4. Classifying NGOs: Who Fulfills Social Rights, Who Fulfills State Obligations?

If NGOs fulfill the social rights obligations of the state, then social rights law should shape the way that the state regulates NGOs. Within the least developed countries of Africa, where structural and financial limitations prevent even well-meaning governments from eradicating widespread poverty and properly managing social risks, and where nonprofits are major players in the realization and enjoyment of social rights, understanding the state's regulation of nonprofits is crucial to evaluating whether the state is fulfilling its social rights obligations. The ECSR Committee has recognized how governmental restrictions on NGOs can interfere with the social rights of beneficiaries, but it has not gone so far as to conclude that such restrictions constitute violations of the states' social rights obligations, or to develop its reasoning with some depth.[535] What is missing is an examination of how the state's social rights obligations toward the beneficiary can give rise to implicit state obligations regarding the manner in which they regulate nonprofit actors. The present chapter builds upon this idea in order to classify the various ways that NGOs might advance the realization of social rights in relation to the state's own efforts and obligations to do so.

Although typologies already exist that categorize NGOs based on their relationship to the state, they do not take into account the state's social rights obligations. In the present chapter, NGO-state relationships are categorized in accordance with the propensity of NGOs to fulfill the state's social rights obligations and bring about the realization of social rights. Each category represents a different functional role for NGOs and is associated

535 E.g., Concluding Observations on the Third Period Report on Angola, Committee on Economic, Social and Cultural Rights, UN Doc. E/C.12/AGO/CO/3 (UN 2008) para. 13; Concluding Observations on the First through Third Period Reports on Ethiopia, Committee on Economic, Social and Cultural Rights, UN Doc. E/C.12/ETH/CO/1-3 (UN 2012) para. 7; Concluding Observations on the Initial Period Report of Uganda, Committee on Economic, Social and Cultural Rights, UN Doc. E/C.12/UGA/CO/1 (UN 2015) para. 11; Concluding Observations on the Fourth and Fifth Period Report of Angola, Committee on Economic, Social and Cultural Rights, UN Doc. E/C.12/UGA/CO/4-5 (UN 2015) paras. 17-18.

with a distinct set of regulatory duties that are imposed upon the state by social rights law. The next chapter then outlines the specific obligations of the state that arise in the context of certain NGO types that is essential for the advancement of social rights and fulfillment of state duties. The chapter after that considers how far states can go to restrict such essential NGOs.

4.1. Existing NGO Classifications in the Literature

Although there are many classifications in academic literature of NGOs and their relationships with government, none of these groupings appears to be based on the legal obligations of states. This is mainly due to the simple fact that the analysts are predominantly scholars from non-legal disciples. The way in which NGOs and governments relate to one another has been theorized from at least four perspectives:[536] the *alignment* of aims and strategies;[537] how *embedded* NGOs are within the state's social policy framework;[538] the relative *capacity* of each sector to deliver and finance social services;[539] and the relative *function* of NGO services vis-à-vis the state's own provision of services.[540]

Of the four perspectives listed above, two provide meaningful insight into how various groups of NGOs might advance the realization of social rights or fulfill state obligations. These two perspectives are the relative *capacity* and relative *function* of the nonprofit sector. As will be demonstrated later, the social rights obligations of a state under international human rights law are defined by the state's *capacity* to advance the realization of social rights. However, some states do not ensure the level of achievement that they are required to ensure, thereby leaving behind a service gap where nonprofits step in. This suggests that understanding the relative ca-

536 There is some overlap among these four dimensions. In reality, NGO-government relations can occupy multiple forms within each dimension at any particular time. These models offer heuristic value as analytical tools.

537 Adil Najam, 'The Four-C's of Third Sector-Government Relations: Cooperation, Confrontation, Complementarity, and Co-Optation' 10 Nonprofit Management & Leadership 375 (2000).

538 Salamon and Anheier (1998).

539 Cammett and MacLean (2014) *The Politics of Non-State Welfare*.

540 Dennis R. Young, 'Alternative Models of Government-Nonprofit Sector Relations: Theoretical and International Perspectives', 29 Nonprofit and Voluntary Sector Quarterly 149 (2000).

pacity and function of NGOs *vis-à-vis* the government will be important for determining whether nonprofit activities fulfill the state's obligations. How restrictive nonprofit regulations can be will depend on the extent to which NGOs perform state-like functions, and how important those functions are for the realization of social rights. Unfortunately, the existing taxonomies of NGOs that are based on relative capacity and relative functions do not provide much insight into how restrictive NGO laws are allowed to be, thereby highlighting the need for a distinctively legal-based classification of NGO-government relations.

4.1.1. Classification Based on Relative Capacity

Melanie Cammett and Lauren M. MacLean developed a classification of NGO-to-state relations based on their relative capacity to provide services.[541] The categories are co-production (high state capacity; high NGO capacity), state domination (high state capacity; low NGO capacity), substitution (low state capacity; high NGO capacity) and appropriation (low state capacity; low NGO capacity).[542] The authors' are concerned with the manner in which service provision can take place in each scenario, rather than the degree to which NGOs fulfill state obligations or advance realization *per se*.

While Cammett and MacLean's work cannot be used to address legal issues that are symptomatic of nonprofit provision in Africa's LDCs, it can be helpful in problematizing them in the first place by explaining how service provision methods vary according to the relative capacities of state and NGOs. The substitution and appropriation modes represent two scenarios commonly found across the continent because the vast majority of African states have low capacity for service provision.[543] What legal issues can arise from a social rights perspective when the state's capacity to provide services is rather low?

In substitutional relationships, non-state entities exhibit a high capacity to provide services while the state's own capacity is rather low. Here, NGOs can provide services in areas neglected by the state. This raises concerns about how the social rights of beneficiaries might be affected if the state severely restricts the activities of NGOs that substitute for state provi-

541 Cammett and MacLean (2014) *The Politics of Non-State Welfare.*
542 MacLean (2017) table 1.
543 Ibid 4-5.

sion. In the appropriation mode, both the state and non-state providers exhibit low capacity for service provision. The authors hypothesize that NGOs in this scenario will act as brokers of the services that are in limited supply by appropriating access to these services. This kind of relationship has been theorized by Geof Wood as a potential feature of low-capacity states, which he refers to as informal security regimes. He describes this arrangement as a collection of hierarchical "relations of adverse incorporation and clientelism", which can be detrimental to beneficiaries since it tends to reproduce patterns of poverty and oppression.[544]

This raises concerns about the capability of NGOs to interfere with social rights rather than advance them. NGOs would become the culprits rather than the benefactors if they take advantage of their organizational capacity to control or distort access to services. In such cases, the state certainly has some obligation to protect the rights of beneficiaries. Moreover, it is worth noting that the appropriation model does not capture comprehensively all instances in which the state must protect beneficiaries from NGOs. For example, NGOs may harm beneficiaries even when both the state and the NGO enjoy high capacities for service provision.

By considering the relative capacities of states and NGOs to provide services, Cammett and MacLean's work offers a framework that is useful for thinking about the legal relations between parties. It provokes the relevant legal questions, but this is a consequence rather than an aim of their work. What is still missing is a categorization of NGOs that indicates how different types of NGOs should be protected against restrictive regulatory measures. Moreover, the narrow focus of Cammett and MacLean's work on the provision of services does not take into consideration NGOs that bring about the realization of social rights through advocacy rather than service provision. Finally, a focus on comparative capacity is limited in its utility because it measures the *potential* for NGOs to provide services, but says nothing about how much NGOs in fact provide compared to the state. It is of legal significance whether an NGO law restricts nonprofit activities that are essential for the existing enjoyment of social rights, or whether they limit the potential for NGOs to execute activities that have not yet brought about the enjoyment of social rights. A new taxonomy is needed that is based on the degree to which NGOs in fact realize social rights, rather than merely their potential to provide services, in order to understand how restrictive an NGO law is allowed to be.

---

544 Wood, 'Informal Security Regimes: The Strength of Relations' 77. See also *supra* at part 0on the peculiarities of regulating NGOs in informal security regimes.

4.1.2. Classification Based on Relative Function

Another non-legal classification of NGOs that provides some useful insight for shaping a legally based taxonomy comes from the work of Dennis Young, who – unlike Cammett and MacLean – accounts for advocacy NGOs and not just nonprofit service providers. Young proposes three models of government-to-nonprofit relations that represent the relative function of NGOs *vis-à-vis* government.[545] In his view, nonprofits and government can engage one another in complementary, supplementary or adversarial relations. His model relies on socioeconomic factors derived from various economic theories developed by third sector scholars.[546] Young's model captures a variety of generic roles that NGOs might take in relation to the state's social policy plan, thereby inspiring certain legal inquiries. However, his work does not examine the legal character or consequences of these NGO-to-state relations.

To begin with, Young posits that NGOs that prod and criticize the state for inadequate service provision are in an adversarial relationship with the state. Such NGOs attempt to hold governments accountable and demand policy changes. This relationship is present in many African states, as evidenced in part by governmental efforts to silence NGO advocacy. In an adversarial NGO-government relationship, the key legal question is whether the state's duty to realize social rights progressively indicates a state obligation to permit NGO advocacy. This depends on whether NGO advocacy can be construed as advancing the realization of social rights. Young's work does not address this question because he is not concerned with the effect that NGOs have on the realization of social rights, but rather with their impact on the state's social policy.

In a complementary relationship, the state has incorporated NGOs into its own service provision scheme, often at the stage of delivery. NGOs are a component of the state's plan for service provision. The fact that the state has elected to incorporate NGOs into service provision suggests that the legal relationship between NGOs and the state will be characterized by close regulation and a high level of governmental support. Young's complementary relationship is based on Salamon's third-party government theory of voluntary associations, which posits that the government's weaknesses are

545 Young (2000).

546 However, the complementary model also represents relationships involving for-profit providers.

complemented by the strengths of voluntary associations, and *vice versa*.[547] Thus, the two actors work together in a complementary manner toward the implementation of social policy. Young asserts that in a complementary relationship, the government contracts or otherwise partners with providers by financing the delivery of services.

In states where the complementary arrangement is rather dominant, the underlining principle is to enhance efficiency and efficacy in service provision. Proponents of the complementary arrangement believe that efficiency and efficacy is best achieved through collaboration between government and private providers whereby, as Salamon has hypothesized, a symbiotic relationship can form.[548] The idea is that the private sector has the institutional capacity that government needs in order to delivery services; and government has the political authority to regulate sector-wide pricing and quality, thereby ensuring the suitability and accessibility of services. Government also has the institutional capability to funnel mandatory contributions or taxes into national funds, thereby ensuring that sufficient resources are available to finance the delivery of services by private providers. Complementary relations raise their own set of legal issues with respect to social rights law. The primary concerns are whether private providers are adequately fulfilling the social rights of beneficiaries, and whether the government is adequately reimbursing and regulating private providers in order to ensure that the state's social rights obligations to beneficiaries are fulfilled in a proper manner.

Young's supplementary relationship is characterized by NGOs that provide services that are not ensured by the state. In this regard, NGOs act as the functional equivalent of the state because they step into fields of provision where the state is absent. Young based his model of the supplementary relationship on the economic theory of Burton A. Weisbrod, which posits that whenever governments failed to supply services that voter demanded, nonprofit provision would expand in order to fill the unmet demand.[549] Young likewise imagines the beneficiaries collectively as power-

547 Salamon (1987).

548 Ulrich Becker and others, 'Strukturen Und Prinzipien Der Leistungserbringung Im Sozialrecht' 5 Vierteljahresschrift für Sozialrecht (VSSR) 323 (2011) 341-342. This is also in line with the principle of subsidiarity, which has a long history in German social provision and has been described as "the economic backbone of the German nonprofit sector." (Helmut K. Anheier and Wolfgang Seibel, *The Nonprofit Sector in Germany: Between State, Economy, and Society* (Manchester University Press 2001) 72, 96-98.).

549 Weisbrod (1977).

ful actors with substantial financial capabilities and political influence over the provision of services, which does not describe reality in many African countries.[550] Although Young's theoretical reasoning for how a supplementary relationship emerges within a society does not explain the emergence of nonprofits in African countries, his notion of a supplementary relationship is indeed similar to the types of relationships found in many African states. In these states, where governments lack the resources to provide all the public goods that are needed, the legal implications of a supplementary relationships is that NGOs might be fulfilling the state's social rights obligations. Young's model, however, does not address this issue because his criteria do not take into consideration what the state's social rights obligations might be in the first place. Thus, in his view, NGOs are always substituting for the state when they provide services that the state does not provide, even if the state was never obliged to provide those services in the first place.

The existing categorizations based on relative functions and capacities serve inquiries that derive from sociological, political and economic sciences. While these categories are useful for problematizing the legal issues concerned, they are not appropriate for examining the legal relationship between the various types of NGOs and the state, and how restrictive NGO laws might inhibit the state's social rights obligations. A legal inquiry grounded in a beneficiary-centered approach would be concerned with the manner in which the regulation of NGOs complies with the state's social rights obligations, how various types of NGOs might be protected differently from restrictive regulatory measures, and how the state may need to employ restrictive regulatory measures in order to protect the rights of beneficiaries from harmful NGO practices.

4.2. Deriving New Criteria from Social Rights Law

A beneficiary-centered approach to examining the legal relations between the state and different types of NGOs would be to define the relationships

550 Young does not appear to be thinking of nonprofit sectors like many in Africa that are financed predominantly through foreign funders, who in turn typically exert great influence over the content and direction of service provision. He concludes, "[i]n areas such as social services where citizens' preferences can be volatile, we can expect nonprofit provision to respond to ebbs and flows of public sentiments and consensus." (Young (2000) 152.).

on the bases of social rights law. This section reviews the social rights obligations of states according to international human rights law in order to derive from them implicitly the obligations of states toward nonprofits. These implicit obligations indicate which factors are relevant for categorizing the various NGO-state relationships. The categories should reflect whether NGOs bring about the realization of social rights in an appropriate manner, whether they work in concert with the state to do so, whether they advance minimum essential levels of social rights, and whether they fulfill the state's social rights obligations.

4.2.1. Theoretical Framework

When NGOs are significant players in the field of social welfare, whether states fulfill their social rights obligations will depend on how essential NGOs are for the realization and enjoyment of social rights, and on how states regulate essential NGOs.[551] Thus, distinguishing among NGOs in terms of their role in the fulfillment or discharging of a state's obligations, as well as whether they are essential for the realization or enjoyment of social rights, is critical to evaluating whether the state has gone too far in restricting nonprofit activities.

This theoretical framework is derived from doctrinal and normative foundations. The present section begins by discussing the legal theory of implicit duties, namely how some duties can be derived implicitly from the explicit recognition of other duties. The implication is that the social rights obligations of states, which are explicitly stated within international human rights law, give rise to implicit obligations regarding the regulation of nonprofit entities. Then, this section considers the principle of subsidiarity, which offers normative guidance on the extent to which governments should interfere with nonprofit activities that are essential for the realization or enjoyment of social rights. Together, these components indicate that highly restrictive NGO laws may very well be incompatible with the state's social rights obligations toward beneficiaries. Moreover, they provide the foundation for developing a new set of criteria for categorizing NGOs that differentiates nonprofits by their contribution to the fulfill-

551 The Committee has noted that when it examines the state's ability to meet its own Covenant obligations, it will consider the effects of assistance provided by all other actors. (General Comment No. 15: The Right to Water (2003) para. 60; General Comment No. 19: The Right to Social Security (2007) para. 84.).

ment of state duties and the realization and enjoyment of social rights. This allows for an analysis of whether regulatory measures are likely to interfere with the social rights of beneficiaries.

4.2.1.1. Doctrinal Foundations: Recognizing Indirect or Implicit Duties

The interpretive practice of recognizing implicit or indirect rights and duties allows for the construction of state obligations toward nonprofit entities that are essential for the realization and enjoyment of social rights. This is done by recognizing that such obligations arise implicitly from the social rights of beneficiaries as correlative duties that are necessary for their effective realization and enjoyment. Thus, an implicit duty is any conduct (or omission) that is necessary in order to remain in compliance with an obligation explicitly recognized under the law.

A few examples from the work of the ESCR Committee illustrate different ways in which implicit duties have already been interpreted from the ICESCR. For instance, covenant obligations explicitly recognized in one state-to-state interaction could indicate implicit obligations in another. The Committee urges,

> In relation to the negotiation and ratification of international agreements, States parties should take steps to ensure that these instruments do not adversely impact upon the right to education.[552]

Another type of implicit obligations relates to the methods of realization. These are a generic set of actions that each state should take in order to bring about the realization of covenant rights because they are necessary for the achievement of its objectives. For example, in order to fulfill their social rights obligation to achieve full realization progressively, states must understand where they are on the path to full realization, and what can be done to advance further along that path. Without some way of monitoring and assessing social welfare conditions, states cannot possibly determine how to fulfill their Covenant obligations. This indicates that regularly monitoring social welfare conditions and access social welfare interventions is part of each state's methodological obligations, although these

552 General Comment No. 13: The Right to Education (1999) para. 56.

obligations are not explicitly stated in the ICESCR.[553] Other necessary methods of implementation include creating and adopting a detailed plan of action based on the results of regular assessments,[554] ensuring adequate budgetary support, and requesting international assistance when needed.[555] Finally, an implicit obligation can also arise conditionally from the voluntary conduct of the parties. For example, a party's extensive voluntary interference with the enjoyment or realization of rights may ultimately result in that party bearing implicit responsibility for the protection of the same. In relation to the use of economic sanctions by state parties to the ICESCR, the ESCR Committee noted,

> When an external party takes upon itself even partial responsibility for the situation within a country…it also unavoidably assumes a responsibility to do all within its power to protect the economic, social and cultural rights of the affected population.[556]

The notion of implicitly derived obligations has its analogue in a separate but related interpretive practice of tribunals whereby certain rights are implicitly derived from explicitly recognized rights. Martin Scheinin demonstrates that treaty bodies have used an integrated approach that indirectly protects ESC rights through the direct protection of civil and political rights.[557] Such reasoning is employed in order to conclude that whenever an act or omission is necessary for the realization and enjoyment of an explicitly enshrined right, then that act or omission may be protected as an implicit right in order to give effect to the right that has been explicitly enshrined.[558] A simple example of this would be that the right to free speech

---

553 General Comment No. 1: Reporting by States Parties, Committee on Economic Social and Cultural Rights, U.N. Doc. E/C.12/1989/5, Annex III (UN 1989) para. 3.

554 Ibid paras. 4 & 8.

555 General Comment No. 6: The Economic, Social and Cultural Rights of Older Persons, Committee on Economic Social and Cultural Rights, U.N. Doc. E/C.12/1995/16 (UN 1995) para. 18; General Comment No. 5: Persons with Disabilities, Committee on Economic Social and Cultural Rights, U.N. Doc. E/1995/22 (UN 1994) para. 13.

556 General Comment No. 8: The Relationship between Economic Sanctions and Respect for Economic, Social and Cultural Rights, Committee on Economic Social and Cultural Rights, U.N. Doc. E/C.12/1997/8 (UN 1997) para. 13.

557 Martin Scheinin, 'Economic and Social Rights as Legal Rights' in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (2nd rev. edn, Martinus Nijhoff 2001) 41-62, 44-52; Scheinin (2016).

558 Fitzmaurice (2013) 761.

implicitly gives rise to a right to associate or assemble with others, otherwise the speaker would not be able to exercise her free speech right because there would be no one around her with whom she could speak.[559]

This is an approach based on the principle of effectiveness, which requires laws to be interpreted in such a way as to ensure that their objectives are capable of being achieved.[560] By emphasizing the object and purpose of a law, the effectiveness principle appears to stray from the interpretive rules of the Vienna Convention. Normally, treaty interpretations should, in good faith, rely on the ordinary meaning of the text within its full context and in relation to its object and purpose, rather than overemphasizing a teleological approach.[561] However, many have argued that the distinctive features[562] of human rights treaties sets them apart so much so that they may be interpreted through a primarily teleological lens that seeks to render their object and purpose effective.[563] For example, one commentator argues that the ICESCR's underlying aim of improving the lives of people by protecting their ESC rights supports the assertion that effectiveness of law as a basic principle of interpretation.[564] Despite criticism about the ways in which this interpretative approach deviates from the rules of the Vienna Convention, Daniel Moeckli maintains that this approach is nonetheless legitimate.[565] It has also been asserted that the princi-

559 See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, (Supreme Ct. 1965) (U.S.).

560 Fitzmaurice (2013) 761; Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (2d edn, Hart Publishing 2016) 79-80; Craig Scott, 'Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights' 27 Osgoode Hall Law Journal 769 (1989) 781-781 & 786 ("It is important to remember that the idea of interdependence [of rights] has been developed not for the sake of rights but for the sake of people.").

561 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (Vienna Convention on the Law of Treaties) art. 31.

562 Namely their long-term objectives, the presence of asymmetrical duties whereby rights bearers are not parties to the treaties, and their use of equivocal and broadly stated terms.

563 Sepúlveda (2003) 77-79.

564 Sepúlveda (2003).

565 Daniel Moeckli, 'Interpretation of the ICESCR: Between Morality and State Consent' in Daniel Moeckli, Helen Keller and Corina Heri (eds), *The Human Rights Covenants at 50: Their Past, Present, and Future* (Oxford University Press 2018) 48-74.

ple of effectiveness is reflected within the good faith requirement for treaty interpretations, which is also found in the Vienna Convention.[566]

In this way, ESC duties of the state have evolved and expanded through the interpretive work of the ESCR Committee.[567] Likewise, the African Committee on Human and Peoples' Rights has used this style of interpretation in order to expand the definitions of social rights.[568] Other interpretive bodies such as the European Court of Human Rights have done the same.[569] In these ways, explicitly recognized obligations and rights can give rise implicitly to other obligations and rights in order to ensure the effectiveness of law.[570]

Based on such a teleological interpretation of human rights law, certain duties of the state toward NGOs may arise implicitly from those duties toward beneficiaries that are explicitly recognized under law, particularly when NGOs are heavily involved in the realization of social rights. States are fully capable of harming the social rights of beneficiaries indirectly by obstructing access to nonprofits that are essential to the realization and enjoyment of social rights. The regulation of NGOs may interfere with not only the associational and free speech rights of NGOs, but also the social rights of their beneficiaries and – by extension – the social rights obligations of the state. If NGO regulations become increasingly more restrictive

---

566 See Ian Brownlie, *Brownlie's Principles of Public International Law* (8th edn, Oxford University Press 2012) 380.

567 The principle of human dignity is central to its expansive interpretive approach, whereby ESC rights take on a broad normative meaning in order to ensure a life in dignity rather than merely limiting ESC rights guarantees to the basic minimums needed for human survival. (See, e.g., General Comment No. 12: The Right to Adequate Food (1999) para 4 ; General Comment No. 4: The Right to Adequate Housing (1991); General Comment No. 14: The Right to the Highest Attainable Standard of Health (2000) para. 1; General Comment No. 18: The Right to Work, Committee on Economic Social and Cultural Rights, U.N. Doc. E/C.12/GC/18 (UN 2006) para. 1; General Comment No. 21: The Right of Everyone to Take Part in Cultural Life, Committee on Economic Social and Cultural Rights, U.N. Doc. E/C.12/GC/21 (UN 2009) para. 40; General Comment No. 19: The Right to Social Security (2007) para. 1 ; General Comment No. 15: The Right to Water (2003) para. 3.).

568 See, e.g., General Comment No. 15: The Right to Water (2003) para. 3; *SERAC v. Nigeria.*

569 *Golder v. United Kingdom*, Application no. 4451/70 (ECtHR 1975) (Europe).

570 Craig Scott refers to this as 'organic interdependence' and offers a hypothetical example: the right to an adequate standard of living can be interpreted as constituting part of the right to life, and therefore the former can be directly protected through the latter. (Scott (1989) 780-781.).

in countries where nonprofits are essential for social rights, there could be a point at which – in theory – the social rights of beneficiaries are compromised. As such, the social obligations of states may provide an upper limit on how restrictive NGO laws can be, thereby giving rise to an implicit obligation of states to respect and permit essential nonprofits.[571]

4.2.1.2. Normative Foundations: The Principle of Subsidiarity

The principle of subsidiarity offers a normative basis for whether and how far states should interfere with nonprofit entities that advance the realization of social rights and support their enjoyment. The principle is particularly instructive because it is anchored in the overarching purpose of human rights law in general, and the Covenant in particular, to achieve and support human freedom. Without this normative principle, states would generally be free to interfere with nonprofit activities as long as they were able to provide the benefits of those activities through state measures. However, by viewing the enjoyment and realization of social rights as a necessary and significant stepping stone toward achieving human freedom, the principle of subsidiarity puts the individual's freedom at the core of the entire human rights project, and thereby promotes a normative tendency toward supporting individual and group efforts to realize and enjoy social rights.

Broadly stated, the term 'subsidiarity' is used in this context to characterize a relationship between two entities whereby one supports the other while imposing only very little or no limitations on the autonomy of the other. The supporting party is called the "subsidiary" entity, while the supported party is referred to as the "subordinate" or "principle" entity. The subsidiary principle seeks to maximize the benefits of a supportive relationship while preserving the autonomy of the subordinate entity. Paolo Carozza argues that the principle of subsidiary circumvents human rights debates that juxtapose the sovereignty of states against the rights of individ-

571 In the context of the right to adequate food, the ESCR Committee similarly asserts, "States parties should respect and protect the work of human rights advocates and other members of civil society who assist vulnerable groups in the realization of the rights to adequate food." (General Comment No. 12: The Right to Adequate Food (1999) para. 35.).

uals, and that rely primarily on the language of rights and authority.[572] Instead, the principle emphasizes the abilities (and vulnerabilities) of each entity within the social hierarchy as well as the interests of smaller units of society. It provides guidance on when state intervention is necessary and when it should be withheld based on the underlying values of human dignity and the individual autonomy.[573]Thus, whether the state should interfere in private or community-level affairs is inextricably linked to maintaining a balance between two risks: the risk that the primary entity will fail in its task without some or additional assistance from the subordinate entity, and the risk of it being dominated by the latter.

There are two normative aspects of the subsidiary principle that deal with the appropriateness of intervention: positive and negative subsidiarity.[574] Negative subsidiarity serves as the starting point for the relationship between the state and the community. In general, the subsidiary entity should refrain from interfering in the activities of the subordinate entity in order to preserve the freedom of the subordinate. In some cases, however, state intervention may become necessary as a form of support for the subordinate entity. Positive subsidiarity denotes the expectation that a subsidiary entity comes to the aid of a subordinate entity when the former is unable to accomplish its goals without such assistance.

Carozza has argued rather persuasively that the subsidiarity principle is a structural component of international human rights law.[575] This would indicate that it could guide the interpretation and development of social rights law, which would seem appropriate. Drafters of the ICESCR, for example, expressed a strong desire to restrain international interference in

572 Paolo G. Carozza, 'Subsidiarity as a Structural Principle of International Human Rights Law', 97 American Journal of International Law 38 (2003) 58, 66-67.

573 Although, there appears to be some evidence to suggest that the subsidiarity principle may have facilitated greater state-dependency among nonprofits in Germany's social and health services sectors. The state's implementation of subsidiarity, such that public bodies must finance and assist nonprofit providers, has resulted in a growing nonprofit sector within health and social service provision that relies predominantly on public funds for its revenues. This has prompted analysts to hypothesis that "organizations subsumed under the subsidiarity principle…may well have developed a state orientation, particularly in the field of social services and health". (Anheier and Seibel (2001) 96-97, 108-109.).

574 Gerald L. Neuman, 'Subsidiarity' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013) 345-359, 363.

575 Carozza (2003).

the states' national fields of competence.[576] The same concern extended to protecting individuals and groups from state interference.[577] Moreover, the principle of subsidiarity has already become operationalized through at least one area of international human rights law. The ICESCR recognizes families as the basic units of society and protects them against invasive state intervention, thus applying negative subsidiarity.[578] On the other hand, other international instruments of human rights law, such as ICEDAW and ICRC impose a duty upon the state to intervene within the family to support the family as well as to protect vulnerable members within the family.[579]

4.2.1.2.1. As a Component of the ICESCR's Overarching Purpose

The tenants of the subsidiarity principle are virtually identical to the overarching purpose of the Covenant, which emphasizes the value of human freedom and autonomy. Like the subsidiarity principle, the Covenant aims to strike a balance between promoting and protecting human freedom, and requiring states to intervene in private affairs in order to ensure the realization and enjoyment of ESC rights.

The object and purpose of the Covenant can be gleaned from its texts. The preamble emphasizes the aim of achieving human freedom through means that respect and encourage human empowerment and personal autonomy. In addition to aligning the Covenant with the overarching principles and objectives of the U.N. Charter,[580] the preamble declares that the

576 Draft International Covenants on Human Rights: Report of the Third Committee, U. N. General Assembly, UN Doc. A/5655 (UN 1963) paras. 97-101 (drafters concerned that specific measures aimed at achieving freedom from hunger would be better enumerated at the national level.).

577 Draft International Covenants on Human Rights: Report of the Third Committee, U. N. General Assembly, UN Doc. A/3525 (UN 1957) paras. 25-26, 39, 47, 48 (r)-(s) (drafters added paragraph 4 of article 14, which emphasizes the liberty of individuals and groups to establish and direct educational institutions.).

578 ICESCR art. 10.

579 Neuman (2013) 366.

580 These are to secure freedom, justice and peace in the world, as well as to respect the territorial integrity of states and to recognize equally their political sovereignties. (ICESCR preamble. See also, Draft International Covenants on Human Rights: Report of the Third Committee, U. N. General Assembly, UN Doc. A/3077 (UN 1955) (while drafting the ICESCR preamble, members agreed that "in accordance with the principles proclaimed in the Charter" was intend-

Covenant's overarching objective is to reach an "ideal of free human beings", characterized as "freedom from fear and want" through the realization and enjoyment of ESC rights. It notes that human freedom is only achievable if "conditions are created" that allow everyone to enjoy their ECS rights as well as their civil and political rights. This statement holds out individual autonomy (freedom from want) and personal security (freedom from fear) as the ideal forms of freedom while simultaneously recognizing that human vulnerabilities and suffering (i.e., being deprived of one's human rights) cannot be overcome without support from the state.

Another part of the preamble that supports this notion is the suggestion that the participation and cooperation of non-state actors is vital to realizing Covenant rights. It notes that "the individual" is "under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant." Allowing states wide discretion to limit the freedom of individuals to realize social rights through their own means or through other non-state means would appear inconsistent with the overarching objective of the Covenant to achieve both human freedom and human security. Implicitly, the state takes on a subsidiary role in order to fulfill the Covenant's overarching aim to achieve and protect human freedom.

The preamble reveals that the Covenant seeks to realize human rights not simply for their own sake, but for the ultimate purpose of achieving human freedom. What is the point of having food, housing, education, health or shelter if it cannot be enjoyed freely but instead must be used up under oppressive conditions? Are not human rights meant to be enjoyed rather than stomached? This would seem to suggest that, in general, social policy measures that have the effect or purpose of contracting human freedom are not consistent with this overarching purpose of the ICESCR. For example, it would be difficult to interpret the Covenant to mean that – absent exceptional circumstances – states are permitted to fulfill their social rights obligations by forcing people to accept state-provided social service and denying them the freedom to realize ESC rights by their own means. Offering direct state provision is certainly necessary in some cases in order to enable the enjoyment of ESC rights. However, there is also an element of personal freedom that the Covenant clearly values and a degree of which it attempts to protect against state interference. This suggests that the Covenant has envisioned an essentially subsidiary role for the state.

---

ed to include both the principles of article 2 and the purposes of article 1 of the UN Charter).).

Support for this claim can also be found in the articles of the Covenant. Of particular relevance is the rejection of a general state right to destroy ESC rights or an unrestricted state power to limit them. Article 5 (1) prohibits any interpretation of the covenant that would recognize a right for states to destroy or limit ESC rights "to a greater extent than is provided for in the present Covenant". This implies that – as a general rule – states are not free to limit ESC rights. Rather, they are only permitted to do so whenever the Covenant allows them to do so. Although article 4 recognizes a general state power to limit ESC rights, its provisions carefully restrict the permissible scope and application of limitations. The underlying suggestion is that human freedom is protected as a boundless range of ESC rights, while the power of states to restrict that freedom is limited. The *travaux préparatoires* appear to support this understanding. Drafters seem to have understood article 4 as a provision that primarily *restricted* the ability of states to limit ESC rights in order to avoid any suggestion that states possess infinite power to limit ESC rights.[581] The boundlessness of human freedom is further supported in the way that article 2 (1) appears to contemplate the full realization of ESC rights as an undefined and ever-expanding target, and that the rights themselves are broadly defined using limitless language such as "highest attainable standard of physical and mental health" and "continuous improvement of living conditions".

Other more specific provisions of the Covenant similarly point to an ideal of human freedom as the overarching purpose of the Covenant. Contemplating a subsidiary role for the state, these provisions require states to enable various non-state actors in their efforts to realize the rights of others, rather than to dominate or control private efforts through excessive state interference. States must enable the efforts of families, parents and guardians to realize the rights of their children. Article 10 (2) states that the "widest possible protection and assistance should be accorded to the

581 The drafting members of the 307th and 308th meeting of the Commission on Human Rights were concerned that the discretion of states to limit ESC rights might be too wide due to the practical consequences of trying to fulfill broadly stated obligations. They adopted the general limitations clause in order to restrict states' power to limit ESC rights and to preclude any interpretation of the Covenant that would suggest states have wide discretion to impose limitations on ESC rights. (Summary Record of the 307th Meeting, Commission on Human Rights, U. N. Economic and Social Council, UN Doc. E/CN.4/SR.307 (UN 1952) 4-6; Summary Record of the 308th Meeting, Commission on Human Rights, U. N. Economic and Social Council, UN Doc. E/CN.4/SR.308 (UN 1952) 5-6.).

family…particularly for its establishment and while it is responsible for the care and education of dependent children." Article 13 (3) envisions the support of parents and guardians so that they may realize the right of children to a religious or moral education. The same kind of language is found in other areas of rights, such as freedom from hunger, the right to health and the right to education. Article 11 (2) (a) enables parties involved in the production, conservation and preservation of food in order to realize the right to food. Article 12 (2) (d) mirrors part of the language found in the preamble in order to enable healthcare providers through the "creation of conditions which would ensure to all medical service and medical attention in the event of sickness." Article 13 (2) (e) requires that states enable educators through continuously improving the "material conditions of teaching staff". Under the provisions of article 13 (4), private educational institutions must be allowed to realize the right to education for their students without being shut down by the government, given certain education standards are met.

Finally, the drafting history of the ICESCR also supports the claim that promoting human freedom is an overarching value of the Covenant and that the principle of subsidiarity is among its underlying principles. In preparation for drafting the ICESCR and the International Covenant for Civil and Political Rights (ICCPR), the U.N. General Assembly affirmed the importance of economic, social and cultural rights for human freedom. In a resolution issued in 1950, the General Assembly emphasized that, "when deprived of economic, social and cultural rights, man does not represent the human person whom the Universal Declaration regards as the ideal of the freeman."[582] Drafters of the ICESCR likewise agreed that the denunciation of paternalism was important. In relation to realizing the right to freedom from hunger, they stressed that,

> …freedom from hunger had to be assured with full respect for the liberty of the developing peoples: they should be given not only enough to eat but also, *and above all*, the possibility to provide for their needs through their own efforts.[583]

582 Draft International Covenant on Human Rights and Measures of Implementation: Future Work of the Commission on Human Rights, UNGA (Dec. 4, 1950) UN Doc. A/RES/421(V) part E.

583 Draft International Covenants on Human Rights: Report of the Third Committee (1963) para. 102 (emphasis added.).

Human freedom is the central value of the Covenant, as well as both the means and end that it contemplates. The Covenant aims for an ideal level of state support whereby people are still able to live dignified lives of their own choosing, rather than a scenario wherein human survival is merely sustained by the state for some other purpose. The ideal of free human beings is not achieved merely by giving a person enough food so that she does not starve, but rather by also ensuring that she is able to acquire the types and amount of food that she reasonably believes will nourish her. It is by expressing this overarching objective that the Covenant reveals the subsidiarity principle as one of its underlying principles. Ensuring that the enjoyment of social rights is at the service of achieving human freedom indicates that states must support human freedom in the enjoyment of social rights. Consequently, in addition to providing direct state support where it is needed, states must permit and facilitate the efforts of individuals and groups of individuals to advance the realization of social rights by private means. This is particularly critical whenever the state does is not capable of ensuring the enjoyment and realization of social rights by public means. But even if the state advances the realization of rights through its direct state provision, it is important that the state maintains a subsidiarity role because non-state activities that advance the realization of rights are valuable in and of themselves as expressions of and potential precursors to human freedom and personal agency.

4.2.1.2.2. As Appropriate in the African Legal Context

The principle of subsidiarity, as it has been understood within the European context, has its roots in the Catholic Church.[584] There are, however, limitations to implanting into the African legal context the particular way in which subsidiarity has been conceptualized and operationalized within Europe.[585] One who is mindful of the imperialistic implications of blindly transferring legal concepts and practices,[586] or simply one who notes the vast differences between Africa and Europe, must acknowledge that at times each region will require different solutions to seemingly similar

584 Neuman (2013) 361-362.

585 As African legal philosophers have cautioned, African jurists should tread lightly when borrowing from Euro-Christian doctrines. (John Murungi, *An Introduction to African Legal Philosophy* (Lexington Books 2013).).

586 Shivji (1989).

problems. In thinking about how the principle of subsidiarity offers a normative foundation for the way in which states may regulate NGOs in Africa, this sub-section examines whether the various tenants of the principle are compatibility with African legal thinking, in particular with respect to the concept of human rights.

The subsidiarity principle is compatible with African legal thought and practices, particularly with the principle of self-determination, which has been emphasized as a central aspect of the African conception of human rights.[587] The two components of subsidiarity (territorial and social) appear to align with the two aspects of self-determination (external and internal). Territorial subsidiarity refers to the subsidiary relationship between political units, wherein the geographical jurisdiction of one subsumes the other. In this aspect, the principle aims to maintain a balance between supporting the smaller political unit through assistance offered by the larger political unit, as well as protecting the autonomy and independence of the smaller unit against being dominated by the larger unit. For example, regarding its application in human rights law, international efforts to protect human rights are typically subsidiary to national efforts to do the same. Territorial subsidiarity is consistent with the external aspect of self-determination, which legitimizes African resistance against foreign domination, undue political influence and imperialistic control.[588]

External self-determination aims to preserve the democratic processes from foreign domination in order to support African peoples in the establishment and maintenance of their own systems of political and socio-economic organization.[589] The external aspect of self-determination is particularly important to the concept of human rights in Africa. In international human rights law, the right to self-determination is enshrined in the first

587 Self-determination is a central part of concepts of human rights that are dominant in Africa. This is due in large part to its historical significance in African struggles for rights. Some argue that the very concept of human rights emerged in Africa through organized struggles against oppressive and colonial regimes, rather than by flowing down from the international law that enshrines them. (See Firoze Manji, 'The Depoliticisation of Poverty' in Firoze Manji (ed), *Development and Rights* (Oxfam GB 1998) 12-33, 143.).

588 Shivji (1989) 76-77.

589 Ibid; Allan Rosas, 'The Right of Self-Determination' in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (2nd rev. edn, Martinus Nijhoff 2001) 79-86, 79-80.

article of the ICESCR.[590] However, in African human rights law, there is an emphasis on the external aspect of self-determination. Article 19 of the African Charter condemns the domination of peoples by other people, while article 20 recognizes the right to self-determination and freedom from "foreign domination, be it political, economic or cultural."[591] In practice, subsidiarity norms – such as state sovereignty, territorial integrity, non-intervention, etc. – have emerged as external self-determination claims made by less powerful states, including African states. Amitav Acharya notes that less powerful states that are dissatisfied with the international order make solidarity claims in order to consolidate power and autonomy at the regional and sub-regional levels.[592] These states can claim subsidiarity norms in order to challenge their exclusion from global norm-making processes, their own growing entanglement within the international political order, and the seemingly ever-expanding reach of international law. Subsidiarity norms can also be claimed somewhat symbolically in order to point out and respond to the hypocrisy of greater powers that circumvent or openly violate international norms.[593]

An important role for the state in the protection of the peoples' right to self-determination is guarding against intrusive political influence or imperialistic threats to the domestic order. Shivji argues that such threats can manifest within Africa through foreign NGOs or foreign-funded NGOs.[594] Others have similarly raised concerns that African NGOs have taken up a compradorial role in terms of promoting foreign interests in exchange for securing their share of foreign aid.[595] This risk would suggest that observing territorial subsidiarity and external self-determination would require a certain degree of NGO regulations in order to that NGOs with foreign ties do not pose a threat to the freedom of African peoples to determine their own political and socio-economic systems. However, if such regulations

590 See Inclusion in the International Covenant or Covenants on Human Rights of an Article to the Right of Peoples to Self-Determination, UNGA (Feb. 5, 1952) UN Doc. A/RES/545 (VI).

591 African Charter art. 20 (3).

592 Amitav Acharya, 'Norm Subsidiarity and Regional Orders: Sovereignty, Regionalism, and Rule-Making in the Third World' 55 International Studies Quarterly 95 (2011) 101 ("system-dissatisfied weak states/powers tend to be more prone to norm subsidiarity than system-satisfied weak states/powers.").

593 See Julie A. Mertus, *Bait and Switch: Human Rights and U.S. Foreign Policy* (2d edn, Routledge 2008) 107-156.

594 Shivji (2006).

595 See Julie Hearn, 'African NGOs: The New Compradors?' 38 Development and Change 1095 (2007).

are overly burdensome in that they do not remain strictly limited to those measures that are necessary for the protection and freedom of African peoples, then they run the risk of obstructing nonprofit activities that are essential to the social rights of beneficiaries, by excessively limiting access to foreign funding, foreign NGOs or their services. This highlights a problem with the second aspect of subsidiarity, social subsidiarity, which aligns with the second aspect of self-determination, internal self-determination.

Social subsidiarity is consistent with African legal thought through its alignment with internal self-determination, as demonstrated by their shared affinity for democratic values, personal freedom and pluralism. Unlike territorial subsidiarity, which is concerned with different political units, social subsidiarity applies the subsidiarity norms to relationships between societal units with different capabilities that are located *within the same political unit*. Dinah Shelton describes social subsidiarity as a principle that "calls for non-interference with the activities of individuals or smaller groups when these are capable of the tasks appropriate to them, and assistance to individuals and lesser societies when these are not able to perform appropriate or necessary tasks."[596] For instance, social subsidiarity would insist that charities and other social associations should be free to act with limited governmental intervention, even as they are subject to governmental supervision. This promotes pluralism and social participation within society by enhancing the capabilities and freedom of communities and other sub-state units.

Internal self-determination is similar to social subsidiarity in that it emphasizes the right of people to resist an oppressive government and to organize themselves and their society in accordance with their own will.[597] This is also an important aspect of African conception of human rights from the perspective of individuals and groups in Africa. For Shivji, internal self-determination is an essential part of guaranteeing a democratic order, the legitimacy of the African state, and the ability of people to claim their rights.[598] He notes the risk that African governments align more closely with the interests of elite classes rather than popular masses. Dinah Shelton holds social subsidiarity in high regard as the structural backbone

596 Dinah Shelton, 'Subsidiarity and Human Rights Law' 27 Human Rights Law Journal 4 (2006) 5.

597 Shivji (1989) 76-77; Allan Rosas, 'Internal Self-Determination' in Christian Tomuschat (ed), *Modern Law of Self-Determination* (Martinus Nijhoff 1993) 225-252.

598 Shivji (1989) 76-77; Rosas (1993).

of the subsidiarity principle and even of international human rights law because it serves as a precondition for democratic rule,[599] which is consistent with the principle of internal self-determination. In essence, the notions of social subsidiarity and internal self-determination both arise from recognizing the democratic value of human freedom that is innately promoted by enabling communities and individuals to advance their own interests and realize their own goals, within the limits of a democratic society. As with the beneficiary-focused approach, the ability of individuals and groups to realize their rights is always of primary concern, and it is this prioritization of the wellbeing and freedom of smaller and more vulnerable units of society over that of larger and more powerful entities that highlights the compatibility of the subsidiarity principle in the African legal context. The indication from both is that the rights and wellbeing of individuals and peoples should not be sacrificed in order to pursue grand ideological state and inter-state projects such as modernism, developmentalism or globalism, or to advance exclusively the interests and rights of foreign donors, foreign entities or nongovernmental organizations within the state. The subsidiarity principle, the right of self-determination and the beneficiary-centered approach all indicate that these various interests must be balanced in a manner that nonetheless emphasizes protection of individual freedom, autonomy and self-sufficiency.

In summary, in the wake of intensified governmental intervention in the affairs of NGOs, the regulation of nonprofits would likewise benefit from the principle of subsidiarity. Since subsidiarity marks the degree of deference that a subsidiary entity must exercise with respect to the autonomy and self-sufficiency of a subordinate entity, the principle indicates that African states should exercise both restrictive and supportive regulatory control over the nonprofit entities in order to protect the rights and wellbeing of individuals. In concrete terms, African states should give way to NGO action when NGOs are capable of protecting the social rights of individuals, but remain critical of the impact that their foreign ties can have on African peoples' rights without generally obstructing their activities. On the other hand, states must step in to protect the social rights of African peoples against neglectful, marginalizing or harmful nonprofit activities.

599 Shelton (2006) 'Subsidiarity and Human Rights Law'; Carozza (2003) 38.

4.2.1.2.3. As Appropriate for the Regulation of NGOs

Subsidiarity has negative and positive aspects, which provide normative guidance on how states should regulate nonprofits that are essential for the realization and enjoyment of social rights. Negative subsidiarity indicates that states bear some obligation to refrain from obstructing nonprofit activities, while positive subsidiarity ensures that states are not reduced to passive bystanders to the interaction between NGOs and their beneficiaries. To be sure, the subsidiarity principle does not expect states to stand idly by while nonprofit entities involve themselves in the realization and enjoyment of social rights any more than it would expect states to stand aside while communities organize their own methods of retribution and punishment in lieu of a state-organized criminal justice system. Indeed, positive subsidiarity indicates that states may not completely step back from their regulatory or supervisory role because communities and individuals cannot be expected to exercise self-determination outside of a legal and political framework that enables, supports and protects their efforts.

Moreover, negative subsidiarity does not indicate that states must refrain from participating in the realization or enjoyment of social rights. To the contrary, states that provide services in a way that does not obstruct the parallel provision of private services can expand the overall availability of services.[600] Similarly, international human rights law does not appear to relegate states to providers of last resort. For example, neither the ICESCR nor the African Charter discourage states from providing social services that private organizations could have provided or that individuals could have acquired on their own. The law merely requires that state provision and non-profit provision be allowed to coincide.

This raises the question, when is it appropriate for states to interfere with nonprofit activities? The normative position of positive subsidiarity suggests that states bear an ongoing obligation to *monitor* and *regulate* nonprofit activities for the protection of individuals who benefit from those activities as well as of those individuals who do not. It is only by monitoring at the community and individual levels that the state becomes aware of the need for its subsidiary interference in the first place. Thus, it is always nec-

600 For an example of similar reasoning from the United States see *Pierce v. Society of Sisters*, 268 U.S. 510, (Supreme Ct. 1925) (U.S.), wherein the Supreme Court found that state law requiring all children to attend public schools violated constitutionally guaranteed liberties of individuals because it effectively obstructed access to education provided by private schools.

essary for the state to take on a supervisory role. Moreover, while the state's non-interference can empower communities and individuals by affording them the freedom to achieve their goals, it does not guarantee to do so equitably. Vulnerable individuals or minority groups within a community are particularly vulnerable if the state takes on a passive role because they are exposed to the risk of being marginalized by more powerful or privileged groups within their society. As such, the principle of positive subsidiarity indicates that there are times when the state's interference will be necessary to protect those who might otherwise be neglected or marginalized by nonprofits.

The subsidiarity principle also indicates that the right regulatory balance will depend on the size and function of the NGOs being regulated. The size of NGOs varies immensely in terms of their impact – namely the number of people for whom they can support the realization and enjoyment of social rights – and in terms of their ability to comply with multifaceted legal requirements and cope with their complexity. NGOs that are considered large in terms of impact can affect the social rights, autonomy and self-sufficiency of individuals more tremendously than smaller NGOs. Since individuals are subject to the pervasive scrutiny of nonprofit providers,[601] what remains of their autonomy should be protected by the state. To that end, positive social subsidiarity would justify strengthening NGO laws to ensure that high-impact NGOs do not inhibit or injure the social rights of individuals. NGOs that exhibit a high capacity to cope with complex regulations are less likely to be burdened by NGO laws and can enjoy a greater degree of freedom from state interference. For these NGOs, advanced regulatory schemes aimed at protecting social rights would not pose a problem in terms of negative subsidiarity.

Smaller NGOs usually feature low impact and low capacity. They will achieve only small gains for smaller units of society – such as families and individuals – and pose little threat to them. Additionally, smaller NGOs likely need greater support – rather than scrutiny – from the state due to their low capacity for complying with and coping with complex regulatory requirements. Thus, the subsidiarity principle would indicate that smaller NGOs and community based organizations, should not be regulated as though they were larger pseudo-state entities. Broad and burdensome regulatory control in this context can serve to subvert the principle's humani-

601 For example, indirectly steering individual behaviors and beliefs by enforcing certain eligibility requirements for nonprofit benefits or by executing outreach programs that disseminate political, religious or ideological information.

tarian purpose: namely, to protect the exceedingly limited autonomy and rights of individuals and communities against the overwhelming control of large and powerful state bodies. Instead, the principle of positive subsidiarity should be operationalized such that state agencies and larger NGOs work together to support and enable smaller NGOs in their efforts to provide services and protection to beneficiaries.

Administrative efficiency is one of the widely valued aims of the subsidiarity principle. When states with limited regulatory capacity, such as African LDCs, use heavy-handed regulatory measures on NGOs, corruption is enabled, and administrative efficiency is undermined. In a context of 'overregulation',[602] one would observe inefficiencies in executing and enforcing rules that govern NGOs – including delays in registration, licensing and releasing of funds – which would in turn encourage selective or arbitrary enforcement, corruption, bribery and clientelism between NGOs and state administrators.[603] The Gregor Dobler argues that, in the long term, such as a constellation might result in increased institutional stability and reduced corruption.[604] However, the immediate consequences for beneficiaries of nonprofit providers could prove to be devastating. Consider the case of Kenya in this regard. In October 2015, the NGO Coordination Board suddenly attempted to exercise its power to deregistered nearly 1000 NGOs at once, partly on allegations that some NGOs were supporting terrorism in Kenya.[605] This alarmed donor countries and raised among them "serious concerns and questions about regulation of the sector"; these countries pointed out in a joint statement to Kenya that "regulations must be fair, reasonable, and justly administered."[606] The Board ultimately recalled its notice to deregister these NGOs.[607] In December of the previous year, however, it deregistered hundreds of NGOs – freezing bank accounts and revoking work permits for many of them. [608] In terms of reg-

602 Described by Dobler in analytical (rather than normative) terms as a scenario wherein "more rules apply in theory than can be implemented in practice". (Dobler (2012) 222.).

603 The administrative practice of overregulation leads to "a selective application of regulations and thus increases the power of those who decide which rules to implement", thereby enabling corruption and political clientelism. (Ibid.).

604 Ibid 217.

605 'Non-Governmental Organizations Suspensions' (4 Nov. 2015) <https://ke.usembassy.gov/non-governmental-organizations-suspensions/>.

606 Ibid.

607 Ibid.

608 'Kenya 'Deregisters' NGOs in Anti-Terror Clampdown' *BBC* (19 Dec. 2014) <https://www.bbc.com/news/world-africa-30494259>.

ulating small NGOs, the subsidiarity principle would indicate that states should provide some regulatory oversight to ensure human rights are being respected, but that they should take care not to 'overregulate' smaller NGOs since such NGOs would not likely lack the capacity to cope with erratic or unpredictable regulatory enforcement.[609]

Where large NGOs appear analogous to state agencies in terms of their functional, financial and operational capacities, the subsidiarity principle would permit broader regulatory control in order to ensure the protection of beneficiaries' rights. However, if a state were limited in its regulatory capacity, then its government would not be able to ensure the protection of social rights against potential injuries that might be caused by large NGOs. In this scenario, overregulation could become a problem as states struggle to regulate larger NGOs, thereby enabling corruption between large NGOs and governmental administrators. Since this would be the result of limited state capacity to regulate large NGOs, the subsidiarity principle would indicate that an entity even larger than the state would need to step in to support it. One way to do this would be to recognize the horizontal application of human rights law so that larger NGOs can be held directly liable for human rights abuses even if the state is unwilling or unable to hold them accountable.[610]

---

609 In principle, this normative prescription based on the subsidiarity principle should apply equally to the regulatory practices of larger NGOs that exercise control over smaller NGOs, such as high-value donors and international NGOs.

610 The direct application of international human rights obligations upon larger NGOs would ensure that these entities could not easily evade legal scrutiny if ever a state lacked the capacity (or will) to govern them. Moreover, with direct international oversight of both the state and large NGOs, corruption at the state level would be subject to international review, which could provide a deterrent for both parties. However, although the horizontal application of social rights is clearly relevant for investigating restrictive NGO laws, it remains beyond the scope of this dissertation, which focuses on the regulatory relation between state and NGOs rather than between NGOs and international organizations. Further reading on the horizontal obligations of NGOs and other non-state actors includes: Andrew Clapham, 'Non-State Actors' in Daniel Moeckli and others (eds), *International Human Rights Law* (Oxford University Press 2010) 561-582; Andrew Clapham (ed), *Human Rights and Non-State Actors*, vol 5 (Edward Elgar Publishing Limited 2013); Anne Peters, *Jenseits Der Menschenrechte: Die Rechtsstellung Des Individuums Im Völkerrecht* (Mohr Siebeck Tübingen 2014); Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law*, vol 126 (Cambridge University Press 2016); Rephael Harel Ben-Ari, *The Normative Position of International Non-Governmental Organizations under International Law: An Analytical Framework* (Martinus Nijhoff 2012).

In order to establish a set of criteria for categorizing NGOs based on social rights law, it is critical to look to a legal framework that supersedes the authority of state law, priorities the rights of the beneficiary or at least addresses them on equal footing with that of NGOs and with state sovereignty, and allows for the implicit derivation of the state's regulatory duties from its social rights obligations to beneficiaries. The following sub-sections look to the terms of the ICESCR and the African Charter to derive such a set of criteria, based on the normative guidance offered by the subsidiarity principle and the doctrinal foundations relating to the recognition of implicit rights and duties.

4.2.2. General Social Rights Obligations of the State

States' international human rights obligations are a particularly useful framework for examining the legality of restrictive NGO laws because states are bound to fulfill their international agreements in good faith,[611] which precludes the use of national law to circumvent international obligations – a view shared by the African Commission.[612] Thus, most African states, having ratified the ICESCR and the African Charter, may not pass restrictive NGO laws that would be incompatible with the social rights obligations imposed upon them by those instruments of international law.

It is widely accepted that human rights law imposes three kinds of obligations upon states: the duties to respect, protect and fulfill human rights.[613] The duty to fulfill includes within it the duties to facilitate, provide and promote human rights.[614]The nature of these duties is progressive and forward-looking. They generally rule out a deterioration of the conditions necessary for the realization or enjoyment of social rights. The Com-

611 Udombana (2004) 'Between Promise and Performance: Revisiting States' Obligations under the African Human Rights Charter' 126-128 (referring to the principle of *pacta sunt servanda*.).

612 See ibid.

613 See General Comment No. 14: The Right to the Highest Attainable Standard of Health (2000) para. 33; General Comment No. 13: The Right to Education (1999) para. 46; General Comment No. 12: The Right to Adequate Food (1999) para. 15. See also Martin Scheinin, 'Core Rights and Obligations' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013) 527-540, 536.

614 General Comment No. 14: The Right to the Highest Attainable Standard of Health (2000) para. 37; General Comment No. 15: The Right to Water (2003) para. 25.

mittee has recognized the same,[615] and has gone further to insist that there is a strong presumption against the permissibility of retrogressive measures.[616] In very general terms, these duties call for the use of measures that progress realization, protect enjoyment, and alleviate or withdraw retrogressive effects on social rights.

4.2.2.1. Duty to Fulfill Social Rights: Realizing Social Rights Through NGOs

The duty to fulfill social rights can limit the degree to which states may restrict nonprofit activities. The duty to fulfill encapsulates the duties to facilitate, provide and promote. The nature and extent of African states' obligation to fulfill social rights are laid out in article 2 (1) of the ICESCR and article 1 of the African Human Rights Charter. These are considered general obligations because they apply equally to all rights guaranteed by the respective instruments. In simple terms, the duty to fulfill social rights is equated with the duty to realize them, which can be done by providing and promoting rights directly or facilitating their realization and promotion through non-state means. The ESCR Committee notes in particular that the duty to facilitate the fulfillment of social rights "means the State must pro-actively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihood".[617]

Article 2 (1) of the ICESCR relates to the state's obligation to realize Covenant rights. It requires states to take steps toward the full realization of rights, but allows them a great deal of flexibility in determining precisely how and when they will accomplish this task. However, in interpreting

615 General Comment No. 4: The Right to Adequate Housing (1991) para. 11 ("[A] general decline in living and housing conditions, directly attributable to policy and legislative decisions by States parties, and in the absence of accompanying compensatory measures, would be inconsistent with the obligations under the Covenant.").

616 General Comment No. 13: The Right to Education (1999) para. 45; General Comment No. 3: The Nature of States Parties' Obligations (1990) para. 9; General Comment No. 14: The Right to the Highest Attainable Standard of Health (2000) para. 32.

617 General Comment No. 12: The Right to Adequate Food (1999) para. 15; see also, General Comment No. 14: The Right to the Highest Attainable Standard of Health (2000) para. 37.

the Covenant, it is critical to ensure that states' obligations retain some meaningful content consistent with the functional objective of the Covenant, which is to impose legal obligations upon states that would effectively bring about the full realization of social rights. Therefore, article 2 (1) also limits states' margin of flexibility by imposing a set of conditions that states cannot easily circumvent. The text of article 2 (1) of the ICESCR is as follows:

> Each State Party of the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of 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.[618]

At its core, article 2 (1) imposes an obligation of conduct (to "take steps") as well as an obligation of results (to achieve the "full realization" of social rights). At the very least, this means states must take concrete and deliberate steps.[619] The covenant also imposes an obligation of intent, which requires states to take steps "with a *view* to achieving progressively"[620] the full realization of covenant rights.[621]

Most of the difficulty with interpreting article 2 (1) arises from the conundrum that while the obligation of conduct must be fulfilled straightaway, the desired results need not be attained immediately thereafter, but rather progressively over time.[622] However, the allowance for progressive realization is not a license for states to drag their feet or circumvent their obligations. Rather, it is an acknowledgement of the limitations that states encounter in their efforts to realize social rights, and a requirement that they offer nothing less than their full effort, up to the limits of feasibility.[623] The term progressively creates a dynamic state obligation, which ex-

618 ICESCR art. 2(1).
619 General Comment No. 3: The Nature of States Parties' Obligations (1990) para. 2.
620 Emphasis added.
621 General Comment No. 3: The Nature of States Parties' Obligations (1990) para. 9.
622 See ibid.
623 The *travaux preparatoires* of the ICESCR reveal the same. Members of the drafting committee (Third Committee) agreed that the term "progressive" was not intended to permit delaying tactics that, in particular, impeded efforts of less developed countries. Some understood article 2 to require maximum speed of realization, even though it is progressive. (Draft International Covenants on Hu-

pands over time. As one state representative aptly noted during the drafting of what eventually became the ICESCR,

> The idea expressed in the word 'progressively', which must be taken in conjunction with the words 'full realization of the rights', was not a static one. It meant that certain rights would be applied immediately, others as soon as possible.[624]

Rather than progressing, however, some LDCs in Africa see stagnation in their socio-economic outcomes, while others even experience regression.[625] Another reason that constructing concrete social rights obligations can be rather challenging is that such considerations touch upon political issues. Since a multitude of social policies can bring about the full realization of social rights, it is difficult to articulate legal principles that would guide what is essentially a political determination about which social policy is best suited for any particular country. Moreover, determining whether a

---

man Rights: Report of the Third Committee, U. N. General Assembly, UN Doc. A/5365 (UN 1962) para. 52.) Even members of the drafting commission (UN Commission on Human Rights) who opposed the adoption of a general clause that allowed for progressive realization agreed that states were only expected to do all that they could feasibly do – and not more – in order to achieve full realization of ESC rights. (See, e.g., Summary Record of the 237th Meeting, Commission on Human Rights, U. N. Economic and Social Council, UN Doc. E/CN.4/SR.237 (UN 1951) (speaking about the situation of lesser developed countries, Mr. Jevremović of Yugoslavia noted "...no one would censure them if their economic circumstances hampered the full implementation of the Covenant by them.").).

624 Summary Record of the 237th Meeting (1951) (comments of Mr. Whitlam of Australia); see also Summary Record of the 363rd Meeting, Third Committee, U. N. General Assembly, UN Doc. A/C.3/SR.363 (UN 1951) paras. 14-15 (state representative Mr. Cassin of France - whose delegation drafted the original version of what became art. 2 - expressed his view that the term "progressive" did not preclude the immediate implementation of certain ESC obligations.).

625 In terms of poverty outcomes, for example, data made available between 1996 and 2016 indicates that the percentages and absolute numbers of people living at or below the international poverty level in Benin, Comoros, Djibouti, Guinea Bissau, Madagascar, Malawi and Sao Tome and Principe has either increased or remained the same, despite their governments having received substantial foreign development aid. (See Poverty Equity, Number of Poor at $1.90 a Day (2011 PPP) (Millions) (World Bank 2017); Poverty Equity, Poverty Headcount Ratio at $1.90 a Day (2011 PPP) (% of Population) (World Bank 2017); World Development Indicators, Net ODA Received (% of Central Government Expense) (World Bank 2017); World Development Indicators, Net ODA Received (% of GNA) (World Bank 2017).).

particular social policy plan is within the maximum of a state's available resources also involves resolving contentious political questions. Consequently, it seems reasonable that states retain a wide margin of flexibility in deciding how they will achieve the full realization of covenant rights. Yet, their discretion is not absolute. It is incumbent upon states to repeal legislative measures that are inconsistent with the state's article 2 (1) obligations.[626]

The Committee interprets the Covenant conservatively and in accordance with the principle of subsidiarity to conclude that a state's obligation to provide social rights is triggered "whenever an individual or group is unable, for reasons beyond their control, to enjoy the right".[627] In some cases, the state is also unable (or unwilling) to provide the rights. In such cases, nonprofit activities that provide social rights are assisting the state in fulfilling its duties. As long as this is the case, it appears that the state's duty to fulfill social rights would require it, at the very least, to permit these nonprofit activities. The simple fact that nonprofit activities might fulfill the state's duties does not alleviate the state of its obligation to ensure that those underlying social rights are being fulfilled. Indeed, international law addresses states rather private parties. This means that in some cases the state might bear an additional obligation to facilitate and support nonprofit activities unless and until it ensures those social rights by alternative means.

Perhaps what is most striking about the state's obligation under article 2 (1) is its dynamic and customizable character.[628] The full extent of one state's article 2 (1) duties will be distinct from those of another because they expand (and, theoretically contract) in accordance with the state's particular capacity to advance the realization of social rights within the maximum of its available resources. It is as if article 2 (1) imposes upon each

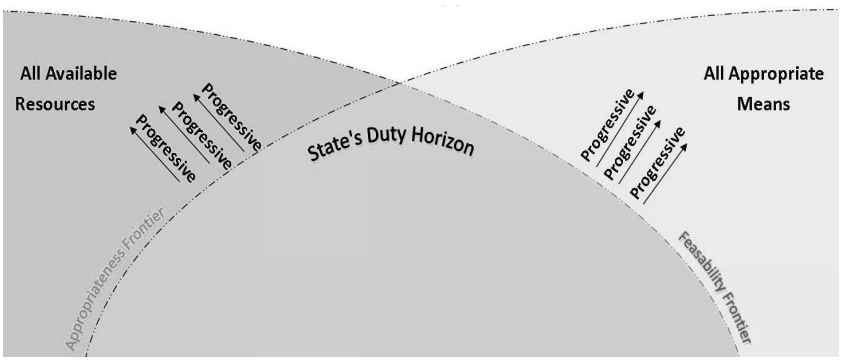
626 See Alston and Quinn (1987) 167.

627 General Comment No. 12: The Right to Adequate Food (1999) para. 15; see also, General Comment No. 14: The Right to the Highest Attainable Standard of Health (2000) para. 37; see also, General Comment No. 15: The Right to Water (2003) para. 25.

628 During deliberations regarding the drafting of what eventually became the ICESCR, one state representative (Mr. Sörensen of Denmark) noted that the word "progressively" encapsulated a "dynamic element, indicating that no final fixed goal had been set in the implementation of economic, social and cultural rights, since the essence of progress was continuity." (Summary Record of the 236th Meeting, Commission on Human Rights, U. N. Economic and Social Council, UN Doc. E/CN.4/SR.236 (UN 1951).).

state its very own duty horizon that tracks an (ideally) ever-expanding feasibility frontier.[629] From the outset, one can already anticipate that nonprofit activities that fall within the duty horizon should be regulated differently than those taking place beyond that which the state is obliged to ensure. The central argument of this thesis is that restricting nonprofit activities that advances the realization of social rights beyond what the state is willing and able to ensure may be incompatible with the state's Covenant obligations. The state's duties are also limited by the appropriateness of the means available to it. The area where feasibility and appropriateness overlap marks the expanding horizon of the state's article 2 (1) obligations.

Figure 4.1. The Duty Horizon of Article 2 (1)



It is notable that the Covenant requires the use of not merely any but *all* appropriate means that are also feasible to adopt (i.e., within the maximum of available resources). The ordinary and full meaning of "all" implies that states may not forgo the implementation of any feasible measure that is deemed appropriate.[630] Whenever a measure would be necessary for the realization of Covenant rights, it is reasonable to conclude that implementing such a measure would fall squarely within the state's article 2 (1)

629 Some members of the Commission on Human Rights that were drafting article 2 of ICESCR understood the term "progressive" to have placed upon states a duty to achieve ever higher levels of fulfillment. (Report to the Economic and Social Council on the Eigth Session of the Commission, Commission on Human Rights, U. N. Economic and Social Council, UN Doc. E/CN.4/669 (UN 1952) para. 107.).

630 The Vienna Convention requires texts to be given their ordinary meaning. (Vienna Convention on the Law of Treaties, art. 31.).

obligation to "take steps…by all appropriate means…". Thus, all feasible measures relating to nonprofit entities must be adopted if doing so is appropriate for the full realization of social rights. Conversely, states are under no obligation to take up *inappropriate* means, indicating that states need not tolerate nonprofit activities that employ inappropriate means of realizing social rights. The key inquiry for this sub-section is, under what circumstances might repealing a restrictive NGO regulation be considered both a feasible and appropriate means of achieving the full realization of social rights, and thus an act required by the Covenant? The following subsections will examine in further detail the state's duty to adopt all appropriate means and the duty to use the maximum of available resources.

4.2.2.1.1. Appropriateness

The lack of a definition for the term 'appropriate' within the Covenant has left commentators baffled as to its meaning.[631] However, the Covenant provides some limited guidance in this regard. Among what some have referred to as a "panoply of appropriate means",[632] article 2 (1) singles out legislative measures as a particularly important type of appropriate means.[633] The Committee asserts further that appropriate means may also include judicial, administrative, financial, educational and social mea-

631 In their seminal work, *The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights*, leading human rights scholars Philip Alton and Gerard Quinn ask rhetorically and critically, "If legal measures are not required, what other means might be 'appropriate' and … who shall determine whether the means that have been adopted are both comprehensive ('all') and 'appropriate'?" (Alston and Quinn (1987) 166.) Similarly, in examining socio-economic rights adjudication in South Africa, Nick Ferreira laments, "The world 'appropriate' in the existing dicta is responsible for much of the interpretive challenge, as it is a difficult normative question what level of provision and from which sources is appropriate." (Nick Ferreira, 'Feasibility Constraints and the South African Bill of Rights: Fulfilling the Constitution's Promise in Conditions of Scarce Resources' 129 South African Law Journal 274 (2012) 294.).

632 Ben Saul, David Kinley and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases and Materials* (1 edn, Oxford University Press 2014) 157 (internal quotation marks omitted).

633 ICESCR art. 2 (1) ("…by all appropriate means, including particularly the adoption of legislative measures.").

sures.[634] Nonetheless, the role of legislative measures is especially pertinent to the realization of social rights, where, as the Committee has recognized,

> [i]n such fields as health, the protection of children and mothers, and education, as well as in respect of matters dealt within articles 6 to 9 [which include labor, employment and social security rights], legislation may also be an indispensable element for many purposes. [635]

Article 5 of the covenant offers some outer limits for the term "appropriate means" by indicating what types of activities are not permitted by the Covenant. Article 5 (1) forbids any interpretation of the Covenant that would imply that acts aiming at the destruction or extensive limitation of Covenant rights are permissible. This would rule out any reading of article 2 (1) that would suggest that "appropriate means" include aiming at destroying or extensively limiting ESC rights. Article 5 (2) offers a limit on what is considered appropriate *vis-à-vis* the effect that state measures can have on fundamental rights guaranteed by other laws or customs, but that are not fully recognized in the Covenant. Article 5 (2) prohibits derogating from such rights or restricting them on the pretext that the Covenant does not recognize them or recognizes them to a lesser extent. This provision still leaves open the possibility that states may permissibly restrict the enjoyment or realization of unenumerated rights when it is done on some other pretext or for some legitimate purpose, thereby leaving the regulation of such limitations to those legal instruments that fully recognize those affected rights. There are instances when state measures might result in derogations from or restrictions upon unenumerated rights and would still be considered appropriate for the progressive realization of social rights, especially since the ICCPR already permits limitations and derogations *vis-à-vis* civil and political rights. For example, making primary education compulsory for children would still be an appropriate means of realizing the right to education, although it imposes a restriction upon the right to liberty of movement and freedom of association since children would not be free to leave the classroom or associate with other students freely during lectures.[636]

---

634 General Comment No. 3: The Nature of States Parties' Obligations (1990) paras. 5 & 7.

635 Ibid para. 3.

636 ICCPR arts. 12 (right to freedom of movement) & 22 (right to freely associate with others).

Article 5 thus provides guidance on what constitutes the very outer boundaries of "appropriate means" by excluding – at the very least – acts aimed at the destruction and extensive limitation of rights recognized by the Covenant, as well as the use of the fact that the Covenant does not fully recognize certain fundamental rights that are protected elsewhere as a pretext for derogating from or restricting those rights. In other words, aiming at destroying or extensively limiting Covenant rights is never appropriate for the realization of social rights, while derogations from or restrictions of unenumerated fundamental rights are considered inappropriate only if they are taken on the pretext that the Covenant does not fully recognize them. Within the wide limits set by article 2 (1) and 5, it appears that states have a great deal of space to maneuver.

Other texts of Covenant (articles 6 (2), 11 (2), 12 (2), 13 (2), and 15 (2)) provide some insight into what might be considered appropriate means through a set of examples.[637] Particularly instructive for the appropriateness of social rights measures are articles 11 (2) (on food rights), 12 (2) (on health rights) and 13 (2) (on educational rights). These provisions direct states to take measures that aim at specific objectives, indicating that these types of objectives constitute "appropriate means". Regarding the right to the highest attainable standard of health, states must achieve the full realization of this right through measures that are "necessary" for (1) improving the population's health according to certain indicators such as infant mortality, healthy child development, and environmental and industrial hygiene, (2) "the prevention, treatment and control" of diseases, and (3) "the creation of conditions" that would assure medical care for all people who are ill.[638] Article 13 (2) specifies in rather precise language that the right to education shall be achieved through compulsory and free primary education that is made available to all, as well as higher levels of education that is made available gradually and in accordance with the limits of feasibility.[639] Finally, the right to be free from hunger must be protected through "specific programs" that are "needed" in order to,

> … improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by develop-

637 Craven (1995) 116.
638 ICESCR art. 12 (2).
639 Ibid art. 13 (2).

> ing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources. [640]

While these provisions neither define the term 'appropriate means' nor specify their particular form,[641] they clearly indicate what the objective of the state's measures should be, and what results they should bring about. It does not appear to be permissible, for example, for states to achieve freedom from hunger without also aiming to improve methods of production or to disseminate knowledge of nutrition; or to guarantee the right to education without also ensuring free and compulsory primary education for all. Moreover, these objectives and results are directed by the use of terms such as "necessary", "needed" and "shall", which the *travaux préparatoires* reveal are intended to be binding mandates rather than merely illustrative recommendations relating to merely hypothetical needs.[642] As such, states that do not employ any measures to bring about these results, or that employ measures that are deleterious with respect to these aims, are likely noncompliant in terms of their article 2 (1) obligation to make use of all appropriate means, assuming it is within the availability of their resources to do so. Therefore, NGO laws that obstruct private efforts to reach these mandated objectives could amount to inappropriate means that are inconsistent with article 2 (1) obligations if the state does not or cannot pursue alternative means of reaching these objectives.

Another indication of what may be considered appropriate comes from the object and purpose of the Covenant, which can be gleaned from its preamble, as well as the overarching principles of human rights law. Consistent with the aims of the subsidiarity principle, the Covenant seeks to realize ESC rights not for their own sake, but in order to achieve the ideal of human freedom and personal autonomy.[643] This indicates that appropriate means cannot include measures that undermine human freedom or personal autonomy.

---

640 Ibid art. 11 (2) (a).

641 For example, legislative form, judicial form, administrative form, etc. (with the exception, perhaps, of article 13 (2)'s requirement that states use "specific programs" to bring about freedom from hunger).

642 Draft International Covenants on Human Rights: Report of the Third Committee (1963) para. 105 (A drafter found unacceptable a proposal that would replace "which are needed" with "if and where needed" in reference to the use of measures to improve food production, conservation and distribution methods. The proposal was ultimately withdrawn.).

643 See *supra* part 0on the subsidiarity principle as a component of the ICESCR's overarching purpose.

Through years of reviewing country reports, the Committee has developed a few conceptual parameters for the term 'appropriate means'.[644] In her review of the Committee's work, Magdalena Sepúlveda concludes that certain criteria for "appropriateness" have emerged.[645] She posits that the means of a state are appropriate if they are reasonable and effective.[646] Sepúlveda found that in deciding what is reasonable for a particular state, the Committee tends to consider the country's level of development.[647] In assessing effectiveness, on the other hand, it considers whether the allocation of resources is sufficient to meet Covenant targets.[648] Thus, reasonableness and effectiveness are relative terms that can only be specified in terms of the particular context and circumstances of each state. Sepúlveda also notes that the results of a particular measure appear to matter such that measures are inappropriate if they do not produce results compatible with Covenant obligations.[649] This is consistent with the Covenant's mandate that social rights measures must aim for a particular set of objectives.[650]

Due to the fact that the 'appropriateness' of any measure depends on the socio-economic circumstances of each country, defining 'appropriateness' in clear and universal terms is a rather difficult task.[651] As such, it seems

644 An obvious drawback of the Committee's use of concluding observations is that they are particularized, non-binding recommendations that are determined on a case-by-case basis, which makes it difficult to draw universal themes from them about the meaning of the term 'appropriate means'. (Saul, Kinley and Mowbray (2014) 169-170.) However, the Committee's work can still provide some meaningful insight into what criteria matter for determining whether a particular measure is appropriate for the realization of Covenant rights.

645 Sepúlveda (2003).

646 Ibid 337-338.

647 Ibid.

648 Ibid.

649 Ibid. See also General Comment No. 9: The Domestic Application of the Covenant (1997) para. 5 ("…the means used should be appropriate in the sense of producing results which are consistent with the full discharge of its obligations by the State party.").

650 See ICESCR arts. 11 (2), 12 (2) & 13 (2).

651 See Saul, Kinley and Mowbray (2014) 170-172.

sensible that the Committee[652] and The Limburg Principles[653] have left it to each state to determine whether a particular measure is appropriate.[654]The Committee has cautioned, however, that "the 'appropriateness' of the means chosen will not always be self-evident".[655] Thus, while states determine whether a particular measure is appropriate, the Committee notes that "the ultimate determination as to whether all appropriate measures have been taken remains one for the Committee to make."[656] While a state may take a handful of measures that it deems appropriate, that alone does not ensure noncompliance unless it takes *all* means that are appropriate in relation to its country's socio-economic context, assuming it is feasible to do so.

At the domestic level, courts have tried to tackle the problem of defining appropriateness. To provide an African example: the Constitutional Court of South Africa has developed a rich source of doctrinal material on the reasonableness of social welfare measures, which allows South African courts to consider a wide range of factors including social, economic, historical and constitutional contexts, institutional capacity of the state, and the flexibility, balance and comprehensiveness of the measure in question.[657] The problem remains, however, that the term 'reasonable' is

652 General Comment No. 9: The Domestic Application of the Covenant (1997) para. 5; General Comment No. 3: The Nature of States Parties' Obligations (1990) para. 4.

653 The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultulral Rights, UN Comm's Hum Rts (Jan. 8, 1987) UN Doc. E/CN.4/1987/17 (The Limburg Principles) para. 20.

654 For an historical view from the preparatory work of Covenant drafters and the Committee members see Saul, Kinley and Mowbray (2014) 158-163 (on whether the Covenant should mandate the use of any particular form of appropriate means such as legislative or constitutional incorporation of Covenant provisions), and Craven (1995) 115-116 (on whether it should be the states or the Committee members that determine whether a state measure is an appropriate means).

655 General Comment No. 3: The Nature of States Parties' Obligations (1990) para. 4.

656 Ibid. See also General Comment No. 9: The Domestic Application of the Covenant (1997) para. 5 ("The means chosen are also subject to review as part of the Committee's examination of the State party's compliance with its obligations under the Covenant."); The Limburg Principles, para. 20 ("The appropriateness of the means to be applied in a particular State shall be determined by that State party, and shall be subject to review by the United Nations Economic and Social Council, with the assistance of the Committee.").

657 *South Africa v. Grootboom*, paras. 41-44.

just as vague as the term 'appropriate' and thus requires additional normative content.

To limit the risk of the judiciary acting as a super-legislature within the all-too political realm of socio-economic policymaking, one could lean toward a more narrowly constructed version of the term "appropriate means". Certainly, and at the very least, all measures that are indispensable for the realization of social rights and that remain consistent with the text, object and purpose of the Covenant will also be considered to be "appropriate means" and therefore must be adopted by the state.[658] This is consistent with the Covenant's mandated objectives that require states use measures that are "necessary" or "needed" to bring about certain desirable outcomes, such as lowering infant mortality and improving methods of food production.[659] In other words, while all appropriate means may not be necessary for the realization of social rights, all measures that are necessary for the realization of social rights are undoubtedly appropriate means if they remain consistent with the text, object and purpose of the Covenant.

4.2.2.1.2. Essentiality as a Measure of Appropriateness

In my view, repealing, striking and refraining from adopting laws that obstruct nonprofit activities always constitute appropriate measures whenever nonprofit activities are *essential* to the realization or enjoyment of social rights in a manner that is *consistent* with the norms and principles of human rights law. 'Essentiality' thus refers to the extent to which nonprofit activities are necessary for the realization or enjoyment of social rights, or for the fulfillment of states' Covenant obligations. NGOs become necessary in this regard when their activities are the sole significant cause of enjoyment or realization for an individual or groups of individuals, such that alternatives are not readily available to these beneficiaries. This definition fits the criteria for appropriateness because it relates to the necessity of realizing/enjoying social rights or fulfilling state duties, but it is only a partial fit.

On the one hand, if NGOs are necessary for realization or enjoyment, then state measures that enable their activities would normally be consid-

658 See General Comment No. 3: The Nature of States Parties' Obligations (1990) para. 3.

659 ICESCR arts. 11 (2) (a) & 12 (2) (a).

ered appropriate means that, according to article 2 (1), a state would normally be required to employ if it is feasible for the state to do so. On the other hand, I have stopped short of claiming that the state must always enable NGOs that are necessary for social rights because unless such NGOs are also compatible with human rights norms and principles they cannot be considered appropriate for realization or enjoyment. Ethnic-based discriminatory practices by NGOs, for example, would undermine the overall objectives of human rights in general and the ICESCR in particular. In these instances, the state would be under no obligation to enable the nonprofit entities because, although they are necessary, they are nonetheless inappropriate for the realization and enjoyment of social rights. To the contrary, states would be obliged to restrain egregiously inappropriate nonprofit activities, even if they are essential to the realization of social rights, in order to uphold the overarching principles and objectives of human rights law. Thus, in order to align essentiality with appropriateness, the essentiality of nonprofit activities is marked by both how necessary these activities are for the realization/enjoyment of Covenant rights or the fulfillment of states' Covenant obligations, as well as whether they are compatible with human rights norms and principles.

The necessity of nonprofit activities is measured by reference to two dimensions of NGO-government relations: their relative *functions* and their relative *capacities*.[660] The more involved NGOs are in the provision of services that contribute to the realization of social rights (functional dimension), and the less capable or willing the state is to provide those services (capacity-related dimension), the more essential the NGO's role is in the realization of the beneficiaries' social rights. This can take place in a number of ways but generally occurs whenever nonprofit activities are the only recourse for people to realize or enjoy their social rights. For example,

660 By selecting relative functions and capacities as the key criteria for essentiality – rather than the need for the services in question or their social significance – essentiality takes on a distinctly *legal* analytical character. The critical requirement for essentiality is not whether the service fulfills basic human needs, which can only be determined through political or philosophical inquiry, but rather whether the service reasonably contributes to the realization of social rights. This is a more inclusive definition that is derived from international human rights law, rather than a restricted notion of which of the very basic services are needed for human survival. Social rights envision a dignified life for each person, not merely human survival. Therefore, when determining whether a nonprofit service is essential, the brunt of the analysis is done on the state's capacity to provide the nonprofit service in question.

when the state does not provide adequate or comprehensive assistance, but NGOs provide the same, then the NGOs are essential for the realization and enjoyment of the rights related to those services.

The crucial point is that under these circumstances, but-for the NGO's contributions, the social rights of beneficiaries would not be realized or enjoyed through reasonably accessible means. Since, by definition, states are unwilling or incapable of replacing essential nonprofit activities, state measures that enable these activities are appropriate for satisfying a state's obligation to fulfill social rights in accordance with article 2 (1). Conversely, obstructing essential nonprofit activities would likely constitute inappropriate regressive measures that breach the state's obligation both to fulfill the realization of rights and to respect their enjoyment.

In developing and using the concept of essentiality of the purposes of this dissertation, a few caveats and comments are in order. First, not all NGOs that are essential for realizing and enjoying social rights are essential in the same way. Some are essential for the enjoyment of social rights that stand at a level of realization beyond what the state is capable of achieving, while others are essential for the enjoyment of very basic rights that are necessary for sustaining human life and fall squarely within the state's duty horizon. In general, the more essential nonprofit activities are, the more they appear to be performing public functions,[661] sometimes even to the point of discharging or fulfilling state duties. Second, the degree to which nonprofit activities are essential to the realization/enjoyment of social rights can impact the way that states try to fulfill their social rights obligations because political decision-making does not take place within a social or legal vacuum. For example, in deciding how to fulfill its outstanding obligations, a state with limited resources may forgo providing services directly to a community that is already serviced by nonprofit providers. In this way, the contours of state action are likely influenced by the extent of nonprofit activities within the country.[662] Finally, since what makes nonprofit activities essential in the first place is the state's reluctance or inability to ensure those social rights being protected or promoted by the nonprofit entity, essentiality can serve as an indirect indication of the govern-

661 See Jonathan Garton, 'The Judical Review of the Decision of Charity Trustees' 20 Trust Law International 160 (2006).

662 Due to the diffused nature of institutionalized political power and political performance, the balance between governmental (formal) and nonprofit (informal) functions is itself an endogenous organizational property of the real-world political structure. (See Philip Abrams, 'Notes on the Difficulty of Studying the State (1977)' 1 Journal of Historical Sociology 58 (1988) 64 & n. 18.).

ment's reliance on or acquiescence to the fulfillment of their state obligations through nonprofit activities. This in turn justifies imposing limits on the way that governments may regulate nonprofit providers.

The notion of essentiality can help us formulate the state's regulatory obligations *vis-à-vis* nonprofits, the specificities of which can be measured on a matrix that represents the extent to which nonprofit actors are essential for the realization of new social rights, the enjoyment of existing rights, the fulfillment of standing state duties, or the discharge of state obligations that have not yet ripened into standing duties but will do so in the reasonably foreseeable future. Consequently, the power of governments to restrict essential nonprofit activities should be restricted and defined according to their essentiality, and courts should employ higher levels of scrutiny when examining whether NGO laws are consistent with the state's social rights obligations whenever they restrict essential nonprofit activities.

4.2.2.1.3. Feasibility

A key qualification of the duty to use all appropriate means is the provision within article 2 (1) that relates to the use of maximum available resources. States must dedicate the maximum of their available resources toward the realization of social rights. When interpreted in light of the primary purpose of the Covenant, which is to recognize and protect ESC rights, the ESCR Committee notes that the use of the term "maximum" indicates an implicit obligation to "strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances."[663] This suggests that states must do nothing less than what they are in fact capable of doing to achieve the full realization of social rights. In this regard – setting aside momentarily a consideration of what precisely constitutes *available* resources – states have no discretion as to how much effort or how much of their available resources they dedicate to achieving full realization.

Even if certain measures are deemed appropriate for the full realization of social rights, states bear no obligation to implement those measures if they lack the available resources to do so. This suggests that the state's duty to use all appropriate means is not yet ripe until the resources to do so be-

663 General Comment No. 3: The Nature of States Parties' Obligations (1990) para. 11.

come available. Nick Ferreira terms this latent obligation to adopt an appropriate (yet infeasible) measure a 'conditional duty', which he argues ripens into an immediate duty once it becomes feasible to adopt the appropriate measures.[664] Based on his assessment of the jurisprudence of the South African Constitutional Court, he goes a step further to assert that states bear 'enabling' duties, which require them to take measures that would increase the availability of resources and feasibility of implementing appropriate means,[665] or as the Constitutional Court put it in *South Africa v. Grootboom*, "legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time."[666]

In terms of restrictive NGO laws, among the least costly measures that a state can take are (1) refraining from obstructing nonprofit provision and (2) removing existing obstacles to nonprofit provision. These measures very likely fall within the available resources of all states, rendering them feasible. If refraining from obstructing nonprofit provision or removing such obstacles is also necessary for the realization or enjoyment of social rights – in other words, if nonprofit provision is essential for the realization or enjoyment of social rights – then taking such measures would also constitute appropriate means. Under such circumstances, obstructive nonprofit laws would be inconsistent with a state's obligation under article 2 (1) to take all appropriate measures to the maximum of their available resources.[667] Furthermore, this would give rise to an immediate state obligation to repeal the offending NGO law.[668]

Feasibility also relates to the state's ability to regulate and steer NGOs. While refraining from obstructing essential nonprofit activities is certainly

664 Ferreira (2012) 299.

665 Ibid 299-300. Seeing as the Covenant already explicitly recognizes at least one enabling duty, Ferreira's assertion does not seem so farfetched when placed within an international legal context. (See ICESCR art. 13 (2) (d) ("The steps to be taken…shall include those necessary for…the creation of conditions which would assure to all medical service and medical attention in the event of sickness.").).

666 *South Africa v. Grootboom*, para. 45.

667 See, The Limburg Principles, para. 70 ("A failure by a State party to comply with an obligation contained in the Covenant is, under international law, a violation of the Covenant.").

668 See ibid paras. 18 & 72 ("…article 2 (1) would often require legislative action to be taken in cases where existing legislation is in violation of the obligations assumed under the Covenant", and a state violates the covenant if "it fails to remove promptly obstacles which it is under a duty to remove to permit the immediate fulfillment of a right").

located within the state's feasibility frontier, regulating and steering them in a manner that is appropriate for the realization/enjoyment of social rights may not be. This depends on how limited a state is in its regulatory and enforcement-related capacities, which is highly relevant for low-income LDCs in Africa. Ultimately, whether the state must employ or forgo employing a particular regulatory scheme regarding nonprofit activities will depend on whether doing so lies within its duty horizon – that is whether it is both feasible and appropriate to do so.

4.2.2.1.4. Maximizing Availability: Public Spending, Private Resources and Accepting Foreign Funding

Given the reality of resource scarcity, major issues of concern are how much a state should spend on realizing ESC rights, what kinds of resources should be considered, and what its obligations if additional funds are made available through an external source? These are issues of particular concern in African LDCs where the availability of resources is severely limited. It is doubtful whether most sub-Saharan countries in Africa – being among the world's least developed nations – can achieve widespread social wellbeing and eradicate poverty in the foreseeable future without an extraordinary upsurge in the availability of resources at their disposal.[669] Chinzara, et al. estimate that, in order to eradicate poverty in Africa by the year 2030, Africa must sustain an economic growth rate of at least 16%, and lower-middle-income countries and lower-income countries would need external funding in the amounts of 56% and 76% of their respective GDPs.[670] After concluding that "these requirements are nearly impossible to achieve", the authors of the study note,

> … to facilitate future progress in battling extreme poverty, initiatives, especially in low-income countries in the form of social protection, investment in education, and redistribution, need to be pursued with sustained political commitment and at a scale never seen before.[671]

The obvious yet vital point here is that in the least developed countries of Africa, states simply lack the resources needed to eliminate widespread

669 See Robinson and White 82.
670 Chinzara and others (2017) 23-24.
671 Ibid 25.

poverty within the lifespan of people who are currently alive, and probably for some generations to come as well.[672]

In the context of such resource scarcity, it is critical that the governments of LDCs are managing their resources in a proper manner. Not only is squandering scare resources incompatible with article 2 (1) obligations, but improper governmental spending will contribute to the essentiality of nonprofits by reducing the state's capacity to ensure the realization/enjoyment of social rights in relation to that of nonprofits. This raises the question of *how* states should manage limited resources in terms of rationing and compromising through spending trade-offs? In this regard, issues of particular concern are, firstly, the amount of resources that states should make available for social spending; and, secondly, whether courts are competent to evaluate such choices, which are predominantly political in nature.

Since it is impossible to fix a social spending target based merely on the state's article 2 (1) obligations, Robert E. Robertson proposes using a comparative approach instead. He suggests comparing expenditures of countries with comparable economies to determine what a reasonable social spending amount would be.[673] If most countries with comparable economies can spend a specified amount on social rights, then it is reasonable to expect that it is also feasible for all similarly situated countries to do the same. On the other hand, a state could fall into non-compliance if, for example, its military spending exceeded its social spending by an extraordinary amount compared to its peers. [674] In response to the inevitability of such compromises and trade-offs in government spending, scholars like Marius Pieterse offer a critical view.[675] Writing with South African constitutional rights in mind, Pieterse argues that although trade-offs and rationing are an accepted part of reality in developing countries, the discourse of inevitability and compulsion that pervades discussions on rationing "isolate individual rationing decisions from the broader context in which they are taken and hence 'de-politicizes' them".[676] This happens by

672 There are certainly other important factors at play, such as political will and governance. Thus, the availability of adequate resources is a necessary but certainly not sufficient requirement for the progressive realization of social rights.

673 Robert E. Robertson, 'Measuring State Compliance with the Obligation to Devote the "Maximum Available Resources" to Realizing Economic, Social and Cultural Rights' 16 Human Rights Quarterly 693 (1994) 711-712.

674 Ibid.

675 Pieterse (2007) 516-518 ; see also Ferreira (2012).

676 Pieterse (2007) 516-518.

normalizing what are otherwise extraordinary sacrifices of social wellbeing, and by minimizing the need for "institutional scrutiny" of the political or otherwise societal decisions that have contributed to the need for such sacrifices in the first place. [677] Pieterse concludes similarly to Robertson and others in arguing that courts should not shy away completely from scrutinizing the financing and budgeting decision of government,[678] especially in cases involving the frivolous or otherwise unreasonable government spending of scare resources that could have been dedicated to realizing or enjoying social rights.[679] Moreover, evidence of emerging domestic jurisprudence across the globe casts doubt on blanket assertions that courts cannot or do not question the lawfulness of trade-offs in government expenditures.[680]

Even when states are managing scarce resources in a proper manner, they may still need more resources in order to ensure basic or minimum subsistence levels. For African LDCs, additional resources often take the form of foreign funding. Some take the position that developing states with fewer resources must accept financial assistance when it is made available to them from external sources. [681] There is support for this argument in the text of the Covenant, its drafting history, as well as the interpretive work of the ESCR Committee. The Covenant contemplates the use of resources made available to the state by external funders when it imposes obligations of international cooperation through financial and technical assistance,[682] suggesting that perhaps it is indeed impermissible for poorer states to close themselves off from international assistance without good

677 Ibid.

678 Ibid 527-536; Robertson (1994) 711-712; Ferreira (2012); Darrel Moellendorf, 'Reasoning About Resources: Soobramoney and the Future of Socio-Economic Rights Claims' 14 South African Journal on Human Rights 327 (1998).

679 Ferreira (2012) 295. See also, Karl Klare, 'Critical Perspectives on Social and Economic Rights, Democracy and Separation of Powers' in Helena Alviar García, Karl Klare and Lucy A. Williams (eds), *Social and Economic Rights in Theory and Practice: Critical Inquiries* (Routledge 2015) 3-22; Jeff King, *Judging Social Rights* (David Dyzenhaus and Adam Tomkins eds, Cambridge University Press 2012) 316-320.

680 Lucy A. Williams, 'Resource Questions in Social and Economic Rights Enforcement: A Preliminary View' in Helena Alviar García, Karl Klare and Lucy A. Williams (eds), *Social and Economic Rights in Theory and Practice: Critical Inquiries* (Routledge 2015) 43-64.

681 Robertson (1994) 712-713.

682 ICESCR arts. 2 (1) & 23; see also General Comment No. 3: The Nature of States Parties' Obligations (1990) paras. 13-14 (relying on Articles 55 and 56 of the U.N. Charter to emphasize the obligation of states to cooperate with one anoth-

cause. The Covenant similarly emphasizes the "essential importance of international cooperation based on free consent", particularly regarding the right to an adequate standard of living and continuously improving living conditions.[683] The ICESCR's drafting history also seems to support the suggestion that states have an obligation to make use of resources made available from external sources, including foreign funding. [684]

On this basis, the ESCR Committee takes the position that in order for states to make use of *all* available resources, they must "avail themselves of international cooperation and technical assistance",[685] and even request that the same be made available through "resources from the international community".[686] Seeking out and securing such assistance is important for the fulfillment of Covenant obligations in developing countries.[687] Particularly when the realization of social rights – like the right to social security – calls for resource-intensive measures, which "carr[y] significant financial

er); see also Draft International Covenants on Human Rights: Report of the Third Committee (1962) para. 50 (drafting history for art. 2 of the ICESCR reveals members emphasized the importance of international assistance and cooperation in the form of economic and technical cooperation.).

683 ICESCR art. 11 (1). See also Draft International Covenants on Human Rights: Report of the Third Committee (1957) para. 142 (drafting members of the ICESCR noted that recognizing the importance of international assistance for the realization of an adequate standard of living was "particularly essential" for lesser developed countries.).

684 During drafting deliberations at the UN Commission on Human Rights, Mr. Cassin, the state representative from France, proposed amending the phrase "their available resources" – which referred only to the resources of the state – to the unspecified language found in the version that was ultimately adopted: "of the available resources." (Summary Record of the 236th Meeting (1951) (emphasis added) (see also comments from Mr. Azmi of Egypt, Mrs. Roosevelt of USA, and Mr. Sörensen of Denmark, all understanding "available resources" to include international resources made available to developing countries).).

685 General Comment No. 19: The Right to Social Security (2007) para. 41; see also General Comment No. 6: The Economic, Social and Cultural Rights of Older Persons (1995) para. 18.

686 General Comment No. 3: The Nature of States Parties' Obligations (1990) para. 13.

687 See General Comment No. 6: The Economic, Social and Cultural Rights of Older Persons (1995) para. 18 ("...international cooperation...may be a particularly important way of enabling some developing coutnries to fulfill their oblgiations".).

implications".[688] Finally, the ESCR Committee insists that states that were unable to secure the international assistance that they needed must demonstrate to the Committee that they were unsuccessful in doing so.[689] Where NGOs are essential for the realization / enjoyment of social rights, this would of course call into question the legality of NGO laws that broadly limit or obstruct access to foreign funding in countries where resources are already scarce.

Critics have pointed out some problems with the Committee's interpretation of the Covenant. Some scholars note that the initial fervor with which drafting members tried imposing upon richer states obligations to provide technical and financial assistance to poorer states has since been downplayed.[690] Consequently, the Committee emphasizes the duty of poorer states to seek out and accept international assistance, but falls short of addressing *how* international assistance is to be made available and *who* is responsible for ensuring that it is made available to poorer states in the first place.[691]

What about the scenario in which foreign assistance for advancing social rights is being offered to nonprofit organizations instead of directly to the state? This is precisely what happens in sub-Saharan Africa, where many nonprofits are supported predominantly by foreign funding. Thus, one might ask whether the obligation to use the maximum of available resources requires the state to allow or even enable such transactions? This depends on how broadly the terms 'available resources' and 'use' are interpreted.

Among scholars, there is no clear agreement as to the types of resources that qualify under article 2 (1) as "available resources". Some interpret the term 'resources' in narrowly such that it primarily concerns financial resources of the state.[692] Others like Robertson and Sigrun Skogly assert that the state should also mobilize a broader array of resources including hu-

688 General Comment No. 19: The Right to Social Security (2007) para. 41; see also General Comment No. 6: The Economic, Social and Cultural Rights of Older Persons (1995) para. 18.

689 General Comment No. 4: The Right to Adequate Housing (1991) para. 10; General Comment No. 12: The Right to Adequate Food (1999) para. 17.

690 Saul, Kinley and Mowbray (2014) 137-140.

691 Ibid.

692 Audrey R. Chapman and Sage Russell (eds), *Core Obligations: Building a Frameowrk for Economic, Social and Cultural Rights* (Intersentia 2002); Craven (1995).

man, natural, technological, informational and regulatory resources.[693] A wider interpretation is consistent with the ordinary meaning of the term "resources", and falls in line with the related terms within article 2 (1) that are also broadly stated, such as maximal use and international cooperation and assistance. Foreign-funds funneled into a country through NGOs for the purpose of advancing social rights are certainly 'resources' for beneficiaries in the proper sense of the word. However, are they resources in the legal sense of article 2 (1) obligations such that the state can "use" them?

Since these funds are not provided to the state, they are not resources that the state can 'use' in the sense of directing their expenditure. Nonprofit funds that are dedicated to social welfare and development do not constitute resources that are made available to the state *per se*; rather they are a part of those resources that are made available to the people in the state, but not necessary to the government. The legal consequence of this distinction is significant: the property and associational rights of all NGOs proscribes state attempts to take control of nonprofit operations or resources. A question that remains, however, is whether the obligation to 'use' available resources can also mean an obligation to 'permit others to use' available resources.

On the one hand, such an expansive interpretation of the Covenant admittedly stretches the word 'use' beyond its ordinary meaning. On the other hand, the social rights of beneficiaries – which it is the objective of the Covenant to protect and promote – are jeopardized in least developed countries if the state is generally permitted to block the use of private resources that are essential for the realization or enjoyment of social rights. Thus, although the obligation to use the maximum of available resources does not explicitly forbid the state from blocking access to foreign funds granted to NGOs, its emphatic insistence on not wasting resources that are needed for the realization of social rights does seem to suggest that the Covenant would not favor an interpretation whereby states are generally permitted to block foreign funding without adequate justification.

Some have gone a step further to argue that states must, or at least should, not only permit private giving, but also facilitate and encourage it. Relying on Danilo Türk's argument that governments must enable non-governmental actors to dedicate resources to ESC rights, Robertson notes that while governments lack direct control over private donations, they do

693 Robertson (1994) 695-703; Sigrun Skogly, 'The Requirement of Using the 'Maximum of Available Resources' for Human Rights Realisation: A Question of Quality as Well as Quantity?' 12 Human Rights Law Review 393 (2012).

have the power to encourage and allow private giving.[694] Likewise, Nick Ferreira has argued from a South African perspective that the state bears 'enabling duties' with respect to ensuring that resources are made available for the realization of socio-economic rights. He writes,

> Even if it is truly infeasible to provide a certain good now, there are often measures that can be taken which will enable its provision in the future. Such measures might include, for example: alterations to the tax system; saving; the creation of enabling infrastructure (eg building roads and public transport to enable people to access existing services); training people to address skills shortages (eg educating teachers); and re-designing and reforming state institutions to equip them to be able to deliver in future. [695]

Although Ferreira was writing with the South African Constitution in mind, the requirement in article 2 (1) of the ICESCR that *all* appropriate means be used supports his assertion that states bear enabling duties. However, I would add to Ferreira's list of enabling duties the obligation of states to permit private foreign sources of funding to reach nonprofits that are essential to the realization / enjoyment of social rights.

Just as a state should not block essential nonprofits from receiving foreign funding and assistance, it should take care not to obstruct their activities or access to their services without justification because doing so would amount to blocking the external resources that flow through the NGOs. This is a consequence of the state's duty to respect social rights of beneficiaries, which implicitly gives rise to an obligation to refrain from restricting access to available resources that are essential for their realization or enjoyment, such as adequate food, shelter, healthcare and educational services.[696]These nonprofit activities can be thought of as external resources that are made available to beneficiaries through the nonprofit organization. The Committee has noted that, in the area of education, "a State must respect the availability of education by not closing private schools".[697] The African Commission has also used this approach. It asserts that the state's duty to respect social rights includes the duty "to respect the free use of resources owned or at the disposal of the individual alone or in

694 Robertson (1994) 713.
695 Ferreira (2012) 299-300.
696 General Comment No. 12: The Right to Adequate Food (1999) para. 15; *SERAC v. Nigeria* para. 45.
697 General Comment No. 13: The Right to Education (1999) para. 50.

any form of association with others, including the household or family, for the purpose of rights-related needs."[698] This language is broad enough to include the free use of resources owned by NGOs that are essential to the realization or enjoyment of social rights.

Thus, state measures that obstruct foreign-funded NGOs whose activities are essential for the realization or enjoyment of social rights should be subject to judicial scrutiny as measure that potentially circumvent article 2 (1) obligations. Without proper justification, obstructing the activities of essential NGOs or denying them access to foreign funding likely contravenes the state's obligation to use the maximum of its available resources and all appropriate means. Moreover, since foreign-funded NGOs do not draw on state resources, courts would not need to address the uncomfortable political questions about state budgeting and apportionment that would normally accompany judicial assessments of whether a state has used the maximum of its available resources.

There must, however, be some exceptions to a general duty to permit externally supported NGOs or to accept foreign assistance. Critics of the ESCR Committee's line of reasoning on this point have argued that it suggests rather unfairly that African states are required to accept foreign aid, which could undermine their sovereignty and independence.[699] Each time a state avails itself to significant amounts of external funding it also exposes itself to foreign control and political influence. Thus, the obligation to accept external resources must be balanced against the risk of foreign political interference. Article 2 (1) allows analysts to balance these risks by implying that states are not required to accept external resources if it would be inappropriate for them to do so. However, since there is not much guidance on what constitutes appropriate means, it remains debatable whether such an assessment is judicially operational. Thus, at least in theory, nonprofit activities that are essential for the realization or enjoyment of social rights cannot be restricted simply because they are backed by foreign funders, unless the state can demonstrate that being backed by foreign funds somehow reduces such activities to inappropriate measures. If, for instance, the conditions placed on accepting foreign funding render nonprofit activities inappropriate, then the social rights obligations of the state

698 *SERAC v. Nigeria* para. 45.

699 See, e.g., Lilian Chenwi, 'Unpacking "Progressive Realisation", Its Relation to Resources, Minimum Core and Reasonableness, and Some Methodological Considerations for Assessing Compliance' 46 De Jure 742 (2013) 752-753.

do not compel it to support those activities or their acceptance of such funds.

Despite the lack of clarity about the meaning of "appropriate", there are some clear instances when enabling foreign-backed nonprofit activities will not be appropriate for the realization of social rights. If, in extreme cases, foreign funding causes nonprofit activities to become harmful to the human rights of beneficiaries or others, the Covenant would allow or even require that states block these nonprofit services or their access to these foreign funds. The potential influence of foreign donors in domestic affairs and their growing entanglement with nonprofit entities certainly raises legitimate concern for the state's political independence and the people's right to self-determination. For example, the state may legitimately subject NGOs and their foreign funders to restrictive regulatory measures if they seek to use nonprofit provision as a means of discriminating against people on account of their ethnicity. The legal grounds for permitting such restrictive regulations, despite their obvious interference with the social rights of the NGO's beneficiaries, is the finding that these nonprofit activities are both inappropriate and harmful, and thus article 2 (1) does not compel the state to enable them but rather requires the state to prevent the discriminatory harm that such activities are likely to inflict on people within the its territory.

4.2.2.1.5. As Compared to State Duties under the African Human Rights Charter

Like the ICESCR, the African Charter incorporates a measure of flexibility into states' Charter obligations, with some limitations. It imposes upon ratifying members an obligation to recognize rights and undertake to adopt effective measures:

> …parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them.[700]

Although the term "recognize" appears to be a weakening of state's duties when compared to the ICESCR's requirement to "take steps", the African Commission insists that article 1 of the African Charter imposes upon states "a positive obligation" to "define the legal framework for the enjoy-

700 African Charter art. 1.

ment of the rights and freedoms contained in the Charter…"[701] It emphasizes the critical function of article 1 as the provision that legally binds each state, and refers to it as "the root of the Charter".[702]

The Charter also imposes duties of promotion:

> States parties to the present Charter shall have the duty to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood.[703]

Finally, states parties to the African Charter have certain obligations toward judicial and institutional actors that protect Charter rights. In this regard, article 26 of the Charter announces the following:

> States parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.

In a case concerning the government's involvement in an attack on protestors that took place in Egypt, the African Commission interpreted article 26 in conjunction with article 7 (the right to a fair trial) and concluded that states bear a duty to establish not only courts but also the "institutions which also have the mandate to create mechanisms for protection."[704] This is essentially a positive obligation to "provide the structures and mechanisms necessary for the exercise of the right to fair trial."[705] Article 26, however, is not restricted in its application to the right to fair trial. The commission's reasoning can be applied analogously to ESC rights as well. In that regard, the state would be bound to provide structural support to institutions – meaning to permit and facilitate their establishment and improvement – when those institutions have a national character and when they are – as the Commission has noted elsewhere – "institutions

701 *Groupe De Travail Sur Les Dossiers Judiciaires Stratégiques v. Democratic Republic of Congo*, Comm. No. 259/2002 (ACmHPR 2015) para. 62.
702 *Sir Dawda K. Jawara v. Gambia (the)*, Comm. No. 147/95-149/96 (ACmHPR 2000) para. 46.
703 African Charter art. 25.
704 *Egyptian Initiative for Personal Rights and Interights v. Egypt*, Comm. No. 323/2006 (ACmHPR 2013) para. 235.
705 Ibid.

which are essential to give meaning and content to that right".[706] It would seem that if a state fails to establish such institutions, although it is obliged to do so, it must at the very least enable the establishment and improvement of nonprofit institutions that might take its place.

Notably absent in the African Charter's statement of duties are those qualifying conditions found in the ICESCR. The Charter makes no mention of the maximal use of available resources or the appropriateness of means, which would have restricted both the discretion of states as well as the scope of their duties. The African Charter also excludes the language of progressive realization, which relieves states of the obligation to maintain the particular intention of progressing rather than regressing in the achievement of full realization. At first glance, it may appear that the African Charter provides less protection than the ICESCR, or that African states are bound by less rigorous obligations than other states. However, that would be an erroneous conclusion.

The African Charter should be interpreted in light of the ICESCR,[707] and in a way that is consistent with the object, purpose and terms of each treaty. Thus, the fact that the African Charter is silent with regard to the more stringent obligations found in the ICESCR cannot be taken to mean that the African Charter negates the duties imposed by the ICESCR. Indeed, the more protective provisions of either treaty should trump the less protective provisions of the other.[708] As such, African states are still obliged to fulfill all state obligations found in article 2 (1) of the ICESCR, namely using the *maximum* of available resources, taking *immediate* steps, adopting *all* appropriate means and acting with the intention of realizing social rights *progressively* rather than regressively or stagnantly. In addition, African states are obliged by the African Charter to recognize Charter rights and to ensure that their adopted means are *effective* for the realization of rights. Furthermore, African states must ensure that Charter rights are known and understood by rights bearers. Lastly, African states are

706 *Civil Liberties Organisation v. Nigeria*, Comm. No. 129/94 (ACmHPR 1995) para. 15.

707 African Charter art. 60.

708 Scott and Alston argue that "a principle of greatest protection…should govern interpretive harmonisation amongst human rights treaties." They reason that "[s]uch a principle flows from the best reading of the combined normative signals...and the general principle of treaty interpretation in art 31 (3)(c) of the Vienna Convention of the Law of Treaties which calls for a treaty term to be read in light of other relevant international law applicable in the relations between states." (Scott and Alston (2000) 229.).

bound to guarantee the independence of the judiciary, and to refrain from interfering with the establishment and improvement of national institutions that promote and protect Charter rights.

4.2.2.2. Duty to Respect Social Rights: Permitting Essential NGOs

When the state's duty to respect social rights is characterized as a negative duty, it requires state to refrain from doing anything that would deprive a person of his or her rights.[709] This becomes relevant when states try to restrict private efforts to bring about the realization or enjoyment of social rights.[710] The ESCR Committee refers to this negative aspect when it insists that the duty to respect forbids the implementation or continued use of state measures that result in the prevention or limitation of access to things like adequate food and water, private schools, and preventative, curative and palliative health services (including traditional healing practices).[711] For example, with respect to the right to health, the Committee has asserted, "obligations to respect include a State's obligation to refrain from prohibiting or impeding traditional preventive care, healing practices and medicines."[712] For the regulation of nonprofits, the negative aspect of the state's duty to respect social rights would indicate that it should not obstruct the efforts of nonprofits that are essential for realization or enjoyment.

The positive dimension of the duty to respect imposes another obligation upon states. When viewed through the lens of the duty to respect, the positive obligation of states to take steps toward the progressive realization of social rights through the use of all appropriate means, and particularly

709 See, Sandra Liebenberg, *Socio-Economic Rights: Adjudication under a Transformative Constitution* (Juta & Co. 2010) 214-218 (describing jurisprudence in South Africa that recognizes negative state duties of non-intereference with respect to socio-economic rights.).

710 See, Rosas, 'The Right of Self-Determination' (noting that the internal aspect of the right of self-determination indicates "a right of non-intereference" and "a certain basic freedom to economic, social and cultural activities indepenedent of government policies.").

711 General Comment No. 12: The Right to Adequate Food (1999) para. 15; General Comment No. 13: The Right to Education (1999) paras. 47 & 50; General Comment No. 14: The Right to the Highest Attainable Standard of Health (2000) para. 34; General Comment No. 15: The Right to Water (2003) para. 21.

712 General Comment No. 14: The Right to the Highest Attainable Standard of Health (2000) para. 34.

legislative means, indicates that states bear a standing obligation to repeal existing laws that interfere with or undermine the progressive realization of social rights, unless their retention can by fully justified. If the manner in which a state regulates nonprofit providers is inconsistent with that state's social rights obligations, then the state must withdraw that regulation.

The ESCR Committee has supported this view in its interpretive work. It has noted that states violate their Covenant obligations not only with the "formal repeal or suspension of legislation necessary for the continued enjoyment" of social rights, but also with "the failure to reform or repeal legislation which is manifestly inconsistent" with social rights.[713] In a General Comment on the right to water, the ESCR Committee maintains that "[e]xisting legislation, strategies and policies should be reviewed to ensure that they are compatible with obligations arising from the right to water, and should be repealed, amended or changed if inconsistent with Covenant requirements."[714] The duty to respect the right to social security has been interpreted in a virtually identical manner.[715]

While the imposition of restrictive NGO laws may indicate that the state has breached its duty to respect social rights, the failure to repeal such provisions when they are inconsistent with the state's Covenant obligations may also constitute a breach of the duty to respect. If the content of a restrictive NGO law is an affront to the realization or enjoyment of social rights, then the state breaches its duty to respect social rights not only at the moment that it passes the offensive legislation but also continuously thereafter because it remains in breach until it repeals the offensive law.

4.2.2.3. Duty to Protect Social Rights: Controlling Harmful NGOs

In addition to their duties to fulfill and respect, states also bears a duty to protect social rights from third party interference. The obligation to protect social rights is implicated whenever nonprofit activities are involved in, or could potentially interfere with, the enjoyment and realization of

713 General Comment No. 12: The Right to Adequate Food (1999) para. 19; General Comment No. 13: The Right to Education (1999) para. 59; General Comment No. 14: The Right to the Highest Attainable Standard of Health (2000) paras. 48 & 50; General Comment No. 15: The Right to Water (2003) para. 42; General Comment No. 19: The Right to Social Security (2007) paras. 64 & 65.

714 General Comment No. 15: The Right to Water (2003) para. 46.

715 General Comment No. 19: The Right to Social Security (2007) para. 67.

beneficiaries' social rights.[716] In order to restrain nonprofit activities that pose a threat to human rights, states must – at the very least –exercise adequate regulatory and supervisory oversight. In theory, although NGOs have a right to free speech and free association, the state may limit their conduct so as to protect the social rights of beneficiaries, though such limitations would need to be legitimized with sound and lawful justifications.

States bear primary responsibility for the realization of social rights.[717]While states may delegate tasks towards the fulfillment of their social rights obligations, they may not alienate themselves entirely from their duties. As such, private acts that interfere with the enjoyment of social rights are sometimes attributable to the state.[718] In *Social and Economic Rights Action Center and Other v. Nigeria*, the African Commission concluded that the Nigerian government's treatment of the Ogoni people, and its acquiescence to the destructive conduct of a private oil company, constituted violations of socio economic rights.[719] In that communication, the Commission laid out the state's minimum core obligations under regional and international human rights law for certain social rights. In general, the minimum core obligations of states are twofold: first to refrain from violating social rights, and secondly to refrain from interfering with the efforts of people to fulfill those social rights. With respect to housing and shelter, the Commission notes that states must "refrain from destroying housing

716 In relation to private for-profit providers, Marius Pieterse draws out the state's obligation to regulate private providers from its constitutional obligation toward the social rights of beneficiaries. He asserts,

> Given that private providers of essential social goods and services are in the business of rendering access to the objects of constitutional rights, the limitation of their commercial liberties through such public intervention is not only constitutionally justified, but called for.
>
> (Marius Pieterse, 'Relational Socio-Economic Rights', 25 South African Journal on Human Rights 198 (2009) 208.).

717 Robert McCorquodale, 'Non-State Actors and International Human Rights Law' in Sarah Joseph and Adam McBeth (eds), *Research Handbook on International Human Rights Law* (Edward Elgar 2010) 91-114, 100-103; General Comment No. 13: The Right to Education (1999).

718 This is the case when private parties act on behalf of the state, have some claim to governmental authority, are controlled by the state, carry out government-like conduct in the absence of the state, or exercise conduct that is subsequently acknowledged and adopted by the state. (Responsibility of States for Internationally Wrongful Acts, UNGA (Jan. 28, 2002) U.N. Doc. A/RES/56/83 (Annex) arts. 4-11.).

719 *SERAC v. Nigeria* para. 66.

and obstructing efforts of people to rebuild lost homes."[720] Likewise, the Commission expounds that "the minimum core of the right to food" requires that a state "should not destroy or contaminate food sources" and it should not "prevent peoples' efforts to feed themselves."[721] According to the Commission, Nigeria violated the right to food in part "through terror", by which it had "created significant obstacles to the Ogoni communities trying to feed themselves." [722] These minimum obligations extend to the state's obligation to protect social rights against violations and interferences perpetuated by private actors.[723]

Similarly, in *Sudan Human Rights Organisation and Other v. Sudan*, the Commission held that states could be indirectly responsible for the deprivation of rights by third parties who are "insufficiently regulated by States".[724] Private attacks by state-supported "nomadic tribal gangs of Arab origin"[725] on civilian populations in the Darfur region constituted a violation of the rights to health and the right to food.[726] The Committee noted that "the destruction of homes, livestock and farms as well as the poisoning of water sources, such as wells exposed the victims to serious health risks and amounted to a violation of Article 16 of the Charter", which guarantees the right to health. [727]

Yet even when third party interference cannot be attributed to a state, it is still required to protect individuals against such interference.[728] This is why states must monitor the effects of privatization on the social rights of

720 Ibid, para. 61.
721 Ibid, para. 65.
722 Ibid, para. 66.
723 Ibid, paras. 61 & 65.
724 *Sudan Human Rights Organisation v. Sudan*, para. 210.
725 Ibid, para. 5.
726 Ibid, paras. 1-14.
727 Ibid, para. 212.
728 General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, Human Rights Committee, U.N. Doc. CCPR/C/21/Rev. 1/Add.13 (UN 2004) para. 8 (stating that "positive obligations on States Parties to ensure Covenant [ICCPR] rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amendable to application between private persons or entities."). See also, *X and Y v. The Netherlands*, 8 EHRR 235, 8978/80 (ECtHR 1985); *Velasquez Rodriguez Case*; *Mouvement Burkinabé Des Droits De L'homme Et Des Peuples v. Burkina Faso*, 204/97 (ACmHPR 2001) § 42; Clapham, 'Non-State Actors' 566-568.

beneficiaries with vigilance.[729] The benefits derived from privatization should not be acquired by diminishing the rights of beneficiaries.[730]

The African Children's Committee has also weighed in on the matter of protecting social rights. Its jurisprudence recognizes the duty to protect beneficiaries against unscrupulous NGOs as one of the state's core obligations. In *Centre for Human Rights and Other v. Senegal*, a case referenced in an earlier section about *talibés* students in Senegal who were in the care of private *daraas* schools,[731] the African Children's Committee found a violation of not only the duty to provide minimum essential levels for education and health services, but also the duty to protect the children against the misconduct of the *daraas*. The Committee noted that the duty to protect the right to education from third party deprivation requires the state to "set minimum standards for all educational institutions", including privately run schools like the *daaras*.[732] The African Children's Committee found that the Senegalese state failed to fulfill its obligation to protect because it did not provide "the necessary curriculum and facilities in which the *daaras* function in delivering education." [733] The African Children's Committee wrote:

> The government must enforce its own laws to protect *talibés* from this abuse and ensure that the education received in *daaras* equips these children with a rounded education, and does not allow forced begging… But the authorities have largely failed to take concrete steps to enforce the law and end the exploitation and abuse of the *talibés*. Therefore, the Government of Senegal has violated the right to education of the *talibés* by failing to ensure the availability, accessibility and acceptability of the education and supervising the *daaras*.[734]

Regarding the right to the best attainable health, the African Children's Committee found that the obligation to protect requires states "to assure that children are not deprived of access to health care services", that the state "should not tolerate any practice which violates the right to health of

729 Neuman (2013) 368. See also, General Comment No. 14: The Right to the Highest Attainable Standard of Health (2000).
730 General Comment No. 5: General Measures of Implementation of the Covenant on the Rights of the Child, Committee on the Rights of the Child, U.N. Doc. CRC/GC/2003/5 (UN 2003).
731 Supra note 441 and accompanying text.
732 *Centre for Human Rights v. Senegal*, para. 47.
733 Ibid, para. 48.
734 Ibid, para. 50.

children", and that it "must assert that third parties do not deprive children of their right to access medical services."[735] Each of these obligations is relevant for third party deprivations of social rights, and they indicate that the state must, at the very least, protect against such interferences. The Committee concluded that Senegal violated the right to health by failing to take measures against those private entities that "accommodated *talibés* in squalid health conditions."[736]

The ESCR Committee, the African Commission and the African Children's Committee have all strongly indicated that the destruction, by non-state actors, of objects necessary for the realization of social rights may constitute a breach of the state's duty to protect social rights. These opinions support the claim that the government should protect the social rights of beneficiaries against harmful nonprofit activities. From this perspective, a beneficiary-centered analysis offers a critical approach that renders visible the potential harm that NGOs could cause to beneficiaries in a way that an analysis based exclusively on the rights of NGOs would not have detected. The state's concerns about abusive, negligent or otherwise harmful nonprofit activities can be addressed within a paradigm that takes into account the state's duty to protect the human rights of beneficiaries. For example, from the beneficiary's perspective, the ICESCR can accommodate the claim among some African states that NGOs with foreign ties pose a threat to the political independence of the African state because it guarantees the right to self-determination.

4.2.2.4. Concluding Remarks

It cannot be said in specific terms when a state must fully realize social rights, or by what particular collection of means or with how large a budget it must go about achieving that goal. Instead, the Covenant imposes upon states the task of doing all that they can do in order to achieve the realization of social rights. It does this by requiring that states dedicate the maximum of their available resources, and that they make use of all appropriate means. Then if after having offered all that they can offer toward the realization of social rights states are only able to reach full realization progressively, they do not fall out of compliance for failing to achieve full realization immediately.

---

735 Ibid, para. 54.
736 Ibid, para. 56.

States are bound to adopt all appropriate and feasible measures. Appropriate measures include those that are necessary for the realization of social rights with respect to the particular social and economic context of each country. When nonprofit activities become essential for the realization or enjoyment of social rights, or for the fulfillment of state obligations, then state measures that enable such activities will be considered appropriate means. In the least developed countries of Africa, where the state's own resources are inadequate for the progressive realization of social rights,[737] nonprofit activities are more likely to be essential for the realization / enjoyment of social rights and the fulfillment of state duties. This suggests that the Covenant likely prohibits state measures that obstruct nonprofit activities in African LDCs. Moreover, appropriate and feasible measures would include repealing and refraining from enacting obstructive NGO laws.

NGO laws that forbid or limit the use of foreign funding can cause significant harm to the enjoyment and realization of social rights in countries where essential nonprofits rely heavily on foreign funding. The Covenant and the ESCR Committee seem to suggest that poorer states must accept external resources, and their reasoning seems to extend to foreign-backed nonprofit activities as well. However, whether states must enable or obstruct NGOs with foreign funding depends on whether accepting the foreign funding renders the nonprofit activities inappropriate for or harmful to the realization or enjoyment of Covenant rights. When nonprofit activities are appropriate and foreign funding does not render them inappropriate, then there is an obligation to enable and support them and their access to foreign funding. Otherwise, states bear no obligation to enable or support inappropriate services from a social rights perspective. Lastly, if the activities pose a threat to human rights, then the state has a positive obligation to prevent the harm in order to protect the rights of beneficiaries and others. In this case, the threatening nonprofit activities and their access to foreign funds may be restricted or obstructed.

737 It is questionable whether LDCs can progress without the assistance of external resources. The United Nations agency for least developed countries has stressed how critical external support and, in particular, overseas development aid has been for efforts to eliminate extreme poverty in LDCs. (See (2014) United Nations Under-Secretary-General and High Representative for LDCs, LLDCs and SIDS, *Extreme Poverty Eradication in the Least Developed Countries and the Post-2015 Development Agenda,* 25 & 42.).

4.2.3. Minimum Core Obligations

The term 'minimum core obligations' refers to the notion that states bear certain critical duties that must be fulfilled as a matter of priority because they correspond to the minimum essential level of ESC rights. The term 'minimum essential level' (MELs) refers to the basic core of a right that is inviolable because it reflects the very nature of the right. Despite the lofty ideals that underpin MELs, they are not described with enough precision or normative content to render them legally determinable. What, for example, constitutes adequate housing in Mali? How might adequate housing differ in South Africa? Where does one draw the line between inadequate housing and adequate housing? And, finally, how does one go about determining whether the state has ensured adequate housing? Thus, there is a great deal of controversy about whether the ICESCR guarantees or even recognizes MELs. Since, however, it is clear that the Covenant forbids the total destruction of ESC rights, presumably at the very least adequate housing must exclude homelessness, basic health care must exclude being denied medical attention or services when one is very ill, compulsory and free primary education must exclude fee-based enrollment, access to adequate foodstuffs must exclude chronic hunger and malnutrition, and basic social security must exclude widespread poverty and income insecurity. Therefore, at the very least, MELs reflects a legal guarantee that people are entitled to some level of protection beyond the total deprivation of ESC rights.

As a consequence, the minimum core obligation of states would be to refrain from totally destroying ESC rights or to bring about at least some meaningful degree of realization for all ESC rights whenever it is possible to do so. Although states have a great deal of discretion as to how they will achieve the realization of ESC rights, that discretion does not extend to deciding whether they will all together forgo realizing a particular right when it would otherwise be feasible and appropriate for them to do so. Proponents of the minimum core would insist that it provides greater protection for ESC rights than merely adopting a more-than-nothing rule for the realization and enjoyment of rights. Yet even this very basic assertion would still have considerable legal consequences in least developing countries where the total deprivation of ESC rights is not an uncommon occurrence, and even more so when that deprivation is being alleviated by nonprofit entities.

Accepting the notion of core obligations augments the legal relationship between nonprofits and regulatory bodies. In countries where nonprofit

entities realize minimum essential levels in lieu of the state, the nonprofits are fulfilling those core obligations of the state. Thus, any state measures that restrict NGOs that are essential for the realization or continued enjoyment of minimum essential levels may constitute a violation of the state's core obligations. The implication is that such NGOs would enjoy a special level of legal protection from state interference, above and beyond that enjoyed by other NGOs. This kind of legal intervention would in turn incentive greater nonprofit activity in the areas of service that are prioritized by the core obligations approach. In least developed countries, where NGOs are often essential for the realization and enjoyment of very basic ESC rights and where governments have sometimes targeted NGOs through restrictive regulatory measures, the recognition of core obligations could reshape the very landscape of the nonprofit sector, to the benefit of rights bearers. In this section, I will consider what core obligations – if any – states may bear in relations to ESC rights. From these core obligations, I draw out criteria for further classifying NGOs in accordance with their propensity to fulfill minimum essential levels of beneficiaries or the core obligations of states.

4.2.3.1. ICESCR Recognizes Minimum Essential Levels

The notion that states bear minimum core obligations is not found explicitly within the Covenant. Yet these basic duties may be derived implicitly because their fulfillment is necessary for the realization of ESC rights. They are derived first and foremost from the Covenant's indication that the MELs of ESC rights – whatever they may be – cannot be violated. However, while there are conceptual difficulties in demarcating a core or minimum level of realization and enjoyment for each right that constitutes its very nature or essence, the notion of a minimum core is easier to conceptualize for state duties. The existence of minimum core obligations is consistent with the Covenant, at least to the extent that these core obligations condition the way in which article 2 (1) obligations should be operationalized. Thus, although the particular content of MELs is difficult to deduce from the ICESCR, core obligations can be legally defined to a certain extent. The following paragraphs will expound on this point.

As noted earlier, core obligations can be derived from the Covenant's implicit recognition of MELs. Any interpretation of the Covenant that supports the recognition of MELs and core obligations must be consistent with the ordinary meaning, purpose and object of the Covenant, within its

context.[738] The text of the Covenant supports the view that ESC rights contain an essential core that must be protected. For example, although article 4 permits limitations on covenant rights, it also requires that those limitations remain "compatible with the nature of these rights". Article 5, which prohibits "any act aimed at the destruction of any of the rights", similarly appears to suggest that a non-derogable core exists within each right. Therefore, MELs exist because, at the very least, the Covenant forbids the total deprivation of ESC rights; and this acknowledgement – without even having yet defined the contents of those MELs – is already enough to give rise to certain determinable core obligations.

A teleological reading of the treaty confirms that MELs, and consequently core obligations, exist. This approach reasons that interpreting the ICESCR as though it does not guarantee the protection of minimum essential levels would effectively wipe out the covenant's objective function, which is to create ESC rights and correlative state duties. The ESCR Committee goes so far as to conclude, "If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*." [739] If the Covenant does not implicitly recognize MELs for each right, then, although it appears to be a binding instrument of international law, the Covenant would nonetheless have the same practical effect as a recommendation or declaration. Consequently, without imposing certain implicit core obligations to ensure protection for MELs, the Covenant will have created merely illusory state duties. This would suggest that the corresponding rights are reduced to legal principles or, at worst, hollow promises. Since, however, the Covenant is indeed a legal instrument that protects certain human rights by imposing legal restraints and obligations upon states, it must create at the very least some protection against the total deprivation of the rights guaranteed therein.

Martin Scheinin makes a convincing case for the minimum essential levels approach from the perspective of giving effect to the Covenant. His treatment of Robert's Alexy's theory on rules and principles distinguishes between rights as legal principles, which may be balanced against competing principles, and rights as legal rules, which – when applied – determine the outcome of a case without the need for balancing.[740] Scheinin favors a

738 Vienna Convention on the Law of Treaties, art. 31.

739 General Comment No. 3: The Nature of States Parties' Obligations (1990) para. 10.

740 See Martin Scheinin, 'Terrorism and the Pull of 'Balancing' in the Name of Security', EUI Working Papers Law 55 (2009).

minimum essential core approach to human rights in which "every human right contains a core with the quality of a rule", rather than merely a principle, and that the proper scope of application of each right is defined in such a way that "there can never be a genuine conflict between rules".[741] In agreement with Alexy's critics, Scheinin doubts the efficacy of a judicial process that only ever balances rights against one another without recognizing an inviolable core within. Such a system "does not *exclude* its erosion to irrationality, arbitrariness and insufficient protection of the rights of the individual".[742] He asserts that, in an era of global terrorism and the resulting limitation on rights in the name of national security, those judicial bodies in "even the finest democracies of the world" run the risk of "accept[ing] too many compromises in the name of balancing".[743]

The human rights context of the ICESCR also supports the existence of MELs for ESC rights. The ICCPR, being the sister covenant to the ICESCR and having been drafted alongside it, constitutes part of the context within which the ICESCR should be interpreted, especially in view of the interdependence of each set of rights. From this perspective, the existence of MELs in relation to ESC rights can be derived from the right to life, which is protected in the ICCPR. Some proponents of core obligations argue that states must refrain from wrongfully ending life, and must take all possible measures to ensure survival. [744] The African Charter is also part of the human rights context that is relevant for African LDCs. The African Commission's interpretive work features multiple references to core obligations and MELs for social rights,[745] although core obligations as they are recognized by the African Commission are sometimes conflated with the negative duty of states to refrain from destroying existing social rights achievements.

4.2.3.2. The Contents of Core Obligations May Be Legally Determined

Much of the debate and controversy around core obligations is centered around whether and how the specific normative content of MELs can be

741 Scheinin (2013) 535.
742 Scheinin (2009) 57 (emphasis in original).
743 Ibid (emphasis in original).
744 E.g., Bertrand G. Ramcharan, 'The Concept and Dimensions of the Right to Life' in Bertrand G. Ramcharan (ed), *The Right to Life in International Law*, vol 3 (Martinus Nijhoff 1985) 1-32, 8-10.
745 *SERAC v. Nigeria.*

legally defined.[746] Some doubt the conceptual integrity of MELs.[747] Others question whether the MELs concept is even capable of advancing social justice.[748] Despite the difficulties presented by the concept of MELs, their legal determinability is not a prerequisite for beginning to define the contents of core obligations. Although it remains unclear whether one can legally deduce the normative contents of MELs, their mere existence of MELs indicates that some core obligations must also exist. Indeed, core obligations remain intact in their functional form: they exist to the extent that they refine the state's general obligations under article 2 (1), even if it is not possible for law to define in a normative manner the MELs of each ESC right.

The Covenant appears to protect at least some positive, albeit legally indeterminable, degree of MELs for ESC rights. At the very bare minimum, there is protection against the total deprivation of ESC rights. From there, certain generally applicable core obligations can be defined as a consequence of the mere existence of MELs, without the need to first attribute any particular level of realization or enjoyment to the inviolable minimum core of ESC rights. The key is in accepting that, at the very least, the Covenant forbids the total deprivation of ESC rights.

The ESCR Committee appears to have taken this view in some of its interpretive work. Its construction of the substantive contents of MELs and core obligations is based on the need to alleviate and prevent total deprivations of ESCs. They include the following duties: to ensure access to minimal essential food and freedom from hunger to everyone; to ensure equal, secure and affordable access to safe water; to refrain from committing and to protect against forced eviction; to respect and protect existing formal and informal social security schemes; to provide and ensure access to free and compulsory basic education for everyone; to provide essential drugs and to ensure equitable access to health services and goods.[749] The African Children's Committee has expanded upon these core obligations, as they relate to children's rights to health and education. In doing so, it adds the following duties: to establish and enforce minimum educational standards for private schools; to provide schools, qualified teachers, equipment and

746 E.g., Lisa Forman and others, 'Conceptualising Minimum Core Obligations under the Right to Health: How Should We Define and Implement the 'Morality of the Depths''. 20 The International Journal of Human Rights 531 (2016).
747 E.g., Lehmann (2006).
748 E.g., Young (2008).
749 See *supra* part 0on the minimum essential levels of social rights.

other "corollaries" of the right to education; and to provide electricity, adequate nutrition, safe drinking water and medicine.[750] The African Commission has similarly asserted that states bear a core obligation to provide electricity, safe drinking water and adequate medicine.[751] These standards are directed toward preventing and alleviating the total deprivation of ESC rights, signaling that at the very least core obligations should be understood as duties to prevent and alleviate total deprivation.

From the perspective of alleviating and preventing total deprivation, the core obligation of states consists of a negative duty to refrain from causing or facilitating the total deprivation of ESC rights, as well as a positive duty to prevent such deprivations in the first place. Hunger, extreme poverty, homelessness and the widespread unavailability of education or medical services all constitute total deprivations of social rights that are not uncommon in least developed countries. The mere presence of such deprivations within a state raises suspicion of a breach of its core obligation.

4.2.3.3. Reconciling Core Obligations and Progressive Realization

There appears to be some problems reconciling core obligations with the allowance for progressive realization found in article 2 (1), and this has created a great deal of confusion among analysts. The inconsistent manner in which the ESCR Committee has developed its concept of core obligations is partly to blame. At times, the Committee has limited core obligations to achieving those minimum essential levels that the state's available resources will allow for. Other times, it omits this qualifier, insisting that minimum essential levels of social rights – unlike *full* realization – must be achieved immediately.[752] This assertion has become a contentious point among commentators who try to reconcile the ESCR Committee's interpretation with the clear language of article 2 (1). Complicating things even further, the ESCR Committee has stressed that minimum core obligations are non-derogable, and that noncompliance cannot be justified,[753] thereby

750 See *supra* part 0on the minimum essential levels of social rights.
751 See *supra* part 0on the minimum essential levels of social rights.
752 General Comment No. 15: The Right to Water (2003) paras. 37 & 40.
753 Ibid. The Committee has insisted that a "State party cannot, under any circumstances whatsoever, justify its non-compliance with the core obligations…which are non-derogable". (General Comment No. 14: The Right to the Highest Attainable Standard of Health (2000) para. 47. See also General Comment No. 15: The Right to Water (2003) para. 40.).

leaving analysts wondering whether all poorer states fall into noncompliance simply because they are less wealthy than their peers.

Criticism of the minimum core approach is largely, and understandably, directed at the Committee's inconsistent and rather confusing assertions.[754] One scholar among these critics is Kerstin Mechlem, who posits that expanding the concept of core obligations such that they are understood to have immediate effect or that noncompliance is unjustifiable is an unfounded interpretation of the ICESCR.[755] She argues that such interpretations are inconsistent with Articles 31 and 32 of the 1969 Vienna Convention[756] on the grounds that they ignore the object and purpose of the Covenant, which includes allowing states to realize social right progressively and up to *but not beyond* the limits of their available resources.[757] Mechlem contends that such an interpretation would result in the unfair scenario where, by design, poorer countries are likely to be noncompliant as a simple matter of practical circumstances.[758]

Some proponents of MELs have tried to address this unfair scenario that the core obligations concept appears to create. Craig Scott and Philip Alston, for instance, would set different requirements for wealthier states than for poorer states.[759] They assert that while there is an absolute minimum core that constitutes the basic requirements for human survival, wealthier states must also fulfill *specific* MELs, which are placed at a level higher than the absolute minimums and relates to each country's specific economic conditions and relative wealth.[760] Ultimately, however, the assertion that the there is no justification for failing to achieve MELs immediately is difficult to reconcile with the clear terms of article 2 (1), which only requires states to do what is feasible and appropriate for them to do. As expected, the ESCR Committee's assertion in this regard has been subject to heavy criticism for its apparent deviation from the plain meaning of the Covenant's text. In its most recent work, even the Committee appears to concede that there is a problem with understanding core obligations as non-derogable, immediate duties to achieve MELs without exceptions. As recently as 2016, it issued a General Comment on reproductive and sexual

754 Young (2008); Lehmann (2006).
755 Mechlem (2009) 940-945.
756 Vienna Convention on the Law of Treaties.
757 Mechlem (2009) 940-945.
758 Ibid.
759 Scott and Alston (2000) 250.
760 Ibid.

health rights wherein its statement on core obligations omitted the strong language of non-derogable duties that was present in its earlier work.[761]

In my view, the disarray about whether deprivations of MELs automatically constitute violations of core obligations are largely related to the tendency to obscure the distinction between those duties that are subject to progressive performance and those that must be performed immediately. If core obligations are understood to be nothing other than the duty to fulfill the realization of MELs, then it would be difficult to reconcile the claim that core obligations have immediate effect on the one hand, with the Covenant's allowance for progressive realization on the other. It is this erroneous construction of core obligations that gives rise to the notion that all deprivations of ESC rights conclusively indicate a failure to comply with core obligations. If, however, core obligations were to represent something other than the immediate fulfillment of MELs, then perhaps there is no conflict of interpretation.

The notion that MELs have immediate effect cannot mean that a total deprivation of ESC rights immediately or necessarily constitutes a breach of core obligations. This is due to the fact that rather than simply mirroring one another, MELs and core obligations differ in their functionality. Martin Scheinin points this out when – in his comparison of the two concepts – he rightly notes that the core obligations approach offers a methodology to operationalize minimum essential rights.[762] MELs, on the other hand, function as an indication that states bear certain core obligations *vis-à-vis* the alleviation and prevention of total deprivations.

In truth, both MELs and core obligations have immediate effect. MELs are, after all, legal rights belonging to rights bearers immediately, at all times and without delay. These ESC rights do not need to ripen or come into effect over time. For example, a person is immediately and always entitled to the right to be free from hunger, without conditions. Since all rights should correspond to duties elsewhere, the assertion that MELs are immediate is an indication that states certainly bear some obligations that are also immediate in nature, such as duties to respect and protect MELs without delay. However, this does not mean that states bear immediate or unconditional obligations to *fulfill* MELs, thus the occurrence of total deprivation alone is not enough to conclude that a state has breached its core obligations. The key to validating the claim that both MELs and core obli-

761 See General Comment No. 22: The Right to Sexual and Reproductive Health (2016) para. 49.

762 Scheinin (2013) 538.

gations have immediate effect is to distinguish between the various aspects of the state's Covenant obligations (i.e., to respect, protect and fulfill) and to clarify the extent to which each duty requires immediate actions or omissions on the part of states. The proper construction of core obligations is one that limits them to those acts that the state must immediately perform; not one that inflates all state duties to the status of core obligations.

In order to remain consistent with article 2 (1)'s allowance for progressive realization, the construction of the core obligations concepts must take into account whether it was feasible and appropriate for the state to prevent or alleviate deprivations of MELs. Some of the ESCR Committee's interpretations of the Covenant take this into account. According to its understanding of core obligations, states that fail to achieve MELs are deemed, *prima facie*, to have violated the Covenant.[763] This presumption of noncompliance arises when "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".[764] To be sure, article 2 (1) indicates that not all deprivations of MELs constitute breaches of core obligations: it prevents holding states responsible for such deprivations if they lacked the resources to have prevented or alleviated them in the first place. Thus, the core obligation of states to refrain from causing or facilitating total deprivation as well as to prevent its onset is qualified such that these duties are binding only when the actions or omissions that they require are both feasible and appropriate. Moreover, conflating the scope of MELs and the corresponding core obligations with the limited scope of a state's obligation to fulfill runs the risk of undermining the protection of MELs by severely conditioning and restricting their contents. Since the obligation to fulfill is not absolute but rather dependent on the availability of resources by virtue of article 2 (1), restricting the contents of MELs and core obligations to the limited scope of what a state is obliged to fulfill or

763 General Comment No. 12: The Right to Adequate Food (1999) para. 17.

764 General Comment No. 3: The Nature of States Parties' Obligations (1990) para. 10 ("[A] minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant".).

ensure would mean that there is no inviolable core for ESC rights in the first place. [765]

4.2.3.4. Core Obligations Set Priorities for Realizing ESC Rights

When combined with the concept of minimum core obligations, the requirement that states dedicate the maximum of their available resources limits the flexibility that is inherent in the language of progressive realization by imposing upon states an immediate obligation to prioritize certain objectives over others. Thus, the state cannot ignore such deprivations whenever it allocates resources for the realization of ESC rights. It must alleviate or prevent such deprivations as a matter of *priority* and to the maximum extent that the availability of resources will allow.[766] In other words, the realization of ESC rights and the allocation of resources for that purpose must prioritize eradicating the total deprivation ESC rights, even if the minimum essential levels of ESC rights are yet legally definable. The drafting history of the Covenant's general limitations clause (article 4) also supports this assertion. It reveals that the proposal to protect the nature of ESC rights against all limitations was intended to prevent states from de-

765 See Lehmann (2006) 183-185 ("Following the logic of this approach, if a sufficiently wealthy state existed that could afford to meet its citizens [sic] every medically-prescribed health care need, the minimum and the maximum would be one and the same. The reverse, for the impoverished state, would of course be equally true").

766 Chenwi (2013) 753; Scott and Alston (2000) 252 ("Positive rights and the notion of core guarantees *do* have a significant prioritising function") (emphasis in original). Cf., Young (2008) 174 (cautioning that prioritizing an essential minimum core is analogous to distinguishing between the deserving and undeserving poor, which often supports rather than confronts neoliberal institutional structures, which perpetuate rather than combat poverty); Lehmann (2006) 185-193 (asserting the impossibility of locating a ranking of individual interests within a social right, such that the *right itself* requires the denial of one person's claim (beyond the minimum level) in order to grant the claim of another (below the minimum level). Instead, Lehmann argues, the full scope of protection envisioned by a right applies equally to all people, and any subsequent ranking of interests occurs exogenously within the utilitarian realm of justified limitations.).

laying the implementation of ESC rights for motives such as concentrating all their resources on economic development.[767]

Moreover, when combined with the core obligations approach, the state's duty to fulfill MELs takes on a more serious character. Scott and Alston note that the Committee's use of the term *prima facie* in reference to such cases is significant because it indicates that states that are unable to achieve immediately the absolute minimum must prove the infeasibility of guaranteeing absolute minimums by documenting their "societal poverty and patterns of wealth distribution".[768] The duty to fulfill contains an immediate obligation to do all that one can do to ensure the fulfillment of MELs as a matter of priority. In cases where nonprofits are essential for the fulfillment of MELs, the state's core obligations to fulfill MELs would indicate an immediate obligation to permit and support nonprofit provision, or to demonstrate why it was not feasible or appropriate to do so. Essentially, the immediate core obligation concept acts as a qualifier that prioritizes MELs in the protection, respect and fulfillment of social rights, rather than as an unauthorized amendment to the treaty that alters the duties of states such that they no longer correspond to the terms of the Covenant. In response to Mechlem's concerns: a harmonized construction of core obligations would mean that it is only those countries that do not dedicate the maximum of their available resources to achieving minimum essential levels – rather than simply all poorer countries – that fall out of compliance.

An additional matter of concern is whether the *manner* in which a state prioritizes the use of its resources is in line with its Covenant obligations. Since resource scarcity is the primary limitation for the realization of ESC rights, states must – at the very least – make use of their resources in a reasonable manner. The Committee of ESCR has also followed this approach at times. Due to the critical nature of these deprivations, it places the burden of the proof on the state to demonstrate that it was not in fact possible for the state to prevent their occurrence. According to its General Comments, whenever a state asserts that it lacks sufficient available resources to fulfill the minimum core of its obligations, "it must demonstrate that every effort has been made to use all resources that are at its disposition in an

767 Summary Record of the 235th Meeting, Commission on Human Rights, U. N. Economic and Social Council, UN Doc. E/CN.4/SR.235 (UN 1951) (see comments of Mr. Santa Cruz of Chile.).

768 Scott and Alston (2000) 250.

effort to satisfy, as a matter of priority, those minimum obligations."[769] In general, citing resource constraints alone does not conclusively indicate compliance or noncompliance with core obligations. Rather, a state seeking to overcome a presumption of noncompliance must demonstrate that, no matter how well-endowed its country may or may not be, it did in fact dedicate the maximum of its available resources towards alleviating total deprivation of MELs and reaching MELs *as a matter of priority*, despite not having ever reached that aim. Ultimately, the progressive realization of rights cannot be achieved in an unjust manner by, for example, deferring resources toward improving the living conditions of elite social classes, political supporters of ruling parties, or members of privileged ethnic groups.

There is still, however, the issue of reconciling states' discretion in public spending with fulfilling their core obligations. As long as states allocate their resources *with a view to* alleviating total deprivations of MELs and reaching MELs as a matter of priority, then they should enjoy a certain degree of discretion in social policy planning. First, states should be free to decide how to allocate resources between competing MEL goals. Maintaining this intentional element within the core obligations approach recognizes that some rights – such as the right to water – will need enormous investments into infrastructure in order to ensure that they can be enjoyed and to alleviate total deprivations of MELs. Therefore, a policy that directs much of the available resources into alleviating one right such that few or no resources are left for the alleviation of MEL deprivations in other areas will not constitute a breach of state duties because the state is acting with a view to alleviating total deprivation of MELs, despite not having done so evenly.

Understanding core obligations as the duty to allocate resources with a view to prioritizing MEL objectives – rather than ensuring certain minimum benefits levels – allows the state to determine for itself the best method of achieving a prioritized MEL goal. States should take into account the circumstances that are particular to their own contexts, thus benefits levels need not be the same from person to person or from country to country. Rather, the state should always aim to ensure MELs related to adequate housing, freedom from hunger, basic health care and education. This notion is exemplified by the ICESCR Committee's decision – pursuant to the ICESCR Protocol – in the *Rodríguez* case; particularly its treatment of the reduction of non-contributory disability benefits for pris-

769 General Comment No. 3: The Nature of States Parties' Obligations (1990) para. 10 (emphasis added).

oners in Spain.[770] A reduction in non-contributory benefits was deemed proportional to the cost of Mr. Rodríguez's upkeep in prison. The Committee concluded that this was a reasonable state measure because there was a change in the Mr. Rodríguez's needs, which the state – being the entity paying for his upkeep over a long period of time – was in a position to determine with a great deal of specificity and certainty. The state demonstrated that while Mr. Rodríguez was incarcerated, it was able to ensure that he received adequate housing, health care, foodstuffs and an adequate standard of living without the need to issue him non-contributory benefits. If a minimum benefits level was required, rather than the prioritized achievement of certain objectives, the state would have had to continue paying Mr. Rodríguez his disability benefits in addition to covering the costs of his upkeep in prison.

4.2.3.5. Implications for the Legality of Restrictive NGO Laws

In summary, the general core obligations of states are to refrain from allowing or causing the total deprivation of MELs and to take measures with the view of alleviating and preventing the same as a matter of priority, to the extent that such actions and omissions are both appropriate and feasible. These findings have implications for the manner in which states may regulate NGOs, particularly in least developed countries. Because a state with limited resources cannot totally eradicate deprivations of ESC rights throughout its entire country, some nonprofit entities operating within such states will be playing the critical role of alleviating the total deprivation of ESC rights for their beneficiaries. This includes nonprofit entities that provide basic medical assistance, free primary education, food and water to those who are chronically hungry or suffer from malnutrition, cash or in-kind assistance to those who are chronically poor, or housing to those who lack basic shelter. Such nonprofits would be considered essential not only to the achievement of minimum essential levels, but also to the fulfillment and discharge of the state's core obligation to ensure that no one is totally deprived of his or her ESC rights.

NGO laws that restrict the operations of this category of critical NGOs will likely constitute violations of the state's core obligations. This suggests that nonprofits that are essential for the realization and enjoyment of MELs should enjoy special legal protection against state interference, and

770 *Rodríguez v. Spain* para. 10.3.

not merely for the protection of their own right to associate or speak freely, but also for the sake of protecting the social rights of their beneficiaries. In practice, this could result is greater judicial scrutiny of NGO laws that tend to reduce access to funding, create complicated registration procedures, or grant public entities wide authority to interfere with or shut down nonprofit activities. For such interferences, it should not be sufficient for a state to offer blanket justifications such as protecting national security interests or maintaining public order in a generic or vague manner.

Providing special protection to these critical NGOs could also impact the patterns of nonprofit provision in a positive way. Ensuring essential nonprofit providers greater protection from state interference would incentivize nonprofit service activities to flourish the areas prioritized by core obligations. On the other hand, due to their involvement in the achievement of prioritized objectives, essential nonprofits would also bear greater responsibilities and thus may justifiably be subject to heavy regulation. The difference, however, would be that lawful government oversight must be directed toward enhancing the protection and realization of social rights, in accordance with core obligations, rather than interfering with the same.

4.3. A New Taxonomy for NGOs: Different Functional Type

Based on the analysis above, six factors can be derived from social law that are relevant for categorizing NGOs in accordance with their propensity to advance realization of social rights, to protect their enjoyment, and to fulfill state obligations. In general, social rights law requires the state to support or at the very least refrain from interfering with all nonprofit activities that are essential to the realization or enjoyment of social rights of beneficiaries. However, not all nonprofit activities that are essential to the realization of social rights will also fulfill the state's social rights obligations, thus the particularities of a state's obligations to nonprofits were vary accordingly. Social rights law, therefore, provides various levels of protection against restrictive regulatory practices and measures, in accordance with the various ways in which NGOs may advance realization, protect enjoyment and fulfill state obligations.

Within countries exhibiting sizable nonprofit sectors, these factors can combine in different ways to yield eight NGO categories or types, each representing a slightly different legal relationship between NGOs and the

state. Once categorized, the varying regulatory obligations of the state with regard to nonprofit activities can be explicated, as well as the degree of protection that each type of NGO enjoys from restrictive regulatory measures. Here are the six factors:

(1) whether nonprofit activity is necessary to the realization or enjoyment of social rights, such that their activities are the sole significant cause of enjoyment or realization for an individual or groups of individuals, and alternatives are not readily available to these beneficiaries;
(2) whether nonprofit activity uses appropriate means to bring about realization/enjoyment of social rights, such that their means are both necessary for realization/enjoyments as well as compatible with principles and norms of human rights law;
(3) the level of social rights achievement reached by *nonprofit activity*;
(4) the level of social rights achievement that *the state* is required to ensure;
(5) the level of social rights achievement that the state *in fact* ensures; and
(6) whether the state and nonprofit entity work in concert to bring about realization or enjoyment of social rights.

The following subsection uses these criteria to create a new taxonomy of NGOs based on their propensity to ensure realization / enjoyment of social rights and the fulfillment of state duties.

Figure 4.2. NGO Types when MELs extend beyond Duty Horizon

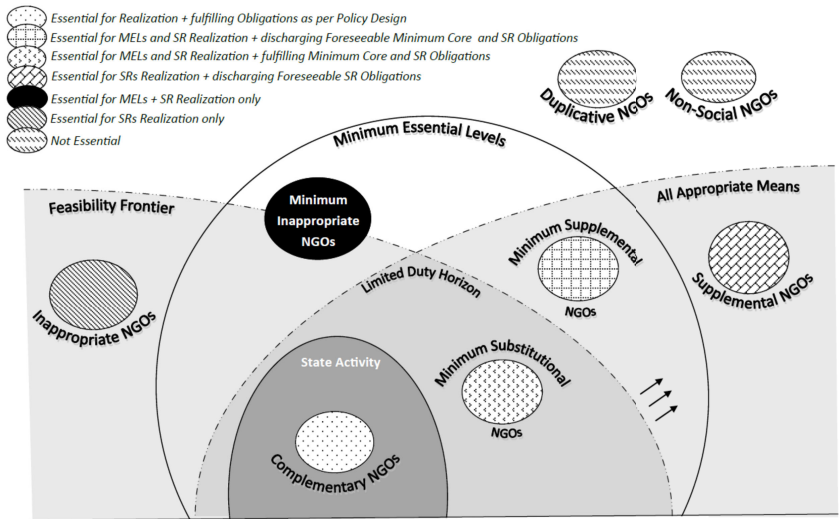
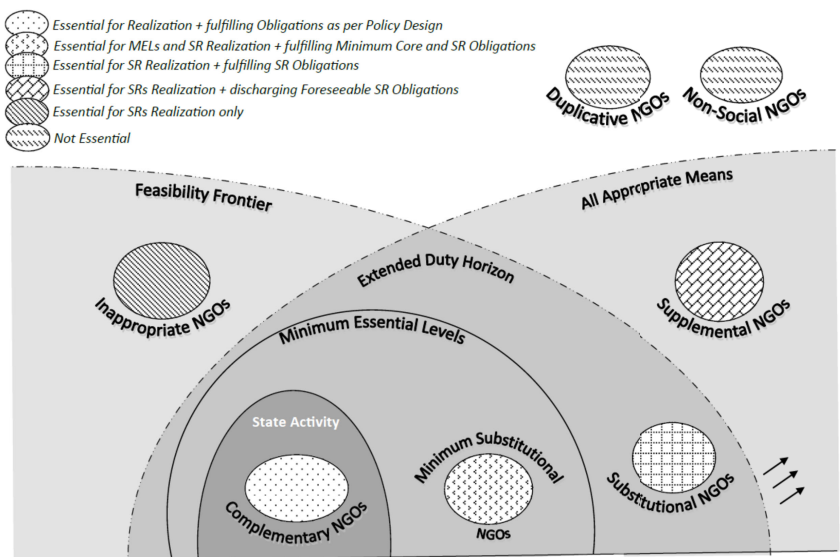


Figure 4.3. NGO Types when Duty Horizon extends beyond MELs



4.3.1. Non-Social NGOs, Duplicative NGOs & Inappropriate NGOs

The first two factors relate to whether nonprofit activities are essential for the realization of social rights. These criteria are legally significant because they trigger the need for an analysis of NGO-state relations from a social rights perspective. Essentiality is a function of both necessity and appropriateness. Nonprofits that are necessary for realization/enjoyment such that alternative means are not reasonably available are considered essential if their activities are also compatible with the principles and norms of human rights law. These factors have been split into separate criteria because some NGOs can feature one but not the other, thereby creating distinct categories of nonprofit activities.

Some NGOs are necessary neither for the realization of social rights nor for their enjoyment. *Non-social NGOs*, such knitting clubs or groups of antique enthusiasts, might advance social rights indirectly by promoting general wellbeing, but they are not necessary to realization and enjoyment because their activities do not pertain to social rights and their impact on social rights is simply too tenuous. The regulation of nonprofit activities that are not necessary for realization or enjoyment of social rights is simply not subject to scrutiny under social rights law, and restrictions on these types of NGOs do not present a social rights problem in the proper sense.

Duplicative NGOs – that is, those whose activities reach a level of achievement that the state already ensures – will not advance realization because the state has already done so. Nevertheless, their activities protect the enjoyment of social rights for beneficiaries that choose to engage them. An example of this may be an NGO that begins to operate a school within a community where all children already have the opportunity to attend public schools of comparable quality. For children who switch to the new school, the duplicative NGO would be protecting the enjoyment of the right to education, even though it neither advanced the right to education nor became necessary for its enjoyment. This suggests that duplicative NGOs are not fulfilling the state's social rights obligations and thus will not enjoy a great degree of protection from restrictive regulatory measures as a matter of law. However, the principle of subsidiarity, as it coincides with the overarching purpose of the ICESCR to promote human freedom, indicates that the state should refrain from interfering with duplicative NGOs unless it is necessary in order to support their work. By broadening the educational offerings that are available to children, our duplicative NGO allows for greater human freedom through the expansion of choice, which ultimately supports personal agency. Thus, the duplicative activity is

valuable because it promotes human freedom, even if it is not essential to realization or enjoyment.

The next issue is whether the nonprofit activity advances the realization of social rights through appropriate means. In addition to using the maximum of available resources, article 2 (1) of the Covenant requires states to advance realization through "all appropriate means". The area where the state's maximum available resources (or all feasible means) overlap with all means that are appropriate for the realization and enjoyment of social rights represents all measures that the state is obliged to undertake. The boundary of that overlapping area marks the state's duty horizon, which expands and contracts in accordance with the availability of resources and the appropriateness of means. *Inappropriate NGOs* are those whose activities are necessary for realization or enjoyment, but do not overlap with the area of appropriate means. These activities may or may not occur within the area of maximum available resources; that is, replacing their activities may or may not be feasible for the state to do. By definition, the state is not required to ensure that these activities take place, even though they may be necessary for realization and enjoyment, because they fall beyond the state's duty horizon. Therefore, these activities do not fulfill the state's obligations. This suggests that greater regulatory restrictions may be justified in the case of inappropriate NGOs since their methods likely interfere with the rights of others, interfere with other rights of their own beneficiaries, or otherwise undermine the norms, principles or overarching objectives of the Covenant by limiting human freedom or personal autonomy. This category captures controversial NGOs whose activities advance social rights through unethical, unlawful, or otherwise inappropriate means.

Minimum inappropriate NGOs are perhaps the most controversial category of all because they advance the realization of MELs through means that are inappropriate. Both permitting and restricting their activities are rather contentious measures because of their proximity to beneficiaries whose vulnerabilities are entrenched in existential hazards. An example of such an NGO would be one that provides shelter to homeless persons in accommodations that are unfit for human habitation. This type of nonprofit activity presents a particularly challenging legal problem. On the one hand, their services are necessary to the realization of a prioritized level of social rights achievement and – in some cases – may be critical to sustaining human life and ensuring personal security. On the other hand, however, their inappropriate means may also pose a threat to the health rights of their intended beneficiaries. How far a state can go to restrict these activities will depend on the given facts of each case since the competing interests will

need to be balanced in accordance with the circumstances. Restrictions against this category of NGOs are the most difficult to assess. Unfortunately, this group of NGOs is not uncommon in African LDCs, where tradeoffs within MELs are a regular occurrence due to an overall lack of resources, widespread underdevelopment, and low state capacity for regulatory control.

4.3.2. Supplemental NGOs & Substitutional NGOs

Nonprofits activities that are essential for the realization or enjoyment of social rights can be distinguished further by the third, fourth and fifth criteria in accordance with their propensity to fulfill the state's social rights obligations. NGOs that fulfill the state's obligations are distinguished from those that preemptively discharge it. The starting point here is to recognize that a state is only required to realize social rights up to the level of achievement that it can feasibly ensure. The activities of *supplemental NGOs* advance the realization of social rights beyond the level of achievement required of the state. In other words, they operate beyond the state's duty horizon. When the state's duty horizon is so limited that parts of the MELs of social rights still lie beyond the horizon, NGOs that realize those MELs beyond the duty horizon are referred to as *minimum supplemental NGOs*. Unlike their duplicative and non-social counterparts, both supplemental types are essential for the realization of social rights, indicating that they come under the protection of article 2(1).

Although they advance realization, supplemental NGOs fall short of fulfilling the state's Covenant obligations because the state is not yet required to achieve the heighted level of realization that has been reached by the supplemental and minimum supplemental NGOs. Instead, these NGOs preemptively discharge what will foreseeably become the state's obligation at a later. Since the state is not yet capable of achieving the higher level of realization, foreseeable obligations have yet to ripen into standing duties. Nonetheless, they are foreseeable due to the legal expectation that states achieve realization with an intention to do so progressively rather than regressively. This underlying intention suggests that even if despite resource availability and technological advancements the state's feasibility frontier stagnates or contracts in the short term, the long-term trend of the state's duty horizon is to expand infinitely toward the ideal of reaching "full real-

ization" in a world where "free human beings enjoy[] freedom from want and fear".[771]

When nonprofit activities fulfill the state's standing obligations, they become the functional equivalent of state activity. *Substitutional NGOs* and *minimum substitutional NGOs* advance realization of rights to a level that falls within the boundaries of the state's duty horizon, but beyond the level that the state itself ensures. In other words, these NGO types operate within the state's fulfillment gap, which is the difference between how far the state must advance realization and how far it in fact advances realization. As such, supplemental types fulfill the state's social rights obligations. In the case of minimum substitutional NGOs, the nonprofit activity and the state's fulfillment gap coincide with MELs of social rights. Since their nonprofit activities achieve MELs that the state is obliged to achieve but nonetheless does not ensure, minimum substitutional NGOs fulfill the *core obligations* of the state. This suggests that social rights law will extend special protections to supplemental NGOs – and even more protection to minimum supplemental NGOs in particular – such that they are not overburdened by regulatory restrictions.

Although I use the terms "fulfill" and "discharge" to describe how NGOs can relieve the state of the need to provide certain social rights, it should be emphasized that the obligation to realize social rights and ensure their continued enjoyment always remains with the state, even if the state explicitly involves NGOs in the provision of services. This distinction is crucial because NGOs do not bear an obligation to continue providing services or to expand their coverage. Moreover, states cannot offload their responsibilities regarding the quality of nonprofit services or the obligation to replace such services if they are terminated. As the ESCR Committee asserted in a comment on the obligation of states toward the social, economic and cultural rights of persons with disabilities, "while it is appropriate for Governments to rely on private, voluntary groups to assist person with disabilities in various ways, such arrangements can never absolve Government from their duty to ensure full compliance with their obligations under the Covenant." [772]

771 ICESCR preamble & art. 2 (1).
772 General Comment No. 5: Persons with Disabilities (1994) para. 12.

4.3.3. Complementary NGOs

The sixth factor delineates between NGOs whose activities have been incorporated into the state's social policy plan, who are referred to here as *complementary NGOs*, and the rest of NGOs who act more or less independently of the state. Since it is not clear whether the state can replace complementary activities of nonprofit actors, their essentiality is indeterminate. This reflects a fundamental difference between complementary NGOs on the one hand, and supplemental and substitutional NGOs on the other. Whereas complementary NGOs work in collaboration with the state to promote realization/enjoyment of social rights, the supplemental and substitutional varieties operate independently of the state. It is their entanglement with state activity that makes it impossible to conclude whether complementary nonprofit activities are categorically essential for the realization/enjoyment of social rights or the fulfillment/discharge of state duties. Perhaps the most that can be said is that complementary NGOs are essential for the realization/enjoyment of social rights, as well as the fulfillment/discharge of state obligations, but only as a result of the state's own policy design. However, this conclusion reveals nothing of the state's dependence upon complementary activities for the fulfillment/discharge of its own social rights obligations.

Their interdependence with the state and the complex myriad of ways in which they may be incorporated into the state's social policy plan makes it difficult to conclude with certainty whether the state depends on complementary NGOs in order to fulfill its obligations, or whether it could fulfill its obligations without them. Thus, rather than taking their essentiality for granted, the state's dependency must be assessed for each collaborative relationship between itself and a complementary NGO before a determination can be made as to whether the NGO is in fact essential. In other words, whether a complementary NGO is essential to the realization/enjoyment of social rights will depend on whether the state is able and willing to ensure its replacement in the event that its activities have been terminated, notwithstanding the fact that these complementary activities may indeed be critical to the realization/enjoyment of social rights and fulfillment/discharge of state duties as per the state's own social policy design.

Despite the indeterminate nature of their essentiality, complementary NGOs still enjoy a degree of protection against severe state interference. The subsidiarity principle indicates that states may not forcibly incorporating or totally dominating complementary NGOs. However, their integration with the state's comprehensive social policy plan also suggests that the

state can exercise greater regulatory control over them than it could be able to exercise over NGOs that operate independently of the state.

Figure 4.4. Essentiality Matrix of Nonprofit Activities

	Essential for Realization or Enjoyment of Social Rights	**Essential for Realization or Enjoyment of Minimum Essential Levels**	***Not Essential for Realization or Enjoyment***
Essential for Fulfillment of Standing State Duties	Substitutional Nonprofit Activities	Minimum Substitutional Nonprofit Activities	*Duplicative Nonprofit Activities*
Essential for Preemptive Discharge of Foreseeable State Duties	Supplemental Nonprofit Activities	Minimum Supplemental Nonprofit Activities	*N/A*
Not Essential for Fulfillment or Discharge	*Inappropriate Nonprofit Activities*	*Minimum Inappropriate Nonprofit Activities*	*Non-Social Nonprofit Activities*

Essentiality of complementary nonprofit activities is indeterminate.

This depends on policy design and state's ability to replace lost complementary services.

In summary, the various NGO types have been derived from social rights law on the theory that the explicit obligations of states toward beneficiaries give rise to implicit regulatory obligations *vis-à-vis* nonprofit activities that are essential for realization or enjoyment of social rights, as well as those activities that fulfill or preemptively discharge the social rights obligations of the state. Each NGO type represents a hierarchy of legal regulatory relationships between the NGO and the state. Inappropriate NGOs that advance realization enjoy the least amount of protection and may not be protected at all if their means are so inappropriate that they violate human rights law or its underlying objectives. The subsidiarity principle ensures that duplicative NGOs enjoy a basic level of protection against restrictive NGO laws because their activities promote human freedom and personal autonomy. The next most protected type is supplemental NGOs because they are necessary for the realization of social rights, even if they do not fulfill state duties. The state must enable their activities because they preemptively discharge state obligations under the Covenant. The state must also enable the activities of substitutional NGOs; however, this category enjoys even more protection than its supplementary counterpart. Since this type fulfills the state's obligations, the state bears an additional obligation to ensure the same level of achievement through alternative means.

States must ensure that the activities of substitutional NGOs reach the required level of achievement through state-funded financial support or otherwise. Depending on the circumstances, the state could be required, for example, to replace withdrawn nonprofit activity or support nonprofit services to maintain a certain level of quality. Finally, complementary NGOs will enjoy a varying degree of protection depending on how essential they are for the realization and enjoyment of social rights and the fulfillment and discharge of Covenant duties in each particular case.

In countries with limited duty horizons, where the state is not capable of reaching MELs, the restriction of essential nonprofit activities will pose an even greater threat to the social rights of beneficiaries. While the state must support all nonprofit activities that are essential for realization and enjoyment, an NGO's protection is never absolute. In theory, all social rights can be limited in accordance with the terms of the ICESCR. However, those NGOs whose activities achieve MELs for their beneficiaries are – arguably – protected against the kinds of limitations made permissible under the Covenant. since article 4 (1) does not appear to tolerate limitations to minimum essential levels provided by the state,[773] allowing states to restricting minimum essential levels provided by nonprofit activities, *which the state would otherwise have to provide*, would effectively permit states to circumvent their Covenant obligations. This will be discussed in detail in a later chapter. Minimum supplemental NGOs enjoy a great deal of protection against restrictive regulatory measures because they achieve the minimum essential levels that the state cannot reach. However, minimum substitutional NGOs are the most protected category of all NGOs due to the fact that they are fulfilling core obligations of the state.

4.4. Conclusion

States have an obligation to do nothing less than what they can do to bring about the realization of social rights. Their minimum core obligation is to prioritize the realization of MELs. The protection of social rights is espe-

773 In order to be permissible, limitations to "the enjoyment of those rights provided by the State" must be "compatible with the nature of these [Covenant] rights"; the "nature" of social rights being synonymous with their minimum essential core. (See ICESCR art. 4; Amrei Müller, 'Limitations to and Derogations from Economic, Social and Cultural Rights', 9 Human Rights Quarterly 557 (2009).).

cially urgent in African LDCs where even prioritized objectives, such as alleviating hunger, homelessness and chronic poverty, are not within reach of the state's available resources. In this regard, nonprofit entities can be essential for the realization and protection of social rights because they bring in additional resources which are sorely needed. This raises the question whether restrictive regulation of nonprofit activities is compatible with the social rights obligations of states.

The answer to this question will depend on whether nonprofit activities are essential to the realization and enjoyment of social rights, and the fulfillment or preemptive discharge of states' obligations. NGOs can be categorized in accordingly. The resulting taxonomy renders explicit the link between realization, enjoyment, fulfillment and preemptive discharge on account of nonprofit activity on the one hand, and the permissibility of state measures that restrict nonprofit activities on the other hand. Thus, the new classification indicates that social rights law affords different kinds of NGO varying degrees of protection against restrictive regulatory measures.

Although each of these NGO types is presented separately, many of them can and often do appear simultaneously within the same society. A government may, for example, incorporate NGOs into its service plan in order to realize a portion of the MELs that it is required to ensure, while in the meantime other NGOs independently realize and ensure the enjoyment of the remainder of MELs, and still others might advance realization beyond the boundaries of MELs or the states duty horizon. For the sake of analytical simplicity, however, NGO types are examined independently in order to explicate the specific social rights obligations arising from the legal relations that bind states, NGOs and beneficiaries, as well as in order to discuss the level of protection each NGO type enjoys against restrictive regulatory measures.