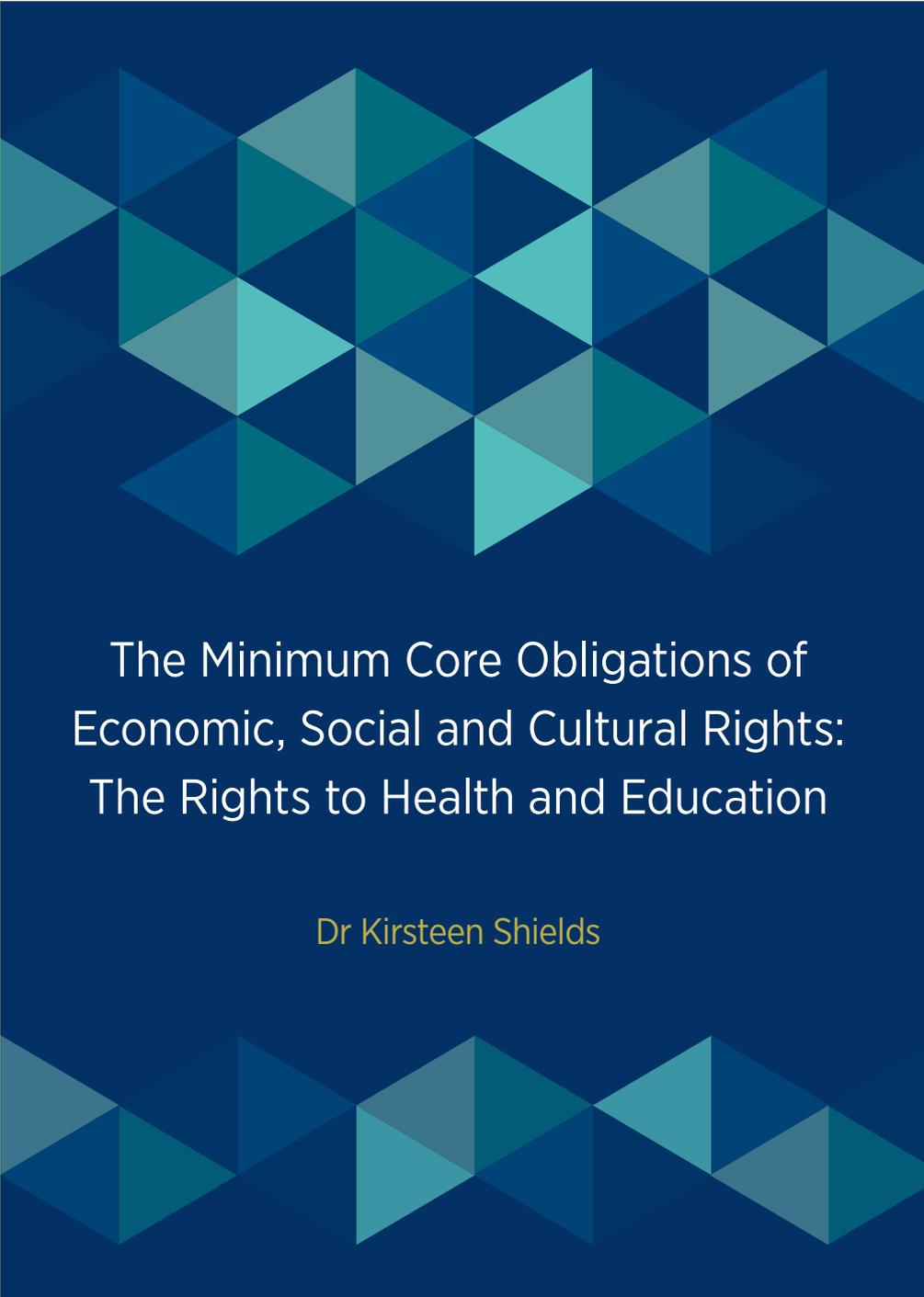


Research Summary

October 2017



**NORDIC
TRUST FUND**



The Minimum Core Obligations of Economic, Social and Cultural Rights: The Rights to Health and Education

Dr Kirsteen Shields



THE WORLD BANK
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Nordic Trust Fund (NTF) is a knowledge and learning initiative to help the World Bank develop a more informed view on human rights. It is designed to improve existing Bank involvement on human rights in the overall context of the Bank's core mission of promoting economic growth and poverty reduction. The NTF is managed by a secretariat in the Operations Policy and Country Services vice-presidency (OPCS). Financial and staff support for the NTF is provided by Denmark, Finland, Iceland, Norway, and Sweden, with additional funding provided by Germany.

Abbreviations

CESCR	Committee on Economic, Social and Cultural Rights
ESC	Economic, social and cultural
ICESCR	International Covenant on Economic, Social and Cultural Rights
MCD	Minimum Core Doctrine
MCO	Minimum Core Obligations

Executive Summary

The minimum core doctrine (“MCD”) is derived from International Covenant on Economic Social and Cultural Rights (“ICESCR” or “the Covenant”) adopted under the aegis of the United Nations (UN) and is derived from the UN CESCR’s (Committee on Economic, Social and Cultural Rights) interpretation of the Covenant. This paper describes various approaches to MCD but ultimately anchors its explanation of MCD in minimum core obligations (“MCOs”) and it develops existing knowledge on MCOs attached to economic and social rights (ESCR) under the Covenant and suggests ways in which the doctrine might have relevance for development policy and practice.

- This paper demystifies MCD and the nature of MCOs by bringing together seminal contributions from John Tasioulas and Angelina Fisher on the legal basis of MCOs, their nature and parameters and their application to the right to education and the right to health respectively
- It confirms the legal and philosophical grounding of MCD in MCOs and it outlines the legal and conceptual contributions of MCD and its potential implications, including for development policy and practice, for example by helping to guide prioritization and competing policy demands or by setting limits on the blanket use of the concept of progressive realization, which is sometimes mobilized to defend failures to realize economic, social and cultural (ESC) rights or to provide adequate resource allocations for ESC rights realization.
- MCOs are identified as a sub-set of obligations associated with ESC rights that must be fulfilled immediately and in full, by all states.
- In addition, this paper incorporates Tasioulas’s identification of key characteristics of MCOs through a 5-step framework to assist in identifying and defining MCO; and in applying this theoretic construct of MCOs to the right to health.
- This paper presents the two case studies systematically to draw out their inferences for the implications and application of MCOs in the contexts of education and health to demonstrate how MCOs are derived from the UN ICESCR provisions. The analysis is structured around two questions: (i) *How are the MCOs to be identified in the contexts of the right to education and the right to health?* (ii) *What has MCO been interpreted to mean in these contexts?*
- The immediacy of the minimum core obligation (which Tasioulas suggests is the critical piece) is the feature that can be most clearly observed as the common (even if not consistent) thread both in the context of the right to health and in the context of the right to education.
- Given the increased emphasis on indicators in development policy and analysis as well as the growing body of work on human rights measurement and human rights indicators, the paper also considers the strengths and weaknesses of indicators in relation to MCOs.

Abstract

Economic, social and cultural rights (ESCR), such as the right to education and the right to health, comprise one of the two principal pillars of the UN human rights framework—the other pillar of which is constituted of civil and political rights (CPR); together with the UDHR, these two groups of rights comprise the “international bill of rights”. ESCR also overlap substantially with development activities, in that they share significant subject matter coverage. Put differently, development activities now occupy many areas governed by ESCR. ESCR are also central to conflicts over resource allocation which increasingly arise in both developed and developing countries as a result of crises stemming from climate change, violent conflict and war and displacement. In such resource constrained contexts, ESCR, and MCD in particular, provide a potential means to prioritise resource allocation through the identification of MCOs.

In addition to generally applicable human rights structural principles such as universality, inalienability, indivisibility, interdependence and non-discrimination *inter alia*, ESCR are subject to a number of distinct doctrines, such as ‘progressive realisation’ and the obligation not to adopt non-retrogressive measures and minimum core. Of these, the doctrine of ‘minimum core’ is under-developed and often misunderstood. At the same time, MCD should provide direction for development policy makers/practitioners to establish priority needs in resource-constrained contexts and it may help place some limits on the excessive deployment of “progressive realization” to excuse poor performance on ESC rights realisation, or defend inadequate or inappropriate resource allocation with respect to ESC rights. In a more general way, MCD helps recall the equal importance of ESC rights as human rights, on par with civil and political rights.

MCD has been articulated by the UN Committee on Economic, Social and Cultural Rights (CESCR) in

their General Comments issued to interpret and guide the implementation of the ICESCR. In particular, the Committee’s General Comment 3 states that particular ESC rights are subject to MCOs (or more generally subject to MCD). Yet the MCD has not been effectively translated or given practical applicability.

This report is financed by the World Bank Nordic Trust Fund; it was written by Dr. Kirsteen Shields under the guidance of Aris Panou (Task Team Leader), Dr. Siobhan McLnerney-Lankford, and Melinda Good. It draws upon the work of the UN Committee on Economic, Social and Cultural Rights (UN CESCR), specially commissioned research papers by John Tasioulas of King’s College, University of London and Angelina Fisher, of New York University, and expert inputs of, Prof Robert McCorquodale, Prof Aoife Nolan and participants of a June 2017 expert workshop hosted by the World Bank Legal Department which included experts from the Health Nutrition and Population (HNP), and Education Global Practices of the World Bank.

It forms part of a package of research papers¹ commissioned by World Bank staff, that includes papers by John Tasioulas and Angelina Fisher which seeks to establish the foundations, application and implications of the MCD through analysis of UN documents and regional and state practice. Tasioulas' framework paper provides a more in-depth analytical framework for understanding MCD; this is complemented by two companion papers, which illustrate the MCD through the examples of the right to health (Tasioulas) and right to education (Fisher). From these case studies, the 'immediacy' of minimum core obligations emerges as the most commonly and clearly observed feature, other features such as non-derogable nature, justiciability and 'special value' (e.g. such as a relationship to 'human dignity') are also discernible but less clearly.

It is not the aim of this research to argue for a specific list of MCOs. Instead it seeks to elucidate the MCD and identify and define a framework through which MCOs may be identified. In this respect, this work is pivotal

to the development of ESC rights, to which the MCD is central and to a more informed understanding of ESC rights in the development context.

Recognising and establishing MCOs requires developing an objective normative foundation for these obligations. In other words, these obligations require a foundation in existing legal and moral obligations of states. The realisation of MCOs also requires an analytical framework which addresses the definitional questions pertaining to MCOs, in particular their identification, definition, value and content. Through using this framework it is possible to identify a meaning and content of MCOs as analytically 'robust' and 'politically inclusive'.

¹ The package comprises 4 papers in all: (i) this summary report; (ii) Tasioulas's framework paper on MCO and two companion papers on (iii) the right to health (Tasioulas) and (iv) the right to education (Fisher).

1. Historical Context

ESC rights, as we know them today, were first codified in the Universal Declaration of Human Rights (1948) and later elaborated in the UN ICESCR. Disagreement amongst states at the time of drafting led to the provisions within the ICESCR being classed as ‘second generation’ rights subject to ‘progressive realisation’. This was in contrast to civil and political rights, which were termed ‘first generation’ rights and subject to immediate realisation.

According to the doctrine of ‘progressive realization’: “Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”²

Subsequently the Committee on ESC rights (hereafter “the Committee”) identified steps that should be taken immediately regardless of the level of resource availability (CESCR General Comment 3). For example, the elimination of discrimination and improvements in the legal and juridical systems do not necessarily pose an inordinate burden on resources. Moreover, in many cases ESC rights are violated not because resources are not available, but rather because they have been misallocated. At any level of resource availability,

states parties must prioritize the realization of people’s basic economic, social and cultural rights, and there must continual progress on people’s enjoyment of ESC rights.

This is recognised as the inception of the MCD. Neither MCD nor MCOs feature in the text of the Covenant; the doctrine was introduced by the Committee with the aim of ensuring “*the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party.*”³ Beyond the general obligation that states parties have to prioritize the realization of ESC rights (over expenditures in other areas) the Committee has used the doctrine to identify a sub-set of demands within the total body of requirements imposed by economic, social and cultural rights in General Comments issued by CESCR.⁴

² ICESCR Article 2(1).

³ Amrei Müller, “An Analysis of Health-Related Issues in Non-International Armed Conflicts” in Michael O’Flaherty and David Harris (eds) *The Relationship between Economic, Social and Cultural Rights and International Humanitarian Law*, Nottingham Studies on Human Rights (2013).

⁴ In particular, see CESCR General Comment 3, ‘*The nature of States parties’ obligations*’, (Fifth session, 1990), U.N. Doc. E/1991/23, annex III at 86 (1991), and CESCR General Comment 14, ‘*The Right to the Highest Attainable Standard of Health (Art. 12)*’, adopted at the Twenty-second Session of the Committee on Economic, Social and Cultural Rights, on 11 August 2000, E/C.12/2000/4).

2. Definitions of the of the MCD

The attached research papers of Tasioulas and Fisher identify ‘immediacy’ as the most common and clear feature of MCOs, found in UN documentation and state practice. It is important to observe that wider definitions of the MCD discernible in UN documentation, state practice and the commentaries of practitioners and academics exist. These have included discussion of the following points of definition:

- *Universal or state specific standards?* (- Not specific to MCOs and arises for human rights generally)
- *Justiciable or non-justiciable?*
- *Immediacy, Essence, or Consensus as the defining feature?*

Minimum core obligations also apply across the tripartite typology of human rights obligations, established as:

- to *respect* (refrain from interfering with the enjoyment of the right);
- to *protect* (prevent others from interfering with the enjoyment of the right);
- to *fulfil* (adopt appropriate measures towards the full realization of) economic, social and cultural rights.

In the widest sense, the term also potentially overlaps with other categorisations of rights such as:

- *‘Minimum floor’ rights*

- *‘Priority’ rights*
- *‘Immediately applicable’ rights*

Lack of certainty around the meaning of minimum core has impeded its utility in practice. This is compounded by the multiplicity of interpretations and by scepticism about the coherence and utility of the doctrine, as well as what some commentators have observed as a lack of consistency in the Committee’s own interpretations and deployment of the doctrine. According to some accounts, the “minimum core” doctrine aims to set a quantitative and qualitative floor of economic, social and cultural rights that must be immediately realized by the state as a matter of priority.⁵ Yet these floors are rarely identified and states’ engagement with the minimum core doctrine and terminology is rare and where states’ have articulated an interpretation of the doctrine, their interpretation has not necessarily been consistent with the Committee’s. This research gathers and systemise knowledge and precedent from the relevant UN, regional and state actors in order to identify commonalities in approaches to MCOs.

⁵ U.N. Doc. E/C.12/1993111, para. 5; M. Craven, “Assessment of the progress on adjudication of economic, social and cultural rights” in J. Squires, M. Langford, M., B. and Thiele (eds.) *The road to a remedy: Current issues in the litigation of economic, social and cultural rights* (2005) Australian Human Rights Centre and Centre on Housing Rights and Evictions, p. 39.

3. The Legal Basis of MCOs

a. Legal Basis of MCOs at the International Level

The legal basis of Minimum Core Obligations (MCO) supplements a generic obligation set out in the ICESCR which places an obligation on the state parties to:

“[U]ndertake to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.” (Article 2)

This provision has been interpreted by the Committee on ESCR to include:

- An immediate obligation to take steps towards the realisation of the rights
- An immediate obligation to not adopt regressive measures

The Committee on ESCR issues General Comments to assist the interpretation of particular provisions of the Covenant.

In an effort to define the normative content of each of the ICESCR rights, the CESCR issued General Comment No 3 in 1990. General Comment No 3 confirms that a ‘minimum core obligation’ attaches to each of the rights contained in Covenant:

“On the basis of the extensive experience gained by the Committee, as well as by the body that preceded it, over a period of more than a decade of examining States parties’ reports, the Committee is of the view that a minimum core obligation to

ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party.”

‘Minimum essential levels’ were applied to the contexts of foodstuffs, primary health care, basis shelter and housing, and education. General Comment No 3:

Box 1: A note on the Legal Status of General Comments

General Comments are issued by the UN human rights monitoring bodies and are intended to give guidance on the interpretation of treaties, although they are not legally binding sources of law. They are properly understood as “*authoritative statements of the law*”. As Angelina Fisher observes:

“As a general matter, General Comments of the human rights committees do not constitute binding legal pronouncements. However, over time General Comments have arguably acquired a normative role. For example, regional human rights commissions and courts often treat them as “internationally accepted ideas of the various obligations engendered by human rights” and as “authoritative statements of the law”. Many domestic courts consider General Comments as supplementary means of interpretation and often refer to them alongside judicial precedents.” (Angelina Fisher, ‘Minimum Core and the Right to Education’, at page 14., citing Conway Blake, “Normative Instruments in International Human Rights Law: Locating the General Comment”, Center for Human Rights and Global Justice Working Paper (2008), <http://chrgj.org/wp-content/uploads/2012/07/blake.pdf>)

“Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant.”

The General Comment also identified the risk of not having minimum essential levels:

“If the Covenant were to be read in such a way as to not establish such a minimum core obligation, it would be largely deprived of its *raison être*.”

Resource constraints are inherent to the doctrine of ‘minimum core’:

“By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. Article 2 (1) obligates each State party to take the necessary steps “to the maximum of its available resources”. In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.”⁶

Box 2: Features of MCOs discernable in the work of the UN Committee on ESCR

Key associated features of MCOs developed in UN Committee on ESCR General Comments (especially GCs# 3, 13, 14 and 22)

(a) Immediacy	It must be fully satisfied with “immediate effect” by all states, as opposed to belonging to that aspect of a right’s content which may in principle permissibly be fully complied with in the longer-term in accordance with the doctrine of ‘progressive realization’.
(b) Special value	Its justification or content bears some peculiarly intimate relationship to an underlying, high-priority value, such as human dignity or basic needs required for survival;
(c) Non-derogability	It is non-derogable as a matter of normative force, in that it no competing considerations can ever justify non-compliance with a human rights demand that belongs to the ‘minimum core’, even in an emergency;
(d) Justiciability	It is or should be justiciable, i.e. enforceable (presumably by the right-holder, at least in the first instance) through domestic or supranational courts.

b. The Legal Basis of ESCR MCOs at the Regional Level

MCO for ESCR have been developed in regional human rights instruments at the Inter-American, African and European levels. MCO are not included in the *Arab Charter on Human Rights*.⁷ They are also included in legal documents, reports and jurisprudence of the Inter-American Commission on Human Rights,⁸ the African Commission on Human and

⁶ Para 10, Committee on Economic, Social and Cultural Rights, General Comment 3, ‘The nature of States parties’ obligations’, (Fifth session, 1990), U.N. Doc. E/1991/23, annex III at 86 (1991), reprinted in *Compilation of General Comments and General Recommendations*. Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 14 (2003).

⁷ Inter-American Commission on Human Rights, “Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico” (2013); Annual Report of the Inter-American Commission on Human Rights 1993, OEA/Ser.L/V.85 Doc. 9 rev. 11 February 1994, Chapter V; *Juvenile Reeducation Institute v. Paraguay*, Judgment (IACtHR, 2 Sep. 2004).

⁸ The African Commission on Human and Peoples’ Rights, *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights*, http://www.achpr.org/files/instruments/economic-social-cultural/achpr_instr_guide_draft_esc_rights_eng.pdf

Peoples' Rights and the European Court of Human Rights.⁹ The evolution of the MCOs in regional human rights is elaborated in the case studies below.

c. The Legal Basis of MCOs at the National Level

It is relatively rare for states to employ the “minimum core” terminology which may be due to the association of the doctrine with the UN ICESCR.¹⁰ That is, the minimum core doctrine is likely to be invoked when the ICESCR is invoked, which is not as common at the domestic level; and where the ICESCR is not invoked, but rather domestic legal norms, alternative terms are likely to be used. Fisher's review of selected jurisdictions suggests that it is very rare for states to employ the “minimum core” terminology, but that alternative terms such as ‘basic education’ in the context of the right to education, which resemble the minimum core doctrine do appear. In addition, there exist divergent approaches between institutions at the domestic level in relation to the UN ICESCR. In those instances where the courts are empowered to refer to the UN ICESCR (through incorporation of

international treaty for instance), Fisher suggests that courts are the appropriate institution to delineate the meaning and content of the minimum core.

⁹ See generally I.E. Koch, *Human Rights as Indivisible Rights: The Protection of Socio-Economic Demands Under the European Convention on Human Rights*, Dordrecht (2009), and jurisprudence such as; *Cypres v. Turkey* (2001), para. 219.

¹⁰ Similarly, in reviewing laws on social protection in India and Indonesia, Chopra notes that although “[j]udicial decisions that require a particular service to be delivered could be understood as impliedly including that service in the state's minimum, immediately effective obligations...courts have not engaged with the concept of the minimum core or sought to define it.” Surabhi Chopra, “Legislating Safety Nets: Comparing Recent Social Protection Laws in Asia”, *Indiana Journal of Global Legal Studies*, Vol. 22, No. 2 (Summer 2015), pp. 573-629. At the same time, Chopra observes that when Indian government attempted to prescribe the minimum requirements for ensuring “adequate quantity of quality food at affordable prices” in the National Food Security Act (2014), it created an unambiguous but extremely spare right that was far thinner than the conception of right to food under international standards. By contrast, Indonesia created a universal system of social security that avoids assigning immediately deliverable, minimum core duties to the state, but instead “conceptualizes social security as a right to be progressively realized, thereby creating expansive but weak rights”.

4. Choosing a taxonomy of minimum core obligations

“The starting-point in assessing the meaning, implications, and utility of the MCD is to arrive at a coherent and compelling interpretation of Paragraph 10.” Tasioulas¹¹

Taxonomies which seek to define the content MCD have emerged through discussion of the CESCR’s MCD in academic or policy spheres. Leading academics have addressed the MCD from different angles. Most of these anchor the MCD in minimum core obligations (MCOs), though some anchor it instead in rights. Some of the key taxonomies to emerge are: (i) Alston and Scott’s approach that seeks to identify a framework that make MCOs workable – they propose through universal and state specific standards; (ii) Young’s approach that addresses what MCO represent in terms of ‘normative value’ - essentially what makes MCOs, MCOs; and (iii) Tasioulas’s approach which focuses on the nature and implications of MCOs.

These key taxonomies are summarised and contrasted broadly below.

- i. **The “two minimum cores”:** This approach, advocated by Scott and Alston and broadly supported by Müller, proposes “two minimum cores” – one that is universal evidencing the absolute floor and another that is state-specific.¹² The ‘absolute floor of obligations’ terminology is used in relation to social security policy at the international and national levels.¹³ The state-specific obligations element was key to early developments at CESCR. Philip Alston, who played a key role in drafting the General Comment has observed that the original intention of the CESCR was that a minimum core would be set at the national level by the political authorities and its adequacy would subsequently be subjected to political contestation through the exercise of civil and political rights by

those affected. Subsequent work of CESCR has not integrated this approach however.

¹¹ John Tasioulas, Nordic Trust Fund /World Bank Paper 1, ‘*Minimum Core Obligations: Human Rights in the Here and Now*’, page 12 citing the Committee on Economic, Social and Cultural Rights, General Comment 3, ‘*The nature of States parties’ obligations*’, (Fifth session, 1990), U.N. Doc. E/1991/23, annex III at 86 (1991), reprinted in *Compilation of General Comments and General Recommendations*. Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 14 (2003). Paragraph 10 states: “*On the basis of the extensive experience gained by the Committee, as well as by the body that preceded it, over a period of more than a decade of examining States parties’ reports the Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its raison d’être. By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. Article 2 (1) obligates each State party to take the necessary steps “to the maximum of its available resources”. In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.*”

¹² Scott, Craig, and Philip Alston, “Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney’s Legacy and Grootboom’s Promise”, *South African Journal of Human Rights* 16 (2000): 206-268; Amrei Müller, “An Analysis of Health-Related Issues in Non-International Armed Conflicts” in Michael O’Flaherty and David Harris (eds) *The Relationship between Economic, Social and Cultural Rights and International Humanitarian Law*, Nottingham Studies on Human Rights (2013)

¹³ For example: CESCR, ‘Social protection floors: an essential element of the right to social security and of the sustainable development goals’ (15 April 2015) UN Doc. (E/C.12/2015/1, paras. 7-8).

- ii. **Young’s taxonomy** is based on the nature of *rights* associated with MCD. She identifies the MCD as being based on the essence, consensus or obligation of the rights. She explains that different bodies have sought to establish that MCOs should be representative of either the essence of the rights or ‘needs’ at issue;¹⁴ the consensus around the right;¹⁵ or the level of obligation around the right.¹⁶ It is highlighted that there is no consensus on the substantive meaning of each of the key aspects of rights. For example, there is no agreement as to whether the essence of the MCOs relates to the level of right realisation necessary for human survival or the level necessary for human dignity.
- iii. **Tasioulas’s taxonomy** is substantiated in the framework paper on MCOs and in his companion paper on the right to health. This taxonomy focuses on defining the nature of *obligations* rather than the nature of the rights in relation to the MCD. He considers the four key associated *features of MCOs* to be; **(a) Immediacy; (b) Special content; (c) Non-derogability; and (d) Justiciability**. He considers the hierarchy and prioritisation, compatibility and integrality of each feature to the MCO and advocates that immediacy is the defining feature. This taxonomy is developed below.

Box 3: Summary of MCD taxonomies in academic literature

Taxonomy	Advocate	Focus	Terms of definition	Challenges /Risks
“Two Minimum Cores View”	Scott and Alston	Blend of minimum obligations and content of rights	Absolute floor of obligations; State-specific obligations.	The process and practices for establishing state specific obligations have not been established.
“Three Approaches Taxonomy”	Young	Nature of rights	Essence; Consensus; Obligation	No consensus on framing rationale of survival or dignity
“Four Associations” Taxonomy	Tasioulas	Nature of obligations	Immediacy; Special content; Non-derogability; Justiciability	There is the general risk that the taxonomy reduces the significance or meaning of those rights not considered ‘minimum core’.

¹⁴ For example; the Inter- American Commission on Human Rights, in Annual Report 1979-1980, Inter-American Comm’n on Human Rights, OEA/Ser.L/V/II.50, doc. 13 rev. 1, at 2 (1980), available at <http://www.iachr.org/annualrep/79.80eng/chap.6.htm>. Supported by Fons Coomans, “Exploring the Normative Content of the Right to Education as a Human Rights: Recent Approaches”, <http://www.corteidh.or.cr/tablas/r27050.pdf> Also by David Bilshitz, “Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance”, 119 *S. African L.J.* 484 2002; “*The minimum core is to be specified in relation to the basic needs that we all share.*”

¹⁵ For example, this approach is employed by The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights 1997.

¹⁶ This is the approach developed by Tasioulas in his commissioned research.

5. Developing a Taxonomy

a. Nature of MCOs

As Tasioulas's taxonomy is the predominant one in this commissioned research, the following section explains its components in more depth. In the framework paper, Tasioulas describes the: **(i) concept (ii) scope, (iii) conceptual value, (iv) content, (v) challenges and (vi) indicators and benchmarks of MCOs**

i. Concept

With respect to **conceptual foundations**, Tasioulas establishes a basis for MCOs within international human rights law which in turn, he asserts, is grounded in morality and in concepts of justice.

ii Scope

In terms of scope, Tasioulas proposes that a distinction can be made between the interests that rights serve (e.g. health and education) and the interests to which they may be instrumental (e.g. friendship or knowledge).

Tasioulas rejects the approach which assumes that all rights partly justified by the interest in health form part of the right to health (the 'maximalist' approach identifiable in some UN General Comments). Instead he advocates for a more constrained approach to identifying rights situations. He gives the example of the right to health's scope of concern is determined by the subject-matter of the obligations associated with it, which primarily concern three matters: the provision of medical services, public health measures and some of the social determinants of health.¹⁷

With respect to **scope** in the wider sense, Tasioulas also includes actors. He states; "*Given that what*

is at issue are moral obligations corresponding to universal moral rights, there is no reason in principle to restrict the bearers of these obligations exclusively to states."¹⁸

iii Conceptual value

Conceptually, MCOs encompass a sub-set of ESCR obligations that must be immediately complied with in full by all states. This conceptual value sheds the prevailing and blanket dogma of 'progressive realisation' of ESC rights but according to Tasioulas, does not automatically confer related key characteristics of justiciability, non-derogability, and connection to an underlying value such as human dignity.

iv Content

In relation to **content**, Tasioulas proposes three main guidelines:

1. A plurality of types of obligations may in principle feature among the minimum core obligations of a given human right;
2. MCOs are a sub-set of human rights obligations and must satisfy both general and specific constraints pertaining to the proper *scope* of a given human right, the *possibility* of compliance, the imposition of an obligation not being unduly *burdensome*, and a holistic constraint of consistency with other obligations;
3. The MCD constitutes an *invariant* standard across different societies, irrespective of their differences in levels of available resources; in this way, the content of obligations of 'immediate effect' is truly universal

¹⁷ John Tasioulas, *supra* at page 8.

¹⁸ John Tasioulas, *supra* at page 7.

rather than variable in light differential resource endowments.

Furthermore, Art 2(2) ICESCR infers that there is a minimum core obligation on states not to discriminate on the impermissible grounds when seeking to secure Covenant rights. Therefore, in reality it is unlikely that any ESC right does not have an associated minimum core.

v Challenges

Tasioulas identifies 4 sets of objections to the MCD. They can be abbreviated to:

- Misplaced objection to non-derogable norms or justiciability of ESCR.
- That the process of identification lacks coherence, - 'is intolerably indeterminate'.
- That the MCD is excessively rigid, lacking sensitivity to important contextual factors that differ significantly from one state to another.
- The attempt to give legal effect to the MCD is likely to be counter-productive in practice.

On the key point that the MCD creates excessively rigid obligations that may be counter-productive in practice, Tasioulas argues: "*It is precisely the point of an adequate deployment of the MCD, on the invariant view, to identify immediate human rights obligations that apply to all states irrespective of resource variations.*"¹⁹ This does not exclude scope for some variance in relation to 'contextual or situational relativity', through 'margin of appreciation' or 'subsidiarity' or 'proportionality', nor does it exclude evolution in standards beyond the substantive standard.

vi Indicators and benchmarks

Tasioulas asserts: "*Assessing compliance with the minimum core obligations should draw on tools such as benchmarks and indicators, but that these could not displace the MCD from its vital role.*"²⁰ The effective use of indicators to monitor and enhance the implementation of human rights depends on responding to certain important challenges. Tasioulas highlights three:

- **Anchoring:** Indicators must be attached ('anchored') to key attributes of a given human right.

- **Contextualization:** Indicators must be context sensitive.
- **Fetishization:** Compliance with indicators must not be a replacement to enhancing compliance with human rights. Instead indicators should be seen as ways of promoting compliance with the MCD.²¹

b. Implications

Understanding MCD and Immediacy: - Are all MCO's Immediate and Vice versa?

Aligning MCD with immediacy potentially brings several benefits. Essentially, it addresses "*the thorny problem of the prioritization of competing demands*"²² arising from rights and responds to criticism that states can always plausibly justify non-compliance with any given obligation by appealing to the need to comply with other such obligations. In such contexts, the MCD doctrine can serve as a mechanism which sets a limit to permissible trade-offs and compliance delays in cases involving economic, social and cultural rights. The other characteristics of justiciability, non-derogability and special values are compatible with immediacy and are important but not uniform components of the MCD. All MCOs are immediate obligations. However immediate obligations may not be met due to lack of resources, and in such circumstances a duty to assist on the part of third parties emerges.

The CESCR Committee has repeatedly made clear that there are situations in which immediate achievement of MCOs will be impossible: for instance, in its statement that 'any assessment as to whether a State has discharged its MCO must also take account of resource constraints applying within the country concerned. For a state to be able to attribute its failure to meet at least its MCO 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. So an MCO undoubtedly creates a priority in terms of outlining what states must prioritise in terms of ESR realisation while accepting that it may not always be possible for states to satisfy the MCO, in which case a duty to assist emerges.

¹⁹ John Tasioulas, *supra*, at page 32.

²⁰ John Tasioulas, *supra*, at page 37.

²¹ John Tasioulas, *supra*, at page 36.

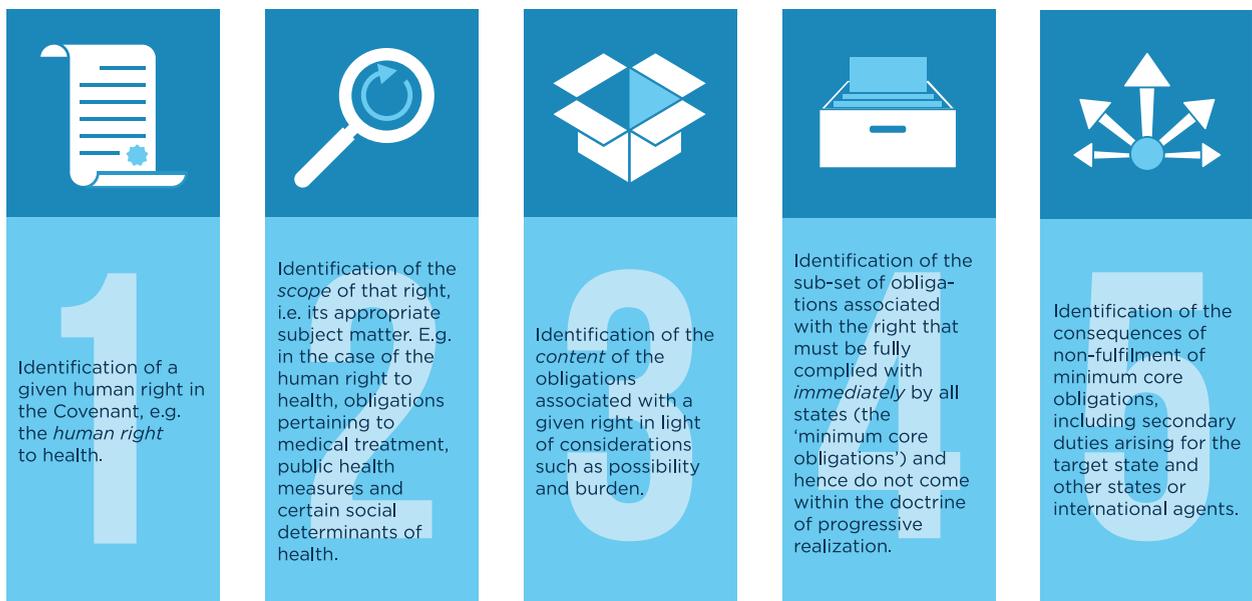
²² John Tasioulas, *supra*, at page 17.

6. A 5 Step Process for ‘MCO’ Identification

Tasioulas outlines schematically the steps that have to be followed in identifying the MCOs associated with any given right in the Covenant:

- **Step 1:** Identification of a given *human right* in the Covenant, e.g. the human right to health.
- **Step 2:** Identification of the *scope* of that right, i.e. its appropriate subject matter of its associated obligations. E.g. in the case of the human right to health, obligations pertaining to medical treatment, public health measures and certain social determinants of health
- **Step 3:** Identification of the *content* of the obligations associated with a given right in light of considerations such as possibility and burden.
- **Step 4:** Identification of the sub-set of obligations associated with the right that must be fully complied with *immediately* by all states (the ‘MCOs’) and hence do not come within the doctrine of progressive realization
- **Step 5:** Identification of the consequences of non-fulfilment of minimum core obligations, including secondary duties arising for the target state and other states or international agents.

Box 4: Five steps to identify MCOs



In the case studies below Steps 1-3 are grouped together (section a), and steps 4 and 5 treated separately (sections b and c respectively).

7. Case-Study I: Right to Education

The international human rights framework protects right to education in the UN ICESCR and the UN CRC and under regional human rights instruments in European, American and African contexts.

The MCD relates specifically to the ICESCR, therefore the following analysis identifies (a) the relevant provisions of the ICESCR, (b) commentary on which of these are ‘minimum core’ and (c) the implied meaning of minimum core. Many provisions, both overlapping and additional, on the right to education are included in the UN CRC. In order to ensure greater precision, this case study only considers the ICESCR provisions, but a further analysis could be applied to the UN CRC provisions.

a. Identification of ICESCR provisions on the right to education (Steps 1-3)

ICESCR, Article 13, provides that states are required to:

*“recognise the right of everyone to education...[,] agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. ... agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.”*²³

ICESCR, Article 13, also lists a series of measures necessary to achieve the full realization of this right:

(a) Primary education shall be compulsory and available free to all;

(b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;

(c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;

(d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;

(e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved. (Article 13(1) and (2)).²⁴

In addition, ICESCR, Article 14, further provides that if a state:

“[h]as not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, [the state] undertakes, within two years, to work out and

²³ ICESCR, Article 13.

²⁴ ICESCR, Article 13.

adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all."²⁵

The CESCR has also established that the following conditions apply to all ICESCR rights:

(i) states must *immediately* take steps towards realization of the right to education to the maximum of its available resources (i.e., inaction cannot be justified by lack of resources) and;

(ii) states must not adopt retrogressive measures (i.e., states cannot repeal existing guarantees or take backward steps that will minimize realization of rights).²⁶

b. Identifying MCOs within the ICESCR right to education? (Step 4)

In order to define the contours of the obligation, the work of the UN committees and international and national jurisprudence is of relevance. It is the treaty bodies, in relation to the right to education; the CESCR and CRC, that introduced the term “minimum core” and, (as noted by Fisher) they have predominantly defined the term for purposes of evaluating states’ compliance with the ICESCR. Although focusing on the ICESCR provisions, the work of both the CESCR and CRC, are relevant as both have interpreted the ICESCR provisions to have ‘minimum core’ content, as well as the work of the UN Special Rapporteur on the Right to Education. The extent to which the MCD has been interpreted and applied at the national level is also considered.

i. International level

The UN Special Rapporteur on the Right to Education has defined the three types of obligations attaching to the right to education in the following way:

In particular:

- the “respect” obligation means that the state must refrain from interfering with the enjoyment of the right to education (e.g., must respect the right of parents to choose their children’s schools),
- the “protect” obligation means that the state must prevent others from interfering with the enjoyment of the

right to education (e.g., ensuring that children are not prevented from attending schools by third parties), and

- the “fulfil” obligation means that the state must adopt measures towards full realization of the right (e.g., by ensuring that education is culturally appropriate, of good quality; taking appropriate legislative, regulatory and budgetary measures, etc.) The obligation to fulfil incorporates both an obligation to *facilitate* and an obligation to *provide*.²⁷

ii. National level

According to Fisher, at the national courts level “*minimum core*” term is rarely used in national laws, state reports to human rights bodies or jurisprudence.” Most (but not all) states’ national laws guarantee the right to compulsory free primary education – this generally includes, provision of schools, furniture, textbooks, and transportation. These are considered to be essential conditions to the realization of the right to basic education. This possibly stems from the Article 14 general recognition that the right to primary education for all includes obligation to provide education to children with disabilities, children in detention and other vulnerable groups.

²⁵ ICESCR, Article 14.

²⁶ ?

²⁷ Special Rapporteur on the Right to Education: <http://www.ohchr.org/EN/Issues/Education/SREducation/Pages/SREducationIndex.aspx>

Fisher provides the following summary of the MCOs²⁸ :

“Minimum Core” obligations for the right to education:

- to provide access to public educational institutions and programs without discrimination (this includes the requirement for government to establish and fund educational institutions as well to permit third party to do so)
- to secure access for all to primary education that is compulsory and free of charge to ensure that education is of good quality (this includes the requirement that the government set minimal standards of health and safety as well professional requirements for teachers)
- to ensure that education is directed to the development of human personality and sense of dignity, that it enables all persons to participate in a free society, and that it promotes understanding among ethnic, national, racial and religious groups
- to ensure that instruction is provided in appropriate language so that the language is not foreign to either the students or the teachers
- to prohibit corporal punishment
- to adopt and implement a national educational strategy which includes provision for secondary, higher and fundamental education; and
- to ensure free choice of education without interference from the State or third parties, subject to conformity with “minimum educational standards”

c. What has MCD been interpreted to mean in relation to the right to education? (Step 5)

The following analysis applies the taxonomy developed by Tasioulas in order identify the qualitative dimension of the MCD in relation to the right to education. The next section mirrors this analysis in relation to the right to health. The analysis seeks to identify factors that are consistent to the MCD across legal systems in both developed and developing countries.

i. Immediacy

MCOs are subject to immediate realization. MCD is not subject to availability of resources and not dependent on the level of development, although the regional treaty bodies (and some national courts) differentiate between the existence of the MCO and implementation of the said obligation (the latter is subject to availability of resources).

UN Committee on Economic, Social and Cultural Rights, General Comment 3, para. 10 implies immediacy:

“If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its raison d’être. By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. Article 2 (1) obligates each State party to take the necessary steps “to the maximum of its available resources”. In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.”²⁹

²⁸ Angelina Fisher, Nordic Trust Fund /World Bank Paper 3, “Minimum Core” and the “Right to Education”, October 2017.

²⁹ Para 10, Committee on Economic, Social and Cultural Rights, General Comment 3, ‘The nature of States parties’ obligations’, (Fifth session, 1990), U.N. Doc. E/1991/23, annex III at 86 (1991), reprinted in Compilation of General Comments and General Recommendations. Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 14 (2003).

ii. Non-derogability

Only the African Commission takes the view that “minimum core” obligations are non-derogable.

iii. Universality

There is a lack of clarity if the MCO is universal, state-specific or both.

iv. Prioritisation

When resources are scarce, the MCO pertaining to the right to education require that prioritization is to be given to vulnerable children.

8. Case-Study II: Right to Health

As Paul Hunt, former UN Special Rapporteur on the right to health, and lead author of General Comment 14, observed recently: ‘Guidelines on international economic, social, and cultural rights are increasing. Nonetheless, on the whole, the international interpretation and application of these human rights is a relatively recent enterprise’³⁰

a. Identification of ICESCR provisions on the right to health (Steps 1-3)

The human right to health is enshrined in Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). It provides:

1. *The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.*
2. *The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:*
 - (a) *The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;*
 - (b) *The improvement of all aspects of environmental and industrial hygiene;*
 - (c) *The prevention, treatment and control of epidemic, endemic, occupational and other diseases;*

*(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.*³¹

In addition, the human right to health – standardly, in the formulation of a ‘right of everyone to the enjoyment of the highest attainable standard of physical and mental health’ - has been incorporated into a large number of subsequent treaties and United Nations instruments.³²

Also, as with the right to education case study, Article 14 ICESCR is relevant to the application of the right to health.

b. Identifying MCOs within the ICESCR right to health (Step 4)

i. International

Sub- Step 1: ‘Essential primary care’

With respect to the right to health, CESCR includes ‘*essential primary health care*’ as an MCO.³³ As Tasioulas notes, the possibility that forms of secondary and tertiary health care, or certain social determinants of health, also feature among

³⁰ P. Hunt, ‘Interpreting the International Right to Health in a Human Rights-Based Approach to Health’, *Health and Human Rights Journal* (2016), p.13.

³¹ International Covenant on Economic, Social and Cultural Rights, GA Res 2200 (XXI) A (UN Doc A/6316) at 49 (Dec. 16, 1966)

³² UN world summits that reference the right to health include the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights (Vienna), 14-15 June, 1993, esp. paras. 11, 18, 24, 31, and 41; the Programme of Action of the United Nations International Conference on Population and Development; and the Declaration and Programme of Action of the Fourth World Conference on Women. Three of the eight UN Millennium Development Goals (December 2000) (MDGs) directly relate to the right to health: reducing child mortality (4); improving maternal health (5) and combating HIV/AIDS, malaria and other diseases.

³³ Para. 10.

the right's MCO is left open. The synergy between 'essential primary' health care and MCO leads to questions of definition in relation to 'essential' and 'primary'.

Tasioulas's uses UNICEF's formula for 'selective primary health care' (known as the GOBI FF) to fill the gap. This acronym encompasses the following (capitalization added):

*"[G]rowth monitoring for under nutrition;
Oral rehydration therapy to treat childhood diarrhoea;
Breastfeeding to ensure the health of young children and
Immunization against six deadly childhood diseases' supplemented by 'food supplementation;
Family spacing; and
Female education."*³⁴

Tasioulas also supports Tobin's extension that selective primary health care should also combine:

*"the provision of food and water necessary for survival as an account of a feasible set of minimum core obligations associated with the right to health."*³⁵

Tasioulas critiques this definition on the basis that; "[D]espite its strength at the level of principle, it does not enjoy strong support in international legal practice as an exhaustive account of the minimum core obligations of the right to health."³⁶

Sub-Step 2: Expansive obligations in relation to services, other rights and public health measures.

General Comment 14 offers a more detailed and expansive set of MCOs than General Comment 3's reference to "essential primary health care" and adopts a wide-ranging characterization of the human right to health as a whole which covers: services; other human rights;³⁷ and extensive public health measures and social determinants of health within the content of the right to health.

General Comment 14 sets out schedule of MCOs under the right to health in para. 43 (a)-(f):

- (a) To ensure the right of access to health facilities, goods and services on a non-discriminatory basis especially for vulnerable or marginalized groups;
- (b) To ensure access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone;

- (c) To ensure access to basic shelter, housing and sanitation and an adequate supply of safe and potable water;

- (d) To provide essential drugs from time to time defined under the WHO Action Programme on Essential Drugs;

- (e) To ensure equitable distribution of all health facilities, goods and services;

- (f) To adopt and implement a national public health strategy and plan of action on the basis of epidemiological evidence, addressing the health concerns of the whole population; the strategy and plan of action shall be devised and periodically reviewed, on the basis of a participatory and transparent process; they shall include methods, such as right to health indicators and benchmarks, by which progress can be closely monitored; the process by which the strategy and plan are devised as well as their content, shall give particular attention to all vulnerable and marginalized groups.

The Comment also lists a series of obligations of "comparable priority" to those enumerated as featuring in the minimum core:³⁸

- (a) To ensure reproductive, maternal (pre-natal as well as post-natal) and child health care;
- (b) To provide immunization against the major infectious diseases occurring in the community;
- (c) To take measures to prevent, treat and control epidemic and endemic diseases;
- (d) To provide education and access to information concerning the main health problems in the community, including methods of preventing and controlling them; and
- (e) To provide appropriate training for health personnel, including education on health and human rights.

³⁴ UNICEF, *State of the World's Children 2009* (New York, 2009), p.31.

³⁵ J. Tobin, *The Right to Health in International Law*, p.247.

³⁶ John Tasioulas, Paper 1, 'Minimum Core Obligations: Human Rights in the Here and Now', at page 6.

³⁷ General Comment 14, the right to health, para 3.

³⁸ General Comment 14, The Right to Health, para 44.

Sub-Step 3: Extension to sexual and reproductive health
The ESCR's Committee's General Comment No.22, on The Right to Sexual and Reproductive Health, specifies core obligations in this sub-field of the human right to health:

49. States parties have a core obligation to ensure the satisfaction of, at the very least, minimum essential levels of the right to sexual and reproductive health. In this regard, States parties should be guided by contemporary human rights instruments and jurisprudence, as well as the most current international guidelines and protocols established by the UN agencies, in particular WHO and UNFPA. The core obligations include at least the following:

(a) To repeal or eliminate laws, policies and practices that criminalize, obstruct or undermine individual's or particular group's access to sexual and reproductive health facilities, services, goods and information;

(b) To adopt and implement a national strategy and action plan, with adequate budget allocation, on sexual and reproductive health, which is devised, periodically reviewed and monitored through a participatory and transparent process, disaggregated by the prohibited grounds of discrimination;

(c) To guarantee universal and equitable access to affordable, acceptable and quality sexual and reproductive health services, goods and facilities, in particular for women and disadvantaged and marginalized groups;

(d) To enact and enforce the legal prohibition of harmful practices and gender-based violence, including female genital mutilation, child and forced marriages and domestic and sexual violence including marital rape, while ensuring privacy, confidentiality and free, informed and responsible decision-making, without coercion, discrimination or fear of violence, on individual's sexual and reproductive needs and behaviors;

(e) To take measures to prevent unsafe abortions and to provide post-abortion care and counselling for those in need;

(f) To ensure all individuals and groups have access to comprehensive education and information

on sexual and reproductive health, that is non-discriminatory, non-biased, evidence-based and taking into account the evolving capacities of children and adolescents;

(g) To provide medicines, equipment and technologies essential to sexual and reproductive health, including based on the WHO Essential Medicines List; and

(h) To ensure access to effective and transparent remedies and redress, including administrative and judicial ones, for violations of the right to sexual and reproductive health.³⁹

ii. Regional

The African Commission on Human and Peoples' Rights:

MCOs are explicitly adopted in the 'Principles and Guidelines on the Implementation of Economic, Social, and Cultural Rights' of the Banjul Charter, passed by the African Commission on Human and Peoples' Rights.⁴⁰ The Principles identify the following MCOs associated with that right, echoing much of the analysis in General Comment 14 (para. 67):

The MCOs of the right to health include the following at a minimum:

a. Ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalised groups;

b. Ensure the provision of essential drugs to all those who need them, as periodically defined under the WHO Action Programme on Essential Drugs, and particularly anti-retroviral drugs;

c. Ensure universal immunisation against major infectious diseases;

d. Take measures to prevent, treat and control epidemic and endemic diseases;

³⁹ The ESCR's Committee's General Comment No.22, on The Right to Sexual and Reproductive Health. At para 49.

⁴⁰ African Commission on Human and Peoples' Rights, Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, http://www.achpr.org/files/instruments/economic-social-cultural/achpr_instr_guide_draft_esc_rights_eng.pdf

e. Provide education and access to information concerning the main health problems in the community, including methods of preventing and controlling them.

African Commission Jurisprudence:

There has not been a significant amount of litigation on the right to health at either national or regional levels in Africa.⁴¹ However, one regional case worth mentioning is *Purohit v The Gambia*, where the Commission not only accepted the doctrine of progressive realization – the doctrine that provides the background rationale for the MCD’s operation – but also stressed the importance of non-discrimination in the fulfilment of the right to health, an element with a strong claim to inclusion within the core obligations associated with that right: ‘having due regard to this depressing but real state of affairs [poverty in Africa rendering the full realization of the right to health impossible], the African Commission would like to read into article 16 the obligation on part of states party to the African Charter to take concrete and targeted steps, while taking full advantage of its available resources, to ensure that the right to health is fully realised in all its aspects without discrimination of any kind’.⁴²

Inter-American System Jurisprudence:

The MCO “to ensure access to . . . an adequate supply of safe and potable water”, specified by the ESCR Committee as part of the right to health (General Comment No. 14, para. 43(c)), was explicitly recognized by the Inter-American Court in *Xákmok Kásek Indigenous Community v. Paraguay*.⁴³ The Court found that Paraguay had violated the right to a dignified life under Article 4(1) of the American Convention, by failing to provide sufficient amounts of water to an indigenous community that had been forced off its land. The Court cited General Comment No. 15 of the CESCR in support of a specific MCO to provide 7.5 litres of water per person per day:

Gonzales Lluy and Family v Ecuador,⁴⁴ a case involving treatment for infection with HIV as a result of a blood transfusion. In a key passage, the Court explicitly drew a connection between the right to health in the Protocol of San Salvador and the MCOs set out in General Comment 14, especially

to provide essential drugs. The Court protected the right to health through its connectivity with the justiciable rights to life and to personal integrity, finding a violation of “the obligation to monitor and supervise the provision of health care services, within the framework of the right to personal integrity and of the obligation not to endanger life”.⁴⁵

European:

The Revised European Social Charter, however, includes in its Article 11 a right to health but makes no explicit reference to MCOs or obligations of immediate effect; rather the European jurisprudence includes the phrase “take appropriate measures”, which is suggestive of the doctrine of progressive realization.

iii. Domestic

Selective examples from national jurisprudence are focused on ‘obligations of immediacy’ not on ‘minimum core obligations’. Tasioulas finds that: “*The comparison between the jurisdictions suggests six major conclusions: (a) even when a minimum core obligation exists under the right to health, it may nonetheless be derogable in the light of resource limitations; (b) that the existence of minimum core obligations is a separate matter from the question of how best they are best implemented, in particular, the question of the nature of the role, if any, that should be accorded to courts in defining and enforcing them (c) that the modes of judicial implementation are various, and are not limited to the case of individual claimants being able to enforce their right to their individual entitlements through the courts, (d) that courts may play an important role alongside other organs of the state in defining and enforcing minimum core obligations, (e) that*

⁴¹ See, for a comprehensive and recent overview, E. Durojaye (ed), *Litigating the Right to Health in Africa: Challenges and Prospects*.

⁴² *Purohit v The Gambia* (2003) AHRLR 96, para 84.

⁴³ *Xákmok Kásek Indigenous Community v. Paraguay*, Series C no. 21 (2010) http://www.corteidh.or.cr/docs/casos/articulos/seriec_298_ing.pdf. See also subsequent case of *Chinchilla Sandoval and Others v Guatemala* http://www.corteidh.or.cr/docs/casos/articulos/seriec_312_esp.pdf (regarding a woman with diabetes who died in prison, raising questions of access to adequate treatment – case not yet available in English translation)

⁴⁴ *Gonzales Lluy and Family v Ecuador* (Judgment of 1 September, 2015).

⁴⁵ *Id.*, para. 193.

the role of the respective organs of government in these processes may legitimately vary from one jurisdiction to another, depending on contextual factors, such as judicial traditions, the relative efficacy and legitimacy of various branches of government, and so on; and (f) that essential medicines (including antiretrovirals for HIV infection), non-discrimination, and access to minimum levels of food and water figure prominently among obligations of immediate effect in states where the notion of minimum core obligations is recognized.”⁴⁶

c. What has MCD been interpreted to mean in relation to the right to health? (Step 5)

As with the right to education, the following analysis applies the taxonomy developed by Tasioulas for the MCD to the right to health. The analysis seeks to identify factors that are consistent to the doctrine across legal systems in both developed and developing countries. The following draws on Tasioulas’s report *The Minimum Core of the Human Right to Health*.

Implications for process

Tasioulas draws several inferences in relation to process:

- “Perhaps the most compelling contribution [of General Comment 14] is the emphasis MCD places on non-discrimination in the access to health facilities, services and goods in para. 43(a).” This non-discriminatory norm seems a pre-eminent candidate for inclusion within MCOs attached to the right to health because it reflects a background right of non-discrimination (Art. 2(2) of the Covenant) which, like civil and political rights generally, imposes obligations of ‘immediate effect’.⁴⁷
- “Another significant aspect of the account of MCOs elaborated by the General Comment is the emphasis on transparent and participatory procedures in the formulation of health policy in para. 43(f). Both innovations highlight the fact that in addition to the delivery of goods and services, MCOs of the right to health may also incorporate demands regarding just procedures.”
- Furthermore, as Tasioulas notes, General Comment 14 addresses lack of resources by generating obligation of prioritisation and of international assistance: ‘If resource constraints render it impossible for a State to comply fully with its Covenant obligations, it has the burden of

justifying that every effort has nevertheless been made to use all available resources at its disposal in order to satisfy, as a matter of priority, the obligations outlined above.’⁴⁸ States unable to comply with right to health are under an obligation to seek international cooperation and assistance,⁴⁹ and developed countries have an obligation to provide cooperation & assistance (Art 2(1) ICESCR).

Immediacy

Certain health obligations are of immediate effect and are not subject to progressive realization. This includes core obligations, such as non-discrimination. The Sustainable Development Goals reflect a number of core obligations, such as access to health facilities, goods and services on a non-discriminatory basis, access to food, shelter, housing and sanitation, safe and potable water and essential medicines, and ensuring universal coverage of health-care services. Other core obligations that will be essential to realizing the Goals include the revision of the national and subnational legal and policy environment and the amendment or enactments of laws and policies when necessary; the adoption of a national health strategy that addresses the right to health; and the equitable distribution of health facilities, goods and services.⁵⁰

The African Commission on Human and Peoples’ Rights:

MCOs are explicitly enshrined in The African Commission on Human and Peoples’ Rights, ‘Principles and Guidelines on the Implementation of Economic, Social, and Cultural Rights’ in the Banjul Charter.⁵¹ The Principles characterize ‘minimum core obligations’ as among ‘immediate’ obligations that set a limit to the doctrine of progressive realization

⁴⁶ John Tasioulas Paper 2, *The Minimum Core of the Human Right to Health* at page 28.

⁴⁷ See also CEDAW COMMITTEE, Gen Rec 24 on the right to health of women under article 12 of the Convention. Committee on the Elimination of Discrimination against Women, General Recommendation No. 24, ‘Women and Health’, UN Doc A/54/38 Rev 1 (1999): states under an obligation to ensure non-discriminatory access to health care for women, and that these health care services must take into account the particular needs of women.

⁴⁸ General Comment 14, the right to health, para 5.

⁴⁹ General Comment 14, the right to health, para 52.

⁵⁰ “Right of everyone to the enjoyment of the highest attainable standard of physical and mental health” (5 August 2016), UN Doc A/71/304, para. 28. See also para 77.

⁵¹ African Commission on Human and Peoples’ Rights, *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights*, http://www.achpr.org/files/instruments/economic-social-cultural/achpr_instr_guide_draft_esc_rights_eng.pdf

(para. 16): “These obligations include but are not limited to the obligation to take steps, the prohibition of retrogressive steps, minimum core obligations and the obligation to prevent discrimination in the enjoyment of economic, social and cultural rights.”

MCOs, understood as obligations of *immediate effect*, is mobilised also in the Commission’s ‘Resolution on Access to Health and Needed Medicines in Africa’,⁵² which requires states to meet ‘immediately... the minimum core obligations of ensuring availability and affordability to all of essential medicines as defined by the country’s essential medicines list and the WHO Action Programme on Essential Drugs’.

Non-derogability

The Committee has occasionally described core obligations as non-derogable⁵³ and at other times suggested that MCOs may be overridden in some cases of resource constraints: “*in order for a State part to be able to attribute its failure to meet at least its MCOs to a lack of available resources it must demonstrate that every effort has been made to use all resources at are at its disposition in an effort to satisfy, as a matter of priority, those minimum*

obligations”.⁵⁴ There is also precedent from the Inter-American System where it was found that member States bore an obligation ‘regardless of the level of economic development, to guarantee a minimum threshold of these rights [in the American Declaration and the American Convention]’.⁵⁵

Tasioulas notes that “The non-derogability of the MCOs of the right to health was apparently reaffirmed more recently in a report of the Special Rapporteur on the right to health”⁵⁶ but concludes that it is difficult to draw conclusions in relation to derogability.

⁵² The African Commission on Human and Peoples’ Rights, meeting at its 44th Ordinary Session held in Abuja, Federal Republic of Nigeria, from the 10th to 24th November 2008, available <http://www.achpr.org/sessions/44th/resolutions/141/>

⁵³ General Comment 14, the right to health, para 47.

⁵⁴ UN CESCR General Comment No.3,

⁵⁵ Annual Report of the Inter-American Commission on Human Rights 1993, OEA/Ser.L/V.85, Doc. 9 rev.11 February 1994, Chapter V, available at <http://www.cidh.org/annualrep/93eng/chap.5.htm>

⁵⁶ Right of Everyone to the enjoyment of the highest attainable standard of health”, (11 August 2014) UN Doc A/69/150, para 11: ‘Even if an obligation of immediate effect depends on resources, a State may not rely on the lack of resources as a defence or excuse for not fulfilling the obligation’.

9. Indicators

One of the most significant influences shaping the content of human rights, national priorities, and relatedly MCOs, is the growing use of human rights indicators.⁵⁷

Fisher notes that: “As early as 1990, then-Special Rapporteur on Economic, Social and Cultural Rights, Danilo Türk noted that “*indicators can . . . assist in the development of the ‘core contents’ of some of the less developed rights . . . , and can provide a basis from which a ‘minimum threshold approach’ can be developed.*”⁵⁸ [...] Since then, the popularity of indicators has increased exponentially.” Their intended use has been for monitoring compliance rather than defining the content of the rights., however these objectives can overlap with detrimental consequences.⁵⁹

In relation to the right to education; a list of proposed human rights indicators has been prepared by the Office of High Commissioner for Human Rights which include structure, process and outcome indicators. Moreover, the OHCHR Right To Education Project provides a public list of 150 indicators for measuring the right to education (the project is in the process of creating a Right to Educations Index); SDGs has 11 indicators for Goal 4 (Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all), the World Bank has over 3000 education-related indicators (which includes education-related indicators produced by other organizations, like the OECD), and there is an additional group of indicators that measure learning (e.g., TIMSS, PIRLS, PISA, UWEZO, etc.)

In relation to the right to health; the OHCHR has likewise developed a detailed set of human rights indicators, which also include structure, process and outcome indicators. Furthermore the Sustainable Development Goals Indicators (IAEG-SDGs) propose two indicators related to the SDG of ‘universal health coverage’.⁶⁰ These are; one to monitor tracer interventions (e.g. complete childhood immunization,

antiretroviral therapy, skilled birth attendance) and the other to monitor the proportion of a population protected from catastrophic or impoverishing out-of-pocket health expenditures.⁶¹

The intersection of indicators with MCD should be noted with caution. The qualitative dimensions of the MCOs (which have been central to this NTF research) risk redefinition or even omission if reduced to numerics, and potentially risk being politicised. In her paper, Fisher notes: “*Indicators are inherently reductive. [...] the creation of global indicators is often a highly political process, as negotiations over SDG indicators aptly illustrated, where deciding which indicator to chose often has little to do with what is normatively desirable or relevant to the rights regime but rather with what is measurable and what data is available.*”

⁵⁷ See e.g. OHCHR, *Human Rights Indicators: A Guide to Measurement and Implementation* (2012); World Bank: *Human Rights Indicators in Development: An Introduction* (2010).

⁵⁸ U.N. Econ. & Soc. Council [ECOSOC], Realization of Economic, Social and Cultural Rights, ¶ 7, U.N. Doc. E/CN.4/Sub.2/1990/19 (July 6, 1990). Young advocates for such use of indicators as well. Young, *supra*. See also, around the same time; World Conference on Human Rights, Apr. 19-30, 1993, Report on the Seminar on Appropriate Indicators to Measure Achievements in the Progressive Realization of Economic, Social and Cultural Rights, 3, U.N. Doc. A/CONF.157/PC/73 (Apr. 20, 1993).

⁵⁹ For an excellent analysis on the use of human rights indicators, see Ann Janette Rosga and Meg Satterthwaite, “The Trust in Indicators: Measuring Human Rights,” 27 Berkeley J. Int’l L. 256 (2009), http://its.law.nyu.edu/faculty/profiles/representiveFiles/satterthwaite%20-trustinindicators_F87546AC-1B21-6206-60D8FF1DE73901F1.pdf

⁶⁰ SDG Sub-Goal 3.8: “*Achieve universal health coverage, including financial risk protection, access to quality essential healthcare services and access to safe, effective, quality and affordable essential medicines and vaccines for all.*”

⁶¹ United Nations Statistics Division, *Results of the list of indicators reviewed at the second IAEG-SDG meeting* (November 2, 2015).

Another widely held objection to reliance on indicators is that collecting and reporting data is a resource-intensive process and that there is a dearth of reliable data and varying statistical capacity across states. States are already mandated to report a plethora of indicators and data,⁶² and given the scarcity of resources and lack of capacity experienced by many countries, states may spend resource on the collection of certain data rather than investing in state infrastructure to improve areas of rights provision.⁶³

⁶² See *Follow-Up and Review of the Sustainable Development Goals Under the High Level Political Forum* (2015), Annex 1, report prepared by the NYU Law International Organizations Clinic and UNDP. In addition to mandated reporting, a list of proposed human rights indicators has been prepared by the Office of High Commissioner for Human Rights; the Right To Education Project provides a public list of 150 indicators for measuring the right to education (the project is in the process of creating a Right to Education Index); SDGs has 11 indicators for Goal 4 (Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all), the World Bank has over 3000 education-related indicators (which includes education-related indicators produced by other organizations, like the OECD), and there is an additional group of indicators that measure learning (e.g., TIMSS, PIRLS, PISA, UWEZO, etc.)

⁶³ This concern was raised at the NTF Project Expert Validation Meeting held at the World Bank on June 20th 2017.

Conclusion

This paper consolidates research undertaken to define and substantiate the MCD at the heart of the UN's ESCR framework, including in-depth research of the MCD in the rights to health and education. It has explained the origins MCD within the work of the UN's Committee on Economic, Social and Cultural Rights, its interpretation in the academic literature and the significance of the MCOs for understanding and prioritising the legal obligations attached to ESCR. The paper has also outlined how the introduction of the MCD signals a paradigm shift from the prevailing dogma of 'progressive realisation' of ESCR which is sometimes deployed to defend failures to dedicate adequate resources to ESCR or justify shortcomings or delays in terms of ESCR realization. MCD signals that the rights at issue are subject to obligations of universal application with immediate effect.

In substantiating the MCD through MCOs, this paper does not purport to create a 'shopping list' of human rights obligations that bind states. Rather, it has sought to identify an analytical framework by which states and other stakeholders (including development partners) can work towards identifying MCOs in respect of ESCR on a case-by-case basis. The work of UN CESCR provides guidance and broad recommendations for countries in order to do this. This research has sought to bring that guidance to life by answering some of the questions which arise in relation to MCOs and to draw on UN, regional and domestic practice to develop an account of its practical application for the rights to health and education.

General questions that frequently arise include: 'are the MCOs universal or state-specific obligations?' and are 'ESCR justiciable?'. On the basis of the UN documentation and academic commentary this research concludes that MCOs are universal in principle, but that they may operate differently according to context. In relation to justiciability, the research undertaken by Angelina Fisher for this project demonstrates

that many jurisdictions have incorporated ESCR so as to make them justiciable in domestic courts. The research undertaken by John Tasioulas establishes that justiciability is not a pre-condition for an obligation to be considered as a MCO.

Questions outstanding relate to the specific nature of MCOs in given contexts, for example in relation to public health or primary education in development contexts. As the number of contexts is inexhaustible, not to mention ever-changing, so too is the precise nature of obligations attached to each context. This research has attempted to consolidate what we do know about the operation of MCOs in relation to the right to education and the right to health from UN documentation, state and regional practice. Beyond this it has sought to develop a framework through which obligations may be identified.

While identifying certain human rights obligations as MCO helps to prioritise the rights they attach to, and whilst there may be emerging practice about identifying those rights, outstanding questions remain in relation to the prioritisation of rights. In particular,

who should decide on that prioritisation – the state, UN, regional bodies, communities or stakeholders? What effect does the classification of certain rights

as subject to MCOs have on the wider catalogue of ESCR. In other words, what are the risks attached to this endeavour, beyond its clear benefits?



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