Why Third Sector Broadcasting is Important: the Relationship between Third Sector Broadcasting and International Human Rights Law  
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Abstract  
The article discusses the relationship between third sector broadcasting (TSB) and International Human Rights Law (IHRL). The article aims to show that there are legal obligations derived from IHRL which require States to contemplate TSB in their broadcasting policy, and, to demonstrate that TSB has a significant potential to contribute to the realization of IHRL goals. Specific issues discussed include how Freedom of Religion requires States to provide means of access to the airwaves for religious groups and how TSB can be used as an affirmative action measure to increase the participation of members of traditionally disadvantaged groups in the media.

Introduction
International Human Rights Law (IHRL) is the branch of international law devoted to the international protection of human rights. IHRL is formed by a series of treaties which impose obligations upon the States that have ratified them. Depending on the particular circumstances these obligations can be enforced through domestic or international mechanisms.

The concept of Third Sector Broadcasting (TSB) is more complicated to define. At the most basic, TSB can be said to be all broadcasting which is both, non-government and not-for-profit. However, there are forms of broadcasting which do not strictly meet that basic definition and yet, are strongly linked with TSB. For example, broadcasting by public educational institutions is often considered a form of TSB, despite the State created nature of the institutions. Whether a particular model of broadcasting can be considered TSB or not is always a matter for debate. Fortunately, it is not necessary for the purposes of this article to resolve these definitional issues. In this article, the denomination “TSB” is used to refer to broadcasting by the actors commonly associated with the sector such as community, ethnic and indigenous groups, educational entities and religious organizations without attending to whether specific models meet the definition in its fine print.

This article discusses the relation between IHRL and TSB and its purpose is, first, to demonstrate that there are legal obligations derived from IHRL which require bound States to contemplate TSB in their broadcasting policy. Additionally, the article also aims to show that beyond such an obligation, TSB has a significant potential to contribute to the realization of IHRL goals which should be taken into consideration by States eager to fulfil those goals. The Article describes some of the rights recognized in IHRL and explains, according to the case, how these rights support TSB or how TSB can contribute to the fulfilment of these rights.
1. Freedom of Expression

Freedom of Expression (FoE) is one of the best known human rights having been enshrined in every IHRL instrument that deals generally with civil and political rights, as well as domestically in the constitutions of most countries. Through case-law and scholarly work, the concept of FoE has been developed and expanded with a series of principles and implied or derived rights, some of which are closely tied to broadcasting policy. Those most relevant for this article are the right to seek an audience and the Right to Information (RtI). The latter is also associated with the social dimension of FoE. This section will discuss each of these elements of FoE and explain how they relate to broadcasting in general and TSB in particular.

1.1. The Right to Seek an Audience

There is a right to seek an audience under International Human Rights Law. FoE would be meaningless if limited to a right for persons to express themselves freely in an empty space. Accordingly, it is widely accepted in IHRL and constitutional law doctrine that FoE also encompasses the right of persons to seek others as an audience for a message. In this sense, the Inter-American Court of Human Rights (IACrHR) has stated, in reference to the American Convention on Human Rights (ACHR) that:

> it emphasizes the fact that the expression and dissemination of ideas and information are indivisible concepts. This means that restrictions that are imposed on dissemination represent, in equal measure, a direct limitation on the right to express oneself freely.

Both the International Covenant on Civil and Political Rights (ICCPR) and the ACHR expressively establish the right of persons to use any medium of their choice to express their messages. In keeping with this notion, the IACrHR has determined that FoE ‘also includes and cannot be separated from the right to use whatever medium is deemed appropriate to impart ideas and to have them reach as wide an audience as possible’. The European Convention on Human Right (ECHR) does not contain a similar provision regarding choice of medium, nor does the African Convention on Human and Peoples’ Rights (ACHPR). However, both the European Court of Human Rights (ECrHR) and the African Commission on Human and Peoples Rights (African Commission) have determined that the FoE includes the right to communicate through broadcasting means.

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4 ICCPR Art 19.2.

5 ACHR Art. 13.1.

6 Supra, note 3

7 ECrHR, Judgment, Informationsverein Lentia and Others v. Austria, 1993; See also, ECrHR, Judgment, Radio ABC v. Austria, 1997; ECrHR, Judgment, Demuth v. Switzerland, 2002.


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Licensing is a restriction on the right to seek an audience

It is clear then that broadcasting is, in principle, an activity protected under the right to FoE. However, the reality is that access to this activity is more often than not limited by the requirement of obtaining a license prior to engaging in broadcasting. Article 10 of the ECHR which provides for the right to freedom of expression states: ‘This article shall not prevent States from requiring the licensing of broadcasting’. No similar phrases can be found in the corresponding articles in the ICCPR, the ACHR or the ACHPR. This seemingly important difference in the wording of the instruments does not appear to have caused a significant divergence in the doctrine of the different human rights protection systems as in all four systems (The Universal, the Inter-American, The European and the African) the practice of requiring licenses to broadcast is considered acceptable. Any broadcasting licensing system is, in essence, a restriction to the right to seek an audience. However, this restriction has so far been deemed justifiable and even necessary due to spectrum scarcity.

Spectrum scarcity as the justification of the license requirement

It is commonly accepted that spectrum scarcity or, more accurately, the reality that interest in using the spectrum highly exceeds the technical capacity to exploit it, requires a system whereby exclusive rights over the use of a frequency for defined amounts of time are granted, in other words a system of licensing.

License restrictions are only justified under the assumption that there are more parties interested in engaging in broadcasting than States can allow, considering their spectrum allotment and the need to allocate spectrum to other uses. This assumption is the fundament of the broadcasting licensing system. It is also the justification for applying certain restrictions and regulations to the right to seek an audience through broadcasting that would not be as readily accepted if imposed on expressions through other mediums such as the print media.

While spectrum scarcity is the current reality, it is predicted that in the future technological developments like, for example, cognitive radio could overcome the problem of scarcity. If these predictions are correct, then many of the currently accepted policies, including the broadcasting license requirement would have to be rethought. One can only hope that cognitive radio or any other new technological developments will eliminate one day the problem of spectrum scarcity, as this would be a great triumph for FoE.

9 ECHR Art 10.
10 See for example, Inter-American Commission on Human Rights (IACHR), Press release 29/07; Supra, note 8, Art. V.2.
12 As, as some authors have pointed out (See for example, De Sola Pool, Ithiel, Technologies of Freedom (Harvard University Press, 1983)), paper for printing or material for building internet servers are also finite resources.
13 See among others, United Nations Human Rights Committee (UNHRC), General comment Nº.34, Article 19: Freedoms of Opinion and Expression, 2011; Note on Draft General Comment Nº. 34 on Article 19 of the ICCPR (Upon Completion of the First Reading by the Human Rights Committee), Submission by the Centre for Law and Democracy to the UNHRC (2011).
The third sector is an alternative for wider access in the prevailing era of scarcity

As the situation currently remains, the third sector is seen as a way to broaden access to broadcasting activity. Among other reasons, this is because the third sector, allows for access to the airwaves which is not dependent on the monetary capacity of those who are interested in providing such services. Some modern systems make access to licenses directly dependant on economic capacity, for example by auctioning the license to the higher bidder. However, it is important to note that although the use of auctions and other price based mechanisms for the assignment of licenses is a relatively new practice, economic capacity has traditionally been an important element in determining access to the spectrum. For example, financial capacity considerations are normally part of comparative or “beauty contest” assignment systems and, in the worst possible cases, access ends up being dependent on “under the table” money. Both the Supreme Court of Mexico and the Inter-American Commission on Human Rights (IACHR) have found that making access to broadcasting exclusively dependent upon financial capacity represents a violation of State duties regarding FoE.

Beyond allowing access that is not dependent on financial capacity, TSB is also considered to open access to more voices in general. This is due to the programming structures typically used by broadcasters belonging to the sector, which normally allow them to offer access to more voices per station (in the same amount of spectrum bandwidth), than their commercial or public sector equivalents.

Free to air broadcasting remains important despite technological advances

Despite the increased availability of other means to seek an audience, such as the internet, free-to-air broadcasting remains a highly sought after medium by those who want to spread a message. The possibility of capturing the attention of audiences while changing TV channels or radio stations gives it certain advantages over other mediums which require a more active and intentional role from the audience in seeking the message. John Langer has described how online activism initiatives end up frequently producing sites that only serve those who already share the creator's convictions, a problem that also applies to other mediums such as books or films.

Empirical studies have also revealed a preference for audiovisual mediums by most audiences, which in turn makes them more effective for the dissemination of ideas. While significant improvements have been achieved in internet penetration, the broadband capacity required for the dissemination of audiovisual content online has not

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15 Supra, note 10.
18 IACHR, Country Report, Guatemala 2003, Chapter VII-E.
20 Examples such as the controversies relating the non renewal of the terrestrial broadcasting license of RCTV in Venezuela or the divestiture of terrestrial broadcasting licenses in Argentina are evidence of this.
yet achieved the levels of worldwide spread which would allow it to even begin to be considered as a replacement for traditional over-the-air broadcasting. Radio in particular, has been noted as the most cost effective medium for community media.23

For the reasons so far presented it is evident that, if States intend to fulfil their international obligations regarding the right to seek an audience, then they have to offer non-profit and community groups access to frequencies for free-to-air broadcasting.

1.2. The Right to information/Social Dimension of Freedom of Expression

There is a right to information under International Human Rights Law

Beyond the individual satisfaction of the right to seek an audience broadening access to broadcasting is also considered to carry a societal benefit counterpart in the form of diversity of information as described below. In fact, the literature has tended to focus more on the social rather than the individual dimension.

In IHRL doctrine, it is widely accepted that there is a societal benefit inherent in the exchange of ideas.24 For this reason the notion of FoE is expanded and, as a counterpart to the right of persons to express themselves freely, a right to seek and receive information from others willing to share it is also enshrined.25 This notion is often called the “right to information” but should not be confused with the “right of petition of information” which is the individual right to request access to information held by the State. The right of petition of information is a different legal concept, which is equally important but not directly relevant to this article.

Under the RtI, the State has an obligation to abstain from interfering unduly in the relationship between willing speakers and willing listeners.26 Although this can be considered the most basic obligation derived from the RtI, in the context of broadcasting policy and the problem of spectrum scarcity, adopting a “hands off” approach is not sufficient to fulfil the requirements of IHRL. In these circumstances, an additional duty arises for the State to try to maximize the social benefit of the information output when formulating spectrum management and broadcasting policy.

Fulfilling the RtI is, of course, not the only consideration for States to take into account when elaborating spectrum management policy. Other concerns such as developing telecommunications and raising revenue through the collection of fees for the commercial exploitation of the spectrum are equally valid. However, the existence of competing interests can not be used under any circumstances as an excuse for States to take their IHRL obligations relating the RtI less seriously. For this reason, the concept of diversity of the media, also called plurality of the media, has moved to the forefront of human rights concern in recent years, receiving significant attention both from intergovernmental organizations (IGOs) and the civil society sector.

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24 Supra, note 3.
25 See for example, ICCPR Art 19.2; ECHR Art. 10.1 ; ACHR Art. 13.1
Public service broadcasting alone cannot fulfil the right to information
Traditionally it was argued that, with sufficient safeguards, public service broadcasting (PSB) alone could fulfil the information needs of a society. However, in this modern day, it is considered undesirable to leave broadcasting activity under the exclusive control of the State, even if the control is exercised through an independent institution, such as an independent statutory authority. One reason is that the modern notion of diversity of information is based on the concept of plurality of voices. Regardless of how independent from government the PSB system is, and what measures are implemented to secure plurality in the decision making process of the service, the service would still represent a single broadcasting voice.

Even if multiple Public Service Broadcasters (PSBs) totally independent from each other were to be established and wide opportunities for access for independent content producers were implemented, there may be concerns regarding protecting FoE. One has to remember that all legislation protecting the independence of the PSBs, even if this was to be at the constitutional level, is subject to change. Of course, the same can also be said of legislation regarding private media. However, one has to assume it would be more difficult for a government intending to take regressive steps regarding FoE in an environment where multiple private broadcasters exist than in an environment where all broadcasting is PSB. The statutory regulation of the PSBs may even prohibit them from actively opposing the regressive measures. Finally, the common arguments against State monopolies, such as private initiatives being more likely to produce innovation, and them being more able to adapt to new needs due to being independent from a slow political process, could also be raised as arguments against a system relying solely on PSB.

Commercial broadcasting alone cannot fulfil the right to information
Similarly, where broadcasting was dominated by the commercial sector, ownership concentration controls were considered the prime tool to ensure plurality. These are indeed very important, but they are in no way sufficient. As the IACrHR has warned, it is not only monopolies in the media sector which present a serious threat to freedom of expression and information; oligopolies can be just as harmful. Since commercially competitive broadcasting requires relatively high investment, and spectrum scarcity may be a serious entry barrier, the desirable level of competition in the commercial broadcasting sector may not always be attainable. Moreover, when competition is indeed high, market pressures may rule the information output, which can result in catering to the “lowest common denominator” and similarity of output despite diversity of ownership.

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27 We can observe that even in Europe, the continent where tradition and philosophy tended to support PSBs dominated broadcasting systems new policy documents call for a 3 sector system. See for example, Committee of Ministers, Recommendation to member States on media pluralism and diversity of media content, 2007.
29 Supra, note 3.
Although in theory journalists and other commercial media workers and the content they produce should be independent from the interests of those who own the outlet, the reality is that such independence is almost impossible to attain in practice. The main reason is that securing this independence will require the government to interfere directly in decisions regarding the content of private media in order to solve disputes between workers, directors and owners. Such interventions are deemed absolutely undesirable. In this sense, the UN rapporteur on FoE has wisely stated:

The promotion of content diversity must not be used under any circumstances as a means to influence, directly or indirectly, the fundamental principle of editorial independence. The Special Rapporteur emphasizes that the most adequate means to promote diversity is not direct interference with media outlets, but rather more general measures to set up a free environment where independent media outlets and content producers can emerge and flourish.

For this reason, and considering commercial broadcasters are typically business corporations with profit seeking as their raison d'être, certain opinions contrary to their interests may have a difficult time reaching the airwaves in a solely commercial broadcasting system. Examples include opinions favourable to higher corporate taxes or reforms to broadcasting policy which would bring new competition to existing commercial broadcasters.

The right to information requires a three sector based broadcasting system

There is no intention in this article to argue that TSB could alone satisfy society’s information needs. Instead, the contribution of PSB and Commercial broadcasting to the diversity of information is acknowledged. However, States’ obligations regarding the RtI cannot be fulfilled without the proper recognition of the third sector. This position is in agreement with most contemporary commentators of broadcasting policy, which recommend a three sectors based system.

Contemporary doctrine requires “diversity of source”, in other words, requires individuals to have access to media and information from all three sectors. It also requires “diversity of content”, meaning content from different outlets being actually identifiable as different from each other. Diversity of content is more difficult to plan for, in view of the undesirability of direct State interference with the content decisions of private outlets. However, taking into account the significant differences in nature and purpose of broadcasters from the three sectors, it is safe to assume that actual diversity of content is more likely to be attained in a three sector system.

Beyond offering content that is different from that provided by the commercial and public broadcasting sectors, empirical studies in Australia indicate that, at least according

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34 See among others, IMPFoE, Joint Declaration on Diversity in Broadcasting, 2007.
35 Ibid.
36 Supra, note 32.
to audience perceptions, there tends to be more diversity of content between different Third Sector Broadcasters (TSBs) than between different commercial broadcasters.37 This can be attributed to the audiences of TSBs being either localized or specialized38 as well as to the lack of commercial purpose, which, as described by Forde, Meadows and Foxwell allows them to ‘broadcast a niche program without fear of alienating or marginalising audiences or losing ratings’.39

2. Freedom of Religion

Unlike FoE, Freedom of Religion (FoR) does not always immediately come to mind when one is engaged in the task of evaluating broadcasting policy. Indeed, when compared to FoE, FoR issues in broadcasting might be considered tangential. However, religious broadcasting is one of the most common forms of TSB, religious organizations are among the usual types of non-profit entities which are interested in obtaining broadcasting licenses and religious broadcasters have traditionally been major players in the third sector. For this reason, considering FoR issues is unavoidable when discussing TSB.

Persons or groups may be interested in requesting the use of broadcasting frequencies, either to exercise their right to share their religiosity with others who share the same beliefs or to promote their views on religious matters to others. Both of these are legitimate interests under IHRL. When regarding the dissemination of ideas, FoR is lex specialis to FoE. In this sense, all the principles of FoE apply even when the content of the expression can be considered religious in nature. FoR is considered to encompass a private dimension (the freedom to hold beliefs) and a public one (the freedom to externalize one’s beliefs).40 Regarding this public dimension, there is no mention in IHRL instruments regarding a choice of medium, but using FoE principles, it is clear that all persons would have the right to externalize their beliefs through broadcasting unless other considerations merit a restriction of that right.

The right to change religions also implies the right to engage in religious proselytism

Of the two types of religious broadcasting, the type that is conceived as a service to a community of believers tends to be more easily accepted by governments and the general public than the type which is of a militant or proselytizing nature. However, both types of religious broadcasting are protected, in principle, by FoR. Although there has been some debate regarding whether a right to engage in religious proselytism - that is, to deliberately seek to change the belief of others - can be derived from FoR41, it is well established that FoR encompasses the freedom of persons to change their religions or beliefs.42 FoR, as Paul Sturges has rightly expressed, ‘in protecting a right to change

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37 Supra, note 19.
40 See for example, ICCPR Art 18.1; ECHR Art. 9.1; ACHR Art. 12.1.
42 See for example, ICCPR Art 18.2; ECHR Art 9.1 ; ACHR Art 12.1
religion or belief it implicitly protects the right to persuade others to change’. The soundness of this proposition can be easily observed by drawing parallels. Just as the RtI is a counterpart to FoE which can only be fulfilled in an environment conducive to the free exchange of ideas, the right of persons to form and change their beliefs can also only be realized where the exchange of ideas that enhance or challenge those beliefs is equally free.

Blanket prohibitions of religious broadcasting are not acceptable. Nor can religious broadcasting be reserved for a specific group or groups

There are also reasons why a State may desire to prohibit religious broadcasting altogether. The sector may be too difficult to regulate, or the State may wish to prevent tensions among religions groups or to protect people from cons or forms of abusive proselytism. However, while these concerns are valid, an outright prohibition of religious broadcasting in all of its forms would be unacceptable from a FoE and FoR point of view.

Although there is no prohibition under IHRL for States to have an official religion or religious position or to support specific religious groups, any difference in treatment between different religions groups requires a valid justification in order to be allowed under IHRL. In this sense, it is clear that laws that render the access to broadcasting exclusive to a single group or some specific groups would be incompatible with IHRL obligations, as would, legislation that expressly favours one religion over others in the assignment of licenses.

The complexity of regulating religious broadcasting

Even taking the principle of no blanket prohibitions as a starting point, there are many systems States can use to provide religious organizations with access to the airwaves. Examples include: specific licenses for religious broadcasting; no special licenses but religious organizations can acquire commercial licenses; religious organizations are eligible for community licenses; no licenses can be held by religious organizations as such, but legal measures allow religious groups access to air time on public, commercial or third sector services. All these systems can be subjected to criticism if religious organizations feel dissatisfied with the level of access provided by the system in place.

The issues of balance of access between different religious groups are difficult to manage in a context of spectrum scarcity. Potential audience is a criteria very commonly used for


46 See for example, ECtHR, Judgment, Savez Crkava ‘Riječ Života’ and Others v. Croatia, 2010.
48 Ibid.
the assignment of broadcasting licenses. Although this criterion is normally considered objective and legitimate, it can be perceived by upstart religious groups as discriminatory due to favoring traditional religions and religious groups already established in the community. Likewise, balancing access to the airwaves for groups supporting religious positions with those supporting non-religious positions such as atheism and agnosticism which are equally protected under FoR may be difficult.

There is no denying the complexities and difficulties States may face when given to the task of regulating religious broadcasting, and it falls beyond the scope of this article to discuss in depth all the potential issues as well as the merits of each of the different systems of access. What is important to stress is that there is an obligation under IHRL for States to provide religious groups with access to the airwaves and that regulation difficulties are not a justification for States to fail to discharge this obligation. Additionally, in light of the FoE principles already discussed, it is clear that access systems for religious broadcasting cannot rely solely on the monetary capacity of the interested parties.

3. The Right to Participate in Cultural Life and the Right to Participate in Artistic Life

Third sector broadcasting facilitates the enjoyment of the right to participate in cultural life IHRL recognizes a right for all persons to participate in the cultural life of the community in which they live. When compared to FoE or FoR the right to take part in cultural life has not been as discussed and developed in literature. However, in its General Comment No. 21 of 2009 the UN Committee on ESCR elaborated on the content of this right. The Committee established, among other elements, that the fulfilment of the IHRL obligations under this right requires “positive action” from the States, that ‘States parties are under an obligation to facilitate the right of everyone to take part in cultural life’, and that ‘the access of communities to means of expressions and dissemination’ is a necessary condition for the full realization of this right.

While there are many ways in which States can fulfil these obligations, it is evident that the potential of TSB for enabling persons to participate actively in the cultural life of their community should be considered when making policy decisions. Moreover, the committee also stressed that cultural services ‘must not be treated as having solely a commercial value’ which is also a reason why the broadcasting activity should not be exclusive to commercial enterprises.

49 See for example, ECtHR, Admissibility Decision, Application no. 6754/05 by 92.9 Hit FM Radio GMBH against Austria, 2010.
51 See for example, UNHRC, General Comment Nº 22: Freedom of Thought, Conscience or Religion, 1993.
56 Supra, note 54.
Third sector broadcasting facilitates the enjoyment of the right to participate in artistic life

While the International Covenant on Economic, Social and Cultural Rights (ICESCR) only mentions a right to participate in cultural life, the San Salvador Protocol which is the Inter-American system treaty on ESCR makes reference to a right to participate in cultural and artistic life. It is not clear whether there is a substantial difference regarding the legal meaning of the concepts of “cultural life” and “artistic life”.

In common parlance, the arts are normally considered a form of cultural expression so one would be inclined to the view that there is no substantial difference. In the aforementioned General Comment regarding the content of the right to participate in cultural life the UN Committee did not delve into these differences of wording between the ICESCR and other international treaties. However, it did stress the importance of allowing members of traditionally marginalized groups to develop their artistic potential and in a previous general comment had already established that encouraging artistic creation was a goal of the ICESCR and the reason for which a right to benefit from the protection of the moral and material interests deriving from artistic creations is prescribed. Additionally, the UNESCO Convention on Diversity of Cultural Expressions clearly establishes the importance of artistic creation for cultural diversity. In light of this, even if the right to participate in artistic life is considered to be separate from that to participate in cultural life, it is clear that it is still a universal human right protected by IHRL.

Third sector forms of broadcasting serve as outlets for musical and audiovisual artistic creations which may be culturally important, but which fall outside the scope of interest of commercial broadcasters. In this way, TSB can assists persons in fulfilling their right to participate in the artistic life of their communities. For this reason, there is a common practice of imposing higher quotas of locally produced content on TSBs over their commercial counterparts which seeks, at least theoretically, to maximize their efficiency in performing this role.

4. Political Rights and Security of Persons

Local broadcasting is important from a political rights and security stand point IHRL doctrine recognizes that there is a strong link between the right to FoE and political rights. FoE and access to information are considered essential elements required for persons to be able to fully exercise their political rights. In this sense,

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59 Supra, note 54.
60 UNCESCR, General Comment No 17: The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author, 2005.
62 Supra, note 16.
63 See for example, Australia, Community Radio Broadcasting Codes of Practice, 2008; CRTC, Broadcasting Regulatory Policy 2010-499.
64 ICCPR Art. 25; ACHR Art.23; ACHPR Art. 13; ECHR Protocol No1. Art.3.
media covering matters of local interest enables democratic participation at the local level.\textsuperscript{66}

IHRL also recognizes a right of all persons to personal security.\textsuperscript{67} Local broadcasting services are also important from a security standpoint as multiple broadcasters scattered throughout a country are less likely to be neutralized in times of war, political unrest or natural disaster. Maintaining the flow of information during extreme situations of this kind is paramount as, especially in these cases, persons require access to timely information in order to adequately protect their own security and that of others. For this reason, relying solely on a system where central broadcasters feed all content and local stations are limited to retransmissions represents a serious risk to the security of the population in general.

Third sector broadcasting is an alternative when other forms of local broadcasting are not considered viable
Local matters concerning small or marginalized communities may not be of interest to wide reach commercial broadcasters and there are markets where local broadcasting services may not be commercially viable. TSB can be an alternative to secure local broadcasting services in communities under these conditions. In some cases States have also found it to be more efficient to allocate some of the resources reserved for PSB to supporting TSB than to establish local PSB services.\textsuperscript{68} One reason for this practice is that TSB reliance on volunteers makes them a less expensive alternative to PSBs with paid employees. Additionally, community members can be assumed to be better informed about the needs and wants of their community in respect of a broadcasting service. This is an alternative when resources do not allow otherwise, but an ideal scenario would be for every community to have access to local content from all three sectors.

5. The Right to Equality Before the Law and The Prohibition of Discrimination
The right to equality before the law sometimes requires States to take positive measures
Under IHRL persons have a right to receive equal treatment before the law.\textsuperscript{69} This right is strongly linked with the principle of prohibition of discrimination under which States are not allowed to exercise unjustified distinction of treatment among groups or classes of persons, or towards individuals due to their belonging to a particular group or class.\textsuperscript{70} However, just abstaining from engaging in unjustified discrimination is not always enough for States to fulfil their obligation of providing equality before the law to their subjects, as wisely stated by the UNHRC:

the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their

\textsuperscript{66} See, Meadows, Michael, et al., Community Media Matters: An Audience Study of the Australian Community Broadcasting Sector, Griffith University (2007); Council of Europe, Additional Protocol to the European Charter of Local Self-Government on the Right to Participate in the Affairs of a Local Authority Art. 2.2(iii).
\textsuperscript{67} See for example, ICCPR Art 9.1; ECHR Art. 5.1; ACHR Art. 7.1, ACHPR Art. 6.
\textsuperscript{69} See for example, ICCPR Art 26; ACHR Art. 25, ACHPR Art. 13.1.
\textsuperscript{70} See for example, UNHRC, General Comment No 18: Non-Discrimination, 1989.
enjoyment of human rights, the State should take specific action to correct those conditions.71

In the same sense, the ECrHR has determined that the principle of no discrimination is breached not only when the State practices unjustified distinctions of treatments but also when the State fails to perform those distinctions of treatment that reasonably and foreseeably could be considered necessary to secure the due respect of human rights72

Third sector broadcasting as a means to reduce inequality in access to mass communications
TSB serves as a means to reduce inequality in access to broadcasting and mass communications in general. As explained, a system of access not dependent on economic capacity is an essential element of TSB. For this reason, TSB contributes to reduce the common exclusion of large sectors of the population from participating in mass communications for financial capacity reasons. Such exclusion constitutes a form of discrimination for economic reasons contrary to the goals of IHRL.

TSB has also been noted as very important for traditionally disadvantaged groups (TDGs) such as immigrants, refugees, women and lesbian, gay, bisexual and transgendered (LGBT) persons, national minorities, indigenous peoples and the elderly.73 These groups have traditionally suffered from different degrees of exclusion of mass communications in two dimensions. First, due to these groups also being traditionally economically disadvantaged the economic barriers to entry have hampered the access of their members to the ownership and control of media outlets. However, there is a second dimension to this inequality as there has also been a traditional insufficiency of programming targeted to these groups, representative of them and sensitive to their particular circumstances, needs and interests. This can be attributed, in most cases, to a lack of economic interest on the part of commercial broadcasters and a lack of political will in the public sector. Additionally, media aimed toward groups such as immigrants, refugees and national minorities are sometimes also hampered by direct legal barriers such as language restrictions.

Difficulties in taking affirmative measures to increase diversity in the commercial broadcasting sector
Taking affirmative measures to improve the representation of TDGs in commercial broadcasting is a complicated endeavor. The difficulties the Federal Communications Commission of the United States (FCC) have faced in trying to implement such measures is well documented. The FCC, uses an auction based assignment system and has special affirmative measures for applicants belonging to minorities and disadvantaged groups, which include special bidding credits and pay plans.74 One challenge when trying to take affirmative action measures, is that corporate structures can blur the identity of the persons who are the final financial beneficiaries of, and have actual control over a media outlet. For this reason the FCC was faced with sham applications where a person belonging to one of the favored groups was presented as the apparent responsible of the proposed broadcasting service in order to benefit from the concessions. However, these

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71 Ibid.
72 See for example, ECrHR, Judgment, Thlimmenos v. Greece, 2000.
persons were later found not to be the ones in actual control of the broadcasting service once it started operations.\textsuperscript{75}

Sham applications were not the only problem faced by the FCC system of affirmative action. The system has been considered effective in opening access to the economic activity of broadcasting to persons belonging to the beneficiary groups\textsuperscript{76}. In the area of telecommunications this is sufficient. However, in broadcasting the intended goal is not only to open economic opportunities to members of the disadvantaged groups. In broadcasting the intent is also that the diversity of ownership ends reflected in content in order to improve the presence of underrepresented groups in the media.\textsuperscript{77} The measures taken by the FCC have been less effective in the fulfilment of this second objective which has been attributed to commercial broadcasters being businesses and therefore being the market, rather than ownership, the primary determinant of their output.\textsuperscript{78} This is not to say content targeted specifically towards members of TDGs is not commercially viable as under the right circumstances it can very well be.\textsuperscript{79} However, the reality is that there are cases where it is not. Additionally, in auction systems services intending to serve a specific group may find it difficult to outbid services intended for the widest audiences possible, even when benefiting from bidding credits, as the economic value of the license can be expected to be much higher for the latter.

Access rules as affirmative action measures
A more common type of affirmative action measure is to require commercial and public broadcasters to reserve time slots for access to TDGs who can broadcast content produced by their members during the reserved spaces. This tends to be more effective in terms of ensuring that the measure favors the intended beneficiaries, but can also be deemed more invasive of the FoE rights of commercial broadcasters. Additionally, distrust between the government and the members of the TDGs may, in certain circumstances, hamper the effectiveness of measures of access to public broadcasters.

Supporting third sector broadcasting representative of traditionally disadvantaged groups is a viable affirmative action alternative
The legal forms used for the organization of non profit entities and the regulation applied to them tend to demand greater transparency than the corporate structures of businesses. As TSBs shall have no commercial purposes and are usually required to use the structure of non profit legal persons one can assume it should be easier, since it can not be by any means certain, to secure affirmative measures taken to support TSB by TDGs favor the intended beneficiaries.

In the same sense, due to being non profit entities TSBs have to legally declare a social goal rather than profit seeking as their raison d’etre. For this reason, it is more feasible to regulate TSBs to ensure they offer an added value in terms of diversity in broadcasting and offer content representative of the groups the measures intend to benefit.

\textsuperscript{76} Gahr, Evan ‘FCC Preferences: Affirmative Action for the Wealthy – Awarding of Broadcast Licenses’ Available at http://findarticles.com/p/articles/mi_m1571/is_n8_v9/ai_13506859/pg_4/?tag=content:col1
\textsuperscript{77} Ibid.
\textsuperscript{78} Ibid.
While access measures are valuable, the sense of ownership over their means of communication, and the greater freedoms members of TDGs can feel when they identify a TSB service as their own, offers a plus in terms of empowerment over simple dedicated access.

It is not suggested that seeking to address inequality in the public and commercial sectors through affirmative measures is a wasted effort or that supporting TSB is a perfect solution. Instead, it is highlighted that opening opportunities for TSBs devoted to serving TDGs is a very viable alternative to combat, in the short term, the inequality they experience in attaining access to the airwaves.

6. State Duties regarding the Administration of Natural Resources

Under IHRL, States have a series of duties to fulfill in their role as administrators of common goods such as natural resources. As the radio spectrum is a natural resource of the State, these obligations can not be ignored when making decisions regarding spectrum management policy.

States have an IHRL obligation to utilize their natural resources efficiently toward the realization of Economic, Social and Cultural Rights (ESCR). The UN Committee on ESCR has stated regarding Article 2.1 of the ICESCR that it:

obligates each State party to take the necessary steps ‘to the maximum of its available resources’. In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.

A similar principle can also be found in the UN Resolution on ‘Permanent Sovereignty Over Natural Resources’ which establishes a duty for States to administer their natural resources in the interest of their national development and of the well-being of the people of the State concerned. From these principles it follows that all State decisions regarding spectrum management must aim to maximize the benefit toward the realization of ESCR.

Spectrum policy impacts multiple economic, social and cultural rights

There are several ways in which spectrum uses impact ESCR. For example, TSB and diversity in broadcasting sector generally contributes to the realization of cultural rights; spectrum uses for telecommunications and similar activities contribute to the fulfilment of the right of all persons to benefit from technological development; and experimental uses involve the freedom of scientific research.

81 *ICESCR* Art. 2.1.
82 UNCESCR, General Comment No 3: The Nature of States Parties’ Obligations, 1990.
84 *ICESCR* Arts. 15.1(a) and 15.2.
85 *ICESCR* Art. 15.1(b).
86 *ICESCR* Art. 15.3.
The duties of the State as spectrum administrator are not vague or lacking in substance. In light of the fact that multiple human rights are involved, the decisions regarding how to best administer the spectrum are never easy. It is impossible to design one size fits all solutions and it is difficult to evaluate spectrum policies without intimate knowledge of all the conditions that prevail in the country in which they are implemented. For this reason, as far as IHRL goes, States would enjoy a wide margin of discretion regarding the administration of their spectrum. However, this does not mean that this discretion is absolute, nor that the IHRL obligations regarding the States duty to seek the realization of ESCR through the efficient administration of the spectrum are devoid of substance. There are indeed certain minimum standards the State is obliged to comply with and ways in which domestic and international courts can exercise review regarding this compliance.

7. Third Sector Broadcasters as Tools for Human Rights Activism and Community Organization

Finally, besides being strongly related to the exercise of specific rights recognized under IHRL, TSBs also serve more generally as tools for human right activism and people empowerment. Ways in which TSBs have performed a useful role in the quest for full enjoyment of human rights include: facilitating organization at the community level, being a starting point for community cooperation initiatives, serving as means through which people can demand accountability from those who govern them, and assisting governments in programs which require community outreach, such as campaigns regarding crime or disease prevention.

TSB is, evidently, not the only way in which human rights sensitive States can empower their citizens. For this reason, this article is not presenting TSB as a panacea or suggesting that TSB should always be prioritized over other human rights interest projects. Instead, the point being stressed is that the potential of TSB to support development toward the realization of IHRL goals cannot be overlooked. Although conditions vary from place to place, there is sufficient evidence that TSB is generally cost-effective in terms of the resource investment required versus the social benefit received. For this reason, any State truly eager to fulfil its IHRL obligations would have to, at the very least, give serious consideration to supporting TSB.

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87 For example, standards regarding the independence of the licensing and regulating authority, decisions by the regulating authority being subject to judicial review and transparency standards for the licensing process.
88 See for example, Supra, note 17.
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