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Direct Television Broadcasting and the Quest for Communication Equality

Howard C. Anawalt*

In the immediate past modern communication means such as efficient telephone and television systems have been viewed as the luxuries of well developed economies. Rapid advances in the field of communications and computer technologies have changed this basic outlook. Now, it is possible to use these technologies as tools of economic growth in both developed and developing countries. This is primarily because cost has gone down while efficiency has gone up. A recent article concerning small computers demonstrates the point. "If the aircraft industry had developed as spectacularly as the computer industry over the past twenty-five years, a Boeing 767 would cost $500 today, and it would circle the globe in twenty minutes on five gallons of fuel." 1

The peoples of the world all wish to benefit from the advantages offered by these new technologies. The use of communication facilities and computers is bound to change legal institutions within individual nations, and it seems likely that it will have an impact on international legal relationships as well. In order to gain some understanding of the impact of communications institutions on the formation of international law, I have chosen to examine the possibility of international regulation of direct television satellite broadcasting. This form of broadcasting raises questions of national sovereignty, cultural independence, and free flow of information. In addition, examination of the negotiations concerning potential regulation of this form of broadcasting offers a valuable opportunity for understanding how the delicate problems of international communication might be approached and resolved in the future.

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DIRECT TELEVISION BROADCASTING

For years it has been possible to send short wave radio messages from a transmitter directly to individual radio sets around the world. The reason for this is that short wave radio clings to the earth's circumference and allows broadcasting in rough proportion to the power of the transmitter. Television transmissions, on the other hand, travel at a tangent to the earth's surface and soon escape into the heavens. Thus television programming cannot ordinarily be sent long distances without being rebroadcast by another station located on the earth's surface. Artificial earth satellites have changed this capacity, since they have allowed the sending of a television transmission to a satellite and then back to earth thousands of miles away. For example, a television broadcast from Europe to North America can be accomplished by sending the messages by ground transmitter in Europe to a satellite, then back to a second ground station in North America which rebroadcasts the televised events. Future technology, indeed, some existing technology, offers the possibility of eliminating the need for a second transmitter located in North America. That is, in the future it may be possible to send a television program from Europe to a satellite and then from the satellite directly into individual television sets located in North America or elsewhere in the world. If this ever occurs on any broad scale, then long range direct telecasting could become as pervasive as long distance short wave broadcasting.

RECENT INTERNATIONAL DEBATE

The possibility of long distance direct television broadcasting has sparked a debate in international legal circles which has lasted a decade and a half. Television, as we know, is an extremely powerful communications medium. It is a political and economic force. It is political in that it shapes the expectations of people who watch it. It is even suggested by many communication scholars that such a powerful medium has the capacity to "set the agenda," or frame the basic politics of the people by identifying the issues and expectations to which they will pay attention. It is an economic force which distributes information and which can mobilize the efforts of the population. Mass media has in the past been very effective at organizing the efforts of entire populations. One good example is domestic propaganda during time of war, which has been very effective in assisting the organization of war production.

Such a powerful medium raises issues bearing on the cultural independence of individual nations, especially those which are less developed economically. A comment in a working paper prepared by Sweden and
Canada for one of the early international meetings concerning direct broadcast satellites summarizes some of these concerns, especially from the point of view of the developing countries. “It is considered that the probable impact of direct broadcast systems in a national context could be particularly profound in developing areas with undeveloped communication systems where broadcasting from satellites could dramatically change the entire outlook of millions of people who at the present have little contact outside their immediate surroundings.”

Thus, the concerns of the world community began to emerge in negotiations discussing the use of these satellites. These concerns were, on the one hand, to preserve the essence of cultural self-determination or self-guidance, and, on the other, to assure continued and fertile international communications with all the benefits that these can bring to mankind.

The debate began in earnest in the late 1960s, but shifted into high gear when the Soviet Union put forth a proposal in 1972. This proposal set the stage for the formal and informal legal discussions on direct television broadcasting. The USSR proposed an international convention that would bind nations to observe, among other items, the following:

1. Prior consent. Transmission from broadcasting states to receiving states would be illegal, unless the express consent of the receiving state were obtained.

2. Content regulation. In addition to the content regulation implicit in a prior restraint regime, the Soviet proposal banned broadcasting of programs publicizing war, militarism, Nazism and racial hatred; types of content widely regarded as odious. The proposal also prohibited other broader categories of content including violence, pornography, use of narcotics and "broadcasts undermining the foundations of local civilization, culture, way of life, tradition or language."  

3. State responsibility. Finally, the proposal provided that the nation or state "shall bear international responsibility for all national activities connected with the use of artificial earth satellites for the purposes of direct television broadcasting, irrespective of whether such broadcasting is carried out by governmental agencies or by non-governmental organizations. . . ."

The USSR enlisted considerable support for this approach. First of all, the prior consent regime could be seen as a necessary protection of national sovereignty and national self-development. The specific prohibitions on content might be viewed as further protection against abusive communications and assurances of use of a powerful medium for generally peaceful purposes. Finally, the insistence on state responsibility could be seen as assuring that the less powerful nations would be able to demand accountability from those, like the United States, that possess great communications power.

The United States and certain other western nations opposed the
USSR's proposal primarily on the basis that it violated a fundamental international norm or general principle safeguarding the free flow of information. These nations frequently cited Article 19 of the Universal Declaration of Human Rights which states that "[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any medium and regardless of frontiers." The United States urged that no special regulation of direct broadcast satellites was appropriate, and that whatever legal responsibility there might be for such broadcasts should be resolved by application of existing provisions of international law. Content regulation in any form was not an appropriate item for an international covenant. State responsibility for the action of all communicators would be equally inappropriate, for it would require national governments to interfere with private broadcasters contrary to applicable domestic law.

Canada and Sweden attempted to create a middle position between those of the Soviet Union and the United States. Their compromise formula eliminated the prohibition of certain types of content, retained state responsibility, and offered a prior consent regime under which the sending and receiving states would be obliged to confer and reach agreement or arrangements giving due consideration to the facilitation of "the freer and wider dissemination of information of all kinds."

It is worthwhile going over some of the elements of the Canadian/Swedish position as advanced in 1979 in order to appreciate the nature of the compromise which it offered. First of all, it contained a preamble and a statement of purposes and objectives which emphasized that direct television broadcasting should be developed on an orderly and equitable basis which would promote social and economic development, particularly in the developing countries. At the same time the preamble recognized that direct satellite broadcasting presents unique characteristics which are "not encountered in other forms of broadcasting." Therefore certain legal principles ought to be recognized which apply solely in that field. This preamble and statement of purposes appealed to developing nations because of the emphasis on development and cultural independence. It offered elements of assurance to nations which urge the primacy of the principle of free flow of information. First of all, since the principles were restricted to direct television broadcasting, there was less likelihood that any of the regulatory aspects would carry over to other forms of communication. Secondly, the preamble emphasized international cooperation, and the text of the declaration of principles specifically highlighted elements of the doctrine of free flow.

The purposes and objectives section of the 1979 working paper stressed that direct television broadcasting activities should be compatible with
"development of mutual understanding and the strengthening of friendly relations and cooperation among all states. . . ." This aspect of the draft addressed a basic Soviet concern, namely, that international broadcasting should not be used to foment war or other disruptions of peace. The draft also provided that each nation or state "should bear international responsibility" for television broadcasting whether carried out by state entities or private broadcasters under their jurisdiction. This also appealed to the Soviet Union, which had long urged that states must bear responsibility for broadcasting. The Soviet position on this point appears to have been based on the notion that state responsibility is necessary in order to preserve the sovereign prerogatives of receiving nations. State responsibility was probably important to developing nations not so much because of its protection of sovereignty per se, but because it would help preserve the cultural independence of these nations. For reasons which will be explained later in this paper, the position on state responsibility can be viewed as acceptable to the United States and other western jurisprudence as well.

Finally, it should be noted that the 1979 working draft strongly supported the principle of free flow of information at a most important juncture. The most difficult item to resolve in the years of negotiation was the problem of prior consent or agreement on the part of the receiving state. The 1979 draft retained a prior consent requirement in that the broadcasting state was required to consult and obtain agreement on the part of the recipient state, but both parties were obliged to bear in mind an overriding purpose of the agreement, namely that it was to be entered into "in order to facilitate the freer and wider dissemination of information of all kinds and to encourage cooperation in the field of information and the exchange of information with other countries." Good faith bargaining in the name of freedom of information was required for all parties.

The Swedish/Canadian proposal of 1979 was a useful and concrete proposal. Its key feature was that it articulated principles to guide the conduct of nations rather than establish rules which might appear inflexible in the growing area of communications. The principles referred to existing international law, especially the Outer Space Treaty, and created specific boundaries for bargaining in good faith concerning reception of television broadcasting. The proposal offered a basis for meeting the concerns of cultural independence and of advancing the principle of free flow. It urged protection of the dignity of individual national cultures and created a growing basis for a right to receive information, including by way of satellite broadcast.
THE 1982 RESOLUTION

The debate on direct television broadcast regulation appears to have come to a close in the fall of 1982, when a resolution concerning direct television broadcasting was adopted by the General Assembly. By that time the problem areas in the agenda appeared to have been refined to four items concerning the merits of the proposed satellite broadcasting principles, and a fifth problem, which was the desire to achieve consensus. As a general rule, the nations attempt to achieve consensus or general agreement on major issues of substance. The reason for this is that international support, hence progress, may not be forthcoming where there are substantial dissenting views. As we will see, consensus was not achieved with respect to the direct broadcast principles. The five items of importance were:

1. "Shall" versus "should." First of all, there was the issue of whether the direct broadcast resolution should be couched in mandatory or precatory terms, whether it should mandate or recommend certain practices. It appears to have been this issue more than any other that split the international community in the final vote. A substantial majority of the nations voting in the General Assembly, including the majority of the developing countries, voted for a resolution cast in mandatory language which provided that direct satellite broadcasting service "shall only be established after" consultations have occurred between the sending and receiving states and after agreements and/or arrangements have been established.

2. Prior consent. The language of the resolution calls for a prior consent regime concerning direct broadcasting. While the resolution of the General Assembly is not legally binding, some of the dissenting and abstaining nations appeared dissatisfied that such a regime should be recommended, especially in absence of consensus and without the encouragement to free flow of information which was built into the 1979 Canadian/Swedish proposal. This appeared for example in the remarks made by Mr. Brattstrom of Sweden to the Committee on the Peaceful Uses of Outer Space. He indicated that Sweden had abstained in the committee vote on the resolution because the proposed principles did not contain a preamble containing a number of important considerations which might militate against an interpretation that governments should be permitted to control the content of programs. Previous versions of the resolution had for the most part contained such preambulatory language to guide interpretation. One of the most recent examples was a final Swedish working paper submitted, apparently some time in 1982, which emphasized promotion of the right of freedom of expression and the importance of free flow and mutual exchange of information.

3. State responsibility. A third outstanding issue was the question of state responsibility. In this case the resolution adopted by the General Assembly
included language which was precatory rather than mandatory: "States should bear responsibility for international direct television broadcasting by satellite carried out by them or under their jurisdiction and for the conformity of any such activities with the principles set forth in this document." However, the dissenting nations and some of the abstaining nations must undoubtedly have understood that this portion of the resolution was antagonistic to free flow of information, especially when coupled with a prior consent rule. The Swedish representative to the committee stated, "The formulation of the principle of state responsibility was too broad and could be interpreted as implying a responsibility on the part of Governments for the content of programmes." Thus, it appears that Sweden and, indeed Canada, both of whom abstained in the committee vote and in the General Assembly vote, had abandoned their project of endorsing a principle of state responsibility where there was no adequate emphasis on free flow of information as a basic guiding principle.

4. The role of international law. The United States, as has been noted, was reluctant to have any general statement of principles concerning direct broadcast satellites, since that country viewed general international law to be sufficient. However, the statements of the American representative, Mr. Lichenstein, indicated that the United States government had been persuaded to go along with some kind of a draft resolution, so long as the draft resolution relied primarily on existing international regulation of the radio spectrum. Mr. Lichenstein indicated that consensus had in fact been rejected by a majority in the Outer Space Committee. He stated:

Those rejecting consensus were apparently unwilling to deal with two sensitive issues, namely international legal responsibility of states regarding the content of broadcasting and the requirement of prior consent, through a nonprejudiced reference to the international law on those matters. The adoption of a text going beyond that would only highlight the fact that international law did not provide for the kind of State responsibility or require the kind of nontechnical, non-ITU-oriented prior agreements or arrangements which the draft resolution called for.

On this issue, it appears that the United States was unable to persuade many other nations to go along with it. Some form of United Nations recommendations concerning direct broadcast satellites would certainly have been supported by most of the dissenting nations in the final United Nations vote, provided some consensus could have been reached on appropriate emphasis to be given to the importance of free flow of information. One can only speculate on whether the United States would in fact have joined such a consensus.

5. Consensus. Finally, there was the issue of consensus. These negotiations
concerning direct broadcast satellite regulations had gone on for more than a decade. A study of the mass of documents created by the Outer Space Committee and its legal subcommittee testifies to the hard work of the various delegations and to the continuous efforts to achieve some sort of meaningful compromise. No doubt all the nations participating made genuine efforts to arrive at a compromise or consensus. This includes both the Soviet Union and the United States. The Soviet Union abandoned its insistence on outlawing certain program content. The United States apparently indicated some willingness to concur in some sort of recommendation for prior consultation including prior arrangements or agreements. Numerous members of the Outer Space Committee spoke of the need for achieving consensus on this delicately debated issue. Nations on the record lamenting the absence of consensus included the United States, the Federal Republic of Germany, the United Kingdom, Japan, New Zealand, The Netherlands, Austria, France, Turkey, Italy, Canada, Ireland, and Sweden. The general tenor of these observations was that without the achievement of consensus there might be no meaningful international legal resolution of the issues which had been debated for so long. Even though consensus was lacking in the final outcome it is likely that the negotiations will have made a significant mark on world communications development.

THE IMPACT OF THE NEGOTIATIONS

The impact of the direct broadcast negotiations will be felt for years. While non-binding legally, the resolution does crystalize current world views on direct broadcasting. It also presents a preview of issues which will arise in other sensitive areas of communication and computer technology, such as control of technical data flow and access to powerful computer data banks and software. In an epoch that thrives on information, when knowledge is literally power, the issues of sovereignty, cultural identity and free flow of ideas will dominate the international scene.

While the different nations and different national blocks have decidedly different self-interests, it is nevertheless possible to assess the success of the negotiations from a general perspective. The world depends on communications, and since the Treaty of Paris established the International Telegraph Union in 1865, the community of nations has recognized that the communications order is dependent on cooperation. From the point of view of achieving further cooperation, the direct broadcast rounds achieved passing marks, but certain inadequacies stand out in sharp relief.

For one thing, claims of sovereignty were confused with claims of cultural independence. For example, in March, 1982 the Bulgarian delegate to the Outer Space Committee stated that the draft principles concerning
direct broadcasting "should be subordinated to the general recognition of the principle of state sovereignty and strict respect for sovereign States and non-interference in their internal affairs." 28 The difficulty with this type of statement is that such concerns for preservation of sovereignty are not germane in a communications debate. A state's sovereignty signifies its power over its own territory and acknowledged authority to govern its inhabitants. 29 Communication, however, does not threaten territorial integrity or undermine legal authority over inhabitants. International communications simply present information and ideas. A government’s authority cannot be undermined by ideas alone. If a government finds itself overwhelmed by communication, it must already be enfeebled by other causes so that its sovereignty is in jeopardy. 30

Cultural independence, on the other hand, may be endangered by powerful communications media. The pace of change which is suggested and even facilitated by television programs may begin to sweep aside existing mores and patterns of life. 31 The national personality or culture might be gobbled up in the process. Protection of national cultures is an implicit goal of the United Nations system. The Charter is based on the principle of sovereign equality of nations, and the concept of self-determination seems to embrace a concern for preservation of the elements of the separate cultural, linguistic and philosophical groups that make up the world community. 32 In 1946 Professor Philip Jessup observed that nations have "feelings"; these feelings should be taken into account if one seeks a more just world order. 33 These feelings are no doubt the very thing that drives the developing nations to claim a stronger position in the world communications system. Each nation wants to find and use its own voice. The MacBride Commission probably expressed a deeply held consensus when it stated, "every country should develop its communication patterns in accordance with its own conditions, needs and traditions, thus strengthening its integrity, independence and self reliance." 34 Such cultural independence can be aided by explicit international arrangements. However, future negotiations in search of such arrangements must emphasize the appropriate concern which is cultural independence, not the preservation of state sovereignty, as the latter is not generally in issue.

The utility of the doctrine of "free flow" of information should likewise be scrutinized. I am convinced that a minimum-censorship principle is essential in international communications legal theory and practice. Official interference with the content of communications should be restricted to that which is truly necessary to the public order, and such restrictions should be spelled out in the law. 35 The utility of this principle is based on two conditions, both of which are within the practical control of the world’s sovereigns. First of all, realization of the promise of free flow of information depends, as a practical matter, on acceptance by national
governments. Secondly, national governments remain free to articulate specific institutions for enhancing the flow of uncensored communications. In particular, nations are free to go beyond the international minimum in creating even greater communication freedom.

Advocates of free flow and minimum censorship should be careful to distinguish real threats to these principles from lesser problems and annoyances. For example, the content restrictions originally put forward by the Soviet Union would have squelched a whole range of international programming and would have stood as an endorsement for broad censorship on regional and domestic levels as well. Such an approach must be strongly resisted and, at a minimum, scaled down.

A similar problem exists with respect to the prior consent requirement. However, prior consent requirements will have less censorial effect when coupled with obligations to observe other elements of international law. For example, the receiving state can be obliged to allow entry of programming, unless it has specific and necessary legislation which controls such content in accordance with the terms of Article 19.

The provision for state responsibility is not, however, a grave stumbling block to free flow. First of all, it should be recognized that any such requirement stands basically as a means of identifying an internationally recognizable accountable party. It is rather like identifying those who are possible defendants in a certain class of lawsuit. The principle does not dictate the outcome in a given situation, but identifies the state as responsible under the terms of international law. Even when such responsibility is enforced against a state for an offending broadcast by a private broadcaster under its jurisdiction, there need be no censorship of the broadcaster.

For example, suppose CBS broadcasts to Saudi Arabia without making a prior arrangement. The remedies available to Saudi Arabia include diplomatic protest to the United States government and bringing legal action in United States courts against CBS. If a protest is lodged, the United States government can comply in full good faith with the principle of state responsibility by acknowledging the breach of principle and requesting CBS to participate in consultations to be held with Saudi Arabia. In the event of serious or continuous direct broadcasts, the United States could even pay some damages, without demanding indemnity from the broadcaster. If violation of the direct broadcast principles were made a statutory basis of a legal action in the United States courts, CBS could raise all appropriate international and national legal defenses to the Saudi suit, including free flow obligations and the First Amendment.

I conclude that the negotiations would have achieved a greater international commitment to improved broadcasting if the confusion of sovereignty and cultural independence had been eliminated, and the free flow
advocates had acknowledged that free flow in broadcasting will survive certain requirements such as consent and state responsibility. The conclusion of the direct broadcasting negotiations is disappointing from an international perspective because so many developed nations with strong communications capacity dissented or abstained. The resolution so far does not enjoy the wholehearted support of the powerful communicators, and as Judge Jessup has emphasized, it is critical under the United Nations system that the powerful nations be persuaded to use their resources for "the general advantage of the international community" if there is to be progress toward economic fairness on a world scope.

Nevertheless, there are good reasons to assume that genuine international cooperation will evolve under the direct broadcasting resolution as adopted. The resolution does recognize the principle that everyone has the right "to seek, receive and impart information and ideas." Although its text confounds sovereignty and cultural independence, it does emphasize that free dissemination of ideas is important "particularly in the developing countries." The critical provisions concerning the requirement of agreement to reception by the receiving state are arguably conditioned by the requirement that the receiving state must give due accord to international principles concerning free flow when making its decision.

On the practical level one can envision actual consultations between a broadcaster like BBC or ABC and a potential receiving state once direct broadcasting facilities become practical. The consultations to arrange for broadcasting to a recipient state, for example Kenya, would have to be between Kenya and the United States or the United Kingdom. However, as a practical matter, the broadcast entities would certainly play the largest role. The recipient state would most likely be very careful before exercising any option of excluding all broadcasts, as the chances are that this would disadvantage the people and national development. During any consultations, the broadcaster would emphasize the benefits of its services, and the recipient would express its needs. In fact, the utility of direct broadcasting might be so great that the recipient state might be the initiating party urging a direct broadcast entity to include it within the sweep of its broadcast. Once direct broadcasting arrangements have been established, the broadcaster should be free to operate generally without specific program censorship, unless specific provisions for program supervision have been built into the agreement. Presumably the broadcaster will have many valuable bargaining chips to use to persuade the recipient to shy away from heavy censorial arrangements.
CONCLUSION

Progress in the field of communication should be measured by enhanced ability of individuals and groups to communicate and understand. One part of this facility to communicate is the acquisition of ideas, and another is the ability to speak with one's own voice. The concept of free flow appears to embrace both of these, yet practically it favors those nations which have the greater communications power. Thus, the direct broadcasting negotiations took place among nations which accorded different priorities to enhancing the flow of information on the one hand, and preservation of the national "voice" on the other.

On balance, the negotiations and the resulting United Nations resolution should be judged as solid achievements. During the negotiations the relative importance of values was earnestly debated and compromises were, in fact, achieved. Unfortunately, consensus eluded the parties—unfortunate because international communication depends so fully on international cooperation. The negotiations were also marred by confusion of sovereignty claims with cultural identity concerns. However, in the end, a suggested mode of cooperation was set forth within which broadcasters and receiving states can work successfully.

The present state and rate of telecommunications development make it likely that international direct television broadcasting will become a reality.48 Thus, the United Nations resolution will turn out to be of practical importance, unless it is ignored. It would be impolitic for the powerful broadcasting states to ignore such a resolution, and I hope that this article has demonstrated that there is no necessity or utility in their doing so.49 Governments in power will always be tempted to employ censorship, and their efforts in that direction must be met with all the firmness that can be mustered. In the case of international communications, the tendency to censor can best be met by recognition of needs of all peoples to express and to continue to develop their own national ideas.50

NOTES

1 Toong & Gupta, Personal Computers, Scientific American, December, 1982 at 87.
5 UNCOPUOS, Soviet Draft Convention on Principles Governing the Use by States of

6 Soviet Draft Convention, supra note 4, at 3.
7 Id.
8 At this stage a variety of Third World states expressed support for a prior consent requirement. This support appears to have remained throughout the decade of negotiations, as evidenced in the final vote in the General Assembly. See infra note 19.
12 Canada and Sweden: Principles, supra note 11, at 12.
13 Id. at 12.
14 The 1973 version provides that states shall bear responsibility, whereas the 1979 draft provides that states should bear responsibility. Compare Canada and Sweden: Principles, supra note 11, at 13 with Canada and Sweden: Draft, supra note 11, at 4.
15 See infra text accompanying notes 32-38 for a discussion of the importance of distinguishing between sovereignty and cultural independence.
16 Canada and Sweden: Principles, supra note 11, at 14.
18 Compare the phrasing of the principle of "consultation and agreement between states," id. at 14-16 ("A state . . . shall without delay, notify that state of such intention and shall promptly enter into consultations if the latter so requests . . .") (emphasis added) with the United States' proposal found in UNCOPUOS, Working Paper Submitted by the United States of America, U.N. Doc. A/AC.105/286/LS Annex II, at 10 (1981) (A state . . . should without delay, notify that state of such intention and should promptly enter into consultations with that state if the latter so requests . . .") (emphasis added).
19 See Preparation of an International Convention, supra note 17, at 14-16. The vote in favor of the draft resolution was 107 to 13, with 13 abstentions. The final vote tabulation was as follows: In favor: Afghanistan, Algeria, Argentina, Bahrain, Bangladesh, Barbados, Benin, Bhutan, Bolivia, Botswana, Brazil, Bulgaria, Burma, Burundi, Byelorussian Soviet Socialist Republic, Central African Republic, Chad, Chile, China, Colombia, Comoros, Congo, Cuba, Cyprus, Czechoslovakia, Democratic Kampuchea, Democratic Yemen, Djibouti, Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, Fiji, Gabon, Gambia, German Democratic Republic, Ghana, Guyana, Haiti, Honduras, Hungary, India, Indonesia, Islamic Republic of Iran, Iraq, Jamaica, Jordan, Kenya, Kuwait, Lao People's Democratic Republic, Liberia, Libyan Arab Jamahiriya, Madagascar, Malaysia, Maldives, Mali, Malta, Mauritania, Mauritius, Mexico, Mongolia, Mozambique, Nepal, Nicaragua, Niger, Nigeria, Oman, Pakistan, Panama, Papua New Guinea, Peru, Philippines, Poland, Qatar, Romania, Rwanda, Sao Tome and Principe, Saudi Arabia, Senegal, Sierra Leone, Singapore, Solomon Islands, Somalia, Sri Lanka,
Sudan, Surinam, Syrian Arab Republic, Thailand, Togo, Trinidad and Tobago, Tunisia, Turkey, Uganda, Ukrainan Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Emirates, United Republic of Cameroon, United Republic of Tanzania, Upper Volta, Uruguay, Venezuela, Vietnam, Yemen, Yugoslavia, Zaire, Zambia.

Against: Belgium, Denmark, Federal Republic of Germany, Iceland, Israel, Italy, Japan, Luxembourg, Netherlands, Norway, Spain, United Kingdom of Great Britain and Northern Ireland, United States of America.

Abstaining: Australia, Austria, Canada, Finland, France, Greece, Ireland, Lebanon, Malawi, Morocco, New Zealand, Portugal, Sweden.


22 Preparation of an International Convention, supra note 17, at 15.

23 Special Political Comm., supra note 20, at 16. The Swedish position was that state responsibility could be applied to activities in outer space only as set out in art. VI of the Outer Space Treaty. See Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, opened for signature Jan. 27, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205. Sweden proposed that the following language be included: “To the extent required by international law, in particular the relevant provisions of the [Outer Space Treaty], states should bear international responsibility . . .” Sweden, 1981 Working Paper, supra note 21, at 25. The Swedish proposal was not included in the final draft. See Preparation of an International Convention, supra note 17, at 15.

24 See supra text accompanying notes 8-10.

25 Special Political Comm., supra note 20, at 10.

26 This author does not know if the United States ever formally indicated its willingness to concur in a recommendation for prior consultation. A recent submission from the United States urges that, instead of a requirement for prior consent, there should be a simple requirement that states which propose to authorize international direct television satellite broadcasts notify the receiving state and “promptly enter into consultations with that state if the latter so requests.” UNCOPUOS, Working Paper Submitted by the United States, U.N. Doc. A/AC.105/271 Annex I, at 17 (1980). The tenor of the committee report and of Mr. Lichenstein’s remarks indicate, however, that the United States may have been willing to concur with a modification along the lines of the Swedish working paper. Mr. Lichenstein said: “For the first time, consensus on a comprehensive text had been achievable at the current session.” He then referred apparently to the Swedish working paper which had been circulated during 1982. See Special Political Comm., supra note 20, at 10.


29 See H. KELSEN, GENERAL THEORY OF LAW AND POLITICAL PHILOSOPHY 383 (A. Wedberg Trans. 1945) (“The statement that sovereignty is an essential quality of the State means that the State is a supreme authority. ‘Authority’ is usually defined as the right or power to issue obligating commands. The actual power of forcing others to a certain behavior does not suffice to
constitute an authority. The individual who is, or has, authority must have received the right to issue obligating commands, so that other individuals are obliged to obey.

Soviet scholars emphasize territorial control and authority to govern as attributes of sovereignty. See Ushakov, International Law and Sovereignty, in Contemporary International Law 97 (G. Turkin ed. 1967).

It is readily admitted that communication is a powerful organizing tool, and that certain communications can, and indeed do, threaten the existence of government authority. However, this is an insufficient justification for treating all communication from a certain medium as a threat to sovereignty. The offending examples of communication that threaten the state are punished by all legal orders with which the author is acquainted, including that of the United States. See, e.g., W. Lockhart, Y. Kamisar & J. Choper, Constitutional Law 650-65, 702-29 (9th ed. 1980) (advocacy of unlawful conduct: clear and present danger test).

See, e.g., International Commission for the Study of Communications Problems, Many Voices, One World 30-31 (1980) [hereinafter cited as the MACBRIDE REPORT].

P. Jessup, A Modern Law of Nations 28 (1948). Judge Jessup’s book was written between 1946 and 1947, virtually contemporaneously with the formation of the United Nations. The portion of the book from which the reference is drawn states:

The international problem of equality is the result of the coexistence of two facts: (1) states are not factually equal; their power differs; (2) states have “feelings,” and the psychological factor cannot be ignored in international politics . . . power may be utilized by those who have it for the general advantage of the international community as a result of a conviction of self-interest in such utilization. This is the theoretical basis of the United Nations Charter, which recognizes the existence of power and entrusts its exercise, under agreed limitations, to those who possess it.

MACBRIDE REPORT, supra note 31, at 254.


It should be noted in this regard that both the United States and the Soviet Union are specifically obliged by their markedly different legal heritages to support the flow of uncensored communications. See U.S. Constitution amend. I; KONSTITUIZIA (Const.) art. 50 (U.S.S.R.), reprinted in THE SOVIET LEGAL SYSTEM: SELECTED CONTEMPORARY LEGISLATION AND DOCUMENTS (W. Butler trans. 1978), which reads as follows:

“In accordance with the interests of the working people and with a view to strengthening the Socialist system, citizens of the USSR shall be guaranteed the freedom of: speech, press, assembly, meetings, street processions, and demonstrations. The realization of these political freedoms shall be insured by granting public buildings, streets and squares, extensive dissemination of information, and the possibility of using the press, television and radio to the working people and their organizations.”

Id. at 13.

See supra note 5 and accompanying text.

See Preparation of an International Convention, supra note 17. at 14.

I do not wish to go into detail on the various defenses raised. It is clear, however, that statutory creation of a cause of action pursuant to a treaty will not compromise any constitutional defenses of a domestic entity. See Reid v. Covert, 354 U.S. 1 (1957) (no agreement with a foreign state can serve to confer power on the U.S. government which would otherwise be prohibited by the Constitution).

Television broadcasting in the United States is primarily a matter of private enterprise.
Programming is produced locally and by national producers. National programming is distributed by several large private networks. The private enterprise system survives administrative requirements, such as FCC licensing. However, broadcasters are subject to scrutiny in their performance: a legal standard requires them to meet the twin public interests in convenience and necessity in their programming. Licenses can be revoked for inadequate performance. Licensed broadcasters can be disciplined for even single incidents of inappropriate programming. See, e.g., Federal Communications Commission v. Pacifica Foundation, 438 U.S. 726 (1978). Despite such regulation United States spokespersons, governmental and private, do not claim that the American system deprives broadcasters of substantial ability to reach their audiences.

41 See supra note 19. Among the dissenters, Belgium, Japan, Great Britain and the United States stand out as important sources of technology and programming. France, who abstained, is also powerful from the technological point of view and is of great importance to the French speaking developing countries. Canada and Sweden also abstained. Their abstention marred the resolution of this issue, since they had performed a mediating role throughout the negotiations.

42 See Jessep, supra note 33, at 28.

43 See Preparation of an International Convention, supra note 17, at 14-16. This convention will take its place among the many other documents drafted by the UN and UNESCO concerning communications. Although it focuses on a particular area—direct broadcasting—to provide fairly specific international principles, it is unlikely that direct broadcasting to individual television receivers will become a widespread phenomenon in the near future. The belief that direct television broadcasting is not an issue of great practical importance appears to have weighed heavily in the thinking of the American negotiators throughout the direct broadcasting rounds.

44 Id.

45 However, some governments might be very heavy-handed, and exercise their option to exclude direct broadcasting, e.g., Idi Amin. No international declaration or convention concerning broadcasting can guard against the caprice of such a ruler, however.

46 The better argument under the Convention is that the receiving state has no right to censor, unless it is spelled out in the bilateral agreements established prior to the commencement of direct broadcasting. Since the Convention provides only for consultation and the establishment of broadcasting agreements, see supra note 17, at 15, and since they provide for resolution of international disputes in accordance with the United Nations provisions, see supra note 17 at 15, it appears by implication that the remedy of unilateral censorship is precluded. A recipient state which does not agree with certain broadcasts will have the option of withdrawing from the agreement altogether or seeking peaceful settlement of the dispute.

47 The effect of the bargaining process should not be overlooked. For example, states which are interested in the free flow of ideas might very well lean on their own private broadcasters during the negotiation phase. If NBC or PBS were to seek to establish a direct broadcasting link with the Soviet Union, the United States government might urge, or even insist, that the broadcaster take a firm line with the Soviet government, and require the Soviet government to accept certain public affairs or political broadcasting as a condition for receiving some other attractive portion of the package, such as cultural or sports or entertainment programming.

48 At the present time the broadcast and telecommunications industries are paying very serious attention to the possibility that direct satellite communication, including direct satellite broadcasting, will burgeon in the near future. At the International Satellite Television Conference (held on March 4 and 5, 1983, under the auspices of UCLA's Communications Law Program) a number of views were presented indicating that direct television broadcasting by satellite is very likely to occur—even in the near future. Stanley S. Hubbard, President
and General Manager of Hubbard Broadcasting, Inc., stated that if the cost of individual receiving antennas for direct broadcast reception were reduced to $300 per unit, direct satellite television broadcasting would probably capture 25% of the American television market. He also indicated that several Japanese companies believe they will be able to reach this cost figure by 1986 or 1987. Compare supra note 42 (belief that direct television broadcasting is not commercially feasible colored U.S. negotiators bargaining position).

49 See supra text accompanying note 42.

50 See MacBride Report, supra note 31, for a recent review of the problems caused by the developed countries' dominance of communications. To the extent that such communications are viewed as harmful foreign influences, the MacBride Commission emphasized that positive encouragement of local communications is preferred to negative restrictions: "The best answers to injurious foreign influence are not to be found in negative restrictions. Such influx is most irresistible when it flows into a relative vacuum." Id. at 164. Instead of negative restrictions, the MacBride Commission urged the encouragement of indigenous cultural forms, which should be "allowed to give of their best in an atmosphere of liberty. This is the true safeguard of cultural identity." Id.