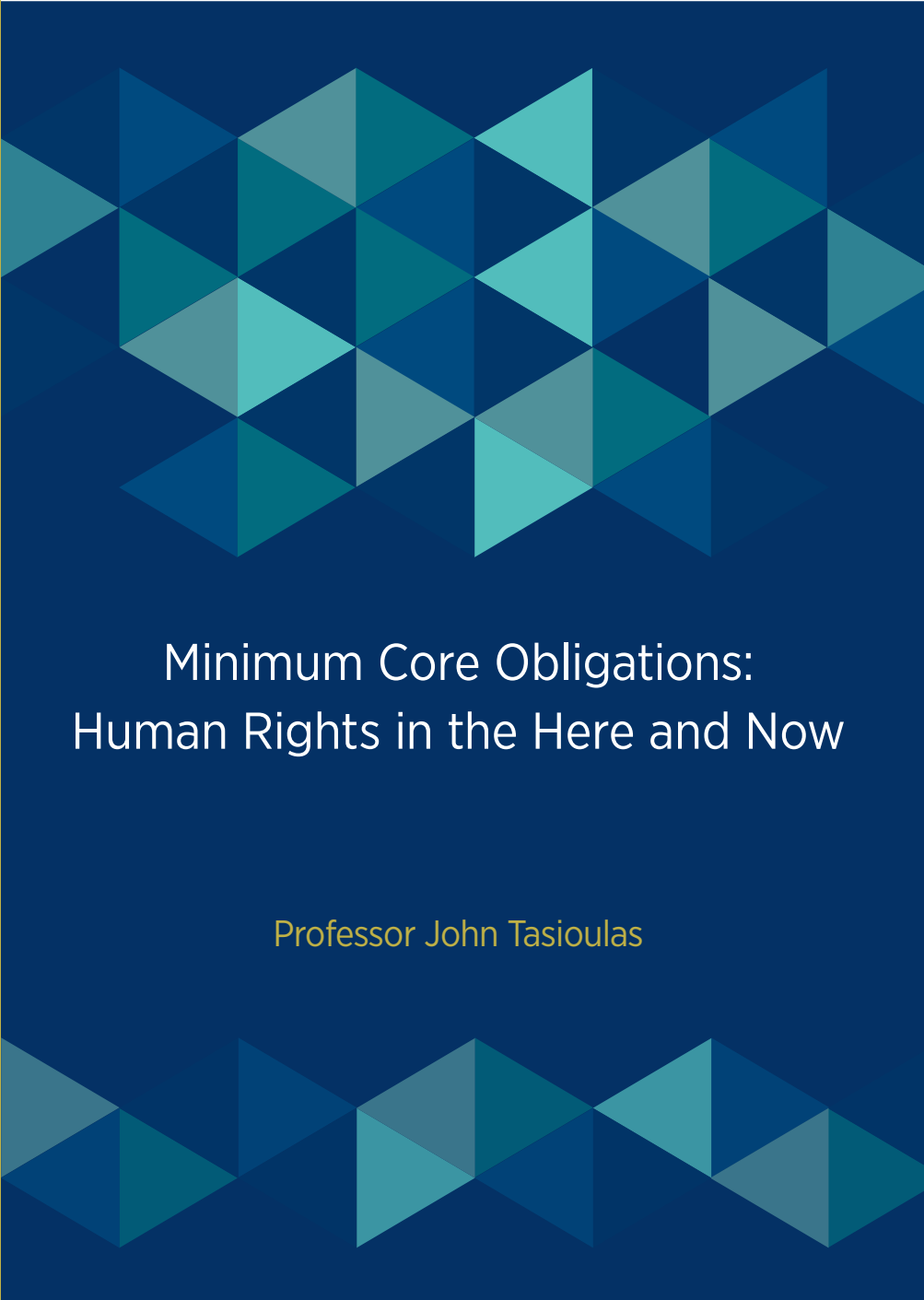


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Minimum Core Obligations: Human Rights in the Here and Now

Professor John Tasioulas



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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.

Executive Summary

- **Foundations:** The formative point of international human rights law (IHRL) is to give effect to a background morality of human rights, but only insofar as it is appropriate to do so through the technique of assigning individual legal rights to all human beings. The morality of human rights consists in universal moral rights, i.e. moral rights possessed by all human beings simply in virtue of their humanity. Central to the distinctive nature of moral rights is that their normative content is given by associated obligations. Although a variety of considerations (human dignity, needs, universal interests, etc.) typically ground human rights, the process of establishing their counterpart obligations is sensitive to what is feasible, in the sense of possible and not unduly burdensome. Human rights are a crucial element of the objectives of sustainable development, but they do not exhaust those objectives.
- **Concept:** Civil and political human rights, such as those set out in the International Covenant on Civil and Political Rights, are generally interpreted as imposing obligations of ‘immediate effect’. By contrast, the rights set out in the International Covenant on Economic, Social and Cultural Rights are subject to a doctrine of ‘progressive realisation’ (Article 2(1)) that enables them to be complied with over time in light of available resources). ‘Minimum core obligations’, however, are the sub-set of obligations associated with economic, social and cultural rights that must be *immediately* complied with *in full* by *all states*. Minimum core obligations, so understood, are obligations of ‘immediate effect’ to which the doctrine of ‘progressive realisation’ is inapplicable.
- On the view defended in this Framework Report, it is not a defining feature of minimum core obligations that they are justiciable, non-derogable or that they enjoy a special connection to an underlying value, such as human dignity or basic needs. Whether a given minimum core obligation is, or should be, justiciable or non-derogable, or whether it has a special connection to a particular underlying value, is a further matter to be assessed on the merits, case-by-case.
- **Value:** Minimum core obligations help address the problem of how to prioritize compliance with human rights obligations in the context of resource limitations by setting a minimum standard that applies to all states irrespective of differences among them. This minimum standard specifies those obligations associated with economic, social and cultural rights that all states must immediately comply with in full.
- **Content:** The content of minimum core obligations is to be determined by a process that reflects the following considerations:
 - a. The potential plurality of types of obligations comprehended in the core, e.g. obligations to respect, protect, fulfil, primary and secondary

obligations. Among the secondary obligations, it is worth highlighting the role of obligations to seek assistance on the part of a state unable to satisfy its primary minimum core obligations, and corresponding obligations to provide assistance on the part of states or other agents in a position to assist the state in question.

- b. Constraints on human rights obligations generally, and minimum core obligations in particular, e.g. (i) what properly belongs within the scope of a given human right, (ii) constraints of feasibility, including possibility of compliance and whether imposition of a given obligation would be unduly burdensome, and (iii) the holistic constraint of consistency with other obligations, including other minimum core obligations which must also be complied with immediately and in full;
- c. The invariance of the content of minimum core obligations across different states despite variations in resource endowments among them. Minimum core obligations are a uniform set of obligations that specify the minimum all states are required to do by way of immediate compliance with economic, social and cultural rights. The substantive content of these obligations does not vary from state to state.

A schematic account is offered of the derivation of a specific minimum core obligation: the obligation to prevent hunger under the right to adequate food.

- **Challenges:** Two major challenges to the doctrine of minimum core obligations are outlined and addressed:
 - a. Although minimum core obligations set an invariant standard that applies to all states, rather than one that varies in line with resource differences among them, it does not render human rights law unduly inflexible in responding to contextual differences among states in the application of human rights norms; and
 - b. Although it is possible that the minimum core doctrine generates a risk that it will be counter-productive in relation to the objective of compliance with human rights obligations generally, there are plausible ways of minimizing this risk.
- **Indicators and Benchmarks:** Well-crafted indicators and benchmarks are potentially valuable statistical tools for monitoring compliance with human rights obligations, including minimum core obligations, and enhancing future compliance. Among other things, their judicious employment may help ameliorate the risk that identifying certain obligations as belonging to the 'core' may be variously counter-productive in effect.

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1. Introduction

The doctrine of the ‘minimum core’ (MCD) has in recent decades achieved prominence within international human rights law (IHRL) and practice. This enhanced profile is largely attributable to the activities of the United Nation’s Committee on Economic, Social and Cultural Rights (henceforth, ‘the Committee’). As this origin indicates, the MCD has been articulated in relation to the sub-set of human rights, usually denominated as ‘economic, social and cultural rights’, that are set out in the International Covenant on Economic, Social and Cultural Rights (henceforth, ‘the Covenant’).¹ In addition, some regional and domestic legal regimes, notably in Africa and South America, have recognised some version of the MCD in relation to constitutional or legal rights.² However, this report will almost exclusively concentrate on the nature and value of the MCD as it has developed within international law and practice.

In spite of the currency enjoyed by the MCD, two caveats are worth stating at the outset. First, it is not yet obviously a binding norm of international law, hence its characterization as a ‘doctrine’ should not be taken to convey that status. If the MCD is a sound interpretation of the Covenant, then it is legally binding on all states parties. But its interpretative correctness is not guaranteed simply in virtue of the Committee’s endorsement. Instead, it largely depends on whether the MCD coheres with the text, established interpretations, and underlying objectives of the Covenant. Alternatively, it may come to acquire the status of binding law either through being explicitly incorporated into a formal treaty or by evolving into a norm of customary international law. Whether either of these developments transpire in the future will depend on whether the MCD receives widespread endorsement from states, which in turn will largely be a function of the perceived attractiveness of the normative idea to which it gives expression. Second, even leaving aside the issue of its legal status, a cursory investigation reveals that the MCD is heavily contested among both practitioners and scholars as to its meaning, practical implications, and even its ultimate coherence and utility. Indeed, there have been various calls to jettison the doctrine, or at least to downgrade its role.³

¹ International Covenant on Economic, Social and Cultural Rights, GA Res 2200 (XXI) A (UN Doc A/6316) at 49 (Dec. 16, 1966).

² See, for example, Inter-American Commission on Human Rights, Press Communique No. 14/93, in *Annual Report of the Inter-American Commission on Human Rights 1993*, IACHR Doc OEA/SER.L/V/II.85 Doc. 9 rev (11 February 1994) 603-4 and 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*, para.16 http://www.achpr.org/files/instruments/economic-social-cultural/achpr_instr_guide_draft_esc_rights_eng.pdf

³ The most extensive scholarly treatment, in K. Young, ‘The Minimum Core of Economic and Social Rights: A Concept in Search of Content’ *Yale Law Journal* 33 (2008): 113, 173, questions its standing and utility as a legal doctrine, proposing that it is best seen as a tool in the armoury of political advocacy. Other sceptical accounts of the MCD include: E. De Wet, *The Constitutional Enforceability of Economic and Social Rights: The Implications of the German Constitutional Model for South Africa* (Durban: Butterworths 1996); M. Harris, ‘Downsizing rights: why the ‘minimum core’ concept in International Human Rights Law should be abandoned’, *Public Interest Law Journal of New Zealand* 1 (2013): 169; and M. Tushnet, ‘Social Welfare Rights and the Forms of Judicial Review’, *Texas Law Review* 1 (2013): 169. More positive accounts of the MCD, but with variations in how they interpret the doctrine, can be found in: D. Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (Oxford: Oxford University Press, 2008); S. Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford: Oxford University Press, 2008), p.84; J. Tobin, *The Right to Health in International Law* (Oxford: Oxford University Press, 2012).

Both caveats suggest that in order to achieve a clearer view of the MCD, we need to go back to basics. In particular, we must begin our inquiry with an account of the nature and purpose of IHRL in general. Only in this way can we properly grasp the valuable role minimum core obligations play, or should come to play, within IHRL. This Report will proceed in the following manner:

In section 2, an account is offered of the *formative point* of IHRL in general. The primary goal of this domain of law, it is argued, is to secure universal moral rights through the technique of conferring legal rights upon all human beings. Hence, understanding the idea of a universal moral right is key to understanding the point of IHRL, and central in turn to understanding a universal moral right are the duties or obligations that constitute its normative content. The violation of these obligations renders one blameworthy, and their existence and content depend, among other factors, on considerations of feasibility, including those relating to what it is possible and not unduly burdensome to demand of putative obligation-bearers. Human rights, so understood, are vital elements in an adequate account of sustainable development, but they do not exhaust all of the value considerations bearing on such development.

In section 3, the *concept* of minimum core obligations of human rights is explored, i.e. what it is that marks out such obligations among other human rights standards. Four possible senses of ‘minimum core obligations’ are identified, which may be combined in various ways: (a) that sub-set of obligations corresponding to economic, social and cultural human rights that must be *immediately* complied with *in full* by *all* states, irrespective of differences in the level of resources that exist among them; (b) those human rights obligations whose content or justification bears a *special connection* to some underlying, high-priority ethical value, such as human dignity or basic human needs; (c) a sub-set of *non-derogable* human rights obligations, such that no competing considerations can ever justify a state’s non-compliance with them, even in an emergency; and (d) those human rights obligations that are or should be *justiciable*, i.e. enforceable through domestic or supranational courts.

Drawing, in particular, on the Committee’s General Comment 3, section 4 contends that the main gist of the MCD is given by interpretation (a). On this view, minimum core obligations belong to the sub-set of human rights obligations that all states must fully comply with immediately irrespective of the resource differences that exist among them. So understood, the MCD serves to draw a limit to the operation of the doctrine of progressive realization which otherwise bears on the time-frame for compliance with economic, social

and cultural human rights. The section also expands on the practical *value* of the minimum core obligations concept, i.e. it helps address the difficult question of priority setting in situations in which resource limitations make it inappropriate to require immediate and full compliance with all human rights obligations. Moreover, it does so by establishing a universal standard applicable to all states.

In section 5, it is argued that interpretation (a), standing alone, offers the best account of the MCD. We should not conjoin (a) with any of the interpretations (b), (c), or (d) in characterizing the concept of a minimum core obligation. Interpretation (b) is primarily of theoretical interest, lacking the practical significance needed to be incorporated into the MCD. Interpretation (c), in terms of non-derogability, lacks sufficient grounding in existing practice and would render the MCD less flexible in responding to changing circumstances. Finally, claims about the justiciability of minimum core obligations are helpfully understood as best practice recommendations, rather than as obligations inherent in the MCD. On this view, it is to be decided on the merits, on a case by case basis, whether a given minimum core obligation is best construed as non-derogable or as apt for judicial enforcement. Neither conclusion follows simply from the characterization of an obligation as belonging to the ‘minimum core’.

Having outlined the concept of a minimum core obligation, section 6 addresses the difficult question of how to determine the *content* of such obligations. It sketches 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) minimum core obligations 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; and (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 rather than variable in light differential resource endowments. It is emphasised that pure moral reasoning is seldom able to give a fully determinate specification of any rights-based obligation, and that further determinacy may be sought through some process of social decision, such as law. The section concludes by illustrating how the foregoing considerations can be deployed to justify a minimum core obligation to prevent hunger.

Section 7 responds to two major *challenges* confronting the MCD as it has been interpreted in this report: (1) that in seeking to specify an invariant standard of human rights assessment for all states, the MCD is overly rigid, lacking a due sensitivity to important contextual factors that vary significantly from one state to another; and (2) that even if there is a strong case in principle for the MCD, the attempt to give it legal effect is liable to be counter-productive due to

its being misunderstood or misappropriated. Finally, section 8 briefly examines how *indicators and benchmarks* are statistical tools that can help monitor and enhance compliance with minimum core obligations. Not being subject to rule of law requirements, these tools can circumvent certain problems of compliance that afflict exclusive reliance upon legal or regulatory standards.

2. The Formative Aim of International Human Rights Law: Realizing Universal Moral Rights

IHRL's formative aim: to realize universal moral rights through assigning individual legal rights to all. IHRL is that department of international law whose formative aim is to realize independent moral human rights through the technique of assigning individual legal rights to all human beings insofar as it is appropriate to do so. The distinct identity of IHRL consists in the fact that it seeks to deploy a specific legal technique in order to give effect to a specific ethical notion. This is the idea of a universal moral human right, i.e. a moral right that possessed by all human beings simply in virtue of our humanity. Of course, IHRL is not the only area of international law that is concerned with human rights, understood as universal moral rights. Norms such as those prohibiting the use of force and intervention are also in significant part justified by the way they serve human rights, for example, by erecting barriers to aggressive wars or the collapse of established social order into anarchy. But IHRL is distinguished from other domains of international law in two ways: (a) the realization of human rights is its *primary* concern, and (b) it pursues this concern through the distinctive *legal technique* of attributing universal legal rights to all human beings.

Human rights are fundamentally moral in character, but there may be good reasons for their legalization. A human right, at this most basic level, is not an inherently legal notion: human rights do not owe their existence to legal recognition, nor does the existence of a human right always generate a strong reason to enshrine it in law, let alone to make it justiciable.⁴ Hence, compliance with human rights is not automatically to be equated with compliance with some body of human rights law, whether actual or advisable. It is always a further question, to be determined by moral deliberation in the light of prevailing circumstances,

to what extent human rights are best realized through any given legal regime.⁵

Although human rights are fundamentally moral standards, often compelling reasons exist to seek to realize them through law, e.g. to embody them in law, to make them justiciable or in some other way legally enforceable. The need for the 'legalization' of human rights can arise from various sources: (i) to make a clear public declaration of commitment to these rights; (ii) to specify their content more precisely than is possible through pure moral reasoning, e.g. by selecting one formulation of the right from a range of eligible possible formulations; (iii) to address societal disagreement about the existence and content of such rights by

⁴ A. Sen, 'Human Rights and the Limits of Law', *Cardozo Law Review* 2 (2006): 913–927 and J. Tasioulas, 'On the nature of human rights', in G. Ernst and J.C. Heilinger (eds), *The Philosophy of Human Rights: Contemporary Controversies*, (Berlin: de Gruyter, 2012): 17, pp. 40–57. There is a different philosophical perspective according to which human rights are essentially moral grounds for legal enactment, e.g. J. Habermas, *The Postnational Constellation* (Cambridge: Polity Press, 2001), p. 122 and J. Raz, 'Human Rights in the Emerging World Order', *Transnational Legal Theory* 1 (2010): 31–47, p. 43.

⁵ This anti-legalist point is vividly illustrated by the UN's General Principles on Business and Human Rights (2011) available at http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf. The GPs are moral-political norms, not legal principles imposing legal obligations on corporations, and the model of 'polycentric governance' that they presuppose envisages judicial redress as only one method of enforcement among others. The point is also supported by studies that indicate that the constitutionalization of socio-economic rights, such as the right to health, has been counter-productive in some jurisdictions, especially in having the effect of shifting health resources from poorer to richer segments of society, see e.g. O. Ferraz, 'The right to health in the courts of Brazil: Worsening health inequities?' *Health and Human Rights* 11 (2009): 33–34.

laying down an authoritative standard, ideally one arrived at by means of an inclusive and transparent process; and (iv) to bolster compliance with human rights through various mechanisms of domestic and international legal enforcement. ('Enforcement' here should be interpreted widely so as to include sanctions such as criticism and shaming in addition to coercive enforcement mechanisms). In virtue of one or more of the considerations (i)-(iv), there is often a compelling justification for the enactment of human rights laws, and the creation of sustaining practices and institutions, over and above any commitment to the morality of human rights.

A number of instruments, often collectively referred to as the 'International Bill of Human Rights', play a fundamental role in IHRL. The most basic document is the Universal Declaration of Human Rights (1948)⁶ which, officially, is not legally binding but merely hortatory, although its provisions have achieved binding legal status by evolving into norms of customary international law or through their incorporation into subsequent legally binding treaties. The two other instruments which make up the 'International Bill of Human Rights', and which give legal force to many of the provisions of the Universal Declaration, are the International Covenant on Civil and Political Rights (ICCPR) (1966)⁷ and the International Covenant on Economic, Social and Cultural Rights (1966). As noted previously, the doctrine of minimum core obligations has been developed by the Committee in relation to the economic, social and cultural rights set out in the latter Convention. In addition, a number of other, more specifically focussed conventions make important contributions to IHRL, such as the Convention on the Elimination of all Forms of Discrimination against Women (1979),⁸ the Convention Against Torture (1984),⁹ and the Convention on the Rights of the Child (1989).¹⁰

Human rights have counterpart duties. To grasp the point of IHRL, therefore, we must begin by elaborating the idea of a universal moral right. A key consideration is that rights involve counterpart duties or obligations (these terms are used interchangeably). They are not merely interests whose fulfilment would be beneficial, but moral requirements that, in the absence of justification or excuse, we are blameworthy in the event that we do not satisfy them. This follows from the fact that human rights involve counterpart obligations that it is wrongful to violate. The right to health, for example, does not extend as far as the interest in health. There are many things that would greatly enhance a person's interest in health but to which they do not have a right e.g. being able to compulsorily acquire the spare healthy kidney of another when they are in urgent need of a transplant. This is because

their interest is not sufficient to impose an obligation on others to acquiesce in such compulsory acquisition. Unfortunately, the distinction between a right and an interest has often been neglected both in IHRL and in human rights discourse more generally. One consequence has been an unprincipled proliferation in the number of rights recognised and, more commonly, an unjustifiable expansion of the presumed content of any given right.

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. Individuals, corporations, international organizations and other agents may also be directly subject to human rights obligations. The UN's General Principles on Business and Human Rights, which directly impose human rights obligations on corporations, are powerful recent testimony to the pluralism of human rights at the level of duty-bearers. This pluralism is especially important insofar as some of the statist assumptions that underpinned thinking about human rights in the middle of the previous century have come under strain in an era of globalization in which the capabilities of states have been eroded while those on some non-state actors, such as multinational corporations, have been correspondingly magnified.

Human rights grounded in a plurality of values. The ethical foundations of human rights is a matter of controversy among theorists. On the view adopted herein, human rights are not grounded solely in one kind of normative consideration (e.g. basic needs, freedom, dignity) but in a plurality of considerations. In particular, both universal human interests (e.g. knowledge, health, friendship, accomplishment, play, etc) and the idea of human dignity (the intrinsic and non-derivative value of each individual human being who has these interests) figure in the grounds of human rights. If this is correct, any given human right will typically serve a variety of interests, and not just the interest that may feature in its description, e.g. the rights to health and education. One

⁶ Universal Declaration of Human Rights, GA Res 217A (III), UN Doc A/810 at 76 (1948).

⁷ International Covenant on Civil and Political Rights (ICCPR), 999 UNTS 171, adopted 16 December 1966, entered into force 23 March 1976.

⁸ Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), GA Res 54/180, UN GAOR 34th session Supp No 46, UN Doc A/34/46 (1980), adopted 18 December 1979, entered into force 3 September 1981.

⁹ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UNTS vol. 1465, p.5, adopted 10 December 1984, entered into force 26 June 1987.

¹⁰ Convention on the Rights of the Child, A/RES/44/25, adopted 20 November 1989, entered into force 2 September 1990.

reason that this is so is that the fulfilment of some interests (e.g. health or knowledge) also has instrumental value, as a means to the fulfilment of others interests (e.g. friendship, accomplishment, etc).¹¹

The scope of human rights defined by the subject-matter of their associated obligations. The *scope* of human rights concerns the subject-matter of each human right: where one human right ends and another begins. Although this too is a contested topic, the preferable view is that human rights are individuated by the subject-matter of their associated obligations, not by the interests or values that they protect. Consider, by way of illustration, the human right to health. It protects a variety of interests, including, but not limited to, the interest in health. This is in part because, as mentioned above, health itself is instrumental to the realization of a number of other interests. But 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.¹²

This is a more constrained interpretation than the maximalist view of the scope of the right to health evident in General Comment 14.¹³ According to maximalism, the right to health 'subsumes' or 'includes' such health-protecting rights as the right not to be tortured or subjected to degrading treatment, the rights to non-discrimination and political participation, etc. The error here is to assume that all rights partly justified by the interest in health form part of the right to health. The advantages of the more constrained approach that is adopted herein include the following: (a) it explains why there is a list of distinct rights, and (b) it generates a more specific and practicable standard of assessment when seeking to determine the level of compliance with a given human right. This more constrained approach also seems to be adopted in the Committee's General Comment 13, on the human right to education.¹⁴

Specifying the content of human rights duties: possibility and burden. The normative content of a given human right consists primarily in the duties or obligations corresponding to it. The proper way to specify this content is, as with the questions of grounds and scope, a matter of considerable disagreement. However, two major factors that plausibly determine the existence and shape of these obligations are considerations of *possibility* and *burden*.¹⁵ Both bear on the feasibility threshold that has to be crossed for considerations relating to individual interests and human dignity to generate not only reasons for action but *obligations*. Both of these factors give substance to the maxim that 'ought implies can'. They give the lie to the familiar accusation that talk about

human rights is a utopian exercise in constructing a 'wish list' of goods that is unchecked by limitations on individual and societal capacities and resources. The process of specifying the content of individual human rights is holistic in character, reflecting the good sense in the idea of the 'indivisibility and interdependence' of human rights. The content of one human right, e.g. to health, must be specified in a manner than renders it generally consistent with the content of other human rights, e.g. to bodily security. In other words, it must be generally practically feasible for duty-bearers to comply with all the obligations associated with human rights.

In this process of specifying duties associated with human rights, it is important to appreciate how discontinuities between human rights morality and IHRL may properly arise. Although the formative idea animating IHRL is that of giving effect to background moral human rights, it does not follow that the rights properly established in law ought straightforwardly to reproduce the content of those in human rights morality. Recall that IHRL should give effect to the morality of human rights, through the technique of assigning legal rights to all human beings, *only insofar as it is appropriate to do so*. This italicised proviso highlights the fact that often strong principled and pragmatic reasons exist why IHRL should not simply mirror in content the morality of human rights. For example, some of the obligations associated with moral human rights may pertain to private matters—personal fidelity, family arrangements, etc—into which the state should not intrude, since they do not fall within the remit of the state's concern with the *public* good. Moreover, IHRL, as with any body of law, must be alert to the potentially counter-productive consequences of the direct legalization of

¹¹ For an elaboration of this pluralistic account of the grounding of human rights, see J. Tasioulas, 'On the foundations of human rights', in R. Cruft, M. Liao, and M. Renzo (eds.), *Philosophical foundations of human rights* (Oxford: Oxford University Press): 45-70. Other approaches are discussed in the introduction to this volume, which gives a comprehensive overview of the state of the art in the philosophy of human rights.

¹² See J. Tasioulas and E. Vayena, 'The Place of Human Rights and the Common Good in Global Health Policy', *Theoretical Medicine and Bioethics* 37 (2016): 365-382, at pp.369-73, available at <https://link.springer.com/article/10.1007/s11017-016-9372-x>

¹³ CESCR General Comment No.14: The Right to the Highest Attainable Standard of Health (Art. 12), E/C.12/2000/4, adopted at the 22nd session of the Committee on , Social and Cultural Rights, on 11 August 2000 para.3.

¹⁴ CESCR General Comment No.13: The Right to Education (Art. 13), E/C.12/1999/10, adopted at the 21st session of the Committee on Economic, Social and Cultural Rights, on 8 December 1999, para.57.

¹⁵ The role of these considerations in shaping the obligations associated with human rights is further discussed in J. Tasioulas, 'On the Foundations of Human Rights'.

moral principles. These include the generation of widespread social disruption and attitudes of disrespect towards the law and legal institutions. This is an especially salient concern in relation to IHRL given the ideological heterogeneity that prevails within the international community of states.

Both cases just adverted to are instances in which IHRL is justifiably more restrictive than the morality of human rights; but the divergence may also go the opposite way. Concerns about the abuse of the overwhelming coercive power at the state's disposal, for example, may counsel establishing more generous legal rights to a fair trial or to protection against capital punishment or torture than those that exist as a matter of pure moral reasoning, leaving in each case a healthy 'margin for error'. The foregoing discussion simply gestures at the potentially highly complex relationship between IHRL and the morality of human rights, disabusing us of the naïve idea that we should be seeking a one-to-one correspondence between the two bodies of human rights.¹⁶

Human rights are not exhaustive of all ethical considerations. It is vitally important to appreciate that moral rights (including human rights, understood as universal moral rights) are one ethical consideration among others. They do not exhaust all of the considerations that bear on how individuals, corporations, states or international organizations should act. There are also prudential reasons (self-interest), duties owed to oneself (to protect one's health or develop one's talents), duties owed to others to which they do not have a counterpart right (e.g. duties of compassion or public participation), and common goods that go beyond anything claimable as a matter of right (e.g. the common good of a flourishing literary culture or of a health-conscious society).¹⁷ At least three consequences follow from this point. First, we should not 'inflate' human rights to incorporate concerns that properly belong to other normative categories. Second, in assessing whether a putative human rights obligation is unduly burdensome, we also need to consider also its potential cost in terms of non-human rights based considerations, e.g. some common goods or non-human interests, such as those of animals. Finally, sometimes conflict situations may arise in which human rights have to be weighed not only among themselves, but also against other ethical considerations, e.g. the common good, environmental protection, etc.

Human rights and development. Lastly, consider how human rights relate to the general rubric of development. Now, much here turns on how the contested notion of development itself is to be understood. If it is given a rather crude, utilitarian interpretation, as the goal of maximizing overall welfare, then we cannot simply treat human rights as part of an account of development. Human rights do not

neatly fit into this schema for two reasons. First, as we saw, even though human rights typically protect human interests, they are not reducible to those interests. Human rights are not primarily a welfarist notion, but a moral one. Otherwise put, human rights represent the extent to which the dignity and interests of individuals generate moral duties on others to serve those values in particular ways, e.g. by refraining from torturing them or by providing them with basic health care and education. Second, human rights are not oriented to the maximization of welfare but, on the contrary, often condemn attempts to maximize welfare as morally impermissible. Even if, for example, the torture of one innocent person would prevent the torture of two other innocent persons, thereby maximizing overall welfare, human rights morality prohibits torture in this case. The mere fact that greater welfare would be produced in virtue of torturing the one is not of itself sufficient to justify doing so. This is not to say that human rights can never be qualified or trumped by considerations of social welfare, but only that the point of qualification or trumping is not plausibly that at which overall welfare is maximized.

However, it has long been recognised that the simpler utilitarian interpretations of development as welfare maximization rely on highly disputable premises about the nature of value and about the extent of our cognitive and volitional capacities.¹⁸ So, the fact that human rights do not find a hospitable environment within such interpretations is not a knock-down objection to the recognition of such rights. Moreover, human rights are arguably integral components of development on more sophisticated accounts of the latter notion. Consider, for example, the classic definition of 'sustainable development' formulated by the Brundtland Commission: 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.¹⁹ Or consider the later evolution of sustainable development beyond intergenerational needs in order to integrate the three elements of economic development, social inclusion, and environmental sustainability. Hence, in

¹⁶ For more extended discussions of this theme, compare A. Buchanan, *The Heart of Human Rights* (Oxford: Oxford University Press, 2013) with J. Tasioulas, 'Exiting the Hall of Mirrors: Morality and Law in Human Rights' https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2915307

¹⁷ J. Tasioulas and E. Vayena, 'The Place of Human Rights and the Common Good in Global Health Policy', pp.375-80.

¹⁸ See, e.g. J.M. Finnis, *Natural Law and Natural Rights* 2nd ed. (Oxford: Oxford University Press, 2011) and J. Griffin, *Value Judgment: Improving our Ethical Beliefs* (Oxford: Oxford University Press, 1996).

¹⁹ Report of the World Commission on Environment and Development, 'Our Common Future', UN Doc A/42/427 (1987), p.41.

'The Future We Want', the final outcome document for the Rio + 20 Summit, sustainable development is characterized in the following way:

We also reaffirm the need to achieve sustainable development by: promoting sustained, inclusive and equitable economic growth, creating greater opportunities for all, reducing inequalities, raising basic standards of living; fostering equitable social development and inclusion; and promoting integrated and sustainable management of natural resources and ecosystems that supports inter alia economic, social and human development while facilitating ecosystem conservation, regeneration and restoration and resilience in the face of new and emerging challenges.²⁰

On these more sophisticated interpretations of sustainable development, human rights can be seen as vital *components* of development, but without exhausting the whole array of developmental values. So, for example, human rights are crucial in specifying the extent to which the needs of others for education, health care, food, work, and so on generate obligations to fulfil them, thereby blocking the allocation of scarce resources away from those needs in order to satisfy mere preferences or desires. Similarly, human rights, such

as those to non-discrimination and political participation, will be crucial in fleshing out the kind of 'equitable social development and inclusion' that sustainable development has as its objective. For all their importance, however, human rights cannot provide a comprehensive normative basis for sustainable development. Not everything we seek to achieve regarding economic development, social inclusion and environmental sustainability can be intelligently articulated exclusively in the language of human rights. This is perhaps most obvious in relation to environmental sustainability insofar as it incorporates vital concerns—such as the preservation of various species of flora and fauna—that cannot be reduced, anthropocentrically, to the way in which the survival of these species caters to human interests, let alone human rights. This illustrates the point, made above, that not all important ethical considerations are matters of human rights. Understanding this reduces the pressure to express all our deepest concerns in the form of human rights claims.²¹

²⁰ 'The Future We Want', UN GA Res A/Res/66/288, resolution adopted by the General Assembly on 27 July 2012, p.41.

²¹ See, for example, D. Wiggins, 'Nature, Respect for Nature, and the Human Sale of Values', *Proceedings of the Aristotelian Society* 100 (2000): 1-32.

3. ‘Minimum Core’: A Taxonomy of Senses

Against the background of the account of IHRL sketched in the previous section, we can proceed to carve out the place that the MCD might meaningfully play within this body of law. The first question we need to address in making sense of the MCD is a *conceptual* question. What does it mean to characterize an obligation as belonging to the ‘minimum core’? How do such obligations differ from their non-core counterparts? Only when we have secured an adequate conceptual fix on minimum core obligations (sections 3-5), can we proceed to the question of how to specify the normative *content* of the obligations that belong to the core (section 6). Indeed, genuine disagreements about how to specify the content of minimum core obligations, and about which particular obligations count as belonging to the core, presuppose at least some agreement on the conceptual character of such obligations.

The closest there is to a canonical formulation in the international sphere of the concept of a minimum core obligation was issued a quarter of a century ago by the Committee in its General Comment 3 on ‘The nature of States’ parties obligations’.²² Paragraph 10, which introduces the idea of a ‘minimum core obligation’ in relation to the rights set out in the Covenant, provides as follows (italics added):

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*.

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. Investigation reveals a multiplicity of extant interpretations of the MCD, both in official documents and the corpus scholarly commentary, in addition to outright scepticism about the very coherence and utility of the doctrine. Indeed, some of the scepticism is itself fuelled by the unruly proliferation of competing interpretations. What, then, is it to speak of the ‘minimum core obligation’ in relation to human rights?

As we have already seen, human rights norms—even when taken as a totality—are in one important sense ‘minimum’

²² 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).

standards, since they do not exhaust all of the normative considerations that bear on states and other agents (see 2, above). In that sense, human rights are minimum demands insofar as sound practical deliberation often needs to attend to more than just compliance with human rights. However, this is not the significance that ‘minimum’ has been given by the most influential explications of the MCD. Instead, the MCD has usually been taken to identify a sub-set of demands *within* the total body of requirements imposed by economic, social and cultural rights. Paragraph 10 above gives expression to this idea by linking the MCD not to full compliance with all of the obligations associated with a given human right, but rather to the fulfilment of ‘essential levels’ of any such right.

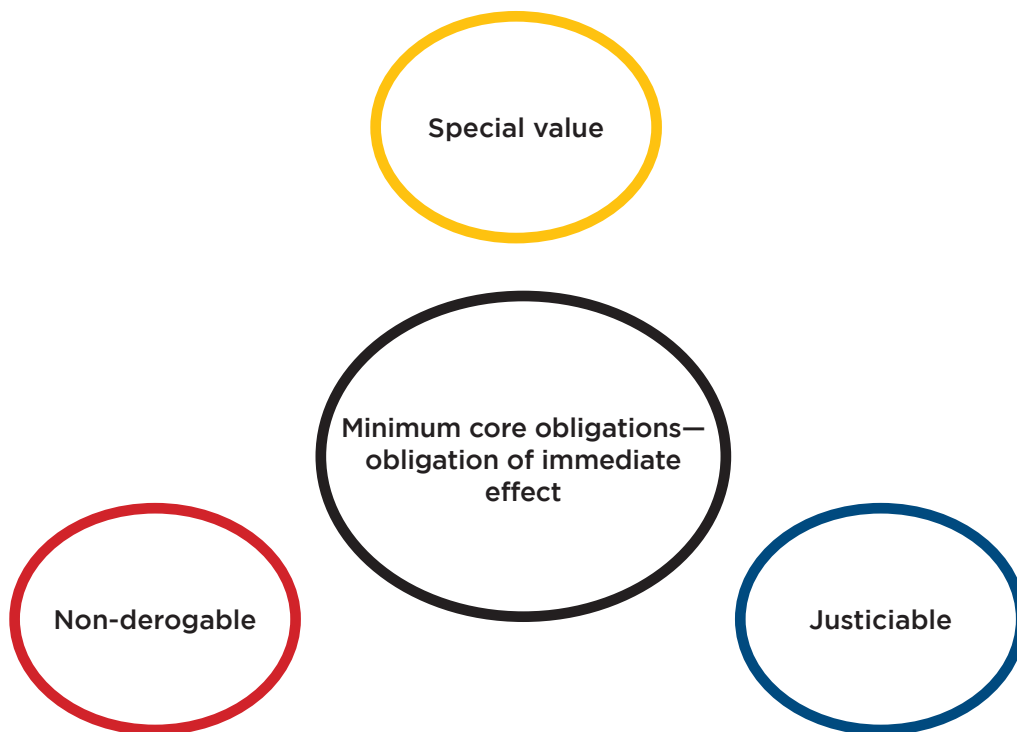
How, then, is that sub-set of human rights requirements—the ‘essential levels’ of the obligations associated with any given human right—to be understood? Among the various candidate explanations, it has been asserted that the MCD is that aspect of a human right’s normative content—i.e. the obligations associated with it—that meets one or more of the following four specifications:

(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 obligation 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.



Given that all four characteristics (a)-(d), either singly or in various combinations, have been identified as forming the distinctive significance of the MCD, two points need to be noted. The first is that the characteristics (a)-(d) are logically independent. Affirming any one as a hallmark of the MCD does not automatically entail the possession of any other of the three characteristics. The features (a)-(d) do not, in other words, come as an all-or-nothing package deal. So, for example, it is possible to identify the MCD in terms of feature (a)—the requirement of immediate full compliance by all states—while denying that these obligations necessarily

reflect a special value (b), are non-derogable (c), or justiciable (d). They may or may not possess these additional features, but if they do so, it will not be simply in virtue of their status as elements of the 'minimum core'. The second point is that the features (a)-(d) are logically compatible. In other words, there is no inherent contradiction in claiming that the hallmark of the MCD is the joint possession or two or more of these features. The question that we must now address is which of these features, or which combination of them, fixes the contours of the concept of a minimum core obligation.

4. Minimum Core: Obligations of the Here and Now

The Concept of a Minimum Core Obligation

According to interpretation (a), the MCD picks out those aspects of the obligations associated with a given socio-economic human right that must be *immediately* complied with *fully* by *all* states. As the italicized words indicate, minimum core obligations possess three distinguishing features: (a) *immediacy*: they demand immediate compliance, (b) *completeness*: they must be fully complied with at any given time, and (c) *universality*: they bind all states (presumably, all states parties to the Convention) irrespective of variations in wealth and other resources. On this interpretation, the MCD is addressed to the following question: Given the existence of a multiplicity of human rights, and that each human right typically has a multiplicity of obligations associated with it, which of these obligations must be *immediately* complied with *fully* by *all* states? What gives point to the question is the reality that various constraints, primarily limitations on the resources available to states, may make it infeasible to demand that all states immediately fully comply with all human rights obligations. The MCD, therefore, is a means of identifying the sub-set of human rights obligations which do have to be immediately fully secured by all states irrespective of their level of development. In the language of General Comment 3, these are the ‘minimum essential levels’ of each right that all states must immediately fulfil.

So understood, the MCD gives expression to an intuitively compelling idea, one that is neither especially novel nor technical. It is addressed to a question that naturally arises regarding the prioritization of the multiple obligations that bear on states. Indeed, we find the core idea clearly prefigured in Immanuel Kant’s distinction between *leges strictae*

and *leges latae* in his famous 1795 essay on international justice, *Perpetual Peace*:

All of the articles listed above... are *prohibitive laws* (*leges prohibitivae*). Yet some of them are of the strictest sort (*leges strictae*), being valid irrespective of differing circumstances, and they require that the abuses they prohibit should be abolished immediately (Nos. 1, 5, and 6). Others (Nos. 2, 3, and 4), although they are not exceptions to the rule of justice, allow some *subjective* latitude according to the circumstances in which they are applied (*leges latae*). The latter need not necessarily be executed at once, so long as their ultimate purpose... is not lost sight of. But their execution may not be *put off* to a non-existent date (*ad calendas graecas*, as Augustus used to promise), for any delay is permitted only as a means of avoiding a premature implementation which might frustrate the whole purpose of the article.²³

Let us now raise this question of the time-frame of compliance with respect to IHRL in general. Which human rights obligations must be immediately fully complied with by all states? The orthodox answer importantly differs according to the category of human right in question; in particular, whether a right belongs to the ICCPR or to the Covenant. The answer, in the case of civil and political rights, is that *all of them* must be immediately and fully complied with by all states. As the Human Rights Committee stated in its General Comment 31, para.14, the ICCPR requires that ‘unqualified’

²³ I. Kant, ‘Perpetual Peace’ in H. Reiss (ed.), *Immanuel Kant: Political Writings* 2nd ed. (Cambridge: Cambridge University Press, 1991), p.97.

and ‘immediate’ effect be given to all the obligations arising under it.²⁴ By contrast, the answer in the case of economic, social and cultural rights laid down in the Covenant is very different. This is due to the doctrine of ‘progressive realization’ set out in Article 2(1):

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.

The Committee’s General Comment No.3, para 10, on minimum core, comes directly after paragraph 9 on ‘progressive realization’. In accordance with interpretation (a), the first part of the latter paragraph explicitly contrasts ‘progressive’ realization with obligations that must be fully ‘achieved in a short period of time’ by all states, such as those in the ICCPR:

The principal obligation of result reflected in article 2 (1) is to take steps “with a view to achieving progressively the full realization of the rights recognized” in the Covenant. The term “progressive realization” is often used to describe the intent of this phrase. The concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. In this sense the obligation differs significantly from that contained in article 2 of the International Covenant on Civil and Political Rights which embodies an immediate obligation to respect and ensure all of the relevant rights.

Now, just as with Kant’s *leges latae*, obligations subject to the doctrine of progressive realization are genuine obligations and not merely aspirations or optional ideals. States remain under an obligation fully to comply with them eventually, even if not immediately, and a state’s failure to ‘take steps... to the maximum of its available resources’ towards this end contravenes that obligation. Full compliance cannot be postponed indefinitely, to a ‘non-existent date’, thereby depriving economic, social and cultural rights of all practical force. However, the point of the doctrine of progressive realization is to register the insuperable difficulties that limited resources pose for many states when it comes to complying immediately or in the short-term with economic, social and

cultural rights. These resource constraints render it infeasible—in the sense of impossible or excessively burdensome (second 2, above)—to require *immediate* compliance with all human rights obligations under the Convention on the part of all states. As para 9 of General Comment No. 3 goes on to state:

Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the *raison d’être*, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.²⁵

To reprise: interpretation (a) construes the MCD in terms of a relationship with the doctrine of progressive realization. Even if obligations arising under the Covenant are generally subject to the latter doctrine, and hence may in principle be realized ‘over time’, there is nonetheless a core of obligations that must be fully complied with immediately (or in the short term) by all states. These latter obligations form the ‘minimum core’ obligations. Regarding the core obligations, a state cannot say that it is taking steps towards their full realization in the medium-to-long term. Instead, they require immediate full compliance, just like the civil and political rights relating to torture, free speech and a fair trial.²⁶ Thus,

²⁴ Human Rights Committee, General Comment No.31, ‘The Nature of the General Legal Obligation Imposed on States Parties to the Covenant’, (18th session, 2004), CCPR/C/21/Rev.1/Add.13, adopted on 29 March 2004.

²⁵ CESCR General Comment 13 on the right to education, para 44: “The realization of the right to education over time, that is “progressively”, should not be interpreted as depriving States parties’ obligations of all meaningful content. Progressive realization means that States parties have a specific and continuing obligation .to move as expeditiously and effectively as possible towards the full realization of Article 13”.

according to General Comment 3, the provision of ‘essential foodstuffs’, ‘essential primary health care’, ‘basic shelter and housing’, and ‘the most basic forms of education’, must be realized immediately, even if other, non-core obligations of the relevant rights may permissibly be delivered over the longer-term.

The way in which MCD draws a limit to the general applicability of the doctrine of progressive realization is very clearly brought out by the Committee’s General Comment 13 on ‘The Right to Education (Art 13 of the Covenant)’, which states in paragraph 43 that “[w]hile the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes on States parties various obligations which are of immediate effect”. In similar terms, General Comment 12 on ‘The Right to Adequate Food (Art 11)’, acknowledges that the right to adequate food will be realized progressively, but then immediately enters a qualification using the language of ‘core’ obligations: ‘However, States have a core obligation to take the necessary action to mitigate and alleviate hunger... even in times of natural or other disasters’.²⁷ More recently, a report by the Special Rapporteur on the right to health has endorsed what looks like a clear-cut version of (a): ‘The right to health imposes overlapping obligations of immediate effect on States. They include... the core obligation to ensure the minimum essential levels of the right... Immediate obligations are outside the ambit of article 2(1) of the International Covenant on Economic, Social and Cultural Rights. Core obligations are the minimum essential level of a right and are not progressively realized’.²⁸

If the MCD is to be understood in relation to the doctrine of progressive realization, as interpretation (a) proposes, a question remains as to the precise nature of that relation. On one view, the MCD is a *component* of the doctrine of progressive realization, specifying ‘the minimum or first steps that states must take as they embark on their progressive obligation to fully realize a given human right’.²⁹ According to a somewhat different view, the MCD is not among the initial steps required by progressive realization, but rather a set of requirements that have to be satisfied immediately, and hence are not subject to progressive realization, but which instead operate as an independent *threshold* beyond which the latter doctrine may in principle apply. On this second view, the MCD demarcates obligations of immediate compliance in just the same sense that civil and political rights impose such obligations insofar as they are not interpreted as subject to a doctrine of progressive realization. The key point is not that these obligations are to be complied with first in a sequence of progressive realization, but that they

are to be complied with immediately. Since the Covenant and ICCPR feature obligations demanding ‘immediate’ compliance, yet the doctrine of progressive realization is not supposed to extend to the latter, it seems preferable to interpret the MCD in line with the second approach, not as part of the doctrine of progressive realization but rather as limiting its domain of operation.

The Value of the Minimum Core Doctrine

The concept of obligations demanding immediate compliance, which is highlighted by interpretation (a) of the MCD, is undoubtedly one that has very real practical value. It addresses a difficult and recurrent problem of human rights compliance: how to prioritize the competing demands arising from human rights obligations, whether the obligations associated with a single right or a multiplicity of them, when resource constraints make it infeasible to comply immediately with all of these obligations. To the extent that it provides an answer to this question, the MCD shows that IHRL does not simply set out a series of obligations that states must comply with. It also provides valuable guidance on the vital, second-order question of how to prioritize compliance with these obligations in cases in which immediate compliance in full with all of them is simply infeasible in

²⁶ For interpretations of the MCD broadly along these lines, see D. Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights*, ch.6; S. Liebenberg, ‘South Africa’s Evolving Jurisprudence on Socio-Economic Rights: An Effective Tool in Challenging Poverty?’, *Law, Democracy and Development* 6 (2002): 159, p.176; J. Tobin, *The Right to Health in International Law*, pp.238ff.; S. Fredman, *Human Rights Transformed*, p.84f.

²⁷ CESCR, General Comment No 12: The Right to Adequate Food (Art 11), (12 May 1999) UN Doc E/C.12/1995/5, para 6. In para 16, the Comment goes on to draw a distinction between obligations that must be immediately realized and those subject to progressive realization: ‘Some measures at these different levels of obligations of States parties are of a more immediate nature, while other measures are more of a long-term character, to achieve progressively the full realization of the right to food’. Other examples: General Comment 13, on the right to education, para 57; CESCR General Comment No. 15: The Right to Water (Arts. 11 and 12), E/C.12/2002/11, adopted on 20 January 2003.

²⁸ ‘Right of Everyone to the enjoyment of the highest attainable standard of health’, (11 August 2014) UN Doc A/69/150, para. 10. Somewhat confusingly, having said that core obligations are outside the scope of article 2(1) on progressive realization, the report appears to contract itself by speaking of ‘the immediate obligation... to take steps towards the progressive realization of rights’.

²⁹ J. Tobin, *The Right to Health in International Law*, p.245. This interpretation finds support in General Comment 13, para. 43, although in a way that threatens to lose the contrast between minimum core and progressive realization. Tobin preserves the contrast by limiting the minimum core to the universally necessary first steps of progressive realization.

all the circumstances. In this way, the IHRL on economic, social and cultural rights emerges as a more comprehensive, and sophisticated, framework for guiding state action than many believe it to be.

Moreover, the MCD is one important means by which IHRL can respond to the criticism, made by human rights sceptics such as Eric Posner, that in light of the large number of human rights obligations and the limited resources available for their fulfilment, states can always plausibly justify non-compliance with any given obligation by appealing to the need to comply with other such obligations. If this criticism is sound, human rights would be largely rendered nugatory as a basis for both the guidance and criticism of state policy. As Posner puts it: ‘The dilemma for human rights enforcers is that they cannot demand that states comply with all rights perfectly, but if they do not, then they have no basis for criticizing a country’s decision to allocate more resources to satisfy one rather than another’.³⁰ This problem is seemingly exacerbated, in the case of economic, social and cultural rights, by the potential for self-serving invocations of the doctrine of progressive realization as a cover for present non-compliance.

Although by no means a comprehensive answer to challenges of the kind highlighted by Posner, MCD doctrine is one mechanism through which IHRL sets a limit to permissible trade-offs and compliance delays in cases involving economic, social and cultural rights. Human rights obligations that fall within the ‘core’ are to be complied with immediately, hence must be prioritized over those that do not belong within the core. So, for example, a state cannot appeal to the need to fulfil the human right to education by means of establishing high-level research institutes as a justification for delaying the provision of ‘the most basic forms of education’. Such an ordering of priorities is blocked by the fact that the provision of primary education falls within the core of the right to education.³¹

There is an additional aspect to the value of the MCD worth noting. If the invariant interpretation of the doctrine is accepted (see section 6, below), the minimum core obligations are invariant across all states, irrespective of resource differences that obtain among them. The MCD therefore not only offers an answer to the pressing question of prioritization, but one that is universally applicable. It specifies a ground floor of immediate compliance with Covenant rights that binds all states. In virtue of the doctrine, all states are put on

notice of the bare minimum that they must do with respect to immediate compliance. This clarifies the normative position both of the primary bearers of human rights obligations, and potentially also the bearers of secondary obligations—other states or international agents ‘in a position to assist’—in cases where there is non-compliance with primary obligations.

It is worth registering, however, that the MCD, as articulated by interpretation (a), potentially is in tension with the idea that human rights—the totality of civil and political rights, on the one hand, and economic, social and cultural rights, on the other—are ‘indivisible, interdependent and interrelated’.³² On a very strong construal of this latter idea, civil and political rights cannot be fully secured unless economic, social and cultural rights are also fully secured, and vice versa. If so, civil and political rights, which as we have seen are all to be fully complied with immediately, must also require immediate full compliance with economic, social and cultural rights. This would leave no room for the ‘progressive realization’ of some obligations associated with the latter category of rights, and hence no room for the idea behind the MCD that obligations of immediate effect are only a subset of the obligations associated with these rights. However, there are other ways out of this quandary that enable us to preserve the MCD. One solution is to abandon the idea that the obligations associated with civil and political rights are all of immediate effect. Another way out is to adopt a more modest interpretation of the thesis that the two categories of human rights are ‘indivisible, interdependent and interrelated’. In particular, it could be argued that full compliance with obligations of civil and political rights, even if they are all of immediate effect, requires *partial* but not *full* compliance with at least *some* economic, social and cultural rights. Perhaps most plausibly, versions of both lines of response could be deployed in tandem.

In conclusion, although the idea of ‘minimum core’ does not explicitly feature in the text of the Covenant, it is arguable that it is defensible as part of an interpretation of the Covenant that is essential to giving effect to the latter’s object and purpose.

³⁰ E. Posner, *The Twilight of Human Rights Law*, (Oxford: Oxford University Press, 2014), p.92.

³¹ See CESCR General Comment 13, para 6f.

³² Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, A/CONF.157/23 at 1.5.

5. Other Interpretations: Special Value, Non-Derogability, Justiciability

Given its fidelity to authoritative texts and practice, its conceptual coherence, and its practical appeal in securing plausible Covenant objectives, there are strong reasons to treat interpretation (a) as the conceptual spine of the MCD. Whatever else it does, the MCD picks out those aspects of the obligations associated with Convention rights that must be immediately fully realized by all states. We must now consider whether any of the interpretations (b) to (d) should be added to (a) as elements of the MCD, bearing in mind the earlier point (section 3) that it is logically possible to affirm (a) without also embracing any of (b)-(d).³³

(b) *Special value*. This interpretation asserts an intimate connection between the MCD and certain key values, such as human dignity or basic human interests.³⁴ No doubt it may be worth isolating a ‘core’ of human rights obligations in this way. The success of any such enterprise, however, is by no means to be taken for granted. On the one hand, it could be argued that all human rights derive from the same underlying value, e.g. human dignity, hence no meaningful differentiation along this dimension exists between core and non-core obligations. Alternatively, it may be that any attempt to isolate a privileged value basis for the core would fail because all human rights obligations are standardly grounded in a multiplicity of considerations (as suggested in section 2, above). But even if the project succeeds, it would seem to be principally of theoretical interest, lacking the practical relevance needed to justify its recognition as a legal doctrine. After all, what would *follow*—as a practical matter bearing on what anyone was required or permitted to do—from the realisation that some human rights obligations had a link with a special category of value?

Now, the proponent of interpretation (b) might reply that the connection to a special set of values does give certain

obligations a distinctive practical significance. Perhaps human rights requirements with this connection have a special weight, e.g. they are non-derogable (as per interpretation (c)). Alternatively, it may be that the connection explains why the norms in question must be immediately complied with by all states (as per interpretation (a)). In either case, the relevant explanation would have to be produced, which is no simple task. It is, moreover, highly doubtful that the presence of any category of value is always sufficient to generate obligations of immediate effect. Even as basic a value as the preservation of life from imminent threat can fail to generate an obligation, let alone a rights-based obligation of immediate effect, if it is not feasible (because it is impossible or excessively burdensome) to impose an obligation to undertake the action required to preserve life. At best, I think, an appeal to a special value could only be necessary, not sufficient, to establish obligations of immediate effect.

But even if a plausible account linking non-derogable obligations, or those of immediate effect, to a special category of values were forthcoming, practical relevance will have been secured only through forging a link with one of

³³ An example of a view that seems to combine (a) with (c) and (d), see M. Scheinin, ‘The Concept of “Core” Rights and Obligations’, in D. Shelton (ed), *The Oxford Handbook of International Human Rights Law* (Oxford: Oxford University Press, 2013), p.537 according to whom the MCD picks out ‘those dimensions of ICESCR right [that] are immediate, not conditioned by the possible lack of resources, and even directly applicable (justiciable)’. He connects this to a notion of ‘core’ obligations that also applies to civil and political rights. Cf. Art. 19(2) of the German Constitution which regards the core content of constitutional rights as incapable of being justifiably infringed.

³⁴ For a survey of some view of this kind, see K. Young, ‘The Minimum Core of Economic and Social Rights: A Concept in Search of Content’, pp.126-40.

the other interpretations, e.g. in the above discussion, interpretations (c) and (a), respectively. This conclusion suggests that (b) by itself does not have enough practical significance to constitute the meaning of the MCD. It can at best play a subsidiary role to one of the other interpretations of that doctrine. If so, it is arguably preferable to focus on those other interpretations and not to characterize the MCD, in addition, by reference to (b). Instead, it will be a further matter, to be determined by substantive argument, whether or not non-derogability, say, or immediacy, bear special relations to a distinct underlying class of justifying values picked out in the manner of interpretation (b). This would also have the pragmatic benefit of disentangling the concept of minimum core obligations from ongoing controversies about the value considerations that generate human rights obligations. The *concept* of minimum core obligations would remain neutral regarding the substantive question of the values that properly generate such obligations. In this way, it would exemplify the phenomenon of ‘incomplete theorization’ that is common, and often very useful, in law.³⁵

(c) *Non-derogability*. According to this interpretation, no competing considerations can ever justify non-compliance with a human rights obligation that belongs to the ‘minimum core’, even in the case of an emergency. (An exception might be permitted in the case of competing considerations that are themselves minimum core obligations). Perhaps the clearest affirmation of this interpretation is to be found in General Comment No.14, paragraph 47: ‘It should be stressed, however, that a State party cannot, under any circumstances whatsoever, justify its non-compliance with the core obligations set out in paragraph 43 above, which are non-derogable’.³⁶ However, this interpretation of the MCD is contestable. To begin with, it has limited support in practice and is in tension with General Comment 3, para. 10, which appears to countenance the possibility of justified infringement of core obligations by a state ‘when every effort has been made to use all resources that are at its disposal to satisfy, as a matter of priority, those minimum obligations’.³⁷ Indeed, as has been pointed out, General Comment 14 itself affirms such an ambitious set of obligations as part the core of the right to health—obligations that many developed nations would struggle to satisfy—that it fits poorly with the idea that these obligations are to be complied with in full by all states even in emergency situations.³⁸

Given its patchy support in practice and the fact that there is no natural inference from the immediacy of an obligation to its non-derogability, it may be best to resist characterising the MCD in line with (c). Nor is it clear that there are good reasons of principle favouring the non-derogability

interpretation. After all, in what sense is it meaningful to hold a state subject to an obligation to provide ‘essential primary health care’ or ‘the most basic forms of education’ in the midst of events such as a devastating natural catastrophe or a massive outbreak of armed conflict that render it literally impossible to do these things? Moreover, as shall be discussed below, allowing derogation from minimum core obligations in extreme circumstances helps address one of the main objections to the MCD, i.e. that it is excessively rigid in imposing certain invariant and immediate demands on all states (see section 8, below). Instead, it should be a further question, to be addressed on the merits on a case-by-case basis, whether any particular minimum core obligation is non-derogable. Some core obligations may be derogable, whereas others are not. The mere fact of belonging to the minimum core category would not, on this view, automatically entail the status of non-derogability, even if it does not exclude that status.

(d) *Justiciability*. On this interpretation, at least those obligations that belong to the minimum core are or should be made justiciable, i.e. enforceable through domestic or international courts. The link between justiciability and minimum core obligations can be formulated at varying levels of strength, as the following sample versions of (d) exemplify, progressing from the weaker to the stronger: (i) minimum core obligations are in principle eligible for judicial enforcement, i.e. there is no general and conclusive reason against ever making them justiciable, (ii) in general there is good reason to make minimum core obligations justiciable, albeit one defeasible in the circumstances, and (iii) it is mandatory to make minimum core obligations justiciable, although again this general requirement may be defeasible in particular circumstances.

We can dismiss formulation (i) as too weak to mark out minimum core obligations, as it appears to be a characteristic of obligations associated with human rights generally, including those in the Covenant. Hence, it cannot pick out

³⁵ C. Sunstein, ‘Incompletely Theorized Agreements’, *Harvard Law Review* 108 (1995): 1733-1772.

³⁶ The non-derogability of the minimum core of the right to health is also affirmed in ‘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’.

³⁷ The derogability of the minimum core obligations has recently been endorsed by the Committee in recently endorsed in its Statement on ‘An Evaluation of the Obligation to Take Steps to the “Maximum of Available Resources” under an Optional Protocol to the Covenant’, E/C.12/2007, 21 September 2007, para.6.

³⁸ J. Tobin, *The Right to Health in International Law*, p.240.

the *distinctive* character of the MCD insofar as it identifies a *sub-set* of human rights obligations. By contrast, formulation (iii) seems excessively strong in positing the existence of a second-order obligation to make minimum core obligations justiciable. Instead of adopting mandatory language in relation to justiciability, the Committee's General Comments tend to 'encourage' the adoption into the domestic legal order of provisions in international instruments recognizing a given economic, social or cultural right, partly on the basis that domestic courts would be thereby empowered to adjudicate at least violations of the 'core content'³⁹ or 'core obligations'⁴⁰ associated with that right.

The foregoing suggests that formulation (ii) has the best foothold in the practice of the Committee. Again, however, (b) construed along the lines of (ii) is not a sufficient specification of the minimum core. This is because the General Comments cited above appear to envisage reasons for also making the non-core components of economic, social and economic rights justiciable. Therefore, justiciability can at best work in tandem with another interpretation—most plausibly, (a)—in demarcating the minimum core of a given right. But should the very concept of a minimum core obligation be interpreted as including a *recommendation* of justiciability? The answer to this question is a matter open to reasonable contestation. Two reasons militate against this view, but not conclusively so. First, insofar as (ii) embodies what is in effect a 'best practice recommendation', it may seem odd to incorporate it into the very idea of a minimum core obligation. It might promote clear thinking to separate the question of what minimum core obligations essentially are—obligations of immediate effect, according to (a)—from non-binding recommendations about how they are to be implemented. Second, the case for that best practice recommendation is itself open to dispute. It is widely acknowledged that the justiciability of economic, social, and cultural rights poses special challenges. These largely centre on concerns about the capacity of courts, in light of judges' limited expertise in matters of economic, social and cultural policy and their lack of a democratic mandate, to adjudicate on what the demands of such rights are and whether they have been violated in a given instance.⁴¹ It may be, moreover, that making Covenant rights justiciable is an effective and legitimate policy in some jurisdictions, given their history, institutional structure, legal traditions, level of development and so on, but that in other jurisdictions it is preferable to rely on administrative review, a national human rights institution or the individual complains procedure under the Optional Protocol to the Covenant adopted by the UN General Assembly in 2008.⁴² Both

of these general points suggest caution about interpreting the MCD as embodying a recommendation of justiciability.

Conclusion. Interpretation (a), in terms of obligations that must be immediately fully complied with by all states, constitutes the essence of the MCD; the 'core' of the minimum core doctrine, as it were. As we saw above (section 4), it captures an idea that has a distinctive practical significance and which does not in itself entail any of the other interpretations (b)-(d). The question that we have addressed is whether the MCD should be understood as a conjunction of (a) with one or more of the interpretations (b)-(d). We have found good reason to sideline (b), since by itself it has no practical significance, and could at best form part of the explanation of why a norm should be understood as (a) requiring immediate compliance, (c) non-derogable, or (d) justiciable. Interpretation (c) lacks sufficient support in practice and threatens to diminish the value of the MCD, leaving it vulnerable to the criticism that it is excessively rigid. We should therefore allow that the derogability or otherwise of a given minimum core obligation is to be determined case-by-case, on the merits. By contrast, interpretation (d) enjoys more institutional support, especially if we interpret it as recommending, rather than requiring, the justiciability of minimum core obligations. But given the fact that the recommendation seems to extend to all Convention obligations, the controversy about the utility of justiciable economic, social and cultural rights, and the oddness of embodying a non-binding recommendation into the concept of a minimum core obligation, there is good reason to resist incorporating justiciability into the MCD. At best, justiciability might be taken to belong to the periphery, rather than the core, of the MCD itself.

In short, it would likely obscure the contribution of the MCD in identifying obligations of immediate compliance to saddle it with the additional, and highly consequential, implication that these obligations must also possess one or more of the features (b)-(d). Whether any component of a human right's minimum core obligations does or should possess these additional qualities is, instead, a complex and

³⁹ See, e.g. General Comment 12, on the right to food, para 33 and CESCR, General Comment No.18: The Right to Work (Art. 6 of the Covenant), E/C.12/GC/18 (February 6, 2006), para 49.

⁴⁰ See, e.g. General Comment 13, on the right to health, para.60.

⁴¹ For a discussion of 'important reasons not to equate the definition of the minimum core to the decision rules leading to justiciability and remedies', see K. Young, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content', pp.162-3.

⁴² Optional Protocol to the Covenant on Economic, Social and Cultural Rights, GA Res. A/RES/63/117, adopted on 10 December 2008.

context-sensitive matter to be determined case-by-case on the balance of the legal and ethical merits.

In light of interpretation (a), we can now outline schematically the steps that have to be followed in identifying the ‘minimum core’ obligations 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. For example, 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 ‘minimum core obligations’) 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.

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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.

We have already addressed Steps 2-3 (in section 2 above). Steps 4 and 5 will be considered in section 6.

6. Specifying the Content of the Minimum Core Obligations

So far we have been concerned to spell out the concept of a minimum core obligation: to identify the kind of human rights standard to which it refers. We have seen that there is a strong case for conceiving of the MCD as referring to a sub-set of human rights obligations, i.e. those that must be fully secured with immediate effect by all states, in accordance with interpretation (a). This still leaves open the controversial matter of what the *content* of the minimum core obligations is, or should be, for any given human right at any given time. Indeed, it is the challenge of giving a determinate content to minimum core obligations that is one of the persistent sources of scepticism about the coherence and utility of the doctrine. However, once that concept has been fixed by reference to obligations of immediate effect, we are better placed to specify the content of minimum core obligations. In this process, we should not be surprised to discover that the Committee has occasionally faltered when characterising the content of core obligations. The real question, however, is whether a principled basis exists for making judgments about the content of minimum core obligations. In making such judgments, the following three general guidelines plausibly offer such a basis for content-specification.

1. A plurality of types of obligations may in principle feature in the minimum core of a given human right

Human rights doctrine has developed a number of ways of categorizing the various kinds of obligations that are associated with a given human right. Any of these types of obligations may in principle feature in its minimum core. The manifold categorizations include the following:

Negative v positive obligations. Some obligations associated with a human right require a state to desist from specified conduct (negative obligations), and are violated by the prohibited acts of commission.⁴³ Other human rights obligations require that the state embark on some conduct (positive obligations), and are violated by acts of omission.⁴⁴ Thus, the Committee has claimed, in relation to the minimum core of the human right to health, that there is a positive obligation to secure ‘essential primary health care’,⁴⁵ and a negative obligation not to undertake any retrogressive measures incompatible with core obligations under the right.⁴⁶

Obligations to respect, protect, fulfil. Following in the footsteps on the philosopher Henry Shue’s influential work on basic subsistence and security rights, the Committee has also taken up the threefold classification of obligations to *respect*, to *protect*, and to *fulfil*.⁴⁷ Obligations to *respect* are primarily negative obligations that the state must itself comply with, such as the obligation not to deny access to health care on the basis of gender discrimination and the obligation not to enter into agreements with other states, international organizations

⁴³ See, for example, General Comment 14, the right to health para. 48.

⁴⁴ See, for example, General Comment 14, the right to health, para. 49.

⁴⁵ General Comment 3, on the nature of states parties’ obligations, para 10. But for a significantly more expansive interpretation of that right’s minimum core obligations, see General Comment 14, on the right to health, paras 43(a)-(f) and 44 (a)-(e)).

⁴⁶ General Comment 14, the right to health, para. 48.

⁴⁷ H. Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* 2nd ed. (Princeton: Princeton University Press, 1997). See also Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (Maastricht, Netherlands, 22-26 January 1997).

or other agents that would impact negatively on the right to health.⁴⁸ Obligations to *protect* are primarily positive obligations on the state to take measures to prevent violations of a human right by third parties. For example, such obligations are violated by a state's failure to regulate the activities or individuals, groups or corporations to prevent them violating the right to health through the marketing of dangerous medicines or the pollution of water, air and soil.⁴⁹ Finally, obligations to *fulfil* are primarily positive obligations that a state must itself comply with. Illustrations of the violation of these obligations, according to the Committee, include the state's failure to adopt policies to reduce gender discrimination in the provision of health facilities, goods and services or its failure to adopt or implement a national health policy.⁵⁰

Obligations of conduct v obligations of result. Obligations of *conduct* are mandatory steps that must be taken, or processes required to be put in place, for the direct realization of given right, e.g. reasonable steps towards the adoption of a national health strategy through a participatory process that engages all relevant parties. Obligation of *result* specify outcomes states are obligated to secure, such as the provision of certain elements of primary health care or the quality and quantity of food and water necessary for survival.⁵¹

Primary v secondary obligations. Primary obligations are those obligations directly requiring a state to do or refrain from doing certain things. Secondary obligations are second-order in character, relating to a state's failure (or potential failure) to comply with primary obligations. Secondary obligations may also arise for third parties in the case of non-compliance or potential non-compliance by the target state. According to the Covenant, these third parties may be states, international organizations or other bodies in a position to assist. Thus the Covenant refers to the need for 'international assistance and cooperation' to ensure compliance with the rights it sets out (Articles 2(1), 11(2), 15(4), 22 and 23). The Committee has affirmed an obligation 'on all those in a position to assist, to provide "international assistance and cooperation, especially economic and technical" to enable developing countries to fulfil their core obligations'.⁵² Corresponding to this secondary obligation on third parties 'in a position to assist', states that have violated or are at risk of violating a given human right have an obligation to seek third party assistance. Just

as important as this secondary *positive* obligation of assistance in the event of actual non-compliance by the target state with the primary minimum core obligation, there is a secondary *negative* obligation on the part of states and other relevant agents not to subject the target state to conditions, e.g. the imposition of programmes of economic austerity and debt repayment schedules, that will predictably have the effect of preventing the latter from meeting its minimum core obligations.⁵³

2. Minimum core obligations are a sub-set of human rights obligations and must meet both general and specific constraints

Minimum core obligations are a sub-set of the obligations associated with any given right: they are those obligations that are to be given immediate effect by all states. Hence they must satisfy the *general* constraints that apply to all human rights obligations and in addition they must satisfy the *specific* constraints that apply to that sub-set of obligations that should be give immediate effect. One general constraint is that the obligation must properly fall within the scope of the human right in question, rather than some other right. So for example, in specifying the core obligations under the right to health, General Comment 14 refers to access to 'minimum essential food' and 'basic shelter, housing'.⁵⁴ However, food, shelter and housing do not come within the proper remit of the human right to health (Article 12 of the Covenant), but are rather components of the right to an adequate standard of living (Article 11). Again, the error consists in attributing to the right to health all obligations that are partly justified by the way they advance our interest in health.

⁴⁸ General Comment 14, the right to health, para. 50.

⁴⁹ General Comment 14, the right to health, para. 51.

⁵⁰ General Comment 14, right to health, para. 52. See also, for this typology, General Comment 12, the right to adequate food, para. 15.

⁵¹ See General Comment 3, on the nature of states parties' obligations; Maastricht Guidelines, para 7.

⁵² CESCR, Statement: Poverty and the International Covenant on Economic, Social and Cultural Rights, E/C.12/2001 (May 10th, 2001), para 16; see also General Comment 14, the right to health, para. 45.

⁵³ For a useful discussion in relation to the policy of austerity, see M. Salomon, 'Of Austerity, Human Rights and International Institutions', *European Law Journal* 21 (2015): 521. See also Report of the Special Rapporteur on the Right to food A/HRC/10/5/Add.2 (February 11, 2009).

⁵⁴ General Comment No.14, para. 43(b),(c).

Another vitally important general constraint is that the obligations must be feasible in a dual sense: *possible* to comply with and not *excessively burdensome*. Of course, the starting-point for the affirmation of the existence of a human right (a universal moral right), is some important value consideration, such as an aspect of human dignity or one or more universal human interests. But a right is not the same as the value considerations that ground it. Instead, whether a right exists will be a matter of whether considerations of individual dignity and individual interest suffice to impose an obligation on others. And an obligation, which is the content of a right, will only exist if it is feasible, which is in turn a matter of it being *possible* to comply with and *not unduly burdensome*. In light of this, we can see the mistake in asserting that a human right to health is a flawed basis for healthcare policy on the grounds that it represents ‘a claim on funds that has no natural limit, since any of us could get healthier with more care.’⁵⁵ Precisely what distinguishes our interest in health from our right to health is the fact that feasibility constraints shape the content of the obligations associated with the latter. These obligations do have a natural limit: that imposed by considerations of feasibility.

What is more, in the case of minimum core obligations, any candidate obligation must satisfy a more stringent version of these feasibility constraints: an obligation qualifies for membership of the minimum core only if it is feasible to insist on *all* states fully complying with it *immediately*, rather than in the medium-to-long term (which is the weaker feasibility requirement applicable to non-core obligations in accordance with the doctrine of progressive realization).

A final point to recall here is that the process of specifying the obligations associated with a given human right is a *holistic* one. The MCD consists in a multiplicity of obligations: obligations deriving from distinct human rights (to education, health, an adequate standard of living, etc) and also potentially multiple obligations arising from the self-same right (e.g. in the case of the right to health, a combination of obligations pertaining to medical treatment, public health measures and social determinants of health). Just as the general process of specifying the obligations associated with human rights norms is a holistic one (see 2, above), the same is true of the specification of that component of any given human right that constitutes its minimum core. The set of minimum core obligations must be such that, as a totality, they meet the feasibility threshold imposed by possibility and cost to qualify as obligations that together demand immediate full compliance on the part of all states. In other words, they must be immediately fully realizable *simultaneously*, and the immediate satisfaction of each obligation must not be

unduly burdensome in light of the requirement to satisfy immediately the other core obligations.

Marshalling these points, we can begin to appreciate how disagreements as to the content of minimum core obligations can be addressed in a principled manner. A dramatic illustration of such a disagreement regarding the human right to health is the seemingly radical discrepancy between two of the Committee’s own General Comments. On the one hand, General Comment 3 refers to an obligation to provide ‘essential primary health care’ (para. 10). On the other hand, General Comment No. 14, on the right to health, offers a very demanding list of requirements under the rubric of core obligations (para. 43(a)-(f)), and then adds to them a series of further requirements that it describes as being of ‘comparable priority’ (para 44 (a)-(e)). General Comment No. 14 includes requirements—such as the adoption and implementation of ‘a national public health strategy and plan of action on the basis of epidemiological evidence, addressing the health concerns of the whole population’—that many developed states are a long way from realizing any time soon. It is arguable that, on closer inspection, the minimum core obligations it specifies fail to meet the requirements of feasibility as obligations that should be immediately realized by all states irrespective of their level of resources. This conclusion seems to follow even more obviously if we endorse General Comment 14’s view that minimum core obligations are non-derogable.⁵⁶

There is no need to address here the question of what the content of the minimum core obligations of the right to health is once feasibility constraints are properly factored in. Instead, two points are worth emphasizing. First, these constraints offer genuine, and not hopelessly indeterminate, guidance in the specification of the content of minimum core obligations. Second, there is a limit to how much moral reasoning can deliver in spelling out the content of any human right, including its core obligations. In particular, it is a mistake to suppose that pure moral reasoning will always generate a uniquely correct, or operationally adequate, specification of the minimum core. It might be, instead, that alternative specifications are eligible or that extra content needs to be

⁵⁵ W. Easterly, ‘Human rights are the wrong basis for health care’, *Financial Times* Oct 12, 2009 <http://www.ft.com/cms/s/0/89bbb-da2-b763-11de-9812-00144feab49a.html#axzz3ym5A1A9w>

⁵⁶ This chimes with the assessment of John Tobin: ‘the vision of the minimum core obligations of states under the right to health, as advanced by the ESC Committee, is disassociated from the capacity of states to realize this vision. It simply does not offer a principled, practical or coherent rationale which is sufficiently sensitive to the context in which the right to health must be operationalized’, *The Right to Health in International Law*, p.240.

added to make the obligations practically workable standards. In that case, it will be necessary to embody, through legal processes, a choice of some eligible specification or other of the minimum core. Law will in that way bring an extra, socially valuable injection of determinacy to our thinking about human rights that is not available when we consider them purely as the deliverances of moral reasoning.

3. An invariant or variable standard?

One important question, on which no settled consensus exists, is whether the MCD constitutes an invariant standard requiring the same substantive ‘minimum essential level’ of human rights protection across all societies, or whether the level of protection required adjusts in response to differences in states’ resources and capabilities. Views on this question divide between proponents of an invariant (or absolute) and a variable (or relative) standard.⁵⁷ Both standards are supposed to be objective, but only one of them relativizes the content of minimum core obligations to resource capacities that may vary from one state to the other. On the invariant view, Mali and Switzerland must secure the same ‘minimum essential level’ of human rights protection under the MCD. On the variable view, the minimum core obligations will demand a significantly higher level of rights protection in the case of relatively wealthy Switzerland as compared to poorer Mali. On the latter view, but not the former, whether an obligation is ‘core’ or ‘non-core’ for a state will partly depend on the level resources of the state in question, since this will affect what may be reasonably imposed as an obligation of ‘immediate effect’. Although versions of both alternatives are logically eligible, the invariant interpretation seems on balance superior, both on the grounds of fit with existing practice and as a means of advancing the purposes of the MCD.

Taking variations in resources into account has its place within the doctrine of progressive realization, which concerns the timetable for compliance with obligations that are invariant for all states. But we have construed the MCD as a doctrine to which progressive realization does not extend. Instead, the MCD defines the threshold of immediate human rights obligations to be met by all states regardless of variations in resources that exist among them. Just as human rights standards generally are invariant across different states,⁵⁸ notwithstanding massive variations in resources globally, so too on this reading are minimum core obligations. In other words: non-core obligations are invariant standards applying to all states that may in principle be satisfied in due course, whereas core obligations are invariant standards that must be immediately satisfied by all states. Resources differences

bear on the question of whether a particular state is taking adequate steps progressively to realize the fulfilment of non-core obligations. To make the content of human rights obligations, whether they be core or non-core, a function of the resource capacities of state would transgress the ‘one world, one standard’ idea that animates IHRL.

It is also worth noting that an invariant interpretation generates a more readily applicable and less contentious standard of assessment than one tailored to the specificities of resource capacities in each state. When seeking to determine whether or not a state is complying with its minimum core obligations, we have to assess it against a substantive level of immediate human rights protection that applies uniformly to all states. We do not have to engage in an extra, and potentially complicated and controversial, process of identifying the specific minimum core obligations that are applicable to a particular state in light of its resource endowment before embarking on the process of assessment. Since the MCD is supposed to identify *urgent* human rights requirements it is, other things being equal, especially desirable to identify such standards by means of a process that is comparatively less complicated and contestable.

The invariance of the obligations has implications for how we assess feasibility in specifying the content of the obligations associated with a given human right. We need a standardized baseline of state capacity—as defined by resources in a broad sense, so as to encompass not only wealth, natural resources, but also levels of institutional and technological capacity—that can serve in fixing a uniform set of obligations that applies to all states. Presumably, this will be the same baseline of state capacity that is assumed in fixing the content of the human rights in the International Covenant on Civil and Political Rights. The baseline is not ascertained by asking what is feasible for the most dysfunctional or ‘failed’ state

⁵⁷ For the view that the ‘minimum core’ is state-specific or relative, see C. Scott and P. Alston, ‘Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney’s Legacy and Grootboom’s Promise’, *South African Journal of Human Rights* 206, 250–16 (2000): 206, p.250. For an absolutist reading, see G. van Buren, ‘Of Floors and Ceilings: Minimum Core Obligations and Children’, in D. Brand and S. Russeld (eds), *Exploring the Core Content of Socio-Economic Rights: South African and International Perspectives* (South Africa: Protea Boekhuis, 2002), p.184. For seeming endorsements of the invariant reading, see Limburg Principles on the International Covenant on Economic, Social and Cultural Rights, Annex, U.N. Doc. E/CN.4/1987/17 (June 2-6, 1986); Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, U.N. Doc. E/C.12/2000/13.

⁵⁸ See, e.g. G. Brown (ed.), *The Universal Declaration of Human Rights in the 21st Century: A Living Document in a Changing World. A report by the Global Citizenship Commission* (Cambridge: Open Book, 2016), pp.65-66.

in the world. This would be comparable to specifying the obligations of parenthood by reference to what is feasible for the most incompetent of parents. Instead, since the subject matter concerns *obligations of immediate effect* that we can feasibly attribute to all states, we have to ask the following question for each and every putative minimum core obligation: Can this obligation be imposed on all states, in the reasonable expectation that for almost all states, for almost all of the time, it is possible and not unduly burdensome for them immediately to comply with the putative obligation in full? Of course, there is no single correct answer to the precise level at which the baseline of state capacity should be set. Nonetheless, there are real constraints on its specification. And, at the point at which moral reasoning is exhausted in setting the baseline, we have to resort to some form of social decision reflected in law.

Any adequate specification of the invariant set of minimum core obligations, on this view, would allow for two possibilities. The first is that at any given time there may be a handful of ‘failed states’ that are not at the baseline level of state capacity used to fix the content of such obligations. Another possibility is that an emergency situation may arise—the outbreak of war or a natural disaster—which for a period pushes a given state below the baseline capacity. In each case, we can say that although the minimum core obligations apply to the state in question, a justification or excuse exists for non-compliance. Crucially, secondary obligations would then presumably arise in both cases, e.g. on the part of the states in question, to seek assistance in meeting the minimum core obligations and rebuilding state capacity, and on the part of other states or international agents in a position to assist, to take measures to provide that assistance.

4. An illustration: the obligation to prevent hunger

We cannot take for granted that in the case of each and every economic, social and cultural right in the Covenant there will be one or more associated minimum core obligations. Theoretically, it is possible that some of these rights do not contain any minimum core obligations as part of their normative content, so that the totality of the obligations associated with them are subject to progressive realization. However, it is unlikely that this possibility is realised, especially if we take into consideration the non-discrimination clause in Article 2(2) of the Covenant. This requires states to guarantee that the rights contained therein shall be ‘exercised without discrimination of any kind as to race, colour,

sex, language, religion, political or other opinion, national or social origin, property, birth or other status’, echoing a theme also present in Article 26 of the ICCPR. Presumably, on the basis that non-discrimination is a civil and political right, and that rights of the latter sort are of ‘immediate effect’, it would seem to follow that there is a minimum core obligation on states not to discriminate on the impermissible grounds when seeking to secure Covenant rights.

It is not the aim of this Framework Report to argue for a specific list of minimum core obligations. Its focus has been on elucidating the concept of a minimum core obligation and setting out principled guidelines for determining the content of such obligations. However, for the purposes of illustrating the MCD, this section outlines very schematically the derivation of one minimum core obligation that has a good claim to being paradigmatic: the obligation to prevent hunger. Since General Comment 12, on the right to adequate food, is for the most part a sound exemplification of the five step procedure for adducing minimum core obligations offered above (section 5), reference will be made to it throughout.

Step 1. Identification of a general human right.

Article 11(1) of the Covenant sets out a right to ‘adequate food’ as falling within the scope of the broader right to an ‘adequate standard of living’.

Step 2. Identification of the scope of the right.

In the words of the Committee, the right to adequate food is concerned with securing to all human beings ‘physical and economic access at all times to adequate food or the means for its procurement’.⁵⁹ Therefore, obligations will come within the scope of the right to adequate food to the extent that they are concerned with securing such access and such means.

Step 3. Identification of the content of the obligations associated with the right.

The main elements of the content of the right to adequate food are characterized as follows by the Committee: (1) ‘The availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances and acceptable within a given culture’; (2) ‘The accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human beings’.⁶⁰ Presumably, the Committee judges that these obligations meet the requirement of feasibility, but with the proviso that

⁵⁹ General Comment 12, the right to food, para. 6.

⁶⁰ General Comment 12, the right to food, para. 8.

they are subject to the doctrine of progressive realization, and so may be fully realized only in the longer-term given resource constraints.⁶¹

Step 4. Identification of minimum core obligations associated with the right, i.e. those to be fully complied with immediately by all states.

General Comment 12 distinguishes between obligatory measures under the right to adequate food that are of a ‘more immediate nature’ and those that ‘are more of a long-term character’.⁶² This is entirely consonant the distinction between core and non-core obligations associated with a right that has been defended in this Framework Report. It goes on to state that the ‘minimum essential level’ of the right to adequate food—that which constitutes the minimum core or immediate obligation applicable to all states—involves securing for all people ‘access to the minimum essential food which is sufficient, nutritionally adequate and safe, to ensure their freedom from hunger’.⁶³ This corresponds with the more specific ‘fundamental right of everyone to be free from hunger’ set out in Article 11(2) of the Covenant, which is only a component of the broader right to adequate food, since the latter requires access to food required to meet “dietary needs” and not just to ensure freedom from hunger and starvation.

This is a very plausible analysis of at least one minimum core obligation associated with the right to adequate food.⁶⁴ We can take it to provide a somewhat fuller gloss on the obligation to provide access to ‘essential foodstuffs’ identified as a core obligation in General Comment 3, para.10. No doubt more elaboration is needed, so as to pin down the precise content of an obligation that satisfies the operative requirements of feasibility that apply to minimum core obligations: that it be possible for the generality of states to comply with immediately and in full, and that they can do so without imposing excessive burdens on them. The following two observations bear on this discussion of feasibility.

First, the notion of ‘hunger’ must be unpacked. One meaning it bears is ‘chronic hunger’, defined by the Food and Agriculture Organization (FAO) as the insufficient intake of energy (calories) and proteins. For the years 2010-12, the FAO estimated 870 million people were chronically hungry. Another definition of hunger is ‘hidden hunger’, which concerns insufficient micronutrients, e.g. vitamins, in the diet.⁶⁵ Clearly, fully realizing the right to adequate food requires, among other things, access to food needed to avoid both kinds of hunger. An important task, however, is to determine which kind of hunger is encompassed by

the minimum core obligation to prevent hunger. Arguably, it encompasses chronic hunger *at the very least*. Second, as the Committee has observed, ‘the roots of the problem of hunger and malnutrition are not lack of food but lack of access to available food, inter alia because of poverty, by large segments of the world’s population’.⁶⁶ Given that food shortages are not the fundamental problem, the feasibility of the minimum core obligation concerns the possibility and burdensomeness of immediately securing people’s *access* to enough food to avoid hunger. In determining the feasibility of this obligation, the findings of Amartya Sen’s research on famines have great importance.⁶⁷ Sen shows that compliance with civil and political rights, such as freedom of speech and rights to democratic political participation, plays a vital role in ensuring access to food and preventing famine. The key point here is that the feasibility of the minimum core obligation to avoid hunger must be assessed in light of the fact that all states have an obligation to secure *immediately* civil and political rights which, according to Sen, are major determinants of access to food. This strengthens the case for a minimum core obligation to prevent hunger, and perhaps militates in favour of its encompassing hidden, as well as chronic, hunger.

It is worth noticing, however, that General Comment 12 is ambiguous as to whether or not this minimum core obligation to ensure freedom from hunger is derogable in an emergency. Paragraph 6 suggests that it is non-derogable: ‘States have a core obligation to take the necessary action to mitigate and alleviate hunger as provided for in paragraph 2 of article 11, even in times of natural or other disasters’. Paragraph 17, on the other hand, can be read as countenancing the possibility that the core obligation to prevent hunger is defeasible in circumstances of severe resource constraints that make provision of access to food ‘impossible’. We can draw on the distinction between a state’s primary and secondary obligations to resolve this ambiguity. The primary minimum core obligation is an obligation to secure for all food that is sufficient to ensure their freedom from hunger.

⁶¹ General Comment 12, the right to food, para. 14.

⁶² General Comment 12, the right to food, para. 16.

⁶³ General Comment 12, the right to food, para. 14.

⁶⁴ It is arguable that right to be free of hunger is a norm of general customary international law, hence binding even on states that are not parties to the Covenant, see FAO, *The Right to Food Guidelines: Information Papers and Case Studies* (Rome, 2006), pp.103-106.

⁶⁵ J Sachs, *The Age of Sustainable Development* (New York City: Columbia University Press, 2015), pp.318-9.

⁶⁶ General Comment 12, the right to food, para. 5.

⁶⁷ A. Sen, *Poverty and Famines: An Essay on Entitlement and Deprivation* (Oxford: Oxford University Press, 1990); A. Sen, *Development as Freedom* (Oxford: Oxford University Press, 2001).

Clearly, extreme circumstances can arise – natural disaster, warfare—that render it impossible or unduly burdensome to fulfil this obligation immediately and in full, given resource limitations. Therefore, the primary obligation may be derogable in such emergencies, which is not to say that it is always derogable in case of emergency—it depends on its severity. However, in those emergency circumstances in which the state is justified in derogating this minimum core obligation, it comes under a secondary obligation to do what it can to ‘mitigate and alleviate hunger’. This obligation is not the same as the primary obligation to prevent hunger by ensuring everyone’s access to food, but is instead triggered by non-compliance with the latter.

Step 5. Identification of secondary duties of the target state and other agents.

In the previous paragraph we have already identified one of the target state’s secondary duties. Where it is justified

in derogating from the primary minimum core obligation to prevent hunger, due to resource shortages in emergency circumstances, a secondary obligation is triggered to do what it can to ‘mitigate and alleviate hunger’ in those circumstances. In addition, the state has an obligation to seek international support to secure the right to adequate food—an obligation to take steps to obtain such support in order to forestall non-compliance with the right or to help ensure future compliance. This secondary obligation to seek help is matched by corresponding secondary obligations on those states and international organizations ‘in a position to assist’ to provide assistance and cooperation to ensure the fulfilment of the primary core obligation.⁶⁸ In addition, as noted previously, these other agents have a negative secondary obligation not to undertake activities that will prevent states from meeting their primary obligations under the right to adequate food.⁶⁹

⁶⁸ General Comment 12, the right to food, paras. 36, 38, 39, 40, 41.

⁶⁹ General Comment 12, the right to food, para. 37.

7. Responding to Objections: Excessively Rigid and Counterproductive?

Various objections have been directed at the utility of the MCD within IHRL. Some are premised on attributing to that doctrine features that we have seen do not properly belong to it, such as the idea that minimum core obligations are non-derogable norms or that they are always to be made justiciable (see section 5, above). Others depend on claims that are dubious, for example, that the process of specifying minimum core obligations is hopelessly indeterminate (see section 6, above).⁷⁰ In this section, however, we shall address two other, large-scale objections: (1) that in seeking to specify an invariant standard of human rights assessment for all states, the MCD is excessively rigid, lacking sensitivity to important contextual factors that differ significantly from one state to another, and (2) that even if, in principle, the MCD is a cogent doctrine, the attempt to give it legal effect is likely to be counter-productive in practice with regard to the ultimate objective of improving states' compliance with economic, social and cultural rights.

Excessively Rigid?

It might be objected that the invariant reading of the MCD is unappealing because it is insensitive to salient differences among the states that bear human rights obligations.⁷¹ If the objection is couched in terms of differences in levels of resources among states, the answer is that 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. Minimum core obligations are the very least that all states must immediately undertake by way of human rights compliance. If it is not generally feasible to demand the immediate fulfilment of a

given human rights obligation due to resource limitations, that obligation is not a viable candidate for inclusion in the minimum core. This is precisely why the minimum core comprises only a sub-set of human rights obligations, those that are not subject to the doctrine of progressive realization that takes into account variations in resources.

Still, a critic might argue that a truly universal and invariant reading of the MCD lowers the bar of human rights compliance unduly for states that have resource capacities well above the global average. Does it not seem peculiar to suppose that the obligations of immediate effect applicable to Switzerland are identical to those applicable to Mali, given the immensely greater resources at the disposal of the former? It is important to note that the invariant reading of the MCD does not carry this untoward implication. The MCD identifies those obligations of immediate effect that apply to *all* states irrespective of variations in their resource endowments. These are the 'minimum core obligations'. As for the non-core obligations, they are subject to the doctrine of progressive realization. But the permission to realize progressively given by this doctrine is significantly conditional in character: it makes it permissible to take measures to realize non-core obligations progressively, rather than immediately, only insofar as resource constraints justify this approach. However, to what extent, if at all, resource

⁷⁰ For an overview of objections, see M. Harris, 'Downsizing Rights: Why the 'Minimum Core' Concept in International Human Rights Law Should be Abandoned'.

⁷¹ 'Fixing a quantified content might, in a rigid and counter-productive manner, prevents an analysis of context', O'Regan J in *Mazibuko v City of Johannesburg* [2009] ZACC 28 at 60.

constraints justify such an approach will vary from one state to another depending on the level of resources available to them. This means that while a poorer state may legitimately invoke the doctrine of progressive realization in relation to some non-core obligations, a richer state may not be able to do so, because comparable resource constraints do not exist in its case. Hence, a state may be required to give immediate effect to non-core obligations, because it has the resources to do so. What distinguishes minimum core obligations, however, is that these are the obligations to which *all* states are required to give immediate effect.

So far, the MCD has been defended against the objection that it wrongly fails to take into account resource differences between states in determining the ‘minimum core’ obligations that apply to them. However, it is important to keep in mind how an invariant standard may nonetheless accommodate considerable variability in other, especially non-resource-related, respects.

Firstly, there is the phenomenon of what might be called ‘contextual relativity’: meeting the self-same obligation may require different state conduct in light of environmental, cultural or other differences. For example, which languages must be taught under the right to education will depend, among other things, on the languages that happen to be the official or prevalent means of communication within a given society. Similarly, the right to adequate clothing—adequate to offer protection from the elements and ‘to appear in public without shame’—will require access to a winter coat in Scotland but not in Suriname. In such cases, different courses of conduct, attuned to specificities of cultural or environmental context, are needed to discharge what is meaningfully one and the same obligation.

Secondly, the minimum core may be formulated in such a way as to permit states to choose from a diverse but limited array of ways of fulfilling it, exemplifying a phenomenon sometimes referred to as ‘margin of appreciation’ or ‘subsidiarity’. Thus, it could be that different packages of health care provision, or different kinds of educational curricula, satisfy the abstract standard or human rights protection set by, respectively, ‘essential primary health care’ and ‘the most basic forms of education’. It is compatible with an invariant minimum core to confer freedom on states to exercise a choice within this constrained range. The rationale for conferring such freedom may be of various kinds. It might be a way of addressing contextual relativity; but another possibility is that it can reflect the importance of an element of self-determination in the concrete specification of human rights obligations that may not be fully determinate at the level of the deliverances of pure moral reasoning.

Thirdly, if we adopt an interpretation of the MCD according to which its obligations are not inherently non-derogable, as suggested above (see section 5) there is always the possibility that an emergency situation may arise in which minimum core obligations are defeated by countervailing considerations, including resource shortages arising from war or natural disasters. In judicial contexts, doctrines such as that of ‘proportionality’ may be deployed in order to determine whether there is a good justification for departing from the minimum core obligations. Of course, in such situations, secondary obligations to assist on the part of other states and international organizations will normally be triggered.

Finally, it is entirely compatible with the invariant interpretation of the MCD that the content of minimum core obligations changes over time, as assessments about feasibility may change in light of factors such as climate change or technological and scientific advances. Access to the Internet or to antiretroviral drugs, for example, can come to be part of the minimum core of the human rights to education and health, respectively, as the cost of providing them decreases over time. The minimum core of a human right is therefore not forever set in stone, but can evolve over time. What the invariant interpretation insists upon, however, is that at any given point of time in its evolution it imposes the same substantive standard of immediate human rights compliance for all states irrespective of their resources.

Counterproductive?

The concern that the MCD is counterproductive targets not its intrinsic merits, but the presumed consequences of its being established and widely endorsed as a legal doctrine or even as a ‘soft norm’ of IHRL. The worry is that the language of ‘minimum core obligations’ lends itself to being misunderstood, or perhaps even to being hi-jacked, so as to suggest that only the ‘core’ obligations are important, or worth worrying about, or ‘real’ obligations, as opposed to the ‘non-core’ obligations associated with a human right. In less developed countries, the unwelcome consequence may be that human rights efforts are disproportionately focussed on securing core obligations, while non-core obligations are side-lined or ignored instead of being taken seriously in the way that the doctrine of progressive realization demands. In more developed countries, the unwelcome consequence may be that human rights generally come to be seen as of no real practical significance, as the ‘essential minimum’ levels specified by core obligations are perhaps complacently

assumed to be amply fulfilled, and non-core obligations are perceived as unimportant or merely aspirational.⁷²

Naturally, any such practical ill-effects would depend on a misunderstanding or misappropriation of the MCD. ‘Core’ obligations are not to be simplistically equated with ‘important’ obligations. Instead, they are a sub-set of the totality of obligations associated with a human right, all of which are important in virtue of being human rights obligations. However, minimum core obligations enjoy an *additional* form of importance, i.e. they are obligations of immediate effect in the case of all states notwithstanding resource differences. Moreover, the MCD does not operate in normative isolation but in the context of other doctrines, such as that of progressive realization, which imposes important demands regarding the fulfilment of economic, social and cultural rights beyond the core.

Nonetheless, the concern about the potential counter-productiveness of the MCD is one that should be taken seriously, as we can see by means of a comparison with civil and political rights. After all, as noted above (section 4), civil and political rights are not subject to a doctrine of progressive realization. Instead, the obligations associated with them are all to be given ‘unqualified’ and ‘immediate’ effect.⁷³ But at the same time, it has long been understood that compliance with civil and political rights has significant resource implications. Setting up the requisite judicial and executive institutions, and elaborating and implementing appropriate policies and regulatory frameworks, in order to secure rights such as those to a fair trial and political participation, are hugely costly endeavours. Constraints on available resources may impose obstacles to immediate compliance, just as in the case of economic, social and cultural rights. Yet there is no doctrine of progressive realization with respect to civil and political rights and no associated doctrine of a ‘minimum core’. In trying to make sense of this discrepancy, one plausible explanation is that the introduction of a distinction between core and non-core obligations, although in principle valid, is thought to pose an unacceptable risk of being counter-productive in precisely the way described above.

Now, this concern about the counter-productiveness of the MCD is a genuine one, but it is a worry that is not confined to that doctrine. Such a problem is always liable to arise when any category of international legal norm—such as peremptory norms of *jus cogens*—is singled out as possessing a distinctive normative significance. Fortunately, there are a number of responses that can be made to the objection from counter-productiveness. First, there is a need for reliable empirical evidence to determine the extent to which the phenomenon at which it gestures is real and not merely speculative. Second, the concern, to the extent that it tracks a real phenomenon, highlights the need for clarity about the precise nature of the MCD, and also the need to embark on an educative process to ensure that the distinctive meaning of ‘minimum core’ obligations is adequately understood not only by state officials and international organizations, but also by non-governmental organizations concerned with human rights and, indeed, by ordinary citizens. Third, once empirical data about the incidence of counter-productivity has been collected and analysed, it will be possible to start formulating strategies for presenting the MCD in ways that help counteract this tendency. Some of these strategies may relate to the nature of the indicators by means of which compliance with minimum core obligations is monitored and implemented.

⁷² For such concerns, see K. Young, ‘The Minimum Core of Economic and Social Rights’, p.114; M. Wesson, ‘Disagreement and the Constitutionalisation of Social Rights’, *Human Rights Law Review* 12 (2012) 221 at 242; K. Lehman, ‘In Defence of the Constitutional Court: Litigating Socio-economic Rights and the Myth of the Minimum Core’ *American University International Law Review* 22 (2006): 163 at 182; J. Klaaren, ‘A Second Look at the South African Human Rights Commission, Access to Information, and the Promotion of Socioeconomic Rights’, *Human Rights Law Quarterly* 27 (2005): 549 at 552. On the basis that the MCD threatens to ‘downsize’ economic, social and cultural rights, it has been argued that the doctrine should be abandoned in favour of a proportionality test, in M. Harris, ‘Downsizing Rights: Why the ‘Minimum Core’ Concept in International Human Rights Law Should be Abandoned’.

⁷³ Human Rights Committee, General Comment 31, on the nature of the general legal obligation imposed by the ICCPR, para. 14.

8. Indicators and Benchmarks: Tools for Monitoring and Implementation

We have already discussed the ‘operationalization’ of human rights. In the first instance, IHRL is itself an enterprise that is aimed at giving effect to a background morality of human rights—insofar as it is appropriate to do so via the mechanism of individual legal rights assigned to all human beings (section 2, above). Secondly, we saw that one of the reasons for preferring the invariant reading of the MCD over the variable reading is that the former is a more readily applicable, and less controversial, standard for assessing the behaviour of states (section 6, above). But now we turn to a further topic, the operationalization of both human rights generally, and minimum core obligations specifically, by means of human rights indicators. These have been defined as: ‘specific information on the state or condition of an object, event or outcome that can be related to human rights norms and standards; that addresses and reflects human rights principles and concerns; and that can be used to assess and monitor the promotion and implementation of human rights’.⁷⁴

Whereas compliance with human rights is intrinsically valuable, the significance of indicators is purely instrumental. They are tools of social science the purpose of which is to better equip us to monitor the extent of human rights compliance and to improve compliance in the future. Such indicators can be either quantitative or qualitative in character. Quantitative indicators are mainly expressed in a numerical form, as numbers, percentages, indices, e.g. the rate of enrolment or school-aged children, or the proportion of one-year olds immunized against vaccine-preventable diseases, etc. Qualitative indicators are expressed in more narrative or evaluative terms, e.g. the status of ratification of a given human rights treaty. Benchmarks can be specified in relation to indicators by requiring a specific value for a given indicator, e.g. raising the rate of enrolment of school-aged children to 90%. The Committee has at various times

urged states to set benchmarks so as to facilitate human rights compliance.⁷⁵

Indicators and benchmarks promise to inject the empirically-based methodology of social science and big data into the human rights enterprise, adding a useful tool to its existing, primarily moral and legal, repertoire. They are a valuable supplement to human rights thinking and potentially especially important in helping to underwrite conclusions about the extent to which economic, social and cultural rights are being ‘progressively realized’ over time.⁷⁶ However, their effective use to monitor and enhance the implementation of human rights depends on meeting certain important challenges. Here, we can highlight three.

Anchoring. First, and most fundamentally, there is a need to ensure that the indicators and benchmarks chosen adequately track components of the normative content of any given human right, including its minimum core obligations. In the jargon, this involves identifying the ‘attributes’ of a given human right—the key components

⁷⁴ Office of the High Commissioner of Human Rights, *Human Rights Indicators: A Guide to Measurement and Implementation* (New York & Geneva, 2012), p.16.

⁷⁵ See, for example, General Comment 14, on the right to health, paras. 57-8.

⁷⁶ Indeed, a UN conference in preparation for the Vienna Conference on Human Rights in 1993 concluded that indicators could ‘assist with the development of “core contents” of economic, social, and cultural rights’ (*Report of the Seminar on Appropriate Indicators to Measure Achievements in the Progressive Realization of Economic, Social and Cultural Rights*. Report of the secretariat to the World Conference on Human Rights preparatory committee, 4th session, Geneva, Switzerland, April 20, 1993. A/CONF.157/PC/73), p.8, cited in S. E. Merry, *The Seductions of Quantification: Measuring Human Rights, Gender Violence, and Sex Trafficking* (Chicago IL: University of Chicago Press, 2016), p.175.

of its normative content, the bundle of obligations associated with it. Hence, the process for specifying the content of these obligations, including the minimum core, discussed in sections 2 and 6 is all-important. As a next step, it is crucial to devise indicators that are suitably anchored in these attributes, so that their measurement helps us monitor compliance and enhance future implementation. It is important to note that just as the obligations associated with a human right may be quite diverse in character (see the taxonomy of kinds of obligations in section 6(1)), so too indicators will be of correspondingly different kinds, e.g. structural indicators, concerned with legal instruments and institutions (e.g. ratification of relevant treaties), process indicators, measuring ongoing efforts to comply with human rights commitments (e.g. human rights complaints received and the proportion redressed), and outcome indicators, measuring the extent to which human rights are enjoyed (e.g. literacy rates by targeted population group).

Contextualization. Although human rights obligations are in general invariant, as are minimum core obligations, we have noticed that they may nonetheless demand somewhat different measures depending on contextual factors that vary from one state to another (see section 7, above). Hence, the implementation of these universal obligations may need to be measured by indicators that also vary from one state to another, since they will be tailored to the different contexts inhabited by each state. So, to take the simplest example, indicators regarding literacy will test for competence in different languages depending on which language is prevalent in the state in question. But the process of contextualization can become more complicated when seeking an indicator that effectively measures the core obligation to provide ‘essential primary health care’. The specific forms of such care that must be provided, in fulfilment of the relevant minimum core obligation, may differ depending on the specific health risks present in a given state, e.g. whether there is a non-negligible risk of contracting a tropical disease such as malaria.

Fetishization. We saw that a challenge confronted the MCD insofar as there is a risk that it might have the unintended effect of downgrading or displace the non-core obligations associated with economic, social and cultural rights. There is an even more acute version of

this danger in relation to indicators. Contrary to their status as instruments for monitoring the implementation of human rights, they may come to be fetishized, so that the concern with scoring well on various indicators becomes an end in itself, crowding out the ultimate objective of enhancing compliance with human rights. Because indicators are, by design, more amenable to measurement than the underlying human rights they are seeking to measure, this risk is a very real one. This is why the proposal to replace the MCD with reliance on benchmarks and indicators seems especially misguided.⁷⁷ Although the problem of counter-productiveness does arise for the MCD, the proposal to replace it with benchmarks and indicators confronts an even more egregious version of the same problem. This is because indicators, unlike minimum core obligations, are merely of instrumental significance, helping us to measure the extent to which intrinsically significant standards—the obligations associated with human rights, including the minimum core—are being realized.

However, rather than conceiving of indicators as *replacements* for the MCD—a somewhat incoherent notion in any case, since we would still need to specify the independent standards regarding compliance with which they serve as indicators—they can instead be seen as ways of promoting compliance with the latter doctrine, in part by ameliorating the concern about counter-productiveness that we previously noted. The potential counter-productiveness of the MCD arises in the first instance from the fact that minimum core obligations are legal or regulatory standards and, as such, must comply with the rule of law requirement of being publicized in advance to those subject to them. It is primarily this fact of being declared in advance that generates the worry that states may respond to them in a manner that is counterproductive. Indicators may potentially help address this problem because, as statistical devices, they are not in the same way governed by rule of law requirements, including the requirement of advance notice. Indicators can therefore potentially provide an independent check on compliance with human rights obligations generally, and minimum core obligations in particular, without running the same risk of being misunderstood or misappropriated.

⁷⁷ K. Young, ‘The Minimum Core of Economic and Social Rights’, pp.164-173.

9. Conclusion

It has been argued in this report that the MCD is a valuable nascent doctrine of IHRL, one that facilitates the realization of the rights set out in the Covenant. It does so by picking out a particular sub-set of obligations: those that must be immediately given full effect by all states irrespective of resource differences among them (section 4). This is the essence of the idea of a minimum core obligation, and it addresses a persistent problem: the temporal prioritization of competing human rights obligations in the context of resource constraints. The Covenant is better equipped to further the realization of economic, social and cultural rights in a principled and practical manner when read in the light of the MCD. It has been further argued that the MCD should not be understood as necessarily embodying notions of special value, non-derogability or justiciability, which are distinct from, and may obscure, its focus on obligations of immediate effect (section 5). An account has been given of how we can then proceed to adduce the content of minimum core obligations, taking into consideration their potentially diverse character, the scope of the associated right, the need to satisfy constraints of feasibility and overall consistency, and the invariant character of the standard they establish (section 6). Two major objections to the MCD were addressed: that it is excessively rigid in enforcing a 'one size fits all' prescription and that the propagation of the doctrine might be counterproductive in fostering human rights compliance through its being misunderstood or misappropriated. Finally, it was argued that assessing compliance with the minimum core obligations needed to draw on tools such as benchmarks and indicators, but that these could not displace the MCD from its vital role.



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