

HUMAN RIGHTS GUIDING PRINCIPLES ON THE ROLE OF STATES AND NON-STATE ACTORS IN THE PROVISION OF EDUCATION

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Contents

Background and Rationale	2
The project in a nutshell	4
Why are a set of Guiding Principles needed?	4
Objectives of the work	4
Expected outcomes.....	4
Key activities	4
Concepts	4
Outputs	5
Overview of the process and structure of the work	6
Advocacy and coordination	6
<i>Advocacy</i>	7
<i>Coordination with other civil society organisations</i>	8
Methodology on the content of the framework	9
Timeline	11

Background and Rationale

The last two decades have seen a dramatic increase in scale and scope of non-state actors in education, in particular in developing countries. This privatisation in education includes not only an increase in the number of traditional private schools catering to the elite, but also the rapid expansion of low-cost profit-making schools targeting poor households, large-scale commercial investments in private school chains, private tutoring, privatisation of education services such as testing, the adoption of private sector management techniques in the public education sector, and the growth of community and faith-based schools.

A growing body of [research](#) has been conducted from various perspectives to assess the impact of this broad dynamic in different contexts. As part of this research, the Global Initiative for Economic, Social and Cultural Rights (GI-ESCR), the Right to Education Project (RTE), and the Open Society Foundations Education Support Program (*Privatisation in Education Research Initiative*) in close collaboration with a number of other partners, have, since 2014, embarked on [a joint research and advocacy project](#) on privatisation in education. This project has involved work with civil society organisations in eight countries to analyse the impact of privatisation in education on human rights.

The research that has been conducted by various actors has raised important questions about the social justice implications of the growth of private actors in education, to the point where the UN Special Rapporteur on the right to education dedicated his [October 2014 report](#) to the issue and expressed the concern that “soon, it may not be an exaggeration to say that privatization is supplanting public education instead of supplementing it”, which “cripples the universality of the right to education as well as the fundamental Guiding Principles of human rights law by aggravating marginalization and exclusion in education and creating inequities in society”.

However, what is still missing is a broadly accepted understanding of the normative framework against which to assess both practice and evidence, where this exists. While there is an increasing and broad range of studies about private schooling, there is not yet a common understanding of what is “good” and what is “bad” in private provision from a social justice perspective, and a delineation of the responsibilities and duties of different actors in education.

International human rights law offers guidance on how to assess the role of private actors in education through its protection of the right to education. Nonetheless, as with other human rights, the norms relative to right to education are spread out in many conventions, court decisions, and other legal texts. In addition, the application of the human rights framework to privatisation in education is not straightforward as it guarantees two Guiding Principles that may conflict: (1) the right to free, quality, compulsory education without discrimination, and (2) the liberty of parents to set up and/or choose for their children non-governmental schools.

As such, there is a need to clarify what exactly the existing legal human rights framework entails as it applies to the role of private actors in education, in order to provide normative Guiding Principles against which to analyse the reality from a human rights perspective. This project seeks to develop such Guiding Principles, as a collection of existing content under customary and conventional human rights law. It is suggested that they be called the “Human rights guiding principles on the role of private actors in education” (hereafter “the Guiding Principles”).

The Guiding Principles will be developed in parallel to, and drawing on, the [work](#) carried out by a number of civil society organisations (CSOs) to apply the human rights framework to contexts where education is being privatised. As part of this project, a reflection on the application of the international

human rights framework to the role of private actors in education has already been conducted in the context of the research and advocacy project on privatisation in education in various countries. Drawing on this research, an initial assessment framework was prepared and discussed with key civil society organisations working on the topic at [workshops](#) in June 2014 and June 2015 in Geneva, Switzerland. Following these workshops, the assessment framework has been further refined through a series of consultations with domestic civil society organisations in Ghana, Kenya and Uganda, and discussions with education and human rights experts. From this process, the idea of Guiding Principles, which would draw from this assessment framework, emerged, and initial discussions on the process and content of these were conducted with CSOs and experts in Geneva in June 2015 and in London in October 2015.

The preliminary version of the Guiding Principles – a *Privatisation in Education Analysis Framework* - is available [here](#). This preliminary version has served to inform the latest parallel reports submitted to the United Nations, in particular the report on [Chile](#). This initial work provides a starting point, which needs to be widely discussed, improved and refined, in order to deliver a robust and useable set of Guiding Principles.

In addition to filling a conceptual gap on the state of the law on the role of private actors in education provision, developing this set of Guiding Principles will provide a much-needed opportunity to conduct informed advocacy on a concrete basis. The final Guiding Principles will provide a long-term rigorous framework interpreting legally binding Conventions and Guiding Principles that States have committed to. It will be possible to use the Guiding Principles at the local, domestic, regional and international level to provide a basis for advocacy, policy development, and litigation.

This concept note details the scope of, and process to develop, a set of human rights Guiding Principles on the role of private actors in education. It focuses on the process of developing the Guiding Principles, during the period 2016-2017.

The project in a nutshell

Why are a set of Guiding Principles needed?

1. To stimulate an informed debate on the role and limitations of private education by gathering key information related to the state and application of human rights law related to private education.
2. To clarify the normative framework with which to assess privatisation in education from a social justice perspective.
3. To facilitate the analysis of concrete manifestations of privatisation in /privatised education by civil society organisations, and empower them to take action when relevant.
4. To provide guidance to States and inter-governmental organisations on the complex topic of private education, including donor States funding private education in developing countries, at a time when the pace of privatisation in education is outstripping analysis.
5. To inform the reflection of private actors that have set up or are considering setting up private schools.

Objectives of the work

- Develop an authoritative and rigorous set of Guiding Principles analysing existing law applicable to the role of private actors in education.
- Garner broad support for the Guiding Principles.
- Raise awareness about the Guiding Principles.

Expected outcomes

The work should:

- Provide a normative reference point on the involvement of private actors in education.
- Provide a practical tool to help stakeholders analyse situations of privatisation in or privatised education.
- Develop a network of partners and allies supporting the Guiding Principles.
- Raise awareness with States and other key stakeholders about the Guiding Principles and related issues.

Key activities

- Review, analyse and unpack existing human rights law and Guiding Principles related to the role of private actors in education.
- Conduct a series of regional, global and institutional face-to-face and on-line consultations with a broad range of stakeholders.
- Conduct advocacy in parallel to the development of the framework.

Concepts

The framework will be broadly similar to other sets of landmark human rights Guiding Principles that have been produced in the last years by groups of experts, NGOs, or UN bodies, such as:

- The [Maastricht Guiding Principles](#) on Extra-Territorial Obligations
- The [Pinheiro Guiding Principles](#) on Housing and Property Restitution for Refugees and Displaced Persons
- The [Guiding Principles](#) on Extreme Poverty and Human Rights

- The [set of core Guiding Principles](#) and measures to address the human rights challenge of large-scale land acquisitions and leases
- The basic [Guiding Principles and guidelines](#) on development-based evictions and displacement
- The [Declaration of Guiding Principles on Equality](#)
- The [Minimum Standards for Education](#): Preparedness, Response, Recovery

The Guiding Principles will focus on the role and limitations of private education and the growth of private education. If one takes a broad definition of **privatisation of education** as the “growth of the role [or share] of private actors in education”, then the framework will address more than that. “Private actors” is here understood to include all non-state actors *providing* education services. Education will also be considered in its different forms, including non-formal education.

Several points regarding the scope of the Guiding Principles will need to be decided on during the process, including:

- **The levels of education addressed:** the law and reality is easier to analyse at the basic education level (primary and lower secondary education). Pre-primary and higher education respond to slightly different supply, demand and environmental dynamics.
- **The type of involvement of private actors:** do they address privatisation *of* education only, or also privatisation *in* education, i.e. the use of techniques and approaches of the private sectors in the public sector.

The Guiding Principles will analyse and unpack *lex lata* – existing law — and not speculate on *lex feranda* – the law as it should be. They will be a collection of existing content under customary and conventional human rights law. However, the Guiding Principles should be **practical** in the sense that they respond effectively to the reality of privatisation in education as it has been researched. It is a fundamental principle of these Guiding Principles that they offer a context-responsive reflection, and not a purely theoretical approach. The aim is to outline a number of clear and, to the extent possible, simple, existing human rights legal Guiding Principles applicable to the role of private actors in education.

In addition, the possibility to define a **positive vision** for education grounded in human rights Guiding Principles will be explored. This vision would mirror the areas identifying the limitations of private actors, by providing a positive version of Guiding Principles setting out what States should do to put in place a human-rights compliant education system. For example, an area may consist of listing the Guiding Principles according to which private education/privatisation should not affect the conception of education as a public/common good; the mirror of this would be Guiding Principles that explain how education can be preserved as a public/common good.

Outputs

The work involves two main outputs, to which secondary outputs that will feed into the main outputs may be added (see below background papers):

1. A short, concise, and clear version of the Guiding Principles
2. A more detailed and legally argued version of the Guiding Principles – which may be a commentary.

In addition, as much as possible in parallel to the definition of the Guiding Principles, additional tools will be developed that complement the principles, when finalised:

- A practical guide on how to implement them, for policy makers and/or CSOs, will be developed. This guide will include specific examples and recommendations for using the framework and clarify the research necessary for using it effectively. It would also cover positive recommendations/solutions;
- A series of short explainers for the public and various audiences, including a document to guide States on regulating private schools and a guide on public private partnerships;
- An assessment tool: the Privatisation Analysis Framework (PAF), including research questions/indicators;
- A methodological guide to conduct research and assessment.

Overview of the process and structure of the work

The Guiding Principles will be developed throughout 2016 – 2017 and validated at the end of 2017. The work is structured as follows:

- The coordination of the **drafting** of the Guiding Principles will be led by the Right to Education Project, GI-ESCR and the OSF-ESP, who will synthesize the contributions and feedback from the various consultations, and suggest successive drafts incorporating the various inputs.
- There needs to be a clear guidance for the work going forward, which is inclusive of key organisations to ensure coordination. A **steering committee** to the process of the work and ensure institutional support will include the existing regional coalitions (APBAE, CLADE, ACEA, and ANCEFA), the organised language groups (Francophone and Lusophone), 2 representatives of global organisations, and a representative for academics. The steering committee would be operational and different from the expert group (below).
- An **expert group**, formed of several experts, will provide input and feedback during the entire process.

Throughout the drafting period, regional and institutional consultations will gather input and feedback in person and/or remotely on the Guiding Principles – depending on availability of funding. Advocacy events should be coordinated alongside the development of the Guiding Principles.

At the end of the drafting period, the Guiding Principles will be discussed, finalised, and endorsed by leading academics and practitioners at a closed conference, and open to adoption by civil society. The next step will then be to push for the dissemination and implementation of the Guiding Principles by various authorities.

More details on the above process are provided below.

Advocacy and coordination

Throughout the development of the framework, it will be imperative to build broad support and **consensus** on the Guiding Principles. Key to this process taking into account various perspectives, including the views of stakeholders defending the liberty of parents to choose the education their children receive. As mentioned above, the framework also needs to be pragmatic, in the sense that its implementation is feasible and that it responds to reality. These requirements entail that the Guiding Principles will be developed in a collaborative and participatory manner through multiple consultations.

Advocacy

Building consensus, broad ownership, and consultation on the Guiding Principles will also facilitate wide dissemination and advocacy for its implementation – the process for developing the Guiding Principles is directly connected to the advocacy strategy to make it a tool for change. For this reason, while developing the Guiding Principles, advocacy will be conducted to build the interest of States and official bodies able to influence its implementation. The following advocacy targets have been identified and already preliminary engaged, and the list should be furthered during the project and as engagement with additional stakeholders grow:

Body	Advocacy opportunity
UN Committee on Economic, Social and Cultural Rights	Could produce a statement Forthcoming general comment on private actors and ESCR
African Commission on Human and Peoples' Rights	Could produce a statement or general comment Can conduct country visits
UN Special Rapporteur on the Right to Education	Can receive complaints Produce reports Can conduct country visits
Selected States' representations in Geneva	Brazil, Chile, Sweden/Finland, France, Mali, among others, might support, formally or informally, the set of Guiding Principles on privatisation in education
World Bank	General engagement - Could limit or stop funding private education
African Development Bank	General engagement - Could limit or stop funding private education
European Union	Political influence Ensure that it does not begin funding private education
DFID	Engagement through report on the UK - Could limit or stop funding private education
UNESCO	Political influence Advise on education policies Process of reform of its work on the right to education Possibility to active joint expert group on the right to education with CESCR General assembly
UNICEF	Political influence in countries Fund education
GMR team	Influence reflection on education Will publish a paper on private actors in education
Organisation Internationale de la Francophonie	Political influence with its members Conducting work on the regulation of private actors in education

The longer term objective is to get the Guiding Principles (1) to gain legitimacy as the authoritative document on the issue; (2) to be implemented in practice.

- (1) Encouraging the use of and reference to the Guiding Principles in various declarations and documents is paramount to building and ensuring their legitimacy. Expert bodies, such as UN human rights bodies, the regional human rights commissions, independent human experts, or national human rights commissions, could be targeted to this effect. The Guiding Principles may further provide a basis for an expert comment, whether a General Comment or a UN report.
- (2) In order to get them implemented in practice, it will be necessary to raise awareness and provide training to CSOs, international organisations and States on the principles. It'll also be necessary for supports of the Guiding Principles to use them in various contexts at the domestic and international levels, including as a basis for research reports, litigation, and advocacy documents.

Although this form of advocacy will take place in a second phase, from 2018 onwards, it should be planned for early on. Inclusive and participatory debates during the drafting phase with key stakeholders, including States, will facilitate later dissemination and adoption.

Advocacy on the Guiding Principles, until their finalisation and adoption/endorsement in late 2017, should be mainstreamed through existing meetings and initiatives. Key opportunities include, among others:

- Annual Comparative International Education Society conferences (March 2016 and 2017)
- Review of States by the UN human rights bodies (throughout 2016-2017)
- Consortium General Assemblies (September 2016 and 2017?)
- World bank Spring and Annual meeting
- Global Partnership for Education board meetings

In addition, contacts should be sustained with all the target bodies mentioned above. Particular objectives for the next years may be to influence:

- The GEM team paper on privatisation
- The CESCR general comment on private actors and economic social and cultural rights
- The UNESCO process of reform/rethink its right to education strategy, and potentially the joint expert group UNESCRO/CESCR on the right to education
- The GPE positioning on private actors
- Institutional donors' position in their funding of education

Coordination with other civil society organisations

Additionally, it is essential that the work on the Guiding Principles be **coordinated with other research and advocacy initiatives** on privatisation in education, so that:

1. All opportunities to building consensus and get input into the Guiding Principles are maximised,
2. The general ideas behind Guiding Principles, while they being drafted and before it is even finalised, are included already in forthcoming initiatives.

For this purpose, it is important to keep coordinating with other organisations. Existing tools, such as the Google mailing list, and regular calls with key organisations, will be instrumental. Other tools may be developed or strengthened to reach out to stakeholders, including an **informal academic network**.

Methodology on the content of the framework

Inputs into the Guiding Principles will come from:

1. Theoretical analysis of the existing law and literature related to privatisation in education

Research should be conducted and **background papers** produced on key topics, whose aim would be to provide background information and analysis on complex or contentious areas, in order to inform the content of the Guiding Principles.

The exact topics and scope of the background papers needs to be decided, however, they could include one paper for each area of the Guiding Principles, or at least research into the:

1. Scope of equality and non-discrimination, and the connection with segregation
2. Scope of freedom of education in the jurisprudence
3. Assessment of freedom of education in different constitutions
4. Comprehensive Jurisprudence review on privatisation (building on the Right to Education Project database)
5. Regulation overview, building on RTE's work
6. Guiding Principles: examples of legal principles that made a difference/had an impact
7. History of education in Northern countries and comparison with the current evolution of developing countries
8. The obligation to directly provide public education?
9. Is profit acceptable for education (under human rights law?) (from poor communities)?
10. Research on *travaux preparatoires* right to education in different treaties
11. Background research on difference between right and liberty in law
12. Case summary of States where the State is not the primary provider/manager: Netherlands, Belgium, Sweden?, Spain?, Pakistan?, Middle East?, Canada?

Some of these areas could be developed through partnerships with university legal clinics. If funding allows, each of these papers should be combined with an expert meeting to debate the specific issues at stake and validate/finalise the paper.

2. Reflection on empirical cases

RTE, GI-ESCR and other domestic and international organisations are collaborating to conduct research on the impact of privatisation in education on human rights in a dozen countries across four continents (including Brazil, Chile, Uganda, Ghana, Kenya, Morocco, Nepal, Pakistan, and the Philippines).

Oxfam International and Education International are conducting respective research on privatisation in education in several developing countries (Pakistan, the Philippines, Kenya, Ghana, Haiti, India, Colombia and Brazil), to be defined, and links could be made to be able to draw lessons. The Privatisation in Education Research Initiative has produced a number of empirical pieces of research, which have been preliminary analysed from a human rights angle by the Right to Education project. Additional research on specific school models and countries (the DRC) are forthcoming from the Open Society Foundations Education Support Program and ISER (Uganda). ActionAid is conducting research on taxation and privatisation in education in Ghana, Kenya and Pakistan.

Other empirical experience can be drawn from the networks of domestic partners, including, ASPBAE, ANCEFA, ACEA, CLADE, and the Global Campaign for Education.

3. Expert inputs

For this purpose, an expert group could be established. Other experts will be consulted throughout, remotely, and in person when occasions allow (e.g. CIES).

4. Series of consultation with a broad range of stakeholders

Several workshops/consultations should be taking place. Global and regional consultations should be jointly organised with different regional organisations, in particular ASPBAE, CLADE, OSIWA, OSIEA, and OSISA and the OSF Education Support Program. Some organisations may also be able to organise consultation at the domestic level with their members. A number of other conferences and events could potentially allow for a discussion of the Guiding Principles with various stakeholders, which should include inter-governmental organisations, governments, development agencies, academics, civil society organisations, etc.

5. Validation meeting with experts and representatives from different stakeholders

The validation meeting will include leading academics and practitioners from the expert group, members of the steering committee, and may include additional stakeholders who will reinforce the legitimacy and strength of the Guiding Principles.

Timeline

Date	Activity
January – June 2016	Development of an initial draft
March 2016	Pre-consultation during side-event at Comparative International Education Society (CIES) Conference in Vancouver, Canada
March 2016 – June 2017	Development of expert background papers on key issues/themes
April 2016 – September 2017	<p>Series of regional, national, thematic and informal consultations (the following include consultations planned or confirmed so far):</p> <p>Regional consultations (planned thus far):</p> <ul style="list-style-type: none"> ○ Asia-Pacific (August 2016, potentially August 2017) ○ East Africa (Nairobi, September 2016) ○ Southern Africa (2017) ○ Western Africa + Francophone countries (2017) ○ Latin America (2017) ○ Europe (Paris, 2017; hosted by UNESCO) <ul style="list-style-type: none"> • Consultations with thematic groups: <ul style="list-style-type: none"> ○ Geneva stakeholders ○ CIES (Atlanta (USA), March 2017) ○ DC stakeholders/World Bank/GPE/North America ○ EU delegation • National consultations organised by partners: <ul style="list-style-type: none"> ○ Pakistan (January/February 2017; hosted by FOSI-Pakistan) • Informal consultations with States • Engagement of other stakeholders
October – December 2016	<p>Review of the first draft based on inputs from consultations</p> <p>Establishment of Guiding Principles Steering Committee and Expert Group</p> <p>Development of second draft with experts</p>
January 2017 – April 2017	Online consultations
May – September 2017	<p>Review of second draft</p> <p>Development of third draft</p>
October – November 2017	Expert review and feedback
November – December 2017	<p>Consolidation of the drafts</p> <p>Validation at expert meeting</p>
2018	Launch, dissemination, and advocacy