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FIGHTING HOMOGENIZATION: The global infiltration of technology and the struggle to preserve cultural distinctiveness.

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FIGHTING HOMOGENIZATION: *The global infiltration of technology and the struggle to preserve cultural distinctiveness.*

Saptarishi Bandopadhyay[+]

While technology and globalization continue to pervade every aspect of the world, the scope for the sustenance of national or regional culture is rapidly disappearing. This paper will seek to use the lessons and experiences obtained through the controversies in the use of Direct Broadcasting Satellites in its more initial years and apply the same to the Internet to assess its effect on the culture of developing States. The eventual thesis proposed here argues that the freedom of information upheld through technology, and the human right to culture need not be seen as perpendicular interests, but that the latter may be secured by its active participation in the market place of ideas (or cultures) i.e. by its projection rather than protection. Further, by drawing analogies with the evolution of principles for the protection of the environment, this paper offers a psychological framework for the development of a larger normative standard on which developing nations can base their struggle to correct the existing technological imbalance and demand technology transfer and knowledge sharing as matter of right and thereby ultimately, competitively project their culture.

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[+] Associate, RADON & ISHIZUMI (New York). This article is a revised and updated version of notes presented at the 3rd Cornell Law School Conference on *Emerging Challenges for International Law in the Cyber Age* (1st April, 2006). I would like to thank the participants at the conference as well as B.S. Chimni, R. Klein, C. Maksoud, J. Radon and C. Kent for their comments, and D. Bradlow and American University, Washington College of Law for facilitating my participation in the conference. All opinions and errors are of course my own.

TOOTING GLOBALIZATION

One of the inherent consequences of the continued infiltration of technology and globalization into the far corners of the globe (which is indeed making the world a 'smaller place' or even a 'global village') is the development of a symptom common to all such '*places*', that of social and cultural homogeneity.[1] While some evidence supports this view, the presence of cultural alternatives and resistance to Western norms suggest that polarization may provide a more convincing picture of global cultural development.[2]

Does technology really pose a credible threat to social/cultural identity or is this theory a creature of uniformed and ignorant perceptions? For instance, when telegraph lines first crossed national borders, they were considered more of an affront to state sovereignty than a development benefiting humanity in general.[3] However, national fears eventually subsided, and the telegraph is today an accepted instrument for the promotion of peace.[4] The ideological conflict with respect to Direct Broadcasting Satellites and the

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[1] *See* Robert Holton, "*Globalization's Cultural Consequences*", 570 ANNALS 140 (July, 2000) at 141, where the author outlines Homogenization, Polarization and Hybridization as the three most plausible arguments to describe the effect that globalization may have on cultures across the globe. ("The homogenization thesis, in which globalization leads to cultural convergence; the polarization thesis, which posits cultural wars between Western globalization and its opponents; and, finally, the hybridization, or syncretism, thesis, in which globalization encourages a blending of the diverse set of cultural repertoires made available through cross-border exchange.") (hereinafter *Holton*)

[2] *Id.*at 140.

[3] *See* James J. Moylan, *The Role of International Telecommunications Union for the Promotion of Peace Through Communications Satellites*, 4 CASE W. RES. J. INT'L L. 61 (1971).

[4] *Id.*

Internet (an advanced version of the *New World Information Order*) is arguably an extension of the terrestrial version of the age-old sovereignty debates.[5]

This paper will seek to use the lessons and experiences obtained through the controversies in the use of Direct Broadcasting Satellites (hereinafter DBS) in its more initial years and apply the same to the most recent technological advancement in the field of global communication, the Internet. The freedom of expression across boundaries is probably one of the most progressive liberties that must be allowed free access to, the world over. Especially in this age of security tensions where the need for international cooperation is so highly felt,[6] it is urged that such free and fast communication and information pathways hold the key to the development of nations, in particular those that that are rated as part of a third world.

In elaborating on this thesis, the arguments herein are divided into three sections: *At its very outset*, the paper provides a basic outline of the technology behind DBS and the Internet and discusses the largely unresolved nature and extent of international human

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[5] *See* Francis J. Skrobiszewski, *An Overview of the Problems, Perspectives and Developments in International Communications and Information Flow*, *in* 1 ISSUES IN INTERNATIONAL INFORMATION: A WORKSHOP ON THE NEW WORLD INFORMATION ORDER AND OTHER KEY ISSUES 1(1981). (The term, "*New World Information Order*" refers to a debate underway in a number of international forums which encompasses a wide range of issues. . . The core issues in the current debate over the merits of a New World Information Order are. . .related to similar considerations raised during previous periods of adjustment to revolutionary changes in technology and governmental attempts at controlling the flow of information to serve the sovereign's objectives. What distinguishes the New World Information Order concept from earlier discussions of international organizations in which Third World nations predominate; the development of computer systems, satellite communications and other high-speed processing and transmission technologies; and the recognition of information as a scarce resource?")

[6] Under this view, it could be asserted that the ICJ has recognized the free flow of information as a basic principle of international law. In the *Case Concerning the Corfu Channel*, the International Court relied on "*general well-recognized principles*" in deciding that Albania had a duty to warn of the presence of mines in Albanian waters. *See Corfu Channel Case* (U.K. v. Alb.), 1949 ICJ 1, 4 (Apr. 9).

rights arguments that allow for its free usage (i.e. an unrestricted transfer of information) and those that call for its restriction.

The *second* part follows this subject beyond the scope of contemporary debates to provide, first, an analysis of the imbalance that aggravates the emotions of those on either side of free usage of transboundary communication technology and then ultimately assesses the failures—political and technological—experienced in efforts to negate the conflicts described in the prior section.

Based on the analysis in earlier sections, the *third* part of the paper argues that the freedom of information (upheld through technology) and the human right to culture cannot be reconciled if we continue to view them with a *one-excludes-the-other* logic. On the contrary, this section conveys that salvation for the latter may very well lie in the hands of the former. By no longer viewing the two as perpendicular interests, the perpetuation of cultural interests may be secured by their active participation in the market place of ideas (or cultures) i.e. by projection rather than protection. Further, by drawing analogies with the evolution of principles for the protection of the environment, this paper offers a psychological framework for the development of a larger normative standard on which developing nations can base their struggle to correct the existing technological imbalance and demand technology transfer and knowledge sharing as matter of right and thereby ultimately, competitively project their culture.

(I) UNDER THE HOOD: *Transboundary technology and its world of trouble*

> The decentralization of technology may make this preliminary section seem somewhat superfluous; however, the issues discussed (particularly those describing how the nature of technology determines political and/or technical efforts to restrict access), require that the reader have a clear notion of both the logistical nuances as well as the rights

based debate surrounding transboundary communication technology. This section of the paper aims to ensure this preparedness.

(A) DIRECT BROADCASTING SATELLITES

Although DBS is not the newest form of international communication, it is certainly one of the most widely used.[7] It is undisputed that DBS transmissions resemble earth-based radio signals in that each disregards national frontiers[8] i.e. a DBS over the Pacific Ocean could beam a program from the west coast of the United States to a home television set in Indonesia.[9] The *New World Information Order* makes it possible for a single broadcasting station to send a message around the globe without going through transmission stations or government sensors.[10] Through a network of only three strategically located communications satellites, any point on the earth's surface may be reached by DBS.[11] Yet, despite the unprecedented ability of DBS transmissions to reach a greater number of people than ever before,[12] the international community has reached

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[7] *See Commission on the Peaceful Uses of Outer Space,* U.N. GAOR, 55th Sess., at 13-16, U.N. Doc. A/AC.105/127 (1974).

[8] *See* Michael F. Flint, *Signal Reception and Piracy*, 11 INT'L BUS. L. 3 (1983).

[9] *See* Joel R. DePaul, *Images From Abroad: Making Direct Broadcasting by Satellites Safe for Sovereignty*, 9 HASTINGS INT'L & COMP. L. REV. 329, 330 (1986). (hereinafter *DePaul*)

[10] *See* BENNO SIGNITZER, REGULATION OF DIRECT BROADCASTING FROM SATELLITE: U.N. INVOLVEMENT 8 (1976).

[11] *See* NANDASIR JASENTULIYANA & ROY S. LEE, MANUAL ON SPACE LAW, vol.. 1 (Oceana Publications, NY) 284 (1979).

[12] *DePaul*, *supra* note 9, at 375.

little agreement on the issue of transboundary DBS transmissions in this era of information.[13]

(B) THE INTERNET

Originally developed by the United States Department of Defense to maintain communications between critical agencies especially in times of war,[14] the Internet was designed with sufficient flexibility to counter even the most determined blocking efforts.[15] It has thus become an axiom among Internet users that "*the Internet interprets censorship as damage and routes around it*".[16] The Internet is the largest online network in the world;[17] it is a network of networks and is comprised of a number of different

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[13] *See* Theodore M. Hagelin, *Prior Consent or the Free Flow of Information Over International Satellite Radio and Television: A Comparison and Critique of U.S. Domestic and International Broadcasting Policy*, 8 SYRACUSE J. INT'L L. & COM. 265, 268 (1981). (hereinafter *Hagelin*)

[14]A brief history of the motivations behind the pioneering research leading up to the currently used Internet system is available at (http://www.freesoft.org/CIE/Topics/57.htm) (last visited: July 10, 2008) ("…The subject of the project was wartime digital communications. At that time the telephone system was about the only theater-scale communications system in use. A major problem had been identified in its design - its dependence on switching stations that could be targeted during an attack. Would it be possible to design a network that could quickly reroute digital traffic around failed nodes? A possible solution had been identified in theory..."; A more comprehensive, if somewhat technical, biography on the Internet and the assessments, motivations and calculations that went into its creation (written by some of the researchers involved in the process) may be found on the website of the *Internet Society* under "*Histories of the Internet: A Brief History of the Internet*", available at (http://www.isoc.org/internet/history/brief.shtml) (last visited: July 10, 2008)

[15] *See* John T. Delacourt, Recent Development: *The International Impact of Internet Regulation*, 38 HARV. INT'L L.J. 207, 217-18 (1997).

[16] *Id*., Delacourt attributes the axiom to John Gilmore, a Silicon Valley engineer.

[17] For a widely acknowledged definition of the Internet, see the language prepared by the Federal Networking Council in 1995, as quoted in Robert E. Kahn and Vinton G. Cerf, *What Is The Internet (And What Makes It Work)* available at (http://www.cnri.reston.va.us/what_is_internet.html) (last visited: July 10, 2008) at note v (hereinafter *Kahn*).

technologies and infrastructures.[18] Internet users connect to the network though an Internet Service Provider (hereinafter ISP).[19] Users can communicate privately on the Internet via the exchange of e-mail and related services, or by accessing public services that are available to all Internet users. Possibly the most popular Internet application is the *World Wide Web*, which permits access to a vast amount of information supplied from computers known as "*web servers*" since they serve information to other users of the Web.[20] The Internet also provides access to online discussion groups called newsgroups and collectively known as *Usenet*.[21]

The Internet displays characteristics, which make it different from other media: it is decentralized that is to say that it was designed to function without gatekeepers, and accommodate multiple, competitive access points.[22] The absence of gatekeepers of the kind that exist in broadcasting, cable television, or satellite transmission, the availability of numerous hosting sites, and the irrelevance of geographic location[23] means that

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[18] For a description of the technologies involved in the creation and functioning of the Internet, *see* Vinton G. Cerf, COMPUTER NETWORKING: *Global Infrastructure for the 21st Century*, available at (http://www.cs.washington.edu/homes/lazowska/cra/networks.html) (last visited: July 10, 2008).

[19]See *Internet Service Provider* (ISP) available at: http://www.webopedia.com/TERM/I/ISP.html (last visited: July 21, 2008).

[20] *Kahn*, *supra* note 17 ("WHO RUNS THE INTERNET: *The Domain Name System*")

[21] *See* Valerie Sedallian, *Controlling Illegal Content over the Internet*, Paper presented to the Media Law Committee, 26th International Bar Association Conference, on "*Censoring the Internet: A lawyer's deceit*" at Berlin, 23 October 1996, available at (http://www.internet-juridique.net/chroniques/control.html) (last visited: Feb 16, 2003).

[22] *See* Regardless of Frontiers: *Protecting the Human Right to Freedom of Expression on the Global Internet* presented by the GLOBAL INTERNET LIBERTY CAMPAIGN at the OECD "*Internet Content Self-Regulation Dialogue*," 25 March 1998, in Paris, available at (http://gilc.org/speech/report/) (last visited: Jan. 10, 2003) (hereinafter *GILC*).

[23] The Internet is engineered to work on the basis of logical and not geographical locations and consequently a person looking to avoid being traced can simply reconfigure his/her connection so as to appear to reside in a different location (even outside his state or country). This makes it vain to try and link messages to physical locations (which is a prerequisite for legal jurisdiction and

material can almost always be published outside the control of governments, monopolies or oligopolies, thus providing freedom of expression in a form that no other medium has ever before. Because it consists of many loosely connected computers and has many different routes for allowing robust communication and transfer of information, no unique point of control exists.[24]

This feature, coupled with the fact that it exists globally, has low barriers to access and service (for instance the creation and dissemination of content) can be priced very inexpensively, makes it the ideal medium to use.[25] Owing to its decentralized nature and the fact that all material is digitized and floated/transmitted over a telephone or cable network its capacity to hold information is limitless and consequently the marginal cost of adding information is negligible.[26]

However, the most intriguing features of the Internet which make it irresistible as tool for communication or dissemination of information, are that it is *interactive* (it is bi-directional, i.e. unlimited number of parties can communicate with each other simultaneously), *user controlled* (there is almost unlimited freedom to surf the Internet and since the users are free to select the information they want to view, the sites visited may reflect their interests to some degree), completely *infrastructure independent* (i.e. all that is required to link up to the Internet is a modem, a telephone line or cable, thus

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enforcement). *See* Paul D. Callister, *The Internet, Regulation and the Market for Loyalties: An Economic Analysis of Transboundary Information Flow*, U. ILL. J.L. TECH. & POL'Y 59 at 63 (2002) (hereinafter *Callister*).

[24] *GILC*, *supra* note 22

[25] *Id.*

[26] *Id.*

making entry into the Internet completely portable, to the extent of access even through wireless routers or via satellites).[27]

Given that the Internet does not respect sovereignty or the value traditionally accorded to territorial borders,[28] and the relative absence of significant, regulatory intermediaries (between the consumers and producers of information on the Internet)[29]

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[27] *Id.*

[28] See the irrelevance of geographical locations as described in *supra* note 23 and accompanying text.

[29] For an overview of the six best known intermediaries—"The Internet Society," "The Internet Architecture Board," "Internet Engineering Task Force," "InterNIC," "People for Internet Responsibility," and finally, the "Internet Corporation for the Assigned Names and Numbers" ("ICANN")—none of which has any governmental or supra-national authority, *see* Wendy Boswell, *Are there Internet Regulations?*, INTERNET REGULATION, available at (http://websearch.about.com/od/whatistheinternet/a/internetrules.htm) (last visited: August 1, 2008). While a number of these institutions are concerned with ethics, facilitation, sale of domains and technical assistance and maintenance of the Internet, they lack any official enforcement authority by which the relationship between the producers of online content and its receivers, may be altered or controlled. Amongst these bodies, the ICANN has received significant criticism for signing a memorandum of understanding with the U.S. Department of Commerce (as of September 29, 2006) which many viewed as the first stage in a handing over to the corporation, major policy-making abilities with respect to the Internet. The U.S. Government however clarified that its continued engagement of the ICANN was limited to its role as the Internet Assigned Numbers Authority ("IANA") for another five years. This MOU is set to end in September 2009, *see* Grant Gross, "ICANN Looks towards end of US Agreement," WASHINGTON POST (March 8, 2008) available at (http://www.washingtonpost.com/wp-dyn/content/article/2008/03/08/AR2008030800059.html) (last visited: July 29, 2008). Speculation about ICANN's growing influence has been fuelled since ICANN's President, in 2002, issued a report whose 'reform' agenda has been likened to a power-grab aimed to obtain the authority currently reserved for public offices, governmental, and inter-governmental bodies, see Declan McCullagh, "If ICANN Can't, Who Should?" available at (http://www.wired.com/politics/law/news/2002/02 /50670) (last visited: August 1, 2008). On the other hand there has been significant interest, especially on the part of a number of developing countries to have the United Nations take over the role of governing and Internet, see "The New World Disorder: U.N. to control use of Internet?, Developing countries want global body to govern cyberspace", (February 22, 2005) World Net Daily, available at (http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=42982) (last visited: August1, 2008); *See also* "Don't give UN control over Internet" (October 17, 2005) BOSTON GLOBE, available at (http://www.boston.com/business/technology/articles/2005/10/17/dont_give_un_control_over_internet/) (last visited: August 1, 2008). However, thus far, the Internet remains largely free of the control of governmental or supranational bodies.

many governments view their ability to control this new medium, or at least censor it,[30] as being central to their self-interests.[31]

However, the decentralized and international nature of the Internet, as described above,[32] is a serious challenge to censorship.[33]Moreover, in democratic countries, where freedom of speech is valued as being of fundamental importance, any attempt to create specific legislation for the Internet may not only be ineffective but also raise the issue of civil rights abuse. These conflicts which plagued the DBS generation in its prime—and currently haunt the free use of the Internet—are discussed in the following section.

(C) TECHNOLOGY AND RIGHTS: *Rediscovering Opposed Ideologies*

Through its proclamation under Article 1, Operative Para 3 of the Charter, the United Nations has expressly declared that one of its primary goals is the promotion and

[30] One of the most well known instances where China's success at censoring and manipulating the scope of Google's search engine is with respect to the word "Tiananmen". For the varying results received back from a search query entered into *Google Images China* and *Google Images*, see "A Picture Says 1000 Words About Google's Censorship In China" (January 30, 2006) available at (http://blog.searchenginewatch.com/blog/060130-080248) (last visited: July 30, 2008)

[31]Over the past few years there has been significant debate surrounding China's aggressive efforts to censor the popular search engine—Google, within its territory. These efforts have taken the form of filtration and withholding of access to technology to name a few, which in turn has led to services such as *Google News,* being entirely unavailable, while others such as *Google Images* are monitored, censored and key word searches manipulated to produce pre-approved results and so on. Given China's efforts and the temptation of its market size even a mega-corporation such as Google, which has long prided itself on Internet freedom, was ultimately cornered into agreeing "to remove certain sensitive information from [Google's] search results". For a brief description of the challenges faced by Google, in the words of its own senior policy counsel, see Andrew McLaughlin, *Google in China* (January 27, 2006), available at (http://googleblog.blogspot.com/2006/01/google-in-china.html) (last visited: July 30, 2008).

[32] See *supra* notes 14-31 describing the nature of Internet technology. With respect to filtration technology and the possibilities that exist for Internet self-regulation, s*ee infra* note, 111

[33] *See also infra* notes, 106-116 and accompanying text

encouragement of human rights.[34] This objective is used as authority by the "*free flow of information*" school of thought, which deems the freedom of both *information* and *expression* as fundamental human rights, which are universal, and thus should be respected internationally.[35] This position also claims to arise from the *Universal Declaration of Human Rights* (hereinafter also Universal Declaration), which is a natural extension of the principles laid down by the United Nations Charter.[36] Taken together, Articles 19, 12, and 27 of the Universal Declaration constitute a blueprint for the protection of free expression through DBS and the Internet:

Article 19 of the *UDHR* proclaims:

> *"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any medium and regardless of frontiers."*[37]

Article 12 of the Universal Declaration provides: "*No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence.*" This provision is so broadly construed that it logically encompasses an individual or a group(/s) of

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[34] *See* art. 1, ¶3 of the United Nations Charter, 59 Stat. 1031 T.S. No. 993, 3 Bevans 1153, amended 24 U.S.T. 2225 T.I.A.S. 7739 (hereinafter *Charter*)

[35] *See* Wolfgang Kleinwachter, *Three Waves of the Debate, in* THE GLOBAL MEDIA DEBATE: ITS RISE, FALL, AND RENEWAL 20 (George Gerbner et al. eds., 1993) in Albert N. Delzeit, Robin M. Wahl, *Redefining the Freedom Speech under International Space Law: The Need for Bilateral Communication Alliances to Resolve the Debate between the "Free Flow of Information" and the "Prior Consent" Schools of Thoug*ht, at note 55, available at (http://www.nsulaw.nova.edu/student/organizations/I LSAJournal/2-1/delzeit.htm) (last visited: Oct. 11, 2002).

[36] *See Universal Declaration of Human Rights*, G.A. Res. 217, U.N. GAOR, 3d Sess., U.N. Doc. A/Res/810 (1948) (hereinafter *UDHR*)

[37] *See also* Article 19, *International Covenant on Civil and Political Rights*, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* March 23, 1976 (hereinafter *ICCPR*)

individuals, and covers a wide array of communications, including electronic mail and even newsgroup communications.

Finally, the right to seek, receive and impart information guaranteed in Article 19 of the Universal Declaration is reinforced by Article 27, which upholds the right of each individual "*freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.*"[38] Given that the Internet's roots are in the exchange of scientific and technical information,[39] Article 27 seems particularly apt for the protection of communications on the Internet.

The foresightful language of Article 19 (*"through any medium"*) makes it clearly applicable to expression via the Internet. The rights to "*seek*" and "*impart*" information seem particularly relevant to "*surfing*" the Net and posting information on Web sites for all to read, while the right to "*receive*" information encompasses the exchange of electronic mail and the downloading of information.

This reasoning must be supplemented by the extensions that have been further incorporated under Article 19(2) of the *International Covenant on Civil and Political Rights* (1966)[40] (hereinafter *ICCPR*), which although stating the same idea makes one express provision with respect to "*ideas of all kinds…through any media of his choice*". This line of thought would seem to reason a step further, since it tends to individualize the freedom of choice ("*any* media of *his choice*") to encompass not only the medium of

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[38] *See also art.* IV (4), *UNESCO* D*eclaration of the Principles of International Cultural Co-operation*, (4th November 1966) (hereinafter *UNESCO: Cultural Cooperation*)

[39] For a brief description of the motives and expectations behind the creation of the Internet, *see supra* notes 14-18

reception or dissemination of information but also necessarily the access to "*ideas of all kinds*". This individualized choice of media would naturally include both the Internet as well as DBS. However, the question that arises is the extent to which this mandate, to allow unrestricted access to information, can be extended.

The United Nations system through its *Charter*, treaties, agreements, conventions and other instruments has always pursued the ideals of peace.[41] The free flow of information globally, provides a "*free market of ideas*" which has been established in international law as

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[40] *UDHR*, *supra* note 36.

[41] *See* pmbl. to the *Charter*, at *supra* note 34. In the aftermath of WWII, the U.N. was established as an organization aimed to further peace, whose tools would be diplomacy backed by collective security, and whose very basis of existence would be an unfettered belief in the equality of nations. With respect to collective security, *see Charter*, *supra* note 34 at chapter V; *see also* DAVID D. CARON, *The Legitimacy of the Collective Authority of the Security Council*, 87 AM. J. INTL. L. 552, 573-574 (1993); MICHAEL HOWARD, *The Historical Development of the UN's Role in International Security* in UNITED NATIONS, DIVIDED WORLD 63, 77-78 (Adam Roberts & Benedict Kingsbury eds. 2nd ed. 1993) (discussing the effectiveness of the U.N. Peacekeeping Forces). The formal text establishing the equality of States under the U.N. system may be found in art. 2, ¶1 of the *Charter*, *supra* note 34. This much discussed principle has been endorsed at a number of fora, for instance, at the 1945 San Francisco Conference it was pointed out that States are "*juridically equal*", *see* UNCIO VI, 457, Doc. 944, 1/1/34 (1). Similarly, the 1970 *Friendly Declaration* spelt out that States "*…have equal rights and duties*", *see* U.N.GAOR 2625 (XXV) of 24th Oct. 1970. In this respect, while undisputed and realistic equality may not ever have been a reality, the principle of sovereign equality is a concession between peers, which has continuously inspired solutions to international relations problems. It is simply a principle of organization of the international community, which does not imply equality between subjects of international law. "*It is an equality before the rule, not within the rule*", *see* Michael Cosnard, Sovereign Equality –"*The Wimbledon Sails On*" in US HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW, 117 (Michael Byers et al. eds. 2003). *See also* Mariana Florentino Cuellar, *Reflections on Sovereignty and Collective Security*, 40 STAN. J. INT'L. L. 211 (2004) ("*It* [the UN Charter] *also incorporated a cluster of interrelated legal doctrines emphasizing the sovereign equality and territorial integrity of nations and prohibiting aggressive war among them*"). *But see* John R. Bolton, *Should We Take Global Governance Seriously?*, 1 CHI. J. INT'L. L. 205, 208-209 (2000); Jack L. Goldsmith, *The Self-Defeating International Criminal Court*, 70 U. CHI. L. REV. 89, 92-93 (2003), as representative of a substantial body of writing questioning the ability of contemporary international law, as envisioned under the U.N. system, in assuring global security.

one of the basic *"considerations of humanity"*.[42] These considerations are related to human values that are already protected and established by general principles of law.[43] Therefore, the free flow of information should be readily adopted by nations striving to achieve peace. However, none of these principles or instruments can be interpreted to negate or disregard the most fundamental principle of state sovereignty.[44] Thus, such freedom of information without interference is not absolute[45] because if the world's experience with the erstwhile "*state of the art*" media was a preview, then the scope of DBS and the Internet being used for commercial exploitation and cultural imperialism is unlimited.[46]

The *UDHR* is of course subject to exceptions.[47] Article 29(2) provides:

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[42] *See* IAN BROWNLIE, PRINCIPLES OF INTERNATIONAL LAW, 3rd ed. (Oxford University Press, Oxford, 1979) 29-30; *See also* Vladimar Kopal, *Evolution of the Main Principles of Space Law in the Institutional Framework of the United Nations*, 12 J. SPACE L. 12 (1984).

[43] *Id.*

[44] *UNESCO: Cultural Cooperation*, *supra* note 38 at art. 11(1); *See also* Brian Dickson, *Effects of 1977 ITU World Administrative Radio Conference on the Formulation of UN Draft Principles on Direct Broadcast Satellites (DBS)*, 2 ANN. AIR & SPACE L. 255, 256 (1977).

[45] Moreover, proponents of the free flow philosophy also fail to consider a relevant question: Has the free flow of information ever existed? *See* THOMAS L. MCPHAIL, ELECTRONIC COLONIALISM: THE FUTURE OF INTERNATIONAL BROADCASTING AND COMMUNICATION, 2nd ed. (California Sage Publications, Newbury Park), 144 (1987). As Professor McPhail notes: ("*Initially, custom laws, tariffs, visas, telecommunications regulations, preferential rates, and availability of transatlantic cable had an impact on early international dispatches. Reuters tried to block competing wire services, particularly American ones; so also have other competitive and commercial pressures affected news flow from the beginning. Currently, the major national supporters of the free flow philosophy are governments responding to pressures from multinational corporate interests, ranging from American Express to Xerox, to protect or extend their corporate, and not necessarily national, interests. What is good for IBM World Trade, for example in selling computer systems to the USSR, is not necessarily good for the national, or indeed international, interests of the United States. Yet some individuals and firms are holding tenaciously to the old information order.*")

[46] *See* Comment, *Direct Satellite Broadcasting and the First Amendment*, 15 HARV. INT'L L.J. 514, 515 (1974).

[47] *ICCPR*, *supra* note 37 at Article 19(3), 20, 21.

> "*In 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.*"

Proponents of the free flow school cannot ignore these restrictive provisions, in light of the undisputed fact that the entire content of a treaty or document must be given effect.[48] Thus the major premise of any argument based on the aforementioned international instruments is that these rights are clearly not absolute. It must be further noted, that when they are read in their entirety, the *Outer Space Treaty*,[49] *United Nations Charter,*[50] *and Universal Declaration of Human Rights*[51] *and the International Covenant on Civil and Political Rights*[52] protect the national sovereignty of the receiving state. For instance, Article 2 of the United Nations Charter requires that member states should respect the principle of sovereignty and refrain from the threat or use of force against the "*territorial integrity or political independence of any state*."[53] This is enshrined in the preamble of the Outer Space Treaty, which condemns the use of any propaganda "*designed or likely to provoke or encourage any threat to the peace*."[54] Moreover, while Article 1 and 2 of the Outer Space

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[48] *See Interpretation of Greco-Turkish Agreement* of December 1st, 1926, 1928 P.C.I.J. (ser. B) No. 16, at 19 (Aug. 28); *See also Advisory Opinion Minority Schools in Albania*, 1935 P.C.I.J. (ser. A/B) No. 64, at 20; *Acquisition of Polish Nationality*, 1923 P.C.I.J. (ser. B) No. 7, at 16-17.

[49] *See Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space Including the Moon and Other Celestial Bodies*, Jan. 27, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347 (hereinafter *Outer Space Treaty*)

[50] *Charter*, *supra* note 34

[51] *UDHR*, *supra* note 36

[52] *ICCPR*, *supra* note 37

[53] *Charter*, *supra* note 34, *art.* 2

[54] *Outer Space Treaty*, *supra* note 49. The Outer Space Treaty is the basic treaty out of which all other international space agreements developed. *See* MARIETTA BENKO ET AL., SPACE LAW IN THE UNITED NATIONS (Kluwer Law International), 162 (1985); *See also* HENRI

Treaty allow a large amount of freedom to individual States in their use of outer space,[55] Article IV of the same instrument declares that the space activities of a nation must be conducted with due regard to the corresponding interests of all states that are parties to the Treaty.[56]

It may further be noted that Article VI of the Treaty states "*parties to the treaty shall bear an international responsibility for national activities in outer space including the Moon and other celestial bodies"*.[57] The nature of terms comprising the Treaty are such that in the absence of a clear distinction between *national* activities which may be allowed and *transnational* activities or transmissions that require express consent of the receiving State, the scope of liability is unlimited. That is to say that not only will liability arise for any transmission into another state without its express consent but responsibility would not even be attracted by the unintentional crossing of transmission into a state which has not given its consent. Thus, the same international documents simultaneously embody both the idea of "*free flow of information*" and the principle of "*sovereignty of state*."[58]

Given that sovereignty of state forms an undisputed component principle of general international law, the restrictions placed on the freedom of speech and expression

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WASSENBERGH, PRINCIPLES OF OUTER SPACE IN HINDSIGHT 16 (1991); MANFRED LACHES, THE LAW OF OUTER SPACE (Sijtoff Leiden, Netherlands), 135-47 (1972).

[55] *Outer Space Treaty*, *supra* note 49

[56] *Id*. at art. IX.

[57] *Id*. at art. VI.

[58] *See* E. Plowman, *Satellite Broadcasting, National Sovereignty, and Free Flow of Information*, *in* NATIONAL SOVEREIGNTY & INTERNATIONAL COMMUNICATION 162 (KAARLE NORDENSTRENG & HERBERT SCHILLER EDS., 1979) ("*Neither of these concepts, state sovereignty and freedom of information represents an absolute, static, indivisible reality*.")

are understandable.[59] It is well established under international law, that a state possesses the sovereign right to regulate certain activities within its jurisdiction.[60] The school of *'prior consent'* is therefore perhaps justified in its assertion that a nation's sovereign prerogative includes the exclusive right to regulate sources of information that come within its domestic jurisdiction and to determine for itself what information may be supplied to its citizens.[61]

While such an expansive authority in the hands of a State may initially seem arbitrary, one needs to realize that the origin of arguments opposing the "*free flow of information*" school, while derived from the principle of state sovereignty, are rooted significantly deeper in the strife of cultural relativism.[62] For instance, there is no doubt

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[59] The principle of state sovereignty is one of the oldest principles in general international law. It dates back to about 3000 B.C., when the seafaring nations in the Mediterranean area started to discover foreign territories, and, consequently, the need for a clear delimitation of those territories arose. First, only land areas and the adjacent coastal seas were involved, but later natural resources intimately connected with the territory, such as crop harvests and mineral resources, were included in the sovereignty concept. *See generally* art.2, *Charter*, *supra* note 34.

[60] *See* MARIKA NATASHA TAISHOFF, STATE RESPONSIBILITY AND THE DIRECT BROADCAST SATELLITE (Pinter Publishers, London; New York) 109 (1987); *See also* HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW, 11th ed. (1952), (Holt, Rinehart and Winston Inc., NY) 242; Jon Powell, *Direct Broadcast Satellites: The Conceptual Convergence of the Free Flow of Information and National Sovereignty*, 6 CAL. W. INT'L L.J. 1, 13 (1975).

[61] *See* KATHRYN M. QUEENEY, DIRECT BROADCAST SATELLITES AND THE UNITED NATIONS 120 (1978) (hereinafter *Queeney*); *See also* THOMAS L. MCPHAIL, ELECTRONIC COLONIALISM: THE FUTURE OF INTERNATIONAL BROADCASTING AND COMMUNICATION, 2nd ed. (California Sage Publications, Newbury Park), 144 (1987). *Callister*, *supra* note 23 at 88, n. 131 (The easiest and most obvious barrier to entry (with respect to television programming) is a limitation on the number of channels available for public viewing. South Africa had used this method in a dramatic display of cultural protectionism (during the apartheid) through an artificially created and maintained scarcity, where the government banned television until 1976. The National Party felt that American and British programming would threaten the Afrikaans language and undermine the "*multinationalism*" of its Bantustan system.)

[62] *See generally* Emmanuelle Jouannet, *Universalism and Imperialism: The True-False Paradox of International Law?*, 18:3 EJIL 379-407 (2007) (hereinafter *Jouannet*), where the author

that the '*fundamental*' human rights outlined earlier through the *UDHR*, the *ICCPR* and concepts such as '*common considerations of humanity*' are essentially based on western ideals and values serving as mere reflections of the civil and political rights held dear by such nations.[63]

It is ironic that the concept of subjective rights (i.e. the idea of choice in civil and political issues), which is imperative to the western ideals conveyed earlier,[64] are the ones that tend to annihilate the idea of any '*fundamental*' human rights. This is because there is no conclusive definition for the term *fundamental* and in the absence of the same there has been a significant degree of confusion as to which rights are being addressed.[65] In

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develops a compelling argument for the paradox that has followed International Law since its inception and which motivates contemporary efforts to often camouflage (intentionally or not) imperialistic tendencies in the guise of universally accepted ideas.

[63] *See* R. Klein, *Cultural Relativism, Economic Developments and International Human Rights in the Asian Context*, 9 TOURO INTERNATIONAL LAW REVIEW, at 4, 17 (2001) (hereinafter *Klein*). (This is clearly evidenced by the fact that the U.S. has refused to ratify the *International Covenant on Economic, Social and Cultural Rights* (U.N. G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49 entered into force January 3, 1976) because it does not recognize economic rights to housing, employment and so on. In keeping with this ideology, the U.S. has also refused to be party to the *Convention on the Rights of the Child* (Adopted by the U.N. General Assembly on Nov. 20, 1989) and the CEDAW (Adopted and opened for signature, ratification under U.N. GAOR 34/180 on Dec.18, 1979) which are instruments dedicated to raising the status of women and children especially with relation to unfair labour practices adopted in many third world nations. On the contrary, its singular stress with respect to human rights has been along the lines of civil and political freedoms as advanced under the premise of its own Constitution.)

[64] *See* JOANNA R. BAUER & DANIEL A. BELL, INTRODUCTION TO THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS 3, 11 (JOANNE R. BAUER & DANIEL A. BELL EDS., 1999).

[65] There has been some confusion as to whether human rights are themselves denoted as '*fundamental*' or whether the issues being addressed are other more specific ones, which are over and above the general genre of human rights. *Klein*, supra 63 at 59, n. 133 stating that:

> "*The United Nations Economic and Social Council authorized the Sub Commission on the Prevention of Discrimination and Protection of Minorities in 1967 to "examine information relevant to gross violations of human rights and fundamental freedoms as exemplified by the policy of apartheid as practiced in*

fact, almost in the same spirit of human subjectivity, the rights once categorized as '*fundamental*' have also undergone changes.[66] Thus the basis of a universally established, singular stream of human rights agreed upon as being '*fundamental,*' is questionable. Along these lines, the school of prior consent argues that the imposition of foreign standards of human rights, and related freedoms, on the States where such rights did not originate[67] is unjustified.[68]

However, it must be stated that a strict adherence to the prior consent line of thought could lead to a dangerous deadlock because the usage of the prior consent formulae would allow even a single state in a region the absolute veto power over international transmission in the region.[69] Such unfettered veto power would prove to be

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the Republic of South Africa." United Nations Economic and Social Council, Resolution 1235 (XLII), June 6, 1967.One would hope that the concept of human rights encompassed all of the 'fundamental freedoms' ".

[66] For instance while the UDHR (1945) declared the *right to property* as a fundamental right (art. 17), barely 2 decades later the same was removed in the formulation of both-- the ICCPR (1966) and the ICESR (1966).

[67]The proposition that International Law is "the reflection of particular—Western—culture" is no longer really in dispute. For a comprehensive description of the history of International Law, its emergence in Europe thought, and the paradoxical faced in trying to implement it universally the world over, see *Jouannet*, *supra* note 62.

[68] Given the relativist stance that certain rights generally held to be "fundamental" may not be so, universally, there arises the difficulty in relating to them as forming part of customary international law (under which obedience would be mandated irrespective of whether or not a State had explicitly consented to it). A brief explanation of this possibility of international law, as it may apply in practice may be found in INTERNATIONAL LAW ANTHOLOGY, ANTHONY D'AMATO Eds., (Anderson Publishing Co., 1994) at 52 (hereinafter *D'Amato*). For an instance of the real-world, cultural and emotional fall-out of this questionable-universal-standard, *see* infra note 144. *See generally*, S. Bandopadhyay, *After the Clash*: *Assessing the Cultural Repercussions of Globalization in Developing Nations in the Twenty-First Century*, 27:2 MAN & DEVELOPMENT, 21-38 (June 2005).

[69] *See* Nancy Lesko, *Legal Implications of Direct Broadcasting Satellites: United Nations Working Group*, 6 GA. J. INT'L & COMP. L. 564, 568 (1976).

potentially disastrous in less developed nations where technical and medical skills are often imported by the new world information order.[70]

(II) COMING TO THE MIDDLE: *Failures—political and technological*

While the issues described above are widely debated, this is the point in the debate when the wheels come off the wagon i.e. the whole discussion traditionally slows down and ends on cyclical rights and issues based positions. The actual difficulties that arise at this technology/human rights frontier, however, are not nearly exposed by a mere assessment of the ideological differences between the two schools. This is because the next step must be to look at the real-world, logistical and technology imbalances which cause the fear of cultural invasion. In an effort to extend this argument, each part of the following section provides first, a description of the imbalance that aggravates the emotions of either school and then assesses the past failures—both political and technological—in minimizing the conflict described in the prior section.

(A) AND MIND THE GAP: *Global calls to negate technological imbalance*

In a sense, the issue of control over dissemination in terms of advanced technology first arose in 1972, when the former Soviet Union publicly announced various types of programming that should be banned in the *New World Information Order*.[71] Not surprisingly, the United States and its allies publicly responded by opposing all restrictions on content, preferring a resolution of any and all disputes through international cooperation.[72] This situation was sought to be tempered by the UNESCO's Declaration of *Guiding Principles on the Use of Satellite broadcasting for the Free Flow of Information,*

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[70] *See* Edward Finch & Amanda L. Moore, *Outer Space Can Help the Peace*, 7 INT'L LAW 881, 884 (1973).

[71] *See* art. IV, Union of Soviet Socialist Republics: *Principles Governing the Use by States of Artificial Earth Satellites for Direct Television Broadcasting*, U.N. Doc. A/AC.105/WG.3 (V)/CRP.1, (1974).

[72] *See* arts. IX, X, United States of America: *Draft Principles on Direct Broadcast Satellites*, U.N. Doc. A/AC.105/WG.3 (V)/CRP.2, (1974).

the Spread of Education and Greater Cultural Exchange,[73] which required four kinds of programming to be regulated by varying degrees of the *'prior consent'* rule i.e. news, cultural broadcasts, education and commercial advertising.[74]

This was followed by the UNESCO 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 Racialism, Apartheid and Incitement to War* (hereinafter Mass Media Declaration, 1978).[75] Article 1 of the declaration demands "free flow and a wider and better balanced dissemination of information" to effectively counter racism, apartheid and so on.[76] The Declaration also outlines in great detail, the wide scope of beneficial activities that may be conducted and achieved through the careful and just use of mass media.[77] Under the auspices of the aforementioned provision, the technology may be used,

> "*… to eliminate ignorance and misunderstanding between peoples, to make nationals of a country sensitive to the needs and desires of others, to ensure the respect of the rights and dignity of all nations.*"[78]

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[73] *See UNESCO Declaration of Guiding Principles on the Use of Satellite broadcasting for the Free Flow of Information, the Spread of Education and Greater Cultural Exchange,* U.N. Doc. A/AC.105/109 (1973).

[74] *Id.* arts. V, VI, VII, IX.

[75] *See 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 Racialism, Apartheid and Incitement to War*, UNESCO Doc, 20 C/20 Rev. (21 November 1978).

[76] *Id.* art. I

[77] *Id.* art. III

[78] *Id.*

However, it is Article 6 that most accurately addresses the problem that stands to cause the most damage, when it speaks of correcting

> "*…the inequalities in the flow of information to and from developing countries, and between those countries. To this end, it is essential that their mass media should have conditions and resources enabling them to gain strength and expand, and to co-operate both among themselves and with the mass media in developed countries.*"[79]

While Article 9 is a reminder as to the approach that needs to be actively followed, now more than ever before,

> "*…it is for the international community to contribute to the creation of the conditions for a free flow and wider and more balanced dissemination of information,"*[80]

The problem that the international community needs to address is that of the threat of large-scale cultural invasion owing to the uncontrolled and inadequately regulated flow of information into a country, in particular those in the third world. This very concern had been addressed at the *International Conference on Human Rights* held in Teheran (1968) wherein the resulting Proclamation (hereinafter *Teheran Proclamation*) emphasized that

> *"While recent scientific and technological advances have opened vast prospects for economic, social and cultural progress, such developments may nevertheless endanger the rights and freedoms of individuals and will require continuing attention."*[81]

The 1966 *UNESCO Declaration of the Principles of international Cultural Co-operation*, addresses this very issue with a position which perhaps needs to be seriously adopted as an established premise of international law:

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[79] *Id*. art. VI

[80] *Id.* art. IX

[81] *See Proclamation of Teheran* (13th May 1968), ¶ 18.

> "*In their rich variety and diversity, and in the reciprocal influences they exert on one another, all cultures form part of the common heritage belonging to all mankind.*"[82]

This primary premise must be accepted before any efforts to balance the technology divide and ensure a more equitable dissemination of information beyond territorial boundaries, can be seen as legitimate.

Correcting an imbalance, however, requires determining which actors have the ability to control technology. While DBS technology is largely exclusive (being largely state-licensed and corporation controlled, whereby consumers can access but not control television programming), the Internet is far more decentralized (the popularity of *You Tube T.V.* is one of many possible examples). A direct consequence of this specific characteristic of each media has been that efforts to control DBS technology have been directly and openly political,[83] while in the case of the Internet, governments have attempted to let technology self-regulate.[84] Over time, however, both methods have proven to be largely unsuccessful.

(B) HOW DEADLOCKS FREED DBS: *The inadequacy of political muscle*

Even in the presence of such ideals, the issue of imbalanced and unregulated dissemination has continued to threaten the social structure of a large number of states primarily because UNESCO has always lacked any significant legal authority to alter the New World

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[82] *UNESCO: Cultural Cooperation*, *supra* note 38; *UNESCO's Standard-Setting Instruments, IV.C. (1994)*), art. 1(3); *See also* UNESCO 1954: *Preamble* (The 1954 Hague Convention concerning protection in wartime, views all culture as the cultural heritage of all mankind) as *note* 7 *in* (http://folk.uio.no/atleom/master/2.htm) (last visited: Feb.15, 2003)

[83] For a description of this phenomenon, *see infra* part (II)(B) ("HOW DEADLOCKS FREED DBS…") of this paper, and corresponding notes.

information order.[85] Moreover, this issue has always been so highly politicized that even in the case of DBS, the *Committee on the Peaceful Uses of Outer Space* (hereinafter COUPOS)[86] was unable to fashion an agreement and left the task for the General Assembly to resolve.[87] It was against this very backdrop that the issue came before the UN General Assembly in 1982[88] in the form of *Resolution* 37/92 (hereinafter the *Resolution*).[89]

The text of *Resolution* 37/92 while no doubt important in itself, but when studied as a model, what is perhaps even more telling is that despite its modest language, the *Resolution* failed to achieve customary status (through widespread acceptance and implementation),[90] showing the level of politicization that this issue faced. The *Resolution*

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[84] For a description of this phenomenon, *see infra p*art (II) (C) ("NO STOPPING THE INTERNET…") of this paper, and corresponding notes.

[85] *Queeney*, *supra* note 61.

[86] A standing member of the General Assembly since 1959, COPUOS is a main forum for creating international space law. *International Co-operation in the Peaceful Uses of Outer Space*, G.A. Res. 1472, U.N. GAOR, 14th Sess., 856th plen. mtg. (1959). Once COPUOS reaches a consensus on a treaty, the matter is referred to the First Committee of the General Assembly, and then to the General Assembly for a vote. Once approved by the General Assembly, the treaty is then open for signature by the member States. *See also* RITA L. WHITE & HAROLD M. WHITE, THE LAW AND REGULATION OF INTERNATIONAL SPACE COMMUNICATION (Artech, Boston) 244 (1988).

[87] *See Report of the Committee on the Peaceful Uses of Outer Space*, 37 U.N. GAOR, 37th Sess., Supp. No. 20, U.N. Doc. A/37/20 (1982).

[88] *See Report of the Second United Nations Conference on the Exploration and Peaceful Uses of Outer Space*, G.A. Res. 37/90, U.N. GAOR, 37th Sess., 100th plen. mtg., U.N. Doc. A/CONF. 101/10 & Corr. 1, 2 (1982) (hereinafter *Second Conference*)

[89] *See Principles Governing the Use by States of Artificial Earth Satellites for International Direct Television Broadcasting*, G.A. Res. 37/92, U.N. GAOR, 37th Sess., 100th plen. mtg., U.N. Doc. A/RES/3792 (1982) (hereinafter *Resolution*).

[90] *See generally* MALCOLM N. SHAW, INTERNATIONAL LAW, 4th ed., (Cambridge Univ. Press, Edinburgh, 1998) (1998) 64-70 (hereinafter *Shaw*). For a interesting analysis of the development of custom through international 'incidents' rather than legislation, *see* Anthony D'Amato's introduction to the subject, followed by Michael Reisman's unique thesis, W. Michael

proclaims that states have equal rights to conduct direct broadcasting activities[91] and that they shall bear responsibility for their broadcasting activities;[92] it further encourages the settlement of international disputes in this regard through established legal procedures[93]and

lays a certain amount of importance on notification and consultation between broadcasting and receiving states (which includes negotiations before the establishment of any international broadcasting service).[94]

However, while linking the right to receive and impart information with the ideals of interstate cooperation[95] and sovereign authority (including the principles of non-intervention),[96] the *Resolution* fails to bridge the divide between those advocating prior consent and those refusing restriction upon their dissemination rights. While allowing States to use their right to refuse broadcasting services—during the required consultation (if requested)—as an *indirect method* of censoring programs,[97] it houses no binding force associated with this duty-to-consult, nor is there in place any correction mechanism by which compliance may be measured and rectified.[98] Further, the right to expressly prohibit

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Reisman, *International Incidents: Introduction to a new genre in the Study of International Law*, 10 YALE J. INT'L. L. 1 (1984) as excerpted in *D'Amato*, *supra* note 68 at 52, 53 respectively.

[91] *Resolution*, supra note 89 at operative ¶ 5.

[92] *Id. at* operative ¶ 8.

[93] *Id. at* operative ¶ 7.

[94] *Id. at* operative ¶ 13.

[95] *Id. at* operative ¶ 6.

[96] *Id. at* operative ¶ 1, 2.

[97] *Id. at* operative ¶ 10, 13.

[98] Even a cursory reading of operative ¶ 13 of the *Resolution* makes this point obvious. For an instance where a markedly different standard has been set, *see* the *Convention on Environmental Impact Assessment in a Transboundary Context* (hereinafter the *Espoo Convention*) *opened for signature* on Feb.25, 1991, *see* 30 ILM 800 1991, *entered into force* in 1997. Under the *Espoo*

certain program content (which a number of the negotiating States would have liked to have seen reflected in the text) is never addressed.[99] In keeping with these short-comings, the *Resolution* didn't make any distinction between, or describe the consequences of, programming that was made with due regard to consultations and that which was disseminated in contravention of the abovementioned requirements. Allowing both forms of dissemination practically nullifies the significant obligations—with respect to the latter form of broadcasting—described above.[100] And finally, the *Resolution,* while urging dispute resolution by non-violent means, fails to address the crucial issue of the remedy or recourse available to any State, which is subjected to a violation of this instrument by the reception of undesirable transmissions.[101]

The international community's experience in attempting to garner support for the aforementioned *Resolution* serves as an effective model to analyze the potential difficulties that will plague any future efforts to organize an international consensus around the regulation of the Internet. In the case of Resolution 37/92, the nations disagreed on more

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Convention the notification obligations are substantial, *see* Art. 3, as are the descriptions outlining the duty to consult and negotiate, *see* art. 5 and 6, as well as art. 14*bis* (Review of Compliance), art. 7 (Post-Project Analysis). Such a strong convention read together with the decisions of international tribunals provide significant procedural grounds to ensure meaningful compliance with respect to transboundary environmental impact, *see generally*, the reasoning of the ICJ in the *Case Concerning the Gapcikavo-Nagymaros Project* (Hungary v. Slovakia) ICJ, 25 September, 1997, 37 I.L.M. 162 (1998); *Accord*, *Territorial Jurisdiction of the International Commission of the Oder* case, PCIJ, Series A, No. 23, 27: 5 ILR, 83.

[99] *Id. at* operative ¶ 13.

[100] *See also Resolution*, *supra* note 89 at pmbl. ¶5 (which provides a number of instances by which the operation of transboundary DBS technology will significantly impact the international community). Given the reach of this technology, disallowing recourse and substantial objections to receiving certain programming content, significantly diminished the impact that the *Resolution* could expect to have.

[101] *See* Georgetown Space Law Group, *DBS Under FCC and International Regulation*, 37 VAND. L. REV. 67, 135 (1984).

than they agreed on, though this may not be obvious from the numbers alone.[102] The *Resolution* was not adopted unanimously: 107 countries voted in favor, 13 voted against it, and 13 States abstained.[103] These numbers are especially relevant because of the nations that comprised them. The United States and most Western countries voted against or abstained from voting on *the Resolution*.[104] The positions taken by these nations are relevant because it is these nations, which possess the technology and consequently the ability to disseminate globally, while most of the nations, which voted in favour of *the Resolution*, belong to the third world and are disadvantaged in this respect.

This statistic by itself cripples the possibility of *the Resolution* being established as a part of customary international law since the *International Court of Justice*, in its decision in the *North Sea Continental Shelf Cases*, has recognized an established rationale to the end that:

> "*In considering whether the element of general and consistent practice of States is satisfied for there to be a rule of customary international law, the participation of the States whose interests are specifically affect is of paramount importance rather than the mere numbers involved.*"[105]

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[102] This is a classic instance of when numbers absolutely, can lie, or at the very least, as is the case here, give the false appearance of a paradox, *see infra* notes 104, 105 and accompanying text.

[103] *See* CARL Q. CHRISTOL, THE MODERN INTERNATIONAL LAW OF OUTER SPACE (Pergamon Press, New York) (1982) at 154-55.

[104] The following thirteen countries voted **against** the Resolution: Belgium, Denmark, the Federal Republic of Germany, Iceland, Israel, Italy, Japan, Luxembourg, Netherlands, Norway, Spain, the United Kingdom, and the United States. The following thirteen countries **abstained**: Australia, Austria, Canada, Finland, France, Greece, Ireland, Lebanon, Malawi, Morocco, New Zealand, Portugal, and Sweden. *See* CARL Q. CHRISTOL, SPACE LAW: PAST, PRESENT, AND FUTURE (Deventer, The Netherlands; Kluwer Law & Taxation Publishers, Boston), 116 at n. 6 (1991).

[105] *See North Sea Continental Shelf Cases* (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 ICJ 1 (Feb. 20).

The absence of unanimity among nations, and the abject lack of support from the North, leaves little room for doubt as to why *Resolution* 37/92 from never been accepted as a part of international legal custom.

(C) NO STOPPING THE INTERNET: *The inadequacy of self regulation*

Considering the tremendous power of the Internet—or rather because of that very power many governments have sought to restrict its use in terms of the viewing and acquiring of information/content.[106] Government actions infringing freedom of expression on the Internet take many forms:[107] From the formulation of Internet Specific laws[108]

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[106] Perhaps the best description of the ability of governments to regulate the Internet has been made by the Carnegie Endowment for International Peace whose report in 2001, specifically focuses on the exploits of China and Cuba. While the former successfully regulates potential challenges to government authority "*through a combination of content filtering, monitoring, deterrence, and the promotion of self-censorship*", the latter, alternately, controls access, "including a prohibition of individual public access and careful selection of institutions that are allowed to connect to the Internet." *See* Shanthi Kalathil & Taylor C. Boas, Carnegie Endowment for International Peace Global Policy Program, *The Internet and State Control in Authoritarian Regimes: China, Cuba, and the Counterrevolution* 4 (July 2001) (*Carnegie Endowment Working Paper*), (available at http://207.68.164.250/cgibin/linkrd?_lang=EN&lah=ffdab69213ca3df7f593e9ae9bb 521c3&lat=1 053323025&hm___action= http%3a%2f% 2fwww %2 eceip%2eorg %2ffiles % 2f pdf%2f21KalathilBoas%2epdf) (last visited: Nov. 16, 2001)

[107] A German court convicted the local manager of an Internet Service Provider because a subscriber to the service used it to transmit pornographic material. China has made it a crime to access or spread anti-government material. Singapore requires ISPs to block designated websites. The UK has encouraged its ISPs to participate in a scheme of "*self-regulation*" under which ISPs remove offending material without the user's consent. Human Rights Watch compiled a comprehensive assessment of instances of governmental efforts to limit freedom of expression on the Internet in a report entitled "*Silencing the Net: The Threat to Freedom of Expression On-Line*" (May 1996) available at (gopher://gopher.igc.apc.org: 5000/00/int/hrw/expression/7) (last visited Dec. 10, 2002). *See also* "*Internet Censorship Report: The Challenges for Free Expression on-line*" (April 1998), by the Canadian Committee to Protect Journalists, (available at http://www.ccpj.ca/publications/internet/index.html) (last visited Dec. 10, 2002).

[108] For instance, in response to concerns about the undesirable effects of the Internet (whether perceived or actual), Singapore fashioned an "*Internet Code of Practice*" (1996), designed to hold service providers accountable for allowing access to objectionable materials. As per the implications of the *Code*, ISPs are required to exert their "*best endeavours*" in screening objectionable material. However, considering that cyberspace is increasingly proving itself to be

(governments have criminalized certain types of speech over the Internet),[109] to content based license terms applied to Internet users and service providers,[110] and processes such as filtration (blocking) and content labeling.[111]

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ungovernable, the degree of allowances for failure (on the part of the ISPs) as envisaged by the *Code* may indeed be wider than might appear. In this context, what is especially important to note is that by adopting this "*best endeavors*" standard, Singapore has really acknowledged the impossibility of completely screening information flow over the Internet. *See* Assafa Endeshaw, Singapore Gets to Grips with the Internet, 7 J.L. & INFO. SCI. 208, 219 n.40 (1996) (citing Republic of Singapore, Public Notice 2400, 38 Gov't Gazette Extraordinary No. 37 (1996)). The Singapore Broadcasting Authority replaced the public notice with a "schedule" version of the Code in November of 1997. See Singapore Broadcasting Authority, The Schedule Internet Code of Practice (Nov. 1, 1997), (available at http://207.68.164.250/cgibin/linkrd? _lang=EN&lah=d0ac9b c0e5 c2b479858696bf17e11439&lat =1053323025&hm___ action=http% 3a%2f%2fwww %2esba % 2egov %2esg % 2 fsba%2f i codenpractice.jsp) (last visited: Mar. 18, 2000) *Callister*, *supra* note 23 at 66, n. 24, citing China's (7th Nov. 2000) *Regulations on Managing Internet Information-Release Services*. [In addition to established firewall techniques, the regulations require ISPs to apply for permission to post news information with respect to pre-approved, registered categories. (Regulation arts. 6, 11); ISPs must remove and report any prohibited material immediately (Regulation art. 13); The service providers must also keep records of IP addresses and domain names of "*information disseminators*" (Regulation arts. 14 – 15)].

[109] *See* Lawrence Lessig, Paul Resnick*, Zoning Speech on the Internet: A Legal and Technical Model*, 98 MICH. L. REV. 395 (1999) at 396, describing various kinds of speech, the publication (on the Internet) of which is suppressed by various States. *But see*, *ACLU v. Reno*, 521 U.S. 844 (1997) wherein the U.S. Supreme Court held that preventing Internet speakers from being heard by certain populations is effectively a total ban on that speech. Specifically, the Court found the Communications Decency Act (1996) to be in violation of the United States constitutional protection of free speech. The court's detailed description of the various methods of communication that comprise the Internet should serve as the model for any analysis of the validity of government controls. The landmark ruling of the Supreme Court was based directly on the findings of the District Court. The District Court's opinion, which includes the detailed findings of fact, is available at (http://www.ciec.org/decision_PA/decision_text.html) (last visited: Dec.12, 2002). (The Supreme Court opinion is available at http://www.ciec.org/SC_appeal/decision.shtml) (last visited: Dec. 12, 2002).

[110] China has issued rules requiring anyone with Internet access to refrain from proscribed speech while the Singapore Broadcasting Authority requires all Internet Service Providers to abide by specific licensing terms mandating that they block access to foreign web sites and newsgroups deemed harmful to nation's culture and morals. For a description of similar instances and views, *see GILC*, *supra* note 22. *See also*, the Carnegie Endowment's 2001 Report on China and Cuba, at *supra* note 106.

[111] There are significant technological limitations to the effectiveness of filtering. For instance, research into the efficiency of four different commercial software filter products concluded that only when all four products were combined, did they collectively block objectionable materials

Possibly the most comprehensive opinion on current filtering capabilities was submitted by experts appearing in *Licra v. Yahoo* arising out of the online sale (auction) of Nazi memorabilia in violation of French domestic laws.[112] In the course of litigation before the French Court, the experts appearing for Yahoo testified that it was not possible for them to effectively filter attempts to access its auction site.[113] The French Court then proceeded to order Yahoo to screen the percentage of French citizens that it could, through the implementation of a complex and expensive "*keyword based filtering system*" failing which the company would forfeit fines to the tune of $ 13,000 per day.[114] Fortunately for Yahoo, the U.S. Federal District Court in San Jose, California (in November 2001), reasoned, in its summary judgment in the company's favour (with

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25% of the time and that they ended up blocking permissible material about 21.3% of the time. *See* Christopher D. Hunter, *Internet Filter Effectiveness - Testing Over-and Underinclusive Blocking Decisions of Four Popular Web Filters*, 18 SOC. SCI. COMPUTER REV. 214, 220 tbl.7 (2000). Assuming that the government which attempts to block out information, found 1% of the eight petabytes (8 X 10[su'15 '] bytes) available through the Web to be objectionable, or 10 terabytes (10[su'13 '] bytes), then using current filtering technology, 2.5 terabytes of objectionable material would escape filtration (which is roughly the amount of information stored in an academic research library). *See* Lyman et al., How Much Information?, (available at http ://20 7.68.164 .25 0/cgibin/linkrd?_lang=EN&lah=74cfea8ec2f879 0d 961be2c678357b1a&lat= 1053323025&hm___action=http%3a%2f%2fwww%2esims%2eberkeley%2eedu%2fresearch%2f projects/how-much-info/datapowers.html) (last visited: Oct. 24, 2000).

[112] *See UEJF et LICRA v. Yahoo!, Inc. et Yahoo France*, T.G.I. Paris, Nov. 20, 2000, N[degrees] RG 00/05308, (available at http://207.68.164.250/cgi-bin/linkrd?_lang=EN& lah=b7ceda08f24bac0edc67755d27ffb5a2&lat= 1053323025&hm___action=http%3a%2 f% 2f w ww%2ekentl aw%2eedu%2f perritt%2fconflict s/frenchorder.pdf (English trans.)) (last visited: Jan. 24, 2001) (hereinafter *Yahoo incident*)

[113] Even with Yahoo's cooperation, only an estimated 70% of French users could be screened using their IP addresses (especially since many existing services on the Web like *Anonymizer* and *SafeWeb*, work to conceal user IP addresses while AOL does not use IP addresses but instead works through separate networks) leaving around 30% unidentified. Moreover, according to Yahoo, the filtering process is largely unfocussed when counted against the sites unnecessarily screened out. It must be noted that at a subsequent hearing, the French court's own appointed experts testified that a total prohibition would be impossible), see *Id.*

[114] *Id.*

regard to its challenge to the French Court's order), that: "*the principle of comity is outweighed by the Court's obligations to uphold the First Amendment.*"[115] This nearly avoided misfortune of Yahoo's is evidence enough that the process of filtration is hardly foolproof because no amount of blocking is adequate owing to the size and diversity of the Internet and its functions.[116]

With such an overwhelming amount of authority in support of the fact that the Internet cannot be satisfactorily filtered,[117] the remaining options available (*apparently*) to a State are either to compel ISPs' to filter/block *en masse* (leading to a general norm of privatized control within the State, which is very difficult to challenge under international law) or to block out the technology altogether.

With regard to the former, it must be stated that in a number of cases, it may be clear that the ISP is acting under pressure from the government and has, in essence become the agent of the State for the purpose of furthering government policies. What is often promoted as Internet "self-regulation," is actually privatized censorship. It is consistent with the fairly common occurrence of having a formerly direct government function turned over to a private business, whereby State power and governmental pressure continue to provide the backing, but the actual implementation and mechanics of

[115] *See* 169 F. Supp. 2d at 1193.

[116] *See* DAVID R. JOHNSON & DAVID G. POST, THE RISE OF LAW ON THE GLOBAL NETWORK, IN BORDERS IN CYBERSPACE at 8 (Brian Kahin & Charles Nesson eds., 1997). *See also* Ibraheem S. Al-Furaih, *Internet Regulations: The Saudi Arabian Experience*, 12 (Internet Service Unit, King Abdulaziz City for Science & Technology, March 2002) (available at www.isu.net.sa) (last visited: July 17, 2003).

[117] For a representative sampling of the volume of authority opposing the claim that the Internet can be effectively controlled through filtration, *see supra* notes, 106-116 and accompanying text.

the suppression of material is delegated to a private trading group.[118] Leaving aside any social/political uprisings that may result from such behaviour on the part of the government, one needs to be mindful of the fact that even when an ISP bans a site (which often results in banning a large number of sites that are not objectionable) usually as a result of threatened government action, the typical response from the Internet community is the creation of "mirror sites" in other, unrestricted areas of the Internet. This is particularly problematic with respect to the establishment of legal jurisdiction for enforcement, since the Internet functions independent of physical locations.[119] For the most part, therefore, the technology involved once again makes effective regulation impossible.

China has in the recent past strived towards the latter option (upon its realization that the Internet is indeed too large to monitor) by attempting to limit access to a manageable number of users, which include limiting access to certain professions and keeping the cost of local Internet service artificially high. However, such efforts are largely counter productive, because to the extent that they succeed and access to the Internet is limited, any economic development attributable to this technology is correspondingly minimized. To achieve its ideal scenario, States like China would have

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[118]*See* Gerardo Reyes, "*Self-Censorship in Latin America*", 11 MEDIA L. & POL'Y 1 at 9 (2002) ("Self-censorship has the same perverse effect as regular external control: silence. That is the final result of both practices, regardless of whether it comes from the scissors of the government or from the delete key of the editor. The difference is that in the first case that decision sets off all kind of alarms and disapproval. In the second case it remains as a soft talk among reporters.")

[119] *Callister*, supra note 23 and accompanying text. *See also* Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1220 (1998) ("The enforceable scope [of law] is relatively narrow. It extends only to individual users or system operators with presences and assets in the enforcement jurisdiction.")

to sever contact with the Internet completely. It remains to be seen whether the desire to retain social control will inspire States to undertake such a step.

In summary, the ability of the Internet to route around blockages, the phenomenon of mirror sites, the sheer volume of the Net, and the desire of nations to take advantage of the Internet's potential as a tool for economic growth and delivery of vital scientific, economic and educational information render the Internet resistant to, and in some instances effectively immune from regulation.

(III) FURNISHING SOLUTIONS: *Burn the barn and see the moon*

Given that technology continues to evolve with leaps and that the third world already faces an invasion, based *per se* on information imbalance (both in terms of quality and quantity of material imported/exported),[120] the effective protection and preservation of national/regional culture will require some uncommon strategies.

In a third world country, the percentage of individuals who can effectively surf the Internet, actually upload information, and utilize even to a moderate extent the technological advantages provided by the Internet is negligible as compared to the sizable number of individuals that are capable of doing so in a developed nation such as the United States.[121] This disparity, currently existing between such nations, with respect to

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[120] This is an example of the theory of *hybridization* gone wrong, where owing to basic logistical imbalances and differences in opportunity, there is an unequal mingling of distinct cultures which leads to the overshadowing of one by the other. *Holton*, *supra* note 1 at 140.

[121] *See* Alladi Venkatesh (Director, Project Noah (CRITO), University of California), Survey on '*Computers and New Media Technologies in Indian Households: Based on a Study of 8 Major Cities in India*', December 2000. (The survey concludes that the extent of computer penetration even in a rapidly growing country like India is very low, i.e. about 0.5% all over the country and about 10% in the major cities (§3.3.1 at 9). It also documents that about 95% of household computers are concentrated in only 8 of the major cities in India (§ 1 at 6). According to the responses to its sampling, only 27% of the computer owners consider themselves experts at using

the dissemination of information (over the Internet) is a much-magnified version of what has always existed with regard to DBS.

A principal and almost simple-minded solution to this problem of cultural invasion would be to continue to restrict the distribution of information at the State's own peril, while continuously formulating new methods to restrict access. This, as a matter of policy, is literally as hollow as it sounds.

(A) IF CULTURE COUNTS: *Don't Protect, Project*

A more pragmatic approach for a State, may be to try and use the market that seeks to overrun its value system. The history of free speech debates are a living testament to the tenacity of ideas, be they populist or marginalized, and the convectional movement that they enjoy through the mainstream consciousness. From the scientific basis of evolution to society's reliance on the theories of creationism, from the limelight enjoyed by Buddhism and yogic-philosophies right down to the continued existence of Neo-Nazi and divisive followings, the marketplace of ideas has consistently proven to be effective in sustaining and perpetuating not only theories and isolated ideas but entire cultures and

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computer technology (§4.1.7 at 15). Moreover, close to 75% of all computer owning homes have bought the computer within the last 2 years (§4.2.1 at 16), only 42% of homes have Internet connection (§ 4.2.6 at 18) and Internet usage per week on an average amounts to about 43% o the total computer usage time (§ 4.4.2 at 21), over 75% of Internet users have only received the facility in the last 4 years (§ 4.6.5 at 24), over 63% of the sampling uses the Internet to access news and related information (§ 4.6.7 at 26). Other than professionals, a very low percentage of users even know how to upload/download material to/from the Internet). *See also* '*A Comparative Study of Uses and Impacts of Computers in the Home: USA, Sweden and India*', available at http://www.crito.uci.edu/noah (last visited: Feb., 2001). The aforementioned Indian facts must be compared to a very opposite scenario in countries like the US, where the Internet is converting society in such a manner that there is less time spent with real people and more time spent online. For a summary and comparative between the Indian and US proportions of Internet usage, *See* Gustavsson Johan, Malm Andre, Jalerud-Parlo Johan (Chalmers University of Technology), '*A Study of the Use of the Internet in India and the USA*', (available at http://www.mot.chalmers.se/edu c/courses/cte0 45 /Web_sidor/web _gr24.htm) (last visited: July 18, 2003).

belief systems, even if their continued existence necessarily means opening them up—outside their place of origin—for the world to judge. This—free market notion of competition where entire cultural spheres compete for the attention and loyalty of people the world over—is the approach that needs to be adopted before any headway can be made with regard to reconciling access to communication technology and conserving age old cultural knowledge and experiences.

Exercising this strategy would have to be a long-term process combining a number of stages, which would in turn create a broader and wider normative scheme of legal principles. Primarily of course the State(/s) looking to employ such an active projectionist attitude in favour of culture, must be honest about the fact that its trade policies, which will have to be carefully construed to facilitate this end, may not run smoothly within the currently existing international system. As a first step, wealth maximization may not, for an initial period of time, be the primary goal with regard to this subject. The concerned State will have to be prepared to face the adverse consequences which always follow a projectionist attitude towards any particular sphere.[122] The conduct under this scheme of action would require States to learn to step away from using regulation to "protect" culture (and related values) while actively

[122] *See* John A. Ragosta, *Sovereignty Revisited: The Information Revolution – Culture and Sovereignty – A U.S. Perspective*, 24 CAN.-U.S. L.J. 157, 162-163 (1998). (For instance, most viable options designed to promote Canadian culture are likely to violate the premise of national treatment. Yet, this may be necessary if the State is going to boast any sort of cultural policy. An even bigger gamble is going to be a situation wherein the State's policy is in violation of a trading partner's most favored nation (MFN) status. For instance, while Canada is not particularly concerned about being overrun by the culture of Mexico (its primary threat being from the United States), with respect to the NAFTA (which contains a cultural exemption clause applicable only between the U.S. and Canada) the scope of the cultural provision must extended to cover Mexico, simply because "*discrimination among trading partners is never appropriate*") (hereinafter *Ragosta*)

associating itself with attempts to "project" the same.[123] The nuances of this attitude will, of course, depend on the goodwill and international-relations credit that a State has at its disposal as well as its own unique take on the approach suggested above. What is beyond doubt, however, is that culture that does not compete will die. The relevant question therefore—as argued throughout the length of this paper—is not whether a culture will compete. There is little doubt that Hollywood's historic influence on the world's population has as much (if not more) to do with the enormous arsenal of economic abilities and technological tools at its disposal it, as it does with the United States' desire to spread its culture and beliefs all over the world. The relevant question therefore, is how to put a strategy into action to minimize the technological imbalance (or divide) so as to facilitate a projection of cultures.

(B) CONTEMPLATING AN ANALOGOUS PSYCHOLOGICAL FRAMEWORK

It is well understood that under the law, an argument for the preservation of any entity requires that such subject be estimable within some set of universally accepted parameters.[124] But affecting traction in this field is as much about satisfying legal

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[123] "*A country that isolates itself and fails to project its identity in values beyond its borders is doomed to anonymity and loss of influence...Internationalization is essential to success and competitiveness*," *see* Notes for an Address by the Honorable Andre Ouellette, Canadian Minister of Foreign Affairs, on the Tabling in the House of Commons of the Government's Foreign Policy Statement, at 3 (Feb. 7, 1995) as cited in *Id.* at 161. In this context the State concerned could chalk out a scheme for generating and encouraging investment in cultural interests. A similar set up has worked well in Canada with respect to exporting films and television shows.

[124] Consider the challenges faced by intellectual property law in its attempts to differentiate and explicitly delineate amongst numerous forms of intellectual fruit (be they products, ideas, or other forms of "expression") those which would constitute protected works, *see* for instance JEREMY PHILLIPS & ALISON FIRTH, INTRODUCTION TO INTELLECTUAL PROPERTY LAW, (Butterworths & Co., Halsbury House, 35 Chancery Lane, London WC2A 1EL), 3rd ed., 3 (*If an idea can be expressed in only one, or in a very limited number of ways, then copyright of that expression will be refused for it would give the originator of the idea a virtual monopoly on that idea. In such a case it is said that the expression merges with the idea and thus is not*

technicality as it is about opinion shaping and establishing a psychological shift in favour of the cause.[125]

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copyrightable). *See also* DAVID I BAINBRIDGE, INTELLECTUAL PROPERTY, (Pitman Publishing, 128 Long Acre, London WC2E 9AN), 4th ed. (1999), 18, 33 at n. 18. It is for this same reason that "ideas" cannot be protected under this existing regime, unless they are furthered for instance, through an "inventive step" amongst other criteria (for patent protection) or "expression" (in case of copyright law, as described earlier). With respect to patent applications, *see* PATENT'S ACT (1977) Section 1 (1) (The 4 primary requirements for a patent application are: (i) Novelty (ii) Utility (iii) Non-Obviousness (iv) the presence of an *'inventive step'*); and for copyright applications, *see* UNITED KINGDOM COPYRIGHT COMMITTEE REPORT (*Gregory Committee Report*, 1952), ¶9, as quoted in the WHITFORD COMMITTEE REPORT ON COPYRIGHT AND DESIGNS LAW (1977), at 4 (Copyright is a right given to or derived from works, and it is not a right in the novelty of ideas. There is no copyright in ideas. Patents are granted for "inventions" which is defined to mean the physical manifestations of a new and useful art, process, machine, manufacture or composition of matter, or improvements in the same). Now, it is of course, unlikely that any set of drafters or legislators, in any field of law, have or will, ever be able to foresee, as it were, every conceivable possibility or circumstance under which the law may need to be applied, *see* Anthony D'Amato, *Legal Uncertainty*, 71 CALIF. L. REV. 1, 4-8 (1983). An extension of this idea—specifically designed to cover nuanced aspects of rights and obligations which may arise, (without having been initially considered by drafters or legislators), is realized through common-law concepts such as "reasonableness" and "forseeability"; with respect to forseeability, *see* W. Jonathan Cardi, *Purging Foreseeability*, 58 VAND. L. REV. 739, 743 (2005); *see also* S. Balganesh, *Forseeability and Copyright Incentives*, JOHN M. OLIN LAW & ECONOMICS WORKING PAPER NO. 400 (2d series) (April, 2008) (122 HARVARD L. REV., *forthcoming 2009*) available at (https://www.law.uchicago.edu/files/400.pdf) (last visited: August 8, 2008).

[125] Consider the issue of corruption in developing nations and the seemingly endless hurdles faced by international financial institutions (hereinafter *IFI's*) and transnational corporations, as the former endeavours to eradicate this practice [*see The Costs of Corruption* (April 8th, 2004) available at (http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK :20190187 %7EmenuPK:34457%7EpagePK:34370%7Epi PK:34424%7EtheSiteP K:4607,00.html) (last visited: 26th Sept., 2005)], while the latter faces trouble—both at home (say, in the United States) and on-site (say, in Africa)—for doing business at such locations abroad. With respect to corporations the problem is that despite the existence of a number of well-regarded definitions for conduct that may be considered "corrupt", for instance, "the abuse of public office for private gain" as defined by Transparency Internationals' *Corruption Perceptions Index* (2004, 2005), [*see also* WORLD DEVELOPMENT REPORT 2004: *Making Services Work for Poor People* 97 (World Bank & OUP 2003) which defines it as "unauthorized private gain from public resources"], transnational corporations have to, in every individual case, make a decision as to whether or not something seen as a "gift" in Africa, or elsewhere, would constitute a violation of say, the *Foreign Corrupt Practices Act*, 15 U.S.C. §§78m, dd-1,dd-2, dd-3, ff (1997) (hereinafter *FCPA*), at home in the United States.

But even if this technical calculation were to be simple, eradicating the practice of corruption would—as IFI's are discovering—isn't just a matter of having in place, well defined laws, [for a complete list and description of international instruments aimed at fighting corruption, see *Summary of International Legal Instruments*, UNITED NATIONS COMPENDIUM OF INTERNATIONAL LEGAL INSTRUMENTS ON CORRUPTION, (2nd

To affect a drive to project culture, national or regional culture (and its ancillary values in general) need a methodology by which they can be understood, identified, and related to universally. The single most effective approach in this regard has been borne out by the method used in the cases of the *United Nations Convention on the Law of the*

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ed., 2005: New York) at 1-20], but will require a long term shift in the social, cultural and other extra-legal relationships and perceptions prevalent amongst the citizens of countries where this practice runs rampant. In this context, *see* HUMAN DEVELOPMENT REPORT 2002: *Deepening democracy in a fragmented world,* 5 (UNDP & OUP Publication), the foreword to which begins on the premise, "…this Human Development Report is first and foremost about the idea that politics is as important to successful development as economics…," thereby making the argument that *a-priori* anti-corruption activities address an evil which is inherently socio-political and consequently its salvation cannot possibly be apolitical. *See also* M. JOHNSTON, *A brief history of anticorruption agencies*, in A. SCHEDLER ET AL. (Eds.), THE SELF-RESTRAINING STATE: POWER AND ACCOUNTABILITY IN NEW DEMOCRACIES (Lynne Reinner Publishers, 1999) at 4, stating:

> "…There is no way to attack the corruption problem without raising fundamentally political questions about the ways of people…both public and private…that] pursue and use power, and about people and standards to which they should be held accountable…"

It is also worth noting that this psychology of accepting corruption as way of life, isn't only a limited view held by the populations of poorer countries but is, regrettably, shown by historical-legal precedent as having been acknowledged and appreciated by first world authorities: Case in point, in this respect, is the evidence presented on behalf of Warren Hastings (during his trial for impeachment as Governor of Bengal, India, a capacity he served in from 1772-1785) before the British House of Lords between 1787-1795 in the course of which, instead of denying that he had accepted bribes while in service of the British empire, it was argued that, (in the words of the prosecutor: Edmund Burke) "actions in Asia do not bear the same moral qualities which the same actions would bear in Europe" and that it would be unfair to judge Hastings' actions in India by the moral standards applicable to public officials in Great Britain. Burke described this as an argument establishing a sense of "geographical morality," *see* Padideh Ala'i, *The Legacy of Geographical Morality and Colonialism*: *A Historical Assessment of the Current Crusade Against Corruption*, 33:4 VAND. J. TRANS. L. 877 at 881, 887-893. However ridiculous Hastings' arguments may seem, they were nonetheless accepted by the British House of Lords over Burke's laudable appeal to reason and equal treatment of subjects before the law.

The discussion above is meant to highlight how far this psychology of extra-legal considerations (be they, social, cultural, political or otherwise) can shape the way that both citizens (of the State where corruption occurs), and foreigners (IFI's or corporations, for instance) can come to see this practice as systemic or an intrinsic aspect of the society itself. This flawed, but nonetheless common perspective on life and culture in the developing world raises serious questions about how much impact the mere existence of an anti-corruption law can have on a society traditionally disposed to looking the other way.

Sea (hereinafter "UNCLOS"),[126] as well as the international designation of certain areas (e.g. Antarctica and the Deep Sea Bed) and resources (e.g. whales) as "common interests" of humankind.[127] The use of 'common heritage of mankind' to describe culture is not new in the international community.[128]

The step that has always been missing, however, is the bestowing of this status under international law, complete with binding obligations based on global consensus. This is the psychological stepping stone required to make the projection and preservation of culture seem worthy of an international effort to even out the existing technological imbalance. To refer to national/regional culture, as 'common heritage of mankind' would effectively create a psychological framework whereby the exploration and exploitation of this global asset may then be approached in terms of suitable, globally coordinated management mechanisms which "employ the criterion of equity in distributing the

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[126] In 1970, the UN General Assembly adopted a *Declaration of Principles Governing the Seabed and Ocean Floor* in which it noted that the area in question and resources were the "*common heritage of mankind*". This was reiterated in articles 136, 137 of the *United Nations Convention on the Law of the Sea*, *opened for signature,* Dec. 10th 1982, 21 I.L.M. 1261 (hereinafter *UNCLOS*). This concept dates back to the 1950s and was also integrated into the art. XI of the *Agreement Governing the Activities of States on the Moon and Other Celestial Bodies*, Dec. 5, 1979, 18 I.L.M. 1434 (hereinafter *Moon Agreement*). *See also Shaw*, *supra* note 90 at 362.

[127] *See* Antarctic Treaty, *opened for signature* Dec.1, 1959, pmbl., 12 U.S.T. 794, 795, 402 U.N.T.S. 71, 74 (entered into force June 23, 1961); See International Convention for the Regulation of Whaling, Dec 2, 1946, pmbl., 161 U.N.T.S. 72; G.A. Res. 2574, *Question of the Resolution Exclusively for Peaceful Purposes of the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, Underlying the High Seas Beyond the Limits of the Present National Jurisdictions, and the Uses of Their Resources in the Interests of Mankind*, U.N. GAOR, 24th Sess., Supp. No. 30 at 10, U.N. Doc. A/7360 (1969) reprinted in 9 I.L.M. 419, 422.

[128] For instances of prior usage of the "common heritage" label to describe culture, *see Convention for the Protection of World Cultural and Natural Heritage*, Dec. 17. 1975, 2d pmbl. 1972 U.N. JURID. Y.B. 89, U.N. Doc. ST/LEG/SER.C/10, 27 U.S.T. 37, T.I.A.S. 8226, 11 I.L.M. 1358 (1972) which was one of the earliest references to common heritage of mankind (more recently referred to as "humankind") describing the loss of any single cultural and natural heritage site as a loss of "*the heritage of all of the nations of the world*"; *see supra* note 82 and accompanying text.

benefits of such activity."[129] Once this understanding gains momentum, it is this last measure, which could be further utilized to restore the balance in global dissemination of information be it with respect to the Internet or DBS.

The benefits or profits that are reaped by the developed nations through the worldwide dissemination of information (the largest consumers of which are from developing States), must in some proportion be used specifically to help the latter develop its own power to disseminate.[130] This may be construed in law by the employment of the principle of "common but differentiated responsibility" (CBDR), which as a nascent principle of international environmental law evolved from the notion of 'common heritage'.[131]

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[129] *Shaw*, supra note 90. See also *Joyner*, *infra* note 132

[130] While the Canadian Radio-Television and Telecommunications Commission (CRTC) did liberalize Canadian access to U.S. cable services (even though it sill continued to disallow access to HBO, MTV and some others channels), in 1998 (January) the CRTC simultaneously considered adding a "*cultural*" protection measure by requiring that five percent of a cable service's revenue should go to the creation and presentation of Canadian programming. *Ragosta*, *supra* note 122 at 159. The actual and potential number of customers in a recipient State has an immense power to maneuver the minds of the disseminating body, an ideal example would be the Country Music Television (CMT) case in which the United States realizing the quantum of Canadian viewership that its programming collected revenue from, readily agreed to comply with any and all Canadian content regulations, investment requirements as well other broadcast norms ensuring the reinvestment of money into Canada. *See* Amy E. Lehmann, Note, *The Canadian Cultural Exemption Clause and the Fight to Maintain An Identity*, 23 SYRACUSE J. INT'L L. & COM. 187, 207-09 (1997). Disputing Canada's motives, some commentators have argued that the CMT case *"had nothing to do with protecting Canadian culture*", since "*the only difference between Country Music Television and the New Country Network, for which CMT was summarily replaced, was where the dividend check went. That is what mattered to Canadian regulators*". On this ground Canada's actions may be seen as an attempt to regulate the "*distribution and the direction of the flow of money"*. *Ragosta, supra* note 122 at 162. However, even *Ragosta* agrees with the premise that using its customer strength as a bargaining tool is a viable strategy for a State looking for cultural exemptions. *Id.*

[131] *See* Paul G. Harris, *Common but Differentiated Responsibility: The Kyoto Protocol and United States Policy, 7* N.Y.U. ENVIRONMENTAL LAW JOURNAL *27* at 28 (1999). (hereinafter *Harris*)

Insofar as culture is treated as *common concern of mankind*, it follows that there is a responsibility to protect and preserve it.[132] This differential responsibility aims to promote substantive equality between developing and developed States within a regime, rather than mere formal equality.[133] Practically speaking, this differential responsibility does result in different legal obligations.

The natural question that arises is with whom does the possibility of causing cultural invasion rest? Under the principle of CBDR, as enshrined in the *Rio Declaration on Environment and Development*, the onus is upon the developed nations (who in this respect too are primarily responsible for the threat faced by the developing nations) to take measures to equitably distribute dissemination knowledge, technology and opportunity to the latter mentioned populations.[134] In particular, an analogy may be

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[132] *See* Commentary to Article 3 of the *International Union for Conservation of Nature*, *Draft Covenant on Environment and Development* 32 (1995) (hereinafter *IUCN*) describing the principle of "common heritage" as signifying the existing right and duty of all States to undertake individual and joint efforts to prevent environmental harm that has the potential to adversely affect mankind; *See* also Christopher C. Joyner, Comment, *Legal Implications of the Concept of the Common Heritage of Mankind*, 35 INT'L & COMP. L. Q. 190, 192-5 (1986) (hereinafter *Joyner*) citing the following responsibilities on the part of States with respect to "common heritage" resources: (i) to ensure that the concerned resource is free from claims of sovereignty pressed by individual States, (ii) to maintain such resources under a coordinated system global management and governance, (iii) to use such resource solely for peaceful purposes, (iv) to share equitably, all information regarding the resource, (v) to allow unrestricted access and usage provided no harm is caused, (vi) to share equitably, with all other States, the economic benefits derived from the exploitation of the concerned resource by any single State.

[133] The evolution of CBDR (in environmental jurisprudence) stems from the two-fold understanding that not only have developed and industrialized countries contributed more significantly to the current, global environmental crisis but they are also the parties who, when compared to developing/third world States, have tremendously greater access to the technological and financial resources necessary to contribute towards a solution. *See* Ileana Porras, *The Rio Declaration: A New Basis for International Cooperation* in PHILIPPE SANDS, GREENING INTERNATIONAL LAW 20, 25 (NEW PRESS, 1994).

[134] *See* United Nations Conference on Environment and Development: *The Rio Declaration on Environment and Development*, June 13, 1992, 31 I.L.M. 874 (hereinafter *Rio Declaration*).

drawn to Principle 7 of the *Rio Declaration*,[135]which acknowledges that while all countries are responsible for global environmental problems, some are more responsible than others. [136] A very similar truth exists in the case of preservation of culture. In the absence of any singular *world culture*, the eclectic varieties that comprise it are definitely in a position to influence and overshadow each other.[137]The responsibility, however, is

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[135] *Id.* at art. 7

[136] *Id.* at art. 7. While there has some been debate about the motives behind this principle, *see* "It comes down to a matter of cash. The North has it. The South needs it", TIME June 1, 1992 at 43 (the article leading up to the *Rio Conference* discusses accusations of the CBDR being about "wealth redistribution"), this logic of levying differentiated responsibilities even amongst States considered (theoretically and formally) to be equal is now well within the scope of mainstream international legal jurisprudence and well accepted in the practice of international relations. In this regard, *see* Kyoto Protocol to the United Nations Framework Convention on Climate Change, *opened for signature* March 16, 1998, 37 ILM 22 (1998) (*entered into force* 16 February 2005) (which in addition to establishing different reporting requirements for developed, developing and least developed countries, also calls for specific greenhouse-gas reductions on the part of developed countries alone, see Annex B); *see also* Article 5 of the Montreal Protocol on Substance that Deplete the Ozone Layer , *opened for signature* on September 16, 1987, 26 ILM 1550 (*entered into force* January 1, 1989) (providing a delayed compliance schedule for developing countries) which has been decried by some commentators as giving way to a lackadaisical attitude on the part of developing countries, *see* E. P. Barratt-Brown, *Building a Monitoring and Compliance Regime Under the Montreal Protocol*, 16 YALE J. INT'L. L. 519, 534 (1991); V. P. Nanda, *International Environmental Challenges: "Sustainable Development" and "Environmental Terrorism"*, 3 TOURO J. TRANSNAT'L L. 1, 17 (1992); *see also* A. HALVORSSEN, EQUALITY AMONG UNEQUALS IN INTERNATIONAL ENVIRONMENTAL LAW: DIFFERENTIAL TREATMENT FOR DEVELOPING COUNTRIES, 3 (WESTVIEW PRESS, 1999). However despite this criticism, CBDR continues to exist and is widely incorporated into the language of international law, see V. P. NANDA, INTERNATIONAL ENVIRONMENTAL LAW FOR THE 21ST CENTURY at 39 (Transnational Publishers, 2004). International space law itself provides a precedent for the extension of this rationale beyond environmental jurisprudence, when the U. N. General Assembly, in the course of the *Second Conference*, explicitly acknowledges it in inviting "*…all Member States, in particular those with major space capabilities…*" to take action, *see Second Conference*, *supra* note 88 at operative ¶ 4.

[137] The Chinese government has in the past, expressly acknowledged the threat of Western broadcasting. In a statement from China's Ministry of Radio, Film, and Television, such broadcasting was expressly recognized as detrimental to China's national values and sense of identity. *See* Zhao Shuifu, *Foreign Dominance of Chinese Broadcasting - Will Hearts and Minds Follow*?, Intermedia, Apr.-May 1994, at 8-9, quoted in *Callister*, *supra* note 23 at 86-87, n. 126, stating that:

> *"International…dissemination conducted by Western developed countries threatens the independence and identity of China's national culture. We*

more on those for whom this ability to overshadow is a real and genuine possibility, as opposed to those who lack the widespread propagation, accessibility and acceptance to be a sincere threat.

Thus it is the developed nations, which must take the lead in this process of preservation and protection of culture and act in accordance with the CBDR i.e. they should protect the cultural diversity "*for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities.*"[138] Even though the above quoted provisions form part of the corpus of international environmental law, the same principles of equity can be made to apply with respect to the preservation of culture in developing nations.[139]

Under this standard of responsibility, the developed countries, which export the bulk of information globally through DBS or the Internet, must dedicate a portion of their profits towards the development of the indigenous communication networks and related

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> *should seriously deal with this situation. These [cultural] factors include loving the motherland…attaching importance to culture...and stressing moral courage. Precisely because of this, we take seriously the infringement of overseas radio and television and the influence they bring which hampers the national spirit to expand.*"

[138] *See* United Nations Conference on Environment and Development: Framework Convention on Climate Change, May 9, 1992, 31 I.L.M. 849 (hereinafter *Climate Convention*). *See also* Annex I, 31 I.L.M. 872. The poorest countries of the world are excluded from commitments, but so too are South Korea and Singapore and Saudi Arabia and similarly "*less developed*" but hardly poor-countries.

[139] Since international environmental law and related ethics is possibly the most widely and rapidly evolving stream of '*soft-law*', its precepts have often been used to defend and promote the protection of other even *softer* legal issues such as the protection of culture. For instance *See* Sarah Harding, *Value, Obligation and Cultural Heritage*, 31 ARIZ. ST. L. J. 296 (1999).

infrastructure in less developed nations.[140] Doing so would satisfy a particularly important aspect of the principle: international assistance, including financial aid and technology transfer.[141]This transfer of technology must no longer be based solely on benevolent acts of good faith but also on binding international obligations undertaken by developed nations as a corollary to their dissemination activities.[142] The equitable sharing

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[140] *See* for instance the efforts of the Canadian Radio-Television and Telecommunications Commission in this regard, at *supra* note 132. See also *Second Conference*, *supra* note 88, at operative ¶ 7(b), (f), stating parallel objectives towards which the United Nations Programme on Space Applications should be directed.

[141] *See* The Principle of Common but Differentiated Responsibilities: *Origins and Scope*, for the WORLD SUMMIT ON SUSTAINABLE DEVELOPMENT, Johannesburg, August 26th, 2002, (available at http://www.cisdl.org/pdf/brief_common.pdf) (last visited: Feb. 17, 2003) Since developed countries have played the greatest role in creating most global environmental problems, and have superior ability to address them, they are expected to take the lead on environmental solutions.

[142] Frustrated by the largely unidirectional surge of cultural infiltration into its territory, the Islamic Republic of Iran tried to block out television programming through the implementation of a statute (in 1994) which disallowed the use of Satellite Programme Receivers within the territory of the State. This extreme form of restrictive State action was primarily motivated by the belief that:

> *"They [the West] wish to impoverish us and to impose the wrong and hollow culture of the West, which deprives people of any kind of humanity.... The bulk of the enemy onslaught against us, against our brave nation, is a cultural onslaught…"*

See Majlis Official Comments on Bill Banning Use of Satellite Programme Receivers, BBC Summary of World Broadcasts, Dec. 20, 1994, LEXIS, News Library, BBCMIR File (excerpting weekly radio programme, entitled "The Nations House," on December 18, 1994 and broadcast on the Voice of Islamic Republic of Iran), quoted in *Callister*, *supra* note 23 at n. 127. Such arguments are further strengthened by the belief that:

> *"Satellite transmission, broadcasting the programmes of foreign television networks, is not designed to increase the scientific knowledge of nations. Rather it has been developed to mislead youth.... They [the West] do not transfer their knowledge. They do not transfer their experience of modernizing technology. What they transfer is what drags families into corruption."*

See Emani-Kashani: West Interest in Transfer Not of Technology But of Corruption, BBC Summary of World Broadcasts, Sept. 19, 1994, LEXIS, News Library, BBCMIR File, quoted in *Callister*, *supra* note 23 at n. 127. While the condemnation of the West as the "*enemy*", intentionally bent upon destroying Iranian culture by corrupting the minds of the youth may be a

of benefits is especially applicable when the CBDR is read with the rationale behind the *Polluter Pays Principle*, which is a '*general principle of international environmental law*',[143] that allows developed nations to buy up the developing nations share of pollution rights, globally.[144] In this same manner, the transfer of technology and funding for the development of infrastructure and training in developing nations may be seen as a sale of the latter's right to disseminate information at a competitive rate and consequently the sale of the latter's right and opportunity to effectively and actively influence the cultural security of the former states.

Under the CBDR, States have common responsibilities to protect the environment, but due to different social, economic, and technological capabilities, countries each must shoulder different responsibilities. The principle therefore provides for asymmetrical rights and obligations regarding environmental standards, and aims to induce broad State acceptance of treaty obligations while avoiding the type of problems typically associated with a lowest common denominator approach. To this end, the principle also reflects the core elements of equity, placing more responsibility on wealthier countries and those more responsible for causing specific global problems. Most importantly perhaps, it presents a psychological framework for compromise and cooperation in effectively

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bit too much to accept, the quoted texts realistically convey some of the basic fears of many State's.

[143] *See* The International Convention on Oil Pollution Preparedness, Response and Cooperation (1990); Convention on Transboundary Effects of Industrial Accidents (1992); *See also* art. 2(5)b of the Convention on the Protection and the Use of Transboundary Watercourses and international Lakes (1992); OECD Council Recommendations C(74) 223 (1974) and C(89) 88 (1989); Art. 130r(2) of the EC Treaty as amended by the Treaty on European Union.

[144] *See* P. SANDS, *Principles of International Environmental Law*, 213 (1995). *See also* A. BOYLE, '*Making the Polluter Pay? Alternatives to State Responsibility in the Allocation of Transboundary Environmental Costs*' in International Responsibility for Environmental Harm, 263 as cited in *Harris*, *supra* note 131.

meeting one instance of an assortment of global challenges which have in the past (this is certainly true of environmental protection) lacked the transparent immediacy of territorial/natural resource based military conflict, or the sexy dress-up that accompanies transboundary trade, corruption and ostensibly economic concerns.

EPILOGUE

In almost every field of international relations today, a unique lesson is being learnt: that the conflicts of a globalized world are too complicated to be undone by taking aim from steadfast ideological platforms. This premise has informed the subtext behind almost every section of this paper in my effort to argue for a pragmatic and psychologically revamped approach to the age-old questions of communication technology, individual and collective human rights.

Stalling debates at the level of issues (for instance, which school of information has universal appeal?) has consistently proven to disappoint those looking for solutions to real world concerns of the kind discussed in this paper. It is my hope that the questions raised, experiences analyzed, and suggestions made, will allow readers to step beyond existing literature on the subject and rethink what they may know and believe or where they choose to locate themselves with respect to this important issue.