

Using Human Rights Standards to Assess Privatisation of Education in Africa¹

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Education is a right enshrined in international human rights law and incorporated into most domestic legal systems. Historically, State-funded public education generally has aimed to be inclusive, providing free, compulsory education at the primary level and often at the secondary level. State-funded public education has usually been viewed as the direct responsibility of the State, promoting a model of civic participation to prepare children as citizens of a wider country or community. Private education - education provided by non-State actors, such as private companies, religious institutions, non-governmental organisations, community based groups, trusts, or private individuals – has also played a significant role in providing education in countries across the globe. In many instances, private education operates as a parallel system of education alongside State-funded, State-run public education. The role of private education has grown in Africa with private education being promoted and explored as a solution to the lack of provision of education or underperforming State-run schools by some education actors, such as Pearsons, DFID, and the World Bank. As a result, there are multiple models of private education in Africa, some of which are funded by the State.

Increasingly, some models of private education and educational policies that embrace privatisation of education in Africa are being questioned by educationalists² with concerns revolving around quality of education, equality of educational opportunities, and the availability of free education. Missing from these debates is an assessment of privatisation policies using analysis of the international human rights legal framework. This may be largely due to the fact that the role of private education in international human rights law is not as well-defined as the role of the State. Nevertheless, the international human rights framework sets out some freedoms and limitations for private education. The Right to Education Project has embarked on an initiative to identify the human rights standards that may be used to assess privatisation of education. This paper forms part of this initiative and will outline the key human rights principles that should be explored further to develop a set of criteria for assessing the conditions and limitations of private education, as it relates to privatisation in Africa.

¹ This paper initiates the Right to Education Project's (RTE) three year initiative on privatisation outlined in RTE's Strategic and Operational Plan 2012 – 2014.

² See generally, 'From Poverty to Power' blog edited by Duncan Green, <http://www.oxfamblogs.org/fp2p/?p=11264>.

The Right to Education

Before exploring the human rights key principles that may be used to assess privatisation of education, an overview of the right to education is necessary. The right to education is universally recognised in the Universal Declaration of Human Rights³ and is further enshrined in a number of human rights treaties⁴. The right to education is a complex right that can be broken down into several components: 1) the right to free and compulsory primary education, 2) available and accessible secondary and technical / vocational education that is made progressively free, 3) equally accessible higher education – based on capacity – that is made progressively free, 4) available fundamental education for individuals who have not received or completed education, 5) an education system with adequate fellowship and the continuous improvement of the material conditions of teaching, 6) freedom for parents to choose alternative education, 7) and freedom of individuals and non-State bodies to establish and direct educational institutions⁵.

The right to education goes beyond mere access to education and it encompasses certain essential characteristics⁶. These characteristics are often referred to as the 4As – Availability, Accessibility, Acceptability and Adaptability. These essential characteristics can be summarised accordingly:

- Availability – that education is free and available to all and that there is adequate infrastructure and trained teachers able to support education delivery
- Accessibility – that the education system is non-discriminatory and accessible to all, and that positive steps are taken to include the most marginalised
- Acceptability – that the content of education is relevant, non-discriminatory culturally appropriate, and of good quality; that the school itself is safe and teachers are professional
- Adaptability – that education can evolve with the changing needs of society and contribute to challenging inequalities, such as gender discrimination, and that it can be adapted locally to suit specific contexts⁷.

³ Universal Declaration of Human Rights, 1948, Article 26.

⁴ International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966, Article 13; Convention on the Rights of the Child, 1989, Article 29.

⁵ International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966, Article 13

⁶ The 4 As are explained in the Committee on Economic, Social and Cultural Rights General Comment 13, The right to education (Art.13): 08/12/1999. E/C.12/1999/10, paragraphs 6-7.

⁷ The Right to Education Project, Education and the 4 As, <http://www.right-to-education.org/node/226>; CESCR General Comment 13, The right to education (Art.13): 08/12/1999. E/C.12/1999/10.

The right to free and compulsory primary education that is universally available to all has been the core principle underlying and driving the global development agenda for education. The combined efforts of civil society and inter-governmental agencies, such as the UN, alongside governments have resulted in a dramatic global increase in universal primary education in recent years⁸. However, for millions of children education continues to be out of reach, especially for those children who are the most marginalised. Furthermore, the delivery of quality education continues to be a fundamental concern amongst education actors globally, as many national government policies inadequately address the need for improvements to quality of education whilst increasing access.

Privatisation of Education

The emergence of privatisation of education – i.e., the transfer of public education services to the private sector - can be attributed to a number of factors. There is increased pressure on governments to fully implement the Millennium Development Goals on education and Education For All targets by 2015. Shortcomings in achieving these goals may be attributed to a lack of political will, financial resources, or capacity to follow through on policies and programmes. These shortcomings have prompted private actors to step in and fill gaps on the provision of education. In many countries, large corporations as well as local entrepreneurs have been systematically seeking to fill these gaps. In addition, some education policy-makers have actively promoted privatisation policies and programmes for education. There are three key arguments in support of privatisation – 1) that private schools provide better quality education and better learning outcomes for students, 2) that the growth and development of an education market will stimulate economic growth at the local level, and 3) that the private sector is able to facilitate systemic change within the education sector through a more innovative approach.

The human rights framework can provide some guidance on the limitations and conditions for private education to inform these debates. However, educationalists, policy makers and civil society organisations should examine the arguments in support of privatisation with great scrutiny and assess the motivations of the private sector in providing education. There also needs to be criteria for assessing how educational ‘effectiveness’ is being measured by supporters of privatisation and for assessing which models of private education are acceptable, as some private education models may violate international law if applied in particular circumstances. Drawing on the work of the Privatisation in Education

⁸ But see, UNESCO Education for All Global Monitoring Report, Policy Paper 04, June 2012, <http://unesdoc.unesco.org/images/0021/002165/216519E.pdf>, which identifies Sub-Saharan Africa with the highest out of school rate and an increase in out of school children from 2008 – 2010.

Research Initiative (PERI), there are five models of private education contributing to privatisation of education globally⁹:

- 1) For Profit Schools – Schools designed to return a profit to shareholders or owners¹⁰.
- 2) Public Private Partnerships (PPP) – flexible governance and financial arrangements between governments and private sector to provide public services¹¹.
- 3) Low Fee Schools – Fee-based education provided by either large or small entrepreneurs, which is either profit-making or not profit-making¹².
- 4) Private Tutoring – Ancillary or additional lessons privately provided outside of normal school hours¹³.
- 5) Philanthropy Schools – Private initiatives in education that aim to work for the public good that are led by self-funded philanthropic organisations¹⁴.

There are many other private education models not listed above, including non-profit schools¹⁵ which may be fee paying or free to pupils. These schools re-invest surpluses back into the schools, and may be organised by non-profit organisations, religious institutions, community-based organisations, or others. Due to their non-profit character, these non-profit private schools are not considered to be at the centre of the current debates on privatisation. Nevertheless, regardless of the private education model, all educational institutions must comply with international human rights standards, and the State, as the primary duty-bearer, has the direct responsibility to ensure that all private entities comply with human rights standards at the national level.

Freedom to Establish Educational Institutions

According to international law, private actors have the liberty to establish and direct educational institutions¹⁶. This means that individuals, organisations, religious institutions, companies or other bodies are free to open schools or other educational institutions and

⁹ See generally <http://www.periglobal.org/>.

¹⁰ Privatisation in Education Research Initiative (PERI), For Profit Schools, <http://www.periglobal.org/subject/for-profit-schools>.

¹¹ Ibid., Public Private Partnerships, <http://www.periglobal.org/subject/public-private-partnerships>.

¹² Ibid., Low Fee Schooling, <http://www.periglobal.org/subject/low-fee-schooling>.

¹³ Ibid., Private Tutoring, <http://www.periglobal.org/subject/private-tutoring>.

¹⁴ Ibid., Philanthropy Schools, <http://www.periglobal.org/subject/philanthropy-schools>.

¹⁵ Non-profit schools are led by a mission or vision which is usually geared towards providing quality education. Some non-profit schools may violate human rights norms or may fall short of national minimum standards and must be held accountable for these failures.

¹⁶ ICESCR, Article 13 (4); African Charter on the Rights and Welfare of the Child, Article 11 (7).

administer and govern them according to their wishes. This liberty provides an opportunity for private actors to explore alternatives to the State-run public education system, and it provides additional choices to parents and students seeking an alternative to public education¹⁷. In a development context, it would be difficult to imagine the advancement of education without this liberty. However, as with most freedoms, it is not an absolute right and carries certain limitations. The liberty to establish and direct educational institutions imposes a negative obligation on States to not interfere with this freedom, rather than imposing a positive obligation on States to actively facilitate this freedom. This distinction is important, as it implies that State resources should prioritise the regulation of private education over experimental programmes and policies to promote private education. It also suggests that States must intervene if private entities fail to comply with the State's minimum standards.

The liberty to establish and direct educational institutions is further subject to the observance of the primary principles of the right to education – ‘...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 freedoms¹⁸.’ In addition, these educational institutions are required to conform to the minimum standards laid down by the State¹⁹. The State must, therefore, establish minimum standards for private educational institutions, which may relate to admissions, curricula, educational facilities, teacher qualifications, etc., and must regularly monitor compliance by private education providers of these standards. Also, given the prominence of the principle of non-discrimination in international law, the State must also ensure that the liberty of private education does not lead to extreme disparities of educational opportunity for some groups in society²⁰. Therefore, national regulatory frameworks and national policies must include a means for assessing equality in education and incorporate measures to limit private educational freedoms to ensure equality. Ultimately, the State has an obligation to protect individuals from non-State actors by taking measures to prevent interference in the enjoyment of the right to education²¹.

¹⁷ ICESCR, Article 13 (3); African Charter on the Rights and Welfare of the Child in Article 11 (4).

¹⁸ ICESCR, Article 13 (1). This provision further elaborates that ‘...education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nationals and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.’ See also, CRC General Comment 1, The Aims of Education (Art. 29 (1)): 17/04/2001. CRC/GC/2001/1 and African Charter on the Rights and Welfare of the Child in Article 11 (2).

¹⁹ ICESCR, Article 13 (4); African Charter on the Rights and Welfare of the Child in Article 11 (7).

²⁰ CESCR General Comment 13, The right to education (Art.13): 08/12/1999. E/C.12/1999/10, paragraph 30.

²¹ CESCR General Comment 13, The right to education (Art.13): 08/12/1999. E/C.12/1999/10, paragraph 47.

Outline of the Human Rights Principles and Standards that May Be Used to Assess the Conditions and Limitations of Private Education

The human rights framework provides standards which set out freedoms and limitations of private education. However, human rights law does not explicitly mention whether or not the privatisation of public education services is permissible and if so to what extent. In order to determine this, a closer analysis of human right standards is required. Regardless of the provider of education – whether it is the State or a private provider or combination of the two – the education provided must conform to human rights standards. The following section contains an initial outline of the key human rights principles that may ultimately be used by States and civil society to monitor and assess the conditions and limitations of private education as it relates to privatisation. However, further analysis and research is needed to establish the limits of these principles in the context of privatisation.

The Role of the State Regarding Privatisation of Essential Services

The State is the primary duty-bearer and carries the ultimate responsibility for ensuring that the right to education is upheld. However, human rights responsibilities apply to others, including private education providers, as they must refrain from interfering in the enjoyment of the right to education and have a responsibility to ensure that they do not jeopardise the quality, accessibility and availability of education. This means that the State has a duty to regulate and monitor private education providers to ensure that they conform to human rights standards. The State must also develop laws and policies aimed at the full implementation of the right to education. The human rights framework is less clear about whether the State should be the primary provider of direct provision of educational services. Generally, the human rights framework is neutral on the issue of whether services should be delivered by the State or by private actors. However, the State has the principal responsibility ‘to ensure the direct provision of the right to education in most circumstances²²’ and to actively pursue a system of schools at all levels²³. This principle suggests that there may be a more limited scope for privatisation of educational services compared to that of other rights, such as the right to water and the right to health.

This limited scope for privatisation of educational services is further reinforced by the way in which the freedom to develop educational institutions is treated as a separate and distinct obligation from the other core elements of the right to education, including the obligations to ensure a system of schools (including, primary, secondary, tertiary, and fundamental

²² UN CESCR General Comment 13, The right to education (Art.13): 08/12/1999. E/C.12/1999/10, paragraph 53.

²³ ICESCR, Article 13 (2) (e).

education)²⁴. The freedom to develop educational institutions imposes a negative obligation on States, which implies that the positive obligations to directly provide education lies with States. A number of human rights treaties²⁵ and guiding principles²⁶ acknowledge the distinct and separate character of private education. In this way, there is an assumption that the State will be providing educational services as the primary education provider, as private education is seen as a parallel system offering an alternative choice for parents and students.

Education is seen as an essential service, and privatisation of essential services is generally discouraged in international law²⁷. This is particularly true within the African regional human rights framework, where privatisation of essential services is viewed as a potential threat to the full realisation of human rights²⁸. Though the human rights framework stops short of completely eliminating the possibility of privatisation, the legal framework provides a very narrow interpretation of allowable private education. The rationale for this may be that the mandate of a private actor providing public education will differ from that of a private actor operating in a parallel system that offers both public and private education. Further analysis of the limits to privatisation of education will be required in order to determine the extent of these limitations.

Universal Free Education

International human rights treaties²⁹ require that primary education is universal and free for all. In addition, the 1990 Jomtien World Declaration on Education for All and the 2000 Dakar Framework for Action call for universal free primary education. The push for free education is based on the notion that real developmental change in a country can only occur when there is universal free education for all. Free education is the only way to ensure compulsory education, and education was made compulsory in order to forge a collective identity³⁰. The notion of universal free primary education challenges many of the

²⁴ ICESCR, Article 13.

²⁵ ICESCR, Article 13 (3) & (4); Convention on the Rights of the Child, Article 29 (2); African Charter on the Rights and Welfare of the Child in Article 11 (7); UNESCO Convention against Discrimination in Education, 1960, Article 2 (c).

²⁶ Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, paragraph 71, <http://www.escr-net.org/docs/i/1599552>.

²⁷ See, for example, Argentina, Aquino, Isacio vs. Cargo Servicios Industriales S. A. s/accidentes ley 9688 (2004); Nkonkobe Municipality v Water Services South Africa (PTY) Ltd & Others (2001).

²⁸ Pretoria Declaration on Economic, Social and Cultural Rights, 2004, <http://www.achpr.org/instruments/pretoria-declaration/>, paragraph 3 (j).

²⁹ ICESCR, Article 13; African Charter on the Rights and Welfare of the Child in Article 11.

³⁰ Tomasevski, Katarina. The State of the Right to Education Worldwide Fee or Free: 2006 Global Report, August 2006, http://www.katarinatomasevski.com/images/Global_Report.pdf, p. xxii.

barriers to education ensuring that all children, regardless of race, colour, gender, ethnicity, status, or origin enjoy the right to education.

In addition to universal free primary education, States should take active steps to eliminate school fees and move towards universal free secondary education over time. The drive to progressively achieve universal free secondary education is intended to help States transition from secondary education that is dependent on capacity or ability to a means of developing the foundations for life-long learning and human development, which will help children to achieve economic, social and cultural stability³¹. Many States struggle to achieve universal free secondary education, especially if universal free primary education is not fully enacted. Nevertheless, States must include plans for making secondary education more available and free to all in their education policies.

Although there have been significant efforts to make primary education free and available to all by governments, civil society and inter-governmental organisations, there are many public schools that continue to apply both direct and indirect fees to students. Where there continues to be gaps in the provision of universal free primary education, a fee-paying private school may not provide the most practical alternative for communities and for overall policy measures aimed at achieving universal free primary education. Furthermore, government funding that is diverted from progressively achieving universal free education (including secondary education) to support private, fee-paying alternatives, would raise further concerns that the State is not fulfilling its human rights obligations. There may be additional concerns that State policies are discriminatory when there is a lack of available free education for impoverished communities. A fee-paying school as the only option for poor communities exploits the desperation of these families, who are often willing to make significant sacrifices to send their children to school. Voucher systems to cover school fees have been introduced as a means of supporting families with limited resources in both public and private fee-paying schools. However, these voucher systems may only serve as a temporary measure without a clear plan to provide sustainable free universal primary education (and progressively free secondary education) in the long term. Where fee paying schools serve as an alternative choice to public education and when much-needed government funds, including funding from donors, are not diverted from public education to support private then these types of private schools may be a welcome choice for parents and students.

³¹ UN CESCR General Comment 13, The right to education (Art.13): 08/12/1999. E/C.12/1999/10, paragraphs 12-13, 15.

Regulation of Private Actors

Private education providers have the liberty to develop and direct educational institutions. However, States have the obligation to ensure that these institutions comply with national minimum standards³². This means that the State must develop a regulatory framework for private education providers at all levels of education, monitor the private education providers for compliance of these standards, and the State must be prepared to intervene if the private education providers fail to meet these standards³³. Failure to maintain an effective and transparent system to monitor private education and its impact on the right to education constitutes a violation³⁴. This national regulatory framework must be compatible with the right to education in international law³⁵ and should be monitored by an independent body. Regulatory frameworks should incorporate human rights standards into the national minimum standards and assess the wider impacts of private education on the right to education, such as non-discrimination, participation, the aims of education, etc.

Progressive Realisation

States must ensure that they are using the maximum of their available resources to achieve progressively the full realisation of the right to education³⁶. In practice this means that States must allocate resources towards the education budget, develop sound fiscal policies (including tax policies) to generate funds to support the implementation of rights, and work towards the continuous improvement of the right to education. The principle of progressive realisation involves three main elements that States must adhere to: 1) to take progressive, concrete steps using their maximum available resources, 2) to refrain from taking retrogressive or backwards steps in achieving the full realisation of rights, and 3) to implement immediately the minimum core obligations on the right to education, which includes developing a national education plan, ensuring non-discrimination, and achieving universal free primary education³⁷.

Progressive realisation is not intended to be a means for States to ignore their human rights obligations; rather it is intended to be a tool for States that have limited resources so that

³² These standards may include a wide range of standards that affect the delivery of quality education, such as teaching qualifications, testing standards, building regulations, admissions criteria, etc.

³³ UN CESCR General Comment 13, The right to education (Art.13): 08/12/1999. E/C.12/1999/10, paragraph 54.

³⁴ UN CESCR General Comment 13, The right to education (Art.13): 08/12/1999. E/C.12/1999/10, paragraph 59.

³⁵ Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, paragraph 7, <http://www.escr-net.org/docs/i/1599552>.

³⁶ ICESCR, Article 2 (1); See also UN CESCR General Comment 3, The Nature of States Parties Obligations (Art. 2, par.1): 14/12/1990.

³⁷ UN CESCR General Comment 3, The Nature of States Parties Obligations (Art. 2, par.1): 14/12/1990.

they can take steps towards achieving the full implementation of economic and social rights. Although States must prioritise free universal primary education, States must also take steps to make secondary or technical / vocational education available and free to all³⁸, as well as steps to make higher education available based on merit and free³⁹. Failure by States to take continuous steps towards free universal education may lead to informal alternatives, such as unregulated private schools. Furthermore, the principle of progressive realisation also obliges States to make continuous improvements in education, which may include improvements to the quality of education through class size reduction or teacher training, improvements to educational materials and facilities, expansion of adult education opportunities, and more.

Private education providers that are motivated by profit will ‘concentrate on areas that provide the most lucrative financial return for the outlay’⁴⁰. This contrasts with the State’s motivation to ensure quality education for all and to reinvest into a more advanced national education system with improved educational infrastructure. If the State embraces a policy of privatising the direct provision of education to profit-seeking providers, ‘there is a danger that the point of privatisation will represent a glass ceiling, whereby the continuation of progressive improvement in realisation of the right [to education] will cease in the absence of an economic incentive for the private operator to fulfil this objective’⁴¹. In other words, with the absence of economic incentives, some private actors may lack motivation for the continuous improvement of and increased provision of education. Furthermore, State funds for privatised education run the risk of violating the principle of progressive realisation, as the for-profit education provider is likely to distribute the minimum resources necessary to deliver education services.

Aims of Education and Quality Education

The human rights legal framework contains a number of principles with regards to the aims of education, as set out in the Convention on the Rights of the Child⁴². According to human rights law, education goes beyond the achievement of literacy and numeracy. It must

³⁸ ICESCR, Article 13 (2) (b); African Charter on the Rights and Welfare of the Child in Article 11 (3) (b).

³⁹ ICESCR, Article 13 (2) (c); African Charter on the Rights and Welfare of the Child in Article 11 (3) (c).

⁴⁰ McBeth, Adam. ‘Privatising Human Rights: What Happens to the State’s Human Rights Duties When Services Are Privatised?’. *MelbJIntLaw* 5, (2004) 5(1) *Melbourne Journal of International Law* 133, www.austlii.edu.au/au/journals/MelbJIL/2004/5.html, p. 3.

⁴¹ McBeth, Adam. ‘Privatising Human Rights: What Happens to the State’s Human Rights Duties When Services Are Privatised?’. *MelbJIntLaw* 5, (2004) 5(1) *Melbourne Journal of International Law* 133, www.austlii.edu.au/au/journals/MelbJIL/2004/5.html, p.10.

⁴² See generally, CRC General Comment 1, Article 29 (1): The Aims of Education, CRC/GC/2001/1, 17 April 2001

enable individuals to develop ‘the personalities, talents and abilities and to live a full and satisfying life within society’⁴³. This means that education must focus on the following aims:

- (a) The full development of the child’s personality, talents and mental and physical abilities
- (b) The development of respect for human rights and fundamental freedoms
- (c) The development of respect for the child’s parents, cultural identity, language and values, as well as respect for the values of the child’s country and other civilisations
- (d) The development of the child’s responsibilities in a free society, including understanding, peace, tolerance, equality, and friendship among all persons and groups
- (e) The development of respect for the natural environment.⁴⁴

The African Charter on the Rights and Welfare of the Child reiterates these principles and adds the preservation of African morals, values and cultures, as well as national independence; the promotion of African unity and solidarity; and the promotion of the child’s understanding of healthcare⁴⁵.

The right to education, therefore, encompasses a broad and comprehensive understanding of education. Laws, policies and direct provision must be child-centred and support the best interests of the child, ensuring that children are free from private interests and that children are taught with a balance and diversity of values. While these aims of education may seem general and may be difficult to measure, the implications of non-compliance are wide-ranging. Therefore, States must ensure that private providers comply with these aims, and if the State feels that a potential provider of private education is not likely to uphold the aims of education, the State may prohibit or limit the activities of the potential provider from operating within the education system.

The aims of education have a direct link to the delivery of quality education and these aims must be imbedded in the curriculum and teaching methods and not just superimposed as a tick-the-box exercise.

‘The curriculum must be of direct relevance to the child’s social, cultural, environmental and economic context and to his or her present and future needs and take full account of the child’s evolving capacities; teaching methods should be tailored to the different needs of different children. Education must also be aimed at ensuring that essential life skills are learnt by every child and that no child leaves

⁴³ CRC General Comment 1, Article 29 (1): The Aims of Education, CRC/GC/2001/1, 17 April 2001, paragraph 2.

⁴⁴ CRC, Article 29.

⁴⁵ African Charter on the Rights and Welfare of the Child in Article 11 (2).

school without being equipped to face the challenges that he or she can expect to be confronted with in life'⁴⁶.

Some private school providers may be able to ensure that the curriculum and teaching methods conform to the aims of education and deliver good quality education. However, there may also be some private school providers that lack specialist knowledge on the nuances of delivering quality education, such as promoting peace and tolerance amongst diverse cultures or tailoring teaching methods to each child's needs. Many State schools also fail to deliver quality education and these inadequacies must be addressed. However, private education providers that lack the ability to uphold the aims of education will have very little added value towards improving the delivery of quality education. Solutions to poor quality education must incorporate the aims of education and may be more likely to be solved through on-going dialogue with parents, teachers and educationalists combined with analysis of national laws and policies to improve quality and uphold the aims of education.

Non-Discrimination and Equal Treatment

The principles of equality and non-discrimination are embedded throughout the human rights framework and prescribe that all rights must be 'exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status',⁴⁷. Discrimination continues to be a major obstacle in achieving education for all, despite the existence of a UNESCO treaty⁴⁸ to combat discrimination and exclusion. The principle of non-discrimination in education is an immediate obligation, and it plays a key role in empowering marginalised groups, such as women and girls, and helps to combat wider discrimination within societies. Non-discrimination applies to all aspects of education, including access to education, the content of education, teaching methods, the outcomes of learning, education staffing, as well as laws, policies and administrative practices. States have a minimum core obligation to ensure that resources are allocated in a non-discriminatory manner. Therefore, as States develop and expand education programmes, particular segments of the population should not be passed over, and States must not direct marginalised groups to an inferior standard of education.

The act of establishing and maintaining private education institutions is not considered discriminatory 'if the object of the institutions is not to secure the exclusion of any group but to provide educational facilities in addition to those provided by the public authorities, if

⁴⁶ CRC General Comment 1, Article 29 (1): The Aims of Education, CRC/GC/2001/1, 17 April 2001, paragraph 9.

⁴⁷ ICESCR, Article 2 (2); African Charter on the Rights and Welfare of the Child in Article 3; UNESCO Convention against Discrimination in Education, 1960, Article 1 (1).

⁴⁸ See generally UNESCO Convention against Discrimination in Education, 14 December 1960.

the institutions are conducted in accordance with that object, and if the education provided conforms with such standards as may be laid down or approved by the competent authorities, in particular for education of the same level⁴⁹. In other words, private education is intended to be an alternative to public education for parents and students and should not be developed to create exclusive enclaves of education for the privileged. The State must ensure that private education does not create extreme disparities in educational opportunities or that it results in segregation via privately provided education services to marginalised areas. Therefore, States must be careful to avoid a 'patchwork' approach to resolving underserved and marginalised groups through private education. In addition, States must ensure that private education providers conform to national laws and policies to eliminate and prevent discrimination within private schools, which may affect administrative procedures, educational content and materials, teaching methods, redress mechanisms, hiring policies and school management policies.

Participation and Accountability

The right to education includes a strong element of participation, as education prepares children for the responsibilities of life in a free society and serves as a vehicle through which children learn about civic participation. States must develop a national education system that includes participation and input from a variety of stakeholders, including children, parents, teachers, educationalists, and community leaders⁵⁰. This participation helps to ensure greater accountability of educational policies and practices. These stakeholders should also feel empowered to actively participate in decision-making processes at the school level for both public and private schools. An education system that supports community engagement and values participation from all education stakeholders is ultimately more likely to support a more positive learning environment and contribute towards a country's overall development.

The principle of participation is an important means of ensuring accountability when the State experiments with privatisation models. This is particularly true when the State devises processes for developing contracts with private entities to deliver education services, including public private partnership (PPP) arrangements. These processes must be open and transparent and include the participation of the affected community, which will help to guarantee greater accountability. Most importantly, States should take care to avoid

⁴⁹ Ibid., Article 2 (c).

⁵⁰ Convention on the Rights of the Child, Article 12; International Covenant on Civil and Political Rights (ICCPR), 1966, Article 25. African Charter on Human and Peoples' Rights, 1982, Article 13. See also HRC General Comment 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25): 17/07/1996, CCPR/C/21/Rev.1/Add.7.

creating imbalances of power between private actors and communities through experimental models of privatisation.

Effective Remedies

Regulation provides a means of assessing the overall performance and practices of private education providers. However, regulatory frameworks tend to focus on school performance, rather than on individual cases. In this way, they are usually insufficient to deal with individual complaints. The right to an effective remedy forms part of the human rights framework, and States must ensure that effective remedies are available in order to address violations⁵¹. This right includes the right to access a national court or tribunal but also extends to reparations, which may include compensation. The right to education should be incorporated into national legal domestic systems, including the national constitution, legislation, and the judicial system. Consequently, any violations on the right to education pertaining to private education can be addressed through the national legal system. Practically, however, cases are likely to be resolved at the sub-state level (i.e., district or provincial).

There may be additional and less costly ways to address complaints within private schools. Firstly, through the national regulatory framework or another independent body, States may opt to develop an independent complaints body for students, teachers and parents concerning practices of private education providers. These types of bodies receive complaints, investigate cases, and make decisions that private school providers must apply. With an external independent body, private education providers are more likely to comply with national regulations. Secondly, private school providers may also devise their own internal complaints bodies. An internal complaints body may be less likely to be independent. However, they can be very effective at addressing issues at the micro level and can strengthen the governance of these private schools. As long as there is still an option of redress through an independent complaints mechanism, then the two systems may complement one another.

International Cooperation

Both donor States and international organisations, including international financial institutions, must uphold human rights standards through international cooperation and

⁵¹ ICCPR, Article 2 (3).

assistance⁵². This means that wealthier States have an obligation to provide assistance to less developed States to aid with the implementation of human rights, including the right to education. This assistance must adhere to internationally agreed human rights standards, which includes the limitations on private education institutions.

The processes and conditions for international aid and assistance have progressed in recent years, as donor States want to ensure that their investment is free from corruption, is managed appropriately and efficiently, and that there is a discernible impact on the population. This means that there are mechanisms being used by donor States to ensure greater accountability of the recipient States. It also means that some donor States are formulating aid packages according to their foreign policies, which may or may not conform to human rights standards. This practice puts recipient States at risk of potentially implementing programmes which may violate human rights. Although the recipient States may opt to refuse these aid packages that have the potential to violate human rights, it is very unlikely to happen.

Therefore, it is essential that donor States conform to human rights law when devising foreign aid policies and programmes and that they be held to account when such violations occur. Donor States should conduct an impact assessment before developing programmes that encourage privatisation of any essential service, including education. This step is an important one, as experimental programmes on education that may work well in a developed State may not transfer to African States with the same types of results. In fact, they may actually do harm to local governance, infrastructure, economy or services. Most importantly, the human rights of the local population may be affected. An impact assessment allows donor States to consider innovative ways of improving international assistance but reduces the risks and the potential social and financial costs if those programmes cause harm. It is important, therefore, for impact assessments to include engagement with those communities that may be affected by these programmes in a clear and transparent manner. Any intervention on behalf of foreign governments to impose a system of private schooling or where those governments intervene in the national regulation of private schools in accordance with international law can be considered a violation on the part of the foreign government. African States should be empowered to refuse funding aimed at privatisation programmes without the risk of losing much needed funding for other more essential programmes.

⁵² See generally, The Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, 29 February 2012, http://oppenheimer.mcgill.ca/IMG/pdf/Maastricht_20ETO_20Principles_20-_20FINAL.pdf; Also see UN CESCR General Comment 13, The right to education (Art.13): 08/12/1999. E/C.12/1999/10, paragraph 56.

Conclusion

These principles listed above provide a starting point for developing assessment criteria for privatisation of education using the human rights framework. Because the human rights framework does not provide explicit guidelines on privatisation of education, further research and analysis will be required to identify the obligations of the State and the responsibilities of private education providers and donor States providing assistance to support privatisation. The assessment criteria should incorporate the principles outlined in this paper and specify the limitations and conditions under which private education should operate as it relates to privatisation. There are some challenges to devising such a criteria. Firstly, the variety and complexity of private school models means that human rights standards might be difficult to interpret within some contexts. For example, there are a number of hybrid arrangements that combine public and private education aspects. Secondly, there is limited available data on private schooling, particularly regarding the types of private schools that are in operation. Thirdly, there is a lack of transparency regarding some governmental policies on privatisation, which makes it difficult to determine the motivations and intentions of States in pursuing privatisation. Finally, there is a lack of case law challenging privatisation of education, which could lend further support to analysis.

Despite these challenges, analysis of the human rights framework at this initial stage provides some key findings. First, the liberty to develop and direct private education institutions requires that it conforms to national minimum standards and that these standards should include human rights standards. Second, the State as the primary duty-bearer must pursue a system of schools at all levels, establish a regulatory framework for private education and monitor compliance of private school providers with national minimum standards. Third, private education policies and practices must not interfere with the State's obligations to ensure:

- a) free universal primary education and progressively free universal secondary education
- b) progressive realisation of the right to education through continuous improvements to education and the utilisation of maximum available resources
- c) quality of education that upholds the aims of education
- d) non-discrimination and equality of education, including the prevention of extreme disparities of education
- e) participation by affected communities in decisions regarding privatisation
- f) a means of redress for violations and complaints.

Finally, donor States and international financial institutions must ensure that their policies on privatisation of education conform to human rights standards and must not undermine their obligations to provide international cooperation and assistance. As the debates on privatisation of education in Africa progress, the analysis of the human rights framework must also progress so that educationalists, civil society and States have a clearer understanding of the potential impacts of privatisation on the right to education and a framework for assessing violations.