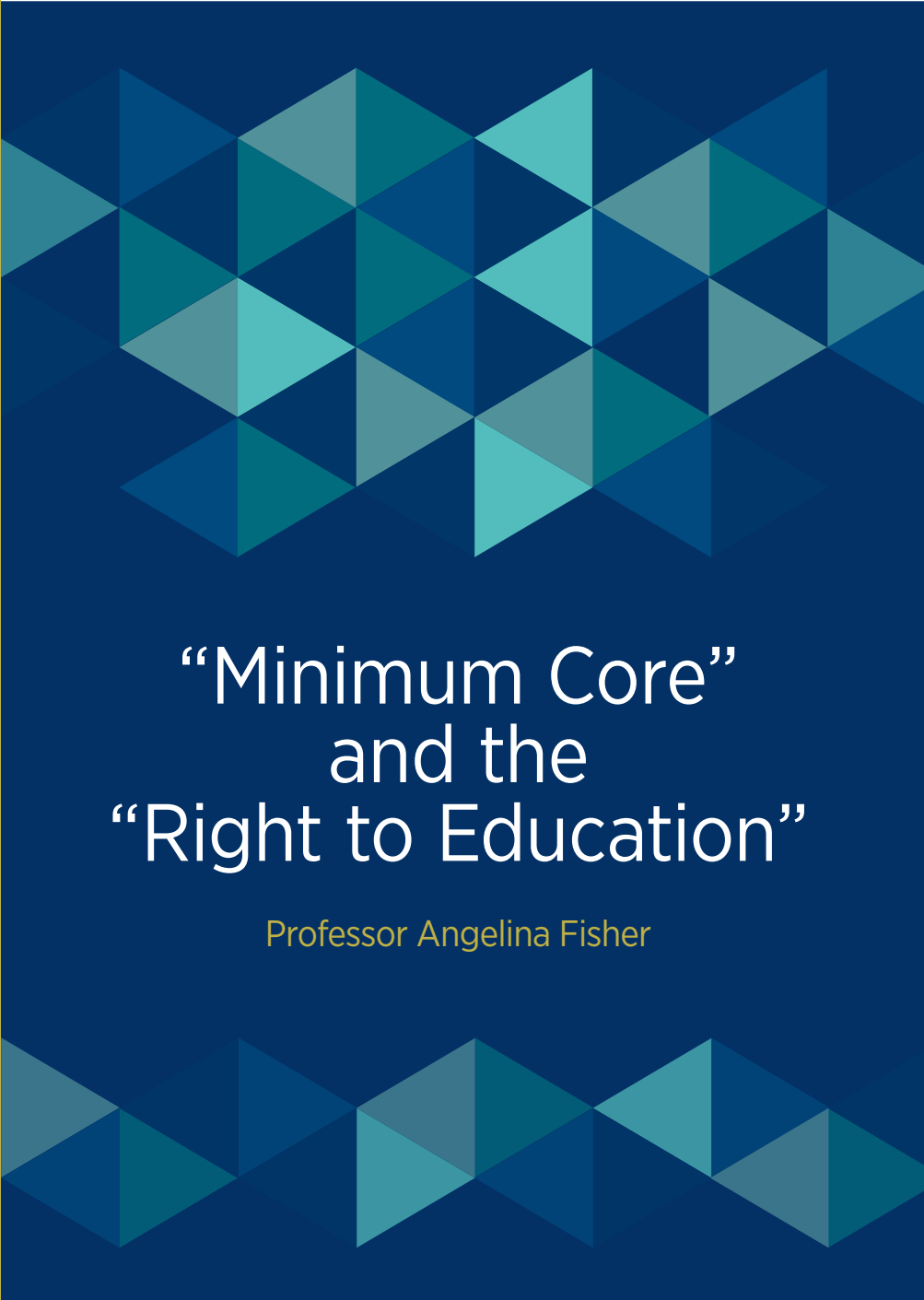


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“Minimum Core” and the “Right to Education”

Professor Angelina Fisher



THE WORLD BANK
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Legal

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Contents

Introduction	1
1. “Minimum core” in academic literature.....	2
Minimum Core as Representation of a Consensus.....	4
Minimum Core as a Minimum Obligation.....	4
2. International and Regional Legal Frameworks.....	7
Overview.....	7
ICESCR and the “Minimum Core”.....	9
“Minimum Core” of the Right to Education According to the Committee.....	11
“Minimum Core” of the Right to Education According to Regional Human Rights Instruments and Institutions.....	12
Human Rights and Development.....	15
Summary	17
3. “Minimum Core” in State Practice	18
State Reports.....	18
National Laws and Policies	20
National Jurisprudence.....	21
South Africa	21
“Minimum core”	21
Basic Education/Immediate Realization Independent of Resources.....	22
Swaziland.....	23
Immediate Realization Independent of Resources	23
India.....	23
Immediate Realization Independent of Resources/Content of the Right	23
Colombia	24
Immediate Realization Independent of Resources	24
Costa Rica.....	24
Fundamental Right	24
Nigeria.....	25
Immediate Realization Independent of Resources	25
Czech Republic	25
Content of the Right	25
United States.....	25
Other	26
Summary	26

Summary	27
4. The Role of Indicators	29
Conclusion: “Minimum Core” and its relevance to the Development Works	33
Value-Added of Human Rights.....	33
“Minimum Core” for Development	35

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.

Introduction

“Minimum core” is a concept introduced by the Committee on Economic, Social and Cultural Rights (“Committee”) with the aim of ensuring “the satisfaction of, at the very least, *minimum essential levels of each of the rights* is incumbent upon every State party.” The “minimum core” concept aims to set a quantitative and qualitative *floor* of socio-economic and cultural rights that must be immediately realized by the state as a matter of top priority.¹ The promise of the minimum core approach is “to give the notion of progressive realization a clearer direction and to evaluate the steps states have taken towards the progressive realization of particular rights”.² Yet, the Committee itself has been inconsistent in defining the content and scope of the “minimum core” concept for different rights. Although the original definition—focused on *minimum essential levels*—seems narrowly constructed, in more recent General Comments, the Committee has given the “minimum core” a far more expansive interpretation.³ Further complicating the query is the fact that states rarely use “minimum core” terminology in State Reports to the Committee. Where national courts have referred to the “minimum core” concept—a rare reference—their interpretation has not always been consistent with that of the Committee. In academic literature, too, disagreements remain about the content, scope and even utility of the “minimum core” concept. Without taking a position on which interpretation of the “minimum core” is normatively desirable, this paper aims to provide a descriptive account of how different actors define the content and scope of “minimum core” of the right to education.

The paper begins by providing a summary of academic engagement with the concept of “minimum core”, highlighting different features of the concept that have been identified in the literature. In Part II, the paper examines how the concept of “minimum core” is featured in the international legal framework. In Part III, the paper considers whether, and if so how, the concept of “minimum core” features in national laws and jurisprudence by sampling a few states.⁴ In Part IV, the paper discusses the use of indicators and other quantitative measures in relation to the content of “minimum core”. The paper concludes by suggesting how development banks might use the concept of “minimum core” to guide their work.

¹ U.N. Doc. E/C.12/1993/11, para. 5; M. Craven, “Assessment of the progress on adjudication of economic, social and cultural rights” in J. Squires, M. Langford, M., B. nd Thiele (eds.) *The road to a remedy: Current issues in the litigation of economic, social and cultural rights* (2005) Australian Human Rights Centre and Centre on Housing Rights and Evictions, p. 39.

² Amrei Müller, “An Analysis of Health-Related Issues in Non-International Armed Conflicts” in Michael O’Flaherty and David Harris (eds) *The Relationship between Economic, Social and Cultural Rights and International Humanitarian Law*, Nottingham Studies on Human Rights (2013)

³ See e.g., CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), adopted at the Twenty-second Session of the Committee on Economic, Social and Cultural Rights, on 11 August 2000, E/C.12/2000/4).

⁴ The analysis in this part is subject to a number of limitations. First, due to language limitations, preference has been given to English-speaking states or states for which laws and jurisprudence have been translated into English. Second, not all relevant laws, rules, regulations and jurisprudence are publicly available. Third, in many states, socio-economic rights are not justiciable, which limits the jurisprudential analysis of the “minimum core”. Lastly, state practice outside of state reports to the CESCR, national laws and jurisprudence is not examined.

1. “Minimum core” in Academic Literature

Although the idea of “minimum core” has received a lot of attention in legal academic literature, there is no agreement on what the *content* of the concept is or how it should be applied (and for what purpose). Indeed, some commentators are deeply skeptical or critical of the utility of “minimum core”.⁵ Even among advocates of the concept, there is lack of consensus regarding how the concept should be interpreted and applied. John Tasioulas in “Minimum Core Obligations: Human Rights in the Here and Now” and Katharine Young in “The Minimum Core of Economic and Social Rights: A Concept in Search of Content” each survey the different approaches taken by the scholars to the concept of “minimum core” by isolating features that distinguish those rights (or obligations) that qualify as “minimum core” from general rights (and obligations). Tasioulas summarizes the literature by isolating four features that have been associated with the “minimum core”:

(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 permissibly be fully complied with in the longer-term in accordance with the doctrine of ‘progressive realization’,

(b) *Special content* – its *content* bears some peculiarly intimate relationship to an underlying, high-priority ethical notion, such as human dignity or basic needs required for survival,

(c) *Non-derogability* – it is *non-derogable* as a matter of normative force, in that it no competing considerations can ever justify non-compliance with a human rights demand that belongs to the ‘minimum core’, even in an emergency

(d) *Justiciability* – it is or should be *justiciable*, i.e. enforceable (presumably by the right-holder, at least in the first instance) through domestic or supranational courts. (internal citations omitted)⁶

Young, in contrast, presents the taxonomy on a higher-level of abstraction. Since Tasioulas’ analysis appears in the framing paper, for the sake of completeness, a brief overview of Young’s taxonomy is provided here.

Young identifies three approaches to defining content and scope of the “minimum core” concept: essence, consensus and obligation.

The earliest quest to define the “minimum core” at international level⁷ can be traced to the work of Esin Orücü, who proposed that

[t]he scope of each right must be analysed in terms of an outer edge, a circumjacence and a core. The essential elements of the norm which are unrelinquishable and unchangeable for the guaranteed core must be determined. This would need extensive multi-disciplinary work. Once meaningful criteria for every right have been established which can be concretized for every right, it should be possible to formulate a lowest common denominator, and

⁵ E.g., Mark Tushnet, “Social Welfare Rights and Forms of Judicial Review”, 82 *Tex. L. Rev.* 1895, 1904 (2004); Katharine G. Young, “The Minimum Core of Economic and Social Rights: A Concept in Search of Content”, *Yale Journal of International Law*, Vol. 13 (2008), p. 113.

⁶ John Tasioulas in “Minimum Core Obligations: Human Rights in the Here and Now” (draft on file).

⁷ The concept of minimum core is said to have its roots in German Basic Law, which in Young’s translation provides that “[i]n no case may the essential content of a basic right be encroached upon”. GRUNDGESETZ [GG] art. 19(2) (F.R.G.)

perhaps even the average, or ideally the highest, common denominator of all guaranteed cores.⁸

Along Young’s taxonomy, Orüciü’s definition encompasses two different approaches to defining “minimum core”: one, a quest for “essence” of each right, and the second, identification of content that enjoys the widest consensus (i.e., “the lowest common denominator”).

This “essence” approach to “minimum core” is premised on the idea that, at the very least, *individuals’ basic needs must be immediately satisfied*.⁹ In other words, while the right itself has higher aspiration of improving the lives of individuals, the minimum core sets the starting point, the satisfaction of which is necessary before the more extensive interests may be progressively realized.

The work of Fons Coomans exemplifies the “essence” approach.¹⁰ He argues that

the nature of a right must be understood as meaning its core or essence, i.e. that essential element without which a right loses its substantive significance as a human right. ...In general terms the core of a right should be the same everywhere. However, it should be ‘translated’ or operationalised at the national or regional level, taking into account national or regional characteristics and circumstances and the specific needs of individual s and groups. ... [F]rom a conceptual perspective, the needs of the people and the available opportunities in a state should not determine the core of a right. It should rather be the other way around, starting with the right itself. ...Complying with obligations which relate to the core of a right should not be dependent upon the availability of resources. In other words, when a government is facing policy dilemmas as a result of limited or insufficient financial resources, priority should be given to the realisation of the core of a right. ...the content of a right determines the nature of state obligations, not the other way round.¹¹

David Bilshitz explains in relation to the right to housing:

[“minimum core”] represents the standard of socio-economic provision necessary to meet people’s basic needs. Such needs can be understood on a general level as the universal preconditions necessary for human survival and those ‘generalized means to a great variety of possible goals and whose joint realization, in the absence of special circumstances, is necessary for the achievement of more ultimate aims’

Let us specify the minimum core obligation [of the right to housing] ... as requiring the government to provide each person in South Africa with shelter that protects him or her from the elements. It then becomes clear that those who have such shelter have no basis upon which to claim it from the government. Those who have land, but no shelter, could claim building materials, for instance. Those with neither land nor shelter, could claim both. But, the general obligation of the state does not vary: it is the same in respect of each person. What differs in an unequal society is how far off from the minimum core each person lies, and therefore what must be provided for each to alleviate his or her need.¹²

As discussed below, a number of international instruments and experts have connected the idea of “basic needs” to the ideas of survival, security and life.¹³ Thus, for example, the Inter-American Commission has stated that:

The essence of the legal obligation incurred by any government in this area is to strive to attain the economic and social aspirations of its people, by following an order that assigns *priority to the basic needs of health, nutrition and education. The priority of the ‘rights of survival’ and ‘basic needs’ is a natural consequence of the right to personal security.* (emphasis added)¹⁴

Prior to the enactment of the Right to Education Act, the Indian Supreme Court held that the fundamental right

⁸ Esin Orüciü, “The Core of Rights and Freedoms: the Limit of Limits,” in T. Campbell, D. Goldberg, S. McLean, and T. Mullen (eds.) *Human Rights: From Rhetoric to Reality* 37, 55 (1986). This quote was cited by Philip Alston, the architect of the “minimum core” concept, as an example of how “minimum core” might be identified. P. Alston, “Out of the Abyss: The Challenges Confronting the New U. N. Committee on Economic, Social and Cultural Rights”, *Human Rights Quarterly*, Vol. 9, No. 3 (Aug., 1987), pp. 332-381, fn. 138.

⁹ See, e.g., David Bilshitz, “Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance”, 119 *S. African L.J.* 484 2002 (“the minimum core is to be specified in relation to the basic needs that we all share.”).

¹⁰ Young, *supra*.

¹¹ Fons Coomans, “Exploring the Normative Content of the Right to Education as a Human Rights: Recent Approaches”, <http://www.corteidh.or.cr/tablas/r27050.pdf>.

¹² David Bilshitz, “Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance”, 119 *S. African L.J.* 484 2002

¹³ Young, *supra*.

¹⁴ Annual Report 1979-1980, Inter-American Comm’n on Human Rights, OEA/Ser.L/V/II.50, doc. 13 rev. 1, at 2 (1980), available at <http://www.iachr.org/annualrep/79.80eng/chap.6.htm>.

to education flows from Article 21 of the Constitution – the right to life and personal liberty.¹⁵

A somewhat more expansive formulation of “basic needs” entails moving beyond what is minimally necessary for survival to identifying what is necessary for life with dignity.¹⁶ Thus, for example, the South African Constitutional Court has affirmed the relationship between dignity and social assistance.¹⁷ Similarly, the African Commission on Human and Peoples’ Rights has held that the right to food “is inseparably linked to the dignity of human beings and is therefore essential for the enjoyment and fulfillment of other rights as health, education, work and political participation.”¹⁸ Education is often seen not just inextricably connected to but a requirement of human dignity.¹⁹ Thus, for example, the Israeli Supreme Court held that a daughter’s right to education was derived from the mother’s right to dignity, noting that the link cannot be broken “between human dignity and a person’s basic right to acquire knowledge, culture, value and skills which are all intertwined and all constitute conditions for a life with human dignity.”²⁰

Minimum Core as Representation of a Consensus

An alternative approach to “minimum core” is to define its content by what enjoys the widest consensus.²¹ The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights emphasize the importance of consensus, as evidenced by state practice, holding that “the application of legal norms to concrete cases and situations by international treaty monitoring bodies as well as by domestic courts have contributed to the development of universal minimum standards and the common understanding of the scope, nature and limitation of economic, social and cultural rights.”²² Thus, to ascertain what constitutes the “minimum core” of the right to education, one might consider state reports to monitoring bodies and national implementations of the ICESCR (e.g., legislation, jurisprudence).

Minimum Core as a Minimum Obligation

A third approach is to consider whether a minimum obligation (or minimum set of obligations) can correlate to the minimum core.²³ This approach entails focusing on the *duties* required to implement the rights, rather than the elements of the rights themselves.²⁴ As Henry Shue notes, the approach requires the analysis of “what it actually takes to enable people to be secure against the standard, predictable threats

to their rights.”²⁵ This is indeed the approach advocated and defended by Tasioulas.

None of the outlined approaches provides a determinative understanding of what the “minimum core” is and how it should be defined. Thus, for example, there are contested understandings of what constitutes “basic needs”²⁶ and human rights advocates express the normative minimum differently, depending on the economic conditions of their state. Moreover, the idea of dignity is both subjective and culturally relative.²⁷ The “consensus” approach raises a question

¹⁵ *UnniKrishnan v. State of AP and Ors.*, AIR 1993 SC 2178

¹⁶ Young, *supra*

¹⁷ *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC) at 27, 33 (S.Afr.); *Mashavha v President of the RSA* 2004 (12) BCLR 1243 (CC) at 29 (S. Afr.);

¹⁸ *Soc. and Econ. Rights Action Ctr. for Econ. and Soc. Rights v. Nigeria*, Comm. No.155/96, 2001-2002 Annual Activity Report of the African Commission on Human and Peoples’ Rights, Annex V, ¶ 68, available at <http://www1.umn.edu/humanrts/africa/comcases/155-96b.html>

¹⁹ See e.g., Friboulet, Jean-Jacques, Ed.; Niamego, Anatole, Ed.; Liechti, Valerie, Ed.; Dalbera, Claude, Ed.; Meyer-Bisch, Patrice, Ed., “Measuring the Right to Education”, *UNESCO Institute for Lifelong Learning (NJ3)*; Klaus Dieter Beiter, *The Protection of the Right to Education by International Law*, Martinus Nijhoff Publishers (2005).

²⁰ *Tebka vs. Ministry of Education* at para. 16

²¹ Young, *supra*; Sage Russell, “Minimum State Obligations: International Dimensions”, in Daniel Brand, Sage Russell, *Exploring the Core Content of Socio-Economic Rights: South African and International Perspectives*, Protea Boekhuis (2002), at 11 (“There now exists wider agreement on the core elements of these rights.”); Philip Alston, The Committee on Economic, Social and Cultural Rights, in *The United Nations and Human Rights: A Critical Appraisal* 473, 491 (Philip Alston ed., 1992) (emphasizing the importance of state reports and criticizing present performance); see also General Comment No. 3, ¶ 10 (relying on experience “of more than a decade of examining States parties reports”).

²² Maastricht Guidelines, para 41

²³ Young, *supra*

²⁴ See, for example, a list of violations of “minimum core” proposed by Audrey Chapman and Russel Sage to the CESCR. Background paper submitted by the American Association for the Advancement of Science (AAAS): . 14/10/98, available at http://www.bayefsky.com/general/e_c.12_1998_19.php.

²⁵ Henry Shue, *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy* 23 (2d ed. 1996), 160.

²⁶ Amartya Sen, *Poverty and Famines: An Essay on Entitlement and Deprivation* 12 (1982) (“People have been known to survive with incredibly little nutrition, and there seems to be a cumulative improvement of life expectation as the dietary limits are raised. . . . There is difficulty in drawing a line somewhere, and the so-called ‘minimum nutritional requirements’ have an inherent arbitrariness that goes well beyond variations between groups and regions.”)

²⁷ Amartya Sen, *Inequality Reexamined* 115 (1992) (“explains how “appearing in public without shame” will be variable between different societies.)

about *whose* opinion counts for purposes of consensus²⁸ and what degree of consensus is necessary.

Tasioulas is persuasive in his defense of the obligations approach. Yet a few questions remain unsettled by his analysis as well. For example, *who* should be determining which obligation is universally feasible and not-burdensome in assessing an obligation candidate for “minimum core”? The Committee has been drastically inconsistent, possibly due to the prior lack of a principled approach (Tasioulas might argue) or due to expertise and agendas of different Committee members or, as Young contends, because lists of obligations that results from such processes seem to be driven more by institutional competencies and jurisdictional powers than by the goal of identifying the core content of the right.²⁹

An additional wrinkle to the above approaches is the question of whether “minimum core” should be universal or state-specific (i.e., invariant or variant).³⁰ In General Comment 3, the CESCR states that “any assessment as to whether a state has discharged its minimum core obligations must take into account the resource constraints applying within a country concerned.”³¹ Moreover, in its reporting guidelines, the CESCR requires states to set out national benchmarks to measure their progress toward ESC rights.³² This might suggest that the minimum core is state-specific. On the other hand, commentators, including Tasioulas, have argued that the minimum core concept should represent a universal standard. They argue that, among other things, “there would be no difference between an obligation to define a minimum core nationally and the general obligation under Art. 2(1) ICESCR to progressively realize ESC rights, as the scope of both would be dependent on available resources.”³³

A third view conceives of two “minimum cores”—one universal evidencing the absolute floor and another state-specific.³⁴ Thus, for example, Scott and Alston interpret the General Comment as follows:

Each state must go about making sure that it fulfills, as its first priority in resource allocation, at least what the Committee calls ‘minimum core obligations’ as a function of that state’s available resources. And every state must meet at least a core universal minimum represented by the most basic provision of state assistance to those in need reflected by the basic-survival examples listed in the last sentence of the above quotation [i.e., essential primary health care or basic shelter and housing, or the most basic form of education]. There is thus a distinction between relative (state-specific) core minimums and absolute core minimums. For instance, Canada’s core minimum will go considerably beyond

the absolute core minimum while Mali’s may go no further than this absolute core.³⁵

In their reading of General Comment 3, states are first obliged to implement the absolute bottom-line requirement (international minimum core) and then develop their own state-specific relative minimum cores that would guide the states’ implementation of the ICESCR. Indeed, the Commission on Human Rights has urged States to “consider identifying specific national benchmarks designed to give effect to the minimum core obligation to ensure the satisfaction of minimum essential levels of each of the [economic, social and cultural] rights.”³⁶

²⁸ Young, *supra* (on whose consensus might count: “judicial consensus as a special place for unfolding reason; governmental and intergovernmental declarations as a more appropriate test for legitimate law (captured at a particular, normatively charged moment or subject to ongoing development); or the consensus established between special experts in policy areas influencing economic and social rights (such as those drawn from public health, education, housing, or land reform areas), who are more familiar with the institutions and organizations that constitute the concrete efforts to deliver on the material requirements behind rights.”)

²⁹ Young, *supra* p. 164

³⁰ Karin Lehmann, “In Defense of the Constitutional Court: Litigating Socio-Economic Rights and the Myth of the Minimum Core”, *American University International Law Review* 22, no. 1 (2006): 163-197, p. 183; Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law*, Hart Publishing (2009), p. 66.

³¹ General Comment No. 3: The nature of States parties’ obligations (article 2, para. 1) (1990), adopted by the Committee on Economic, Social and Cultural Rights at the Fifth Session, E/1991/23, 14 December 1990, para. 10

³² CESCR, Guidelines on Treaty-specific documents, E/C.12/2008/2 (2009), para. 3(b) and 42).

³³ Amrei Müller, “An Analysis of Health-Related Issues in Non-International Armed Conflicts” in Michael O’Flaherty and David Harris (eds) *The Relationship between Economic, Social and Cultural Rights and International Humanitarian Law*, Nottingham Studies on Human Rights (2013) at 81; Tasioulas, *supra*; but see Ruchi Parek, “Lessons from Litigating Universal Primary Education in Swaziland”, *INTERIGHTS Bulletin* Volume 17 Number 2 2013, who points out that the conditions in Swaziland (discussed *infra*) demonstrate that the concept of a universal minimum core is both impractical and ineffective.

³⁴ Scott, Craig, and Philip Alston, “Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney’s Legacy and Grootboom’s Promise”, *South African Journal of Human Rights* 16 (2000): 206-268; Amrei Müller, “An Analysis of Health-Related Issues in Non-International Armed Conflicts” in Michael O’Flaherty and David Harris (eds) *The Relationship between Economic, Social and Cultural Rights and International Humanitarian Law*, Nottingham Studies on Human Rights (2013)

³⁵ Scott, Craig, and Philip Alston, “Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney’s Legacy and Grootboom’s Promise”, *South African Journal of Human Rights* 16 (2000): 206-268, at 250.

³⁶ Commission on Human Rights, Res. 1993/14

A slight variation of this approach is offered by Müller, who argues that the international minimum core and state specific minimum core should operate in tandem. Müller proposes that “internationally-defined principled minimum core” describe the “minimum essential levels of rights” (with the strong underlying assumption that every state has the necessary resources to satisfy those levels of rights alone or with assistance). This “minimum” level would be linked with international indicators. At the same time, every state would be required to define for itself “a pragmatic minimum core...in accordance with available resources”. Where the national minimum core falls under the internationally-defined minimum core, the international core would guide areas of high priority for the states.³⁷ Thus, in contrast to Scoot and Alston, Müller does not think that progressive realization of the rights begins with “minimum core”; instead,

[it begins] with nothing, passes the national minimum threshold (that ideally equals the international standard) and proceeds with the realization of non-core obligations under the right is fully realized. If a pragmatic national minimum core is below the principled international minimum core, states would have an urgent need to pursue the approximation to the international core, to secure a minimum level of well-being of individuals.³⁸

As the different interpretations of the “minimum core” outlined herein illustrate, there is no widespread agreement in the academic literature regarding the content, scope and the normative basis for the “minimum core” concept. Briefly summarized, one approach ties the “minimum core” to the “essence” of the right, often focusing on the basic need encompassed within the right. Another approach claims that the content of the “minimum core” is established by state consensus – that is, the norms that are commonly recognized as such by the vast majority of the states. The third approach claims that “minimum core” relates to those obligations that are subject to immediate realization. Moreover, under different views, the “minimum core” of the rights is either universal, state-specific, or operates on two-tracks. Each of these approaches can find support both in the international legal framework and in the national laws and jurisprudence.

³⁷ Amrei Müller, “An Analysis of Health-Related Issues in Non-International Armed Conflicts” in Michael O’Flaherty and David Harris (eds) *The Relationship between Economic, Social and Cultural Rights and International Humanitarian Law*, Nottingham Studies on Human Rights (2013), 83-85

³⁸ Amrei Müller, “An Analysis of Health-Related Issues in Non-International Armed Conflicts” in Michael O’Flaherty and David Harris (eds) *The Relationship between Economic, Social and Cultural Rights and International Humanitarian Law*, Nottingham Studies on Human Rights (2013), at 84.

2. International and Regional Legal Frameworks

Overview

Broadly speaking, the international legal framework considers the “right to education” in terms of three components: (a) access to education without discrimination, (b) quality and content of education and (c) the rights of parents and guardians with respect to the children’s education. For purposes of this document, only the first two components are analyzed.

As early as 1948, the Universal Declaration of Human Rights (UDHR) reaffirmed that:

(1) *Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.*

(2) *Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.*

(3) *Parents have a prior right to choose the kind of education that shall be given to their children.*³⁹ (emphasis added)

Although the UDHR is legally nonbinding, it is widely perceived that many of its provisions embody norms that have since passed into customary international law. In any event, the UDHR’s Article 26 has been since codified by the

International Covenant on Economic, Social and Cultural Rights (1966) (ICESCR), which requires states to “recognise the right of everyone to education...[,] agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. ... agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.”⁴⁰ Moreover, the ICESCR lists a series of measures necessary to achieve the full realization of this right:

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

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

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

(d) Fundamental education shall be encouraged or intensified as far as possible for those persons who

³⁹ UDHR, Art. 26.

⁴⁰ ICESCR, Article 13.

have not received or completed the whole period of their primary education;

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

Article 14 further provides that if a state “has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, [the state] undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.”

The Convention on the Rights of the Child (CRC), enacted over twenty years after the ICESCR, echoes its provisions, adding that the right to education must be achieved on the basis of *equal opportunity* (Art. 28(1)).⁴¹ The CRC further specifies the *content* of the right by providing that the education of the child shall be directed to:

(a) The development of the child’s personality, talents and mental and physical abilities to their fullest potential;

(b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;

(c) The development of respect for the child’s parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilisations different from his or her own;

(d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin; and

(e) The development of respect for the natural environment.⁴²

Further color to the right of education is added by the UNESCO Convention against Discrimination in Education (1960), the Convention on the Elimination of Racial

Discrimination (1966) (CERD) and the Convention on the Elimination of Discrimination Against Women (1979) (CEDAW). The UNESCO Convention prohibits depriving a person or a group of persons of access to education or limiting a person or a group to education of an inferior standard on the basis of “race, colour, sex, language, religion, political or other opinion, national or social origin, [and] economic condition or birth”.⁴³ Article 4 of the UNESCO Convention requires states, among other things, to make primary education free and compulsory. CERD requires states to prohibit and eliminate racial discrimination in the enjoyment of the right to education and training.⁴⁴ CEDAW requires states to “take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education”, which includes not only providing equal access to studies, teaching staff and curriculum but also eliminating “any stereotyped concept of the roles of men and women...in all forms of education”, providing same opportunities, reducing female students drop-out rates, and providing access to educational information to ensure the health and well-being of families.⁴⁵

Additionally, a number of international legal documents speak to education rights of specific groups – e.g., persons with disabilities (Convention on the Rights of Persons with

⁴¹ CRC, Article 28: “States Parties recognise the right of the child to education and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular: (a) Make primary education compulsory and available free to all; (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need; (c) Make higher education accessible to all on the basis of capacity by every appropriate means; (d) Make educational and vocational information and guidance available and accessible to all children; (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates. 2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child’s human dignity and in conformity with the present Convention. 3. States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.”

⁴² CRC, Art. 29(1)

⁴³ UNESCO Convention against Discrimination in Education (1960), Art. 1(1).

⁴⁴ CERD, Article 5(v).

⁴⁵ CEDAW, Art. 10

Disabilities, 2006)⁴⁶, children of migrant workers (Convention on the Protection of the Rights of All Migrant Workers and Members of their families, 1990),⁴⁷ refugees (“Convention Relating to the Status of Refugees, 1951”),⁴⁸ and indigenous communities (Declaration on the Rights of Indigenous People, 2007).⁴⁹ Since the concept of the “minimum core” traces to the ICESCR, the remainder of this section will focus mainly on that convention.

ICESCR and the “Minimum Core”

Although the ICESCR unequivocally recognizes the right of everyone to education, it only places an obligation on the state parties to “*undertake[] to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.*” (Article 2) (emphasis added)

International human rights law, generally, defines state obligations relating to human rights as encompassing the obligations to respect, protect, and fulfill. In the context of the right to education:

- the “respect” obligation means that the state must refrain from interfering with the enjoyment of the right to education (e.g., must respect the right of parents to choose their children’s schools),
- the “protect” obligation means that the state must prevent others from interfering with the enjoyment of the right to education (e.g., ensuring that children are not prevented from attending schools by third parties), and
- the “fulfill” obligation means that the state must adopt measures towards full realization of the right (e.g., by ensuring that education is culturally appropriate, of good quality; taking appropriate legislative, regulatory and budgetary measures, etc.) The obligation to fulfill incorporates both an obligation *to facilitate* and an obligation *to provide*.⁵⁰

While the realization of the full right to education is subject to progressive achievement, the state nonetheless has certain immediate obligations:

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

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

Professor Philip Alston recognized over two decades ago that “[o]ne of the most striking features of the [ICESCR] is the vagueness of the normative implications of the various rights it recognizes.”⁵¹ Thus, the ability to determine the normative content of the rights in the ICESCR was important both for states and the Committee—a body of 18 independent experts—which was set up to monitor implementation of the ICESCR by states parties.⁵² In his review of the challenges facing the Committee, then-Chair of the Committee Professor Alston observed:

In its endeavors to clarify the normative content of the rights, the challenge facing the Committee will be to strike a balance between an expansive, literal interpretation of the Covenant’s provisions according to which governments are obligated to take a comprehensive set of measures with respect to each right and a highly flexible, subjective interpretation which accords to each state party a virtually unlimited degree of discretion. During the drafting of the Covenant the representative of New Zealand argued that the concept of state responsibility for the material welfare of its citizens “was not static and there might be reasonable differences of opinion on the extent of such responsibilities.” Such an interpretation would appear to be an accurate reflection of the drafters’ intention that the Committee should

⁴⁶ Article 24 requires, among other things, that states ensure that persons with disabilities are not excluded from the general education system on the basis of disability, that they have access to inclusive, quality and free primary and secondary education on equal basis with others, that they receive reasonable accommodations and support.

⁴⁷ Article 30 guarantees every child of a migrant worker the “basic right of access to education on the basis of equality of treatment with nationals of the State”.

⁴⁸ Article 22 requires that refugees be accorded “the same treatment as is accorded to nationals with respect to elementary education”.

⁴⁹ Article 14(2) and (3) provides that indigenous children have the right to all levels and forms of education of the State without discrimination and that states must ensure that indigenous children have access to an education in their own culture and in their own language.

⁵⁰ Special Rapporteur on the Right to Education, <http://www.ohchr.org/EN/Issues/Education/SREducation/Pages/SREducationIndex.aspx>

⁵¹ Philip Alston, “Out of the Abyss: The Challenges Confronting the New U.N. Committee on Economic, Social and Cultural Rights”, in: *Human Rights Quarterly*, 9 (1987), p. 351.

⁵² Information on the CESCR is available here: <http://www.ohchr.org/en/hrbodies/cescr/pages/cescrindex.aspx>

seek to identify some *minimum core content* of each right that cannot be diminished under the pretext of permitted “reasonable differences.” The fact that there must exist such a core (which to a limited extent might nevertheless be potentially subject to derogation or limitations in accordance with the relevant provisions of the Covenant) would seem to be a logical implication of the use of the terminology of rights. In other words, there would be no justification for elevating a “claim” to the status of a right (with all the connotations that concept is generally assumed to have) if its normative content could be so indeterminate as to allow for the possibility that the right holders possess no particular entitlement to anything. Each right must therefore give rise to an absolute minimum entitlement, in the absence of which a state party is to be considered to be in violation of its obligations.⁵³ (emphasis added; internal citations omitted).

In General Comment 3, dealing with obligations of states parties, the Committee noted that:

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.*⁵⁴(emphasis added)

Thus, in addition to the immediate obligations to take steps towards realization of the right to education and to not adopt retrogressive measures, the Committee imposes an immediate obligation on the states to realize the minimum core of the right to education.

Although the “minimum core” originated in the Committee, it has been reiterated with approval by the Committee on the Rights of the Child and in some regional human rights documents.⁵⁵ As a general matter, General Comments of the human rights committees do not constitute binding legal pronouncements. However, over time General Comments have arguably acquired a normative role.⁵⁶ For example, regional human rights commissions and courts often treat them as “internationally accepted ideas of the various obligations engendered by human rights”⁵⁷ and as “authoritative statements of the law”.⁵⁸ Many domestic courts consider

⁵³ Philip Alston, “Out of the Abyss: The Challenges Confronting the New U.N. Committee on Economic, Social and Cultural Rights”, in *Human Rights Quarterly*, 9 (1987), p. 352-353

⁵⁴ Committee on Economic, Social and Cultural Rights, General Comment 3, The nature of States parties’ obligations (Fifth session, 1990), U.N. Doc. E/1991/23, annex III at 86 (1991), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 14 (2003), para. 10. It is worthwhile to note that in the General Comment 3, the CESCR adopted primarily the basic needs approach but required states to satisfy immediately (i.e., not progressively) “minimum essential” levels, such as the *most basic forms of education*. However, the Committee also hints towards the obligations approach, by shifting the burden on the state to demonstrate that it has exhausted all the available resources to prioritize satisfaction of the minimum obligations where a state claims that it is unable to realize core rights due to lack of resources.

⁵⁵ Committee on the Rights of the Child, Draft General Comment No. 19 (2016) On Public Spending and the Rights of the Child (Article 4), June 11, 2015 (“The Committee reiterates 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. Lack of available resources is never a valid argument for States to not comply with this core obligation. The core obligation should always be guaranteed, even in times of economic austerity” (internal citation omitted))

⁵⁶ Conway Blake, “Normative Instruments in International Human Rights Law: Locating the General Comment”, Center for Human Rights and Global Justice Working Paper (2008), <http://chrgi.org/wp-content/uploads/2012/07/blake.pdf>

⁵⁷ *Legal Resources Foundation v Zambia*, Communication No. 211/98, May 2001, paras 59, 63, 70; See for example, *Hirst v. United Kingdom* (No.2), Application No.74025/01 (2005); *Öcalan v. Turkey*, Application No.46221/99 (2005); *Makaratzis v. Greece*, Application No.50385/99 (2004); *Melnichenko v. Ukraine*, Application No.17707/02 (2004) *Kurt v. Turkey*, Application No. 24276/94(1998).

⁵⁸ Conway Blake, “Normative Instruments in International Human Rights Law”, *supra*.

General Comments as supplementary means of interpretation and often refer to them alongside judicial precedents.⁵⁹ In examining the “minimum core” of the right to education, this paper thus turns first to the Committee.

“Minimum core” of the Right to Education According to the Committee

In General Comment 13, the Committee outlined the minimum core obligations for the right to education:

- to ensure the right of *access* to public educational institutions and programmes *on a non-discriminatory basis*;
- to ensure that *education conforms to the objectives* set out in article 13 (1) (i.e., that education be directed to the human personality’s “sense of dignity”, “enable all persons to participate effectively in a free society”, and “promote understanding among all “ethnic” groups, as well as nations and racial and religious groups”);
- to provide *primary education for all* in accordance with article 13 (2) (a) (i.e., education must exhibit the elements of *availability, accessibility, acceptability and adaptability*; must be universal, ensuring that the basic learning needs of all children are satisfied, must be “*compulsory*” and “*available free to all*”,⁶⁰ and must “take into account the culture, needs and opportunities of the community”);
- to adopt and implement a *national educational strategy* which includes provision for secondary, higher and fundamental education; and
- to ensure *free choice of education* without interference from the State or third parties, subject to conformity with “minimum educational standards” (art. 13 (3) and (4)).⁶¹ (emphasis added)

The requirement that *primary education for all* be *available, accessible, acceptable and adaptability* imports additional state obligations. Katarina Tomaševski, the former Special Rapporteur on the Right to Education who introduced the “4-A” framework explained that:

Availability embodies two different governmental obligations: the right to education as a civil and political right requires the *government to permit the establishment of educational institutions by non-state actors*, while the right to education as a social and economic right *requires the government to establish them, or fund them*, or use a combination of these and other means so as to ensure that education is available.

[Accessibility requires the government] to *secure access* to education for all children in the compulsory education

age-range.... Moreover, *compulsory education ought to be free of charge*

Acceptability of education [requires] governments to ensure that education which is available and accessible is of *good quality*. The *minimal standards of health and safety, or professional requirements for teachers*, thus have to be set and enforced by the government. The scope of acceptability has been considerably broadened through the development of international human rights law. ...The focus on indigenous and minority rights has *prioritized the language of instruction*, which often makes education unacceptable if the language is foreign to young children (and also often to the teacher). The *prohibition of corporal punishment* has transformed school discipline in many countries further broadening the criteria of acceptability.

Adaptability has been best conceptualized through the many court cases addressing the right to education of children with disabilities. Domestic courts have uniformly held that *schools ought to adapt to children*, following the thrust of the idea of the best interests of each child in the Convention on the Rights of the Child. This reconceptualization has implicitly faulted the heritage of forcing children to adapt to whatever schools may have been made available to them; the school effectively had a right to reject a child who did not

⁵⁹ For a review of domestic courts’ view of General Comments, see Conway Blake, “Normative Instruments in International Human Rights Law”, *supra*.

⁶⁰ In General Comment 11, the CESCR interpreted the term “compulsory” to mean that “neither parents, nor guardians, nor the State are entitled to treat as optional the decision as to whether the child should have access to primary education” and “the education offered must be adequate in quality, relevant to the child and must promote the realization of the child’s other rights.” In the same General Comment, the CESCR interpreted “free of charge” to mean “the availability of primary education without charge to the child, parents or guardians.” The Committee further observed that “[f]ees imposed by the Government, the local authorities or the school, and other direct costs, constitute disincentives to the enjoyment of the right and may jeopardize its realization. ...Indirect costs, such as compulsory levies on parents (sometimes portrayed as being voluntary, when in fact they are not), or the obligation to wear a relatively expensive school uniform, can also fall into the same category.” At the same time, the Committee noted that “[o]ther indirect costs may be permissible, subject to the Committee’s examination on a case-by-case basis.” Committee on Economic, Social and Cultural Rights, General Comment 11, Plans of action for primary education (Twentieth session, 1999), U.N. Doc. E/C.12/1999/4 (1999), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 59 (2003), para. 6, 7.

⁶¹ Committee on Economic, Social, and Cultural Rights, Twenty-first session 15 November-3 December 1999, *Implementation of the International Covenant on Economic, Social and Cultural Rights*, General Comment No. 13: The right to education (article 13 of the Covenant), E/C.12/1999/10, 8 December 1999, para. 57.

fit or could not adapt. Moreover, a conceptual dissociation between ‘school’ and ‘education’ has taken place in attempts to provide education to imprisoned or working children. They can seldom be taken to school and thus education has to be taken to wherever they are.⁶²

The Committee’s list of “minimum core” obligations with respect to the right to education have been reaffirmed by UNESCO in its law & policy review guidance on the right to education.⁶³ The UNESCO guidelines also outline some potential corresponding violations, which include:

- The introduction of legislation that discriminates against individuals or groups, or failure to repeal this kind of legislation, and the failure to take measures that address de facto educational discrimination;
- The use of curricula inconsistent with the educational objectives set out in international standards;
- The failure to introduce, as a matter of priority, primary education that is compulsory and available free to all, and the failure to take ‘deliberate, concrete and targeted’ measures towards the progressive realization of fundamental, secondary, and higher education;
- The prohibition of private educational institutions and the failure to ensure private educational institutions conform to the ‘minimum educational standards’;
- The denial of academic freedom and the closure of educational institutions in times of political tension.⁶⁴

To get a fuller understanding of the “minimum core” of the right to education, it is helpful to look at the regional instruments (e.g., European Convention on Human Rights, African Charter on Human Rights) and institutions (e.g., European Court of Human Rights, the Inter-American Court of Human Rights, the African Court on Human Rights and People’s Rights, etc.), as well as at national legislation and jurisprudence. These sources are relevant as they represent “subsequent practice” of state parties in implementation of the international “right of education” and thus relevant to the interpretation of the ICESCR.⁶⁵

“Minimum Core” of the right to education according to Regional Human Rights Instruments and Institutions

The Inter-American Commission on Human Rights endorsed the “minimum core” obligation although it appears to equate it with obligation not to take regressive measures and with provision of basic services or satisfaction of *basic needs*.⁶⁶ It is worth emphasizing, however, that while the Protocol

⁶² Katarina Tomaševski, “Human rights obligations: making education available, accessible, acceptable and adaptable”, available at http://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/Tomasevski_Primer%203.pdf.

⁶³ The guidelines “aim to provide guidance in the review of national education legal and policy frameworks in view of: Assessing the status of the right to education at country level and its compatibility with international and regional human rights instruments; Identifying gaps in education norms and policies; Making recommendations for the full alignment of national constitutions, legislations and policies with international standards and provisions.” UNESCO, *The Right to Education: Law and Policy Review Guidelines* (2014), <http://unesdoc.unesco.org/images/0022/0022284/228491e.pdf>.

⁶⁴ UNESCO, *The Right to Education: Law and Policy Review Guidelines* (2014), <http://unesdoc.unesco.org/images/0022/0022284/228491e.pdf>

⁶⁵ Vienna Convention on the Law of Treaties, available <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>.

⁶⁶ Inter-American Commission on Human Rights, “Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico” (2013), available at <https://www.oas/en/iachr/migrants/docs/pdf/Report-Migrants-Mexico-2013.pdf>. (“While the American Convention and the Protocol of San Salvador recognize the progressive development of economic, social and cultural rights, under Article 1 of the Protocol of San Salvador States parties undertake to immediately adopt the necessary measures, to the extent allowed by their available resources and taking into account their degree of development, for the purpose of achieving the full observance of the rights recognized in the Protocol. This obligation of immediate effect is recognized in Article 2 of the ICESCR. The inference of the foregoing is that States are prohibited from adopting regressive measures in the area of economic, social and cultural rights.” At paras. 585-86); Annual Report 1979-1980, Inter-American Comm’n on Human Rights, OEA/Ser.L/V/II.50, doc. 13 rev. 1, at 2 (1980) (“The essence of the legal obligation incurred by any government in this area is to strive to attain the economic and social aspirations of its people, by following an order that assigns priority to the basic needs of health, nutrition and education. The priority of the ‘rights of survival’ and ‘basic needs’ is a natural consequence of the right to personal security.”); Annual Report of the Inter-American Commission on Human Rights 1993, OEA/Ser.L/V.85 Doc. 9 rev. 11 February 1994, Chapter V (“The obligation of member states to observe and defend the human rights of individuals within their jurisdictions, as set forth in both the American Declaration and the American Convention, obligates them, regardless of the level of economic development, to guarantee a minimum threshold of these rights.”); *Juvenile Reeducation Institute v. Paraguay*, Judgment (IACtHR, 2 Sep. 2004), available at http://www.worldcourts.com/iacthr/eng/decisions/2004.09.02_Juvenile_Reeducation_Institute_v_Paraguay.pdf#search=%22basic%20needs%22 (“It is a basic and elementary obligation of the State to ensure to its minors the juridical institutional and political-cultural conditions necessary so that, at the very least, the mandatory and free public education that is the general norm in every country of the world is available within juvenile detention institutions. ... The State has a special role to play as guarantor of the rights of those deprived of their freedom, as the prison authorities exercise heavy control or command over the persons in their custody. [So there is a special relationship and interaction of subordination between the person deprived of his liberty and the State; typically the State can be rigorous in regulating what the prisoner’s rights and obligations are, and determines what the circumstances of the internment will be; the inmate is prevented from satisfying, on his own, certain *basic needs that are essential if one is to live with dignity*”).

of San Salvador requires state parties to undertake *immediately* the necessary measures *to the extent allowed by their available resources and taking into account their degree of development*, the Commission stated that “the obligation of member States to observe and defend the human rights of individuals within their jurisdictions, as set forth in both the American Declaration and the American Convention, obligates them, regardless of the level of economic development, to guarantee a minimum threshold of these rights.”⁶⁷ Distinguishing between *obligation* and *implementation*, the Commission added that “state’s level of development may be a factor that is calculated into the analysis of its implementation of these rights, but this is not a factor that precludes the state’s obligation to implement, to the best of its abilities, these rights.”⁶⁸

The African Charter on Human and Peoples’ Rights (also known as the Banjul Charter), which has been ratified by 53 African states, aims to promote and protect human rights and basic freedoms in the African continent. The African Commission on Human and Peoples’ Rights is tasked with the oversight and interpretation of the Banjul Charter. Like the international treaties discussed above, Article 17 of the Banjul Charter provides that “[e]very individual shall have the right to education”. The African Commission has issued Principles and Guidelines on the Implementation of Economic, Social, and Cultural Rights in the Banjul Charter in which it specifically adopted the concept of “minimum core obligations”.⁶⁹ Recognizing that the states have the obligation to *progressively* realize economic, social and cultural rights, the Commission noted that the obligation “to take steps”, the prohibition of retrogressive steps, minimum core obligations and the obligation to prevent discrimination in the enjoyment of economic, social and cultural rights take immediate effect upon ratification of the Charter. (Para. 16). Regarding the “minimum core obligations”, the Commission noted that states have an obligation to ensure the satisfaction of, “at the very least, the *minimum essential levels* of each of the economic, social and cultural rights contained in the African Charter”, which entails ensuring that “no significant number of individuals is deprived of the essential elements of a particular right.” According to the Commission, this obligation exists regardless of the availability of resources and is non-derogable. Similar to the Committee’s General Comment, the African Commission requires a state that claims that it has failed to realize minimum essential levels of economic, social and cultural rights “to show that it has allocated *all available resources* towards the realisation of these rights, and particularly towards the realisation of the minimum core content.” (emphasis added) The African Commission,

however, goes further and states that “[w]here the State does suffer from demonstrable resource constraints, caused by whatever reason, including economic adjustment, the State should still implement measures to ensure the minimum essential levels of each right to members of vulnerable and disadvantaged groups, particularly by prioritising them in all interventions.” In other words, even where resources are scarce or unavailable for realization of minimum core obligations, whatever resources *are* available must be allocated to the realization of minimum core obligations of the most disadvantaged groups.⁷⁰

Specifically with respect to the right to education, the African Commission identifies the following “minimum core obligations”:

- i. ensuring that all children enjoy their right to free and compulsory primary *education*, which may entail special measures to ensure that children belonging to disadvantaged or vulnerable groups receive free primary education. To achieve this objective states are bound to progressively increase the amount of national resources allocated to education.
- ii. implementing policies to eliminate or reduce the costs of attending primary school which include the provision of stipends, providing free or subsidised uniforms (or lifting of uniform requirements), providing free textbooks and free or subsidised

⁶⁷ Annual Report of the Inter-American Commission on Human Rights 1993, OEA/Ser.L/V.85, Doc. 9 rev.11 February 1994, Chapter V, available at <http://www.cidh.org/annualrep/93eng/chap.5.htm>.

⁶⁸ Annual Report of the Inter-American Commission on Human Rights 1993, OEA/Ser.L/V.85, Doc. 9 rev.11 February 1994, Chapter V, available at <http://www.cidh.org/annualrep/93eng/chap.5.htm>.

⁶⁹ African Commission on Human and Peoples’ Rights, *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights*, http://www.achpr.org/files/instruments/economic-social-cultural/achpr_instr_guide_draft_esc_rights_eng.pdf.

⁷⁰ At the same time, in other contexts, the African Commission appears to have interpreted “minimum core” as prohibiting retrogressive measures or as failing to protect (rather than failing to fulfill) the right. Thus, for example, in *Soc. and Econ. Rights Action Ctr. v. Nig. Comm.* 155/96, 15th ACHPR AAR Annex V (2000-2001), the Commission noted that “At a very minimum, the right to shelter obliges the Nigerian government not to destroy the housing of its citizens and not to obstruct efforts by individuals or communities to rebuild lost homes” (at para 61) and “[w]ithout touching on the duty to improve food production and to guarantee access, the minimum core of the right to food requires that the Nigerian government should not destroy or contaminate food sources. It should not allow private parties to destroy or contaminate food sources, and prevent peoples’ efforts to feed themselves....” (at para 65). http://www.worldcourts.com/achpr/eng/decisions/2001.10_SERAC_v_Nigeria.htm

transportation or free school meals to encourage the attendance of poor children at school. (Para. 71)

The *African Charter on the Rights and Welfare of the Child* does not isolate obligations that are subject to immediate realization and instead reaffirms that that states “shall take all appropriate measures with a view to achieving the full realization of [the right to education]”, including:

- (a) providing free and compulsory basic education;
- (b) encouraging the development of secondary education in its different forms and progressively make it free and accessible to all;
- (d) taking measures to encourage regular attendance at schools and the reduction of drop-out rates;
- (e) taking special measures in respect of female, gifted and disadvantaged children, to ensure equal access to education for all sections of the community. (Art. 11(3)).

The *African Youth Charter* similarly does not provide for immediate obligations, although its list of measures that states must provide in order to achieve full realization of the right to education is more detailed and (in addition to those listed in the *African Charter on the Rights and Welfare of the Child*, the Banjul Charter and international human rights instruments), includes, among others,

- (i) minimizing indirect costs of education
- (ii) strengthening participation in and the quality of training in science and technology;
- (iii) availing “multiple access points for education and skills development including opportunities outside of mainstream educational institutions e.g., workplace skills development, distance learning, adult literacy and national youth service programmes”;
- (iv) allocating “resources to upgrade the quality of education delivered and ensure that it is relevant to the needs of contemporary society and engenders critical thinking rather than rote learning”;
- (v) adopting “pedagogy that incorporates the benefits of and trains young people in the use of modern information and communication technology such that youth are better prepared for the world of work”;

(vi) encouraging youth participation in community work as part of education to build a sense of civic duty;

(vii) providing financial assistance “to encourage entry into post-primary school education and into higher education outstanding youth from disadvantaged communities, especially young girls”;

(viii) establishing “participation of all young men and young women in sport, cultural and recreational activities as part of holistic development”.

Neither the *African Charter on the Rights and Welfare of the Child* nor the *African Youth Charter* mention the “minimum core” obligations and the African Committee of Experts on the Rights and Welfare of the Child (which monitors the implementation of the Charter) does not appear to have adopted the concept in any of its communications, general comments, or concept notes.

The “minimum core” obligation (or obligation subject to immediate realization) is also absent from the the *Arab Charter on Human Rights*, which provides that “[e]radicating illiteracy is a commitment and an obligation”, “[e]ducation is a right for every citizen”, “[e]lementary education is compulsory and free” and “[s]econdary and university education shall be accessible to all.” (Art. 34)

Within the European legal framework, Article 2 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (as amended by Protocol No. 11) provides that “No person shall be denied the right to education.”⁷¹ The European Court of Human Rights does not explicitly adopt the “minimum core” concept although in the review of the Court’s jurisprudence, some commentators note that the certain statements of the Court could be interpreted as recognizing the notion of a minimum core right to basic health services⁷² and social cash benefits.⁷³

Article 17 of the Revised European Social Charter requires states “to provide to children and young persons a free primary and secondary education as well as to encourage regular attendance at schools.” The Appendix provides that Article 17(2) does not imply that there is an obligation to

⁷¹ <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168006377c>

⁷² *Cypres v. Turkey* (2001), para. 219.

⁷³ See generally I.E. Koch, *Human Rights as Indivisible Rights: The Protection of Socio-Economic Demands Under the European Convention on Human Rights*, Dordrecht (2009).

provide compulsory education up to the age of 18,⁷⁴ but the European Committee of Social Rights (ECSR), which monitors the implementation of the Social Charter, considers that education should be compulsory for a reasonable period in general until the minimum age for admission to employment.⁷⁵ The ECSR summarized the state's obligations vis-à-vis the right to education as follows:

The education system must also be both accessible and effective. Accessibility requires firstly that there is a fair geographical and regional distribution of schools (in particular as regards urban/rural areas). Secondly that the basic education system is free of charge; any hidden costs such as books, uniforms etc must be reasonable and assistance must be available to limit their impact on the most vulnerable groups. Thirdly equal access to education must be guaranteed for all children.⁷⁶

The ECSR does not employ the “minimum core” concept. It has stated that “[w]hen the achievement of one of the rights in question is exceptionally complex and particularly expensive to resolve, a State Party must *take measures that allows it to achieve the objectives of the Charter within a reasonable time, with measurable progress and to an extent consistent with the maximum use of available resources.*” (emphasis added)⁷⁷

In addition to its incorporation in the international and regional human rights regime, education has also been a central feature of development agendas. Some have gone so far as to suggest that reaffirmations of the Millennium Development Goals (MDGs) have allowed the minimum core of certain human rights (at least those closest in content to the MDGs) to pass into customary international law.⁷⁸ Without resolving definitively the question of whether or not MDGs embody the consensus understanding of the “minimum core” of the right to education, at the very least, given the widespread state commitment to development agendas, their content is relevant to the quest of ascertaining what is “minimum core”.⁷⁹

Human Rights and Development

In 1990, at the World Conference on Education for All Meeting Basic Learning Needs held in Jomtien, Thailand, states adopted a World Declaration on Education for All and the Framework for Action to Meet Basic Learning Needs. The Declaration recalls that education is a fundamental right for all and recognizes that “sound, *basic education*” (emphasis

⁷⁴ European Social Charter (Revised) Strasbourg, 3.V.1996, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007cde4>

⁷⁵ *The Right to Education under the European Social Charter*, prepared by the Secretariat of the ESC1 17 November 2006, http://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/ESC_The_Right_to_Education_under_the_European_Social_Charter_2006_en.pdf

⁷⁶ *The Right to Education under the European Social Charter*, prepared by the Secretariat of the ESC1 17 November 2006, http://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/ESC_The_Right_to_Education_under_the_European_Social_Charter_2006_en.pdf

⁷⁷ *Autism-Europe (IAAE) v. France* (2003), http://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/ESC_The_Right_to_Education_under_the_European_Social_Charter_2006_en.pdf; see also *European Roma Rights Center v. Bulgaria*, ECSR, Complaint 48/2008 (holding that states are required “to guarantee minimum income and social assistance for persons without adequate resources”).

⁷⁸ Malcolm Langford, Alicia Ely Yamin, “Back to the Future: Reconciling paradigms or development as usual?” in Malcolm Langford, Andy Sumner, Alicia Ely Yamin, (eds.) *Millennium Development Goals and Human Rights*, Cambridge University Press, 2013. At the same time, one should exercise extreme caution in equating the EFA, MDGs and their successors SDGs, with states’ (or international community’s writ large) understanding of international human rights obligations, including the “minimum core”. Committee on Economic, Social and Cultural Rights, *Report on the eighteenth and nineteenth sessions. 31/05/99., E/1999/22*, (27 April-15 May 1998, 16 November-4 December 1998), at para. 487-489 http://www.bayefsky.com/general/e_1999_22_1999.php. For an extensive analysis of the relationship between MDGs and human rights, see Philip Alston, “Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen through the Lens of the Millennium Development Goals, *Human Rights Quarterly*, Vol. 27, Issue 3 (2005), pp. 755-829. In contrast to the MDGs, the post-2015 education agenda, barely mentions “basic education” and whose aim is to engage developed and developing countries equally. Thus, for example, the Incheon Declaration, *Education 2030: Towards inclusive and equitable quality education and lifelong learning for all*, does not mention the terms “basic education” at all. Instead, states commit to moving beyond just the basic minims towards “a single, renewed education agenda that is holistic, ambitious and aspirational, leaving no one behind... “Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all” It is transformative and universal, attends to the ‘unfinished business’ of the EFA agenda and the education-related MDGs, and addresses global and national education challenges.” <https://en.unesco.org/world-education-forum-2015/incheon-declaration>; see also Incheon Declaration and Framework for Action at <http://unesdoc.unesco.org/images/0024/002432/243278e.pdf>. At this stage, it is impossible to ascertain whether, and if so, to what extent, the SDGs reflect the “minimum core” of the right to education.

⁷⁹ Indeed, an argument could be made that the EFA, the Millennium Development Goals and the Sustainable Development Goals effectively shape the content of the right to education. For example, increasingly, in reports to the human rights monitoring bodies, states refer to targets and commitments made under these development schemes as evidence of their implementation of the right to education.

added) is fundamental to the strengthening of higher level education and to self-reliant development (Preamble). The Declaration defines “basic educational needs” as encompassing literacy, oral expression, numeracy and problem solving (‘tools’), as well as knowledge, skills, values and attitudes (‘content’) “required by human beings to be able to survive, to develop their full capacities, to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decisions and to continue learning.” Indeed, much of the Declaration appears to be aspirational. Concluding that the state of basic education at the time was inadequate to meet the basic learning needs of all children, youth and adults, the Declaration calls for an expanded vision of basic education that encompasses five components:

- i. universalizing access to basic education activities and promoting equity of treatment; focusing on actual learning;
- ii. broadening the means and scope of basic education to cover a wide range of delivery systems and population groups;
- iii. enhancing the environment for learning in the home and community; and
- iv. strengthening partnerships at all levels among the various authorities, organizations, groups and families involved in basic education”.⁸⁰

At the World Education Forum (Dakar, 2000), 164 governments reaffirmed the Jomtien Declaration and pledged to achieve Education for All (EFA), identifying six goals⁸¹ to be met by 2015. The Dakar Framework for Action notes that “Education for All is a basic human right at the heart of development [which] must be a *national and international priority*”.⁸² (emphasis added) In addition, in 2000, States adopted the United Nations Millennium Declaration, which set eight Millennium Development Goals (MDGs) to end world poverty; these are also to be achieved by 2015. Two of these goals relate to education:

- Goal 2: Achieve universal primary education
- Goal 3: Promote gender equality and empower women

The focus on the “basic education” as the centerpiece of EFA, insistence that states prioritize EFA resembles the elements of the “minimum core” outlined above. At the same time, EFA and MDGs entail commitments that are clearly not immediately realizable. It is possible and, indeed likely, that

the aim of the EFA is solve the practical problem of lack of resources to implement the immediately realizable obligations (see cases discussed *infra*)⁸³ by triggering obligations of developed, more resource-available countries to assist those whose current resources prevent the implementation of the “minimum core” obligations,⁸⁴ and by preventing states that fail to achieve the goals from claiming lack of resources.⁸⁵

Recalling the earlier discussion of invariant/variant approaches to “minimum core”, it is worth pointing out the EFA appears to take a bi-furcated international-minimum/state-specific “minimum core”:

All children must have the opportunity to fulfill their right to quality education in schools or alternative

⁸⁰ *Meeting Basic Learning Needs: A Vision for the 1990s*, Background Document, World Conference on Education For All, Jomtien, Thailand 1990, <http://unesdoc.unesco.org/images/0009/000975/097552e.pdf>, at 71; see also Appendix for the text of the Declaration

⁸¹ The six goals are:

- expanding and improving comprehensive early childhood care and education, especially for the most vulnerable and disadvantaged children;
- ensuring that by 2015 all children, particularly girls, children in difficult circumstances and those belonging to ethnic minorities, have access to and complete, free and compulsory primary education of good quality;
- ensuring that the learning needs of all young people and adults are met through equitable access to appropriate learning and life-skills programmes;
- achieving a 50 per cent improvement in levels of adult literacy by 2015, especially for women, and equitable access to basic and continuing education for all adults;
- eliminating gender disparities in primary and secondary education by 2005, and achieving gender equality in education by 2015, with a focus on ensuring girls’ full and equal access to and achievement in basic education of good quality;
- improving all aspects of the quality of education and ensuring excellence of all so that recognized and measurable learning outcomes are achieved by all, especially in literacy, numeracy and essential life skills.

⁸² The Dakar Framework for Action; Education for All: Meeting our Collective Commitments, Dakar, Senegal 2000, <http://unesdoc.unesco.org/images/0012/001211/121147e.pdf>

⁸³ Statistics cited to justify the need for EFA focus on (i) literacy rates, enrollment rates, drop-out rates and gender gaps suggesting that EFA is supposed to ensure that children in all states are able to receive at least basic education (i.e., the internationally-acceptable *floor*).

⁸⁴ ICESCR, Article 2.

⁸⁵ Philip Alston, “Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen through the Lens of the Millennium Development Goals, Human Rights Quarterly, Vol. 27, Issue 3 (2005), pp. 755-829, p.823 (“...the MDGs can, up to a point, be taken as reflecting the minimum content of certain of the economic and social rights, so that states that fail to achieve their MDG commitments cannot easily seek to excuse themselves by relying upon a lack of available resources or arguments based on progressive realization.”)

programmes at whatever level of education is considered 'basic'. All states must fulfill their obligation to offer free and compulsory primary education in accordance with the United Nations Convention on the Rights of the Child and other international commitments. (emphasis added).⁸⁶

Summary

Box 1: “Minimum Core” obligations for the right to education

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

As becomes evident from the survey of international and regional instruments, adoption of the “minimum core” concept is not universal. The treaty monitoring bodies have tried to outline a set of “core” obligations although those vary among different bodies both in terms of content and scope. Some regional instruments and institutions differentiate between obligations that have immediate effect and those that could be realized progressively; on the other hand, other instruments do not. Some institutions state that states are obligated to guarantee a minimum threshold of human rights regardless of their economic development; others view availability of resources as a relevant factor, although here, too, the institutions differ on whether states must use all available resources, maximum resources, or reasonable resources. Lastly, one regional institution—the African Commission—suggests that the minimum core obligations are non-derogable.

In the development context, areas of prioritization identified by the EFA and the MDGs resemble elements of the “minimum core” outlined by the Committee. However, the development context also emphasizes *basic* education, the definition of which is left to the states (although, according to the the Jomtien Declaration it encompasses literacy, oral expression, numeracy and problem solving, as well as knowledge, skills, values and attitudes necessary for survival, development of full capacities, and life with dignity). References to “basic education” also feature in the state reports to the Committee. Those are discussed below as evidence of how states themselves have interpreted the “minimum core” of the right to education.⁸⁷

⁸⁶ Dakar Framework For Action, *supra*, <http://unesdoc.unesco.org/images/0012/001211/121147e.pdf>, p. 15. This approach is consistent with the statement in the background report accompanying the Declaration that “each country must first diagnose its own societal resources and requirements in order to define the basic level of learning suited to its context.” Meeting Basic Learning Needs: A Vision for 1990s, *supra*, <http://unesdoc.unesco.org/images/0009/000975/097552e.pdf>, at 41. Elsewhere, the document specifically states that international or other external measures of basic education should not be imposed on the states.

⁸⁷ Vienna Convention on the law of treaties (with annex). Concluded at Vienna on 23 May 1969 Article 31(2)(b).

3. “Minimum Core” in State Practice

It is not easy to ascertain how a state interprets an international treaty in practice. One indication might be reports submitted by states to the Committee and the CRC. Another indication might be national legislation, including national Constitutions, particularly if they explicitly implement the international agreement. Lastly, national jurisprudence could indicate what the state and the courts consider as core obligations of the state.

It is worth noting the limitations of this methodology. With respect to state reports to treaty monitoring bodies, the rhetoric in the narratives may not always accurately reflect the actual practice. With respect to national laws and jurisprudence, the research herein has been severely limited both due to language constraints and due to lack of accessibility to all relevant documents. Jurisprudential analysis is further limited by the fact that in many states, socio economic rights are not justiciable.

State Reports

A review of state reports submitted to the CESCR suggests that states rarely use the term “minimum core” or “immediate obligations”.⁸⁸ When such references are made, there is little accompanying discussion, as the following samples illustrate. Moreover, states sometimes refer to “minimum needs”, “minimum demands”, “basic services” or “basic education”. It is difficult to ascertain whether those references reflect the states’ views of their legal obligations or simply statements capturing their state-of-affairs.

- Namibia’s report (submitted in 2014) provides that “ ... the fundamental human rights and freedoms (Chapter 3) provisions of the Namibian Constitution and its principles of state policy provide a level of commitment... set a precedent in terms of the scope of the commitment of

the state to its citizens. A number of these rights, such as “education for all” (Art. 20(1)), provide objectives, requiring *immediate implementation*.” (emphasis added)

- Yemen’s report (submitted in 2014) notes that “Poverty is also one of the structural problems hampering the process of development and innovation in the field of human rights since current efforts are focused on ensuring the *minimum of rights* and a decent life at a time when increasing demands are being made for qualitative improvement in public and private rights and freedoms”. With respect to the right to education, Yemen focuses on the provision of “basic education”, noting that “The National Strategy for the Development of Basic Education 2003–2015 and the overall Strategic Programme contain numerous components embodying the concepts of equality and non-discrimination, particularly in regard to enrolment and awareness-raising, and programmes have been designed for children with special needs and children from poor families in rural and urban areas. The Ministry of Education is also helping to implement a number of education programmes for refugee children in collaboration with the organizations and bodies concerned. The Strategic Programme consists of plans for the reform and improvement of basic education and the determination and development of strategic performance therein, as well as a national strategy for the development of secondary education....”
- Uganda’s report (submitted in 2012) provides that “ Under the National objectives and Directives Principles

⁸⁸ State reports dating back 10 years were examined. For each, a search was done for words “minimum”, “core”, and “immediate”. In addition, in each report a section on “Right to Education” (or “Education”) was examined in detail.

of state policy provision is made that the State shall make reasonable provision for the welfare and maintenance of the aged, the state shall endeavor to fulfill the fundamental rights of all Ugandans to ensure that; all development efforts are directed at ensuring the maximum social and cultural wellbeing of the people and all Ugandans enjoy rights and opportunities and access to education, health services, clean and safe water, decent shelter, adequate clothing, food security and pension retirement benefits. The above national objectives and directives for state policy create the basis for guaranteeing to people in Uganda *minimum social economic rights*.” (emphasis added). With respect to housing, the report notes the following: “Regarding habitability as a core minimum state obligation which entails, adequate space and protection from the effects of weather, threats to health, hazards and disease restrictions and regulations on occupancy of wetlands have been made by instituting the National Environmental Management Authority (NEMA) to monitor and regulate the use of water-logged areas and forest reserves.”

- Vietman’s report (submitted in 2011) states that: “the right to suitable living standards, particularly food, clothing and housing—the *minimum rights* that people are entitled to—is always given the highest priority by the Vietnamese State.” (emphasis added) With respect to the right to food, the report notes that “Many policies, programmes and measures have been proposed to meet the people’s *minimum demand of food*, provide nutrition for the people to maintain, develop their physical and mental strength, and ensure food safety and hygiene for the people with particular focus on poverty reduction and income improvement for the people.”
- An early report from Morocco (submitted in 1993) quotes then-King in his direction to attend to economic and social rights: “There are clearly human rights, but there are also other rights which ought to be examined, even if they are not represented in other bodies, because they are among human rights. What are concerned here are social rights, the *minimum economic level* and any right of a kind to make a Moroccan citizen a worthy man in full enjoyment of his liberties...Our Council must work to guarantee the dignity of every Moroccan at the social and economic level”. (E/1990/5/Add.13)

Thus, even those few state reports that refer to *minimum* levels or *immediate* obligations, do so obliquely without elaboration of which elements of the rights correspond to such minimum levels or trigger such immediate obligations.

In some instances, state reports give indication of what states *do not* consider to be immediately realizable obligations. Thus, for example, Kenya report to CESR states that “[w]ith regard to children with disabilities, the Government has *progressively* established programmes in various institutions to cater for these learners.” (emphasis added)⁸⁹ Similarly, Burundi acknowledges without further explanation that “[t]here are no specific programmes of education for vulnerable children such as those with disabilities, orphans, street children and the Batwa minority, except for some initiatives by UNICEF and a number of charitable organizations.”⁹⁰

Yet in other instances, it is difficult to discern whether states believe a certain element of the right to education is subject to progressive realization (rather than immediate realization) or whether they accept it as a core obligation but due to the scarcity of resources are unable to fully implement it. Consider, for example, Zimbabwe. While its Education Act guarantees the right to basic education and while at the presentation to the Human Rights Council, the Zimbabwe delegation stated that “[e]very citizen of Zimbabwe had the right to State-funded primary education...”, the Committee on the Rights of the Child noted that education in Zimbabwe is neither free nor compulsory. In fact, the school fees had been identified as the major contributor to falling enrolling rates. In response, the Zimbabwe delegation offered the following:

[t]he State had to take *reasonable measures* to achieve *progressive realization* of those rights. The request for parents to pay was an interim measure and would be phased out as resources became available. Parents were made aware of the need for their children to remain in school. They did not have to pay all their fees at once and could come up with payment plans so that their children could remain in school. No child should be denied education because of the non-payment of fees. Zimbabwe had one of the highest literacy rates in Africa.⁹¹ (italicized emphasis added)

⁸⁹ Committee on Economic, Social and Cultural Rights Consideration of reports submitted by States parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights Combined second to fifth periodic reports of States parties due in 2013 Kenya, E/C.12/KEN/2-5, February 2014.

⁹⁰ Committee on Economic, Social and Cultural Rights Consideration of reports submitted by States parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights Initial reports of States parties due in 1992 Burundi, E/C.12/BDI/1, January 2014

⁹¹ Committee on the Rights of the Child considers the report of Zimbabwe, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16972&LangID=E>

The reference to the progressive realization might suggest that the government does not view provision of free education an *immediate* obligation. However, this is likely not the case because, as described in the state report to the CRC, the government had prioritized and already undertaken a number of schemes to secure additional funds for schools as well as funds for payments of school and other fees for those students who cannot afford them.⁹² It seems more likely that state reports (unlike court cases discussed *infra*) blur and do not differentiate between a state’s *obligation* and its *implementation* of that obligation.

The Committee, in its Concluding Observations, has not given further clarity to the “minimum core” concept. The Committee rarely refers to “minimum core” or immediate obligations and when it does, it provides no guidance as to what actions it requires of the state. For example, in the 1990s when a number of countries were in the throes of economic crises, a number of states highlighted the limited resources as standing in the way of their implementation of the rights. Such was the case, for example, with Suriname whose report clearly evidenced state’s struggle to fulfill its obligation. Yet, in its Concluding Observations, the Committee does not mention “minimum core” obligations nor gives any guidance regarding prioritization.⁹³ In its Concluding Observation to Zimbabwe’s 1995 report, which also highlighted the country’s economic struggles, the Committee oddly mentions only *de jure* non-discrimination and protection of cultural rights of minorities as rights subject to immediate realization independent of resources despite Zimbabwe’s report outlining difficulty in realizing virtually every right.⁹⁴ With respect to the right to education, the Committee noted “as a signatory to the Covenant, [Zimbabwe] is committed to ensure compulsory, free primary education to all children in Zimbabwe. Even though the Committee is aware of the current difficulties in Zimbabwe and the State party’s efforts in this field, the Committee invites Zimbabwe to submit to it within a year a plan of action and a progress report as to the implementation of this obligation.”⁹⁵

More recently, in a letter to member states, the Committee noted that while “some adjustments in the implementations of [ICESCR’ rights] are at times inevitable”, any such adjustment must, among other things, “the minimum core content of the rights...and ensure the protection of this core content at all times.”⁹⁶ Similarly, in Concluding Observations for Spain’s 2012 report, the Committee recommended without further elaboration that “that the State party ensure that all the austerity measures adopted reflect the minimum core content of all the Covenant rights and that it take all appropriate measures to protect that core content under any circumstances,

especially for disadvantaged and marginalized individuals and groups.”⁹⁷ Its lack of guidance coupled with the recent remarks might suggest that the Committee considers the “minimum core” a state-set standard.⁹⁸

National Laws and Policies

Most of the states have provisions in national Constitutions or other legal documents guaranteeing the right to education. Yet the scope of those guarantees varies: most states guarantee access to primary education while some provide a guarantee to “basic” education (that may or may not include

⁹² Consideration of reports submitted by States parties under article 44 of the Convention Second periodic reports of States parties due in 2002 Zimbabwe, CRC/C/ZWE/2 <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G15/076/22/PDF/G1507622.pdf?OpenElement>

⁹³ Committee on Economic, social and Cultural Rights, Consideration fo Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant, Concluding observations of the Committee on Economic, Social and Cultural Rights: Suriname, E/C.12/1995/6, June 1995.

⁹⁴ Committee on Economic, social and Cultural Rights, Consideration fo Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant, Concluding observations of the Committee on Economic, Social and Cultural Rights: Zimbabwe, E/C.12/1/Add.12

⁹⁵ Concluding Observations: Zimbabwe, *supra* E/C.12/1/Add.12

⁹⁶ Open letter of 16 May 2012 from the Chair of the Committee to States parties on economic, social and cultural rights in the context of the economic and financial crisis. <http://www2.ohchr.org/english/bodies/cescr/docs/LetterCESCRtoSP16.05.12.pdf>

⁹⁷ Committee on Economic, social and Cultural Rights, Consideration fo Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant, Concluding observations of the Committee on Economic, Social and Cultural Rights: Spain, E/C.12/ESP/CO/5, June 2012.

⁹⁸ Some state reports appear to reflect this approach: e.g., Uganda state report provided the following: “Regarding habitability as a core minimum state obligation which entails, adequate space and protection from the effects of weather, threats to health, hazards and disease restrictions and regulations on occupancy of wetlands have been made by instituting the National Environmental Management Authority (NEMA) to monitor and regulate the use of water-logged areas and forest reserves.” Consideration of reports submitted by States parties under articles 16 and 17 of the International Covenant on Economic Social and Cultural Rights Initial reports submitted by States parties due in 1990 Uganda, E/C.12/UGA/1, December 2013; Canada mentions a “core housing need” – a nationally defined category of “households that do not have sufficient income to access an adequate and suitable dwelling without spending 30 percent or more of their household income”. There is no evidence that this is tied to the “minimum core” of the right to housing under international law and is surely above the core housing rights that many developing states could fulfill. Thus, this could be described as an attempt by Canada to define its own national core minimum on which it feels obligation to report to the CESCR. Consideration of reports submitted by States parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights Sixth periodic reports of States parties due in 2010 Canada, E/C.12/CAN/6, April 2013, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fCAN%2f6&Lang=en

adult education). Even when states use the term “basic education”, it is unclear whether they intend to connote classification (e.g., Namibia’s Education Act defines ‘basic education’ as Grades 1-12; Venezuela considers “basic education” as encompassing preschool, primary and intermediate levels; Gambia touts its expanded vision of basic education, which encompasses early childhood education, adult and non-formal education and nine years of continuous formal schooling—from grades 1–9; South African Constitution and United Kingdom include “adult basic education” in the guarantee of the right to basic education) or whether the term (also) encompasses qualitative dimension as suggested in the Jomtien Declaration and recently reaffirmed by the Expert Consultation on the Operational Definition of Basic Education (17-18 December 2007).⁹⁹

According to the World Policy Center, 77% of low-income states, 90% of middle-income states and 96% of high-income states guarantee free and compulsory primary education.¹⁰⁰ Additionally, according to UNESCO, as of 2014, 94 out of the 107 low and middle-income countries have legislated free lower secondary education.¹⁰¹ Of these, 66 have constitutional guarantees and 28 enacted other legal measures.

Although the vast majority of state reports to the Committee outline laws, programs and policies aimed at provision of education for people with disabilities, indigenous and other vulnerable communities, improving literacy among the broader population, it is not clear if states themselves view such laws, programs and policies as realizations of *immediate* obligations or as part of their *progressive* realization of the right to education. The next section turns to consider whether further clarity regarding states’ understanding of the “minimum core” concept could be gleaned from national jurisprudence.

National Jurisprudence

At the outset, it should be re-emphasized that in many states, even where national legislation provides guarantees of socio-economic rights, the claims of violation of those rights are not justiciable. Moreover, there is no requirement in international or regional legal frameworks for the “minimum core” rights to be justiciable. Lastly, litigation at national levels most frequently entails challenges to the right to education guaranteed by national constitutions or other national laws. Those do not necessarily correspond to the guarantees pursuant to international human rights. Accordingly, jurisprudential search was focused on the courts’ (a) engagement with the “minimum core” terminology, (b) interpretation of the fundamental/essential/basic/minimal

levels of education, and (c) identification of obligations of immediate nature. Given the numerous limitations, at most, sporadic jurisprudence could provide only minimal guidance on whether (and, if so, how) state and local authorities engage with the concept of “minimum core” of the right to education. Efforts have been made to present a diverse sample of caselaw.

South Africa “Minimum core”

The South African Constitutional Court has explicitly considered the “minimum core” concept in the context of the right to housing, but ultimately questioned whether the Courts had capacity to define the “minimum core” and thus to evaluate whether or not the state had complied with its minimum core obligations.¹⁰² Indeed, the reasoning of the Court suggested that it was under the impression that it was being urged to define the South Africa’s state-specific minimum core (rather than determine if South Africa violated the international law standard as implemented in national legislation¹⁰³):

...the committee developed the concept of minimum core over many years of examining reports by reporting states. This Court does not have comparable information. ...it could not be done unless sufficient

⁹⁹ UNESCO, Expert Consultation on the Operational Definition of Basic Education 17-18 December 2007 http://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/UNESCO_Expert_Consultant_on_the_Operational_Definition_of_Basic_Education_Conclusions_2007_EN.pdf; See also, e.g., Chiedza Simbo, “Defining the term basic education in the South African Constitution: An international law approach”, *Law, Democracy and Development*, Vol. 16 (2012), p. 162. (arguing that “basic education” in South African Constitution should be interpreted as connoting quality) http://www.idd.org.za/images/stories/Ready_for_publication/simbo%20defining%20basic%20education.pdf

¹⁰⁰ World Policy Center, <http://worldpolicycenter.org/policies/is-primary-education-tuition-free-and-compulsory> *Tuition-free* includes cases where no tuition is charged in primary school, but there may be other fees. These additional fees cannot be compared across countries as there is not enough information available. *Compulsory* education can be specified by an age range, a number of years, or a level of education during which children are required to go to school.

¹⁰¹ UNESCO, Global Database on the Right to Education. <http://www.unesco.org/education/edurights/index.php?action=home&lng=en> (analyzed at <http://unesdoc.unesco.org/images/0023/002322/232205e.pdf>)

¹⁰² *Government of the Republic of South Africa & others v Grootboom & others*, (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000), <http://www.saflii.org/za/cases/ZACC/2000/19.html>

¹⁰³ The guarantees of socio-economic rights in the South African Constitution very closely the provisions of the ICESCR.

information is placed before a court to enable it to determine the minimum core in any given context. In this case, we do not have sufficient information to determine what would comprise the minimum core obligation in the context of our Constitution.¹⁰⁴

Basic Education/Immediate Realization Independent of Resources

The right to basic education under the South African Constitution is different from the right to housing in that it is not subject to progressive realization:

Everyone has the right:

- a. to a basic education, including adult basic education; and
- b. to further education, which the state, through reasonable measures, must make progressively available and accessible. (Article 29)

Although never explicitly invoking the “minimum core” standard, the courts have essentially ascribed the content to the right to basic education that recalls some of the features and components of the “minimum core” standard envisioned by international instruments and institutions. Thus, for example, the courts have held that the “right to education” is a positive right that obligates the state to provide education for every person and “not merely a negative right that such a person should not be obstructed in pursuing his or her basic education”.¹⁰⁵ Moreover, the Constitutional Court of South Africa has held that the right to basic education is subject to *immediate realization* and not subject to availability of resources: “There is no internal limitation requiring that the right be ‘progressively realized’ within ‘available resources’ subject to ‘reasonable legislative measures. ... This right is therefore distinct from the right to “further education” provided for in section 29(1)(b).”¹⁰⁶

In *Madzodzo et al v. Minister of Basic Education et al* (2014)¹⁰⁷, the Constitutional Court held that the right to basic education requires the state to take “*all reasonable measures* to realize the right to basic education with immediate effect. This requires that all necessary conditions for the achievement of the right to education be provided” (italicized emphasis added). The Court proceeded to find that access to school, provision of teaching and non-teaching staff and adequate teaching and learning resources, as well as appropriate furniture all constitute necessary conditions that the state must provide.¹⁰⁸ A similar approach had been taken by the

Court in *Section 27 and Others v Minister of Education*,¹⁰⁹ wherein it held that provision of textbooks was an essential component of the right to basic education and is subject to immediate realization under the Constitution. In that the judgment, Justice Kollapen further emphasized that, in order to be meaningful, the right to basic education includes ‘such issues as infrastructure, learner transport, security at schools, nutrition and such related matters’.¹¹⁰ Most recently, the High Court of South Africa also held that states must provide transportation to those students who would otherwise not be able to attend school.¹¹¹

¹⁰⁴ *Government of the Republic of South Africa & others v Grootboom & others*, *supra* at para. 33.

¹⁰⁵ *Ex parte Gauteng Provincial Legislature: In re dispute concerning the constitutionality of certain provisions of the Gauteng School Education Bill of 1995; Tripartite Steering Committee and Another v Minister of Basic Education and Others* (1830/2015) [2015] ZAECGHC 67 (25 June 2015). For a review of South African jurisprudence related to the right to education, see http://www.scielo.org.za/scielo.php?pid=S2225-71602013000100002&script=sci_arttext&tlng=pt

¹⁰⁶ *Governing Body of Juma Masjid Primary School and Others v Essay NO and Others* (2011), http://www.seri-sa.org/images/stories/jumamusjidccjudgment_apr11.pdf, at para. 37

¹⁰⁷ *Madzodzo et al v. Minister of Basic Education et al* (2014), https://www.escri-net.org/sites/default/files/Madzodzo%20Cour%20order%20%2820%20Feb%202014%29_2.pdf, at para. 17

¹⁰⁸ The Court held that the government’s failure to budget adequate amounts to secure purchase of necessary furniture does not excuse its nonperformance and that it should have realized the amounts were insufficient and made appropriate arrangements to ensure its ability to fulfill the immediately realizable right to basic education. This case, however, also highlights that immediate realizability of the right requires, at minimum, that the breaching part offers (and abides by) a clear timetable for relief.

¹⁰⁹ *Section 27 and Others and Another* (24565/2012) [2012] ZAGPPHC 114; [2012] 3 All SA 579 (GNP); 2013 (2) BCLR 237 (GNP); 2013 (2) SA 40 (GNP) (17 May 2012); *Minister of Basic Education v Basic Education for All* (20793/2014) [2015] ZASCA 198 (2 December 2015)

¹¹⁰ *Section 27 & others v Minister of Education & another* [2012] 3 All SA 579 (GNP), para. 23

¹¹¹ *Tripartite Steering Committee and Another v Minister of Basic Education and Others* (1830/2015) [2015] ZAECGHC 67 (25 June 2015). A similar finding was made by the Brazilian Tribunal of the State Minas Gerais. See UN Comm’n on Human Rights, *Information Provided by the Special Rapporteur on the Right to Education, Ms. Katarina Tomasevski*, UN Doc. E/CN.4/2004/WG.23/CRP.4, 3 February 2004, p. 7 (citing decision of the Tribunal of the State Minas Gerais (TMG)) concerning *Apelação Cível No. 000.197.843-6/2000* (holding that the right to free and compulsory education includes free transportation if students are otherwise unable to attend school)).

Swaziland

Immediate Realization Independent of Resources

In *Swaziland National Ex-Miners Workers Association v The Minister of Education* (2010) applicants alleged that the government was in violation of s 29(6) of the Swaziland Constitution, which provides that “[e]very Swazi child shall within three years of the commencement of this Constitution have the right to free education in public schools at least up to the end of primary school, beginning with the first grade.” The government claimed that “‘free education’ referred to ‘a consolidated programme aimed at creating an environment characterised by minimum barriers to quality primary education”, that it had prioritized orphans and vulnerable children and had a plan for incremental implementation of free education, starting with the first grade.

The Court at first instance refused to read in an element of progressive realization as it found such reading to be unsupported by international legal commitments made by Swaziland. It held the government to be in violation of the Constitution, which unequivocally guaranteed free education to all children (not just those in first grade) within the Constitutionally prescribed time period. The court then issued a declaratory order that every child in primary school was “entitled to education free of charge, at no cost and not requiring any contribution from any such child regarding tuition, supply of textbooks, and all inputs that ensure access to education” and that it was the obligation of the Government of Swaziland to make such provisions. However, when the applicants filed a second claim seeking a mandatory order to make free primary education immediately available, the High Court dismissed the application. It noted that there is a difference between recognition of a right and enforcement of that right, which depended on available resources. The Court found that the government’s staggered approach to free education was ‘reasonable and satisfactory in view of the limited resources.’ Importantly, however, the Supreme Court affirmed but went further to hold that the right to education, as a socio-economic right, could only be progressively realized subject to the available financial and infrastructural resources.

India

Immediate Realization Independent of Resources/Content of the Right

In India, the right to free and compulsory education is a fundamental right under Article 21A of India’s Constitution and, in 2009, has been further clarified in the Right to Education Act (RTE). In case before it (prior to the enactment of the RTE), the Indian Supreme Court held that “[t]he State is duty bound to implement [Article 21A] on a priority basis.”¹¹² Noting the laxity in the government’s implementation, the Court directed the Central Government “to set a time-limit within which this Article is going to be completely implemented. This time limit must be set within six months.” The Court proceeded to direct that the government enact legislation that

- (a) provides low-income parents/guardians with financial incentives such that they may afford to send their children to school;
- (b) criminally penalizes those who receive financial incentives and despite such payment send their children to work;
- (c) penalizes employers who preclude children from attending school or completing homework;
- (d) the penalty should include imprisonment; ...The State is obligated under Article 21A to implement free and compulsory education in toto;
- (e) Until we have achieved the object of free and compulsory education, the Government should continue to increase the education budget;
- (f) the Parliament should set a deadline by which time free and compulsory education will have reached every child. This must be done within six months.¹¹³

The Court further emphasized that in addition to free education and/or other financial assistance, poor families should also be given books, uniforms and any other necessary benefits, noting that “the State cannot avoid its constitutional obligation on the ground of financial inabilities.”¹¹⁴ Similarly, in *Amiya Sinha and Ors. V. State of Tripura and Ors*, the Gawahati High Court reaffirmed that “Right to education...

¹¹² *Ashoka Kumar Thakur v. Union of India & Ors*, [2008] 4 S.C.R. 1

¹¹³ *Ashoka Kumar Thakur v. Union of India & Ors*, [2008] 4 S.C.R. 1

means: (a) every child/citizen of this country has a right to free education until he completes the age of fourteen years and (b) after a child/citizen completes 14 years, his right to education is circumscribed by the limits of the economic capacity of the State and its development.”¹¹⁵ In *Environmental & Consumer Protection Foundation v Delhi Administration & Others* [2012] INSC 584, the Supreme Court of India held that failure to provide working toilets, drinking water facilities, sufficient classrooms, and necessary staff violated the right to education and ordered all states to do so within six months of the order.

In a landmark 2012 case,¹¹⁶ the Supreme Court of India upheld the constitutionality of section 12 of the RTE, which requires all schools, both state-funded and private, to accept 25% intake of children from disadvantaged groups. However, the Court held that the RTE could not require private, minority schools to satisfy a 25% quota, as this would constitute a violation of the right of minority groups to establish private schools under the Indian Constitution.¹¹⁷ The Court affirmed that the State can regulate private schools by imposing reasonable restrictions in the public interest under Article 19(6) and held that the imposition of 25% quota was a reasonable restriction in the public interest.

Colombia¹¹⁸

Immediate Realization Independent of Resources

The Constitutional Court of Colombia, in the context of a challenge to the Government’s imposition of fees for primary education, held that the Government had an obligation to guarantee free primary education for all children.¹¹⁹ Referring to international and regional treaties, as well as to General Comment 13, the Court held that the obligation to provide free primary education is not subject to progressive realization but is an obligation of *immediate compliance*. The Court did not, however, address the imposition of indirect fees such as the costs of books, food and travel and it has been therefore assumed that those costs are permissibly born by the families.¹²⁰ In Dec 2011, the Colombian national Government issued National Decree 4807/2011 establishing that education shall be free in public institutions at the primary and secondary levels.

Costa Rica

Fundamental Right

In Costa Rica, the Constitutional Court has declared that school fees or charges of any kind, whether direct or indirect, are unconstitutional. This interpretation of the Constitution as guaranteeing state-sponsored free education occurred following the filing of a petition by parents against a state educational institution for refusing to enroll their son after they could not afford to pay the ‘voluntary contributions’ that the school required for enrolment. Specifically, the Court declared that fees imposed by educational institutions violate Article 78, which states that: ‘Preschool and general basic education are obligatory. These and diversified education in the public system are free and supported by the Nation.’¹²¹ The Court reasoned that ‘[c]onditioning school attendance on the payment of a sum of money, no matter what it is called, is to ignore what the Constitution provides’, in violation of the fundamental right to education.

¹¹⁴ *Ashoka Kumar Thakur v. Union of India & Ors*, [2008] 4 S.C.R. 1; *In Avinash Mehrotra Vs UOI and Ors*, Indian Supreme Court held that the fundamental right to receive education includes an obligation on the part of the state to ensure safety and soundness of the facilities. Writ Petition (Civil) No. 483 of 2004, April 13, 2009.

¹¹⁵ *Amiya Sinha and Ors. Vs State of Tripura and Ors.*, © Nos. 360 of 2008 AND 235 of 2009, Gawathi High Court.

¹¹⁶ *Society for Unaided Private Schools of Rajasthan v Union of India and Another* (2012) 6 SCC; Writ Petition (C) No. 95 of 2010.

¹¹⁷ *Society for Unaided Private Schools of Rajasthan v Union of India and Another* (2012) 6 SCC; Writ Petition (C) No. 95 of 2010.

¹¹⁸ In the context of the right to health, Columbia Constitutional Court equated the two tiers of health benefits—contributory regime (*Plan Obligatorio de Salud*, or POS) for those formally employed or earning more than twice the minimum wage, and the subsidized regime (*Plan Obligatorio de Salud Subsidiado*, POSS)—to “minimum core” as defined in the Committee’s General Comment 13. It reaffirmed in its jurisprudence that POS and POSS are subject to immediate realization and distinguished the obligation from *implementation*. See e.g., Sentencia T-016/07; Sentencia T-227/03; Sentencia T-760/2008; For a discussion, see e.g., Alicia Yamin, “How Do Courts Set Health Policy? The Case of the Colombian Constitutional Court”, *PLoS Med.* 2009 Feb; 6(2); Katharine G. Young & Julieta Lemaitre, “The Comparative Fortunes of the Right to Health: Two Tales of Justiciability in Colombia and South Africa”, *Harvard Human Rights Journal*, Vol. 26 (2013), 179-216.

¹¹⁹ Decision C-376/2010 (*DeJusticia vs Government of Colombia*), Colombian Constitutional Court (19 May 2010). For translated excerpts see <http://www.crin.org/Law/instrument.asp?InstID=186>

¹²⁰ CRIN, COLOMBIA: *Free education secured for 12 million children*, http://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/CRIN_Colombia_Education_for_12million_Children_2016_En.pdf, p. 4

¹²¹ Constitutional Chamber of the Supreme Court of Justice of Costa Rica, Decision 10/5/2000, No. 2000-03954 of 14:55 of 10 May 2000 (discussed at http://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/Interights_Bulletin_17.2_2013_en.pdf).

Nigeria

Immediate Realization Independent of Resources

In *SERAP v The Federal Republic of Nigeria & Anor* (2010), the Community Court of Justice of ECOWAS (the CCJ) heard allegations of the mismanagement of funds allocated for basic education, leading to the denial of free and compulsory education guaranteed by national and international instruments.¹²² The Court held that “whilst steps are being taken to recover the funds or prosecute the suspects, as the case may be, it is in order that the [Government] should take the necessary steps to provide the money to cover the shortfall to ensure a smooth implementation of the education programme, lest a section of the people should be denied a right to education.”

Czech Republic

Content of the Right

The Constitutional Court of the Czech Republic held that the State is required to cover costs related to establishing and maintaining educational facilities and may not charge tuition in primary and secondary education.¹²³ However, the state is not responsible for covering all costs directly related to attendance and fees imposed on students for basic school materials did not violate the right to education under the European Charter on Human Rights, the Convention on the Rights of the Child, and the ICESCR.¹²⁴

United States

In the United States the right to education is not enshrined in the U.S. Constitution and federal courts have generally refused to recognize the fundamental right to education of all citizens. However, the right to basic (or adequate) education appears in state constitutions and has been litigated extensively across the states. A comprehensive survey of U.S. caselaw is beyond the scope of this paper. As a result, only a sample of seminal cases is provided here. The vast majority of the cases speak to the content of “basic education” and the corresponding duty on the part of the state to provide funding necessary for the realization of students’ rights to basic education.

In 1997, the North Carolina Supreme Court held that North Carolina’s state constitution “guarantee[s] every child in this state an opportunity to receive a sound basic education in our public schools.”¹²⁵ The Court stated, “The intent of the framers was that every child have a fundamental

right to a sound basic education which would prepare the child to participate fully in society as it existed in his or her lifetime.”¹²⁶ The Court defined a sound basic education as one that will provide students with each of the following abilities, skills, and areas of knowledge:

- (1) Sufficient ability to read, write, and speak the English language and a sufficient knowledge of fundamental mathematics and physical science to enable the student to function in a complex and rapidly changing society;
- (2) Sufficient fundamental knowledge of geography, history, and basic economic and political systems to enable the student to make informed choices with regard to issues that affect the student personally or affect the student’s community, state, and nation;
- (3) Sufficient academic and vocational skills to enable the student to successfully engage in post-secondary education or vocational training; and
- (4) Sufficient academic and vocational skills to enable the student to compete on an equal basis with others in further formal education or gainful employment in contemporary society.¹²⁷

At a subsequent trial, The Court offered general guidelines for a proper resource allocation system: [that] every classroom be staffed with a competent, certified, well-trained teacher; that every school be led by a well-trained, competent principal; that every school be provided, in the most cost-effective manner, the resources necessary to support the

¹²² *The Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v The Federal Republic of Nigeria and Universal Basic Education Commission (UBEC)* (30 November 2010) ECW/CCJ/JUD/07/10 (ECOWAS Community Court of Justice).

¹²³ See Czech Republic Constitutional Court, *School Material Decision*, Pl. ÚS 25/94, CZE-1995-2-008, Judgment, 13 June 1995 (Czech only), summarized at <http://www.ijrcenter.org/thematic-research-guides/education/>

¹²⁴ See Czech Republic Constitutional Court, *School Material Decision*, Pl. ÚS 25/94, CZE-1995-2-008, Judgment, 13 June 1995 (Czech only), summarized at <http://www.ijrcenter.org/thematic-research-guides/education/>

¹²⁵ *Leandro v. State*, 346 N.C. 336, 347 (1997) (“Leandro I”).

¹²⁶ *Leandro v. State*, 346 N.C. 336, 347 (1997) (“Leandro I”).

¹²⁷ For an extensive discussion of *Leandro I*, see North Carolina Bar Association, “Guide to Student Advocacy in North Carolina; Chapter 1: The Constitutional Right to A Sound Basic Education” <https://www.ncbar.org/media/558490/gsa15-toc.pdf>

effective instructional program within that school so that the educational needs of all children may be met.¹²⁸

In another seminal decision, the Court stated that adequate education must include (in addition to traditional reading and mathematical skills): knowledge of the physical sciences; “sufficient knowledge of economic, social and political systems to enable the student to make informed choices”; “sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state and nation”; and “sufficient levels of academic or vocational skills to . . . compete favorably . . . in the job market.”¹²⁹

In New York, the highest state court ruled that school-children were constitutionally entitled to the “opportunity for a meaningful high school education, one which prepares them to function productively as civic participants.”¹³⁰ The court stressed that although in the nineteenth century, when the state’s adequacy clause was adopted, a sound basic education may well have consisted of an eighth- or ninth-grade education, “the definition of a sound basic education must serve the future as well as the case now before us.”¹³¹

Some state courts have begun to recognize that students who come to school disadvantaged by the burdens of severe poverty need a more comprehensive set of services and resources in order to have a meaningful educational opportunity. For example, the New Jersey Supreme Court observed that “the educational needs of students in poorer urban districts vastly exceed those of others, especially those from richer districts. The difference is monumental, no matter how it is measured. Those needs go beyond educational needs; they include food, clothing and shelter, and extend to lack of close family and community ties and support, and lack of helpful role models. They include the needs that arise from a life led in an environment of violence, poverty, and despair. . . . The goal is to motivate them, to wipe out their disadvantages as much as a school district can, and to give them an educational opportunity that will enable them to use their innate ability.”¹³² The Court ordered the state to provide the low income and minority students attending the urban schools a range of comprehensive services, including after-school and summer supplemental programs, school based health and social services, and preschool services for children ages three and four.¹³³ In a number of other cases, courts held that states had an obligation to fund pre-schools, particularly for children with poverty background.¹³⁴

Other

A number of court cases across different countries deal with states obligations towards vulnerable children, including children of indigenous communities, minorities, children with disabilities and children in detention centers. Generally speaking, national courts recognize that the right to education must be implemented without discrimination and that the state has a general obligation to ensure access for such children.

Summary

A review of selected jurisdictions suggests that it is very rare for states to employ the “minimum core” terminology.¹³⁵ “Basic education” is a more common terminology employed in national laws and, to various extents, it resembles the international “minimum core” concept and particularly the recognition that the right to free and compulsory education triggers an immediate obligations irrespective of available

¹²⁸ *Hoke County School Board v. State*, 358 N.C. 605, 599 S.E.2d 365 (2004) (*Leandro II*)

¹²⁹ *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 186 (Ky. 1989). The *Rose* standards have been explicitly adopted by courts in Massachusetts and New Hampshire, and they have substantially influenced the constitutional definitions adopted by the courts in Alabama, North Carolina, and South Carolina. For a discussion, see Michael Rebell, “The Right to Comprehensive Educational Opportunity”, *Harvard Civil Rights-Civil Liberties Law Review*, Vol. 47 (2012), 47-117, <http://harvardcrcl.org/wp-content/uploads/2012/03/Rebell.pdf>

¹³⁰ *Campaign for Fiscal Equity*, 801 N.E.2d at 332

¹³¹ *Campaign for Fiscal Equity*, 801 N.E.2d at 332

¹³² *Abbott v. Burke*, 575 A.2d 359, 400 (N.J. 1990)

¹³³ *Abbott v. Burke*, 710 A.2d 450 (N.J. 1998)

¹³⁴ See Rebell, *supra*.

¹³⁵ Similarly, in reviewing laws on social protection in India and Indonesia, Chopra notes that although “[j]udicial decisions that require a particular service to be delivered could be understood as impliedly including that service in the state’s minimum, immediately effective obligations...courts have not engaged with the concept of the minimum core or sought to define it.” Surabhi Chopra, “Legislating Safety Nets: Comparing Recent Social Protection Laws in Asia”, *Indiana Journal of Global Legal Studies*, Vol. 22, No. 2 (Summer 2015), pp. 573-629. At the same time, Chopra observes that when Indian government attempted to prescribe the minimum requirements for ensuring “adequate quantity of quality food at affordable prices” in the National Food Security Act (2014), it created an unambiguous but extremely spare right that was far thinner than the conception of right to food under international standards. By contrast, Indonesia created a universal system of social security that avoids assigning immediately deliverable, minimum core duties to the state, but instead “conceptualizes social security as a right to be progressively realized, thereby creating expansive but weak rights”.

resources.¹³⁶ Obligations subject to immediate realization include:

- provision of inclusive and non-discriminatory access to schools (this may include provision of school meals, transportation, parental incentives, etc.)
- provision of learning resources such as furniture and textbooks
- provision of adequate facilities, including toilets, drinking water, etc.
- provision of teachers,
- prohibition against imposition of tuition (i.e., direct costs)

The interpretation of a requirement that primary education be *free* is least consistent across states. Some states offer fully free primary education (i.e., imposing no direct or indirect costs), others offer tuition-free primary education but impose other fees (e.g., for uniforms, books, exams, etc).¹³⁷ Very few states outright charge fees for attendance of primary schools.

Summary

Despite some inconsistencies, it is possible to sketch out the contours of what is the “minimum core” of the right to education and corresponding obligation. The concept appears to develop along two tracks:

(i) at international and regional level:

- a. “minimum core” is defined predominantly by treaty bodies for purposes of evaluating states’ compliance with the ICESCR
- b. the treaty bodies define a set of core obligations
- c. lack of clarity if the “minimum core” is universal, state-specific or both
- d. the minimum core obligations are subject to immediate realization
- e. minimum core is not subject to availability of resources and not dependent on the level of development, although the regional treaty bodies (and some national courts) differentiate between the *existence* of the minimum core obligation and *implementation* of the said obligation (the latter is subject to availability of resources)

f. when resources are scarce, prioritization is to be given to vulnerable children

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

h. core obligations: providing access to schools without discrimination (incl. establishing and funding school as well as permitting others to do so), securing access for all to compulsory and free primary education, ensuring that education is of good quality (incl. obligation to set health, safety and teacher standards), ensuring that the object of education complies with international standards, ensuring that instruction is provided in appropriate language, adopting and implementing national education strategy for progressive realization the right to secondary, higher and fundamental education, ensuring education without interference from the state or third parties, subject to conformity with “minimum educational standards”, education must be adaptable to the child

i. tuition fees for primary schools are prohibited and the CESCR indicated that in some instances indirect fees may be prohibited as well if they impede access to school without discrimination

(ii) at domestic level:

a. “minimum core” term is rarely used in national laws, state reports to human rights bodies or jurisprudence

b. the term “basic education” is more commonly used in national context “Basic” sometimes corresponds to “primary” and sometimes to “primary” and “secondary” levels; at times, it includes adult

¹³⁶ Importantly, some courts distinguish between the existence of immediate obligation and enforcement of its implementation, suggesting that resources have a *practical* effect on the children’s ability to enjoy even the minimum level of education.

¹³⁷ Even in wealthy states, like the United States, where public schools are free and no textbook or other fees are generally imposed on students, low or decreasing budgets for schools often lead parent associations to raise their own funds (i.e., from parent contributions) to cover the costs of school supplies, school trips, reduced class sizes, additional assistance for struggling students, etc.

education. In the United States, “basic education” refers to the content of education.

- c. Many national courts identify elements of the right to education that give rise to immediate obligations irrespective of availability of resources
- d. African courts differentiate between the *existence* of the minimum core right (which is not subject to availability of resources) and the implementation of the right (which is)
- e. Most (but not all) states’ national laws guarantee the right to compulsory free primary education—this generally includes, provision of schools,

furniture, textbooks, and transportation. These are considered to be essential conditions to the realization of the right to basic education

- f. Increasingly, tuition fees for primary schools are prohibited. Indirect costs like textbooks, uniforms, etc. may be permitted.
- g. General recognition that the right to primary education for all includes obligation to provide education to children with disabilities, children in detention and other vulnerable groups

4. The Role of Indicators

IAs early as 1990, then-Special Rapporteur on Economic, Social and Cultural Rights, Danilo Türk noted that “indicators can . . . assist in the development of the ‘core contents’ of some of the less developed rights . . . , and can provide a basis from which a ‘minimum threshold approach’ can be developed.”¹³⁸ In 1993, participants at the World Conference on Human Rights in Vienna in 1993, convened to consider the use of indicators, ultimately agreed that “the first priority was to identify and clarify the content of the various rights and obligations. Only then would it be possible to identify the most appropriate way to assess progressive achievement, which may or may not involve the use of statistical indicators.”¹³⁹ Since then, the popularity of indicators has increased exponentially although their intended use has been for *monitoring* compliance rather than defining the content of the rights.¹⁴⁰ Thus, for example, in reports to the Committee, states routinely report on literacy rates, enrollment ratios, teachers rates, number of textbooks, number of school seats, budget allocation and expenditures on education, among other data.¹⁴¹

Although a complete analysis of impact of using indicators to define content of a human right is beyond the scope of this paper, a few observations regarding the limitation of such an approach are worth noting. Indicators are inherently reductive. They strip context and nuances to reduce highly complex information into an easily digestible number. Thus, for example measures as the number of children enrolled at each level of school may tell us about how many children are registered—but not, for example, how many children attend on a regular basis; the number of children who complete the last grade will not tell us if the children learned anything, the number of textbooks will not provide information about whether their content is relevant, and the number of teachers will not tell us about their effectiveness. Of course,

more indicators can be introduced and the indicators can be designed to measure inputs, process and outcomes.¹⁴² Still, not everything that matters can be measured, and capacity and resources often limit what can be measured regularly. One might argue that indicators’ ability to strip all but what makes it possible to render different units (in this case states) comparable¹⁴³ is precisely what makes it suitable for definition of “minimum core”, which, too, arguably aims to identify the *minimum levels* common to all states. However, the creation of global indicators is often a highly political process, as negotiations over SDG indicators aptly illustrated, where deciding which indicator to choose often has little to do with what is normatively desirable or relevant to the

¹³⁸ U.N. Econ. & Soc. Council [ECOSOC], Realization of Economic, Social and Cultural Rights, ¶ 7, U.N. Doc. E/CN.4/Sub.2/1990/19 (July 6, 1990). Young advocates for such use of indicators as well. Young, *supra*.

¹³⁹ World Conference on Human Rights, Apr. 19-30, 1993, Report on the Seminar on Appropriate Indicators to Measure Achievements in the Progressive Realization of Economic, Social and Cultural Rights, 3, U.N. Doc. A/CONF.157/PC/73 (Apr. 20, 1993).

¹⁴⁰ For an excellent analysis on the use of human rights indicators, see AnnJanette Rosga and Meg Satterthwaite, “The Trust in Indicators: Measuring Human Rights,” 27 *Berkeley J. Int’l L.* 256 (2009), http://its.law.nyu.edu/faculty/profiles/representativeFiles/satterthwaite%20-trustinindicators_F87546AC-1B21-6206-60D8FF1DE73901F1.pdf.

¹⁴¹ The type of reported data varies among states.

¹⁴² See e.g., <http://www.lawschool.cornell.edu/Clinical-Programs/international-human-rights/upload/-B9-Sital-Kalantry.pdf>.

¹⁴³ This process is known as commensuration. For a discussion of commensuration, see W. E. Espeland and M.L. Stevens, “Commensuration as a social process”, *Annu. Rev. Sociol.* 1998. 24:313.43; for commensuration and indicators, see W. E. Espeland and M. Sauder, “The Dynamism of Indicators” in *Governance by Indicators: Global Power through Quantification and Rankings* (Kevin E. Davis, Angelina Fisher, Benedict Kingsbury, Sally Engle Merry, eds.), Oxford University Press.

rights regime but rather with what is *measurable* and what data is *available*.

It is possible, of course, for the Committee to develop a list of indicators with the overt purpose of giving clarity to the content of the rights. However, this process will likely prove to be highly contentious¹⁴⁴ and may not enjoy legitimacy without the states’ buy-in. Moreover, while the content of rights, including the “minimum core” is dynamic, shaped by state practices, jurisprudence, and economic and social improvements, the indicators tend to crystalize standards, granting them saliency rather than flexibility. Rosga and Satterthwaite eloquently demonstrate that, as fixed features, indicators can flout rather than enhance the substantive promise of human rights.¹⁴⁵ This problem is compounded by the fact that as indicators circulate, they acquire “taken for grantedness” status, often becoming impervious to change. Consider for example the *quality* aspect of education. Literacy rates capture but a sliver of quality feature of the right to education, but they become prominent indicator consistently reported to the Committee and used in other contexts.¹⁴⁶ Literacy is the only quality-related indicator among the illustrative indicators for the right to education proposed by the OHCHR.¹⁴⁷ Of course, it is possible to design more indicators, which, when aggregated would more closely represent the quality of education.¹⁴⁸ However, collecting and reporting data is a resource-intensive process. States are already mandated to report a plethora of indicators and data,¹⁴⁹ and given the scarcity of resources and lack of capacity experienced by many countries, it is inevitable that states will prioritize collection of certain data over others.

A recent study by Helena Hede Skagerlind of MDG-3 (gender equality) shows that MDGs were particularly effective in causing states to promulgate national policies when they were tied to financial incentives.¹⁵⁰ This finding is perhaps not surprising, but it reinforces the fact that those indicators that carry with them a financial incentive (or substantial threat of incentive withdrawal) will result in prioritization of data collection for (and performance improvement on!) those aspects that are measured by the indicator. Drawing content from the indicators thus would skew the analysis toward what is measurable, available, and politically and/or economically favorable for the states.

However, even though the use of indicators for purposes of deriving content of human rights may be normatively undesirable, as a practical matter, the prevalence of indicators undoubtedly has influenced both the content of human rights and the national priorities.¹⁵¹ Indeed, there is increasing concern that, if not aligned with human rights standards, development indicators might lead to the dilution of human

rights, especially if states prioritize such indicators due to political or economic incentives.

It is worth noting, however, that indicators—particularly national or sub-national—also have potential to amplify realization of rights. For example, in the United States, students’ performance on standardized tests (a form of indicators) has been used successfully in cases litigating inequitable financing of schools, gave meaning to the content of “basic” or “adequate” education in state constitutions, and has increased the role of the courts in framing and evaluating

¹⁴⁴ Cf. states’ position on whether Human Rights Committee is empowered to determine the appropriateness of treaty reservations. Observations by the Governments of the United States and the United Kingdom on Human Rights Committee General Comment No. 24 (52) relating to reservations, <http://www.iilj.org/courses/documents/USandUKResponses.pdf>.

¹⁴⁵ Rosga and Satterthwaite, *supra*.

¹⁴⁶ The SDG indicator related to quality of education is the percentage of children “at the end of lower secondary achieving at least a minimum proficiency level in (i) reading and (ii) mathematics.” It is unclear how minimum proficiency level will be determined but it will likely include literacy rates.

¹⁴⁷ OHCHR, *Human Rights Indicators: A Guide to Measurement We should never forget that behind every piece of statistical and Implementation*, http://www.ohchr.org/Documents/Publications/Human_rights_indicators_en.pdf.

¹⁴⁸ See, e.g., indicators proposed by the Right-to-Education project, founded by the former Special Rapporteur on the Right to Education, Katarina Tomaševski: http://www.right-to-education.org/monitoring/sites/right-to-education.org/monitoring/files/RTE_Right_to_Education_Indicators_List_2016_En.pdf.

¹⁴⁹ See *Follow-Up and Review of the Sustainable Development Goals Under the High Level Political Forum* (2015), Annex 1, report prepared by the NYU Law International Organizations Clinic and UNDP. In addition to mandated reporting, a list of proposed human rights indicators has been prepared by the Office of High Commissioner for Human Rights; the Right To Education Project provides a public list of 150 indicators for measuring the right to education (the project is in the process of creating a Right to Education Index); SDGs has 11 indicators for Goal 4 (Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all), the World Bank has over 3000 education-related indicators (which includes education-related indicators produced by other organizations, like the OECD), and there is an additional group of indicators that measure learning (e.g., TIMSS, PIRLS, PISA, UWEZO, etc.).

¹⁵⁰ Helena Hede Skagerlind, “Assessment Power in Global Development Policy: The Millennium Development Goals” (2016) (on file with author).

¹⁵¹ Generally on uses and effects of indicators on global governance, see Kevin E. Davis, Benedict Kingsbury, Sally Engle Merry, “Indicators as a Technology of Global Governance”, *Law and Society Review* vol. 46, issue 1 (March 2012); *Governance by Indicators: Global Power through Quantification and Rankings* (Kevin E. Davis, Angelina Fisher, Benedict Kingsbury, Sally Engle Merry, eds.), Oxford University Press; specifically on indicators and human rights, see S. E. Merry, “Human Rights Monitoring and the Question of Indicators” in *Human Rights at the Crossroads* (Mark Goodale, ed.), Oxford University Press, 2013.

compliance with educational standards. Although litigation surrounding inequitable funding in education has a long history in the United States, it was not until the introduction of standards-based reforms and corresponding assessments that plaintiffs began to enjoy substantial victories.

Availability of metrics of students' performance provided challengers with evidence on the basis of which they could claim that states had failed to comply with their constitutional obligations to provide "adequate"¹⁵² education under the states' constitutions ("adequacy litigation"). The availability of state standards and corresponding learning outcome indicators facilitated not only judicial finding of states' legal duties but also judicial determination of the content of that duty (i.e., what was the state obligated to provide to its children). Learning outcome indicators became the missing objective "scientific evidence" in decision-making process on education,¹⁵³ enabling courts to examine standard-based accountability schemes through constitutional lens. Indeed, the court in *Idaho Sch. For Equal Educ. Opportunity v. State* noted that "balancing our constitutional duty to define the meaning of the thoroughness requirement of art. 9 para. 1 [state constitution's provision regarding education] with the political difficulties of that task has been made simpler for this Court because the executive branch of the government has already promulgated educational standards pursuant to the legislature's directive..."¹⁵⁴

Use of learning outcome measures by courts to define ambiguous standards, however, is not without peril and some of the concerns raised in the domestic context echo those already mentioned above with respect to global indicators.¹⁵⁵ James Ryan notes, for example, that when "tests are used to assess whether [adequate] education is being provided, the scope of a student's right to an "adequate" educational opportunity will likely contract."¹⁵⁶ Indeed, many states have "temporized, delayed and manipulated standards and assessments to avoid sanctions ..., rather than ensuring that the resources and other inputs necessary to allow all students to succeed."¹⁵⁷ States have also successfully used the test scores to show that they satisfy their constitutional duties, often leading to the "race to the bottom". Ryan notes that in *Neeley*

[t]he court recognized that there were still funding disparities and that funding might not be sufficient to meet all curricular demands. It recognized that there were still wide gaps in performance; that dropout rates were high; that relatively few students were prepared to enter college and that there was a shortage of highly qualified teachers. But none of this ultimately mattered because "the undisputed evidence is that standardized test scores

have steadily improved over time, even while tests and curriculum have been made more difficult."¹⁵⁸

Similarly, in *Connecticut Coalition for Justice in Education Financing, Inc., et al v. Rell*,¹⁵⁹ the state actually cited standardized testing statistics indicating the Connecticut's students already have a "better-than-average change for success at every stage" and emphasized that students are already performing above national average. The Court noted that these statistics "will have their place in determining at trial whether a constitutional violation requiring remedial action actually exists as a question of fact."

Another reason that over-reliance by courts on outcome metrics may be misplaced is that it doesn't capture the sustainability of measures designed to provide "adequate" education. Michael Rebell, a prominent litigator in the field of education rights in the United States, notes that

for the constitutional right to a sound basic education to be satisfied, outcome measures that are

¹⁵² The precise language in state constitutions varies slightly.

¹⁵³ K. Welner, "Education Rights and Classroom-Based Litigation: Shifting the Boundaries of Evidence", *Review of Research in Education*, March 2010, Vol 34, pp. 85-112, p. 104).

¹⁵⁴ *Idaho Sch. for Equal Educ. Opportunity v. State*, 976 P2d 913, 919 (Idaho 1998) However, in *Haridopolos v. Citizens for Strong Schools, Inc.* 81 So.3d 465 (2011), rehearing denied (2012) (quoting *Bush v. Holmes* 919 So.2d 392, Fla., 2006, noted that amendment to Florida Constitution in 1998 provided as "standards by which to measure the adequacy of the public school education provided by the state"... revised constitutional provision "sets forth how the state is to carry out [the] education mandate, specifically, that '[a]dequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools.' ") See also *Hancock v. Driscoll* ("data from standards-based assessments have been used by courts as a yardstick to measure whether states are meeting their constitutional burden of providing students with an adequate education"). see Superfine, "School Finance Reform Litigation", p. 495

¹⁵⁵ See also H. Hershkoff, "Positive Rights and State Constitutions: The Limits of Federal Rationality Review, 112 *Harv. L. Rev.* 1131, 1176 (1999); K. W. Welner & H. Kupermintz, "Rethinking Expert Testimony in Education Rights Litigation", 26 *Ed. Evaluation and Pol'y Analysis*, 127, 127, 132-140 (2004); see also Superfine, "Using the Courts to Influence the Implementation of No Child Left Behind", 28 *Cardozo L. Rev.* 779, 830 (2006); BUT see M. Heise, "The Courts, Educational Policy, and Unintended Consequences", 11 *Cornell J.L. & Pub. Pol'y* 633, 634 (2002).

¹⁵⁶ James E. Ryan, *Standards, Testing and School Finance Litigation*, 86 *TEX. L. REV.* 1223, 1244-45 (2008) (p. 1240)

¹⁵⁷ Michael A. Rebell, Jessica R. Wilff, *Moving Every Child Ahead: From NCLB Hype to Meaningful Educational Opportunity* (2007)

¹⁵⁸ James E. Ryan, *Standards, Testing and School Finance Litigation*, 86 *TEX. L. REV.* 1223, 1244-45 (2008), 1244.

¹⁵⁹ 295 Conn. 240, 990 A.2d, 206 (S.C. Ct, 2010) (at 311-312)

indicative of success must be maintained over time. A constitutional guarantee is a permanent right: students must be provided with appropriate educational opportunities not just for a particular point in time but throughout their educational experience. Examples abound of schools achieving large but short-term test score gains that can be attributed to teaching to the test, changes in school population, or outright cheating. For example, on New York City’s fourth grade reading exams in 2005, 83 percent of the fourth graders at P.S. 33 in the Bronx scored at or above proficiency, although only 35.8 percent of the fourth graders the year before had reached this

level. The next year, the fourth graders’ pass rate was 47.5 percent, and the previous year’s fourth graders who were now in fifth grade had a pass rate of only 41.1 percent. A key issue in assessing success in sound basic education cases, then, is whether reforms, even if they lead to increased funding for underperforming schools and higher test scores and other outcome indicators, remain in place over a long period of time.¹⁶⁰ [internal citations omitted]

¹⁶⁰ Michael A. Rebell, Michael A. Rebell, *Courts and Kids: Pursuing Educational Equity Through the State Courts*, (2009), Ch. 3

Conclusion: “Minimum Core” and its Relevance to the Development Works

Before analyzing what the “minimum core” concept *ought* to mean for the development community, this section very briefly considers why the development community should engage with human rights (particularly with the right to education) at all.

Value-Added of Human Rights

Apart from the obvious fact that human rights obligations, particularly those codified in international agreements, are legal commitments voluntarily undertaken by states, there are practical advantages to recognizing and considering human rights in development work. Indeed, there is growing recognition of the benefits of human rights approach to development.¹⁶¹ Without reproducing the extensive literature on the benefits of the rights-based approach to development,¹⁶² two things are worth highlighting here. First, if the development community is truly interested in enhancing global development and economic growth and, as a necessary precondition, ensuring that all citizens obtain meaningful and relevant education, it must realize and acknowledge that *citizen demand* is critical to the successful the outcome. Even where a human right is unequivocally recognized and implemented at a national level, the downward implementation of such policies often fails where citizens are not aware of and are not empowered to demand what is due to them.¹⁶³ However, where a service provided by a state is not framed in terms of *individual right* to it, the building blocks for empowering individuals and communities to demand the service are not even available, particularly in states where citizen participation in governance is generally limited.¹⁶⁴ The existence of a right, even if not justiciable, both empowers and provides a basis on which citizens can hold the state accountable for provision of services.¹⁶⁵ It has been documented that even

where people do not speak the language of human rights in local communities, the international human rights ideas permeate the local discourse with positive outcomes.¹⁶⁶ Based on extensive empirical research, Levitt and Merry observe:

¹⁶¹ See, e.g., *Common Understanding on the Human Rights Based Approach to Development Cooperation* undertaken by a number of UN and development agencies, available at <http://hrbaportal.org/the-human-rights-based-approach-to-development-cooperation-towards-a-common-understanding-among-un-agencies>

¹⁶² See, e.g., Urban Jonsson, *Human Rights Approach to Development Programming* 38 (UNICEF, 2003).

¹⁶³ See *The Right to Education in Uganda: Saving the Future Generation*, Report of the fact finding mission to Katanga, Kikoni, Kikumikikumi and Wandegeya assessing the enjoyment of the right to education of children living in these communities, available at <https://dbazekuketta.wordpress.com/2015/12/28/the-right-to-education-in-uganda-saving-the-future-generation/>

¹⁶⁴ Even where governments have made international commitments, it is difficult for individuals to hold the governments accountable for those commitments (or even to know about those commitments)

¹⁶⁵ See, e.g., Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 *Am. Pol. Sci. Rev.* 29, 29–30 (2005).

¹⁶⁶ Sally Engle Merry, Peggy Levitt, Mihaela Rosen and Diana Yoon “Law from Below: Women’s Human Rights and Social Networks in New York City” (2010) 44 *Law & Society Review* 101, Sally Engle Merry and Peggy Levitt “Vernacularization on the Ground: Local Uses of Global Women’s Rights in Peru, China, India and the United States” (2009) 9 *Global Networks* 441 and Sally Engle Merry and Rachel Stern “The Female Inheritance Movement in Hong Kong: Theorising the Local/Global Interface” (2005) 46 *Current Anthropology* 387

That a global women’s rights package exists, that it is formally articulated and institutionalized in various UN conventions and documents that in some cases ‘have teeth’, is important. We found, however, that perhaps even more important were the opportunities this package created, the possibilities it opened up, the slight shift in basic assumptions it brought about, and the new tools it added to local women’s cultural repertoires. Because these ideas and practices were out there, sanctioned and promoted by the magic and financial influence of the West, the range of the acceptable and the good expanded.¹⁶⁷

Second, human rights approach to development mitigates risks of development policies.¹⁶⁸ Globalization is not value-neutral. There is extensive literature now documenting the links between globalization and market liberalization, deregulation and decentralization, including in the areas like provision of education services. These trends, which have themselves been arguably transformed into values,¹⁶⁹ are touted as necessary to alleviating global poverty. It is worth remembering that similar claims had been made in the past about structural adjustment programs;¹⁷⁰ yet not only has the assertion that these programs benefit the developing countries been shown to be dubious at best, but in a number of cases, the programs actually led to reversals in school enrollments and literacy rates.¹⁷¹ Thus for example, in its report to the CRC, Zimbabwe government noted that “Government’s objective to make primary education free was carried through for a period of approximately ten (10) years after independence. This could not be sustained due to inadequate resources, as well as compliance with the Economic Structural Adjustment Programme undertaken in 1992.”¹⁷²

Similar concerns are being raised presently, for example, with respect to increasing role of private actors in provision of education the impact of this trend on the right to education.¹⁷³ An alternative report submitted in connection with the CESCR’s review of Uganda’s compliance with and implementation of the ICESCR, illustrates vividly how unregulated and unmonitored privatization of schools leads to discrimination and growing inequality.¹⁷⁴ Even in wealthy countries, evidence is mounting that movement to privatize education, including by introducing charter schools (privately funded public schools) jeopardize inclusiveness of education, undermine the rights of students, teachers and parents, and do not improve learning outcomes.¹⁷⁵

Nearly twenty years go, the World Bank report on the Development and Human Rights: The Role of the World

Bank¹⁷⁶ had already acknowledged that human rights and development is a two-way relationship:

The world now accepts that sustainable development is impossible without human rights. What has been

¹⁶⁷ Sally Engle Merry and Peggy Levitt “Vernacularization on the Ground: Local Uses of Global Women’s Rights in Peru, China, India and the United States” (2009) 9 *Global Networks* 441, p. 447.

¹⁶⁸ Development policies and aid programs on education require a particularly careful consideration. This is because the theory of education that tends to dominate in the area of development - the human capital theory - is not necessarily or always compatible with the aims and objectives of education envisioned in the human rights documents, which value personal development and have the best interests of the child as the guiding principle. For an overview, see Theodora Lightfoot-Rueda, Ruth Lynn Peach (eds.), *Global Perspectives on Human Capital in Early Childhood Education: Reconceptualizing Theories, Policies and Practice* (Palgrave MacMillan, 2015)

¹⁶⁹ Philip Alston, “The Myopia of the Handmaidens: International Lawyers and Globalization”, 3 *EJIL* (1997) 435-48.

¹⁷⁰ Zulfiqar Ahmed Bhutta, “Structural adjustments and their impact on health and society: a perspective from Pakistan”, *Int. J. Epidemiol.* (2001) 30 (4):712-716. (“The ostensible purpose of these economic measures is to improve debt repayments, reduce fiscal deficits, encourage private sector investment and move towards an export-oriented economy. The measures are targeted to allow the governments to undertake better long-term planning. It is thus anticipated that the consequent improvement in national economic efficiency will lead to stimulation of growth with subsequent ‘trickle-down’ benefits to the poor and vulnerable groups of the population.”)

¹⁷¹ See also, Doris A. Oberdabernig, “The Effects of Structural Adjustment Programs on Poverty and Income Distribution”, at <http://www.wiwi.ac.at/the-effects-of-structural-adjustment-programs-on-poverty-and-income-distribution-paper-dlp-2017.html>.

¹⁷² Consideration of reports submitted by States parties under article 44 of the Convention Second periodic reports of States parties—Zimbabwe, CRC/C/ZWE/2, available at <http://daccess-dds-ny.un.org/doc/JUNDOC/GEN/G15/076/22/PDF/G1507622.pdf?OpenElement>

¹⁷³ E.g., F. Coomans & Hallo de Wolf, “Privatisation of Education and the Right to Education” in *Privatisation and Human Rights in the Age of Globalisation* (de Feyter & Gomez (eds.), 2005; *The UK’s support of the growth of private education through its development aid: Questioning its responsibilities as regards its human rights extra-territorial obligations*, Alternative report presented to the Committee on the Right of the Child (CRC) on the occasion of the consideration of the list of issues related to the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland (UK) during the 72nd session of the Committee, available at http://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/RTE_Alternative_Report_CRC_ETO_UK_FINAL_October_2015.pdf

¹⁷⁴ *Privatisation, Discrimination and the Right to Education in Uganda*, Alternative Report Submitted by the Initiative for Social and Economic Rights and the Global Initiative for Social and Economic Rights (submitted June 2015), available at http://www.iser-uganda.org/images/downloads/privatisation_discrimination_and_right_to_education.pdf

¹⁷⁵ See e.g., Diane Ravitch, *Reign of Error: The Hoax of the Privatization Movement and the Danger to America’s Public Schools* (Vintage, 2014)

¹⁷⁶ Available here <http://siteresources.worldbank.org/BRAZILINPOREXTN/Resources/3817166-1185895645304/4044168-1186409169154/08DHR.pdf>

missing is the recognition that the advancement of an interconnected set of human rights is impossible without development. Enlightened legislation and vigorous civil society are essential. But they are not enough. Human rights are in a sense both the design and the product of people organized through government. They don't just happen. Many public services will only reach the poor if governments are both capable of delivering them, and do so without the obstacles of corruption; laws created to end child labor will be more effective in economic conditions that allow families to live off of the incomes of parents; and legal rights are better pursued in effective court systems.

The link between human rights and economic outcomes is particularly apparent in the area of education. Education is consistently being proclaimed as a necessary precondition to positive sustainable development outcomes, economic growth, and alleviation of poverty. Yet, as some examples demonstrate, even the best-intentioned initiatives can produce deleterious effects on education. At the same time, as cases in the African region illustrate, lack of resources prevents effective realization of the right to education, even where there is recognition that states have an obligation to realize it immediately. Thus, the need to incorporate consideration of the right to education into development projects is particularly acute.

To be clear, understanding and engaging with the “minimum core” concept will not, in and of itself, build the bridge for linking development and human rights. At best it will be a small building block that must form part of a principled approach to human rights developed by the development community.¹⁷⁷ With that preface, the next section considers how the development community *ought* to engage with the “minimum core” concept.

“Minimum Core” for Development

Recognizing that all states must immediately satisfy the “minimum core” of the right to education necessarily entails ensuring that development financing does not interfere with that obligation. This includes ensuring that the development projects do not result in (re)prioritization of national resources so as to make effective immediate implementation of the “minimum core” right impossible or difficult. In doing so, the development agencies should take account not only the international minimum standard, but should also request that the client state define and specify its own minimum

core obligations on the right to education, for example, by outlining priorities, targets and specific benchmarks. Where such state-specific standard falls below the international minimum (e.g., inability to fund building of schools for all), the development agencies should ensure that its resources (loans, grants, technical assistance) are directed as a matter of priority to assisting the state meet the international minimum standard. However, where the state-specific “minimum core” is above the international core, the development community should, at a minimum, ensure that its projects neither violate the state-specific core nor cause the state to regress beyond that core. This approach is consistent with how states themselves appear to interpret “minimum core” or the obligations subject to immediate realization. It also takes into account the importance of context to the meaningful realization of the right to education - what is required in order to “enable all persons to participate effectively in a free society” (core content of the right to education) is different in Zimbabwe and Colombia. Additionally, encouraging states to set their own state-specific “minimum core” through a political process will render the resulting standard more legitimate in the eyes of the state and its citizens, will reduce the likelihood of a gap between the existing obligation and the ability of the state to effectively and immediately implement it, and will provide a standard to which both citizens and the development community could hold the state accountable.

Development agencies could also incorporate the “minimum core” (whether the international minimum or state-specific) into an impact assessment in the same fashion as development banks incorporate various environmental and social standards into environmental and social impact assessments of their projects. This would allow for the evaluation *a priori* of the impacts of the all development projects (even if not education-focused) on the core education rights. The claim that human rights cannot be incorporated into impact assessments due to their indeterminacy would certainly not be applicable in the case of a state-defined minimum core standard.

¹⁷⁷ For a suggestion on how the World Bank might integrate human rights effectively see, for example, World Resource Institute, *A Roadmap for Integrating Human Rights into the World Bank Group* (2010), available at http://www.wri.org/sites/default/files/pdf/roadmap_for_integrating_human_rights.pdf



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