


12-1-1986

The New World Information and Communication Order and International Human Rights Law

Stephen Raube-Wilson

Follow this and additional works at: <http://lawdigitalcommons.bc.edu/iclr>

 Part of the [Communications Law Commons](#), [Human Rights Law Commons](#), [International and Intercultural Communication Commons](#), [International Law Commons](#), and the [Library and Information Science Commons](#)

Recommended Citation

Stephen Raube-Wilson, *The New World Information and Communication Order and International Human Rights Law*, 9 B.C. Int'l & Comp. L. Rev. 107 (1986), <http://lawdigitalcommons.bc.edu/iclr/vol9/iss1/5>

This Notes is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College International and Comparative Law Review by an authorized administrator of Digital Commons @ Boston College Law School. For more information, please contact nick.szydowski@bc.edu.

The New World Information and Communication Order and International Human Rights Law

I. INTRODUCTION

In December 1984, the United States withdrew from membership in the United Nations Educational, Scientific, and Cultural Organization (UNESCO).¹ One of the major reasons for the U.S. withdrawal was the perception held by U.S. officials that the UNESCO secretariat has supported the debate over the establishment of the New World Information and Communication Order (NWICO).² The NWICO³ is a rather amorphous set of demands, originating principally from Third World nations,⁴ aimed at correcting what those countries view as an imbalance in the international flow of information.⁵ As of yet, the

¹ *U.S. Notifies UNESCO of Intent to Withdraw*, 84 DEP'T STATE BULL. 41 (1984); *UNESCO Farewell*, TIME, Dec. 31, 1984, at 14. UNESCO, one of the largest of the United Nations' independent agencies, serves as the educational and cultural arm of the United Nations. Massing, *UNESCO Under Fire*, ATLANTIC MONTHLY, July 1984, at 89. The United Nations founded UNESCO in 1946 in order to help prevent the outbreak of war by promoting educational, scientific, and cultural exchanges among peoples. P. HAJNAL, GUIDE TO UNESCO 11-12 (1983). The preamble of UNESCO's constitution advances the proposition "[t]hat since wars begin in the minds of men, it is in the minds of men that the defenses of peace must be constructed." UNESCO CONST. preamble, reprinted in P. HAJNAL, *supra*, at 403. In recent years, UNESCO has sponsored a wide variety of programs, most of which are aimed at the development of Third World countries. Massing, *supra*, at 89.

² Massing, *supra* note 1, at 94; Power & Abel, *Third World vs. The Media*, N.Y. Times, Sept. 21, 1980, § 6 (Magazine), at 117. The NWICO was not expressly mentioned by the United States in its letter of withdrawal. See 84 DEP'T STATE BULL., *supra* note 1, at 41. Nonetheless, it has been a source of U.S. criticism of UNESCO. Other charges by the United States against UNESCO include excessive politicization and mismanagement. Massing, *supra* note 1, at 90. In 1984, Great Britain also gave notice that it would withdraw from UNESCO at the end of 1985. *UNESCO Farewell*, *supra* note 1, at 14.

³ This concept has also been variously referred to as the New International Information Order, New World Information Order, and New International Information and Communication Order. All of these names generally describe the same concept.

⁴ The term "Third World" refers to the approximately 110 newly emergent countries of the world, primarily located in Africa, Asia, and Latin America. They are also referred to as "less-developed countries," "the Group of 77," "developing countries," "underdeveloped countries," and "the South." See generally Friedman & Williams, *The Group of 77 at the United Nations: An Emergent Force in the Law of the Sea*, 16 SAN DIEGO L. REV. 555, 555 (1979). Despite the over-generalization necessarily involved in the use of such terms, this Comment will also refer to the First World (United States, Canada, Europe, and Japan) as the North and the West, and to the Second World (the countries of the Soviet bloc) as the East.

⁵ See generally Masmoudi, *The New World Information Order*, 29 J. COM. 172 (1979); Aggarwala, *New International Information and Communication Order: Setting the Record Straight*, 4 N.Y.L. SCH. J. INT'L & COMP. L. 9 (1982).

NWICO is still a matter of debate within UNESCO and has not been expressly drafted as an official legal document.⁶

Currently, there is no comprehensive international information order *per se*.⁷ The present situation is best described as a laissez-faire system permitting an unfettered flow of information among countries.⁸ The only restrictions on this flow are those enacted on the national level by individual states. The proponents of NWICO claim that this unregulated state of affairs in information exchange has produced the following effects: a *de facto* imbalance in the flow of information from North to South, inequitable distribution of communication resources, insufficient and negative reportage of Third World news, a western cultural bias in news about the Third World, and transmission of messages from North to South that are irrelevant, or even harmful, to developing cultures.⁹ Officials from the West, East, and South agree that a great imbalance in information flow exists.¹⁰

The NWICO is essentially a plan, albeit one which has yet to be formulated in any detail, that proposes to remedy the existing inequality in the flow of information. Its scope is quite broad, encompassing the exchange of all types of information relating to political, social, and economic subjects.¹¹ The NWICO also embraces all known means of exchanging such information, including the media, books, films, and data banks.¹² Thus far, UNESCO has cast the discussion of the NWICO primarily in terms of political, economic, and social policy questions.¹³ In recent years, however, legal scholars have begun to discuss the international legal implications of the NWICO.¹⁴ The legal debate over the NWICO centers on the differences between the U.S. position that a free and unfettered flow of information is an established international legal principle, and the NWICO proponents' belief that a government balanced flow of information is permitted by international law.¹⁵

The United States views the free flow of information as an individual human right which is protected from government control.¹⁶ The proponents of the

⁶ See *infra* note 43 and accompanying text.

⁷ Schiller, *Freedom from the 'Free Flow'*, 24 J. COM. 110, 110 (1974).

⁸ *Id.*

⁹ Masmoudi, *supra* note 5, at 172-75.

¹⁰ Power & Abel, *supra* note 2, at 116, 122; see also Massing, *supra* note 1, at 94.

¹¹ Aggarwala, *A Third World View*, in *CRISIS IN INTERNATIONAL NEWS: POLICIES AND PROSPECTS* xv, xvi (Richstad & Anderson eds. 1981).

¹² *Id.*

¹³ See UNESCO, *MANY VOICES, ONE WORLD* xvii (1980) [hereinafter cited as MacBride Report].

¹⁴ Theberge, *UNESCO's "New World Information Order: Colliding with First Amendment Values"*, 67 A.B.A.J. 714, 718 (1981).

¹⁵ Note, *A New International Information Order: The Developing World and the Free Flow of Information Controversy*, 8 SYR. J. INT'L L. & COM. 249, 249-51, 263 (1980).

¹⁶ *Id.* at 264.

NWICO also believe that there is a human right to information, but that this right may be limited by a national government in the interest of balancing the flow of information.¹⁷ NWICO's proponents have asserted two legal bases for this restriction of the flow of information at the expense of the rights of the individual.¹⁸ First, the proponents assert that, under the theory of national sovereignty, human rights are granted and defined domestically rather than internationally.¹⁹ Second, the proponents assert that, under the theory of cultural protectionism, certain international standards allow for the balancing of information flow by governments.²⁰

This Comment will examine the basis of the human right to free flow of information in international law. Particular emphasis will be placed upon what the author perceives as a trend toward the internationalization of human rights law. Within this context of international human rights law, this Comment will discuss the differences between the theories of national sovereignty and cultural protectionism in providing a legal basis for the NWICO's government control of the flow of information. The author concludes that there is an international legal principle supporting the free flow of information, but that the establishment of the NWICO need not totally surrender to the control of national governments the individual's right to freedom of information.

II. UNESCO AND THE NWICO

One proponent of the NWICO, articulating the Third World view, has recognized that a major element of the new order would be the promotion of "national communications policies, as being necessary to each country's economic and social development and of a nature to motivate its citizens on behalf of such development."²¹ The United States claims that such policies would take the form of government censorship, and accordingly would restrict or stop the international flow of information.²² U.S. opponents of the NWICO fear that action by UNESCO, in the form of resolutions supporting of the establishment of the NWICO, would legitimize governments' attempts to limit the international flow of information.²³ Under the current laissez-faire system, the international flow of information has been restricted, to some extent, on the national

¹⁷ *Id.* at 263.

¹⁸ *Id.*

¹⁹ See *infra* note 138 and accompanying text.

²⁰ See *infra* note 187 and accompanying text.

²¹ Masmoudi, *supra* note 5, at 178.

²² Theberge, *supra* note 14, at 718.

²³ *Id.* Such resolutions, if adopted by UNESCO, would not be legally binding, but might further a tendency toward national censorship policies. Gross, *International Law Aspects of the Freedom of Information and the Right to Communicate*, in *THE THIRD WORLD AND PRESS FREEDOM* 55, 72 (P. Horton ed. 1978).

level by government actions.²⁴ U.S. critics believe that the establishment of the NWICO would lead to an increase in national government restrictions, thus limiting the availability of information for all peoples.²⁵

UNESCO's constitution mandates its involvement with communications issues.²⁶ Before the 1960s, UNESCO's involvement in this area was primarily focused on promoting the exchange of information materials, such as books and newspapers.²⁷ UNESCO's initial pronouncement of the concept "new world information and communication order" was in its 1978 Mass Media Declaration.²⁸ At present, UNESCO's name has become synonymous with the call for the NWICO and, consequently, the opponents of the NWICO have severely criticized the organization.²⁹

The 1978 Mass Media Declaration recognized that the flow of information should be both free and better balanced, and that the media should play a role in the quest for peace, development, antiracialism, and the protection of culture.³⁰ Currently, about two-thirds of the world's population does not have access to modern communications.³¹ Also, four western news agencies gather and report over eighty percent of the news in the world.³² As a result, news and other information about the Third World, disseminated internationally, originates from a Western perspective.³³ This control over information is par-

²⁴ Note, *supra* note 15, at 255. Restrictions in some countries have led to the imprisonment of foreign journalists. *Id.* at 255 n. 35.

²⁵ Theberge, *supra* note 14, at 718; Note, *supra* note 15, at 255-56.

²⁶ UNESCO CONST. art. 1, para. 2(a), *reprinted in* P. HAJNAL, *supra* note 1, at 404.

²⁷ P. HAJNAL, *supra* note 1, at 243.

²⁸ Declaration on Fundamental Principles Concerning the Contribution of the Mass Media to Strengthening Peace and International Understanding, to the Promotion of Human Rights and to Countering Racism, Apartheid and Incitement to War. UNESCO Res. 4/9.3/2, 20 UNESCO Gen. Conf. Res., UNESCO Doc. 20 C/Resolutions, 100, 102, Preamble (1978) [hereinafter cited as Mass Media Declaration]. See Nordenstreng, *Behind the Semantics—A Strategic Design*, 29 J. COM. 195, 196 (1979).

²⁹ Massing, *supra* note 1, at 94.

³⁰ Mass Media Declaration, *supra* note 28, at 102.

³¹ Power & Abel, *supra* note 2, at 122.

³² *Id.* at 117. These agencies are the Associated Press, United Press International, Reuters, and Agence France-Presse. *Id.* Other examples of the one-sidedness of international information flow include the fact that, according to 1973 figures, Latin America, the Middle East, and Asia (excluding Japan and China) import about 50% of their television programs, while Western and Eastern Europe import 30% or less. de Sola Pool, *Direct Broadcast Satellites and the Integrity of National Cultures*, in CONTROL OF THE DIRECT BROADCAST SATELLITE: VALUES IN CONFLICT 27, 33 (Aspen Institute Program on Communications and Society 1974). The United States, the U.S.S.R., and Japan each import 5% or less. *Id.* In addition, according to information from the 1960s, of 39,483 translated titles of motion pictures and books, 15,279 were translated from English, 5368 from French, 3892 from German, and 3822 from Russian. Figures of all other languages were much lower. *Id.*

³³ Power & Abel, *supra* note 2, at 117-18; Aggarwala, *supra* note 5, at 12. Two examples of this western orientation in news are a tendency to view Third World political events in East-West terms, and a tendency to report news of disasters rather than development. Aggarwala, *What is Development*

ticularly important in the modern era, because some commentators consider a country's power to be directly dependent upon its control over information.³⁴ Although the Mass Media Declaration was constructed in the vague language of compromise, it was the first official acknowledgment by the United Nations of the Third World's demands for a more just and equitable information order.³⁵

Following its initiative in the Mass Media Declaration, UNESCO next attempted to lay out a comprehensive scheme of the current problems in information and communication, and to suggest possible avenues of solution, by forming the Commission for the Study of Communications Problems (known as the MacBride Commission).³⁶ The report of the MacBride Commission,³⁷ however, failed to delineate a precise definition of the NWICO.³⁸ The conclusions and recommendations section of the MacBride report called for a variety of measures, including the economic and technical development of communication infrastructures in the Third World, the formation of national cultural policies, the use of communications in development and education, reform of tariff rates hindering communications flow, and increased protection of, freedom for, and responsibility from journalists.³⁹ Generally, the United States supports the above recommendations of the MacBride Commission, which are essentially aimed at increasing the ability of the Third World to send messages.⁴⁰ Comments by representatives of the Third World, however, indicate that these measures will not be sufficient.⁴¹ The Third World is still very interested in refining the concept of the NWICO, and in employing government controls on the flow of information in order to balance it.⁴²

Since the MacBride Commission submitted its report to the twenty-first session of UNESCO's General Conference in 1980, UNESCO has taken no formal action to further define or implement the NWICO.⁴³ The U.S. withdrawal from

News?, DEVELOPMENT FORUM, Oct. 1978, reprinted in 24 J. COM. at 180; see also M. ROSENBLUM, COUPS AND EARTHQUAKES 1-6 (1979).

³⁴ Power & Abel, *supra* note 2, at 117.

³⁵ Nordenstreng, *supra* note 28, at 196. The original draft of the 1978 Mass Media Declaration was proposed in UNESCO by the Soviet Union in 1972. P. HAJNAL, *supra* note 1, at 244. For a background on the changes leading to eventual U.S. acceptance of the final version see Nordenstreng, *supra* note 28, at 195-98; P. HAJNAL, *supra* note 1, at 244-46.

³⁶ P. HAJNAL, *supra* note 1, at 247-48.

³⁷ MacBride Report, *supra* note 13.

³⁸ Harley, Policy Analysis and Critique of the MacBride Commission Report 32 (interim working paper) (1980).

³⁹ MacBride Report, *supra* note 13, at 253-72.

⁴⁰ Harley, *supra* note 38, at 25-29.

⁴¹ MacBride Report, *supra* note 13, at 281 (remarks of Commissioners Marquez and Somavia).

⁴² Masmoudi, *The New World Information and Direct Broadcast Satellites*, 8 SYR. J. INT'L L. & COM. 322, 329 (1981).

⁴³ See Massing, *supra* note 1, at 96. The twenty-first session of the General Conference did not officially accept the MacBride Commission's recommendations, but did commend the MacBride Commission for its valuable contribution to the study of communication. P. HAJNAL, *supra* note 1, at 249-

UNESCO, however, has changed the dichotomous nature of the political debate over the NWICO.⁴⁴ Some U.S. officials believe that the U.S. withdrawal will make it easier for the proponents of the NWICO within UNESCO to promote their plans.⁴⁵ With the likelihood of political change in the international information and communication order on the horizon, the legal nature and parameters of the individual's right to information and the government's right to control the flow of information will be important factors in the shaping of the NWICO.

III. THE INTERNATIONAL RIGHT TO A FREE FLOW OF INFORMATION

A. *Background*

In attempting to establish the individual's right to information as a principle of international law, two factors will be considered: first, whether international law articulates such a principle of freedom of information, and second, whether international law actually protects this individual right through an enforcement mechanism.

As expressed by the Statute of the International Court of Justice, there are four sources indicating the existence of a principle of international law.⁴⁶ They are international agreements (conventional international law), international practice (customary international law), general principles of law of civilized nations, and judicial decisions and teachings of publicists of various nations.⁴⁷ Of these, international conventions and custom are the major sources of inter-

50. The twenty-first session did, however, approve the establishment of the International Programme for the Development of Communications (IDPC), whose purpose is to increase the communications abilities of developing countries. *Id.* at 255.

⁴⁴ Massing, *supra* note 1, at 96.

⁴⁵ *Should U.S. Withdraw from UNESCO?*, 96 U.S. NEWS & WORLD REP. 34 (1984) (interview with Samuel DePalma, member of the United States National Commission for UNESCO). The United States has had some success in combatting anti-freedom of information forces within UNESCO in the course of the debate over the NWICO. *Id.* It is believed, however, that the U.S. pullout will allow countries opposed to U.S. positions, such as the Soviet Union, to gain a consensus on restrictive measures. *Id.*

At this time, the politics of the debate over the NWICO have become very complex. The East, while approving aspects of the NWICO concept which support greater government control over the media, has been generally against proposals for giving greater access to journalists. P. HAJNAL, *supra* note 1, at 249. Despite general Soviet support for the NWICO, the Soviet member of the MacBride Commission has also expressed misgivings about the whole idea of a NWICO, comparing it with the aims of Nazi Germany. *Id.* at 248. Although Third World governments have been strong proponents of the NWICO, some groups in the Third World, particularly journalists, have been suspicious of the NWICO and its support of government control over information flow. *Id.* at 255. In the West, some developed countries, such as Canada, have supported the NWICO, sharing Third World concerns about cultural and economic protectionism. *Id.*

⁴⁶ STATUTE OF INTERNATIONAL COURT OF JUSTICE ART. 38.

⁴⁷ *Id.*

national law.⁴⁸ When two or more states expressly consent to a principle through the making of a treaty or covenant, that principle becomes part of conventional international law.⁴⁹ Generally, such a principle of conventional international law is binding only upon the contracting parties.⁵⁰ When an overwhelming majority of nations have tacitly consented to a practice, or usage, as a principle of law, this practice becomes a principle of customary international law.⁵¹ Unlike conventional international law, a principle of customary international law is then applicable to all nations.⁵² General principles of law, on the other hand, are derived from the municipal law of various nations, which may supplement custom or treaty as a source of law.⁵³ Finally, decisions of jurists and teachings of publicists may serve as evidence of a particular principle of international law.⁵⁴

Although most states adhere, to some degree, to the principle of free flow of information, domestic application of this principle varies widely.⁵⁵ Because state practice is so inconsistent, free flow of information does not constitute a principle of customary international law.⁵⁶ Therefore, one must look to international conventions to determine the extent to which an individual's right to a free flow of information is protected by international law. Although several international documents refer to freedom of information,⁵⁷ the most important of these for the purposes of this Comment are the Universal Declaration of Human Rights⁵⁸ and the International Covenant on Civil and Political Rights.⁵⁹

In looking to the Universal Declaration and the Civil and Political Covenant for the establishment of the free flow of information as an international legal right, one must also examine the extent to which this individual right is protected by the international community from national government interference.

⁴⁸ L. OPPENHEIM, *INTERNATIONAL LAW* 29 (H. Lauterpacht 8th ed. 1955).

⁴⁹ *Id.* at 27-28.

⁵⁰ *Id.* at 28.

⁵¹ *Id.* at 17.

⁵² *Id.* at 18.

⁵³ *Id.* at 29-30.

⁵⁴ *Id.* at 31-33.

⁵⁵ Buergenthal, *The Right to Receive Information Across National Boundaries*, in *CONTROL OF THE DIRECT BROADCAST SATELLITE: VALUES IN CONFLICT* 73 (Aspen Institute Program on Communications and Society 1974).

⁵⁶ Gross, *supra* note 23, at 61. Customary law is established by state practice, not verbal adherence to a principle. *Id.*

⁵⁷ Buergenthal, *supra* note 55, at 74 (citing documents). Most of these documents are regional human rights agreements which thus do not attempt to establish global norms. *Id.* at 74.

⁵⁸ G.A. Res. 217, U.N. Doc. A/810, at 71 (1948) [hereinafter cited as Universal Declaration].

⁵⁹ G.A. Res. 2200, 21 U.N. G.A.O.R., Supp. (No.16) 52, U.N. Doc. A/6316 at 52 (1966) [hereinafter cited as Civil and Political Covenant]. The adoption of the Civil and Political Covenant, along with that of the International Covenant on Economic, Social and Cultural Rights, *infra* note 171, completed the process of the creation of an international bill of rights, of which the adoption of the Universal Declaration was the first stage. Gross, *supra* note 23, at 61.

Since every right must have a remedy, these documents must permit the individual to assert his enumerated rights against a national government.⁶⁰ In order to discern whether the individual is granted an enforceable right to freedom of information by international law, one must consider the status of the individual in international law. Traditionally, only states were protected by or subject to international rights and duties.⁶¹ Individuals were thought to be merely objects of international legal rules, which regulated only actions between states, not between states and individuals.⁶² The natural corollary of this doctrine is that individuals cannot assert rights before an international tribunal.⁶³ This doctrine has been codified in the Statute of the International Court of Justice, which does not recognize individuals as parties before it.⁶⁴ As a result, under this traditional view, international rights could only be granted to individuals through local municipal laws, since only local tribunals could provide the remedy.⁶⁵

Since World War II, however, individuals have gained some status as subjects of international law.⁶⁶ The U.N. Charter's recognition of fundamental human rights was the beginning of a change from the traditional theory of the individual in international law.⁶⁷ This change represents a departure from international law's historic deference to the sovereignty of states at the expense of individual's rights.⁶⁸ For a document containing statements of human rights to be a truly international legal instrument, it must require that states refrain from certain conduct in respect for the individual's rights guaranteed in the document.⁶⁹ In addition, states must give up some portion of their sovereignty by allowing individuals to enforce these rights against the state through the international community.⁷⁰ To establish free flow of information as a legal principle, therefore, it will be necessary to show that it is enforceable through the international

⁶⁰ H. LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* 420-21 (1968).

⁶¹ L. OPPENHEIM, *supra* note 48, at 636-37; G. SCHWARZENBERGER & E. BROWN, *A MANUAL OF INTERNATIONAL LAW* 64 (1976).

⁶² L. OPPENHEIM, *supra* note 48, at 639.

⁶³ *Id.* at 637.

⁶⁴ STATUTE OF INTERNATIONAL COURT OF JUSTICE ART. 34(1).

⁶⁵ L. OPPENHEIM, *supra* note 48, at 637.

⁶⁶ H. LAUTERPACHT, *supra* note 60, at 61.

⁶⁷ *Id.*

⁶⁸ *Id.* at 70.

⁶⁹ *Id.* at 305.

⁷⁰ *Id.* The term enforcement, as used here, does not imply the use of force or other extreme means of compulsion. *Id.* at 292. It would include, however, investigation of complaints, supervision of compliance, and provision of remedies for violations. *Id.* Authorities hold conflicting opinions as to whether the enforcement mechanism must include a legally binding judgment. *Compare id.* (legally binding judgment necessary); with Mose and Opsahl, *The Optional Protocol to the International Covenant on Civil and Political Rights*, 21 SANTA CLARA L. REV. 271, 322-23 (1981) (legally binding judgment not necessary).

community. If this right to information has not become internationalized in this manner, then any state has absolute freedom to limit the individual's right for any reason. In the NWICO debate, the United States has asserted that free flow of information is an international legal right.⁷¹ For this to be so, the right to free flow of information must not only be part of an international legal document; it must be enforceable by the individual against the state.

B. *The Universal Declaration of Human Rights*

Western writers have pointed to the Universal Declaration as the cornerstone of the individual's right to free flow of information in international law.⁷² Article 19 of the Universal Declaration states that "[e]veryone has the right . . . to seek, receive and impart information and ideas through any media and regardless of frontiers."⁷³ Standing alone, this section provides for an individual right to receive and impart information.⁷⁴

Article 29 of the Universal Declaration provides for some limitations on Article 19:

[i]n the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.⁷⁵

The provisions of Article 29 do not, by themselves, render the Universal Declaration useless as a legal document.⁷⁶ The fact that one's rights cannot be exercised to the point that they interfere with the rights of others or with the operation of the state does not contradict the notion of human rights.⁷⁷ The state, however, cannot have the last word on when these restrictions are justified.⁷⁸ Yet, under the Universal Declaration, the state has complete control over the granting and restricting of the rights provided.

⁷¹ See *supra* note 14 and accompanying text.

⁷² Gross, *supra* note 23, at 59; Theberge, *supra* note 14, at 718.

⁷³ Universal Declaration, *supra* note 58, art. 19.

⁷⁴ Gross, *supra* note 23, at 59. When the United Nations adopted the Universal Declaration after World War II, a primary value of international relations was free enterprise. This economic principal of freedom from government interference was thus embodied in Article 19's statement on information flow. See Schiller, *supra* note 7, at 111; Laskin, *Legal Strategies for Advancing Information Flow*, in *CONTROL OF THE DIRECT BROADCAST SATELLITE: VALUES IN CONFLICT* 59, 59 (Aspen Institute Program on Communications and Society 1974);

⁷⁵ Universal Declaration, *supra* note 58, art. 29.

⁷⁶ See H. LAUTERPACHT, *supra* note 60, at 366.

⁷⁷ *Id.*

⁷⁸ *Id.*

When the member states of the United Nations adopted the Universal Declaration, they were virtually unanimous in denying that the document was legally binding.⁷⁹ The preamble of the Universal Declaration states that the document is to be a "common standard of achievement" securing rights through "universal and effective recognition and observance" by member states of the United Nations.⁸⁰ In other words, states parties to the Universal Declaration are not legally obligated to observe the right to free flow of information granted by Article 19. Also, there is no provision allowing individuals to assert a right to freedom of information under the Universal Declaration in an international forum.⁸¹ The Universal Declaration merely states that individuals have a right to freedom of information, but it does not create a duty on the part of the state to observe that right. Nor does it provide for an international enforcement mechanism. Thus, by itself, the Universal Declaration does nothing to protect the right to seek, receive, and impart information. The right to free flow of information exists only to the extent that it is granted or limited by the domestic law of sending and receiving nations.⁸² Under the Universal Declaration, therefore, it is not a binding principle of international law.

C. *The International Covenant on Civil and Political Rights*

The U.N. General Assembly adopted the Civil and Political Covenant in 1966 as an attempt to formulate a binding international bill of rights.⁸³ With respect to the individual right to free flow of information, Article 19 of the Civil and Political Covenant contains language almost identical to that of Article 19 of the Universal Declaration.⁸⁴ In addition, Article 19 of the Civil and Political Covenant emphasizes the "special duties and responsibilities" that accompany the rights enunciated.⁸⁵ Article 19 allows for certain restrictions on these rights which are provided by law in order to respect the rights or reputations of

⁷⁹ *Id.* at 397. Some authorities state that the Universal Declaration does impose legal obligations on states parties as an authoritative interpretation of the human rights guaranteed by the U.N. Charter (arts. 55, 56). Buergethal, *supra* note 55, at 73-74. Others, however, disagree, since to say that the Universal Declaration is an authoritative interpretation of a legally binding document (the U.N. Charter) is to assert that the Universal Declaration itself is legally binding. H. LAUTERPACHT, *supra* note 60, at 408-09.

⁸⁰ Universal Declaration, *supra* note 58, preamble.

⁸¹ Gross, *supra* note 23, at 60.

⁸² *Id.* at 59.

⁸³ *Id.* at 61.

⁸⁴ Compare Universal Declaration, *supra* note 58, art. 19 with Civil and Political Covenant, *supra* note 59, art. 19(2). Article 19(2) of the Civil and Political Covenant provides: "Everyone shall have the right 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." Civil and Political Covenant, *supra* note 59, art. 19(2).

⁸⁵ *Id.* art. 19(3).

others, or to protect national security, public order (*ordre public*), public health, or morals.⁸⁶ Furthermore, Article 20 of the Civil and Political Covenant calls for the prohibition of both propaganda for war and advocacy of national, racial, or religious hatred.⁸⁷ These allowances for state restrictions resemble Article 29 of the Universal Declaration and, similarly, do not by themselves contradict the legal nature of the document.⁸⁸

The major difference between the Universal Declaration and the Civil and Political Covenant regarding the establishment of the right to free flow of information as a legal principle is that the Civil and Political Covenant is a legally binding agreement among the states parties.⁸⁹ The Universal Declaration asserts that its provisions are a "common standard of achievement,"⁹⁰ whereas the states parties to the Civil and Political Covenant agree to "respect and to ensure to all individuals . . . the rights recognized in the present Covenant."⁹¹

Beyond legally binding the states parties, the Civil and Political Covenant, along with its Optional Protocol,⁹² provide an international implementation mechanism.⁹³ The Civil and Political Covenant establishes a Human Rights Committee⁹⁴ which is competent to observe state implementation measures,⁹⁵ to consider charges of violation of the covenant brought by states parties,⁹⁶ and to consider claims of violations brought by individuals against states parties.⁹⁷ This provision for the assertion of international legal rights by individuals under the Civil and Political Covenant and the Optional Protocol represents an acknowledgment of the improved status of the individual as a subject of international law.⁹⁸ Under the Civil and Political Covenant, the individual has the ability to assert international rights against a state before an international body.⁹⁹

Despite this improvement in the legal status of the individual's right to seek, receive, and impart information, some limitations still remain. First, states parties to the Civil and Political Covenant can make complaints to the Human

⁸⁶ *Id.*

⁸⁷ *Id.* art. 20.

⁸⁸ See *supra* notes 76-77 and accompanying text.

⁸⁹ Gross, *supra* note 23, at 63.

⁹⁰ Universal Declaration, *supra* note 58, preamble.

⁹¹ Civil and Political Covenant, *supra* note 59, art. 2.

⁹² The Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200, 21 U.N. G.A.O.R. Supp. (No. 16) 49, U.N. Doc. A/6316 at 59 (1966) [hereinafter cited as Optional Protocol].

⁹³ Civil and Political Covenant, *supra* note 59, Part IV.

⁹⁴ *Id.* art.28.

⁹⁵ *Id.* art. 40.

⁹⁶ *Id.* art. 41.

⁹⁷ Optional Protocol, *supra* note 92, art. 1.

⁹⁸ Higgins, *Conceptual Thinking About the Individual in International Law*, 24 N.Y.L.SCH. L. REV. 11, 25 (1978).

⁹⁹ *Id.* at 24.

Rights Committee about violations of the document by another state party only if both nations have made an optional declaration under Article 41 of the Civil and Political Covenant.¹⁰⁰ Similarly, an individual can bring a complaint before the Human Rights Committee only if the offending country has adopted both the Civil and Political Covenant and the Optional Protocol.¹⁰¹ Once a claim of violation of the Civil and Political Covenant has been properly brought before the Human Rights Committee, the committee will then act in a quasi-judicial role.¹⁰² It will determine if there has been a violation and express its views on the matter to the parties and to the public through publication.¹⁰³ These views are not binding upon the state party, but may carry enough moral or public relations weight to induce compliance with the Civil and Political Covenant and the Optional Protocol.¹⁰⁴

The Civil and Political Covenant raises another question in terms of the conflict between the right to seek, receive, and impart information and need for a balanced flow as proposed by the NWICO: whether or to what extent Article 19 confers rights on the media.¹⁰⁵ Some commentators assert that the laissez-faire concept of freedom of information has actually operated in a manner adverse to the interests of individual rights by concentrating the control of

¹⁰⁰ Civil and Political Covenant, *supra* note 59, art. 41. According to information provided by the Treaty Section of the United Nations, as of December 31, 1984, the following states had ratified or acceded to the Civil and Political Covenant: Afghanistan, Australia, Austria, Barbados, Belgium, Bolivia, Bulgaria, Byelorussian SSR, Cameroon, Canada, Central African Republic, Chile, Columbia, Congo, Costa Rica, Cyprus, Czechoslovakia, Democratic People's Republic of Korea, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Federal Republic of Germany, Finland, France, Gabon, Gambia, German Democratic Republic, Guinea, Guyana, Hungary, Iceland, India, Iran, Iraq, Italy, Jamaica, Japan, Jordan, Kenya, Lebanon, Libyan Arab Jamahiriya, Luxembourg, Mexico, Madagascar, Mali, Mauritius, Mexico, Mongolia, Morocco, Netherlands, New Zealand, Nicaragua, Norway, Panama, Peru, Poland, Romania, Rwanda, Saint Vincent and the Grenadines, Senegal, Spain, Sri Lanka, Suriname, Sweden, Syrian Arab Republic, Togo, Trinidad and Tobago, Tunisia, Ukrainian SSR, Union of Soviet Socialist Republics, United Kingdom, United Republic of Tanzania, Uruguay, Venezuela, Viet Nam, Yugoslavia, Zaire, and Zambia.

Of these states the following have made the optional declaration under Article 41 of the Civil and Political Covenant recognizing the competence of the Human Rights Committee: Austria, Canada, Denmark, Federal Republic of Germany, Finland, Iceland, Italy, Luxembourg, Netherlands, New Zealand, Norway, Peru, Senegal, Sri Lanka, Sweden, and the United Kingdom.

¹⁰¹ Optional Protocol, *supra* note 92, art. 1. The following states have ratified or acceded to the Optional Protocol to the Civil and Political Covenant: Barbados, Bolivia, Canada, Central African Republic, Columbia, Congo, Costa Rica, Denmark, Dominican Republic, Ecuador, Finland, Iceland, Italy, Jamaica, Luxembourg, Madagascar, Mauritius, Netherlands, Nicaragua, Norway, Panama, Peru, Portugal, Saint Vincent and the Grenadines, Senegal, Suriname, Sweden, Trinidad and Tobago, Uruguay, Venezuela, and Zaire.

¹⁰² Mose and Opsahl, *supra* note 70, at 324.

¹⁰³ *Id.* at 322. These views, in cases already decided by the committee, have included a statement of the obligations of the offending state party to ensure that the covenant is observed and to provide remedies. *Id.* at 324.

¹⁰⁴ *Id.* at 322-23; see *supra* note 70.

¹⁰⁵ Gross, *supra* note 23, at 63.

information flow in the hands of a few media corporations.¹⁰⁶ The U.S. perspective on this issue of free flow presupposes that the product of the communications industry should be subject to the same rights as the ideas of the individual in the context of the rights granted by Article 19 of the Civil and Political Covenant.¹⁰⁷ The personal right guaranteed by Article 19 is generally interpreted as a property right of the media owners.¹⁰⁸ It is not clear that Article 19 of the Civil and Political Covenant would favor a free flow of information that protects a corporation's economic interests as opposed to a government controlled flow aimed at protecting the citizen's right to compete in the seeking and imparting of information.¹⁰⁹ Regardless of whether one believes the interests of the media to be adverse to, or at least independent of, those of the individual, the proponents of the NWICO have phrased the debate in these terms.¹¹⁰

One further observation about the extent to which Article 19 of the Civil and Political Covenant establishes a principle of free flow of information concerns the allowance for possible state restrictions.¹¹¹ Some states have broad notions of what is necessary to protect national security, public order, public health, and morals in order to limit the human rights of their citizens.¹¹² In the context of the freedom of information under the Civil and Political Covenant, these broad grants of state power would presumably be limited and defined through actions by the Human Rights Committee.¹¹³ Most promising, however, is the fact that the states' restrictions will be measured by the committee according to an international standard.¹¹⁴ Under the Universal Declaration, states need not justify their restrictions upon the right to information; implementation is left completely in the states' hands.¹¹⁵ The Human Rights Committee, however, has the ability to reject national reasons for restricting information flow given under the rubric of the *ordre public* clause of Article 19.

As a whole, the Civil and Political Covenant establishes the individual's right to information as an international legal principle.¹¹⁶ It also establishes a legal basis for state control over this individual right to a free flow of information.¹¹⁷

¹⁰⁶ Schiller, *supra* note 7, at 111–12 (quoting President Urho Kekkonen of Finland).

¹⁰⁷ *Id.* at 113.

¹⁰⁸ *Id.* In an attack upon a UNESCO media declaration, an officer of the Columbia Broadcasting System (CBS), a U.S. television network, stated that the broadcaster's right to use the spectrum was protected by the U.S. Constitution's guarantee of free speech to individuals. *Id.*

¹⁰⁹ See Gross, *supra* note 23, at 63; Schiller, *supra* note 7, at 113.

¹¹⁰ Masmoudi, *supra* note 5, at 175.

¹¹¹ Gross, *supra* note 23, at 63; Higgins, *supra* note 98, at 27–29.

¹¹² Higgins, *supra* note 98, at 27–29.

¹¹³ *Id.* at 28–29.

¹¹⁴ *Id.* at 24.

¹¹⁵ See *supra* notes 79–81 and accompanying text.

¹¹⁶ Gross, *supra* note 23, at 63.

¹¹⁷ See *supra* note 111 & accompanying text.

As such, the Civil and Political Covenant constitutes neither an invincible bulwark for an unfettered flow of information, nor a blanket endorsement of the government's right to balance that flow. Exactly what this document will mean in practice will depend upon the number of states adopting the Civil and Political Covenant and the Optional Protocol,¹¹⁸ and the use of the Human Rights Committee by states and individuals.¹¹⁹ In purely legal terms, however, the Civil and Political Covenant does create an international system of rights and duties between states and individuals that is implemented according to an international standard. For those countries that accede to the provisions of the Civil and Political Covenant and the Optional Protocol, the NWICO would define the acceptable application of state restrictions on the flow of information within these rights and duties.

IV. NATIONAL SOVEREIGNTY AND CULTURAL PROTECTIONISM: TWO POSSIBLE LEGAL BASES FOR THE NWICO

A. *Background*

Within the parameters established by the Civil and Political Covenant, there is some allowance for state restriction of the right to seek, receive, and impart information.¹²⁰ In general, if a state is not restricted by a principle of customary or conventional international law, it may take any domestic action it chooses, even if such action has international ramifications.¹²¹ Absent such a restricting principle, the state may legally stop or limit the flow of information by any means, such as expelling reporters or refusing admission of foreign broadcasts.¹²² Under the Civil and Political Covenant, a state party is restricted from limiting the flow of information except for the justifications expressed in Articles 19 and 20.¹²³ Proponents of the NWICO, however, assert that the balanced flow of information should be a positive legal right of states, thereby further justifying state attempts to restrict information flow.¹²⁴ Thus far, the NWICO's balanced flow principle has not been incorporated into any legally binding international instruments.¹²⁵ In the debate over the NWICO, proponents of a principle of balanced flow have suggested two possible legal theories upon which

¹¹⁸ Gross, *supra* note 23, at 63; *see supra* notes 100–01.

¹¹⁹ Mose & Opsahl, *supra* note 70, at 329–31; Higgins, *supra* note 98, at 28–29.

¹²⁰ *See supra* note 111 and accompanying text.

¹²¹ Gross, *supra* note 23, at 58, 64.

¹²² *Id.* at 58.

¹²³ *See supra* notes 85–87 and accompanying text.

¹²⁴ Masmoudi, *supra* note 5, at 183; Note, *supra* note 15, at 263.

¹²⁵ *See supra* note 43 and accompanying text.

such a principle could be based: national sovereignty and cultural protectionism.¹²⁶

The assertion of the theories of national sovereignty and cultural protectionism as bases for limiting the flow of information has been prominent in the discussions within UNESCO and the United Nations Committee on Peaceful Uses of Outer Space (Outer Space Committee) regarding direct broadcast satellites (DBS).¹²⁷ DBS will permit direct audio-visual media flow from one nation to citizens of another.¹²⁸ This aspect of DBS has raised the question of whether broadcasting states should be required to obtain prior consent from the receiving state before direct broadcasting.¹²⁹ It is somewhat ironic that DBS has been the focus of this concern over government control of the flow of information, since various factors may make DBS less of a threat to governments and cultures than other currently existing means of international communication.¹³⁰ Because other media have at least as much effect upon receiving countries as DBS, it seems logical that any justification for government restrictions on the flow of information via DBS could be applied to other media as well.¹³¹

B. National Sovereignty

In the debate over DBS in the U.N. General Assembly and the Outer Space Committee, the Soviet Union has been the major champion of the theory of national sovereignty as a legal justification for restricting the free flow of infor-

¹²⁶ Freeman, *Direct Broadcast Developments and Directions: The National Sovereignty and Cultural Integrity Positions*, 74 PROC. AM. SOC'Y INT'L L. 302, 302 (1980); Note, *supra* note 15, at 263.

The following discussion of the differences between national sovereignty and cultural protectionism as legal theories will entail a certain amount of abstraction and generalization regarding the actions of states in restricting information flow. This is necessary in order to illuminate the divergent legal notions which underlie these two concepts. The author is aware, however, that in the real world of international politics the actions of states rarely fit into such neat analytical frameworks and are often the products of a variety of motivations.

¹²⁷ Freeman, *supra* note 126, at 302. DBS is a technology, albeit not fully developed, by which a satellite in geostationary orbit may broadcast television programs from a sending nation to receivers in other countries. These receivers are expected to be much less expensive and less centralized than those of current satellite communications systems. The increased power of DBS transmission will eventually make it possible to broadcast directly to community receivers, or even to individual home receivers. Laskin & Chayes, *A Brief History of the Issues*, in CONTROL OF THE DIRECT BROADCAST SATELLITE: VALUES IN CONFLICT 3, 4 (Aspen Institute Program on Communications and Society 1974).

¹²⁸ Freeman, *supra* note 126, at 302.

¹²⁹ *Id.*

¹³⁰ de Sola Pool, *supra* note 32, at 27-29. Both prohibitive costs and the necessity of allocating an appropriate waveband make DBS transmission without the consent of the receiving nation unlikely. *Id.* at 27-28. DBS is best transmitted on a small part of the spectrum which currently is one of the most congested areas of wavebands. *Id.* at 27 n.1. If the receiving nation does not reserve a waveband for DBS transmission, the result will be mutual interference. *Id.*

¹³¹ *Id.* at 29-32. Argument by analogy may not be possible if DBS conventions explicitly limit the application of their principles to DBS alone. See Bond (remarks), 74 PROC. AM. SOC'Y INT'L L. 311, 312 (1980).

mation.¹³² The 1972 Draft Convention on Principles Governing the Use by States of Artificial Earth Satellites for Direct Television Broadcasting,¹³³ submitted to the General Assembly by the Soviet Union, requires the prior consent of states receiving DBS¹³⁴ based upon the theory of national sovereignty.¹³⁵ The extremism of the national sovereignty view of this document is evidenced by the fact that it does not even mention free flow of information.¹³⁶

The theory of national sovereignty is also the main force behind the Soviet support for the NWICO.¹³⁷ The Soviet Union views the freedom to send information as violative of the freedom of receiving countries to be protected from unwanted and detrimental information and communication.¹³⁸ Soviet writers have stressed that the legal basis of international exchange of information should be national sovereignty.¹³⁹

Supporting the primacy of national sovereignty over international principles of human rights are three tenets of traditional international human rights law. These are first, the status of the individual in international law, second, state implementation of human rights agreements, and third, noninterference.¹⁴⁰ Western writers claim, however, that the importance of these aspects of traditional international law has been lessened in light of recent developments in the field of human rights.¹⁴¹

First, under traditional international law, only states are considered subjects of international legal rights and duties.¹⁴² Under this view, human rights agreements can only obligate states to secure rights to individuals.¹⁴³ State sovereignty

¹³² Freeman, *supra* note 126, at 303-06.

¹³³ U.N. Doc. A/8771 at 4 (1972). [hereinafter cited as Draft Convention]

¹³⁴ Draft Convention, *supra* note 133, art. 5.

¹³⁵ U.N. Doc. A/8771 at 2 (letter from A. Gromyko).

¹³⁶ Freeman, *supra* note 126, at 304.

¹³⁷ See Androunas & Zassoursky, *Protecting the Sovereignty of Information*, 29 J. COM. 186 (1979). The Soviet Union's insistence on the primacy of national sovereignty over the right of the individual to a free flow of information is indicative of its legal approach to the whole area of international human rights. Consistent with Marxist-Leninist political theory, the Soviet Union does not view human rights as inhering in the individual. The government in socialist society represents the collective will of the people. The only legally cognizable human rights, therefore, are those which the people grant to themselves through their government. These rights, which benefit the collective, are jeopardized by the assertion of individual rights against the sovereignty of the state. Thus, human rights in the Soviet system are not claims belonging to individuals that may be asserted against the government, as in western political and legal theory. Dean, *Beyond Helsinki: The Soviet View of Human Rights in International Law*, 21 VA. J. INT'L L. 55, 57-66 (1980).

¹³⁸ Androunas & Zassoursky, *supra* note 137, at 186.

¹³⁹ Androunas & Zassoursky, *supra* note 137, at 187.

¹⁴⁰ Dean, *supra* note 137, at 72-77.

¹⁴¹ Higgins, *supra* note 98, at 15-17; H. LAUTERPACHT, *supra* note 60, at 61-67.

¹⁴² See *supra* notes 61-64 and accompanying text.

¹⁴³ Dean, *supra* note 137, at 73.

thus establishes a barrier between the individual and international law by making municipal law the only law for individuals.¹⁴⁴

Western writers assert that this traditional concept of the individual has changed.¹⁴⁵ The nature of international law does not mandate the exclusion of the individual as a subject of international law;¹⁴⁶ in fact, the practice of states contradicts the traditional view.¹⁴⁷ To proclaim that the individual is not a subject of international law is to deny the existence of international human rights.¹⁴⁸ The Optional Protocol to the Civil and Political Covenant is evidence of a trend toward recognition of individuals in international law.¹⁴⁹ The Soviet Union, while a party to the Civil and Political Covenant, has not acceded to the Optional Protocol.¹⁵⁰ Because of this, a person whose right to information is being restricted by the Soviet Union cannot bring a complaint before the Human Rights Committee in order to resolve the matter.

Second, the provisions of international agreements traditionally depend upon implementation solely by the state.¹⁵¹ The preamble of the Civil and Political Covenant acknowledges this by emphasizing the role of states in promoting human rights.¹⁵² The Human Rights Committee, however, operates as an additional implementation body, which can test state interpretations of the document's provisions.¹⁵³ According to the Soviet view, these international interpretations conflict with national sovereignty.¹⁵⁴ The Soviet Union, in observing the Civil and Political Covenant, makes frequent use of the national security restriction on human rights.¹⁵⁵ Since the Soviet Union does not recognize the competence of the Human Rights Committee to resolve complaints arising under the Civil and Political Covenant, the Soviet Union may decide for itself what are permissible restrictions on the right to information.

The third traditional element of international law that supports the national sovereignty theory is that of noninterference. This element is expressed in Article 2 of the U.N. Charter, which states that "[n]othing contained in the

¹⁴⁴ H. LAUTERPACHT, *supra* note 60, at 67-68.

¹⁴⁵ See *supra* notes 66-68 and accompanying text.

¹⁴⁶ Higgins, *supra* note 98, at 13-15; H. LAUTERPACHT, *supra* note 60, at 61.

¹⁴⁷ Pirates, for example, are often prosecuted by nations based upon violations of international law. H. LAUTERPACHT, *supra* note 60, at 9. This constitutes a recognition of the pirate as a subject of international law. *Id.*

¹⁴⁸ H. LAUTERPACHT, *supra* note 60, at 71.

¹⁴⁹ Higgins, *supra* note 98, at 24-25.

¹⁵⁰ See *supra* notes 100-01 and accompanying text.

¹⁵¹ Dean, *supra* note 137, at 74.

¹⁵² Civil and Political Covenant, *supra* note 59, preamble.

¹⁵³ See Higgins, *supra* note 98, at 24; Mose & Opsahl, *supra* note 70, at 324.

¹⁵⁴ Dean, *supra* note 137, at 77.

¹⁵⁵ Higgins, *supra* note 98, at 27.

present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state."¹⁵⁶ The Soviet Union, consistent with pre-1945 legal thought, considers human rights to be a matter of domestic jurisdiction.¹⁵⁷ Therefore, according to this position, protection of individual rights by an international body constitutes interference in violation of the U.N. Charter.¹⁵⁸

By contrast, one western writer asserts that international monitoring of the observance of human rights agreements does not constitute intervention under Article 2.¹⁵⁹ Furthermore, he asserts that human rights are outside the realm of matters "essentially within the domestic jurisdiction of any state."¹⁶⁰ Following this more narrow interpretation of Article 2, there exists an international obligation of states to guarantee minimum human rights to their citizens.¹⁶¹

In sum, the theory of national sovereignty is diametrically opposed to legal principles of international human rights. Under the national sovereignty theory, human rights on the international level can only be vague generalities, not legally binding norms.¹⁶² Human rights as concrete legal principles can be defined and implemented only by the state.¹⁶³ Thus, a future communications order based upon the theory of national sovereignty would place the individual's right to seek, receive, and impart information completely within the control of individual nations.¹⁶⁴ As such, a communications order based upon this theory would not be acceptable to those who seek to establish a means of protecting the individual's human right to information through the international community.

C. *Cultural Protectionism*

Like the theory of national sovereignty, cultural protectionism has arisen in the debate over control of the information flow of DBS.¹⁶⁵ In 1972, Canada

¹⁵⁶ U.N. CHARTER art. 2, para. 7.

¹⁵⁷ Dean, *supra* note 137, at 77-78.

¹⁵⁸ The Soviet Union, in justification of its interpretation of Article 2 of the U.N. Charter, asserts that nonintervention in human rights matters contributes to world peace by allowing countries to maintain friendly relations. *Id.* at 78; *see also* Androunas & Zassoursky, *supra* note 137, at 189.

¹⁵⁹ H. LAUTERPACHT, *supra* note 60, at 166-73. Intervention, as construed by an overwhelming majority of legal scholars, means an imposition of the will of the international body upon another state, through some type of enforcement. *Id.* at 167-68. As such, actions to encourage and promote compliance with human rights agreements would not constitute interference. *Id.* at 169.

¹⁶⁰ *Id.* at 176. A matter ceases to be domestic when it becomes the subject of an international obligation, such as a treaty or covenant. *Id.*

¹⁶¹ Dean, *supra* note 137, at 77.

¹⁶² *Id.* at 81.

¹⁶³ *Id.* at 81-82.

¹⁶⁴ *See* Freeman, *supra* note 126, at 306-07 (discussing DBS).

¹⁶⁵ *Id.* at 307.

and Sweden sponsored a set of draft principles governing DBS that was based upon, *inter alia*, the theory of cultural protectionism.¹⁶⁶ As with the Soviet proposal, the Canada/Sweden draft principles called for prior consent of the receiving country before DBS transmission could take place.¹⁶⁷ Since prior consent provisions threaten the free flow of information, the United States has opposed the Canada/Sweden draft.¹⁶⁸ Some developed countries in the West, however, as well as Third World nations, have supported the cultural protectionism theory as a basis for DBS regulations, primarily out of fears that foreign countries with a great amount of media power might excessively intrude upon their respective cultures.¹⁶⁹

Whereas the notion of national sovereignty is rooted in traditional theories of international law, the cultural protectionism theory has emerged with the development of the international community since 1945.¹⁷⁰ Recent human rights agreements have incorporated elements of cultural protectionism. The U.N. International Covenant on Economic, Social and Cultural Rights¹⁷¹ grants to states the duty of conserving, developing, and diffusing culture.¹⁷² Although this covenant establishes a right of the individual to take part in cultural life¹⁷³ and recognizes the benefits of international cultural exchange,¹⁷⁴ the state is allowed to take steps to protect the national culture.¹⁷⁵ These steps might include restricting the free flow of information.¹⁷⁶

In addition, there is an element of cultural protectionism contained within the Civil and Political Covenant.¹⁷⁷ This instrument permits government restrictions upon the free flow of information in order to comply with national cultural

¹⁶⁶ Draft Principles Governing Direct Television Broadcasting by Satellite, U.N. Doc. A/AC. 105/WG.3/L.4 (1973), reprinted in U.N. Doc. A/AC.105/107, Annex IV (1974).

¹⁶⁷ *Id.*, art. 5.

¹⁶⁸ Discussion, 74 *PROC. AM. SOC'Y INT'L L.* 317, 319-20 (1980).

¹⁶⁹ See *id.* at 317-21. Canada, for example, has difficulty maintaining a viable national broadcasting system because Canadians have access to a large number of U.S. television programs. Warren, *A Canadian Perspective on Direct Broadcast Satellites and the New World Information and Communication Order*, 8 *SYR. J. INT'L. L. & COM.* 391 (1981). Third World nations are concerned about the extent to which western media will shape their social and cultural values. Aggarwala, *supra* note 11, at xviii.

¹⁷⁰ Hargrove, *International Law and the Case for Cultural Protectionism*, in *CONTROL OF THE DIRECT BROADCAST SATELLITE: VALUES IN CONFLICT* 85, 87-88 (Aspen Institute Program on Communications and Society 1974).

¹⁷¹ G.A. Res. 2200, 21 U.N. G.A.O.R. Supp. (No. 16) 49, U.N. Doc. A/6316 at 49 (1966) [hereinafter cited as *Economic and Social Covenant*]; see *supra* note 59.

¹⁷² *Economic and Social Covenant*, *supra* note 171, art. 15, para. 2.

¹⁷³ *Id.* art. 15, para. 1.

¹⁷⁴ *Id.* art. 15, para. 4.

¹⁷⁵ *Id.* art. 15, para. 2.

¹⁷⁶ de Sola Pool, *supra* note 32, at 29-32 (since information threatens culture, measures restricting information flow may be justified under the *Economic and Social Covenant*).

¹⁷⁷ *Civil and Political Covenant*, *supra* note 59.

policies by the inclusion of an *ordre public* exception to Article 19.¹⁷⁸ Protectionist steps taken to promote such cultural policies could include the prohibition or restriction of advertisements in media and the enactment of programming standards.¹⁷⁹ Under the Optional Protocol, however, a state's reliance on the *ordre public* clause of the Civil and Political Covenant might be disapproved by the Human Rights Committee.¹⁸⁰

In an attempt to define an international standard whereby governments can legitimately employ restraints upon the free flow of information in the name of cultural protectionism, one writer has proposed four categories of justifiably protected interests.¹⁸¹ They are 1) preservation of the international community heritage,¹⁸² 2) protection of national freedom of choice, or the possibility of diversity in development,¹⁸³ 3) protection of local economic enterprise,¹⁸⁴ and 4) protection of internal social and political order.¹⁸⁵ This proposal reflects a desire to separate cultural protectionism from national sovereignty by showing where the international community, as opposed to an individual state, has an interest in protecting culture by balancing the flow of information.¹⁸⁶ Since a government's exercise of protectionist restrictions in the name of one or more of these community interests may impair other community interests, the success of the cultural protectionist doctrine in practice would depend heavily upon the ability of the international community to regulate state practice to avoid such a conflict.¹⁸⁷ International community interests would have to be not only clearly articulated, but also enforceable in a manner such that the doctrine of cultural protectionism serves more than mere national interests.¹⁸⁸

¹⁷⁸ *Id.* art. 19, para. 3(b). This section of the Civil and Political Covenant recognizes restrictions by the state "[f]or the protection of...public order (*ordre public*)."
Id. The French term *ordre public* is more accurately defined as the public policy of the state, including political, economic, cultural, educational, and social policies. Buergethal, *supra* note 55, at 78.

¹⁷⁹ *Id.* at 78-79.

¹⁸⁰ See Higgins, *supra* note 98, at 28-29.

¹⁸¹ Hargrove, *supra* note 170, at 88-89.

¹⁸² This concerns the protection of certain cultural phenomena which could be characterized, because of intrinsic artistic or scientific interest, as part of the global heritage of mankind, such as a small, geographically distinct population living within the predominant national culture. *Id.* at 90.

¹⁸³ This refers to the desires of countries to maintain a free choice in the course of their national development by avoiding a massive infusion of foreign culture. *Id.* at 91. This would be justified only as a means of bringing various influences into balance, not in limiting certain kinds of influences. *Id.*

¹⁸⁴ This concerns efforts to make local commercial sources of culture, such as publishers and broadcasters, competitive with similar foreign enterprises. *Id.* at 92.

¹⁸⁵ This interest includes the protection of a state's political institutions, as well as its moral and ideological systems. *Id.* at 94. Here, there is a compromise between freedom of choice (as described in the second category) and the traditional police powers of the state. *Id.*

¹⁸⁶ *Id.* at 89. See also Nanda (remarks), 74 PROC. AM. SOC'Y INT'L L. 318-19 (1980).

¹⁸⁷ Hargrove, *supra* note 170, at 95-96.

¹⁸⁸ *Id.*

In conjunction with an international community with the ability to enforce well articulated international cultural protectionist norms, a future communications order based upon cultural protectionism need not sacrifice human rights to national sovereignty. A state choosing to restrict the individual's right to information, however, would have to justify its actions before an international body according to international standards.¹⁸⁹ The purpose of a cultural protectionist communications order, therefore, would be to define clearly which restrictions are justified by international interests.

V. ANALYSIS

Based upon the above examination of the international legal basis for the individual's right to freedom of information and of the possible theories under which this right could be restricted as part of a future communications order, one may draw two conclusions. First, the individual does have an international legal right to freedom of information that the international community may protect, to some extent, from government intrusion.¹⁹⁰ Under the Civil and Political Covenant, however, this international right is not absolute, and may legally be limited by the state under certain circumstances.¹⁹¹ Second, the theories of national sovereignty and cultural protectionism present fundamentally different justifications for government control over the flow of information.¹⁹² According to the theory of national sovereignty, the international community is powerless to grant human rights to the individual and thereby to hold the state accountable for the protection of these rights.¹⁹³ The theory of cultural protectionism, however, holds that the international community may grant human rights to individuals and may also define the acceptable limits of state restrictions of those rights.¹⁹⁴

Given these assumptions as to the international legal right to freedom of information and the underlying basis of the cultural protectionist theory, the United States should seek to strengthen the scheme of international rights protecting the freedom of information. The primary step in promoting the individual's right to information would be to encourage all nations to protect human rights in general. The United States could do this by ratifying the Civil and Political Covenant and the Optional Protocol and making the requisite declaration under Article 41. This would give the United States increased ability to enforce human rights in the international community. It would also give the

¹⁸⁹ *Id.*

¹⁹⁰ See *supra* note 116 and accompanying text.

¹⁹¹ See *supra* note 117 and accompanying text.

¹⁹² See *supra* note 186 and accompanying text.

¹⁹³ See *supra* notes 162-64 and accompanying text.

¹⁹⁴ See *supra* note 186 and accompanying text.

United States additional influence in encouraging other nations, particularly those of the Third World, to follow its example. Only through the establishment of an international community committed to the protection of individuals' human rights will freedom of information become a reality throughout the world.

The United States could also play an important role in formulating the NWICO. The imbalance in the international flow of information is a reality, and does present a legitimate problem for the international community, and for developing countries in particular. Excessive government controls on the individual's right to information, however, poses a threat even greater than that posed by the imbalance to both the West and Third World nations. Freedom of thought and conscience is the basis for all human rights; without freedom of information, these basic human rights do not truly exist.¹⁹⁵ The problem presented by the NWICO, therefore, is how to steer a safe path between the Scylla of unfettered flow of information and the Charybdis of state oppression.

A future communications order which extols the virtues of national sovereignty does not provide an acceptable solution. To endorse the national sovereignty theory is to deny the very existence of international human rights. The Soviet Union, for example, which has clearly demonstrated its strong opposition to freedom of information,¹⁹⁶ professes adherence to the Civil and Political Covenant, but reserves the right to be the sole interpreter and implementor of its provisions.¹⁹⁷ It has steadfastly refused to sacrifice any portion of its sovereignty to the international community that seeks to protect individuals from the Soviet government. An international communications order based upon the theory of national sovereignty would serve as an additional justification from the international community to the Soviet Union and other states opposed to the international protection of the right to information, to continue their restrictive practices.

The theory of cultural protectionism, however, presents a different case. A new information and communication order based upon this theory, as defined by one scholar,¹⁹⁸ would clearly define which state restrictions upon the flow of information will be permitted by the international community as a whole. These acceptable restrictions, the substantive interpretation of the *ordre public* clause of the Civil and Political Covenant, would be the product of international legislation, and therefore subject to international judicial interpretation, possibly via the Human Rights Committee. The NWICO, if based upon cultural protectionism, would be a statement permitting nations to restrict the flow of information. Nonetheless, states currently have this ability under the Civil and Po-

¹⁹⁵ Chen, 4 N.Y.L. SCH. J. INT'L & COMP. L. 37, 37-39 (1982).

¹⁹⁶ Power & Abel, *supra* note 2, at 119.

¹⁹⁷ Higgins, *supra* note 98, at 27.

¹⁹⁸ See *supra* note 180 and accompanying text.

litical Covenant, and do in fact restrict the flow of information in practice.¹⁹⁹ A cultural protectionist communications order would not, at least, sacrifice the individual's rights in this area to narrow national interests. National reasons for restrictions would have to be justified before an international standard.²⁰⁰ The United States could play an important role in the creation of the NWICO by being an ardent and articulate proponent of the individual's rights within the scheme of clearly defined international standards.

If the NWICO is to be based upon cultural protectionism, an important caveat must be made. The success of the NWICO in reducing the harms of an unfettered flow of information while still protecting individual rights, depends upon the ability of the international community to define and enforce agreed upon principles. Currently, the international mechanisms for the protection of human rights are rather weak. The international community has not been very effective in protecting individuals. Although, in purely legal terms, a future communications order based upon cultural protectionism does not conflict with the internationalization of human rights law, it may, in practice, fail to keep the powers of the state in check. For the NWICO to be implemented without jeopardizing basic human rights, the international community must strengthen its ability to regulate the practice of states.

Despite the real possibility of establishing a new international information and communication order which does not essentially oppose the concept of an international right to freedom of information, the United States has chosen, by leaving UNESCO, not to debate the issue. Statements by U.S. officials indicated that the United States would continue to oppose any internationally allowed state restrictions on the flow of information.²⁰¹ In contrast to this absolutist stance against international regulation of the flow of information, the United States has historically been willing to accept domestic restrictions on freedom of information. In the United States, for example, first amendment constitutional guarantees are limited by various governmental actions, such as Federal Communications Commission regulations.²⁰² Further, in a U.S. Supreme Court opinion, Justice Oliver Wendell Holmes stated that:

All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached.²⁰³

¹⁹⁹ Note, *supra* note 15, at 253-54.

²⁰⁰ See *supra* note 186 and accompanying text.

²⁰¹ Discussion, 74 *PROC. AM. SOC'Y INT'L L.* 317-20 (1980).

²⁰² Laskin, *supra* note 74, at 59-60; see, e.g., 47 U.S.C. § 303 (1982).

²⁰³ *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355 (1907).

Like all human rights, the individual's right to seek, receive and impart information will also be limited by other "principles of policy." The call by the Third World for the NWICO has brought that day nearer. If, given the need to correct current imbalances in the flow of information, the creation of the NWICO is inevitable, the United States should not remove itself from the debate over the character of this new order. By withdrawing from the debate, the United States will give up the opportunity to develop a more equitable information order providing strong protection for human rights. The unfortunate result of this U.S. withdrawal may be the creation of a future communications order based upon national sovereignty and supporting unqualified government restrictions.

VI. CONCLUSION

In the debate over the NWICO, the concept of a balanced flow of information is competing with the right to a free flow of information for primacy in the international legal system. Some nations, such as the Soviet Union, are using the NWICO discussions to promote the theory of national sovereignty and to justify state control over the flow of information. Other countries in the Third World and the West, however, have advocated the development of international standards, based upon cultural protectionism, whereby state control of the flow of information can be tested by the international community. Considering that the Third World's political power within UNESCO also exists in the U.N. General Assembly,²⁰⁴ the United States should reconsider its decision to leave UNESCO. The NWICO issue does not show signs of going away, and the United States may have to face this issue in the General Assembly in the near future.²⁰⁵ Assuming that the United States does not withdraw from the United Nations altogether, U.S. policy makers should work as best they can within UNESCO in advocating for the protection of vital human rights within a more just and equitable information order.

Stephen Raube-Wilson

²⁰⁴ Note, *The Human Right of Communication*, 4 N.Y. J. INT'L & COMP. L. 83, 99.

²⁰⁵ *Id.* at 99-100.