singh, investigates this phenomenon and concludes that there has, in recent years, been “[r]apid growth in private providers, which is resulting in the commercialization of education . . . .”<sup>218</sup> His report cites numerous examples of privatization of education occurring in different countries, with negative effects on the right to education.<sup>219</sup>

An analysis of those provisions of international human rights law which protect the right to education, particularly Article 13 ICESCR and Articles 28 and 29 CRC, together with the relevant jurisprudence, *travaux* and State practice, suggests that international human rights law requires States to provide at least some level of public education. Further, an analysis of how private education operates in practice reveals that a system where education is provided solely by private providers would be highly likely to be inconsistent with a number of States’ obligations with respect to the right to education. It therefore seems that States are required, as a matter of international human rights law, to provide at least some level of public education.

This conclusion is supported by the fact that, under international human rights law, States have obligations not to take retrogressive steps with respect to the enjoyment of the right to education. While the right to educa-

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regardless of, for example, ability to pay. But it is also necessary to empower individuals to realize their full potential and to benefit from other human rights. To quote the General Comment: “As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth.” *Id.*

217. See the June 2015 report of the Special Rapporteur, *supra* note 31, ¶¶ 1, 36, 70-74.

218. *Id.* ¶ 1.

219. *Id.* ¶¶ 70-74.



tion may be subject to “progressive realization,” States cannot take backward steps, such that the right is realized to a lesser extent than it was before.<sup>220</sup> Given that all States had at least some system of public education in place at the time that they ratified the Covenant, and given the risks associated with a wholly private education system, there is a strong argument that introducing such a system would constitute a retrogressive step, and would thus be impermissible as a matter of human rights law.<sup>221</sup>

It therefore seems that all States are under an obligation to provide at least some level of public education. This follows both from a legal analysis of the relevant provisions, and from a consideration of how those provisions play out in practice. Having established that there is such an obligation on States, the next question is: what is the scope of this obligation to provide public education?

*B. What is the scope of the State obligation to provide public education?*

*1. Public education for all?*

Having established that States are under an obligation to provide some degree of public education, the next question is: how much? Must States provide public education to everyone within their jurisdiction? Or is it sufficient if only some public education is provided, as long as private providers “fill the gap” and ensure that everyone receives an education in accordance with Article 13 of ICESCR and other relevant provisions?

It follows from the discussion above that there are a number of practical concerns regarding the ability of private providers to deliver, on a non-discriminatory basis, education that complies with Article 13 and related provisions. As a result, States are required to provide at least some degree of public education, to ensure that they comply with their obligations with respect to the right to education.<sup>222</sup> For example, since the operation of private schools can result in discrimination with respect to enjoyment of the right to education on the basis of socioeconomic status, sex, or social group,<sup>223</sup> States must provide sufficient public education, which is equally accessible all, to counter such discrimination. Similarly, where private providers operate only in urban or accessible areas, the State must provide public schools which are reasonably physically accessible to those in

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220. See General Comment 13, *supra* note 37, ¶ 45 (“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.”)

221. See generally Nowak, *supra* note 3, at 62, 64-5.

222. See *supra* Part III.A.1; see also notes 140-145 and accompanying text.

223. See *supra* Part III.A.2.a.

remote or disadvantaged areas, in order to counter discrimination on the basis of place of residence.<sup>224</sup>

In these scenarios, the State is essentially operating as a “gap-filler,” providing public education to address shortcomings with private education which would otherwise mean that the State was not meeting its international human rights obligations. But is this sufficient, for the purposes of international human rights law, or is the State required to provide public education for all who want it? There is an argument that the requirements of equality and non-discrimination demand that if the State provides public education (as it is obliged to do under international human rights law), then such education must be accessible equally to all, in accordance with, for example, the requirements of Article 2(2) ICESCR. The State is therefore obliged to make public education available to everyone within its jurisdiction,<sup>225</sup> without discrimination on any of the prohibited bases,<sup>226</sup> including place of residence, socioeconomic status, sex, and race. Arguably this requires States to provide public education for all.

To make out this argument, it must be shown that providing public education for some individuals and not others (with those others then only able to access private education) constitutes unlawful discrimination. As a matter of international human rights law, discrimination is “any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of Covenant rights.”<sup>227</sup> And discrimination will be unlawful where there is no “reasonable and objective” justification for this “differential treatment.”<sup>228</sup> In order to establish that international human rights law requires States to provide public education for all who want it, and that failure to do so constitutes unlawful discrimination, it is therefore necessary to show three things: first, that where public education is available to some individuals and not others, there is “differential treatment” which has the effect of impairing enjoyment of the right to education; secondly, that this differential treatment is directly or indirectly based on a prohibited ground of discrimination; and thirdly, that there is no “reasonable and objective” justification for the differential treatment.

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224. *See supra* Part III.A.2.c.

225. Although individuals can, of course, still choose to attend private schools.

226. International law explicitly prohibits discrimination on grounds of: race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. *See* ICESCR, *supra* note 13, art. 2(2). “Other status” on which discrimination is prohibited has been found to include attributes such as disability, age, nationality, marital and family status, sexual orientation and gender identity, health status, place of residence, and economic and social situation. *See* CESCR, *General Comment No. 20, Non-discrimination in economic, social and cultural rights*, ¶ 27-35, U.N. Doc E/C.12/GC/20 (July 2, 2009) [hereinafter *General Comment 20*].

227. *General Comment 20, supra* note 226, ¶ 7.

228. *Id.* ¶¶ 13-14.

Turning to the first question, providing public education to some and not others clearly involves differential treatment. But does this differential treatment impair enjoyment of the right to education? The discussion in III.A.2 above suggests that it does, because it is highly unlikely that private education systems will comply with all the requirements of international human rights law. As noted previously,<sup>229</sup> these systems raise particular concerns from the perspectives of accessibility, acceptability and adaptability. As a result, individuals who are unable to access public education, and are only able to access private education, are likely to have their enjoyment of the right to education limited.

The question is then whether this differential treatment (providing public education to some individuals and not to others) is based on a prohibited ground, and if so, whether there is a reasonable or objective basis for it. The most likely scenario is where public schools are available in some areas but not others. This would amount to differential treatment on the basis of place of residence, a prohibited ground,<sup>230</sup> and would therefore constitute unlawful discrimination unless there was a “reasonable and objective” justification for this difference in treatment.<sup>231</sup> A reasonable and objective justification exists if the difference in treatment pursues a legitimate aim and is proportionate to achieving that aim.<sup>232</sup> It is difficult to see what “legitimate aim” could be pursued by offering public education in some areas and not others. The State may argue that it is too difficult or costly to provide public education to, for example, those living in remote areas, or that providing schools in some areas only constitutes the most efficient use of limited State resources. However, these arguments are really about financial resources and the impact of lack of resources on States’ obligations of progressive realization, as discussed further below. They do not, of themselves, render the difference in treatment lawful.

Another possible scenario is where public schools are available in all areas, but there are not sufficient places available in those schools to meet demand. In such a case, schools must decide which students they will offer places to, and on what basis they will make such decisions. There would seem to be a substantial risk that such decisions could involve direct or indirect discrimination on prohibited grounds, including place of residence, social group or socioeconomic status. Even decision-making on the basis of apparently “neutral” criteria, such as order of receipt of application to attend the school, may constitute indirect discrimination against those who live further away from the school or are of lower socioeconomic status. This is because these factors may affect the extent to which individuals are aware of the need to apply for admission, and to do so as early as possible, and the

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229. See *supra* Section III.A.2(c).

230. General Comment 20, *supra* note 226, ¶ 34.

231. *Id.* ¶ 13.

232. *Id.*

ease with which they can apply for admission. If there is indirect discrimination on this basis, there is unlikely to be any reasonable or objective justification for it, as it is difficult to see what legitimate aim could be pursued by these measures. Overall, the selection of some students and not others to attend public school carries with it a grave risk of unlawful discrimination.

It therefore seems likely that providing public education to some individuals and not others will constitute unlawful discrimination with respect to the right to education. This means that the right to education, read together with the prohibition on discrimination, requires States to provide public education to all students who wish to pursue it. States are, therefore, as a matter of international human rights law, required to provide public education for all.<sup>233</sup>

## 2. Resource implications

But what about States which lack the financial capacity to provide public education for all? Such States cannot, of course, be expected immediately to provide public education for all. It is clear that the State obligation, in respect of the right to education, is to “take steps . . . to the maximum of its available resources, with a view to achieving progressively the full realization” of the right.<sup>234</sup>

The nature of the State’s obligation to “progressively realize” economic, social and cultural rights “to the maximum of its available resources” has been clarified by the CESCR in its General Comment 3 on the nature of States parties’ obligations under ICESCR.<sup>235</sup> Applying the principles laid down in this General Comment to the State obligation to provide public education highlights three important aspects of this obligation. The first is that States are obliged to use the maximum of their available resources<sup>236</sup> (and to consider maximizing these resources through, for example, appro-

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233. This does not, of course, mean that all students must be in public education. Students and their parents are free to choose private educational institutions, as provided for in ICESCR, *supra* note 13, art. 13(3). However, it does mean that the State must make some form of public education reasonably available to all.

234. ICESCR, *supra* note 13, art. 2(1).

235. CESCR, General Comment 3, *supra* note 115, ¶¶ 9-13.

236. The question of what “maximum available resources” means, how to quantify it, and how to operationalize the State’s obligation to “progressively realize” economic, social and cultural rights “to the maximum of its available resources”, is one of the most difficult questions related to economic, social and cultural rights, and has been the subject of much scholarship and analysis. See, e.g., Aoife Nolan, *Budget Analysis and Economic and Social Rights*, in *ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN INTERNATIONAL LAW: CONTEMPORARY ISSUES AND CHALLENGES*, 369 (Eibe Riedel et al eds., OUP, 2014); Rory O’Connell et al., *Applying an International Human Rights Framework to State Budget Allocations: Rights and Resources* (Routledge, 2014); Diane Elson et al, *Public Finance, Maximum Available Resources and Human Rights*, in *HUMAN RIGHTS AND PUBLIC FINANCE: BUDGETS AND THE PROMOTION OF ECONOMIC AND SOCIAL RIGHTS*, 13 (Aoife Nolan et al eds., 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?*, 12 *HUMAN RIGHTS LAW REVIEW* 393 (2012).

priate taxation policies)<sup>237</sup> in order to progressively make public education available to all. The question of what “maximum available resources” means and how it is to be quantified is a difficult and contested one, as is the question of how States should prioritize the spending of scarce resources as between public education and other services required for the fulfilment of economic, social and cultural rights, such as hospitals and social housing.<sup>238</sup> However, it is clear from the concluding observations of the treaty bodies, discussed above, that States must prioritize spending on public education over spending to support private education.<sup>239</sup> Thus the treaty bodies require States to “prioritize the provision of quality, free primary education at public schools over the provision of education at private schools,”<sup>240</sup> and, in particular, to prioritize the allocation of resources to public schools.<sup>241</sup> Significantly, the treaty bodies have indicated that this obligation to prioritize the allocation of resources to public education applies not only to the State concerned itself, but also to other States offering development assistance.<sup>242</sup> Thus in relation to the UK, the Committee on the Rights of the Child:

[r]ecommends that the State party ensure that its 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  
 . . . .<sup>243</sup>

The second important aspect of the State’s obligation to “progressively realize” economic, social and cultural rights “to the maximum of its available resources” is that States cannot take retrogressive steps, that is, steps which decrease the availability of public education, except in exceptional circumstances.<sup>244</sup> As the CESCR has stated:

237. See, e.g., Elson et al., *supra* note 236.

238. See Nolan, *supra* note 236 (discussing how budget analysis can be used to determine whether states are complying with their obligations in relation to economic, social and cultural rights, including how states should allocate resources in their budgets to comply with these obligations); O’Connell, *supra* note 236 (discussing how state obligations in relation to economic, social and cultural rights should be reflected in state budgets, in terms of allocation of resources).

239. See *supra* notes 148-153.

240. Committee on the Rights of the Child, *Concluding Observations: Kenya*, ¶ 58(b), U.N. Doc CRC/C/KEN/CO/3-5 (March 21, 2016).

241. See, e.g., Committee on the Rights of the Child, *Concluding Observations: Brazil*, ¶ 74(c), U.N. Doc CRC/C/BRA/CO/2-4 (Oct. 30, 2015); Committee on the Rights of the Child, *Concluding Observations: Chile*, ¶ 68(b), U.N. Doc CRC/C/CHL/CO/4-5 (Oct. 30, 2015).

242. See, e.g., Committee on the Rights of the Child, *Concluding Observations: UK*, ¶ 18, U.N. Doc CRC/C/GBR/CO/5 (July 12, 2016).

243. *Id.*

244. That is, “after the most careful consideration of all alternatives” and where the retrogressive step is “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.” General Comment 13, *supra* note 37, ¶ 45.

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.<sup>245</sup>

Thirdly, even when the State is still working towards making public education available to all, there can be no discrimination in terms of access to public education. The facilities which are available must be available equally to all and schools cannot discriminate in terms of which students they accept on any of the prohibited bases. Similarly, the quality of education should be equivalent in all public schools.<sup>246</sup>

### 3. What is "public"?

If there is a State obligation to make public education available to all (or to progressively move towards doing so in the case of States which have been unable to do so yet due to resource limitations), the question of what constitutes "public education" assumes particular significance. As discussed above, the question of what constitutes "public education" for the purposes of the right to education will be determined on a case by case basis, depending on the particular context of the State concerned. However, a number of factors may be helpful in clarifying the nature of the education States are required to provide in order to satisfy their obligations to make "public education" available to all.

It is clear that the relevant international bodies will show a degree of deference to the State concerned, and will generally accept the State's categorization of particular schools as "public."<sup>247</sup> As a result, it is, in the first instance, a matter for the State itself to decide what it considers to be "public" education. As set out in II.B.6 above, the case law suggests that the appropriate question may in fact be not whether a particular school is public or private, but whether it is "part of the public education system."<sup>248</sup> This gives States a certain degree of latitude in deciding which schools they will consider to form part of their public education system, and it is clear that some schools with private elements, such as the Roman Catholic schools in the *Waldman* case,<sup>249</sup> may nonetheless be considered part of the public education system. It would therefore be permissible for States to

245. *Id.*

246. UNESCO Convention Against Discrimination in Education, *supra* note 11, art. 4(b).

247. *See supra* Section II.B.5.

248. *Waldman v. Canada*, *supra* note 50, ¶ 10.5. *See supra* Section II.B.6.

249. *Waldman v. Canada*, *supra* note 50.

fulfil their obligation to make public education available to all through the use of such schools.<sup>250</sup>

Nonetheless, the State's discretion in this respect is not unlimited, as a matter of international human rights law. In the first place, schools which are run for the profit of private actors will not generally be capable of being classified as public, or as part of the public education system.<sup>251</sup> Secondly, as set out in section II.B.3 above, for a school to be classified as part of the public education system, the State (or local authorities) must have the ability to exercise substantial control over the operation of the school, such that the way in which the school operates is ultimately determined by the State, or by publicly appointed school boards, and not by private actors.<sup>252</sup>

A final important point to note is that what constitutes "public education" cannot, without reasonable justification, vary throughout the State, as this would amount to discrimination on the basis of place of residence. Thus it is not open to States to "rebrand" private schools as "part of the public education system" in order to satisfy their international human rights obligations. This also means that what has traditionally been considered "public education" within the State will be the starting point for determining which schools constitute part of the "public education system": for other schools to be included as part of this system, they must (like the Roman Catholic schools in *Waldman*) have substantially the same characteristics, in terms of State funding, control and so on, as existing public schools.

Pulling this all together, and drawing on the analysis in II.B above, States may be able to fulfil their obligation to make public education available to all through supporting the provision of certain forms of education with elements of private participation. Thus the State could fulfil its obligation by supporting schools such as those conducted under partnership arrangements and schools such as the Roman Catholic schools in *Waldman*. Other arrangements, however, which involve lesser control on the part of the State, and greater possibilities for profit to be accumulated by private actors, would not be sufficient for the State to fulfil its obligations to make public education available to all. In particular, the use of charter schools or voucher systems would not generally be appropriate in this context.<sup>253</sup>

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250. *Id.*

251. *Supra* Section II.B.1.

252. *Waldman v. Canada*, *supra* note 50, ¶ 2.4.

253. See *supra* Section II. The question of where to draw the line, that is, how much private involvement is acceptable, as a matter of international human rights law, will be a difficult one; there are no bright lines between "public" and "private" education for the purposes of international human rights law. In future, more work could fruitfully be done on the distinction between public and private education, to seek to explore further the limits of private sector involvement in light of the State obligation to provide public education.

#### 4. Other requirements

In addition to the above, it is worth remembering that the State's obligation to provide public education is to provide education which complies with Article 13 of ICESCR and other relevant legal provisions, such as Articles 28 and 29 of the CRC. Thus the education provided must be directed towards the ends set out in Article 13(1);<sup>254</sup> it must be free at primary level,<sup>255</sup> and progressively made free at secondary level;<sup>256</sup> it must be available, accessible, acceptable and adaptable;<sup>257</sup> and it must be provided to all without discrimination.<sup>258</sup> In addition, public schools must be of sufficient quality to ensure that they do not offer education inferior to that offered by elite private schools, a situation which would lead to discrimination on the basis of ability to pay.<sup>259</sup>

It is also worth noting that what is demanded by these legal standards will always depend on context, and will fall to be determined on a case by case basis.<sup>260</sup> In relation to the availability of public education, for example, it must be acknowledged that it can be difficult for States to establish schools in particularly remote or inhospitable areas. In these cases, it may be sufficient 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. However, while there may be some variability in what these legal standards demand in particular contexts, it must be remembered that there is a "minimum core obligation [for States] to ensure the satisfaction of, at the very least, minimum essential levels . . . ." of the right to education.<sup>261</sup>

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254. ICESCR, *supra* note 13, art. 13(1).

255. *Id.* art. 13(2)(a).

256. *Id.* art. 13(2)(b).

257. General Comment 13, *supra* note 37, ¶ 6.

258. ICESCR, *supra* note 13, art. 2(2).

259. This would be contrary to ICESCR, *supra* note 13, art. 2(2) as it would amount to discrimination on the basis of socioeconomic status: *see supra* Part III.A.2.a.

260. Thus art. 8(4) of the Optional Protocol to ICESCR, G.A. Res. 63/117, *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, A/RES/63/117 (Mar. 5, 2009), and art. 10(4) of the Optional Protocol to the CRC, G.A. Res. 66/138, *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure*, A/RES/66/138 (Jan. 27, 2012), both require the relevant Committee to assess the "reasonableness" of steps taken by the State when determining whether there has been a violation of the right to education.

261. This concept of "minimum core obligation" comes from General Comment 3, *supra* note 115, ¶ 10. In relation to the right to education, the CESCR has indicated that the minimum core "includes an obligation: to ensure the right of access to public educational institutions and programmes on a non-discriminatory basis; to ensure that education conforms to the objectives set out in article 13(1); to provide primary education for all in accordance with article 13(2)(a); to adopt and implement a national educational strategy which includes provision for secondary, higher and fundamental education; and to ensure free choice of education without interference from the State or third parties, subject to conformity with 'minimum educational standards' (art. 13(3) and (4)).": General Comment 13, *supra* note 37, ¶ 57.



*C. Is there a right to public education?*

Since States are obliged, under international human rights law, to make public education available to all, it follows that there is a right to public education, the scope of which reflects the scope of the State obligation outlined above. This means that individuals have a right to public education, in the sense of having a school that is part of the public education system reasonably available to them.

What constitutes “reasonably available” will, of course, depend on context.<sup>262</sup> As noted above, for students in remote areas, this may mean having the option to travel to a public school further away, or to board at such a school. However, it is clear that, in all cases, individuals are entitled to public education that meets the 4A requirements of availability, accessibility, acceptability and adaptability; is free for primary and progressively free for secondary school; and is directed towards the ends set out in Article 13(1) of ICESCR.

In light of the discussion in III.B above, the right to public education is, in essence, a right of non-discriminatory access to the public education system. It is therefore vital that there is no discrimination, in terms of access to the public education system, on any of the prohibited bases. While the right to education, and therefore the right to public education, is generally subject to progressive realization, this is not the case with respect to non-discrimination in enjoyment of the right, which is an immediate obligation of States. This potentially creates problems for States which do not yet have a fully functioning public education system in all areas, as this could constitute discrimination on the basis of place of residence, which would need to be justified on the grounds that there is a reasonable and objective basis (that is, a legitimate aim) for treating individuals in different areas differently. It is possible that this could be justified on the basis that the State may choose to concentrate its resources on, for example, urban areas, where the number of students who would gain access to public education would be higher. However, as a matter of international human rights law, this justification would be subject to strict scrutiny<sup>263</sup> and would apply only as long as necessary in light of the State’s resources, with the State required to move towards making public education available in all areas as expeditiously as possible.

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262. Assessing reasonableness in this way is one of the tasks of international human rights bodies. It is, for example, what the CESCR and Committee on the Rights of the Child are required to consider when hearing complaints under the Optional Protocols to ICESCR and the CRC, respectively: art. 8(4) of the Optional Protocol to ICESCR, *supra* note 260; and art. 10(4) of the Optional Protocol to the CRC, *supra* note 260, both require the relevant Committee to assess the “reasonableness” of steps taken by the State when determining whether there has been a violation of the right to education.

263. By, for example, the relevant treaty bodies, who would seek to keep the State accountable through monitoring of State reports, and by adjudicating complaints of individuals made under the Optional Protocols to ICESCR and the CRC: see Optional Protocol to ICESCR, *supra* note 260, art. 2; Optional Protocol to CRC, *supra* note 260, art. 5.

As this example suggests, and as the discussion in III.B above demonstrates, other aspects of the right to public education are subject to progressive realization. As a result, an individual's rights will not necessarily be violated where there is no reasonably available option for that individual to attend a public school, provided that the State can demonstrate that it is "tak[ing] steps" "to the maximum of its available resources" to provide public education to all.<sup>264</sup> However, this does not mean that this right is simply an aspiration or goal, and is not legally enforceable or justiciable. As the CESCR notes in its General Comment 3, "the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content";<sup>265</sup> it "imposes an obligation to move as expeditiously and effectively as possible towards"<sup>266</sup> full realization of the right. Further, the CESCR has specifically identified the rights under Article 13(2) (which, as noted above, give rise to the right to public education) as "capable of immediate application by judicial and other organs," that is, of justiciability at the national level.<sup>267</sup> At the international level, it is clear that the right to education (and thus the right to public education associated with it) is justiciable under the Optional Protocols to ICESCR and the CRC.<sup>268</sup> This means that the measures taken by States to progressively realize the right will be subject to scrutiny by the relevant Committees, with a view to determining whether a State is indeed taking steps "to the maximum of its available resources"<sup>269</sup> to provide public education to all.<sup>270</sup>

## CONCLUSION

Against the background of increasing private sector involvement in the field of education, this article has asked the fundamental question of whether there is a right to *public* education under international human

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264. ICESCR, *supra* note 13, art. 2(1).

265. General Comment 3, *supra* note 115, ¶ 9.

266. *Id.*

267. *Id.* ¶ 5.

268. See Optional Protocol to ICESCR, *supra* note 260, art. 2; see also Optional Protocol to CRC, *supra* note 260, art. 5.

269. ICESCR, *supra* note 13, art. 2(1).

270. See Optional Protocol to ICESCR, *supra* note 260, art. 8(4); see also Optional Protocol to CRC, *supra* note 260, art. 10(4), both of which require the relevant Committee to assess the "reasonableness of the steps taken by the state party". Although this "reasonableness test" has been controversial (see Brian Griffey, *The "Reasonableness" Test: Assessing Violations of State Obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* 11 HUMAN RIGHTS LAW REVIEW 275 (2011), which discusses controversies with both the drafting and subsequent application of this test), it is clear that this test requires the Committee to analyze carefully the policies and measures taken by the State, and to find that a State has violated its obligations under the relevant treaty where these steps are not reasonable. (Of course, the question of enforcement of such findings of the Committees is a separate one, there being no binding mechanism for the Committees to compel States to comply with their obligations under international human rights law.)

rights law. Is it permissible for States to allow private actors to take an ever increasing role in the delivery of education, or are States required to maintain public education systems available to all? Answering this question has required me to consider two distinct, but related, matters: first, what is meant by “public education” for the purposes of international human rights law; and secondly, what is the scope of States’ obligations to provide such education?

While there is no clear definition of “public education” for the purposes of international human rights law, a number of factors will be relevant to assessing whether a particular institution is public or not. These include the purpose of the institution; who established it; who controls and directs it; where its funding comes from; and how it is classified within the State in which it operates. Of these, the questions of control and classification within the State are of particular importance. It is also important to note that, for the purposes of international human rights law, the question is not so much whether an institution is public or private in and of itself, but whether it forms part of the public education system as a whole.

International human rights law requires all States to develop and maintain public education systems. And it is clear that private educational institutions raise a number of concerns from the perspective of international human rights. As a result, States are obliged, as a matter of international human rights law, to provide access to public education on a non-discriminatory basis, and therefore to ensure that everyone has access to a school which is part of the public education system. While States maintain a certain discretion in terms of which schools they characterize as “part of the public education system”, this discretion is both limited and amenable to review by relevant international human rights bodies. Similarly, while the obligation to provide public education for all is subject to progressive realization, it is for international human rights bodies to determine whether States are complying with this obligation by taking steps “to the maximum of available resources”<sup>271</sup> to provide public education for all.

Ultimately, then, international human rights law does give rise to a right to public education. How this right applies in practice will depend on context and individual circumstances. However, it is a useful starting point for addressing concerns regarding the role of private actors in education: requiring States to maintain public education for all both puts a limit on private involvement in education and ensures that all individuals are able to access quality education on an equal basis. As such, the acknowledgement of such a right in the Abidjan Principles, as endorsed by human rights bodies,<sup>272</sup> represents an important step forward for the protection of the right to education in an era of increasing privatization.

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271. ICESCR, *supra* note 13, art. 2(1).

272. *See supra* note 5.

