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21. Waiting for Rights: Progressive Realization and Lost Time

Katharine G. Young

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Abstract

The obligation of ‘progressive realization’ under the International Covenant on Economic and Social Rights is often interpreted in light of available resources - this chapter examines, instead, the variable of time. Noting that delay of rights is akin to denial of rights, Young explores the various ways in which accountability models, at the international level, have elaborated on concrete, and temporal, benchmarks. These include the minimum core, and non-retrogression doctrines, and the exercises in comparative rankings. These are important sources of accountability, especially for positive obligations. And yet with the promise of rights, law nevertheless structures the expectations of rights-holders. This chapter examples how ‘waiting’ for rights may be an especially passive, disempowering, and anti-solidaristic experience and in so doing reveals greater insight on a tension with underlies the recognition of fundamental material interests as rights.

Keywords

progressive realization, time, International Covenant on Economic, Social and Cultural Rights, accountability, minimum core, non-retrogression, rankings

I. Introduction¹

In international human rights law, waiting is an accepted part of rights realization. To realize a right, a state must often act positively, and often over time. Duties towards rights-holders include duties on the part of the state to both restrain itself and to act. Each take time, and positive duties to fulfil rights, in particular, may take a considerable time, especially for states with limited resources, or uncoordinated or immature institutions. The lapse between rights recognition and rights fulfilment is often given the shorthand of ‘progressive realization’, which is the obligation by which state parties to the *International Covenant on Economic, Social and Cultural Rights*

¹ With thanks to participants of the Future of Economic and Social Rights Conference, Boston College, April 2016, and the Women in International Law Workshop, Chicago, April 2018, as well as to Kris Collins, Vlad Perju and Paulo Barrozo.

agree to be bound.² Of course, waiting can apply to civil and political rights as well, and prominent metrics have been developed to account for when such delay becomes unacceptable, such as for the right to a fair trial. In this chapter, I claim that not only new metrics, but indeed a new framework of understanding, are required, in order to address the ubiquity of waiting in relation to economic and social rights.

By seeking to emphasise the ubiquity of waiting, I mean to underline the broad legal character of economic and social rights under international human rights law, as well as under the constitutional or statutory laws in many domestic settings.³ Thus, I am not (merely) referring here to the well-understood waiting associated with justiciable rights and the remedies that flow from them. For the recognition of such delay, one need only reference the U.S. school desegregation case of *Brown v. Board of Education*, which has had so much influence on the development of constitutional law in that setting, as well as the developing jurisprudence of constitutional rights in many other countries.⁴ In *Brown v. Board of Education II*, the U.S. Supreme Court famously required, in the follow-up orders seeking to enforce school desegregation on the part of recalcitrant Southern States, that the intentional separation of schoolchildren on the basis of race be halted ‘with all deliberate speed’.⁵ An extended period of waiting resulted for many in the position of the claimants, not only due to the vagueness of the ‘all deliberate speed’ standard, but because the powers of the courts to enforce this injunction, simultaneously across so many sites, was limited. More contemporary cases which involve a direct assessment of the positive obligations that arise from constitutionally guaranteed economic and social rights follow a similar pattern of enforcement-with-waiting. In the prominent South African case of *Grootboom*,⁶ for instance, the Constitutional Court held that the right to housing was infringed by the state’s inability to provide Irene Grootboom and her community with crisis

² International Covenant on Economic, Social, and Cultural Rights (‘ICESCR’), art. 2(1), New York, 16 December 1966, in force 3 January 1976, 993 UNTS 3.

³ Of course, the ‘legal’ character of international law, on the one hand, and constitutional law, on the other, is distinct, despite parallels. These are addressed below, but the chapter is concerned to draw attention to similar concepts and standards that guide interpreters in each.

⁴ *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954) (U.S.) For an attempt to track both local and global influence, see, e.g., Martha Minow, *In Brown’s Wake: Legacies of America’s Educational Landmark* (Oxford University Press, 2010).

⁵ *Brown v. Bd. of Educ. of Topeka*, 349 U.S. 294, 301 (1955) (‘*Brown II*’) 301. For analysis, see Michael Klarman, *Brown v. Board of Education and the Civil Rights Movement* (Oxford University Press, 2007).

⁶ *Government of the Republic of South Africa v. Grootboom* 2001 (1) SA 46 (CC).

housing: yet the Constitutional Court was reluctant to do more with its declaratory order than signal the infringement. Years passed before the community itself was permanently housed (Irene Grootboom herself passed away, 8 years later, waiting for relocation), and before similarly situated rights-holders could access crisis shelter.⁷

Yet the concerns about courts entering the fray of government action – of ordering positive remedial action for economic and social rights enforcement – is only one aspect of the problem of waiting, to which this chapter responds. Indeed, the issue of waiting points to broader debates about economic and social rights in general. For some, the delay of legal rights calls for direct condemnation of the pretensions of ‘rights’ language: it is the availability of remedy – and its immediate delivery – that reveals how far a society goes in assigning heightened protection to certain interests.⁸ This realist position applies to downgrade the importance of unenforceable constitutional protections in domestic settings, just as it applies to demote unenforceable human rights protections within the international framework.⁹ Others, on the other hand, regard the ubiquity of waiting as not significant per se, whether because the law cannot always be expected to replicate the moral duties that are appropriately attached to rights, or because positive obligations are just as critical in satisfying the values of human dignity or freedom as negative ones, however more difficult to hold to account.¹⁰

My own view does not fall neatly under either position, which I see as replicating now-surpassed debates – as to whether economic, social and cultural rights are ‘really’ human rights;¹¹ or as to

⁷ A nuanced assessment of the delays experienced, for the implementation of a national emergency housing policy, on the one hand, and the settlement order, on the other, see Malcolm Langford and Steve Kahanovitz, ‘South Africa: Rethinking Enforcement Narratives’ in Malcolm Langford, César A. Rodríguez Garavito, and Julieta Rossi (eds), *Social rights judgments and the politics of compliance: making it stick* (Cambridge University Press, 2016), 315, 322-333.

⁸ E.g., Daryl Levinson, ‘Rights Essentialism and Remedial Equilibrium’, (1999) 99 *Columbia Law Review* 857, 924-26.

⁹ For drawing parallels in the enforcement problems of both international law and constitutional law, see Jack Goldsmith & Daryl Levinson, ‘Law for States: International Law, Constitutional Law, Public Law’ (2009) 122 *Harvard Law Review* 1791.

¹⁰ Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*, 2nd edition (Princeton: Princeton University Press, 1996) (presenting a three-part typology to cut across negative and positive duties).

¹¹ For a convincing response, see Amartya Sen, ‘Elements of a Theory of Human Rights’ (2004) 32 *Philosophy & Public Affairs* 315 (responding to interlocutors, including Onora O’Neill and Maurice Cranston).

whether they ‘really’ are justiciable.¹² Even if one does not regard those debates as answered by prominent philosophical justifications,¹³ they have at the very least been overtaken by the widespread constitutional uptake of economic and social rights, their growing justiciability, and the growing recognition that rights protection can be advanced outside of court settings.¹⁴ Yet the issue of waiting remains a significant one, and attention to it, I argue, helps to reframe and update the contemporary debates around legal economic and social rights. It becomes necessary to make new inquiries, not only as to the metrics of economic and social rights delay – of how long is too long – but as to whether there are different features of waiting that have been neglected by the conventional acceptance of some postponement or delay.

This chapter approaches this topic by exploring the standard by which international human rights law – and in particular, international economic and social rights law – addresses the ubiquity of waiting. It thus starts from a context in which justiciability and courts are secondary considerations. Instead, it takes a legal standard that is understood to hold governments and officials to account, without assuming a judicial remedy. Although I note the special implications of remedial options devised by a court, for the most part my suggestions are relevant to economic and social rights that operate as directive, regulatory principles by which states are held to account, although they are also relevant to the question of justiciable complaints. This is the teleological standard of ‘progressive realization’.

This analysis proceeds in three parts. Part II of this chapter expands upon the duty to realize rights progressively. The language of progressive realization is supposed to trigger (and/or condition) duties of accountability according to the apparatus of international human rights law. Oftentimes, discussions of this standard focus on how the language of ‘maximum available

¹² Michael J. Dennis & David P. Stewart, ‘Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?’ (2004) 98 *American Journal of International Law* 462.

¹³ E.g., Sen, ‘Elements of a Theory of Human Rights’.

¹⁴ E.g., Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (2008); Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (2013).

resources' releases certain states from the stringency of immediate duties to realize rights.¹⁵ In this chapter, however, I focus on the standards that apply to the passing of time in general. By examining this development, the aim of this chapter is to explore how the experience of waiting has been identified by those interpreting economic and social rights – to food, health care, housing, education and social security – under the ICESCR. This discussion therefore engages a body of analysis – contained in general comments and concluding observations – that are often dismissed as concealing the 'actual' controls on authoritative bodies, and on the states whose behaviour they themselves seek to control. Although this criticism is especially reserved for international bodies, such as the Committee on Economic, Social and Cultural Rights, which interprets the ICESCR, it is also levied at domestic courts engaged with the rights guarantees of public law. Yet to dismiss such analysis is to ignore the institutionalized forms of reason-giving pursued in legal pronouncements – such that we cease talking about reasons altogether. This chapter therefore elects to approach the problem of waiting through this lens. Readers sceptical of doctrinal exegesis are invited to take its contribution as conceptual only, in reconciling the import of postponable, if optimizable, rights.

Part III turns briefly to history, to examine the alternative concepts that had been discussed at the time of drafting the ICESCR, such as the express inclusion of time frames and time limits in the duty of progressive realization. Furthermore, I address the question as to whether the acceptance of waiting has been based on a binary understanding of temporality – as either absolute (immediate obligations) or flexibility (unaccountable and perhaps indefinite delay). Part IV of this chapter calls for a more variegated understanding of the stakes of waiting. Initiating an inquiry into these effects provides a more focused argument as to how an 'optimizing' view of rights may be defeated, due to the docility, passivity, and anti-solidarity that can be created for rights-holders themselves. The chapter closes with preliminary thoughts about how economic and social rights law could develop with a more nuanced understanding of the problem of waiting and its complexity.

¹⁵ E.g., Olivier De Schutter, 'Public Budget Analysis', and Rodrigo Uprimny et. al., 'Bridging the Gap', in this volume.

II. The curious case of progressive realization

In concluding a common standard of achievement for human rights, the United Nations General Assembly pioneered, with its Universal Declaration of Human Rights of 1948, a new legal form especially adapted to the diversity of nation-states. Openly aspirational, and unreservedly teleological, the UDHR had, in the minds of its drafters, straddled at least two mindsets: that human rights were best protected by the rule of law, and that the declaration itself should remain unenforceable. In it, member states pledged to promote the respect for human rights, by ‘progressive measures, both national and international’,¹⁶ so that the enumerated human rights could be ‘fully realized’.¹⁷ A follow-up treaty, that would provide detail to the obligations, in a binding form, was slated for the near future.

Later, of course, that treaty was split and an obligation of ‘progressive realization’ was formulated: a standard reserved for the category of economic, social and cultural rights. In 1966, a larger, more plural, and more polarized United Nations settled on the enumerated rights of the *International Covenant on Economic, Social, and Cultural Rights*, encompassing rights to food, health, housing, education, social security, and work, which were to be ‘fully realized progressively’.¹⁸ This caveat, relaxing the manner and time in which obligations were to be fulfilled, was accompanied by others: that state parties ‘undertake to take steps,’ ‘individually and through international cooperation,’ ‘economic[ally] and technical[ly]’ and through ‘legislative measures,’ to the ‘maximum of its available resources.’¹⁹ No similar flexibility was outlined for the obligations associated with the contemporaneous *International Covenant on Civil and Political Rights*, whose enumerated rights were understood to be immediately realizable; a distinction subject to lengthy commentary.²⁰

¹⁶ Universal Declaration of Human Rights (‘UDHR’), Paris, 10 December 1948, UN Doc. A/RES/3/217 A, Preamble.

¹⁷ UDHR, Preamble; art. 28.

¹⁸ ICESCR, art. 2(1).

¹⁹ ICESCR, art. 2(1).

²⁰ See below, Part III.

It was therefore a starting premise of economic and social rights that their realization would be dependent upon available resources, time, and effective institutions of government; states with limited resources would have a justification for continued non-fulfilment. The starting point is not without its critics. For many, the standard is not rigorous enough to challenge the low performance of states with limited resources, or to halt the backsliding of those with greater means.²¹ The discomfort with what we might see as a ‘nonreviewable privilege of indefinite postponement’²² has been the basis for alternative, more fixed, standards of accountability, such as the ‘minimum core obligation’ or the duty of ‘non-retrogression’. And yet for others, progressive realization provides a useful compromise for the variation in states at international law, since it allows scrutiny and accountability, but not rigidity or uniformity. It is also appropriate for constitutional rights, enforced domestically. Thus, from this starting point, progressive realization ties well into ‘optimizing’ theories of constitutional rights, which seek to hold the state to account for the compatibility of its actions with providing the maximum degree of protection for all rights.²³ Such theories have become widely influential as constitutions have recognized a greater number of interests as subject to legal guarantees. The ‘optimizing’ approach requires all rights to be given the greatest degree of respect, proportionate to the interests of others; an assessment which takes into account both the degree of rights-deprivation and the time in which it is experienced.

And indeed, this obligation of ‘progressive realization’ also ties well into contemporary theories of rights. For instance, a ‘maximizing’ theory of consequential ‘goal rights’, defends the view that rights can be realized according to a variable, contextual, scale. Under this leading philosophical standpoint, the variability of the standard of obligation does not convert such claims to a category of non-right, but instead merely supplements the ‘perfect obligations’ that delineate certain forms of rights-based action with ‘imperfect obligations’ that are more varied,

²¹ This criticism is related to the idea of human rights backsliding, which documents the phenomenon of too-low an international standard in international human rights norms exerting a ‘downward pull on high-performing states,’ linked causally to their membership of the human rights regime: see Andrew T. Guzman & Katerina Linos, ‘Human Rights Backsliding’ (2014) 102 *California Law Review* 603.

²² Frank I. Michelman, ‘Socioeconomic Rights in Constitutional Law: Explaining America Away’ (2008) 6 *International Journal of Constitutional Law*, 663-86, 83.

²³ E.g., Robert Alexy, *A Theory of Constitutional Rights*, Julian Rivers (trans.) (Oxford; New York: Oxford University Press, 2002); Mattias Kumm, ‘Constitutional rights as principles: On the structure and domain of constitutional justice’ (2004) 2 *International Journal of Constitutional Law*, 574-96.

but equally necessary, to satisfy especially important, and socially influenceable, freedoms.²⁴ Such obligations provide scope, always, for further improvement.²⁵ And present unrealizability is not supposed to turn ‘a claimed right [into] a non-right. Rather, it motivates further social action’.²⁶ Yet while the assumptions of maximization may be shared within international human rights law, they have not always guided legal interpretation.

A. The duty to realize rights progressively

The duty to realize economic and social rights progressively was initially inserted into the text of the ICESCR, after heavy promotion by the United States,²⁷ and heavy contestation along both East-West and North-South axes in 1966.²⁸ Yet since that time, the concept of progressive realization has not followed a singular, linear, interpretation, and various complementary or supplementary concepts have been introduced. Three significant approaches are detailed below. This variety has not, however, diminished the influence of adopting progressive implementation as an appropriate standard for economic and social rights, and even, on occasion, civil and political rights.²⁹ Several subsequent human rights instruments have adopted the formula of progressive realization in outlining the state obligation, oftentimes in exact terms. Most recently, the *Convention on the Rights of Persons with Disabilities*, affirms this standard for realizing the economic, social and cultural rights of persons with disabilities, ‘without prejudice’ to

²⁴ See, e.g., Sen, ‘Elements of a Theory of Human Rights’.

²⁵ Ibid.

²⁶ Sen, *The Idea of Justice* (Cambridge: Harvard University Press, 2009), p. 384. (‘Just as utilitarians want to pursue maximization of utilities and the violability of that approach is not compromised by the fact there always remains scope for further improvement ... human rights advocates want recognized human rights to be maximally realized.’).

²⁷ Sally-Anne Way, ‘The “Myth” and Mystery of US History on Economic, Social and Cultural Rights: The 1947 “United States Suggestions for Articles to be Incorporated in an International Bill of Rights”’ (2014) 36 *Human Rights Quarterly*, 4, 869.

²⁸ Roland Burke, ‘Some Rights Are More Equal than Others: The Third World and the Transformation of Economic and Social Rights’ (2012) 3 *Humanity: An International Journal of Human Rights, Humanitarianism, and Development*, 427.

²⁹ Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Oxford: Oxford University Press, 1995), p. 130 (noting its influence on the Additional Protocol to the Inter-American Convention on Human Rights, and its application to the civil and political rights of the African Charter on Human Rights and Peoples’ Rights).

immediately applicable obligations.³⁰ That said, other human rights instruments integrating economic, social and cultural rights have chosen other terminology to signal the imperfect, polycentric or complex nature of obligations. Most recently, the Optional Protocol to the ICESCR, which became effective in 2013, and establishes a complaints mechanism for economic and social rights, only recalls the statement on progressive realization, but utilizes a standard of reasonableness in review.³¹

The duty to realize rights progressively has also been influential domestically, and the language of the ICESCR appears within several constitutions that entrench economic and social rights.³² Domestic courts, however – including those, such as the South African Constitutional Court, which have embraced the justiciability of economic and social rights, have not engaged in interpreting the concept of progressive realization directly, focusing their efforts on more familiar standards, at least to common law systems, such as the ‘reasonableness’ of laws which impact economic and social rights.³³

Internationally, the doctrinal elaboration of the concept of progressive realization began in earnest in 1990, after the opening created by the end of the Cold War, and the pressures of an increasing number of decolonized states.³⁴ At that time, the United Nations Committee on Economic, Social and Cultural Rights described progressive realization as a ‘necessary flexibility

³⁰ Convention on the Rights of Persons with Disabilities (‘CRPD’), New York, 13 December 2006, in force 3 May 2008, UN Doc. A/RES/61/106, art. 4(2). For inclusion of the Convention on the Rights of the Child as entailing progressive realization, 20 November 1989, UN Doc. A/RES/44/25, art. 4 (‘CRC’), alongside the ICESCR and CRPD, see Report from the United Nations High Commissioner for Human Rights, June 25, 2007, UN Doc. E/2007/82.

³¹ Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (‘ICESCR-OP’), 10 December 2008, in force 5 May 2013, UN Doc. A/HRC/RES/8/2, Preamble (recalling progressive realization) art. 8(4) (reasonableness); Bruce Porter, ‘Reasonableness and Art. 8(4)’, in Malcolm Langford, Bruce Porter, Rebecca Brown & Julieta Rossi (eds.), *The Optional Protocol to the International Covenant on Economic, Social, and Cultural Rights: A Commentary* (Pretoria: Pretoria University Law Press, 2016).

³² Constitution of South Africa, ss. 26-7; see also the Constitutions of Maldives, s. 23; Kenya, ss. 21, 82; South Sudan s. 34; Zimbabwe ss. 73, 75, 82; Fiji ss. 31-38; Guyana s. 154a.

³³ *Government of the Republic of South Africa v. Grootboom* 2001 (1) SA 46 (CC); see also Porter, ‘Reasonableness and Art. 8(4)’.

³⁴ Way, ‘The “Myth” and the Mystery’; Burke, ‘Some Rights Are More Equal’.

device' for economic, social and cultural rights.³⁵ In an influential General Comment outlining its meaning, the Committee commended the doctrine for its ability to accommodate 'the realities of the real world ... and the difficulties involved for any country in ensuring full realization.'³⁶ Recognizing the very different resources available to states, the Committee's approach was to emphasize the variation in what should be considered for different state parties with different resources available to them. In a well-cited formulation, states were 'to move as expeditiously and effectively as possible towards [full realization]. ... Moreover, any deliberately retrogressive measures ... would require the most careful consideration and would need to be fully justified.'³⁷

The Committee at that time was thus alert to the temporal burden of progressive realization, and sought to defend the doctrine it was shaping against perceptions of indefinite delay. One aspect of this approach was to emphasize the similarities of the standard with the ICCPR, and the obligation of states to respect and ensure the relevant rights – understood by the Human Rights Committee as immediate in character.³⁸ The Chair of the Committee on Economic, Social and Cultural Rights, Philip Alston, with co-author Gerard Quinn, had criticized the 'artificiality of the idealized way in which the immediate/progressive distinction is often portrayed',³⁹ and pointed to obligations under the ICESCR that were expressly immediate. The right to fair wages and equal remuneration for work of equal value, for example,⁴⁰ and the right to form trade unions,⁴¹ were emphasized as taking immediate effect.⁴² The Committee's later General Comments invariably affirmed that obligations of non-discrimination should be appropriately understood as immediate, especially as they need not be resource-dependent,⁴³ other obligations

³⁵ UN Committee on Economic, Social and Cultural Rights ('CESCR'), General Comment No. 3: The Nature of States Parties' Obligations, 14 December 1990, E/1991/23, art. 2(1).

³⁶ *Ibid.* at para. 9. This formulation was approved, for example, in *Acevedo Buendia et al v. Peru* (1 July 2009, Series C No. 198) (Inter-American Court of Human Rights) (2009) (para. 102).

³⁷ General Comment No. 3, para. 9. This formulation is also parsed in the chapters by Olivier De Schutter, 'Public Budget Analysis', and Rodrigo Uprimny et. al., 'Bridging the Gap', in this volume.

³⁸ UN Human Rights Committee ('HRC'), General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para. 5.

³⁹ Philip Alston & Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 *Human Rights Quarterly* 156, at 173.

⁴⁰ ICESCR, art. 7(a)(i).

⁴¹ ICESCR, art. 8.

⁴² General Comment No. 3.

⁴³ CESCR, General Comment No. 20: Non-discrimination in Economic, Social and Cultural Rights, 2 July 2009, E/C.12/GC/20, art. 2(2) of the ICESCR; see also Malcolm Langford & Jeff King, 'Committee on Economic, Social,

should include ‘deliberate, concrete and targeted’ steps, even if not immediate.⁴⁴ As we will see below, however, some of the nominally ‘immediate’ obligations of non-discrimination, such as those stipulating that policies to eliminate discrimination on racial and gender grounds be pursued ‘without delay’⁴⁵ nevertheless allow for a varied understanding of their punctuality. Both immediacy and progressiveness accommodated the idea that some time was required.

The approach thus epitomized a teleological emphasis that has become a feature of the postwar human rights regime: providing advocates with a standard for calling out non-fulfilment, but omitting to state any bright-line rule.⁴⁶ This approach is not dissimilar to other standards in international law, such as (among many possible examples), the good faith standard for signatories obliged not to defeat a treaty’s purpose,⁴⁷ the obligation on states to observe ‘due diligence’ in respecting human rights,⁴⁸ to establish ‘temporary special measures’ for eliminating discrimination,⁴⁹ or to pursue ‘sustainable development’.⁵⁰ A recent formulation, in a parallel international regime, is for parties to pursue the ‘highest possible ambition’ in submitting to obligations.⁵¹ Partly, the open-ended nature of such obligations is a result of the inevitably positive obligations required for the fulfilment of human rights – duties on the state to act, not only to restrain from doing so. But the permissibility of some delay is also built into the very

and Cultural Rights: Past, Present and Future’, in Malcolm Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2009) pp. 477, 492-95.

⁴⁴ E.g., General Comment No. 13 (the right to education), E/C.12/1999/10 (8 December 1999).

⁴⁵ International Convention on the Elimination of All Forms of Racial Discrimination (CERD), 21 December 1965, in force 4 January 1969, UN Doc. A/RES/2106(XX), art. 2(1); Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), New York, 18 December 1979, UN Doc. A/RES/34/180, art. 2; see also CRC, art. 2(1) for a declaration of respecting and ensuring rights.

⁴⁶ The distinction between legal standards and rules is well canvassed by Kathleen Sullivan, ‘The Justices of Rules and Standards’ (1992) 106 *Harvard Law Review* 19 (describing the approach to the distinction among members of the U.S. Supreme Court).

⁴⁷ Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, in force 27 January 1980, 1155 UNTS 331; (1969) 8 ILM 679; UKTS (1980) 58.

⁴⁸ HRC, General Comment No. 31, para. 8.

⁴⁹ CEDAW, art. 4 para. 1; see also UN Committee on the Elimination of Discrimination Against Women (‘CEDAW Committee’), General Recommendation No. 5: Temporary Special Measures, 1988; CEDAW Committee, General Recommendation No. 25: Temporary Special Measures, 1999.

⁵⁰ Transforming Our World: the 2030 Agenda for Sustainable Development, 25 September 2015, UN Doc. A/RES/70/1, available at: <https://sustainabledevelopment.un.org/sdgs> (accessed 12 June 2018); for a report tying sustainability into progressive realization, see Human Rights Council, Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, Catarina de Albuquerque, 11 July 2013, A/HRC/24/44.

⁵¹ Christina Voigt & Felipe Ferreira, “‘Dynamic Differentiation’: The Principles of CBDR-RC, Progression and Highest Possible Ambition in the Paris Agreement’ (2016) 5 *Transnational Environmental Law*, 285-303 (addressing states’ common but differentiated obligations to address climate change).

structure of accountability within international law: ratification is premised on the idea that states may be presently failing to comply with the terms of a treaty, but agree to do so over time.⁵²

Not surprisingly, efforts to refine the doctrine of progressive realization have diverged. Some commentators have focused on the question of resources, and how they can be measured.⁵³ Others have advanced interpretations of each right that remove their variability, or have instead come up with separate metrics to assess and compare states' performance. These approaches are detailed below – and while they can be thought to supplement the progressive realization standard, it is suggested that they each, in their own way, fail to address the variable of time.

B. Supplements to progressive realization

The first important supplement to the concept of progressive realization is the 'minimum core' doctrine, which was established early in order to establish universal thresholds for all state parties to meet. For example, the Committee in its 1990 General Comment elaborated on the meaning of progressive realization by introducing the idea that the 'minimum essential levels' of food, primary health care, shelter and housing, or education, were required to be satisfied by all state parties to the ICESCR, irrespective of available resources. A lengthy debate about the interpretation of a 'minimum core' ensued, as well as what its legal consequences should be.⁵⁴ While some commentators called for such obligations to be recognized as those non-derogable under the ICESCR, or alternatively justiciable by courts, others emphasized that minimum core obligations should be interpreted as those that were immediate, and not subject to any

⁵² Proposals that would permit states to become parties to the ICCPR, for example, only if they had already implemented, or would simultaneously take the necessary measures to secure those rights were rejected during the drafting: see Dominic McGoldrick, *The Human Rights Committee* (Oxford: Oxford University Press, 1991) p. 12. He notes that the Third Committee resolved, in the end, that 'the notion of implementation at the earliest possible moment was implicit in article 2 as a whole'. The reporting requirement that would become article 40 was also seen as 'an effective curb on undue delay'.

⁵³ De Schutter, 'Public Budget Analysis'; CESCR, 'An Evaluation of the Obligation of "Maximum Available Resources"'.

⁵⁴ Katharine G. Young, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content' (2008) 33 *Yale Journal of International Law* 113-75.

permissible delay.⁵⁵ That interpretation, which reinforces the connection between the minimum core and temporal accountability, was recently confirmed in a prominent analysis commissioned by the World Bank.⁵⁶ Under that view, the minimum core applies to all obligations that must be realized immediately; obligations left out of the ‘core’ are those with lesser priority. A concern with this reading of the minimum core is, of course, that the broad promise of economic and social rights is left, in the main, to the indefinite category; and immediate duties are restricted to minimal ones.⁵⁷ To some extent, this concern equates with a broader unease that economic and social rights law has become too focused on a subsistence-based, ameliorative interpretation of rights at the expense of targeting the broader concerns of distributive justice, such as economic inequality.⁵⁸ In so far as inequality can also be seen as heightened by – or indeed constituted by – waiting, a narrow, minimalistic interpretation of the core does the same thing.

A second approach is the standard of ‘non-retrogression’, which supplements the concept of progressive realization by focusing on current baselines. The idea, which the Committee also adopted in 1990, and elaborated increasingly during the economic crises that followed, was to interpret progressive realization as consistent with the idea of a heightened obligation to prevent any retraction of current rights-realization. Non-retrogression was thus related to the idea of self-appointed benchmarks for state performance, but one pegged in real time: allowing every state to be scrutinized for any backward step in respect of economic and social rights. Since the Committee’s introduction of the notion that ‘deliberately retrogressive measures’ would have to be justified by state parties, the concept of ‘non-retrogression’ has become increasingly detailed.⁵⁹ The Committee has suggested that a heightened level of scrutiny attends to such

⁵⁵ Young, ‘Minimum Core’, 117. National courts have engaged more recently with a justiciable minimum core: David Landau, ‘The Promise of a Minimum Core Approach: The Colombian Model for Judicial Review of Austerity Measures’, in Aoife Nolan (ed.), *Economic and Social Rights after the Global Financial Crisis* (Cambridge University Press, 2014) pp. 267-98.

⁵⁶ John Tasioulas, *Minimum Core Obligations: Human Rights in the Here and Now* (Washington, DC: Nordic Trust Fund World Bank Research Paper, 2017).

⁵⁷ Compare i.e. General Comment No. 3, and General Comment No 13 (emphasizing the need for effective and expeditious steps for all obligations), with Tasioulas, ‘Here and Now’ (deprioritizing all behind the minimum core).

⁵⁸ Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Cambridge, MA: Harvard University Press, 2018).

⁵⁹ Committee on Economic, Social and Cultural Rights, An Evaluation of the Obligation to Take Steps to the ‘Maximum of Available Resources’ under an Optional Protocol to the Covenant, E/C.12/2007/1 (10 May 2007), para. 9. This is further elaborated in the chapters by De Schutter and Uprimny et. al., in this volume.

backward steps, stating that, if any retrogression occurred, the state would have to prove that it was intended only after consideration of all alternatives, with due reference to the ‘totality of the rights’ and the ‘full use of the State party’s maximum available resources.’⁶⁰ This standard has become a focal point for debate in challenges to the austerity programs that were introduced after the global financial crisis of 2008.⁶¹ Nonetheless, even when non-retrogression brings important attention to states that are dismantling previously guaranteed standards,⁶² it may direct less attention to those experiencing economic and social rights deprivation but unbenefited by the baseline status quo in well-resourced states, or those living in countries where social responsibilities along a statist model have not yet been entrenched.⁶³ It thus deflects the challenge of waiting for rights.

In a departure from the above-mentioned doctrinal standpoints of evaluation, a third approach which supplements the concept of progressive realization is grounded on differentiating data by country or across time. Although the previous approaches also rely on information and monitoring, under this approach ‘progressive realization’ is demonstrated by an evaluation of countries’ self-identified benchmarks and goals, or a comparison against more universal indicators. Such approaches, which seek to supplement legalistic notions with close measurement, commenced in earnest in 1990.⁶⁴ Nonetheless, an increasingly concerted international effort, and rising technological capabilities, has led to more ambitious measures of

⁶⁰ CESCR, An Evaluation of the Obligation, paras. 8-10. See also General Comment No. 13: The Right to Education, 8 December 1999, E/C.12/1999/10, para. 45; General Comment No. 14: The Right to the Highest Attainable Standard of Health, 11 August 2000, E/C.12/2000/4, para. 32; General Comment No. 15: The Right to Water, 20 January 2003, E/C.12/2002/11, para. 19.

⁶¹ Nicholas J. Lusiani & Christian Courtis, ‘Two Steps Forward, No Steps Back? Evolving Criteria of the Prohibition of Retrogression in Economic and Social Rights’, in Aoife Nolan (ed.), *Economic and Social Rights after the Global Financial Crisis* (Cambridge: Cambridge University Press, 2014), p. 121; see also Colm O’Cinneide, ‘Austerity and the Faded Dream of a “Social Europe”’, in Nolan (ed.), ‘After the Global Financial Crisis’, p. 169.

⁶² Committee on ICESCR, Letter to State Parties dated 16 May 2012; see also Report of Navanethem Pillay, High Commissioner for Human Rights, Social and Human Rights Questions: Human Rights, 7 May 2013, UN Doc. E/2013/82, paras. 69-71.

⁶³ E.g., Thomas Pogge, ‘Severe Poverty as a Violation of Negative Duties’ (2005) 19 *Ethics & International Affairs* 55-83.

⁶⁴ The first Special Rapporteur on the Realization of Economic, Social and Cultural Rights, Danilo Türk recommended efforts to develop ‘appropriate indicators to measure achievements in the progressive realization of economic, social, and cultural rights,’ as early as 1990. Danilo Türk, see also Vienna Conference (1993).

‘progressive realization,’⁶⁵ such as the Social and Economic Rights Fulfilment (SERF) Index.⁶⁶ This index examines available survey and administrative data to reveal trends in progress and regress over time, and as between countries. By combining the measurements of available GDP with other variables of capacity and obstacles,⁶⁷ this approach analyses ‘progressive realization’ in quantitative, rather than conceptual, terms, and the consequence is to reprimand well-resourced but badly governed countries and celebrate those that do much more with less. While criticisms have been applied to the SERF index in particular, and indicators in general, these are generally concerned with the use of such data as a stand-in for governance – that is, as an unreflective method to decide funding and resources – rather than the methodology of information gathering per se.⁶⁸

These three supplementary approaches to understanding and implementing the ‘progressive realization’ obligation overlap and the Committee has adopted, at various points and sometimes concurrently, each of them. Nonetheless, they are sourced in quite different epistemologies – the minimum core approach resonates with priority-focused efforts in distributive justice; the non-retrogression approach is most accessible to the proportionality-focused inquiries of public law;⁶⁹ and the continuum of measurement reflects efforts to integrate accountability mechanisms with the social sciences. Each are problematic, in different ways; but each share a general limitation with respect to time. While temporality often plays a part in signalling a failure to fully realize economic and social rights, it operates, in the first two approaches, as an on-off binary – both the minimum core and non-retrogression register either an immediacy of obligation or a justified (and thus largely unaccountable) delay. The third approach of ranking, reliant on

⁶⁵ Efforts include those from the WHO, FAO, and UN-Habitat and OHCHR; other independent efforts include Eitan Felner, ‘Closing the “Escape Hatch”: A Toolkit to Monitor the Progressive Realization of Economic, Social, and Cultural Rights’ (2009) 1 *Journal of Human Rights Practice*, 402; see also De Schutter, ‘Public Budget Analysis’.

⁶⁶ Sakiko Fukuda-Parr, Terra Lawson-Remer & Susan Randolph, *Fulfilling Social and Economic Rights* (Oxford: Oxford University Press, 2015)., building upon predecessors in human rights-informed development rankings, such as the Human Development Index, and civil and political rights rankings, such as the Freedom House index

⁶⁷ Social and Economic Rights Fulfilment (SERF) Index available at: https://serfindex.uconn.edu/wp-content/uploads/sites/1843/2017/04/Core_2005to2015.pdf (accessed 12 June 2018).

⁶⁸ Kevin Davis, Angelina Fisher, Benedict Kingsbury & Sally Engle Merry (eds.), *Governance by Indicators: Global Power through Quantification and Ranking* (Oxford: Oxford University Press, 2012); Sally Engle Merry, *The Seductions of Quantification: Measuring Human Rights, Gender Violence and Sex Trafficking* (Chicago: The University of Chicago Press, 2016), p. 162 .

⁶⁹ Kai Möller, *The Global Model of Constitutional Rights* (Oxford: Oxford University Press, 2012).

indicators, tends to accept a shifting temporal horizon, in which the independent variable of time plays no dependent rights-infringing role, outside of the context of ‘structural indicators’ that assess the stipulated time frames in state planning. These aspects are analysed in the next section. This contrasts strikingly with the experience of time, and in particular waiting, to which the final section turns.

III. Temporal accountability in the ICESCR

So far, I have detailed the evolving interpretation, and the development of supplementary concepts to hold states (internationally) or governments (domestically) to account for economic and social rights realization. But the basic flexibility introduced by progressive realization (a doctrinal standard reserved, it bears repeating, only for economic, social and cultural rights), was exaggerated by the assumption that economic and social rights would be demanding of resources, which would require time to accumulate and organize. An extension of time seemed appropriate. Of course, later conceptualizations of the duties accompanying rights, such as philosopher Henry Shue’s influential three-part typology of duties⁷⁰ (adopted and adapted by the Committee as the ‘respect-protect-fulfil’ typology⁷¹), helped to clarify that sometimes rights realization might require only minimal resources – such as for duties of respect – and yet in other instances might require investment into a regulatory regime – such as for duties to protect – or even greater expenditures, in terms of social services delivery or goods provision – such as for duties to fulfil. The time required for each would be similarly different. Duties of respect might be fulfilled immediately; duties of protecting and fulfilling rights might take longer, and might require continual maintenance and updating.⁷²

⁷⁰ Shue, *Basic Rights*.

⁷¹ See, e.g. Asbjorn Eide, *Right to Adequate Food as a Human Right* (1989); see also *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, UN Doc. E/C.12/2000/12, para. 6. The typology has been utilized by various UN agencies and programmes, such as the Food and Agriculture Organization, UN-Habitat, the UN Educational, Scientific and Cultural Organization, the United Nations Children’s Fund, and the World Health Organization.

⁷² Sandra Liebenberg, *Socio-Economic Rights: Adjudication under a Transformative Constitution* (Cape Town: Juta Academic, 2010) (noting the arguments that the obligation to respect, in its negative manifestations, is not subject to progressive realization). See also Report of the UN High Commissioner for Human Rights, A/HRC/4/20, 29 January

The previously approaches to understanding ‘progressive realization’ – sounding in the minimum core concept, non-retrogression, or comparative ranking – are connected differently with time. In the first, the minimum core analysis removes time as an adjustable standard: the core obligations are immediate and no delay is countenanced, although non-core obligations are tolerated as those for which the postponement of realization is acceptable (although, in at least some accounts, still accountable⁷³). In the second, non-retrogression views time as a path in which materialization may progress, and thus flags moves in the wrong direction: the present status quo must be protected, and any diminishment of rights-protections are immediately suspect (although may be justified on certain proportionate, often time-sensitive terms).⁷⁴ By contrast, in the third approach, indicators tie into their assessments a notion of progress that runs across different aspects of rights fulfilment, making time’s passing of the nature of rights materialization. Thus, while indicators can be disaggregated by time⁷⁵ – as well as, as is common, by gender, race, or urban versus rural residence – these are methods of measurement, not castigation. And although the information contained in indicators can ground a theory of infringement, standing alone they favour longitudinal studies and multiple ‘objective criteria’,⁷⁶ without explicit time caps or frames. These viewpoints were not inevitable, as the historical debates about the concept of ‘progressive realization’ make clear.

A. Time frames and time limits

Earlier debates about the ICESCR reveal that a more robust temporal accountability was suggested. In the original formulation of progressive realization, there were proposals to insert time limits into the concept. The Third Committee of the General Assembly and the United

2007, para. 11. For the view of the typology as ‘essentially static’, see Olivier De Schutter, ‘Introduction’, in Olivier De Schutter (ed.), *Economic, Social and Cultural Rights as Human Rights*, p. xix.

⁷³ E.g., General Comment No 13.

⁷⁴ Katharine G. Young, ‘Proportionality, Reasonableness, and Economic and Social Rights’, in Vicki C. Jackson & Mark V. Tushnet (eds.), *Proportionality: New Frontiers, New Challenges* (Cambridge: Cambridge University Press, 2017); see also Xenophon Contiades & Alkmene Fotiadou, ‘Social Rights in the Age of Proportionality: Global Economic Crisis and Constitutional Litigation’ (2012) 10 *International Journal of Constitutional Law* 660. Restrictions may be proportionate because of their timeliness or temporariness, but at times this is a separate inquiry.

⁷⁵ For a general account of bringing temporal measures into the social science, see Paul Pierson, *Politics in Time: History, Institutions and Social Analysis* (Princeton University Press, 2004).

⁷⁶ CESCR, ‘Evaluation of the Obligation to Take Steps to the Maximum of Available Resources’, para. 10.

Nations Human Rights Commission, when negotiating the treaties, debated the idea. The representative of the newly independent Congo, for example, proposed to include a reasonable time limit under progressive realization, on the theory of converting certain obligations to a more timely, calculable, and reliable standard.⁷⁷ Such a proposal was opposed by the representative from Chile, who felt that states should be entitled to proceed according to a time scale determined by their own resources;⁷⁸ a view that ultimately carried. Similarly, a proposal by Costa Rica to introduce the words ‘and at an accelerated rate’ after the word ‘progressively’ was aimed at preventing the use of delaying tactics by state parties.⁷⁹ During a working group, the Egyptian delegate Mahmud Azmi had argued that the phrase ‘if necessary’ should be inserted after the term ‘progressively’, thereby signalling the applicability of the clause only to obligations requiring time.⁸⁰ Again, these amendments were not accepted, and the Third Committee responsible for drafting the two covenants settled on the current formula of progressive realization for the ICESCR,⁸¹ with significant support from the U.S.

This is not to say that timelines and timeliness were not introduced elsewhere. Discrete obligations were accompanied by a more fixed time scale. The obligation to secure free and compulsory primary education for children, for example, was made temporally accountable in both conduct and result. States presently without primary education were required, on becoming a party, to commit to undertake, ‘within two years, to work out and adopt a detailed plan of action ... within a reasonable number of years, to be fixed in the plan’.⁸² Similarly, the reporting requirement for states was also accompanied by a stipulated time period – of one year.⁸³

⁷⁷ Proposal of Mr. Sita (Congo), UNGA Third Committee (1962), discussed in Ben Saul, David Kinley & Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials* (Oxford: Oxford University Press, 2014) p. 154. The *travaux* of the ICCPR also indicate an eagerness to include specified time limits, ‘reasonable’ time limits, or the requirement that each State fix its own time limit in its instrument of ratification. See McGoldrick, ‘The Human Rights Committee’, p. 12.

⁷⁸ A/C.3/SR.1181, at 237, para. 26 (1962); discussed by Craven, ‘A Perspective on its Development’, p. 131.

⁷⁹ Proposal by Mr. Redondo (Costa Rica), UNGA Third Committee (1962) 17 UN GAOR C.3 (1025th mtg.), 26 November 1962, UN Doc. A/C.3/L.1025, cited in Alston & Quinn, ‘Nature and Scope’, 177.

⁸⁰ Commission on Human Rights, Summary Record of the 236th meeting, 10 May 1951, E/CN.4/SR.236, 18, discussed by Burke, ‘Some Rights Are More Equal’, 434.

⁸¹ ICESCR, art. 2(1); see also Way, ‘The “Myth” and Mystery’.

⁸² ICESCR, art. 14

⁸³ ICESCR, art. 17.

In the intervening half century of the Committee’s scrutiny over state reports, Concluding Observations, and its multiple General Comments, new methods to monitor, if not regulate, the passing of time have been introduced. For example, the requirement of explicit time frames is present within many ‘structural indicators’ for economic and social rights. Routinely, discrete economic and social rights measurements depend upon the ‘time frame and coverage of national policy’: for example, the structural indicators for indicating the progressive realization of the right to health include time frames for national policies on sexual and reproductive health, abortion, foetal sex determination policy, child health and nutrition, physical and mental health, medicines access, and for national policies for persons with disabilities.⁸⁴ Measures to promote the rights of the child, as well as the right to food, have included time frames for achievement.⁸⁵ In measures to realize the right to housing, public housing programs are required to have, alongside plans of action, and in a concession to the perspective of rights-holders, published and transparent wait lists, with express estimates of fulfilment.⁸⁶ And when the Committee has outlined action in relation to austerity, it required time frames in which steps were to be taken.⁸⁷

Other human rights regimes have made use of these trends. In the parallel regime of disability rights, for example, the recommendations for monitoring progressive realization have been markedly concrete. The Committee on the Rights of Persons with Disabilities has required, for example, a plan of action by states, which includes ‘(a) a time frame for implementing economic, social and cultural rights, (b) time-bound benchmarks of achievement and (c) indicators of success.’⁸⁸ In contrast, the enterprise of monitoring sustainable development goals, which collect information not on human rights compliance but rather on performance indicators for meeting

⁸⁴ Office of the United Nations High Commission for Human Rights and WHO, *The Right to Health*, Structural indicators for the right to the enjoyment of the highest attainable standard of physical and mental health: Table 7.1, Merry, UN Office of the High Commissioner for Human Rights, 2012a: Such timeframes extend to other policies as an incident of quantitative data measurement: 2012, p. 17.

⁸⁵ See, e.g. CESCR General Comment No. 12 (2000): The right to adequate food (E/C.12/1999/5), para. 29; General Comment No. 14, para. 56; FAO, *The Voluntary Guidelines to Support the Progressive Realization of the Right to Food in the Context of National Food Security* (2004), Guideline 3.

⁸⁶ Rory O’Connell, Aoife Nolan, Colin Harvey, Mira Dutschke & Eoin Rooney, *Applying an International Human Rights Framework to State Budget Allocations: Rights and Resources* (Routledge, 2014).

⁸⁷ E.g., CESCR, ‘An Evaluation of the Obligation of “Maximum Available Resources”’, para. 8(e) (alongside proportionality)

⁸⁸ UN Handbook, *Monitoring the Convention on the Rights of Persons with Disabilities*, HR/P/PT/17, p. 29, available at: http://www.ohchr.org/Documents/Publications/Disabilities_training_17EN.pdf (accessed, 12 June 2018).

timed development goals (now by 2030), use time frames and outcomes as an explicit method of pressure.⁸⁹

B. The immediate/progressive distinction

Just as the alternative approaches of time limits or time scales offer a different perspective on progressive realization, they also challenge the immediate/progressive distinction that has proved so immovable. The distinction is especially problematic when invoked to maintain the separation of the categories of so-called ‘first generation’ and ‘second generation’ human rights. This is because it is inaccurate. For instance, the obligations to ‘respect and protect’ civil and political rights under the ICCPR,⁹⁰ despite lying outside of notions of ‘progressive realization’, and understood as subject to ‘immediate effect’, also record acceptable time frames for compliance. A right to a trial without undue delay, for example, is specified in a number of international human rights treaties. While there is no specific time frame by which the trial must occur,⁹¹ commentators suggest that a 20 month maximum may have crystallized. The prohibition on cruel and degrading treatment is also accompanied by time periods for respecting certain obligations, such as by when medical care should be provided to prisoners (in an appropriate and timely fashion).⁹²

The Human Rights Committee has suggested that ‘immediacy’ does not equate with ‘instant’. Moreover, if an infringement of a civil and/or political right is found on a large scale, a measure of delay may be a feature of redress. For example, commentators have noted that perhaps the

⁸⁹ E.g., United Nations, *Statistics and indicators for the post-2015 development agenda*, available at: https://sustainabledevelopment.un.org/content/documents/1997UNTT_MonitoringReport_WEB.pdf (accessed 12 June 2018).

⁹⁰ ICCPR, art. 2(1).

⁹¹ ICCPR, art. 9; Guzman & Linos, ‘Human Rights Backsliding’, 627-9, noting amongst other sources OHCHR and International Bar Association, *Human Rights in The Administration of Justice: A Manual on Human Rights for Judges, Prosecutors And Lawyers* (Geneva: United Nations, 2003), pp. 267-71, available at: <http://www.ohchr.org/Documents/Publications/training9Titleen.pdf> (accessed 12 June 2018). The Human Rights Committee has held that a delay of 24 months, 29 months, 31 months and longer, between arrest and trial, all violate article 14(3)(c) of the ICCPR; a delay of 18 months, however, has been considered not unreasonable.

⁹² ICCPR, arts. 6, 7, 10. See, e.g., Human Rights Committee, *Lantsova v. Russian Federation* (26 March 2002) UN Doc. CCPR/C/74/763/1997, para. 9(2); Rick Lines, ‘The right to health of prisoners in international human rights law’ (2008) 4 *International Journal of Prisoner Health*, 3, 22-4.

most quintessentially ‘negative’, ‘immediate’ obligation (the prohibition on torture) may entail a timed roll-out for remediation.⁹³ Similarly, even obligations of non-discrimination – which the Committee has recognized as immediate – are often accompanied by some delay. The classic equal protection case of *Brown v. Board of Education*, to take a prominent domestic example, was met with a rolled-out remedy; the United States Supreme Court requiring states to end school segregation ‘with all deliberate speed’.⁹⁴ Only through repeated litigations did that obligation crystallize into a more immediate requirement.

A common thread in measuring time, in relation to the purportedly ‘immediate’ obligations attached to civil and political rights, is to ascertain its proportionality: the duration of rights-deprivation must not be disproportionate. This standard works with a robust assumption around the importance of civil and political rights and the seriousness of infringement. Yet the standard of proportionality has proved less robust as against infringements of economic and social rights.⁹⁵ Along with the deference of assessment mentioned above, the failure to realize economic and social rights have long been associated with explicit discrimination, patterns of prejudice and internalized low expectations.⁹⁶ This presents the worry that adjudicators or assessors measuring the proportionality of delay for economic and social rights realization will be more deferential and/or tolerate greater periods of deprivation. One response to this problem is to increase time-based measures into assessments of rights infringements. Another, pursued in an introductory manner below, is to examine more carefully one impact of delay – in particular, the experience of waiting – to highlight its effect on putative rights-claimants.

⁹³ Tung Yin, ‘Ending the War on Terrorism One Terrorist at a Time’ (2005) 29 *Harvard Journal of Law & Public Policy*, 149, 209-10.

⁹⁴ *Brown II*, 349 U.S. 294 (1955).

⁹⁵ Young, ‘Proportionality’.

⁹⁶ Benjamin Authers & Hilary Charlesworth, ‘The Crisis and the Quotidian in International Human Rights Law’ (2012) 44 *Netherlands Yearbook of International Law*, 19, 31; see also Varun Gauri, ‘Social Rights and Economics: Claims to Health Care and Education in Developing Countries’, in Philip Alston & Mary Robinson (eds.), *Human Rights and Development: Towards Mutual Reinforcement* (Washington, D.C.: The World Bank 2005), p. 65.

IV. Waiting for Progressive Realization

The primary aim of this chapter is to draw attention to the relative absence of temporal accountability among contemporary interpretations of economic and social rights, drawing attention to the ‘progressive realization’ standard of obligation and its supplements under the ICESCR. Clearly, the recognition of ‘immediate’ obligations, and the development of time frames and time limits, give some prominence to the unacceptability of delay in certain cases. Yet my claim is that our assessment of economic and social rights requires both more developed metrics – of how long a delay is too long – and a more nuanced approach to time. In this latter respect, I argue that waiting for rights can conflict with other basic goals of rights recognition. In making clear this argument, it is worth turning from the perspective of the state to the perspective of the rights-holder: to how time is experienced, rather than measured. Although the state is obviously present in structuring this experience, this perspective points to a compounded experience of rights deprivation, that has its own effects on rights.

The modern experience of time is an accelerated one: as a result of drastic changes in transportation, communication, production and exchange technologies, the pace of life has, by many accounts, sped up.⁹⁷ When we perceive delay and are forced to wait for goods, services, or opportunities, for example, we are often only experiencing the impression of delay – an impatience which may be linked to the immense time savings that many of us currently enjoy, in comparison with previous forms of delivery or fulfilment.⁹⁸ And yet these time savings have been disproportionality distributed, and the experience of delay is oftentimes material – and ubiquitous – for certain groups, particularly persons with disabilities, women, and ethnic minorities, and particular those whose ascriptive status intersects – as they more often do – with the experience of poverty.

⁹⁷ E.g. Hartmut Rosa, *Social Acceleration: A New Theory of Modernity*, Jonathan Trejo-Mathys (trans.) (New York: Columbia University Press, 2015); William Scheuerman, ‘Liberal Democracy and the Empire of Speed’ (2001) 34 *Polity* 41-67.

⁹⁸ Rosa, ‘Social Acceleration’, pp. 84-5.

It is in this accelerated, stratified era, that the delay structured into rights realization – and gaps in the international doctrine of progressive realization – take on new significance. A clear implication should be that, at the very least, the measurement of time – and accountability of delay – must include an assessment – from the perspective of the rights-holder - of waiting. The justification of ‘waiting’, implicit in the notion of progressive realization, is I suggest at odds with the moral agency and mobilization associated with rights. This is partly, too, an effect of its unequal distribution. Along with the capitalist premise that ‘time is money’, commodified time allows those who can afford it to purchase the removal of delay, leaving those who cannot to simply wait. The result is a new form of differentiation between the haves and the have-nots that must enter into analyses of rights.

Of course, this experience of waiting is not wholly separable from the teleology of the postwar human rights project. As mentioned above, the UDHR settled on an international symbol of human progress: a trajectory of advancement that Mark Goodale has analogized to Martin Luther King, Jr.’s ‘arc of the moral universe’.⁹⁹ For Goodale, the universalism of human rights is suggestive of a ‘moral mirage: it attracts people to it, but it gets fainter the closer the approach’.¹⁰⁰ This is not necessarily inimical to the mobilizing potential of human rights: Goodale is among those who assert that the gap between the experience of rights and their appeal and legitimacy does not necessarily undermine the strength of the discourse.¹⁰¹ Others are more skeptical, suggesting that the failure to deliver on the promise of much human rights rhetoric, while not necessarily invalidating rights arguments, can nonetheless weaken them.¹⁰²

But what about the official acceptance of delay? Does this provide too great a challenge to the moral agency motivated by official rights rhetoric? What are the other effects of waiting for

⁹⁹ Mark Goodale, ‘Human Rights and Moral Agency’, in Cindy Holder & David Reidy (eds.), *Human Rights: The Hard Questions* (Cambridge: Cambridge University Press, 2012), p. 421.

¹⁰⁰ *Ibid.*, p. 420.

¹⁰¹ Michael Goodhart, ‘Human Rights and the Politics of Contestation’, in Mark Goodale (ed.), *Human Rights at the Crossroads* (Oxford: Oxford University Press, 2013) pp. 31-44, at 40 (noting ‘repeated abuses of human rights ... may even have strengthened’ the discourse).

¹⁰² Joseph Raz, ‘Human Rights without Foundations’, in Samantha Besson & John Tasioulas (eds.), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010) pp. 321-339, at 322.

rights? As Martin Luther King Jr. himself noted, in a key text of the American civil rights movement:

For years now I have heard the word ‘Wait!’ It rings in the ear of every Negro with a piercing familiarity. This ‘wait’ has almost always meant ‘never.’ We must come to see with the distinguished jurist of yesterday that ‘justice too long delayed is justice denied.’¹⁰³

Clearly, frustration with waiting can trigger the social movement action necessary for rights materialization to occur.¹⁰⁴ And yet the experience of delay can also work in other ways. While it is not the purpose of this chapter to provide comprehensive evidence of the effects of waiting, I want to conclude with a number of observations, suggestive of a number of new questions for the field. This takes me, not to ethnographies of human rights, but rather to ethnographies of waiting that have been developed in the social sciences, particular those that track how the daily experiences of ordinary people construct an idea of the state.¹⁰⁵ Such accounts have been slow to appear – the difficulties of observing the absence, rather than the presence, of a recordable activity, have often directed researchers’ attention elsewhere.¹⁰⁶ Moreover, there is a common sense acceptance of the inevitability of waiting: ‘everybody – state officials, social workers, and the poor themselves – thinks of the waiting of the destitute as something obvious and unavoidable.’¹⁰⁷ This acceptance of waiting may be one more aspect of the adaptive preferences

¹⁰³ Martin Luther King Jr.’s, ‘Letter from Birmingham Jail’, *The Atlantic*, April 16, 1963; with an implied reference to the Magna Carta.

¹⁰⁴ Ibid: King’s letter offers a prominent example. See also, e.g., the documentation of social movement protest in South Africa by Jackie Dugard, Tshepo Madlingozi, & Kate Tissington, ‘Rights-Compromised or Rights-Savvy? The Use of Rights-Based Strategies to Advance Socio-Economic Struggles by Abahlali baseMjondolo, the South African Shack-Dwellers’ movement’, in Helena Alviar García, Karl E. Klare, & Lucy A. Williams (eds.), *Social and Economic Rights in Theory and Practice: Critical Inquiries* (Routledge, 2015), pp. 23-43; see also the chapters by Liebenberg and Ryan Chance in this volume.

¹⁰⁵ Akhil Gupta, ‘Narratives of Corruption: Anthropological and Fictional; Accounts of the Indian State’ (2005) 6 *Ethnography*, 5-34.

¹⁰⁶ Javier Auyero, *Patients of the State: The Politics of Waiting in Argentina* (Durham, NC: Duke University Press, 2012), p. 123.

¹⁰⁷ Ibid.; see also Pierre Bourdieu, *Practical Reason*, Randal Johnson (trans.) (Stanford: Stanford University Press, 1998) (describing the doxa of welfare).

and ‘realism’ that can mislead many about the misfortunes – or rights infringements – they experience.¹⁰⁸

By contrasting these ethnographies of waiting with the delay factored into rights, I want to suggest that theories of rights need to be more sensitive to time from the point of view of rights-holders: not in any absolutist sense of avoiding the demarcation of special interests as ‘rights’ if they cannot be realized immediately; but rather in a more context-sensitive appreciation of its effects. The following are features of waiting that run counter to the promise of rights. Rather than the inevitable result of variation and flexibility, progressive realization – and the lapses of time thereby tolerated – becomes a more problematic concept. In particular, the experience of waiting in its current forms – which I explore here in its (a) protracted, (b) uncertain, and (c) individuated manifestations – require closer attention. Far from mobilizing individuals to agitate for social change and claim their rights, the experience of waiting can bring about the opposite result.

A. Protracted Waiting

First, the waiting associated with the realization of rights has assumed a protracted, extended, form, in many parts of the world.¹⁰⁹ Ethnographic studies of asylum seekers and refugees, urban slum dwellers, the unemployed and the rural poor, all highlight the experience of long-term waiting – often in staggering terms.¹¹⁰ Some have argued that such experiences have increased, especially amongst the poorest, since the 1960s: one commentator notes that whole countries, such as Zimbabwe in 2008, are effectively waiting for a better future.¹¹¹ Indeed, waiting may be so protracted that it prompts the abandonment of the expectation of progress, at least in local

¹⁰⁸ Sen, ‘The Idea of Justice’, p. 47 (describing ‘unreasoned fatalism’); see also Gauri, ‘Social Rights and Economics’, p. 65.

¹⁰⁹ Auyero, ‘Patients of the State’, p. 111.

¹¹⁰ These are described in Craig Jeffrey, *Timepass: Youth, Class and the Politics of Waiting in India* (Stanford: Stanford University Press, 2010), pp. 3-9. See also Rebecca Rotter, ‘Waiting in the asylum determination process: Just an empty interlude?’ (2015) 25 *Time & Society* 80 - 101.

¹¹¹ Jeffrey, ‘Timepass’, citing Jean-François Bayart, *Global Subjects: A Political Critique of Globalization* (Cambridge: Polity Press, 2007); Pierre Bourdieu, *Pascalian Meditations*, Richard Nice (trans.) (Stanford: Stanford University Press, 2000), p.4 (noting that many are obliged to ‘wait for everything to come from others’).

terms. Anthropologist James Ferguson has observed a shift, in fieldwork in Africa, ‘from a focus on temporal dynamics of societal progress toward a new reliance on individual spatial mobility’: that agency is accessed not by reliance on progress, but on egress.¹¹²

Discrete increases in waiting time are certainly in evidence in both the Global North and South, such as in the delivery of health care, education, or water services.¹¹³ The growing privatization of many sectors, while vaunted as increasing efficiency in service delivery, often externalizes many costs through time. While market tools can actively minimize the wait for those who are able to pay, they increase it substantially for others.¹¹⁴ Arguably, then, the turn to market-based reforms make time measures all the more pressing, as well as other benchmarks.

This feature of extended waiting is complicated by the fact that, although it can be structured generally by the law, the experience of waiting is not universal. People experience waiting subjectively – and it can be surmised that the very young and very old, or the sick or disabled, experience greater costs than others who wait. Yet these costs are unaccounted for in assigning economic value to time, as a loss of opportunity to otherwise increase social utility or productivity.¹¹⁵ The burden of protracted waiting is therefore only glimpsed by time-based statistics of passing days, months or years. A non-linear, non-chronological, understanding of waiting must also be factored into these assessments.

B. Uncertain Waiting

Second, alongside protracted waiting comes disempowerment, independently occurring alongside the rights-deprivation in question. In many ethnographic studies, the experience of

¹¹² James Ferguson, *Global Shadows: Africa in the Neoliberal World Order* (Durham, NC: Duke University Press, 2006), pp. 190-1.

¹¹³ This is demonstrated well in chapters by Flood et. al., and Sengupta et. al., in this volume.

¹¹⁴ Michael J. Sandel, *What Money Can't Buy: The Moral Limits of Markets* (New York: Farrar, Straus and Giroux, 2012), pp. 17-42.

¹¹⁵ E.g. Gary Becker, ‘A Theory of the Allocation of Time’ (1965) 75 *The Economic Journal* 493. Such measures have become more nuanced, for example, in the quality-adjusted life year (QALY), which allows, for example, the assessment of health outcomes based on every quality year of life saved. For analysis with respect to human rights, see Alicia Ely Yamin & Ole Frithjof Norheim, ‘Taking Equality Seriously: Applying Human Rights Frameworks to Priority Setting in Health’ (2014) 36 *Human Rights Quarterly* 296-324.

waiting is directly connected to the hopes that people have inscribed, of a particular future, which continue to elude them. The experience of long-term waiting is not necessarily caused by the promise of rights, but it can coincide problematically with it: the effects of limbo occur, ‘wherein people have been incited by powerful institutions to believe in particular visions of the future yet lack the means to realize their aspirations.’¹¹⁶ Although such experiences do not always lead to passivity,¹¹⁷ they often extend over many years and even decades. Sociologist Javier Auyero, for example, recounts the experience of one community in Argentina, enduring the wait for relocation from a highly toxic shantytown on the outskirts of Buenos Aires. The children of the community had constantly tested for high levels of lead and carcinogens, and municipal agents had visited often; nonetheless, the wait for some had extended to 30 years.¹¹⁸ Auyero’s study documents the effects of this experience in Kafkaesque terms: residents were ‘lured’ with vague hopes, and ‘tormented’ with unclear threats, experiencing not only the negative health impacts expected to occur (which we can categorize in terms of the state’s failure to protect the right to health, alongside other infringements) but also the profoundly disempowering experience of waiting. Through this experience, recounts Auyero, residents learned to perceive that ‘the motor or the initiative of transformative action lies elsewhere’.¹¹⁹

The effects of bureaucratic control on individual agency are, of course, well known: one prominent theme from Frances Fox Piven and Richard Cloward’s classic study of access to welfare in the United States, was the effect of the interaction between welfare recipients and administrative bodies. The authors concluded that regular postponements and casual alterations of welfare distributions wore out the welfare recipients and discouraged them from seeking other benefits to which they were formally entitled.¹²⁰ Auyero’s study, too, documented the mundane interactions between poor people and the state behind Argentina’s housing and social security determinations. In examining such determinations over a more than 10-year period, he noted not

¹¹⁶ Jeffrey, ‘Timepass’, p. 3

¹¹⁷ Ibid., at 4, notes that some activist organizations adopt their own timelines and ignore others, thereby refusing to wait; such examples, like the techniques of the Abahlali baseMjondolo movement, are worthy of greater study; see also Rotter, ‘Just an empty interlude?’.

¹¹⁸ Auyero, ‘Patients of the State’, p. 139.

¹¹⁹ Ibid., pp. 134-5.

¹²⁰ Auyero, ‘Patients of the State’, p. 107; Frances Fox Piven & Richard Cloward, *Poor People’s Movements: Why They Succeed, How They Fail* (New York: Vintage Books, 1977).

only the prolonged experience of deprivation, but also the creation of confusion, uncertainty and the reinforcement of subordination and political resignation in the lives of the poor. This experience of bureaucratic control of the waiting experience was reinforced by arbitrary actions, reversals, and inconsistencies. ‘Those in need,’ he described, ‘come to the welfare office and are faced with the general disorganization and disinformation ... along with endless delays and also with the sudden rising of surprise paydays, and therefore they quickly learn that this is a space to be a complying welfare client.’ This reduces them to act, suggests Auyero, ‘not as citizens with rightful claims but as patients of the state.’¹²¹

These findings are also consistent with the more general studies of waiting, which, although dependent on the object of the wait, summarize the impressions of their subjects that ‘uncertain waits are longer than known, finite waits,’ ‘unexplained waits are longer than explained waits,’ ‘unfair waits are longer than reasonable waits,’ ‘the more valuable the service, the more patience the customer will show’; and ‘solo waits feel longer than group waits.’¹²² Commonly documented experiences of waiting for state goods and services are those of general limbo and passivity – one researcher categorized the experiences of ‘surplus time,’ ‘heightened suspense,’ ‘lost time,’ and ‘panic and inertia,’¹²³ These experiences should be evaluated as independent from (although of course compounded by) any cognizable rights-deprivation. But of course, such findings become even more poignant and urgent when related to the dignity, freedom, and equality concerns of rights, which are addressed to interests of special concern.

C. Competition through Waiting

Finally, where agency exists, the experience of waiting introduces a different political dimension to rights. In previous work, I have observed that waiting for action by the state can engender enmity between similarly situated claimants, as to who should be served first. In other words, waiting inserts the logic of competition where situational similarity invites a logic of

¹²¹ Auyero, ‘Patients of the State’, pp. 121-23.

¹²² Billy Ehn & Orvar Löfgren, *The Secret World of Doing Nothing* (Berkeley: University of California Press, 2010), pp. 23-5

¹²³ Craig Jeffrey, ‘Guest Editorial: Waiting’ (2008) 26 *Environment and Planning D: Society and Space* 954-8 at 957.

cooperation.¹²⁴ This compounds the noted individuation that can occur in the politics of rights, whereby the backdrop of claim-making, litigation, and individualized remedies can sometimes split collective efforts to secure resources. In my work on the tensions created within ‘queues’ for goods and services to be provided by the state, I found that the institutionalized waiting often narrowed the expectations of realization ‘to an idealized priority line’.¹²⁵ Those waiting often assumed that others who succeeded in accessing housing, or health care, had done so only as a result of ‘jumping the queue’: through illicit payments, political connections, or ‘unjust’ appeals to rights. This included those who had approached lawyers and courts to prevent evictions, or who litigated for health care outside of a waitlist.¹²⁶ Although occurring in very different settings, these examples revealed tensions in the way that individual cases were given priority, or were assumed to have gained priority.

Waiting for rights could, in theory, engender the type of solidarity and agitation that have been central to rights campaigns;¹²⁷ yet such forms of social mobilization become notoriously more complex in campaigns for services rather than mere resistance. Moreover, waiting itself stratifies, just as non-recognition of rights can do.¹²⁸ This means that, while rights agitation can be engendered, it can just as readily be thwarted. In part, this is because a focus on waiting draws claimants’ political focus to direct forms of state assistance, distracting from the more nuanced, regulative, modes in which rights, especially economic and social rights, can be realized. My research on the ‘queue talk’ around housing, for example, distracted from the political stakes of other issues, such as mortgage subsidies, or zoning protections, just as it insisted on the patience of those on the list.¹²⁹ These political effects also run counter to the hopes of agitation and mobilization inherent in rights.

¹²⁴ Katharine G. Young, ‘Rights and Queues: On Distributive Contests in the Modern State’ (2016) 55 *Columbia Journal of Transnational Law* 65.

¹²⁵ Katharine G. Young, ‘When Rights-Talk Meets Queue-Talk’, in Mike Hanne & Robert Weisberg (eds.), *Narrative and Metaphor in the Law* (Cambridge: Cambridge University Press, 2018), p. 297.

¹²⁶ Young, ‘Rights and Queues’.

¹²⁷ E.g., King, ‘Letter from a Birmingham Jail’.

¹²⁸ Barry Schwartz, *Queuing and Waiting: Studies in the Social Organization of Access and Delay* (Chicago: University of Chicago Press, 1975).

¹²⁹ Young, ‘When Queue-Talk Meets Rights-Talk’; see also Dugard, Madlingozi, & Tissington, ‘Rights-Compromised or Rights-Savvy?’, pp. 23-43.

V. Conclusion

This chapter has advanced two criticisms of rights realization over time. As a standard of state accountability, progressive realization has been interpreted with insufficient attention to the need for temporal benchmarks beyond the ‘immediate’. And as an official justification of postponement, progressive realization has structured an experience of waiting that confounds the forms of agency needed for rights agitation. Problems of waiting, priority, access and delay are ubiquitous in economic and social rights claims, especially with respect to the positive obligations, on the part of the state, to protect or fulfil rights. The developing standards of human rights law must become more responsive, both to the metrics of lost time and to the politics of waiting. While related, these two issues call attention to different fields of analysis: of the measures needed for rights-based accountability and of the politics that animates accountability in the first place.