



## Financing Education 2030 Conference

### Opportunities and gaps in financing of education in emergencies situations

#### Public versus private: the challenge of access to free education during emergencies

Delphine Dorsi

2 May 2018

#### Remarks:

- Presentation through a human rights lens
- Overview of the issue as education in emergency is complex.

#### Public versus private

This question is not specific to education in emergencies, it is one of the main current debate in the education field. While private actors have always been part of the education landscape, in the recent years we have seen a rapid growth of private actors, particularly for profit and commercial schools. This phenomena have triggered an hot political debate and raised human rights concerns including from [UN treaty bodies](#) and the [UN Special rapporteur on the right to education](#).

My presentation will use a human rights lens based on the work RTE have done over the past five year on the [privatisation issue](#) in analysing international law applying in that context, monitoring the impact of the involvement of private actors in education on the right to education, and facilitating the develop of [human rights guiding principles clarifying states' obligations in the context of privatisation](#). I will highlight states' obligations as regards [the right to education in the context of emergencies](#) (particularly as regards free education and financing) and key human rights principles that apply as regards private involvement in this context.

#### Importance of the right to education, particularly in emergency contexts

[Education is a human right](#) grounded on the human dignity and inherent to all human beings. Education is essential to the full development of the human personality and to enable all persons to participate effectively in society. It provides the skills needed to live freely and autonomously and contribute to building peace. Education is also a crucial accelerator right, facilitating the enjoyment of other rights and one of the joys and rewards of the human existence.

The Committee on the right of the child “considers that in situations of emergency, the child’s need to enjoy his/her right to education is reinforced by the fact that it is a protection measure, as well as a relief measure and a life saving measure that provides physical, psychosocial and cognitive

protection. Education mitigates the psychosocial impact of conflicts and disasters by giving a sense of normalcy, stability, structure and hope for the future.”<sup>1</sup>

While education is so important, in emergency contexts it become a high challenge either to access or provide it.

### States’ political commitments under the Education 2030 agenda

With the [Education 2030 agenda](#), States have politically committed to “ensure inclusive and quality education and promote lifelong learning opportunities *for all*”, including by developing more inclusive, responsive and resilient education systems to meet the needs of children, youth and adults in emergency contexts. Note that SDG 17 recognised a role for private actors in realising SDGs.

### States’ obligations under international law

While through Education 2030 states have politically committed to achieve a set of goals in a specific time for the effective realisation of the right to education, they have [legal obligations](#) under [international law](#). Every states – except the US – have ratified at least one of the main treaties guaranteeing the right to education: the international covenant on economic, social and cultural rights (Articles 13 and 14), the Convention on the rights of the child (Article 28 and 29) and the UNESCO Convention against Discrimination in Education.

States have the obligations to respect, protect and fulfil the right to education ensuring education is available, accessible, acceptable and adaptable. This includes the obligation to provide [free education](#) (immediately for primary education and progressively for free secondary and education) and to [finance education](#), allocating the maximum of its available resources to the realisation of the right to education.

### Minimum core obligations continue to apply in emergencies context

Human rights law applies in all contexts. People do not lose their human rights because of conflict, or natural disasters. States cannot transfer their obligations under any circumstances.

During armed conflict, States parties have to do everything in their power to improve the enjoyment of economic, social and cultural rights.<sup>2</sup>

Minimum core obligations remain in emergency contexts and include:

- ensuring the right of access to public educational institutions and programmes on a non-discriminatory basis;
- ensuring that education conforms to the its objectives
- providing primary education for all
- adopting and implementing a national educational strategy which includes provision for secondary, higher and fundamental education
- ensuring free choice of education without interference from the State or third parties, subject to conformity with “minimum educational standards”<sup>3</sup>

---

<sup>1</sup> CRC, [Day of General Discussion on the right of the child to education in emergencies situations, Recommendations](#), 19 September 2008

<sup>2</sup> Report of the High Commission on Human Rights on the protection of economic, social and cultural rights in situations of armed conflict, with a specific focus on the rights to health and to education, [E/2015/59](#), 2015, para. 11

<sup>3</sup> CESCR, [GC 13](#), Para. 57

## Financing obligations

Under international law states have the obligations to provide the maximum of their available resources to the realisation of the right to education.

During armed conflicts, States often allocate most resources to military and security policies, military training, counter-insurgency operations and intelligence gathering. However, States often have more difficulty in collecting taxation revenues, incur expenses for damage to infrastructure caused by the conflict, and experience a general decline in wealth.

However, in order for a State to be able to attribute its failure to meet its minimum core obligations to a lack of available resources, it must demonstrate that every effort has been made to use all resources that are at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations. In addition to meeting core obligations, maximum available resources must be fully used to progressively realize all human rights in a way that guards against retrogressive steps or impacts and at least maintains the status quo for the broader range of human rights obligations.<sup>4</sup>

In situations of considerable difficulty, including armed conflict, the burden of proof still falls on the State to demonstrate that every effort has been made to use all resources at its disposal to satisfy minimum core obligations, including through international cooperation and assistance.<sup>5</sup>

## International cooperation

The responsibility to fulfil the right to education in emergency situations does not rest upon individual States alone.<sup>6</sup> When a State lacks the capacity and/or requisite resources, the international community including other states, donor organizations and UN agencies should ensure that the right to education is universally fulfilled. In doing so, they have to respect the right to education and other human rights. Have to prioritise the most marginalised, the realisation of the essential elements of the right to education, including free education, respect the principle of non-discrimination and equality.<sup>7</sup>

The Committee underscores the importance of allocating adequate human and financial resources including through international cooperation in order to fully realize the right of the child to education in emergency situations. It therefore calls upon States parties, United Nations agencies, donors and relief agencies to provide adequate sustained funding and to assist States in raising and appropriately allocating funds to ensure the right of the child to education in emergency situations.<sup>8</sup>

## Private actors involvement in education in emergencies under international law

### Private actors' involvement in education and international law

---

<sup>4</sup> Report of the High Commission on Human Rights on the protection of economic, social and cultural rights in situations of armed conflict, with a specific focus on the rights to health and to education, [E/2015/59](#), 2015, para. 54

<sup>5</sup> (Report of the High Commission on Human Rights on the protection of economic, social and cultural rights in situations of armed conflict, with a specific focus on the rights to health and to education, [E/2015/59](#), 2015, para. 54)

<sup>6</sup> CRC, [Day of General Discussion on the right of the child to education in emergencies situations, Recommendations](#), 19 September 2008, para. 31

<sup>7</sup> See [Maastricht Principles](#) on extraterritorial obligations of states in the area of economic, social and cultural rights

<sup>8</sup> CRC, [Day of General Discussion on the right of the child to education in emergencies situations, Recommendations](#), 19 September 2008, para. 53

International law recognised a role for private actors in education. This is necessary to preserve individual freedom of opinion, religion and political conviction against the risk that the State will use the educational system to enforce its own values, religion or other ideology on individuals.

Conditions:

- Does not lead to any form of discrimination, create or increase inequality;
- Does not lead to fee-charging private primary schools being the only option for compulsory education
- Does not undermine the humanistic mission of education
- Conforms to the minimum educational standards, being adequately regulated and monitored
- Are publically debated in line with the principles of transparency and participation

For more details, see [RTE page on privatization](#) and a [Framework to assess the role of non-state actors in education against human rights](#)

### **Private actors' involvement in education in emergencies contexts**

Ethical tensions between humanitarian and profit motivations of businesses to invest in this crisis.<sup>9</sup>

Key points:

- The primary obligation to respect, protect and fulfil the right to education remains on the State, regardless of whether it has permitted or funded private providers. This is particularly important in emergencies contexts where there is a need for coordination among the various actors delivering education and for looking at the long term, giving particular attention to the content of education (eg.: life skills, learning to live together)
- The liberty of individuals and bodies to establish and direct educational institutions is subject to compliance with minimum standards laid down by the State and to the core values of the right to education.
- Public financing of private actors met particular conditions. See the draft [Human Rights Guiding Principles on states' obligations regarding private actors' involvement in education](#)

See below the draft principles that would apply:

#### *Financing*

##### *General Principle*

*45. States must allocate the maximum of their available resources to fund free public quality education.<sup>10</sup> Available resources include existing resources, additional resources that may be raised for instance through fair progressive taxation and other domestic income-generating mechanisms<sup>11</sup> or through international co-operation, and potentially missing resources such as resources lost through tax evasion and avoidance.<sup>12</sup>*

*46. States must never reduce the budget allocated to education, which constitutes a retrogressive measure prohibited under international human rights law, unless on a temporary basis in exceptional circumstances [in case of force majeure] they can publicly demonstrate that the reduction has been introduced after the most careful consideration of all alternatives and that is fully justified by*

---

<sup>9</sup> See for instance, Francine Menashy and Zeena Zakharia, [Investing in the crisis: private participation in the education of Syrian Refugees](#), Education International, 2017

<sup>10</sup> In line with the Guiding Principle 19.

<sup>11</sup> Or other mechanisms such as corporate social responsibility funds (South Africa) or dedicated sectoral tax (on oil revenues, Brazil).

<sup>12</sup> CESCR, General Comment 24, para. 23.

reference to the totality of its human rights obligations and in the context of the full use of the State's maximum available resources.<sup>13</sup>

*Application to private education*

47. States have no obligation to fund private educational operators.<sup>14</sup>

48. States shall never fund or support,<sup>15</sup> including through tax deductions or other advantages, any operator that is, in theory or in practice, incompatible with their legal obligations. This includes operators that are either:

- a. Discriminatory on any prohibited ground under international human rights law, including by being selective, expelling or sorting learners, whether directly or indirectly, on the basis of the economic status of the learner, family, or community[, or any another basis that leads to a violation of the right to equality and non-discrimination];
- b. Commercially-orientated or for-profit;<sup>16</sup>
- c. Are not subject to democratic control by the populations that they serve;
- d. In breach of any other human rights, including the Guiding Principles herein;<sup>17</sup>
- e. Not of adequate quality; or
- f. Inadequately regulated and accredited as defined under these Guiding Principles.

49. States must not fund or support private educational operators<sup>18</sup> unless, in exceptional circumstances, the public funding<sup>19</sup> meets all of the following requirements related to the nature of the funding:

- a. It seeks to constitute a measure to provide a time-bound, temporary remedy to address an incapacity of the State in a certain area [, as part of a progressive effort to realise the right to free public education], including:
  - i. to address the need [wish] of a minority group[, a vulnerable group,] or an Indigenous people that cannot immediately be catered for satisfactorily in public educational institution or is required to respond to the realisation of cultural rights;

---

<sup>13</sup> CESCR, General Comment 13, para. 45; CESCR, General Comment 3, para. 9. These measures may exceptionally be justified in case of an unforeseen large-scale event, such as a natural catastrophe, where international aid is unable to address the increased need, and where it is a temporary short-term response.

<sup>14</sup> CESCR General Comment 13, para. 54, in conjunction with para. 48. Case "relating to certain aspects of the laws on the use of languages in education in Belgium" v Belgium' (European Court of Human Rights, Application no 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64).

<sup>15</sup> This does not apply to the procurement of materials that is strictly ancillary.

<sup>16</sup> CESCR General Comment 24, para. 22, read in conjunction with the obligation to use the maximum available resources. See also CRC, Concluding observations: United Kingdom, CRC/C/GBR/CO/5, 3 June 2016, <http://bit.ly/1OeyD1M>, paras. 16-17; CRC, Concluding observations: Brazil, CRC/C/OPAC/BRA/CO/1, paras. 75-76, 28 October 2015, <http://bit.ly/2lV3jcb>; CESCR

Concluding observations, E/C.12/CHL/CO/4, para. 30, 19 June 2015, <http://bit.ly/1RWOPkD>, para. 30; CRC, Concluding observations, CRC/C/CHL/CO/4-5, paras. 67 – 68 and 69 – 70, 15 October 2015, <http://bit.ly/1XRUqg8>, paras. 67-69.

<sup>17</sup> This includes educational operators that would indoctrinate, for instance on religious grounds. See Human Rights Committee, General Comment 22, para. 6.

<sup>18</sup> Ibid.

<sup>19</sup> Funding should be interpreted to include any sort of indirect support, such as tax breaks, land concessions, etc.

- ii. *to integrate within the public system historical private educational operators that have previously operated separately, in order to regulate them and reinforce the public education system; or*
  - iii. *[only where everyone under the State's jurisdiction already has access to free quality public educational institution, to respond do the demand for a diversity of pedagogical approaches and content that can be demonstrated to not be doable in public educational institution.]*<sup>20</sup>
- b. *It is the most equitable means to advance the full realisation of the right to education,<sup>21</sup> in accordance with the obligations of non-discrimination, equality and non-segregation;<sup>22</sup>*
  - c. *It does not risk undermining the fastest possible development of a quality public education system in accordance with States' obligations to fulfil the right to education to the maximum of their available resources;*
  - d. *It does not constitute a retrogressive measure as defined under international human rights law;*
  - e. *It does not constitute or contribute to the marketisation or commercialisation of the education system;<sup>23</sup>*
  - f. *It does not risk undermining the [democratic] control of an educational institution by the concerned populations;<sup>24</sup>*
  - g. *It is set up in a way that it is possible in practice to reverse it or to transfer the role of the private educational operators to public authorities; and*
  - h. *It does not create any risk of undermining any of the State's human rights obligations,<sup>25</sup> particularly the obligation to prevent direct and indirect discrimination or segregation on the basis of the economic status.<sup>26</sup>*

50. *States must not fund or support private educational operators<sup>27</sup> unless, in exceptional circumstances, the public funding<sup>28</sup> meets all of the following procedural requirements:*

- a. *It has publicly demonstrated, following a participatory, inclusive, transparent, and accountable consultation process involving all potentially affected rights-holders, that such public funding to private educational operators meet all of the above criteria;*
- b. *The funding has been authorised [locally] by a democratically elected body;*
- c. *[It has selected the provider through an open, fair [competitive], and transparent process;]*

---

<sup>20</sup> For instance to fund different pedagogical approaches to education not included in the public education system and promote diversity, if and only if all other educational institution fully meet the right to education requirements.

<sup>21</sup> These conditions are cumulative, and they must all be fulfilled.

<sup>22</sup> This Guiding Principle is a requirement that needs to be met and demonstrated by States. It does not imply that public funding to private actors should or may be the most equitable means to advance the right to education.

<sup>23</sup> In accordance with the Guiding Principle **Error! Reference source not found..Error! Reference source not found..**

<sup>24</sup> In accordance with the Guiding Principle **Error! Reference source not found..**

<sup>25</sup> Including by meeting the totality of these Guiding Principles.

<sup>26</sup> CESCR General Comment 13, para. 54.

<sup>27</sup> Ibid.

<sup>28</sup> Funding should be interpreted to Include any sort of indirect support, such as tax breaks, land concessions, etc.

- d. *It has adopted an adequate regulatory framework addressing the specificities of the situation; and*
  - e. *It has assessed and publicly demonstrate its capacity to continuously monitor and regulate the private educational operator's ability to meet the applicable standards.*
51. *Should any private educational operator receive public funding, the State obligations to regulate [protect] applies equally as for any private educational operator.<sup>29</sup> The regulations applying to these private educational operators must be at least as protective of human rights as for public educational institutions, including the effective protection of labour and union rights.*
  52. *States must never fund private educational operators in such way that these operators constitute an undue influence in the education system or make up such a substantial part of an education system that it risks undermining any of the Guiding Principles herein.<sup>30</sup>*
  53. *Should a State fund a private educational operator, it must make all possible efforts to overcome as expeditiously as possible the inability to deliver or manage an aspect of education services that justified this funding. The State must ensure that the arrangement reinforce and be regularly re-assessed against State capacities, and include from its inception a plan to be phased out when the State inability that justified this arrangement is addressed [/rectified] and the State is effectively able to manage the educational institution.*
  54. *Any public funding to a private educational operator must be subject to, where applicable, ex-ante, on-going and ex-post human rights impact assessments, which are made public, and are used to continually re-evaluate the contribution of the funding to the realisation of the right to education, and if necessary change or terminate the funding. The assessment must measure both the separate and the systemic effect of each operator, on the short and long term. States must always reserve the right to withdraw any public funding when operators do not meet the required standards or when the impact of the funding undermines the realisation of the right to education, including the development of a public education system.*
  55. *The cost of the assessment, regulation and other requirements on the States must be considered as part of the evaluation realised by the State under the Guiding Principles O and O, taking into account its obligation to deliver quality education for all to the maximum of its available resources.*
  56. *States must ensure that all private educational operators receiving public funding make all proprietary data and material that can help to improve the education system, including technology used in the classroom and management systems, available without a licence [within a reasonable time defined by law] to the relevant public authorities, while preserving the learners' privacy.<sup>31</sup>*

For more info: [RTE website](#) (with an [Arabic version](#)) & [GI-ESCR website](#)

Contact: [delphine.dorsi@right-to-education.org](mailto:delphine.dorsi@right-to-education.org)

---

<sup>29</sup> In line with section 4 of the Guiding Principles herein.

<sup>30</sup> This is a logical consequence of Guiding Principle **Error! Reference source not found.**. The logical consequence of this is that in most cases, a cap should be set in accordance with the context. Discuss the context of The Netherlands and examples of caps (France).

<sup>31</sup> Special Rapporteur in the field of cultural rights, Farida Shaheed, UN A/HRC/28/57 2014), paras. 64, 65, 72, 84, 88.