OIDEL contribution to the **Call for submissions for the open-ended intergovernmental working group on an optional protocol to the Convention on the Rights of the Child**

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Co-Sponsors: 8, see Annex

Introduction

As currently presented in the call and draft resolution, it appears that the right to education—particularly at the pre-primary and secondary levels—is being framed almost exclusively through the lens of public provision. This narrow approach raises concerns. Our contribution aims to question the pertinence of such a framing. While we fully acknowledge the importance of advancing the right to education and welcome the initiative to submit a draft Optional Protocol to the Convention on the Rights of the Child to the Human Rights Council, we encourage stakeholders to reflect on the following question:

Is the notion of 'public education' the most effective way to ensure pre-primary and secondary education for all?

Human Rights Legal Context

- **The notion of "public education" in binding human rights documents.**

The explicit inclusion of the notion of "public education" in a binding international document would be a novelty. This terminology is absent from the Universal Declaration of Human Rights. The Convention to which this Optional Protocol would be complementary makes no explicit reference to public education either.

The Convention on the Rights of the Child, in Article 28, states: *"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."* However, it does not specify that such education must be "public".

Other international treaties that address the right to education—such as the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the UNESCO Convention against Discrimination in Education (CADE)—also omit any explicit reference to "public education." Both these instruments, within the context of respecting the liberty of parents, mention the existence of "institutions established" (ICESCR) or "maintained" (CADE) by public authorities. These references, however, do not define or clarify what is meant by "public education."

While the Convention on the Rights of the Child affirms the availability of free primary education for all, it does so without reference to whether that education must be public or not. The inclusion of this new language which was omitted until now should be a matter, at least, of discussion among UN member state.

This concept is also absent from the main regional human rights instruments.

- **The notion of "public education" in treaty bodies literature.**

As we all know, the General Comments of the Committee on the Rights of the Child are not legally binding, although they serve as authoritative interpretations. While the responsibility of public authorities is acknowledged, the concept of public education is not developed in the main General Comments regarding education issued by this Treaty Body (CRC/C/GC/20, CRC/GC/2001/1, CRC/C/GC/14).

Similarly, this concept does not appear in the General Comments on education of other Treaty Bodies, such as the Committee on Economic, Social and Cultural Rights (e.g., E/C.12/1999/10).

- **The notion of "public education" in other relevant international documents.**

The 2030 Agenda does not refer to *"*public education*"* as a means of implementing SDG 4. Similarly, the document *Education 2030: Incheon Declaration and Framework for Action* (UNESCO, 2016)., adopted by representatives from over 160 countries at the World Education Forum, reaffirms that "*education is a public good, of which the state is the duty bearer*." It emphasizes that the state's primary role is to set and enforce standards and norms, but it does not mention the notion "*public education*"

In 2015, UNESCO published a document titled *Rethinking Education: Towards a Global Common Good?* (UNESCO, 2015). This document addresses the public-private education debate, arguing that the conception of education as a *public good* is insufficient, as it is based on a market-oriented approach. Public goods are described as *"goods which all enjoy in common in the sense that each individual's consumption of such a good leads to no subtractions from any other individual's consumption of that good*." In contrast, education requires a *common good* approach, since common goods are "*constituted by goods that humans share intrinsically in common and that they communicate to each other, such as values.*" In summary, the debate about education should not be framed simply as public versus private, but rather as a matter of fulfilling a fundamental human right with independence of the provider.

In a more recent document, the International Commission on the Futures of Education offers a broader definition of "public" in relation to education:

"The public character of education goes well beyond its provision, financing, and management by public authorities. Public education is education that (1) occurs in a public space, (2) promotes public interests, and (3) is accountable to all. (…) We must not forget that public education educates publics (…) And, it should also be recalled, that, in many instances around the world, a host of state and non-state actors together ensure the publicness of public education" (International Commission on the Futures of Education, 2021).

We can conclude that while the most recent intergovernmental documents do not explicitly use the term *"public education,"* some non-intergovernmental documents refer to it in two distinct ways: either to argue that the notion is

insufficient to meet future educational challenges, or to define it so broadly that further clarification becomes unnecessary.

Again, this should be a matter, at least, of discussion among UN member state.

- **The notion of "public education" in domestic policy.**

At the domestic comparative level, the definition of "public education" often becomes entangled in overly simplistic categorizations of educational actors. In public discourse, there is a common tendency to divide educational institutions into two broad categories: public and private. Under the "private" label, a wide range of institutions are grouped together—community-based organizations, religious institutions, NGOs, philanthropic foundations, businesses, and corporations. This broad classification is problematic, as it conflates actors with vastly different goals, values, and understandings of the right to education. Treating NGOs and corporations as equivalent, for example, leads to confusion and even unfairness.

Moreover, the notion of "public" varies significantly depending on legal tradition. In some jurisdictions, a clear distinction is made between public and state-owned entities, recognizing them as separate concepts. Professor Pierre Delvolvé, a leading scholar of public law, notes that the public/private distinction is complex. He identifies three criteria for classification: organic (based on the sector of activity), functional (based on the nature and purpose of the organization), and personal (based on the applicable legal regime). For instance, in traditional French administrative law, a public institution is defined as one that provides a public service—even if it is not state-owned (Delvolvé, 2006). A museum, for example, may be considered public by virtue of its function.

Similarly, in Spanish-speaking legal traditions, state-owned institutions may engage in commercial or industrial activities that are not considered public in nature (Gordillo, 2013). In some traditions, any institution that fulfills a social function may be deemed public. The Spanish Constitutional Court (STS 18/1984) ruled that the senior leadership of savings banks held public responsibilities due to the social relevance of their roles—even though these banks are not part of the public administration (Argandoña, 1991).

The distinction between public and private institutions, or between public and private law, does not imply strict separation or incommunicability. Public law can make use of private legal instruments, such as contracts; likewise, private law is shaped by public interests, such as zoning laws that affect private property (Palomino Lozano, 2014). This overlap is also evident in the education sector. In countries like France or Spain, public schools are defined as those administered by public authorities. In contrast, countries like Ireland consider any school that is publicly funded and follows the national curriculum to be public—even if it is managed by a religious organization.

UNESCO's 2021/2 *Global Education Monitoring Report*, titled *Non-State Actors in Education: Who Chooses? Who Loses?*(UNESCO GEM Report Team, 2021), directly addresses these complexities. The report recommends that governments work with all educational institutions as part of a unified system, acknowledging that the boundary between public and private education is often blurred. It clearly

affirms that non-state actors are involved in all aspects of education, making it unrealistic to view the state as the sole guarantor of the right to education.[1]

Other critical elements to consider regarding the inclusion of "public education" instead of simply "education"

Since the drafting and adoption of the Universal Declaration of Human Rights (UDHR), the recognition of parental rights and non-governmental schools has been a cornerstone of the right to education. Aware that education could be implemented without a human rights approach, the drafters of the UDHR deliberately chose to affirm parental rights and, consequently, educational pluralism (Stanfield, 2021).

This is why the UDHR does not explicitly mention "public education". Instead, it recognizes parents' "*prior right to choose the kind of education that shall be given to their children*".

From our experience, the push for "public education" has, in some cases, been used by governments to restrict the rights of non-mainstream groups to choose the education they desire for their children. This concern has been acknowledged in a recent UNESCO report, which states:

"*Education has also been used to violate the cultural and religious rights of children—for example, as a vehicle for assimilation of Indigenous peoples and ethnic minorities into mainstream societies, or as a vehicle of religious indoctrination or of obliteration of the religious or cultural identity of minority children, in violation of their fundamental rights*." (*International Commission on the Futures of Education*, 2021)

Recent jurisprudence from the U.S. Supreme Court has confirmed this concern. In *Carson v. Makin*, 596 U.S. 767 (2022), the Court ruled in favor of ensuring that state support for education cannot discriminate against religious schools.

Additionally, we must express our concern with the explicit emphasis on "public education" in international discourse, as only three countries explicitly ban non-governmental schools: Cuba, North Korea, and North Macedonia. By contrast, 101 countries recognize in their constitutions that the provision of education cannot be limited to public authorities alone (OIDEL, 2024).

The right to education must remain compatible with a pluralistic approach. This is essential to ensure that children from non-mainstream groups can access an education that is both adaptable and acceptable. Several major voices within the UN system have recently emphasized the importance of educational pluralism for minorities. For instance, the Special Rapporteur on minority issues has stated:

"*States should support minority-led non-governmental schools to enable them to offer free and culturally relevant education*." (Levrat, 2025)

Similarly, the UN Special Rapporteur on the right to education has reaffirmed that:

[1] To more information about of the issue surrounding "the right to public education": https://www.oidel.org/wp-content/uploads/2022/06/Note_Public-Education_2022.pdf

"*The right of minorities and Indigenous peoples to establish and manage their own educational institutions—using their own languages and in accordance with their cultural teaching and learning methods—is firmly recognized in international human rights instruments. These include Article 27 of the International Covenant on Civil and Political Rights, Article 30 of the Convention on the Rights of the Child, Articles 3 and 4 of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, and Article 14 of the United Nations Declaration on the Rights of Indigenous Peoples*." (Shaheed, 2023).

Recommendations to make this optional protocol more aligned with other human rights treaties

This proposal is not a critique of state education. On the contrary, it affirms the vital role of public systems in guaranteeing access to learning for all. However, to truly treat education as a common good, we must ensure that it also accommodates the rich diversity of our societies. This means making space for educational models that reflect the values, beliefs, and identities of non-mainstream communities. It is about ensuring that every group—no matter how small—can find an education that is both adaptable to their needs and acceptable to their worldview. We have to make sure that public authorities do not use this Optional Protocol to undermine the rights of minorities or parental rights already recognized in other treaties.

- **Recommendations.**

- Delete the notion of "public education" from the optional protocol or clarify that it includes also non-profit non-state schools.
- Acknowledge the responsibilities, rights and obligations of parents in the realization of children in early childhood education and secondary education.
- Acknowledge that non-governmental actors are critical for enjoyment of an acceptable and adaptable education for children, especially those belonging to non-mainstream groups.

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