

Comments on the Chair-Rapporteur's Draft Key Principles for the Elaboration of an Optional Protocol to the Convention on the Rights of the Child on Free Public Pre-Primary and Secondary Education

These comments are submitted by Ann Skelton¹ in response to the Chair-Rapporteur's Draft Key Principles (April 2026)

Introduction

The present comments are offered in a constructive spirit and with full recognition of the vital importance of early childhood education, pre-primary education and secondary education for the realization of children's rights. The concern expressed here is not about the value of these rights, but rather about whether a Fourth Optional Protocol to the Convention on the Rights of the Child (CRC) is the most appropriate means of advancing them.

The Human Rights Council, in resolution 56/5, established an open-ended intergovernmental working group with the mandate of "exploring the possibility of, elaborating and submitting" a draft Optional Protocol. The resolution deliberately envisaged an exploratory process, including examination of whether a new treaty instrument is necessary and likely to add value. It did not predetermine that a new Optional Protocol should be adopted. The Working Group therefore retains responsibility for carefully assessing necessity, feasibility, added value and potential unintended consequences. (Resolution 56/5, operative paragraph 1.)

While the Chair-Rapporteur's draft principles are presented as a framework for elaboration of a protocol, they appear to proceed from the assumption that the need for a new instrument has already been established. However, the Draft Principles assume conclusions that remain the subject of discussion among States.

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General Observations

The principal challenge facing children's access to pre-primary and secondary education is not the absence of international standards but an implementation gap.

Article 28 of the CRC already recognizes the right to education for all children and requires States Parties, with a view to achieving that right progressively and on the basis of equal opportunity, to make secondary education available and accessible to every child and to take appropriate measures such as the introduction of free education. Progressive realisation does not provide States the endless opportunity to delay. It is now 60 years since the right to education was enshrined in the International Covenant on Economic and Social Rights, and over 35 years since the CRC.

Moreover, States have undertaken substantial commitments through other international frameworks, including Sustainable Development Goal 4 and the 2015 Incheon Declaration and Framework for Action. The question is therefore not whether these rights are recognized internationally, but how existing commitments can be more effectively implemented.

Before creating a new treaty, it would be prudent to thoroughly examine alternative measures, including strengthened monitoring, enhanced international cooperation, improved resourcing, updated interpretative guidance, or a joint General Comment between the Committee on the Rights of the Child and the Committee on Economic, Social and Cultural Rights. I acknowledge that a report written by Klaus Beiter was commissioned, which sets out strengths and weaknesses of various different options. However, many of the risks were not engaged with in that paper. The working group should ensure that the options set out in that paper are carefully examined before proceeding further.

Comments on Specific Principles

Principle 1: Focus on the aims contained in Resolution 56/5

The principle accurately reflects the aims identified in the resolution. However, the proposed draft articles raise a fundamental question that remains unanswered: what additional legal protection would these provisions provide beyond existing obligations under article 28 of the CRC and other applicable international instruments?

With respect to Principle 1, it is premature to conclude that the exploratory phase has been completed. During the first session, a number of States raised substantial concerns regarding both the necessity and the added value of a new optional protocol. In addition, alternative avenues for addressing the issues under discussion have not yet been fully

assessed. In these circumstances, the record does not support the view that sufficient exploration has already taken place to justify moving beyond the exploratory stage.

The Working Group should carefully assess whether explicit restatement of rights already recognized through treaty interpretation and State practice is necessary. The mere fact that a right could be stated more explicitly does not automatically justify elaboration of a new Optional Protocol.

Principle 2: No duplication of existing CRC provisions

This principle highlights a central difficulty facing the proposed Optional Protocol.

If the Protocol is not intended to duplicate, revisit, revise or repeat existing provisions, yet is limited to matters already addressed by article 28, its added normative value becomes difficult to identify. Conversely, if it introduces obligations that go beyond existing understandings of article 28, it may create uncertainty regarding the interpretation of the Convention itself.

Principle 2 seeks to avoid duplication of existing CRC provisions. At the same time, the report concludes that a new Optional Protocol is needed to strengthen existing standards. The report would benefit from further explanation of the specific normative gap that requires a new treaty instrument and how that gap differs from questions of implementation.

The Working Group should therefore further examine whether the proposed instrument risks either unnecessary duplication or unintended modification of established treaty interpretation.

Principle 3: Avoiding regression

The objective of avoiding regression is welcome. However, the risk of regression may arise not only from the wording of the protocol itself, but also from the political and legal implications of adopting a new treaty.

A new Optional Protocol could inadvertently encourage arguments that rights not expressly stated in treaty text are not already protected under existing provisions. Such an approach could undermine the important role played by dynamic treaty interpretation, which has enabled the Convention to remain responsive to changing circumstances over time.

At a broader level, there is also a risk that negotiations could reopen debates concerning obligations that are already widely accepted.

The principal regression risk is not only textual regression. It is the possibility that adoption of an Optional Protocol may inadvertently weaken confidence in established methods of treaty interpretation by suggesting that rights require separate codification whenever the Convention's text is not explicit.

The Working Group should engage with the risks that have been raised in a systematic manner, with due regard to the integrity of treaty body interpretation in line with the established rules of international law.

Principle 4: International cooperation

Strengthening international cooperation is undoubtedly important. However, the proposed provisions appear largely to restate obligations already found in the CRC and other human rights instruments. Article 4 of the CRC states that with regard to economic, social and cultural rights States shall undertake measures of implementation ‘to the maximum extent of their available resources and, where needed, within the framework of international co-operation’. Article 28 is more elaborate, requiring States Parties ‘to promote and encourage international cooperation in matters relating to education, and noting that ‘particular account shall be taken of the needs of developing countries’. The States have been aware of this since the adoption of the CRC. For example, India included a specific reference to international cooperation at the time of ratifying the CRC in 1992 – for example, and Eswatini requested international cooperation to support the roll-out of education upon ratification of the CRC in 1995.

Principle 5: Monitoring and reporting

The effort to avoid additional reporting burdens is commendable. At the same time, this principle raises questions about the practical benefits of the proposed Protocol.

If implementation will be monitored through existing reporting procedures, and if no separate monitoring mechanism is envisaged, it becomes necessary to ask what additional accountability the Protocol would generate beyond that which already exists under the Convention.

The proposal appears to recognize concerns regarding treaty body capacity and administrative burdens. Those concerns support a broader question as to whether resources would be better directed toward strengthening existing monitoring systems rather than creating new treaty obligations.

Principle 6: Participation of children

Recognition of children's participation is consistent with article 12 of the Convention and should be welcomed. Information available on the Child Rights Connect website indicates that children were presented with this statement: 'The United Nations Convention on the Rights of the Child says that primary school should be free, but it doesn't say anything about free preschool or secondary school. This is why we wish to work with states to create a new law to make sure all children get at least one year of free education before primary school and free education for secondary school.

Therefore, the working group should give consideration to whether it is accurate to say that children 'participated in the process of exploring the possibility of, elaborating, and submitting this Protocol', because the proposal for an optional protocol was presented as a decision already taken to create 'a new law'.

Principle 7: Life-long learning

While recognising the importance of lifelong learning as a broader educational objective, it is not apparent that this concept falls within either the scope of Resolution 56/5 or the child-specific framework of the Convention on the Rights of the Child. The inclusion of Principle 7 may therefore warrant further consideration and justification, given that lifelong learning extends beyond the age range and subject matter addressed by the Convention and the proposed protocol.

Principle 8: Communications procedure

Particular caution is warranted regarding the proposal for an optional communications procedure.

Accountability for failure to uphold children's rights, including the right to education, is provided for under the 3rd Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, referred to as 'OPIC'. Under OPIC, communications may be submitted by children claiming to be victims of a rights violation under the CRC, the Optional Protocol to the Convention on the sale of children, child prostitution and child pornography and the Optional Protocol to the Convention on the involvement of children and armed conflict. However, any rights that are included under the proposed 4th Optional Protocol will not automatically be included, as they are not listed in article 5 of OPIC.

Creating an additional and separate procedure risks adding complexity into the treaty framework. It may also contribute to fragmentation, especially if ratification rates differ between instruments.

After years of working towards the acceptance by States that rights are indivisible, and that all rights are justiciable, this unwieldy resolution to a self-created problem is a profoundly disappointing set-back.

It risks adding emphasis to a regressive interpretation that the right to education is currently not justiciable.

At the current time, only 53 States have ratified OPIC. The proposed option to opt in from the fourth optional protocol to the 3rd Optional Protocol many layers of rights and obligations, and presents a serious risk of undermining the cogency of the treaty body system. A more coherent approach is to recognise that, under international law these rights exist, and are justiciable.

The Working Group should carefully consider whether strengthening acceptance and implementation of existing accountability mechanisms would be preferable to creating new, fragmented models of optional accountability for different rights.

In addition, there is a technical procedural problem with this Principle. The relationship between Principle 8 and the scope established in operative paragraph 1 of Resolution 56/5 requires further clarification, particularly concerning the legal basis for introducing a communications procedure when such a mechanism is not identified among the aims set out by the Council in the Resolution.

Comments on Principles 9 and 10

The assertion in Principle 9 that the mandate includes elaborating and submitting a draft protocol is correct. However, the resolution expressly established the Working Group to explore the possibility of such a protocol before elaborating it. Exploration necessarily includes continued examination of necessity, proportionality, risks and alternatives.

Similarly, Principle 10's emphasis on efficiency and financial constraints is welcome. In the context of significant financial pressures affecting the United Nations system, States may wish to consider whether resources would yield greater benefits if directed toward implementation of existing obligations rather than negotiation, ratification and oversight of a new treaty instrument.

Conclusion

There is broad agreement that every child should have access to quality pre-primary and secondary education without financial barriers. The question before the Working Group is

not whether these objectives are desirable, but whether a Fourth Optional Protocol is necessary to achieve them.

Existing international law already provides a substantial normative foundation. The principal obstacle remains implementation rather than legal recognition. Before advancing toward treaty negotiations, the Working Group should continue to examine whether alternative approaches could achieve stronger and more immediate results for children.

Should the process proceed further, particular care should be taken to ensure that any instrument is understood as reaffirming existing rights rather than creating the impression that such rights are absent from the current framework.

The working group should question whether the stage of exploring the possibility of the 4th optional protocol has been prematurely concluded. In considering this, it should examine whether the process of ‘exploring the possibility of’ the optional protocol up to this point has included a full and rigorous investigation into the risks that this may pose to the indivisibility of rights, the undermining of existing obligations and rights, and the fracturing and weakening of accountability for rights violations.

A handwritten signature in black ink, appearing to read 'Angeles', with a long, sweeping horizontal line extending to the right.

31 July 2026