

**DIRECT TELEVISION BROADCASTING BY SATELLITES AND  
FREEDOM OF INFORMATION**

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The new technology of direct television broadcasting by artificial earth satellites, defined by the World Administrative Radio Conference for Space Telecommunications in 1971 as "radiocommunication service in which signals transmitted or retransmitted by space stations are intended for direct reception by the general public,"<sup>1</sup> is on the point of entering its experimental phase. The first international cooperative project using the experimental Applications Technology Satellite F (ATS-F) will be undertaken on the basis of an agreement entered into by the USA and India in 1969.<sup>2</sup> Likewise, a joint venture between the USA and Canada using the first Communications Technology Satellite (CTS) is planned for 1975.<sup>3</sup> Japan is planning to launch a medium-size experimental broadcast satellite in 1976 or 1977 with a view toward conducting experiments in preparation for the future use of these techniques.<sup>4</sup> Direct satellite transmission to existing unaugmented home receivers on an operational basis will, however, not become available before the mid-eighties.<sup>5</sup>

The revolutionarily novel dimension of direct television broadcasting from outer space platforms and its impact on mass communications may illustratively be pointed out by a dual fact:<sup>6</sup>

a) Whereas traditional point-to-point transmission is limited to a coverage area of approximately 7,500 to 10,000 square miles, an area which may be enlarged to 150,000 square miles by means of airplanes, direct television broadcasting covers a surface of about 1,000,000 square miles. Three geostationary satellites placed equidistantly in the equatorial plane could transmit to approximately 90 per cent of the earth's surface.

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<sup>1</sup>Partial Revision of the Radio Regulations, Geneva, 1971 and Final Protocol: Space Telecommunications, July 17, 1971, [1972] 23 U.S.T. 1527, 1573, T.I.A.S. No. 7435 at 47 (effective Jan. 1, 1973) [hereinafter cited as Radio Regulations].

<sup>2</sup>Hearings on S. 2955 Before the Senate Comm. on Aeronautical and Space Sciences, 93rd Cong., 2nd Sess., at 768 (1974).

<sup>3</sup>*Id.* at 668.

<sup>4</sup>Dausen, *La télévision directe par satellites et le droit international*, 1973 *Revue Générale de l'Air et de l'Espace* 380; *cf.* U.N. Doc. A/AC.105/127 ¶122 (1974).

<sup>5</sup>U.N. Doc. A/AC.105/51 ¶9 (1969).

<sup>6</sup>Dersi, *Outer Space—TV Law as Jus Speciale*, Proc. 16th Colloquium on the Law of Outer Space 60, 60-61 (1974).

b) Contrary to pure sound transmissions, the visual presentation of television broadcasts has not only a far stronger effect on the public at large, but is also unimpeded by linguistic barriers.

Considering that the new techniques essentially escape the national control of the receiving states, direct television broadcasting from outer space raises new and important legal problems in several fields such as national sovereignty, international responsibility and liability, the protection of copyrights, and the rights of interpretative artists and performers. The most crucial issue arising in this context is, however, that of the relationship between the individual's fundamental right to the free flow of information and national sovereignty of states over their airspace, including the controversial concept of sovereign rights over the ether space.<sup>7</sup>

The community of nations has dealt with this question for several years. In 1969 the United Nations, in pursuance of General Assembly resolution 2453 B (XXIII),<sup>8</sup> established a Working Group on Direct Broadcast Satellites (hereinafter called: Working Group) which has so far held five sessions. Similarly, the United Nations Educational Scientific and Cultural Organization (hereinafter UNESCO), in accordance with its statutory purpose of contributing to peace and security by promoting collaboration among the nations through education, science and culture, has given attention to the legal and deontological questions involved.

### I. THE UNESCO DECLARATION OF PRINCIPLES

On November 15, 1972, the General Conference of the UNESCO adopted at its 17th session a basic declaration entitled "Declaration of Guiding Principles on the Use of Satellite Broadcasting for the Free Flow of Information, the Spread of Education, and Greater Cultural Exchange" (hereinafter, the Declaration).<sup>9</sup> The elaboration of this instrument goes back to 1962 when the General Conference authorized the Director General "to undertake studies on the consequences which the new techniques of communication by artificial satellites might have on the achievement of UNESCO's objectives."<sup>10</sup>

The Declaration recognizes in article V (1) that

[t]he objective of satellite broadcasting for the free flow of information is to ensure the widest possible dissemination, among the peoples of the world, of news of all countries, developed and developing alike.

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<sup>7</sup>Goedhuis, Preliminary Report and Questionnaire on the Legal Aspects of the Use of Direct Broadcasting Satellites, 56th Conf. of the Int'l L. Ass'n 6 (1974-75).

<sup>8</sup>U.N. G.A. Res. 2453B/XXIII (1968).

<sup>9</sup>U.N. Doc. A/AC.105/109/Corr. 1 (1973), also printed in 1 J. Space L. 161 (1973) [hereinafter cited as the Declaration].

<sup>10</sup>12 U.N. ECOSOC, Res. 5.112 (1962).

Article IX (1) specifies the scope of the principle by proclaiming it

necessary that States, taking into account the principle of freedom of information, reach or promote prior agreements concerning direct satellite broadcasting to the population of countries other than the country of origin of the transmission.

The maxim of "free flow of information" is, however, subject to far-reaching restrictions as to the contents of the information to be disseminated. Notably, "[s]atellite broadcasting shall respect the sovereignty and equality of all States"<sup>11</sup> and "shall be apolitical and conducted with due regard for the rights of individual persons and non-governmental entities, as recognized by States and international law."<sup>12</sup> The objective of satellite broadcasting shall be to provide "a new means of disseminating knowledge and promoting better understanding among peoples,"<sup>13</sup> which requires that account be taken, *inter alia*, of "the objectives of peace, friendship and co-operation between Peoples, and of economic, social and cultural progress."<sup>14</sup>

Despite the considerable factual weight of this declaration as an expression of a uniform *opinio juris nationum*, it must be emphasized that resolutions of international organizations do not constitute applicable rules of international law but may, under the *bona fides* clause, only in exceptional circumstances be considered as binding upon the states which voted for them.<sup>15</sup>

## II. THE PROPOSALS SUBMITTED TO THE UN WORKING GROUP

Contrary to the UNESCO, the United Nations has so far not succeeded in reaching a consensus of a majority of nations on this highly ticklish issue. Notably, in its fifth and last session which was held early in the spring of 1974, the views expressed by the several delegations were largely divergent as to both the existence and scope of a right to free information and its implementation with regard to direct television broadcasts.

The discussions on political and legal implications were based on four major working papers which covered various concepts to be taken into account while formulating appropriate principles and which contained detailed proposals for regulation in a future agreement or agreements:

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<sup>11</sup>Declaration, *supra* note 9, at art. II(1).

<sup>12</sup>*Id.* at art. II(2).

<sup>13</sup>*Id.* at art. IV(1).

<sup>14</sup>*Id.* at art. IV(2).

<sup>15</sup>O. Asamoah, The Legal Significance of the Declarations of the General Assembly of the United Nations 70, 159, 243 (1966); Meyer, Der Weltraumvertrag, 16 Zeitschrift für Luftrecht und Weltraumrechtsfragen 65, 69 (1967); Virally, La valeur juridique des recommandations des organisations internationales, 1956 Annuaire Français de Droit International 66.

1. Draft Principles governing the Use by States of Artificial Earth Satellites for Direct Television Broadcasting submitted by the delegation of the Soviet Union pursuant to General Assembly resolution 2916 (XXVII) and based on an earlier submitted Soviet Draft Convention of August 9, 1972.<sup>16</sup>

2. Draft Principles governing Direct Television Broadcasting by Satellite jointly submitted by Canada and Sweden and based on a joint Working Paper of May 2, 1973.<sup>17</sup>

3. Draft Principles on Direct Broadcast Satellites submitted by the delegation of the United States on March 11, 1974.<sup>18</sup>

4. Working Paper listing the problems involved in formulating principles governing the use by satellites for direct television broadcasting along with suggestions for the solution of such problems, submitted by Argentina and serving as a basis for a Draft International Convention on Direct Broadcasting by Satellite submitted by Argentina on July 5, 1974.<sup>19</sup>

The four above working papers may, with a view to the concept of "free flow of information", be evaluated as follows:

1. The Soviet proposal<sup>20</sup> clearly reflects the misgivings of Communist states and a certain number of developing countries about their possibly being discriminated against by the rapid advancement of space science and technology.

While not recognizing a right to free information across the national borderlines, it calls upon states to "carry out direct television broadcasting by means of artificial earth satellites to foreign States only with the express consent of the latter."<sup>21</sup> As to program contents, there should be excluded from television programs transmitted by means of artificial earth satellites "any material which is detrimental to the maintenance of international peace and security, which publicizes ideas of war, militarism, national and racial hatred and enmity between peoples, which is aimed at interfering in the internal domestic affairs of other States, or which undermines the foundations of the local

<sup>16</sup>U.N. Doc. A/AC.105/WG.3(V) CRP.1 (1974) and Corr. 1, reprinted in U.N. Doc. A/AC.105/127 (1974), Annex II [hereinafter the Soviet proposal].

<sup>17</sup>U.N. Doc. A/AC.105/WG.3/L.4 (1974), reprinted in U.N. Doc. A/AC.105/127 (1974), Annex III [hereinafter the Canada/Sweden proposal].

<sup>18</sup>U.N. Doc. A/AC.105/WG.3(V) CRP.2 (1974), reprinted in U.N. Doc. A/AC.105/127 (1974), Annex IV, and also in Hearings on S. 2955 Before the Senate Comm. on Aeronautical and Space Sciences, 93rd Cong., 2nd Sess., at 776-78 (1974) [hereinafter the United States proposal].

<sup>19</sup>U.N. Doc. A/AC.105/WG.3(V) CRP.3 (1974), reprinted in U.N. Doc. A/AC.105/127 (1974), Annex V [hereinafter the Argentine Draft Principles]; U.N. Doc. A/AC.105/134 (1974) [hereinafter the Argentine Draft Convention].

<sup>20</sup>Soviet proposal, *supra* note 16.

<sup>21</sup>*Id.* at art. V.

civilization, culture, way of life, traditions or language.”<sup>22</sup> Furthermore, advertising and other commercial broadcasts would require specific agreements between the States concerned.<sup>23</sup>

Such broadcasts which are carried out without the express consent of the foreign state concerned or which contain material to be excluded from programs under the above principles should be regarded as illegal and giving rise to the international liability of the broadcasting state.<sup>24</sup>

2. In contradistinction to the Soviet proposal, the United States proposal of draft principles<sup>25</sup> does not include a provision that consent must be obtained by a broadcasting state from the receiving states prior to the transmission. On the contrary, prior consent, the major issue in all official debates, is decisively rejected by the United States, the essential considerations being opposition to government censorship of program content and interference with the maxim of free flow of information and ideas as, *inter alia*, enunciated in article 19 of the Universal Declaration of Human Rights.<sup>26</sup>

The principle of freedom of information is invoked in article IV of the United States proposal which provides:

Such activity [international direct television broadcasting] should also be conducted in a manner which will encourage and expand free and open exchange of information and ideas while taking into account differences among cultures and maximizing the beneficial use of new space communications technologies.

Freedom of information is, however, only one of the guiding principles which should govern broadcasting activities. It is embedded into the whole of objectives and purposes which the new techniques should serve and among which are invoked “the maintenance of international peace and security with a view to enhancing co-operation, mutual understanding and friendly relations among all States and peoples,”<sup>27</sup> and, more specifically, the sharing in benefits derived from this activity by all States.<sup>28</sup>

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<sup>22</sup>*Id.* at art. IV.

<sup>23</sup>*Id.* at art. III.

<sup>24</sup>*Id.* at art. VI.

<sup>25</sup>United States proposal, *supra* note 18.

<sup>26</sup>Statement by U.S. Representative at the Fifth Session of the U.N. Working Group on Direct Broadcast Satellites, Press Release at Geneva, Switzerland, Mar. 13, 1974. Statement reprinted in Hearings on S. 2955 Before the Senate Comm. on Aeronautical and Space Sciences, 93rd Cong., 2nd Sess., at 776-78 (1974). Cf. Galloway, Direct Broadcast Satellites, Proc. 17th Colloquium on the Law of Outer Space, 3 (1975); Galloway, Direct Broadcast Satellites and Space Law, 3 J. Space L., 30 (1975).

<sup>27</sup>United States proposal, *supra* note 18, at art. III.

<sup>28</sup>*Id.* at art. V.

3. The joint Canada/Sweden proposal<sup>29</sup> and the Argentine proposal<sup>30</sup> take an intermediary stand as to the compatibility of free international television broadcasting with the exigencies of national sovereignty and the doctrine of non-intervention in the internal affairs of States.

While the belief is expressed that "direct television broadcasting by satellite must be governed by international law so as to ensure the free flow of communications on a basis of respect for the sovereign rights of States and the principle of non-intervention and equality,"<sup>31</sup> and that "[s]tates shall promote the free flow of social communication and shall ensure the veracity of information,"<sup>32</sup> such activities shall not "in any manner impair the rights of States, of the family and of the individual."<sup>33</sup> The Argentine Draft Principles comment in juridical terms that "[t]he principle of freedom of information and free flow of communications is not incompatible with the adoption of additional principles designed to harmonize the rights of States and to protect the economic, social and cultural values of their peoples."<sup>34</sup>

The prior consent requirement, respectively incorporated into articles V and VI of the Canada/Sweden proposal and article 10 of the Argentine Draft Convention, is regarded as essential in order to harmonize the conflicting principles. The Argentine Draft Principles comment thereon:

Prior consent allows for the solution of many questions and reserves the solution concerning the program content.

The freedom enshrined in the 1967 Treaty on Outer Space is not an unlimited freedom, but is subject to international co-operation, which determines the legality or illegality of any activity conducted in space or in the sphere of space communications.

Consent implies participation in scheduled activities.<sup>35</sup>

Like the Soviet Draft Convention, the Argentine Draft International Convention provides for specific agreements for international commercial advertising to which the freedom of information clause is not considered basically applicable.<sup>36</sup>

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<sup>29</sup>Canada/Sweden proposal, *supra* note 17.

<sup>30</sup>Argentine Draft Principles, *supra* note 19.

<sup>31</sup>Canada/Sweden proposal, *supra* note 17, preamble and art. 2.

<sup>32</sup>Argentine Draft Convention, *supra* note 19, at art. VIII(1).

<sup>33</sup>*Id.*

<sup>34</sup>Argentine Draft Principles, *supra* note 19, at ¶13.

<sup>35</sup>*Id.* at ¶14.

<sup>36</sup>Argentine Draft Convention, *supra* note 19, at art. XX.

## III. THE DISCUSSIONS IN THE UN WORKING GROUP

Based essentially on the four above-cited working papers, the discussions within the framework of the UN Working Group revealed similar disagreement among the delegates on this most controversial issue. As the Working Group's report on its fifth session stated, most delegations were of the view that direct television broadcasting by satellites should be conducted bearing in mind the need to ensure the flow of information on a basis of strict respect for the sovereign rights of States and for the right of all peoples to preserve their culture. The opposite position was taken by the delegations of Communist states and a certain number of developing countries, *i.e.*, that the concept of "free flow of information" does not constitute an applicable principle of international law and that states should, in the matter of international exchange of information, act in accordance with a maxim of strict observance of the sovereign rights of states. As an intermediary position, the view was expressed that direct television broadcasting activities should be conducted in a spirit of cooperation so as to reconcile the sovereign rights of states to the need for ensuring the free and open exchange of information and ideas among nations.<sup>37</sup>

Prior consent, including program participation, and program contents of satellite-transmitted broadcasts were the two main subjects of debate during the Working Group's fifth session.<sup>38</sup>

## A. Prior Consent and Participation

The requirement of prior consent—which signifies that no country should engage in direct satellite broadcasting to other countries without prior authorization by the latter—was emphasized by most delegations to the Working Group. It was upheld that prior consent, as already incorporated in article 7, regulation 428 A of the Revised Radio Regulations adopted by the 1971 World Administrative Conference for Space Telecommunications,<sup>39</sup> would be most appropriate to satisfy the recognized rights of states to regulate their communications systems and to decide in light of social, political, economic, cultural and other considerations the type of broadcasting service they desire. It would, furthermore, be in harmony with international legislation and its interpretation of the free flow of communications. The right of participation in broadcasting activities involving coverage of other states' territory was qualified as a necessary corollary of the prior consent clause.

The opposite view was expressed by a minority of delegations that the prior consent clause would be unacceptable to the community of nations as it would seem to undermine and regressively depart from the vital concepts of freedom of information and exchange of ideas which would be essential to a better understanding among states and, hence, for the maintenance of international peace and security. State sovereignty was

<sup>37</sup>U.N. Doc. A/AC.105/127 ¶132 (1974).

<sup>38</sup>Goedhuis, *supra* note 7, at 13 *et seq.*

<sup>39</sup>Radio Regulations, *supra* note 1, 23 U.S.T. at 1648, T.I.A.S. No. 7435 at 122.

interpreted by the opponents to the prior consent rule as comprising every state's right to maintain its domestic public media system free from control or restrictions imposed by others, *i.e.*, the receiving states. While article 19 of the Universal Declaration of Human Rights<sup>40</sup> was invoked as support, the ITU Radio Regulations<sup>41</sup> were not considered applicable as they relate merely to the technical aspects, but not the substance, of direct broadcast satellite systems.

An intermediary view was expressed to establish a clear distinction between direct television broadcasts by satellite specifically intended for foreign states and those resulting from unintentional spill-over. The intermediary view was that the prior consent requirement should only apply to the former category, whereas only the latter should be covered by the scope of the ITU Radio Regulations.<sup>42</sup>

#### B. Program Content

During the Working Group's discussions, close consideration was given to the question of desirability of formulating separate principles of program content as well as to the question of internationally admissible program content itself. For the supporters of the prior consent rule, the issue was one of the considerations on which prior consent should be given or withheld. For the opponents, content requirements were considered as a suitable instrument to fill the regulatory gap which results from the lack of internationally recognized procedures for efficient control of broadcasts by receiving states.

One opinion set forth was that there should be, regardless of the regime of authorization, a specific obligation to exclude from the scope of international direct television broadcasting certain types of programs, primarily any material detrimental to the maintenance of international peace and security or which publicizes war-mongering ideas, militarism, national and racial hatred and enmity between peoples, or interferes in the domestic internal affairs of other states. Another opinion expressed was the opposite view that restrictions on program content would infringe upon the sovereign rights of states to administer their domestic media systems without content interference from other states. The inclusion of a specific provision relating to program contents, it was argued, would be tantamount to dictating to states what should or should not be included in their programs. Among the supporters of the prior consent rule, it was furthermore upheld that the requirement of prior consent would render program content provisions nugatory, particularly since the principle of prior consent would be complemented by that of participation, which would necessarily pre-suppose an agreement on program content.<sup>43</sup>

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<sup>40</sup> 1948 U.N. Y.B. on Human Rights 459.

<sup>41</sup> Radio Regulations, *supra* note 1.

<sup>42</sup> U.N. Doc. A/AC.105/127 ¶42 (1974).

<sup>43</sup> *Id.* at ¶49.

Partly, a differentiation was made between commercial advertising and other types of programs so that only the former should require specific program content agreements between the states concerned.<sup>44</sup>

#### IV. A LEGAL ANALYSIS

The question of freedom of information in the field of direct television broadcasting by satellites can be analyzed and evaluated from two points of view, that of the sovereign rights of states, and that of the individual's right to the unobstructed flow of communications.

National sovereignty is generally considered as a necessary condition for the existence of states, and, hence, a basic concept of both the doctrine of state and that of public international law. It is traditionally defined as "supreme authority, an authority which is independent of any other earthly authority."<sup>45</sup> It may be recalled that the notion of sovereignty has never become, even at the outset of the space age, a controversial issue although it was discussed in somewhat geographical terms of where airspace ends and outer space begins.<sup>46</sup>

However, the concept of supreme and absolute authority is no longer acceptable in national as well as international law, which shows an increasing tendency to admit of certain restrictions on states' power. The recognition by the international legal order of basic human rights and freedoms is a main accomplishment of our century, particularly its post-war period,<sup>47</sup> and is an essential element of what is called "the new international law."<sup>48</sup>

Freedom of information, a fundamental right of the individual, is recognized by the domestic legal order of an overwhelming majority of states. The United States Constitution, *e.g.*, proclaims in its first amendment the freedom of speech and the freedom of the press,<sup>49</sup> freedoms which, according to the decisions of the United States Supreme Court, encompass the freedom of broadcasting.<sup>50</sup> This constitutional provision is *inter alia* implemented by the Freedom of Information Act of 1966.<sup>51</sup>

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<sup>44</sup>*Id.* at ¶150.

<sup>45</sup> Oppenheim & Lauterpacht, *International Law—A Treatise* 115 (7th ed. 1952); *cf.* A. Verdross, *Völkerrecht* 7 (5th ed. 1964).

<sup>46</sup>M. Dausen, *Die Grenze des Staatsgebietes im Raum* 14 (1972); *cf.* Galloway, *supra* note 26.

<sup>47</sup>*See* U.N. Charter arts. 13, 55, 56, 62, 68 and 76c.

<sup>48</sup>A. Alvarez, *Le droit international nouveau* (1959); W. Friedmann, *The Changing Structure of International Law* 58 (1964).

<sup>49</sup>U.S. Const. amend. I.

<sup>50</sup>M. Forkosch, *Constitutional Law* § 330 (1969).

<sup>51</sup>5 U.S.C. § 1002 (1966).

The Fundamental Law of the Federal Republic of Germany enunciates the right of everyone

to freely express and disseminate his opinion verbally, in writing and by images and to inform himself unimpededly from generally accessible sources. The freedom of the press and the freedom of reporting by broadcasting and film are guaranteed. Censorship does not take place.<sup>52</sup>

These basic human rights meet with barriers only "in the provisions of the general laws, the legal provisions for the protection of youth and the right of personal honour."<sup>53</sup>

Among the Communist states, article 125 of the Constitution of the USSR guarantees the freedom of expression and the press.<sup>54</sup>

In international law the principle of freedom of information is to be found in four major instruments. The Universal Declaration of Human Rights, adopted on December 10, 1948, by the United Nations General Assembly, proclaims in article 17 everyone's right "to freedom of thought and expression; this right shall include freedom . . . to seek, receive and impart information and ideas by any means and regardless of frontiers."<sup>55</sup> However, resolutions of international organizations do not constitute applicable norms of international law.<sup>56</sup>

The European Convention for the Protection of Human Rights and Fundamental Freedoms,<sup>57</sup> signed at Rome on November 4, 1950 by the member States of the Council of Europe, is particularly noteworthy insofar as it entitles "any person, non-governmental organization or group of individuals" to lodge complaints to a specifically established European Commission of Human Rights against any State party having recognized the competence of the Commission to receive such petitions.<sup>58</sup> Article 10(1) of the Convention recognizes, subject to certain conditions and restrictions which might be necessary in the interest of national security and public safety, for the protection of health and morals, and of the reputation or rights of others,

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<sup>52</sup>Fundamental Law of the Federal Republic of Germany, art. 5 ¶1.

<sup>53</sup>Fundamental Law of the Federal Republic of Germany, art. 5 ¶2. See Schmidt, Bleibtrau & Klein, *Kommentar zum Grundgesetz für die Bundesrepublik Deutschland* 190 (3rd ed. 1973).

<sup>54</sup>Kotok, *Le droit constitutionnel soviétique*, in *Principes du droit soviétique* 99 (P. Romachkine ed.).

<sup>55</sup>1948 U.N. Y.B. on Human Rights 459.

<sup>56</sup>See O. Asamoah, *supra* note 15; Bindschedler, *La délimitation des compétences des Nations Unies*, 108 *Recueil des Cours de l'Académie de Droit Int'l* 446 (1963); Johnson, *The Effect of Resolutions of the General Assembly of the U.N.*, 32 *Brit. Y.B. Int'l L.* 121 (1955-56); Meyer, *supra* note 15; Virally, *supra* note 15.

<sup>57</sup>1950 U.N. Y.B. on Human Rights 418-26.

<sup>58</sup>*Id.*, art. 25(1) at 423.

the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.<sup>59</sup>

On a world-wide level, the International Covenant on Civil and Political Rights,<sup>60</sup> adopted and opened for signature, ratification and accession by General Assembly resolution 2200 A (XXI) of December 16, 1966, but which is not yet in force, proclaims in words similar to those of the European Convention the fundamental right of everyone

to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.<sup>61</sup>

Conditions on the exercise of these rights may only be provided by law as necessary

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.<sup>62</sup>

An optional protocol to the Covenant which provides, like the European Convention, for a right of complaint by individuals after exhaustion of available local remedies, has also not yet entered into force.<sup>63</sup>

A specific Draft Convention on Freedom of Information has been on the agenda of the United Nations General Assembly since its 14th session. The Third Committee adopted its preamble and article 1 at the 14th session; at the 15th session, article 2 was adopted; and at the 16th session articles 3 and 4 were adopted. From the 17th session on, the Third Committee has not been able to continue its consideration of the Draft.<sup>64</sup>

This Draft Convention, which was a working paper before formation of the Working Group on Direct Broadcast Satellites,<sup>65</sup> declares the following guiding principles:

- (a) Each Contracting State undertakes to respect and protect the right of every person to have at his disposal diverse sources of information;

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<sup>59</sup>*Id.* at 421.

<sup>60</sup>20 Y.B. of the U.N. 423-32 (1966).

<sup>61</sup>*Id.*, art. 19(2) at 426.

<sup>62</sup>*Id.*, art. 19(3) at 426.

<sup>63</sup>*Id.* at 431. *See* arts. 1, 2, 4 and 5 of the Protocol.

<sup>64</sup>U.N. Doc. A/7164 (1968) and Annexes I and II.

<sup>65</sup>U.N. Doc. A/AC.105/WG.3/L.2 (1974).

(b) Each Contracting State shall secure to its own nationals, and to such of the nationals of every other Contracting State as are lawfully within its territory, freedom to gather, receive and impart without governmental interference, save as provided in article 2, and regardless of frontiers, information and opinions orally, in writing or in print, in the form of art or by duly licensed visual or auditory devices.<sup>66</sup>

Article 2(1) points out that the exercise of those freedoms carries with it duties and responsibilities. That exercise, however, may

be subject only to such necessary restrictions as are clearly defined by law and applied in accordance with the law in respect of: national security and public order (*ordre public*); systematic dissemination of false reports harmful to friendly relations among nations and of expressions inciting to war or to national, racial or religious hatred; attacks on founders of religions; incitement to violence and crime; public health and morals; the rights, honour and reputation of others; and the fair administration of justice.<sup>67</sup>

These restrictions shall, however, "not be deemed to justify the imposition by any State of prior censorship on news, comments and political opinions."<sup>68</sup>

As to direct television broadcasts, article 7 of the Draft Convention, so far not adopted by the Third Committee, merits attention. It provides that

[n]othing in the present Convention shall affect the right of any Contracting State to take measures which it deems necessary in order:

- (a) To develop and protect its national news enterprises until such time as they are fully developed;
- (b) To prevent restrictive or monopolistic practices or agreements in restraint of the free flow of information and opinions.<sup>69</sup>

This provision may justify derogations from the principle of freedom of broadcasting in the interest of technologically less-developed countries in order to allow them to further their own communications media.

## V. CONCLUSIONS

This review of the concepts of both national sovereignty and freedom of information clearly demonstrates that the sovereign rights of states must be regarded as prevailing over the individual's right to the unobstructed flow of information. This prevalence results in the first place from the fact that freedom of information, although it

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<sup>66</sup>U.N. Doc. A/7164 (1968), art. 1, Annex I at 1.

<sup>67</sup>*Id.*, art. 2(1), Annex I at 2.

<sup>68</sup>*Id.*, art. 2(2).

<sup>69</sup>*Id.*, art. 7, Annex II at 1.

is incorporated into a considerable number of state constitutions, has so far not found an uncontested place in the international legal order. The International Covenant on Civil and Political Rights and the Convention on Freedom of Information have not yet entered into force, while the Universal Declaration of Human Rights, as a mere General Assembly resolution, lacks any compelling force. The European Convention, on the other hand, is only applicable to a limited number of European states.

Freedom of information can, consequently, only be enjoyed by individuals on the terms and conditions which the sovereign states may impose upon its exercise. With respect to direct television broadcasting activities, this thesis would imply the following:

1. States are free, by virtue of their sovereign rights, to authorize or prohibit television broadcasts specifically intended for their territory. Unintentional broadcast transmissions into foreign territories, *i.e.*, spill-over radiations, are, so far as they are not covered by the above paragraph, to be reduced to the minimum that is technically feasible and economically practical. It should be clarified whether the rule of prior consent or that of prior prohibition should govern a pertinent regulation of the matter. Considering that the states are free to choose their own political, economic and cultural system and that the maxim of national sovereignty and the doctrine of non-intervention are preeminent over individual rights and freedoms under international law, the rule of prior express consent seems to be most appropriate to reconcile the principle of free flow of information to the requirements of sovereign states.<sup>70</sup> The prior consent rule implies the participation of the receiving states in the preparation and contents of television programs as a pre-condition of consent.<sup>71</sup>

2. Independent of the regime of authorization, there are certain basic legal rules applicable to program contents, *e.g.*, the general principles of international law, including the Charter of the United Nations, and the provisions of the 1967 Treaty on Outer Space.<sup>72</sup> Moreover, there was unanimity among the delegates to the Working Group that further documents of international law would be directly applicable,<sup>73</sup> *inter alia*:

a. The International Convention concerning the Use of Broadcasting in the Cause of Peace, signed on September 23, 1936,<sup>74</sup>

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<sup>70</sup>Cf. Argentine Draft Convention, *supra* note 19, at art. X; Canada/Sweden proposal, *supra* note 17, at arts. V and VI; Soviet proposal, *supra* note 16, at art. V.

<sup>71</sup>Argentine Draft Principles, *supra* note 19, at ¶14; Búsák, La radiodiffusion directe par satellites, Proc. 17th Colloquium on the Law of Outer Space (1975).

<sup>72</sup>Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, January 27, 1967, [1967] 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205 (effective Oct. 10, 1967).

<sup>73</sup>Búsák, The Need for an International Agreement on Direct Broadcasting by Satellites, 1 J. Space L. 144 (1973); U.N. Doc. PUOS/C.2 (XIII)/WG.III/DG/CRP.1 (1974), a proposal by several States of a list of international instruments that should be applicable to direct broadcasting by satellites.

<sup>74</sup>[1938] 186 L.N.T.S. 301.

b. United Nations General Assembly resolution 110/II<sup>75</sup> on measures to be taken against propaganda and the inciters of a new war,

c. United Nations General Assembly resolutions 1236/XII<sup>76</sup> and 1301/XIII<sup>77</sup> concerning friendly and peaceful relations among states,

d. United Nations General Assembly resolution 424/V<sup>78</sup> prohibiting radio broadcasts containing attacks against other countries.

3. Both the prior consent requirement and the elaboration of an ethic and legal code relating to program contents seem to contradict the concept of free flow of information across national frontier lines. On the other hand, sovereignty in our modern interdependent world can no longer be measured by the yardstick of traditional law concepts in terms of Jean Bodin or Hugo Grotius. A future code of program contents, therefore, should not only be prohibitive but also affirmative in the sense that, subject to certain clearly defined conditions and restrictions which might be necessary for the protection of public order and the rights and freedoms of others, prior consent should not be withheld, and its refusal would constitute an abuse of state sovereignty. A guarantee of a certain minimum level of free international exchange of information would be the cornerstone of an affirmative program code to be enshrined in a pertinent agreement on the matter.<sup>79</sup>

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<sup>75</sup>U.N. G.A. Res. 110/II (1947).

<sup>76</sup>U.N. G.A. Res. 1236/XII (1957).

<sup>77</sup>U.N. G.A. Res. 1301/XIII (1958).

<sup>78</sup>U.N. G.A. Res. 424/V (1950).

<sup>79</sup>Dausès, La liberté de l'information en matière de la télévision directe par satellites, Proc. 17th Colloquium on the Law of Outer Space, 16 (1975).