EXPERT REPORT ON THE RIGHT TO EDUCATION AND THE ABIDJAN PRINCIPLES

INTRODUCTION

1. I have been asked by Global Schools Forum ("**GSF**") to review and provide an expert report on the "Abidjan Principles: Guiding Principles on the human rights of States to provide public education and to regulate private involvement in education" (the "**Abidjan Principles**")[1].
2. I understand that GSF is a membership organisation which aims: "*to strengthen the education sector by working with non-state organisations in developing countries who are serving children from middle and low income backgrounds*"[2]. Its members run or support schools in 42 countries which provide education to over 2.3 million children. I understand that in many, if not all, of these countries, the state does not provide adequate access to quality, affordable education. GSF's members are amongst those who seek to address this failure, for example by providing a quality education at a cost to learners which is lower than that provided by available public education institutions or by running educational institutions in under-served geographical areas or through innovating in models of education delivery.
3. GSF has expressed concern that, if accepted as reflective of States' duties under International Human Rights Law, the Abidjan Principles will close the legitimate policy space in which States consider themselves at liberty to make decisions about how to structure their education systems and simultaneously restrict the ability of its members to operate, thereby limiting their ability to improve access to quality education for children from middle and low income backgrounds in developing countries.
4. Accordingly, GSF has asked me to set out the obligations imposed on States (both those which are primarily responsible for fulfilling the right to education on their territory and those which fund or otherwise facilitate education programmes in other States) by the right to education under International Human Rights Law with respect to non-State actors. Specifically, I have been asked to consider whether the Abidjan Principles are, as they assert, in fact reflective of States' existing obligations under International Human Rights Law, paying attention to certain issues which are of particular concern to their members. I structure this report accordingly:
    a. Part I (paragraphs 12 to 38) addresses right to education and the obligations it imposes on States with respect to the involvement of non-State actors;
    b. Part II (paragraphs 39 to 77) addresses the Abidjan Principles and comments on certain policy issues which are of interest to GSF's members and which the Abidjan Principles purport to regulate.

[1] https://www.abidjanprinciples.org/
[2] https://www.globalschoolsforum.org/

EXECUTIVE SUMMARY

5. The right to education is articulated in several international instruments. Common to these are the following features:
    a. A prescription of the ends to which education must be directed;
    b. Requirements for the realisation of the right to receive an education, differentiated according to level; and
    c. The protection of the right to educational freedom, comprising the liberty of non-State actors to establish and direct educational institutions (provided that they pursue an education which conforms with the ends prescribed by International Human Rights Law and conform to certain minimum standards prescribed by the State); and the corresponding liberty of parents and guardians to choose to send their children to such institutions.

   In addition, the right to education must be realised in a non-discriminatory fashion.
6. Neither the treaties nor the relevant jurisprudence seek to prescribe the means by which a State fulfils the right to education, nor do they require that provision is exclusively via public educational institutions. Provided that provision is adequately regulated, advances the objects of education, does not undermine quality or access and is subject to appropriate, participatory monitoring and assessment, States retain wide discretion over how they choose to organise their education system. More specifically, States may choose to adopt a model which is heavily calibrated towards public provision; or, alternatively, a mixed economy model which combines direct State provision through public education institutions and provision by non-State actors. This is, in the majority of circumstances, a matter of domestic policy, not international law.
7. However, in circumstances where a State fails to realise the right to receive an education, for example where it fails to provide universal free primary education of adequate quality or secondary education which is generally available and accessible to all, a State has a legal duty to take steps to the maximum of its available resources to achieve the full realisation of the right, by all appropriate means. In such circumstances, the Abidjan Principles suggest that States (including foreign States or international organisations which provide education funding) must prioritise "public" provision and that any private, or non-State, provision must, amongst other things, be temporary. This, in my opinion, is a misconception and represents an unsustainable interpretation of the applicable International Human Rights Law. It is in precisely these circumstances, where a State fails consistently to provide adequate education to people on its territory, that International Human Rights Law requires it to consider a variety of delivery methods, including those offered by non-State actors to achieve the progressive realisation of the right to education.. A State which fails in its fundamental duty to ensure the

adequate provision of education cannot simultaneously seek to introduce or protect a monopoly on provision in circumstances where non-State actors provide a viable alternative.

8. Further, if, in the same circumstances, a State were to introduce measures which would result in the closure of non-State schools without immediately providing satisfactory alternative provision, not only would the State take a retrogressive step, it would also violate its obligation to respect the availability of education. It is conceivable that a State which adheres to the Abidjan Principles may inadvertently end up in this situation. The Abidjan Principles provide that States are only permitted to fund non-State operators in circumstances where they meet a series of substantive, procedural and operational requirements, including that they match the salaries paid to teachers in public educational institutions and hand over all of their intellectual property and data to the State (Principles 65 to 73 in particular). There is, as far as I am aware, no basis in International Human Rights Law for such an obligation – it is certainly not evident in the relevant treaty provisions nor jurisprudence of the relevant treaty bodies. Nevertheless, if a State were to take the Abidjan Principles and their statement that they represent an expression of States' "existing legal obligations" at face value and adhere to such an "obligation", resulting in funding to non-State providers being cut and institutions being closed without adequate alternative provision immediately being in place, that State would commit a particularly grave violation of its obligations under International Human Rights Law.
9. Further, where a State adopts measures to introduce a policy or system which is so far calibrated towards non-State provision as to effectively restrict the right to educational freedom, such measures will be in tension with its obligations under International Human Rights Law. Therefore, notwithstanding the wide latitude given to States to adopt minimum standards applicable to non-State operators, States must not go so far as to unjustifiably restrict the rights of parents or non-State operators. If a State were to implement the long list of expansive regulatory requirements which the Abidjan Principles suggest should be imposed on non-State actors (or the funding of non-State actors), it would risk doing exactly this.
10. Finally, I would stress that there is no discernible basis under International Human Rights Law for the position adopted in Abidjan Principle 38 that donor States, whether acting on a bilateral basis or through an international organisation, must prioritise public, as opposed to non-State provision, nor that they must prioritise the provision of free secondary education.

PART I – THE RIGHT TO EDUCATION AND THE OBLIGATIONS IT IMPOSES ON STATES WITH RESPECT TO THE INVOLVEMENT OF NON-STATE ACTORS

The legal framework

12. The right to education in International Human Rights Law was first articulated in Article 26 of the Universal Declaration of Human Rights:

> *"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. "*

13. It was elaborated upon and given binding effect in Article 13 of the International Covenant on Economic Social and Cultural Rights ("**ICESCR**"):

> *"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 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 institutions shall conform to such minimum standards as may be laid down by the State."

14. The right to education is also recognised in Articles 28 and 29 of the Convention on the Rights of the Child ("**CRC**"):

*"**Article 28***

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.

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.

Article 29

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."

15. As articulated in these instruments, the right to education has the following, common features:
    a. A prescription of the **ends to which education must be directed**;
    b. Requirements for the realisation of the **right to receive an education,** which are differentiated according to level (primary, secondary, higher etc.); and
    c. The protection of the **right to educational freedom**. This comprises: the liberty of non-State actors to establish and direct educational institutions provided that such institutions pursue an education which is in conformity with the ends prescribed by International Human Rights Law and conform to certain minimum standards prescribed by the State; and the corresponding liberty of parents and guardians to choose to send their children to such institutions.

16. In addition, the right to education must be realised in a non-discriminatory fashion. This is expressly provided for under Articles 2 of ICESCR and CRC, as well as Article 1 of the UNESCO Convention Against Discrimination in Education, which provides that:

> *"1. For the purposes of this Convention, the term 'discrimination' includes any distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education and in particular:*
>
> > *(a) Of depriving any person or group of persons of access to education of any type or at any level;*
> >
> > *(b) Of limiting any person or group of persons to education of an inferior standard;*
> >
> > *(c) Subject to the provisions of Article 2 of this Convention, of establishing or maintaining separate educational systems or institutions for persons or groups of persons; or*
> >
> > *(d) Of inflicting on any person or group of persons conditions which are incompatible with the dignity of man.*
>
> *2. For the purposes of this Convention, the term 'education' refers to all types and levels of education, and includes access to education, the standard and quality of education, and the conditions under which it is given."*

Progressive realisation and prioritisation

17. Both ICESCR and the CRC provide for the "progressive realisation" of certain rights. The meaning of the term is set out at Article 2.1 ICESCR:

> *"Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."*

18. This acknowledges that resource constraints may make it practically impossible for States, particularly developing States, fully to realise certain economic, social and cultural rights within a short period of time.
19. Nevertheless, the Committee for Economic, Social and Cultural Rights ("**CESCR**")[3], has adopted the view that there is a baseline of "Minimum Core Obligations" beneath which no

[3] It should be noted that the official output of CESCR is an authoritative source for the interpretation of the rights contained in ICESCR, including the right to education, however it is not determinative. Further CESCR does not have standing to create new norms of International Human Rights Law.

State can be permitted to fall irrespective of circumstances and which must be prioritised for immediate action:

> *"In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.*[4]*"*

20. CESCR has defined a State's Minimum Core Obligations with respect to the right to education in the following terms[5] (emphasis added):

> *"In the context of article 13, this 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)).*"

21. In circumstances where resource constraints render the full and immediate realisation of the right to education practically impossible, it is these, Minimum Core Obligations, which States can most authoritatively be said to have a legal obligation to prioritise. Two features of a State's Minimum Core Obligations are noteworthy in light of the subsequent discussion of the Abidjan Principles:
    a. the only express reference to public provision in this formulation is to the right of access to public educational institutions and programmes on a non-discriminatory basis; and
    b. the distinction between the Minimum Core Obligation to make primary education compulsory and available free to all and a more limited obligation with respect to secondary education which does not specify that provision must be free.

The means by which States realise the right to education

22. States retain a significant amount of discretion over the means employed to fulfil economic, social and cultural rights in general. This is an essential feature of a system which was designed, in the context of the Cold War, to be of universal application to all States, irrespective of their

[4] UN Committee on Economic, Social and Cultural Rights, "General comment No. 3: The nature of States parties' obligations (art. 2, para. 1, of the Covenant)", 1990 https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCESCR%2fGEC%2f4758&Lang=en

[5] UN Committee on Economic, Social and Cultural Rights, "General Comment No. 13; The right to education (article 13 of the Covenant)", 1999 https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f1999%2f10&Lang=en

form of government or economic system. CESCR reflects this in its General Comment 3 (emphasis added):

> *"The Committee notes that the undertaking "to take steps ... by all appropriate means including particularly the adoption of legislative measures" neither requires nor precludes any particular form of government or economic system being used as the vehicle for the steps in question, provided only that it is democratic and that all human rights are thereby respected. Thus, in terms of political and economic systems the Covenant is neutral and its principles cannot accurately be described as being predicated exclusively upon the need for, or the desirability of a socialist or a capitalist system, or a mixed, centrally planned, or laissez-faire economy, or upon any other particular approach.* ***In this regard, the Committee reaffirms that the rights recognized in the Covenant are susceptible of realization within the context of a wide variety of economic and political systems, provided only that the interdependence and indivisibility of the two sets of human rights, as affirmed inter alia in the preamble to the Covenant, is recognized and reflected in the system in question****. The Committee also notes the relevance in this regard of other human rights and in particular the right to development."*

23. CESCR has recently addressed the role of non-State actors in the realisation of economic, social and cultural rights in general its General Comment 24[6]. In relation to the role of private actors in "*traditionally public sectors, such as the health or education sector*", it notes at paragraphs 21 and 22 that:

> *"[…]Privatization is not per se prohibited by the Covenant, even in areas such as the provision of water or electricity, education or health care where the role of the public sector has traditionally been strong. Private providers should, however, be subject to strict regulations that impose on them so-called "public service obligations": in the provision of water or electricity, this may include requirements concerning universality of coverage and continuity of service, pricing policies, quality requirements, and user participation […]*
>
> *22. The Committee is particularly concerned that goods and services that are necessary for the enjoyment of basic economic, social and cultural rights may become less affordable as a result of such goods and services being provided by the private sector, or that quality may be sacrificed for the sake of increasing profits. 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*

[6] UN Committee on Economic, Social and Cultural Rights, "General Comment No. 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities", 2017 https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f24&Lang=en

> *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, or where such institutions are insufficiently regulated, providing a form of education that does not meet minimum educational standards while giving a convenient excuse for States parties not to discharge their own duties towards the fulfilment of the right to education. Nor should privatization result in excluding certain groups that historically have been marginalized, such as persons with disabilities. States thus retain at all times the obligation to regulate private actors to ensure that the services they provide are accessible to all, are adequate, are regularly assessed in order to meet the changing needs of the public and are adapted to those needs. Since privatization of the delivery of goods or services essential to the enjoyment of Covenant rights may result in a lack of accountability, measures should be adopted to ensure the right of individuals to participate in assessing the adequacy of the provision of such goods and services.*

24. In the context of education specifically, CESCR has noted that Article 13 regards States as having "*principal responsibility for the direct provision of education in most circumstances;"* on the basis that: *"States parties recognize, for example, that the "development of a system of schools at all levels shall be actively pursued" (art. 13 (2) (e))*"[7]. The reasoning by which CESCR arrives at this conclusion is sparse. Nevertheless, even if this does represent a correct interpretation of Article 13, it still leaves States with discretion to pursue, subject to certain constraints, a mixed economy model of education provision which uses both State and non-State actors to fulfil aspects of the right to education.
25. The Committee on the Rights of the Child took a similar approach to CESCR when addressing the same issue in its General Comment 16[8], noting (emphasis added):

> *"33. Business enterprises and non-profit organizations can play a role in the provision and management of services such as clean water, sanitation, education, transport, health, alternative care, energy, security and detention facilities that are critical to the enjoyment of children's rights.* ***The Committee does not prescribe the form of delivery of such services but it is important to emphasize that States are not exempted from their obligations under the Convention when they outsource or privatize services that impact on the fulfilment of children's rights****.*

[7] CESCR General Comment 13, paragraph 48
[8] Committee on the Rights of the Child, "General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights", 2013
https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f16&Lang=en

> *34. States must adopt specific measures that take account of the involvement of the private sector in service delivery to ensure the rights enumerated in the Convention are not compromised. They have an obligation to* ***set standards in conformity with the Convention and closely monitor them****. Inadequate oversight, inspection and monitoring of these bodies can result in serious violations of children's rights such as violence, exploitation and neglect. They must ensure that such provision* ***does not threaten children's access to services on the basis of discriminatory criteria,*** *especially under the principle of protection from discrimination, and that, for all service sectors, children have access to an independent monitoring body, complaints mechanisms and, where relevant, to judicial recourse that can provide them with* ***effective remedies in case of violations****. The Committee recommends that there should be a permanent monitoring mechanism or process aimed at ensuring that all non-State service providers have in place and apply policies, programmes and procedures which are in compliance with the Convention."*

26. Insofar as these general comments accurately reflect the state of International Human Rights Law in relation to the role of non-State actors in fulfilling the right to receive an education, the following conclusions can be drawn:
    a. While States cannot abdicate their responsibility to fulfil the right to receive an education, there is nothing to prevent them from delegating the function by which this is achieved, including by utilising non-State providers directly to deliver education or education resources, provided that;
    b. Where States choose to delegate their function to a non-State actor, they must ensure that the non-State provision:
        i. is adequately regulated;
        ii. advances the objects of education articulated by International Human Rights Law;
        iii. does not undermine quality;
        iv. does not undermine access, for example by increasing or introducing new forms of discrimination or economic segregation; and
        v. is subject to monitoring and assessment by bodies in which stakeholders are able to participate.
27. Ordinarily, therefore, the means by which a State fulfils the right to receive an education will, subject to these conditions, be left to the discretion of a State. A wide range of policy options are legitimate for the purposes of International Human Rights Law and remain open to States. They may, for example, opt to pursue a system which is heavily calibrated towards public provision; or a mixed economy system in which provision is delegated to both State and non-State actors. Provided that the State adheres to the conditions set out above while also

protecting the right to educational freedom and other international human rights (as to which, see further below), International Human Rights Law does not act as a fetter on a State's discretion. Selecting the most appropriate system to suit a particular context is a matter of domestic policy, not international law and a choice which is properly reserved for the State.

28. Only where there is a failure fully to realise the right to receive an education (including in circumstances of resource constraints leading to a failure to provide universal free education of an adequate quality) might International Human Rights Law be said to be of relevance to the means by which the right is realised. In these circumstances, far from limiting a State's legitimate choices by requiring them to prioritise a system heavily calibrated towards State provision and placing onerous conditions on non-State actors or those who may choose to fund them, a State has an obligation to fulfil the right to education "*individually and through international assistance and co-operation to the maximum of its available resources*", employing "*all appropriate means*".
29. In such circumstances, CESCR has encouraged States to be flexible in their approach, noting (in relation to secondary education) that:

> *"The phrase "every appropriate means" reinforces the point that States parties should adopt varied and innovative approaches to the delivery of secondary education in different social and cultural contexts."*[9]

30. It has specifically encouraged variety in the "delivery systems" employed to meet the needs of students and *""alternative" educational programmes which parallel regular secondary school systems."*[10]
31. Therefore, a State which fails fully to realise the right to education and refuses to take advantage of the resources at its disposal (which might include those which are offered by other State, non-State or international actors), electing instead to pursue a system which prioritises conventional State provision through public educational institutions without committing the necessary resources to achieve this, might violate its obligation progressively to realise the right to receive an education under International Human Rights Law. The corollary of this interpretation is that a State which does not fully realise the right to education has an obligation to consider a variety of delivery methods, provided that they conform with minimum standards and the other conditions outlined above. Put another way, where a State continues to fail in its duty to provide its citizens with access to quality education, it cannot legitimately take steps to maintain a monopoly on provision when there are viable alternatives.

Policy choices which fail to respect the right to receive an education or restrict the right to educational freedom

[9] CESCR General Comment 13, paragraph 12
[10] CESCR General Comment 13, paragraph 12

32. Like all human rights, the right to education imposes on States three types of obligation, to: respect, protect and fulfil. Respecting the right to education means that a State must refrain from taking measures which hinder or prevent the enjoyment of one of the "essential features" of the right, namely – availability, accessibility, acceptability and adaptability. By way of illustration, CESCR notes that: "*a State must respect the availability of education by not closing private schools.*"[11]
33. This applies irrespective of context. However, in circumstances such as those which I understand prevail in the States where GSF's members operate, where the State does not fully realise the right to receive an education and private schools assist in filling the gap in provision – for example by offering education to learners in a geographical area which is under-served by state-run institutions or at a price point which is lower than the available state-run institutions – taking measures which result in the closure of these schools without immediately providing a suitable alternative would result in rights-holders completely losing their access to education. This would prevent their enjoyment of all of the essential features of education and would amount to a particularly serious violation of the right to receive an education.
34. Such measures may be direct – for example the adoption and implementation of legislation which arbitrarily forces non-State institutions to close – or indirect – for example the adoption and implementation of legislation which restricts the ability of non-State institutions which conform with minimum standards to operate or continue to receive funding necessary to their survival.
35. Therefore, in making policy choices about the nature of the system which a State utilises to fulfil the right to receive an education, States must not go so far as to take steps which would result directly or indirectly in the closure of non-State schools, particularly where those schools offer education to learners whose rights are not fulfilled by the State.
36. Further, it should be noted that a State's policy choices in this area may restrict the right to educational freedom. As outlined above, this comprises: the liberty of non-State actors to establish and direct educational institutions; and the corresponding liberty of parents and guardians to choose to send their children to these institutions. The right to educational freedom is not subject to progressive realisation and therefore imposes an immediate obligation on States.
37. The right to educational freedom is subject to the requirements that non-State institutions pursue an education which is in conformity with: the ends prescribed by International Human Rights Law; and certain minimum standards prescribed by the State. States are afforded a wide degree of latitude in determining the substance and subject matter of such minimum standards. The relevant treaties defer entirely to States in this respect, Article 13(3) referring to "*such*

[11] CESCR General Comment 13, paragraph 50

minimum educational standards as may be laid down or approved by the State". CESCR has provided some general guidance as to the issues which may be subject to such minimum standards, noting that:

> "*These minimum standards may relate to issues such as admission, curricula and the recognition of certificates. In their turn, these standards must be consistent with the educational objectives set out in article 13 (1).*"[12]

38. Notwithstanding this wide degree of latitude over the substance of domestic regulation, a State must exercise its discretion over the formulation of minimum standards, as with other policy decisions, in such a way as not unjustifiably to restrict the right of non-State actors to establish and operate educational institutions; or restrict the right of parents to send their children to such institutions, and thereby violate the right to educational freedom. Where a State calibrates its education system to the extreme of the spectrum outlined above, unjustifiably restricting the right to educational freedom by implementing policy measures which make it effectively impossible for non-State actors to provide education, its actions will be prohibited under International Human Rights Law.

[12] CESCR General Comment 13, paragraph 29

PART II – COMMENT ON THE ABIDJAN PRINCIPLES

The Abidjan Principles

39. The Preamble to the Abidjan Principles describes how the State's role in providing quality, public education and regulating private actors is being increasingly challenged, sometimes under pressure from international financial institutions. In this context, the purpose of the Principles is described in the following terms (emphasis added):

> *"In response to these challenges, human rights bodies and courts have clarified how the right to education should be realised in the context of changing realities. These Guiding Principles intend to assist States and other actors in navigating this evolving context in accordance with human rights instruments.* ***They are an authoritative statement that consolidates the developing legal framework and reaffirms the existing obligations of States in guaranteeing the right to education as prescribed under human rights law****."*

40. The Abidjan Principles do not purport to create new norms but instead to assist States and civil society actors in interpreting existing State obligations under International Human Rights Law. The substantive principles are framed not as policy recommendations but as mandatory obligations with binding, legal force. For example, nine out of the ten "Overarching Principles" deploy the formulation "States must".
41. However, while the Abidjan Principles purport to be based on existing law, the version currently in circulation is not supported by any citations or references to underlying legal authority. I understand that a detailed commentary is due to be published sometime in the future and that this will provide further details on the legal basis for the principles. However, in the absence of such commentary, it is difficult to assess the legal basis upon which the Abidjan Principles purport to tell States what they can and cannot do. Nevertheless, in various respects this appears to go well beyond what is required under the relevant treaty provisions and jurisprudence.
42. GSF have outlined a number of policy issues which the Abidjan Principles purport to regulate and are of concern to its members and the communities which they serve. These issues are considered in turn, with reference to the preceding analysis of the right to education under International Human Rights Law.

Non- State provision

43. In relation to non-State provision, GSF asked whether it is permissible under International Human Rights Law for States to:
    a. *"Choose to deliver education services through non-state actors*

b. *Choose, on a non-temporary basis, to delegate the delivery of public education to non-State providers and fund this via different forms of public subsidies (e.g. subsidies to operators; vouchers to parents)*
c. *Choose to prioritise the allocation of education expenditure as the State sees fit in fulfilment of its obligations*
d. *Choose to set overall education budgets as the State sees fit"*

44. Each issue is addressed below. To avoid repetition, certain issues are addressed together.

Choose to deliver education services through non-state actors / Choose, on a non-temporary basis, to delegate the delivery of public education to non-State providers and fund this via different forms of public subsidies (e.g. subsidies to operators; vouchers to parents)

45. The Abidjan Principles refer throughout to the State obligation to provide a "free, quality, public education". Public education is equated with education at a "public educational institution", defined in Principle 2 as:

> *"a. recognised by the State as public educational institutions;*
> *b. effectively controlled and managed by the State or genuine representatives of the population they serve; and*
> *c. not at the service of any commercial or other exploitative interests that undermines learners' right to education."*

46. It would be incorrect to infer that a State is, under International Human Rights Law, only permitted to fulfil the right to receive education via direct, State provision in public educational institutions. As illustrated above at paragraphs 22 to 27, provided that any non-State provision is adequately regulated; advances the objects of education articulated by International Human Rights Law; does not undermine quality or access (for example by increasing or introducing new forms of discrimination or economic segregation); and is subject to appropriate, participatory monitoring and assessment, a State is at liberty to organise its education system as it sees fit, employing whichever means are at its disposal. International Human Rights Law does not require that provision must be delivered via public educational institutions and leaves open a wide space in which States may make legitimate policy choices about the involvement of non-State actors, including in the direct delivery of education.

47. In relation to whether a choice to delegate provision to non-State actors can be on long-term basis, the Abidjan Principles state, under the heading "retrogressive measures" that:

> *43. In order for a State to be able to attribute its failure to provide free, quality, public education to all to a lack of available resources, it must:*

> *a. publicly demonstrate that every effort has been made to use all resources that are at its disposal in an effort to meet, as a matter of priority, this obligation;*
>
> *b. publicly reassess, on a regular basis, its capacity gaps in light of all existing and potentially available resources; and*
>
> *c. provide a detailed timeline in its national education strategy, including specific targets, for how it will address the capacity gap in the shortest possible time and provide free, quality, public education in accordance with its obligations.*
>
> *[…]*
>
> *45. There is a strong presumption that retrogressive measures taken in relation to the right to public education are impermissible. If, in exceptional circumstances, retrogressive measures are taken, the State has the burden of proving that any such measure is in accordance with applicable human rights law and standards. Any such measure:*
>
> *a. should be temporary by nature and in effect, and limited to the duration of the crisis causing the situation of fiscal constraint;[…]"*

48. Accordingly, the suggestion that non-State provision (and accordingly any funding of non-State provision) must be temporary seems to rest on the premise that this would necessarily constitute a retrogressive measure.

49. Such a premise is misconceived. First, it should be reiterated that States are, subject to the conditions set out above, at liberty to choose to deliver education via non-State actors. Insofar as the term "*failure to provide […] public education*" used in Principle 43 means a failure directly to provide education via a public educational institution (as defined in Principle 2), this should not be equated with a failure to fulfil the right to receive an education under International Human Rights Law. Second, a State may identify that the most appropriate means to realise the right to receive an education within its available resources is through provision by non-State actors. In such circumstances, far from being a retrogressive measure, non-State provision may in fact be the very expression of progressive realisation, reflecting the flexibility of approach advocated by the relevant UN treaty bodies outlined above.

Choose to prioritise the allocation of education expenditure as the State sees fit in fulfilment of its obligations

50. In relation to the allocation of education expenditure, the Abidjan Principles state that:

> *"17. States have the obligation to realise the right to education including by prioritising:*
>
> *[…]*

b. the provision of free, quality, public primary and secondary education for all; […]"

[…]

"34. In allocating their maximum available resources for education, States must prioritise the provision of free, public education of the highest attainable quality, including by allocating adequate financial and other resources for the realisation of the right to education as effectively and expeditiously as possible. States must ensure that any reallocation or expenditure of their education budgets to areas other than the direct provision of free, quality, public education does not impair the delivery of such education.

[…]

"37. In a situation of limited resources, States must prioritise the continued provision of quality, public education."

[…]

"64. States must prioritise the funding and provision of free, quality, public education, and may only fund eligible private instructional educational institutions, whether directly or indirectly, including through tax deductions, land concessions, international assistance and cooperation, or other forms of indirect support, if they comply with applicable human rights law and standards and strictly observe all the substantive, procedural and operational requirements identified below.

[…]

65. Any potential public funding to an eligible private instructional educational institution should meet all the following substantive requirements:

a. it is a time-bound measure, which the State publicly demonstrates to be the only effective option to advance the realisation of the right to education in the situation in question in order to either:

i. ensure short-term access to education for individuals where the State publicly demonstrates that there is no other immediate option which would realise the right to free, quality education;

ii. promote respect for cultural diversity and ensure the realisation of cultural rights, where it is in accordance with the right to an inclusive education;

iii. facilitate the integration within the public education system of private instructional educational institutions that have previously operated independently; or

> *iv. respond to the demand for or to pilot a diversity of pedagogical approaches and content, which the State publicly demonstrates not to be rapidly achievable in public educational institutions.*
>
> *b. it does not create a foreseeable risk of adverse effect on or delay to the most effective and expeditious possible development of a free public education system of the highest attainable quality in accordance with States' obligations to realise the right to education to the maximum of their available resources;*
>
> *[…]*
>
> *d. it does not constitute or contribute to the commercialisation of the education system […]"*

51. The issue of prioritisation arises where a State fails fully to realise the right to receive an education. In such circumstances, as set out above, States are required to prioritise the achievement of certain Minimum Core Obligations. CESCR has provided guidance on the content of these obligations in the context of the right to education. The only express reference to public provision in CESCR's formulation of the Minimum Core Obligations in relation to the right to education is to the right of access to public educational institutions and programmes on a non-discriminatory basis.
52. There is no requirement under International Human Rights Law that "public" provision, i.e. provision via a public educational institution, should be prioritised over provision by a non-State actor. If a State determines that the most appropriate means to realise its Minimum Core Obligations within its available resources is by funding a non-State actor to deliver aspects of the right to education, the State is at liberty to make this policy choice and prioritise the allocation of resources to such actors. This can be on a temporary or long-term basis, as the State sees fit.

Choose to set overall education budgets as the State sees fit

53. Abidjan Principle 15 states that:

> *"States must allocate the maximum of their available resources towards ensuring free, quality education, which must be continuously improved. The maximum available resources should not fall below the level required by domestic or international education funding commitments, such as the percentage of gross domestic product set in development goals."*

54. The first sentence is uncontroversial – it reflects a State's obligation progressively to realise the right to education. The second sentence, relating to funding commitments, belongs to the realm of policy, not International Human Rights Law. There is no support for the existence of such a specific obligation in the relevant treaties or jurisprudence.

Regulatory requirements

55. In relation to regulatory requirements, GSF asked whether it is permissible under International Human Rights Law for a State to: "d*etermine its own regulatory requirements with respect to non-state actors"*. In particular, GSF drew attention to Abidjan Principle 69 and the operational requirement that:

> *"69. Any public funding of an eligible private instructional educational institution must be subject to ex-ante, on-going and ex-post human rights impact assessments, which are made public, and are used to continually re-evaluate the contribution of the funding to the realisation of the right to education, and if necessary, change or terminate the funding. The assessment should measure both the individual and systemic effect of each institution, in the short and long term, and involve all stakeholders, including children and other learners, parents or legal guardians, communities, teaching and non-teaching staff, education unions, and other civil society organisations."*

56. As stated above at paragraph 37, States retain a wide degree of latitude under International Human Rights Law to determine their own regulatory requirements for non-State actors. Unlike the objects of education, which are prescribed by the relevant treaties, Articles 13(3) ICESCR and 29(1) CRC defer entirely to States on the contents of the "minimum standards" to which non-State education institutions must conform. Some guidance as to possible issues for such regulation is provided by CESCR but this is general and non-mandatory in nature.
57. However, the requirement to carry out ex-ante, on-going and ex-post human rights impact assessments does not pertain to these minimum core standards. Rather it seems to relate to the conditions for the provision of public services by private actors elaborated by the relevant treaty bodies (see the extracts from CESCR and CRC General Comments at paragraphs 23 and 25 above).
58. States may choose to ensure that non-State provision is subject to adequate monitoring and assessment via ex-ante, on-going and ex-post human rights impact assessments on the funding of non-State actors, as specified in Abidjan Principle 69. Provided that this does not, in effect, amount to an unjustifiable restriction on the right to educational freedom (see paragraph 38), there is nothing to prevent the adoption of such requirements by a State. However, States are not obliged to adopt such a regime. They could equally realise the right to education by adopting a different set of regulatory requirements for the involvement of non-State actors.

Fees for secondary education

59. GSF asked whether it was permissible for States to "*permit the charging of fees for secondary education.*"

60. The Abidjan Principles consistently elide a State's obligations with respect to the right to receive free primary and free secondary education. For example, Abidjan Principle 17(b) states that: *"States have the obligation to realise the right to education including by prioritising: […] the provision of free, quality, public primary and secondary education".* Although there is no authority provided for this (or any other) principle, a similar provision in a Draft version of the Abidjan Principles published for consultation on 21 August 2018 (the "**Draft Principles**"), is referenced with a citation to the Incheon Declaration.[13]

61. Each of the relevant treaties distinguish between a State's obligation to ensure the provision of free primary education and its obligations with respect to the right to receive other levels of education, including secondary education. Such differential obligations are consistently preserved in the jurisprudence of CESCR. General Comment 13 provides that:

> *"[G]iven the differential wording of article 13 (2) in relation to primary, secondary, higher and fundamental education, the parameters of a State party's obligation to fulfil (provide) are not the same for all levels of education. Accordingly, in light of the text of the Covenant, States parties have an enhanced obligation to fulfil (provide) regarding the right to education, but the extent of this obligation is not uniform for all levels of education."*
>
> *[…]*
>
> *"51. As already observed, the obligations of States parties in relation to primary, secondary, higher and fundamental education are not identical. Given the wording of article 13 (2), States parties are obliged to prioritize the introduction of compulsory, free primary education. This interpretation of article 13 (2) is reinforced by the priority accorded to primary education in article 14. The obligation to provide primary education for all is an immediate duty of all States parties.*
>
> *52. In relation to article 13 (2) (b)-(d), a State party has an immediate obligation "to take steps" (art. 2 (1)) towards the realization of secondary, higher and fundamental education for all those within its jurisdiction. At a minimum, the State party is required to adopt and implement a national educational strategy which includes the provision of secondary, higher and fundamental education in accordance*

[13] See paragraph 18 of the Draft Principles, to which Note 39 states: *"International human rights law requires achieving compulsory free education at the primary level and progressively free at the secondary level and for higher education (ICESCR 13.2, CRC art 28.1). In the more recent Education 2030 Framework for Action, 184 States committed to "Ensure access to and completion of quality education for all children and youth to at least 12 years of free, publicly funded, inclusive and equitable quality primary and secondary education, of which at least nine years are compulsory http://unesdoc.unesco.org/images/0018/001898/189882e.pdf, para. 6"*

> *with the Covenant. This strategy should include mechanisms, such as indicators and benchmarks on the right to education, by which progress can be closely monitored."*

62. Thus, according to CESCR's interpretation, the right to receive an education requires that States prioritise the provision of free primary education whilst also taking steps to achieve free secondary and higher education. In circumstances where resource constraints lead to a failure fully to realise the right to education, States must prioritise spending on free primary education, not free secondary education, as suggested by the Abidjan Principles.
63. The differentiated nature of a State's obligations with respect to the right to receive an education is unaffected by the Incheon Declaration. UNESCO Declarations such as this have considerable moral force. However, they do not, in and of themselves, impose legal obligations on States or modify or extend the obligations set out in the relevant treaties.
64. Provided that States are taking the necessary steps progressively to realise the right to receive a secondary education, there is nothing to prevent educational institutions from charging fees, provided that these fees should not diminish accessibility or increase or introduce new forms of economic segregation or discrimination. This applies irrespective of whether the secondary education is provided directly by the State or delegated to a non-State actor.
65. In circumstances where public educational institutions maintain charges to access secondary education (which I understand to be commonplace in the States where GSF's members operate), delegating the provision of secondary education to a non-State provider who charges the same or lower fees will not introduce a new form of discrimination or diminish accessibility. Indeed, where the fees charged by a non-State provider are lower than those charged by the public institution, the delegation may in fact achieve the opposite, acting as a progressive as opposed to retrogressive step towards realising the right to education.

International funders

66. GSF asked whether funders, *"including, but not limited to, both direct State funding (e.g. bilateral funders such as USA and UK through their own programmes) and indirect State funding (e.g. organisations where governments are shareholders (e.g. World Bank) or funders (e.g. UN agencies))"* are permitted to: "*Allocate aid and other expenditure as they consider appropriate, within legal and other parameters, to achieve development outcomes*"?
67. Abidjan Principle 38 states that:

> *"International assistance and cooperation for education must prioritise supporting the recipient State to meet its core obligations. In particular, it must prioritise free, quality, public pre-primary, primary, and secondary education for all, especially vulnerable, disadvantaged, and marginalised groups, and move as effectively and expeditiously as*

possible towards free, quality, education in public educational institutions at other levels."

68. The issue of Minimum Core Obligations and prioritisation are addressed above at paragraphs 17 to 21 and 50 to 52. For ease of reference, the most authoritative statement on Minimum Core Obligations in the context of the right to education is provided by CESCR in General Comment 13 (emphasis added):

> *"In the context of article 13, this 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)).*"

69. It is these obligations which must be prioritised for action. There is no discernible basis under International Human Rights Law for the position adopted in Abidjan Principle 38 that donor States, whether acting on a bilateral basis or through an international organisation, must prioritise public, as opposed to non-State provision nor the provision of secondary education which is free.

Operators

70. GSF asked whether operators are permitted to:
    a. *"Adopt their own teacher salary levels and other operating practises"*
    b. *"Retain proprietary ownership of data and other material, within the boundaries of national and international regulatory requirements and law"*
71. Each issue is addressed below. Two, preliminary points on the obligations of non-State operators should be born in mind:
    a. States are the primary subjects of International Human Rights Law. Non-State actors, such as private operators, have a responsibility to respect human rights, meaning that they should refrain from taking measures which hinder or prevent the enjoyment of rights. Unlike States, they are not also required to fulfil and protect the right to education (or any other human right).
    b. The Abidjan Principles are primarily directed at States, as opposed to non-State actors such as private operators. They purport to determine the circumstances in which States might permit non-State operators to function, how they should be regulated and, most

importantly for the two issues above, the circumstances in which States might permit non-State operators to receive public funding.

72. Overarching Principle 5 of the Abidjan Principles, along with Principles 65 – 73 seek to regulate the circumstances in which States "may" fund eligible private educational institutions. One of the Operational Requirements for the receipt of public funding is set out at Abidjan Principle 67 as follows:

> *"If an eligible private instructional educational institution receives public funding, the standards and regulations applying to that institution must impose at least the same educational, labour, and other relevant standards as are imposed on public educational institutions, including the effective protection of working conditions and terms of employment, labour rights, and union rights."*

73. The Abidjan Principles therefore purport to make it a condition of receiving public funding, whether from the territorial State or a donor State, that an operator matches the "terms of employment" offered to teachers and other staff in a public educational institution. In the absence of any citations or commentary, it is difficult to assess the legal basis for such a norm. It is certainly not contained in the relevant articles of the treaties; it is not mentioned in the output of the treaty bodies pertaining to the right to education or the use of non-State actors to fulfil socio-economic rights more generally.

74. Conversely, it is possible to envisage a situation in which requiring non-State operators to match public sector salaries might in fact hinder the enjoyment of the right to education. Where a non-State operator is able to provide secondary education at a lower cost to learners than the State by, amongst other things reducing staff costs, provided that this education meets minimum standards and the employment of teachers is on terms which are in compliance with domestic and international law on labour rights, retaining flexibility on teacher salaries might facilitate greater access to education and therefore the progressive realisation of the right to receive an education. Where the State imposes a requirement, as mandated by Abidjan Principle 67, on non-State operators that they match public sector salaries in order to receive any public funding, this might conceivably result in the cost to learners increasing, excluding those who are unable to pay the higher fees from access to an education which they would otherwise have been able to enjoy.

75. In relation to intellectual property, Abidjan Principle 72 purports to make it a condition of receiving public funding that a private operator make all proprietary data and intellectual property which could help to improve the education system available to the State without a licence, stating:

> "*States should ensure that all private instructional educational institutions receiving public funding make all proprietary data and material that could help to improve the education system available without a licence, within a reasonable time defined by law,*

> *to the relevant public authorities. This includes both technology used in the classroom and management systems. This must be done with due respect for the right to privacy, in particular of the learners and the teachers, and the right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary, or artistic production of which they are the author*."

76. As with teacher salaries, there is no support for any such condition in the relevant treaty provisions or jurisprudence. No authority is provided in the present version of the Principles. However, in the Draft Principles, the same principle was included and supported with reference to a 2014 report by the UN Special Rapporteur in the Field of Cultural Rights, Farida Shaheed.[14] The relevant paragraphs of this report contain examples of State practice, some of which is described as "best practice" in the field of copyright and the right to science and culture. They have no binding or legal effect on other States. Further, there is no reference in this report to education funding or the same being made conditional on transferring data and intellectual property rights to the State.
77. Both issues (i.e. the conditions on funding of non-State operators relating to teacher salaries and intellectual property rights) belong to the realm of domestic policy, not International Human Rights Law. States may choose to introduce such requirements as conditions on public funding of non-State actors in education. Provided that this does not amount to an unjustifiable restriction on the right to receive an education or the right to educational freedom (or some other right), International Human Rights Law does not prevent a State from doing this. However it would be incorrect to infer from the Principles that it imposes an obligation on States to do so.

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[14] UN A/HRC/28/57 2014, paras 64, 65, 72, 84, 88 https://digitallibrary.un.org/record/792652?ln=en