

26th November 2020

**To:** **Secretariat of the Abidjan Principles:** Amnesty International<sup>1</sup>; Equal Education Law Centre<sup>2</sup>; Global Initiative for Economic, Social, and Cultural Rights<sup>3</sup>; Initiative for Social and Economic Rights<sup>4</sup>; Right to Education Initiative<sup>5</sup>

I am writing to forward a legal opinion (attached) on ‘The Abidjan Principles on the human rights obligations of States to provide public education and to regulate private involvement in education’, commissioned by the Global Schools Forum from Ben Emmerson QC, a leading human rights lawyer. My purpose in doing so is: to highlight my concerns that the interpretation of international human rights law put forward in the Abidjan Principles is neither accurate nor balanced; and to seek dialogue with you, as the Secretariat of the Abidjan Principles, on the Principles, their application and their potential revision. I also ask that the expert legal justification for the Principles be published to enable further scrutiny, and that the Secretariat provide a response to the substance of Mr Emmerson’s legal opinion.

The Global Schools Forum believes passionately in the right to education. Indeed, the purpose of our work is the realisation of this right. We believe that any misrepresentation of this right – and the law that underpins it – undermines its urgent realisation. In line with human rights law and international agreements, we believe that governments should be the guarantors, but not necessarily the sole providers, of education; we work on the basis that the non-state sector can complement and support government provision of basic education – when invited to do so – and also bring new ideas, funding and energy to the sector. We believe that governments should determine the best way to provide education – whether public, private or a combination of both. We believe that the non-state sector, which accounts for a large, and in many cases, growing share of basic education provision<sup>6</sup>, is uniquely threatened by the COVID-19 pandemic; and that at this time of urgent need, that governments should be supported in regulating and harnessing non-state provision where they see it as a key part of their education systems.

As background, we initially engaged in the process of the then ‘Guiding Principles’ in October 2018. We welcomed, in principle, a process to synthesise international human rights law to help guide countries in their stewardship of the private sector. But we have had six key reservations about this process:

- i. the Secretariat for this process has been led by organisations with active campaigns against private sector engagement in education; in this respect, it is clearly not impartial;
- ii. the drafting process has not, to our knowledge, had representation from private school associations nor membership bodies;
- iii. the legal basis of some of the Abidjan Principles is neither clear, nor has it yet been published 21 months after its signing;

---

<sup>1</sup> Solomon Sacco, Head of International Justice, **Amnesty International:** [solomon.sacco@amnesty.org](mailto:solomon.sacco@amnesty.org)

<sup>2</sup> Rubeena Parker, Head of Research, **Equal Education Law Centre:** [rubeena@eelawcentre.org.za](mailto:rubeena@eelawcentre.org.za)

<sup>3</sup> Sylvain Aubry, Legal and Policy Advisor, **Global Initiative for Economic, Social and Cultural Rights:** [sylvain@globalinitiative-escr.org](mailto:sylvain@globalinitiative-escr.org)

<sup>4</sup> Salima Namusobya, Executive Director, **Initiative for Social and Economic Rights:** [dir@iser-uganda.org](mailto:dir@iser-uganda.org)

<sup>5</sup> Delphine Dorsi, Executive Coordinator, **Right to Education Initiative:** [delphine.dorsi@right-to-education.org](mailto:delphine.dorsi@right-to-education.org)

<sup>6</sup> UIS administrative data point to the share of enrolment in private institutions rising between 1990 and 2018 from 23% to 42% in pre-primary education, 9% to 18% in primary education and 19% to 26% in secondary education. Survey data show even higher levels of enrolment – see, for example, research by Capital Plus Exchange and by Innovations for Poverty Action – particularly in the informal private sector.

- iv. the Principles propose in parts unreasonable obligations and compliance requirements, with no basis in international human rights law;
- v. the Principles are being consistently, and misleadingly, communicated as definitive legal opinion in favour of the assertion that education must be publicly delivered; we have observed this in countries such as Ghana and Uganda as well as at the global level;
- vi. in draft form, and even after three years of ‘expert drafting’, the then Guiding Principles sought to insist that governments could not fund for-profit education providers<sup>7</sup> – the key campaign ask of anti-private sector campaigns – despite this position having no basis in international law.

On this basis, GSF sought the expert opinion of a human rights law firm in October 2018 to respond to the Consultation on the then ‘Guiding Principles’<sup>8</sup>. As a result of this intervention, some adjustments were made in the substance and tone of the document, including the removal of Para 56 cited below. However, the published draft of the Abidjan Principles adopted by signatories in February 2019 still represents, in our view, a misrepresentation of the law. Nor, as stated above, has the underlying legal justification been published, 21 months after its signing. This is in spite of the Abidjan Principles being extensively marketed for adoption worldwide, with no references to enable education policy-makers, jurists and others to scrutinise its legal justification.

GSF therefore commissioned an expert legal opinion of the February 2019 draft of the Abidjan Principles from Ben Emmerson QC, a leading human rights lawyer. His legal opinion can be summarised in the below quote from Mr Emmerson, issued to complement the full report.

---

<sup>7</sup> “Para 56. States must not fund or support, directly or indirectly, any private educational operator that...b. is commercially-orientated or for-profit” Guiding Principles (Consultation draft)

<sup>8</sup> GSF did so jointly with the Education Partnerships Group.

*“International law does not prescribe the means by which a State must meet its obligations to achieve the progressive realisation of the right to receive an education. But it leaves it open to national authorities and international funders to decide the best means of achieving this in any particular state.*

*A state's education authorities can legitimately realise this objective through a combination of public and private education, providing the national authorities maintain overall responsibility for the regulation of the education sector. The realisation of the right to education can quite legitimately be delegated to the private sector, and this may sometimes be the most effective means of delivering good quality education for disadvantaged pupils. Indeed, a prohibition on private education or the introduction of measures which make non-state provision effectively impossible could itself be incompatible with the right to education in some circumstances.*

*The Abidjan Principles are not an accurate statement of the requirements of international law in this respect. They enshrine a strong bias against private provision. The document is deeply ideological in content. It is certainly not a legal document, and it would be wrong to view the principles as soft law standards which ought to restrict the funding options of states or international development organisations. International law plainly allows and envisages the provision of a "mixed economy" in educational provision - allowing a state to make rational choices to allow the operation of private sector providers, and to fund those providers, where this is consistent with delivering effective, appropriately regulated education.*

*The state's duty is to use its best endeavours to achieve the progressive realisation of access to the best available education for all, but international law leaves it to the national authorities to decide the best means of achieving this. If taken at face value, the Abidjan principles would prevent or deter longer term reliance on private educational providers. That policy has no foundation in international law. To this extent, the Abidjan principles are a mis-statement of international law.”*

Ben Emmerson QC, September 2020

Specifically, the report raises five issues which we address in the attached Annex:

1. the assertion that states must prioritise public provision of education;
2. an insistence on excessive regulatory requirements with no basis in international human rights law, and that may effectively limit education provision;
3. the assertion that donors must prioritise funding public education;
4. the assertion that states have a legal obligation to set education budgets at a particular level;
5. the framing of the Abidjan Principles as binding legal obligations.

In the interests of transparency, we will also publish this letter on the GSF website. We would like to publish your response, should we receive one, but will only do so with your permission.

We look forward to your response.

Yours sincerely

Aashti Zaidi Hai, Founding Director, **Global Schools Forum**

## ANNEX. Five issues in the Abidjan Principles contested by the Ben Emmerson QC legal opinion

### 1. The assertion that states must prioritise public provision of education

#### Abidjan Principles text:

- The assertion that states must prioritise public provision of education appears throughout the Abidjan Principles.
- Of particular note is Para 65 a.: “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...”).

#### Ben Emmerson QC legal opinion:

- Para 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.
- Para 7. ...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.
- Para 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))*”<sup>9</sup>. 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.
- Para 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.
- Para 46. ...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.

---

<sup>9</sup> CESCR General Comment 13, paragraph 48

- Para 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.
- Para 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.
- Para 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.

**2. An insistence on excessive regulatory requirements with no basis in international human rights law, and that may effectively limit education provision**

**Abidjan Principles text:**

- The Abidjan Principles seek to establish excessive regulatory requirements with no basis in international human rights law, and that may effectively limit education provision.
- Of particular note is:
  - Para 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...”
  - Para 72: “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...”

**Ben Emmerson QC legal opinion:**

- Para 8. 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.
- Para 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.

- Para 38. ...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.
- Para 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.
- Para 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.

### **3. The assertion that donors must prioritise funding public education**

#### **Abidjan Principles text:**

- Para 38: “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.”

#### **Ben Emmerson QC legal opinion:**

- Para 69. 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.

#### 4. The assertion that states have a legal obligation to set education budgets at a particular level

##### Abidjan Principles text:

- Para 15: “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.”

##### Ben Emmerson QC legal opinion:

- Para 53. The first sentence [of Abidjan Principles Para 15] 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.

#### 5. The framing of the Abidjan Principles as binding legal obligations

##### Abidjan Principles text:

- Preamble: “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.”

##### Ben Emmerson QC legal opinion:

- Para 40. ...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”.
- Para 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.