Conceptualising Minimum Core Obligations under the Right to Health. How Should We Define and Implement the ›Morality of the Depths‹?[1]

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1. INTRODUCTION

In his seminal book on basic rights, subsistence and affluence, Henry Shue characterized basic rights as »the morality of the depths […] [in that they] specify the line beneath which no one is to be allowed to sink«.[3] In the last two decades, the notion that economic, social and cultural rights offer similar minimum substantive guarantees has entered international human rights law in the form of minimum core obligations that delimit permissible restrictions of economic, social and cultural rights. The imperative for such demarcations is stark given that the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) formulation of economic, social and cultural rights like the right to the highest attainable standard of physical

1 Henry Shue uses this phrase in Shue (1996), 18: »Basic rights are the morality of the depths. They specify the line beneath which no one is to be allowed to sink«.

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3 Shue (1996), 18.

and mental health (›the right to health‹) limits state duties to progressive realization within maximum available resources. To prevent progressive realization within resources from undermining both domestic and international responsibilities towards health, international human rights law institutions developed the idea that these rights hold an inviolable »core« equivalent to essential health needs. Yet few aspects of this right and indeed of economic social and cultural rights more generally have generated greater debate and unresolved questions than the core concept: Is the core fixed or moveable, non-derogable or restrictable, universal or country-specific? Is its function to guarantee specified bundles of the most essential health facilities, goods and services, or is it to require governments to act reasonably to progressively realize these minimal health entitlements? Is the concept a legitimate interpretation in terms of international law rules of treaty interpretation? And what are acceptable methods to further develop the content of these entitlements and duties? Indeed the relatively open nature of many of these questions suggests that the core concept as defined does not resolve incommensurable conflicts between fixity and movement, actions and outcomes, and needs and resources.

This paper seeks to examine several of these questions in light of the evolution of this concept in international law and human rights scholarship, focusing in particular on the development of core obligations in relation to the right to health. In this paper, and for reasons of scope alone, we restrict our attention to relevant international human rights law interpretations and to relevant global scholarship in this domain, leaving aside deep analysis of crucial cognate areas such as global economic, social and cultural rights jurisprudence and philosophical justifications of core obligations.[4] Accordingly, our paper focuses first on the evolution of this concept in international human rights law. We then analyse key questions about the intended purpose, function, legitimacy and development of the core concept. We argue that greater conceptual clarity on the core concept is an essential precondition to constructing a feasible, principled and grounded conceptualiza-

4 We are co-investigators on a larger project on minimum core obligations funded through the Canadian Institutes for Health Research and the European Commission, which will devote significant attention to the jurisprudential development of this concept.

tion of the minimum core of the right to health more likely to meet its conceptual and material ambitions.

2. THE EMERGENCE OF THE CORE CONCEPT IN INTERNATIONAL HUMAN RIGHTS LAW

A significant motivator for the genesis of the core is the dilemma created by article 2.1 of the ICESCR, which limits state duties to

»taking steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.«

The duty to progressively realize ICESCR rights within financial resources was introduced into the Covenant to acknowledge that the enjoyment of economic, social and cultural rights depends upon the availability of resources. Yet even at drafting, this article was critiqued for providing a weak guarantee of Covenant rights that provided »too many loop-holes for States Parties wishing to evade their obligations« by pleading a lack of resources and permitting indefinite delays.[5] The risk of evasive state action under article 2.1 is exacerbated by the vagueness of Covenant rights: For example, the generality of article 12.1's entitlement to the highest attainable standard of physical and mental health is only partially offset by the specification in article 12.2 of steps states must take to fully realize this right.[6] Anticipating unjustifiably stagnant or retrogressive action, other parts of the Covenant specify that its rights can only be limited insofar as is compatible with their nature (article 4), and that acts aimed at destroying or limiting rights to a

5 A/2929, 1 July 1955, para. 23; See also Alston/Quinn (1987), analysing the drafting history of articles 2.1, 4 and 5.

6 Article 12.2 requires states to take steps to reduce stillbirth rate and infant mortality, improve environmental and industrial hygiene, prevent, treat, and control epidemic, endemic, occupational diseases, and create conditions that assure medical services to all.

greater extent than provided for in the Covenant are not permitted (article 5.1). Indeed the drafting history of the Covenant indicates explicit acknowledgement that article 4 in particular was deemed necessary to mediate the risk posed by article 2 since it »did not indicate when limitations could be legitimate and it was necessary to state clearly that limitations would be permissible only in certain circumstances and under certain conditions.«[7]

In an effort to address the challenges posed by progressive realization within resources and delimited restrictions of rights, the idea that economic, social and cultural rights have core components not subject to such limitations was introduced into human rights debates by the 1980's.[8] While articles 4 and 5 of ICESCR provided some textual justification for introducing the core concept, its origins are commonly ascribed to the convergence between scholarship on philosophy, development and human rights, and domestic constitutional laws in Germany and Turkey.[9]

Henry Shue's concept of basic rights to subsistence that imposed correlative duties on multiple actors played a significant generative role in the emergence of the core concept.[10] Shue conceived of basic rights as »everyone's minimum reasonable demands upon the rest of humanity«,[11] which would include »unpolluted air, unpolluted water, adequate food, adequate clothing, adequate shelter, and minimal preventive public health care.«[12] A second key influence came in a 1987 article by Bård-Anders Andreassen et al., who argued for a »practicable (ultimately even an area-specific) minimal floor of well-being as a standard for distributive analyses of each of the key economic, social and cultural rights.«[13] Andreassen et al. saw a minimalist approach as a necessary counterpoint to demands for unrealistic levels of redistribution via economic, social and cultural rights, and a necessary stage in the progressive realization of Covenant rights.[14] A third major

7 A/2929, 1 July 1955, para. 50, quoted in Alston/Quinn (1987), 205.

8 Toebes (1999), 277.

9 See for example, Toebes (1999), 277–278; Young, 121; Bilchitz (2007), 186.

10 While the first edition was printed in 1980, this article references the second edition printed in 1996, identical but for its preface and afterword.

11 Shue (1996), 19.

12 Ibid., 23.

13 Andreassen et al. (1987/1988), 334, emphasis in the original removed.

14 Ibid., 342.

influence came from scholarship explicitly promoting the idea that all human rights hold a ›core‹,[15] with its most influential exploration by Esin Örücü in a 1986 chapter on human rights.[16] Örücü drew from German and Turkish law which entrenched ›core‹ and ›essential‹ rights,[17] to suggest that rights should be understood to encompass a »normative scope with three distinct parts: a core, a circumjacence, and an outer edge, the core being that part of a right which is essential to its definition.«[18] Örücü asked whether in a world of qualified rights, the concept of the core could indicate the one area within a right's normative scope which should be protected absolutely.[19]

By the late 1980's, ideas similar to those proposed by Shue, Andreassen and Örücü began to enter international discourse around economic, social and cultural rights. The 1986 *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights* propose that States Parties are »obligated regardless of their level of economic development to ensure respect for minimum subsistence rights for all«, and that available resources should be »mindful of the need to assure to everyone the satisfaction of subsistence requirements as well as the provision of essential services.«[20] A State Party would be in violation of the Covenant if »it wilfully fails to meet a generally accepted international minimum standard of achievement, which is within its powers to meet.«[21] In 1987, in an article in Human Rights Quarterly, Phillip Alston, the rapporteur of the newly created Committee on Economic, Social and Cultural Rights

15 The idea of a core of rights corresponding to its essential content had been proposed in earlier scholarship: see for example, Wellman (1978), 53: »What unified any right is its core. At the centre of any legal right stand one or more legal advantages that define the essential content of the right. Change the core and any remaining right would no longer be the same right.«

16 Örücü (1986), 47.

17 Ibid.

18 Ibid., 38.

19 Ibid.

20 Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, Maastricht, 2–6 June 1986, paras. 25 and 28.

21 Ibid., para. 72.

(CESCR or ›the Committee‹), signalled the Committee's intention to adopt and develop the concept of the minimum core in its clarification of Covenant norms. Alston argued that each right must »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.«[22]

In the following years, the concept and related terms began to appear in international human rights reports and resolutions,[23] with a definitive entry into the Committee's jurisprudence in its 1990 General Comment No. 3 which interprets the nature of State Party obligations under article 2.1.[24] Here the Committee suggests that every State Party holds »a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each right.«[25] In one of the most quoted provisions of this Comment, the Committee suggests that

> »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.«[26]

A state could rebut this presumption of failure due to a lack of available resources by demonstrating »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.«[27]

Over the next seven years, the Committee investigated the suggestion in General Comment No. 3 that a state's core obligations under the right to health extend to essential primary healthcare, particularly at a day of general discussion on the right to health in 1993 which was intended to serve as the basis for a general comment on health. Speakers were urged to pay special attention to core content, with proposals for conceptualizing the core of

22 Alston (1987), 352–353.

23 See for example E/CN.4/Sub.2/1992/16, 3 July 1992; E/CN.4/RES/1994/20, 1 March 1994, para. 11.

24 E/1991/23, 14 December 1990.

25 Ibid., paras. 1 and 10.

26 Ibid., para. 10.

27 Ibid.

the right to health including identification of its key principles, specification of its content (and equivalence with primary healthcare), and specification in some detail of minimum core obligations.[28] The latter proposal by Audrey Chapman, then Director of the Science and Human Rights Programme of the American Association for the Advancement of Science and a co-author of the current paper, provided a detailed account of minimum core obligations utilizing the then novel notion of first defining violations of economic, social and cultural rights. Indeed, Chapman's ›violations approach‹ explicated at the day of discussion and in subsequent scholarship[29] provided foundational incentives for the development of the 1997 *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, and for subsequent interpretations of the right to health by the CESCR.[30] The Maastricht Guidelines suggest that despite the margin of discretion states enjoyed in choosing the means of implementing Covenant rights, »universal minimum standards« for economic, social and cultural rights had been developed through state practice and »the application of legal norms to concrete cases and situations by international treaty monitoring bodies as well as by domestic courts.«[31] In contrast to General Comment No. 3 which made minimum core obligations generally limitable by resource constraints, Maastricht suggests that »[s]uch minimum core obligations apply irrespective of the national availability of resources or other factors or difficulties.«[32]

These developments laid the foundation for the authoritative interpretation of core obligations under the right to health in the seminal General Comment No. 14 on the right to health issued by the Committee in 2000, which advances several novel components of core obligations. In defining core obligations, the Committee restates General Comment No. 3's confirmation that states have core obligations to ensure minimum essential levels of rights including essential primary healthcare. It suggests that it had found compelling guidance on core obligations under article 12 by reading the

28 E/C.12/1993/SR.42, 6 December 1993, paras. 62 and 63.

29 For example, Chapman (1996) and (1998).

30 Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, 22–26 January 1997, para. 8.

31 Ibid.

32 Ibid., para. 9.

1978 Alma Ata Declaration together with contemporary instruments like the 1994 Programme of Action of the International Conference on Population and Development (ICPD).[33] Accordingly the Committee proposes that a state's core obligations under the right to health would include at least: (1) ensuring non-discriminatory access to health facilities, goods and services, especially for vulnerable or marginalized people, (2) ensuring access to food, basic shelter, housing, sanitation and water, (3) providing essential drugs as defined by WHO, (4) ensuring equitable distribution of all health facilities, goods and services and (5) adopting a national public health strategy and plan of action addressing the concerns of all.[34] While this list provided very little indication of the nature of health goods and services to be provided beyond essential medicines, the Committee proceeded to identify what it called »obligations of comparable priority« to ensure reproductive, maternal and child healthcare, provide immunization against major infectious diseases, take measures to prevent, treat and control epidemic and endemic diseases, provide education and access to information on the main health problems in the community, and provide appropriate training for health personnel.[35] It is presumably these obligations that are drawn from the Declaration of Alma-Ata and the ICPD Programme of Action.

The Committee's approach to the limitability of core obligations is markedly different from General Comment No. 3. In General Comment No. 14, the Committee holds that »a State party cannot, under any circumstances whatsoever, justify its non-compliance with the core obligations […] which are non-derogable.«[36] Despite positing core obligations as non-derogable, the Committee only identifies one explicit violation of a core obligation: »The adoption of any retrogressive measures incompatible with the core obligations under the right to health.«[37] This terseness may be explained by the fact that several of the violations identified under a state's positive obligation to fulfil relate to core and comparable priority obliga-

33 E/C.12/2000/4, 11 August 2000, para. 43.

34 Ibid.

35 Ibid., para. 44.

36 Ibid., para. 47.

37 Ibid., para. 48.

tions.[38] The implication is that a state's primary positive obligations to fulfil the right to health are equivalent for the most part to its core and comparable obligations.

3. DEBATES OVER THE CORE

The evolution of the core concept in international human rights law reflects changing ideas about its intended purpose, function, legitimacy and development. The remainder of this paper focuses on an expanded analysis of key conceptual questions in this regard. We believe that these definitions of the core and consequent scholarly analyses provide important guidance for advancing towards a more conceptually sound approach to core obligations in relation to the right to health.

3.1 The Purpose of the Core

As indicated above, the primary impetus for the development of the core concept was to respond to the problem created by progressive realization within resources. The need to protect against the corrosive properties of progressive realization within resources is exacerbated by the historically limited jurisprudential development of economic, social and cultural rights given ideological opposition and their categorization as second generation/positive rights less conducive to legal and judicial enforcement than the ostensibly first generation/negative rights categorization of civil and political rights. Indeed the introduction of the core concept forms part of a larger effort to advance the jurisprudential interpretation and enforcement of economic, social and cultural rights more generally.

38 Thus, primary violations of the obligation to fulfill would occur through state failures to take all necessary steps to realize the right to health, including failures to adopt or implement a national health policy designed to ensure the right to health for everyone; failure to monitor the realization of the right to health at the national level, for example by identifying right to health indicators and benchmarks; and failure to take measures to reduce the inequitable distribution of health facilities, goods and services. Ibid., para. 42.

The metaphor of the core and its usage are instructive in illustrating its intended purpose. The plain language meaning of ›core‹ denotes on the one hand a central location (as in the core of an apple or the earth), which may have different properties to the periphery (as do the fibrous parts of fruit and the molten center of the earth).[39] These different properties might see the core playing vital functional roles in the broader structure (as do core reactors of a nuclear plant or core computer memory). This foundational role is reflected in the secondary meaning of the core as a ›basic, essential or enduring part‹ of something larger.[40] These meanings of the core as both location and function within economic, social and cultural rights are evident in the core's dual role in ›structuring‹ economic, social and cultural rights by defining essential components with different properties from the periphery. This structuring function is evident in scholarship which sees the core assisting in delineating the scope of economic, social and cultural rights, as indicated above when Örücü defines rights as comprising »a core, a circumjacence, and an outer edge.«[41] A similar conception is apparent in Brigit Toebes' suggestion that the scope of the right to health is comprised by all elements entrenched in international treaties that stipulate rights to health, with core content constituting the inner circle of this scope.[42]

This view of the core as a scoping tool suggests on the other hand, that its desired function is to assist in clarifying the ›range of operation‹ of rights. From this perspective, like Hart's notion that legal rules hold a core of certainty and a penumbra of doubt,[43] the core assists in defining a hierarchical structure within economic, social and cultural rights, with priority radiating outwards in diminishing degrees from essentialia to incidentalia. This hierarchy is apparent in how the core concept is intended to denote those aspects of the right to health so essential that they constitute an »irreducible minimum«[44] without which the right »loses its value«.[45] This view

39 Merriam Webster online, ›core‹.

40 Ibid.

41 Örücü (1986), 38.

42 Toebes (1999), 243–244.

43 Hart (1958), 607: When it comes to legal rules »[t]here must be a core of settled meaning, but there will be, as well, a penumbra of debatable cases in which words are neither obviously applicable nor obviously ruled out.«

44 Örücü (1986), 45.

of diminishing priority suggests that core aspects of rights like health provide a temporal starting point for state action. This view of the core as a foundation of action is evident in its common description as a »floor« – quite literally, the lower limit of the right to health.[46] This is the same language used by the Committee in its first conceptualizations of the concept: for example, its call for input to its 1993 general day of discussion on the right to health was to »the concept that there is a minimum core content of each right which constitutes a »floor« below which the conditions should not be permitted to fall in any State Party.«[47] Metaphors of floors and ceilings are evocative of at least some of the intent behind the core: to on one hand, ›ground‹ and ›concretize‹ economic, social and cultural rights, on the other, to ›house‹ the various entitlements within rights in a feasible structure.[48]

Yet the danger of understanding the core as a ›floor‹ is that those aspects of the right to health falling outside the scope of the core are deprioritized, thereby restricting the scope of the right to health rather than usefully structuring and developing it. As Chapman and Russell suggest, this is »the risk […] that the ›floor‹ will become a ›ceiling‹.«[49] Moreover, that which is most essential and therefore important, seems to conflict with that which is minimum, by definition, the very least a state should do. In this light it is not surprising that the word »minimum« ultimately drops out of the Committee's discourse on the core, as it shifts away from discussions of minimum core content to an exclusive focus on core obligations. Nor is this shift away from content to obligations surprising given the Committee's in-

45 Toebes (1999), 276.

46 Merriam Webster online, ›floor‹.

47 E/C.12/1993/11, 22 November – 10 December 1993, para. 5. See also van Bueren (2002); Coomans (2002).

48 A similar metaphor was influential at the drafting of the UDHR, where Rene Cassin's draft conceived of the UDHR rights as a Greek temple ›portico‹, with various rights serving as foundation, columns and roof. It is significant in this regard, that Cassin considered the Preamble and articles 1 and 2 (equality, dignity, non-discrimination) to constitute this foundation. See Swanson Goldberg/Schultheis Moore (2012), 5.

49 Chapman/Russell (2002a), 9.

sistence that the »raison d'être« of the Covenant is to »establish clear obligations for States Parties« to fully realize Covenant rights.[50]

These terminological shifts are themselves instructive, with the core described over time as »minimum subsistence rights,«[51] »minimum essential levels,«[52] »international minimum threshold,«[53] »core content,«[54] »minimum core obligations«[55] and »core obligations«.[56] These changing terms reflect the shift in the Committee's approach from articulating the core as an entitlement to a level, threshold or content, to describing the core as an obligation with very little explicated content. While these shifts in terminology show the evolution of the concept, they also suggest that at different points there have been efforts to develop constituent and equally important parts of the core. It is arguable that entitlements, content and duties are each essential elements of the right to health, and that without clarity on each component part, there is no meaningful way to construct this right. As Shue suggests, without spelling out the duties, one has not really spelled out the rights, and spelling out the substance of rights is essential to defining its entitlements.[57] Thus, rather than reflecting confusion about the role of the core, the shifting institutional focus from entitlements and content to duties might simply reflect a deeper recognition that each component is necessary to identify the structural conditions, actions and outcomes necessary for their realization. In this light, the debate over whether to approach the core as an entitlement, content or obligation calls to mind the parable of people

50 E/1991/23, 14 December 1990, para. 10: »[i]f 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.«

51 Limburg Principles, paras. 25 and 72; Maastricht Principles, paras. 10, 11 and 15.

52 E/1991/23, 14 December 1990, para. 10.

53 A/Conf.191/BP/7, 13 May 2001, para. 17.

54 E/C.12/1997/8, 12 December 1997, para. 7; E/C.12/1993/SR.41, 9 December 1993, para. 2; E/C.12/1999/5, 12 May 1999, paras. 6 and 8.

55 Maastricht Principles, paras. 10, 11 and 15.

56 E/C.12/2002/11, 20 January 200, para. 37.

57 Shue (1996), ix and 15.

in the dark touching different parts of an elephant and believing that they are describing different animals.[58]

Yet these variations also illustrate some of the challenges in conceptualizing the core, since defining an entitlement is different from defining a level of socioeconomic provision, and in turn different from defining an obligation cognizant of progressive realization within resources. Similarly contrasting views of the core as the essence (importance), the floor (the beginning point or the foundation), and the minimum (the very least) variously posit its operation as a beginning point for action, a fixed barrier to limits, and a realm of priority. These contrasting interpretations may be responsible for some disagreements over how the core is intended to function. Yet if entitlements, content and obligations are equally important constituent parts of economic, social and cultural rights and the right to health, then the Committee's decision to describe core obligations alone cannot be a sufficient way to enable the intended operation of the core. However, if more fully elaborated entitlements and core content are required, who should define these aspects and how?

3.2 The Function of the Core

Scholarly debate over how the core is intended to function has mapped closely onto the shifting function ascribed to the core in international human rights law. These debates coalesce around whether the core refers to absolute or relative content (in relation to resources and national needs), or rather to state obligations in relation to such content? And if it refers to obligations, should these be of result or of conduct?[59] These arguments are prompted by the apparent contradiction created by proposing a fixed set of outcomes within a right defined by progressive realization within resources. Viewed in this light, the core concept appears to set up irresolvable conflicts between entitlements and duties, actions and outcomes, and needs and resources.

58 Again, Shue presciently suggests as much: »the mere core of the right indicates little about the social institutions needed to secure it, and the core of the right does not contain its whole structure.« Shue (1996), 39.

59 The Committee introduced the distinction between obligations of conduct and result in General Comment No. 3, see: E/1991/23, 14 December 1990, para. 1.

The Committee's changing interpretations over time have not resolved these questions. Whereas in General Comment No. 3 the Committee delineated derogable core obligations to provide core content (defined as essential foodstuffs, essential primary healthcare, basic shelter and housing, or the most basic forms of education), in General Comment No. 14 it shifted to non-derogable core obligations to assure the structural aspects of health (non-discrimination, access to food, shelter, water and drugs, equitable distributions of health facilities, goods and services, and a national public health strategy). This shift from weaker to stronger duties may attempt to respond to criticisms of the lack of financial feasibility of the core for low and middle-income countries (critiques that not coincidentally map closely onto long-standing critiques of economic, social and cultural rights). This analysis is implied by Paul Hunt's indication as Rapporteur for the Committee that it took a pragmatic decision to define obligations rather than content in General Comment No. 14.[60] Yet shifting from core entitlements to obligations has not resolved debates over whether core obligations require a fixed set of outcomes or simply action reasonably capable of achieving such outcomes. Instead the debate has shifted to whether core obligations should incorporate both conduct and result-based duties, which to some extent simply relocates (without resolution) earlier discussions about the relationship between core content and obligations.

Yet the Committee has been ambiguous about the relationship between core content and obligations of conduct and result. While General Comment No. 3 introduces the distinction between obligations of conduct and result,[61] the Committee never indicates explicitly where core obligations fall in this framework. For example, while the Committee defines minimum essential levels of economic, social and cultural rights, the correlative duties it outlines suggest obligations of conduct rather than result. This interpretation is implicit in the Committee's suggestion that presumptions of violation (suggested if significant numbers are deprived of essential food,

60 E/C.12/2000/SR.10, 4 May 2000, para 27. (In a previous comment on education the Committee had struggled with how to incorporate core content, eventually taking »the pragmatic approach of defining not the core content but the core obligations incumbent upon States Parties«, an approach it had decided to adopt in the general comment on health).

61 E/1991/23, 14 December 1990, para. 1.

housing, healthcare and education) can be discharged if states can demonstrate every effort to use resources at their disposal to satisfy these obligations as a matter of priority.[62] In contrast, in General Comment No. 14, the Committee appears to have shifted definitively towards non-derogable core obligations of result, which include largely structural outcomes as well as essential medicines, minimum essential food, basic shelter, housing, sanitation, and safe and potable water.[63]

Many scholars view the Committee's shift to non-derogable duties as unfeasible and impractical. Indeed, debates over the relationship between core content and duties of result and conduct have riven scholarship. Some like Young reject the notion of fixed core entitlements or core obligations of result. A strong critic of the minimum core concept in general, Katherine Young argues instead for an approach to economic, social and cultural rights that »establishes processes of value-based, deliberative problem-solving, rather than one which sets out the minimum bundles of commodities or entitlements.«[64] Young argues that the practical constraints of limited judicial and CESCR competence ultimately carry the core concept too far from its normative ambitions, which should be transferred to other areas of rights like benchmarks and indicators and assessments of causality and responsibility.[65] In relation to the right to health, Audrey Chapman is the strongest proponent of a primarily conduct-based interpretation of the core (albeit that she does not reject fixed core entitlements per se). She argues that rather than seeing the core as a ›floor‹ below which health conditions must not in any circumstances fall, the core should rather describe »the minimum duties all States Parties set for themselves regardless of the resources available.«[66] With Russell, Chapman argues that doing so shifts focus to a more temporal consideration of what a state must do immediately on ratifying the Covenant to realize the right,[67] and proposes conduct-oriented core obligations in the respect, protect and fulfil categories.[68]

62 E/1991/23, 14 December 1990, para. 10.

63 E/C.12/2000/4, 11 August 2000, para. 43.

64 Young (2012), 6.

65 Young (2008), 117–118.

66 E/C.12/1993/SR.42, 23 November 1994, para. 62.

67 Chapman/Russell (2002a), 9.

68 Chapman (2002).

Chapman argues against an approach based primarily on obligations of result given the absence of reliable data for most countries, the absence of means to carefully measure progress, and the potential impossibility of incorporating all measures necessary to achieve particular health outcomes into a minimum applicable to all countries.[69]

At the other extreme, Maite San Giorgi eliminates obligations entirely and exclusively defines the core content of a right to healthcare, which encompasses primary healthcare and access to essential medicines.[70] She defines these components by drawing upon treaty text in a range of fora and from the Alma Ata Declaration and ICPD program referenced in General Comment No. 14. Others argue for an approach that combines core content with core obligations of conduct and result. For example, Toebes sees the need to define core content as well as obligations, and defines core obligations to respect, protect and fulfil that are both conduct and result oriented.[71] To define the core content of the right to health, Toebes combines elements of the scope of the right to health constituted by treaty provisions relevant to health with reference to WHO policies like Health for All.[72] Accordingly, Toebes characterizes what she terms ›core elements of the right to health‹ incorporating healthcare and underlying preconditions for health.[73] Toebes defines core obligations under the respect, protect and fulfil paradigm, which include primarily conduct obligations and limited duties in relation to result.[74] She defines a single obligation of result as a fulfil

69 Chapman (2002), 202–203.

70 San Giorgi (2012).

71 Toebes (1999).

72 Which she suggest »identify the core content of the right to health from a policy perspective, cf. Toebes (1999), 283, citing WHO Global Strategy for Health for All by the Year 2000, 1981, chapter 3, 31, para.1.

73 The former include maternal and child healthcare, including family planning; immunization against major infectious diseases; appropriate treatment of common diseases and injuries; and provision of essential drugs. The latter include an adequate supply of safe water and basic sanitation; freedom from serious environmental health freedoms, cf. Toebes (1999), 284.

74 Thus, core obligations of conduct include duties to respect equal access to basic healthcare services, refrain from acts that seriously encroach upon people's health, take legislative and other measures to assure that people have equal ac-

duty to provide basic health services or create conditions under which individuals have adequate and sufficient access to health services.[75]

David Bilchitz also proposes core content and obligations (what he calls a principled minimum core), since content (what he terms ›practical minimum standards‹) would allow for government action to be measured.[76] Bilchitz argues that defining practical minimum standards would require consideration of the minimum core and other theoretical considerations, together with the resources and capacity available in a particular society.[77] In the case of the right to health, these considerations would include treatment costs, resource availability, balancing preventing and curative strategies, ensuring equal opportunity for treatment, and considering the impact of such a pragmatic minimum on meeting other social needs.[78] Bilchitz therefore foresees that the core of the right to healthcare would require government policy goal setting (a task not necessarily done by the courts), specification of a minimum level of services, and detailed government plans and programmes for improving healthcare with measurable indicators, targets, and deadlines.[79]

Bilchitz's conception follows closely from the South African Constitutional Court's rejection of the core concept on the basis that it was »impossible to give everyone access even to a ›core‹ service immediately« and that »[a]ll that is possible, and all that can expected of the state, is that it act reasonably to provide access to the [Constitution's socio-economic rights] on a progressive basis.«[80] Yet the South African Constitutional Court's decisions also suggest that the Court's rejection of the core is rooted in part in a sense of the institutional inadequacy of a judicial definition of core content. For example, in an extra curial statement, Justice Richard J. Goldstone ar-

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cess to basic health services provided by third parties, and adopt a national health policy and devote a sufficient percentage of budget to health, cf. Toebes (1999), 337–338.

75 Ibid., 338.

76 Bilchitz (2007), 223.

77 Ibid., 224.

78 Ibid., 223.

79 Ibid., 225.

80 Minister of Health and another v. Treatment Action Campaign and others (2002) 5 S.Afr.L.R. 721 (S.Afr.Const.Ct) (TAC decision), para. 35.

gues that the South African Constitutional Court decisions should be considered as a challenge to provide more information/data on the concept of the minimum core and not to abandon any future reliance on it.[81] He argues that there is need for adoption of ›Brandeis Briefs‹, which could provide the court with factual data and information in addition to the legal aspect, in order to enable the court to effectively implement the minimum core standard.[82] This judicial approach stands in stark contradiction to that adopted in many Latin American countries, such as in Colombia where the idea of »minimo vital« – a set of minimum conditions for a dignified life – has been the basis for key right to health decisions.[83] These contrasting judicial approaches to core obligations provide important illustrations of the practical implications and outcomes of an applied perspective, and are important for the continued conceptualization of core obligations. As indicated above, for questions of scope alone, in this paper we do not more deeply engage this fundamental area of legal practice.

In contrast to Bilchitz, John Tobin argues for a far narrower set of obligations of conduct and result. Tobin is deeply critical of the Committee's definition of the core, which he views as unjustified and impractical, and argues for a ›modest and practical‹ vision of the core of right to health.[84] Tobin suggests a far more minimal list of minimum core obligations of result than in General Comment No. 14 given resource constraints and the fact that local conditions will determine definitive lists applicable in particular countries.[85] He also argues against importing obligations on shelter and housing into minimum core obligations under the right to health, given the interdependence of human rights and the fact the realization of obligations under the right to health must be accompanied by efforts to secure the minimum core obligations of other relevant rights.[86] Instead Tobin argues for the development of a »presumptive list of result obligations«[87] focused on the provision of selective and integrated primary healthcare and the provi-

81 Gauri/Brinks (2010), xii.

82 Ibid.

83 Arango (2003).

84 Tobin (2012), 243.

85 Ibid., 247.

86 Tobin (2012), 247.

87 Ibid.

sion of food and water necessary to survive.[88] Tobin foresees a core obligation to provide essential elements of primary healthcare developed through participatory processes to produce a widely accepted model that all states should be capable of adopting with appropriate assistance.[89]

A related debate over the fixed or relative nature of the core extends to whether there should be a common universal definition of the core or whether such definitions should be country-specific. Andreassen and his colleagues foresaw country-specific thresholds measured by various indicators as necessary to create a minimum threshold for realization of rights.[90] Similarly, Asbjørn Eide viewed Andreassen's minimum threshold approach as requiring governments to establish national systems to identify local needs and opportunities for economic and social rights, as well as identifying the needs of groups with the greatest difficulties in enjoying such rights.[91] Eide did not foresee that this approach would generate universal models: »different governments may find different approaches most suitable to deal with the vulnerability thus identified. No blueprint, no general model will be applicable in all settings.«[92] Indeed, Eide saw such variability as an intrinsic implication of ›progressive realization‹ and ›immediate obligations‹, which meant that states with higher resources have a higher level of core content or immediate duties than those with limited resources.[93]

In contrast, Toebes saw Andreassen's idea of formulating country based minimum thresholds as »almost an impossible task« given the resources needed to establish such benchmarks and the unlikelihood of states setting their own benchmarks and thereby voluntarily hold themselves accountable.[94] Instead Toebes saw value in an approach which defined general universal core contents, distinguishing thresholds for countries at different levels of development.[95] Similarly, Danie Brand argues that understanding the minimum core as a general standard is suitable for the international en-

88 Tobin (2012), 247.

89 Ibid., 251.

90 Bård-Anders (1987/1988), 341, emphasis in the original removed.

91 Eide (1989), 46.

92 Ibid.

93 Eide (1995).

94 Toebes (1999), 279.

95 Ibid., 279–280.

forcement of economic, social and cultural rights, but it is not that useful for the domestic context where we must be »far more specific, particular, concrete, context-sensitive and flexible in our thinking about basic standards, core entitlements and minimum obligations.«[96] Others saw the possibility of both international and domestic cores: for example, Craven argued that while the universal nature of Covenant rights suggests that a common core should be developed to apply internationally, given the Committee's practice of requiring states to establish benchmarks of poverty, »in the short term at least, state-specific minima are the only viable options.«[97] Craven believed however that there was evidence that the Committee planned to establish international standards.[98]

As the foregoing indicates, neither international interpretation nor scholarly debate has resolved key questions about the function of the core, the relationship (if any) between core content and obligations, and the relationship between the core and progressive realization and resources. If content is an important component of the core, what methods should be used to define it, and by whom? And to what extent can obligations of conduct and/or result guide appropriate action in the absence of defined content?

3.3 Methods of Developing the Core of the Right to Health

The final area of contention we will explore concerns the legitimacy of the concept from an international law perspective, and by implication, what might constitute appropriate methods for its further development. Efforts to forestall critiques on the grounds of legitimacy appear in every international interpretation, which suggests that the concept is justified for a range of reasons, all of which are implicitly grounded within accepted sources of international law and methods of treaty interpretation. Thus, when scholars suggest that the core is justified by treaty text, jurisprudence and scholarship, they are implicitly referencing the accepted sources of international law defined in the *Statute of the International Court of Justice* to include

96 Brand (2002).

97 Craven (1995), 142.

98 He cites Sparsis, E/C.12/1990/SR.146, at para. 43, as providing this evidence, cf. ibid., 142.

treaties, custom and judicial decisions and teachings as subsidiary means of determining legal rules.[99] When scholars cite drafter's intention, treaty purpose and state practice, they are relying on the *Vienna Convention on the Law of Treaties* (VCLT) which requires interpreting treaties in good faith according to the ordinary meaning of treaty terms in light of the treaty's object and purpose, and their context (ascertained from treaty text, agreements between parties, subsequent state agreement and practice and relevant rules of applicable international law).[100] The broader intent of the VCLT rules is to give meaning to treaties that accords with that agreed to during the drafting of a treaty and in subsequent practice.[101]

Reliance on treaty text, Committee jurisprudence, rights scholarship, drafter's intention, treaty purpose and state practice pervades elaborations of the core in international human rights documents. For example, in his 1987 article signalling the Committee's intention to introduce the core concept, Alston argues that acknowledgement that there might be reasonable differences of opinion on the extent of state responsibility for the material welfare of its citizens, reflected drafters' intention that the Committee should identify »some minimum core content of each right that cannot be diminished under the pretext of permitted ›reasonable differences‹.«[102] Alston also suggests that the existence of a core subject to limited derogations was a »logical implication of the use of the terminology of rights,« since there »would be no justification for elevating a ›claim‹ to the status of a right […] if its normative content could be so indeterminate as to allow for the possibility that the rightsholders possess no particular entitlement to anything.«[103] Similarly, Alston indicates that core entitlements would be identified through interpretation by States Parties, by the Committee through systematic examination of state reports, and through detailed studies by the Committee and groups acting on its behest of the normative implications of

99 Statute of the International Court of Justice (entry into force 24 October 1945) (3 Bevans 1179; 59 Stat. 1031; T.S. 993; 39 AJIL Supp. 215 (1945), article 38(1).

100 Vienna Convention on the Law of Treaties (1980), 1155 U.N.T.S. 331, 8 I.L.M. 679, entered into force 27 January 1980, Articles 31.1-3.

101 Forman (2011), 163.

102 Alston (1987), 352, citing A/C.3/SR.367 (1951), para. 3.

103 Ibid., 352–353.

Covenant rights,[104] methods consistent with accepted international law practice. Alston, nonetheless, defends a bolder approach when he suggests that the Committee has the authority to unilaterally develop the core through the preparation of »draft issue outlines speculating as to the possible core content of each right«.[105]

These former approaches foreshadow those adopted in General Comment 3 when the Committee justified the introduction of the core concept on the basis of Committee and state practice as well as treaty purpose. Thus the Committee indicates that it introduced the core concept 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.«[106] Treaty purpose is argued to support this interpretation: the Committee suggests that »[i]f 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.«[107] This raison d'être, or overall objective is explicated elsewhere in the Comment, as being to »establish clear obligations for States Parties in respect of the full realization of the rights question.«[108]

Similar justifications appear in the Maastricht Guidelines, which argue that »universal minimum standards« for economic, social and cultural rights had been developed through state practice under the Committee's reporting process and domestic court decisions.[109] They argue that the earlier Limburg principles and the Committee's developing jurisprudence confirm »resource scarcity does not relieve states of certain minimum obligations in respect of the implementation of economic, social and cultural rights.«[110] Reliance on state practice appears again in General Comment No. 14, when the Committee suggests that the entire Comment is »based on the Committee's experience in examining States Parties' reports over many years.«[111]

104 Alston (1987), 353–354.

105 Ibid., 354.

106 E/1991/23, 14 December 1990, para. 10.

107 Ibid.

108 Ibid., para. 9.

109 Maastricht Guidelines, para. 8.

110 Ibid., para. 10.

111 E/C.12/2000/4, 11 August 2000, para. 4.

The argument that contemporary global health declarations and programs like the 1978 Alma Ata Declaration and the 1994 Programme of Action of the International Conference on Population and Development (ICPD) guide elaboration of core content, similarly locate this interpretation within state practice.[112]

This kind of justification was explicitly required since the core concept is only implicitly suggested in the Covenant's text in articles 2.1, 4 and 5. Yet these justifications have not convinced scholars in the field of its legitimacy within international law. David Fidler argues that the framework of progressive realization does not allow for a minimum core concept and that the concept cannot have any impact on treaty and customary law.[113] While John Tobin does not reject the concept in totality, he critiques the Committee's suggestion that cumulative state reports enable it to develop minimum core obligations, arguing that state practice cannot provide consensus on the Committee's list of core obligations since states don't refer to minimum core obligations in the CESCR reports in any uniform way, and only a handful of judicial systems apply minimum core obligations.[114] Nonetheless, Tobin see treaty interpretation rules as providing a

»strong argument that the concept of a minimum core obligation is essential to guide states in their efforts to realize economic and social rights and give effect to the object and purpose of treaties such as the ICESCR and the CRC.«[115]

In this light, Tobin views the minimum core concept as a modest attempt to develop a necessary interpretive tool to guide states to fulfil treaty obligations in good faith.[116] Yet while Tobin argues that one can make a principled defence of minimum core obligations, he also acknowledges that there is no consensus on how to determine the content of minimum core obligations.[117]

112 E/C.12/2000/4, 11 August 2000, para. 43.

113 Fidler (2001), 348.

114 Tobin (2012), 243.

115 Ibid., 242.

116 Ibid.

117 Ibid., 243.

In this regard, scholars have not moved far afield from the Committee's approach in suggesting that new core content and obligations can be developed from state practice, judicial decisions, academic scholarship and treaty text. Thus, Toebes sees the development of rights through judicial application, assisted in cases of limited applications such as the right to health by academic reflections.[118] Donna Sullivan argues that some minimum core obligations can be derived from the practice of regional and international human rights bodies, goals endorsed by government in the UN Conferences, legislation and jurisprudence at the national level.[119] San Giorgi defines core content of the right to healthcare by looking at the interpretive documents including the Committee's concluding observations, European Committee of Social Rights conclusions, ILO conventions and recommendations, the Council of Europe European Code of Social Security, and the Declaration of Alma Ata and ICPD Program of Action.[120]

Yet Young cautions against an overreliance on what she terms a consensus approach in ascertaining the settled and therefore legitimate meaning of the core of economic, social and cultural rights.[121] Young sees a purely consensus based approach to defining core economic, social and cultural rights as threatening to set a lowest common denominator biased »towards the status quo, as well as to deliberately vague, uncontroversial, and unimaginative expressions.«[122]

While Young's critique of consensus as a basis for interpreting core obligations highlights the limitations of this approach, we argue that consensus, nonetheless, provides an important starting point for advancing the conceptualization of core obligations through other legal, political and social means. Questions about the legitimacy of the core concept are particularly cogent given the South Africa Constitutional Court's rejection of its domestic application, and the Committee's own indication that it will adopt an approach to adjudicating Optional Protocol complaints in line with the

118 Tobin (2012), 288.

119 Sullivan (1995).

120 San Giorgi (2012), 21–26.

121 Young (2008), 141–144.

122 Ibid., 145–148.

South African Constitutional Court's reasonableness approach.[123] The Committee's inclination towards a reasonableness approach to adjudicating economic, social and cultural rights raises questions about the role that core obligations will play in this framework. Moreover, if core content is to be developed as an adjunct and necessary component of a fuller core concept, then the processes of development must accord with international legal theory and practice if they are to have legitimacy and relevance.

4. CONCLUSION

In this paper we have argued that much debate over the core derives from contrasting notions of how it should function. We argue further that to build a more workable concept requires greater clarity about its intended role in concretizing, clarifying, enforcing and realizing the right to health. We believe that this clarity is an essential precondition for constructing a feasible, principled and grounded conceptualization of the minimum core of the right to health. We conclude that the concept is essential and justified both by ICESCR text in article 4 and 5 and by recognized rules of treaty interpretation. However we believe that further development of the core concept requires going considerably beyond the status quo to develop each constituent component of entitlements, content and duties. If these components of the core are appropriately developed by the Committee and judicial authorities, then additional core content could be developed by social and political actors from a variety of health and human rights related domains. An augmented core concept of this sort could remedy some of the deficits of its current formulation and feasibly advance towards achieving some of the concept's normative ambitions.

123 A/RES/63/117, 10 December 2008, article 8.4: »When examining communications under the present Protocol, the Committee shall consider the reasonableness of the steps taken by the State Party in accordance with part II of the Covenant.«

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