

CULTURAL RELATIVITY, HUMAN RIGHTS AND THE
INTERNATIONAL REGULATION OF BROADCASTING

by

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Abstract

When a broadcaster broadcasts directly to people living in another state disputes can arise. The audience may find the programmes offensive. The programmes may foment disorder and rebellion and corrupt the values and traditions of the inhabitants of the receiving state or even threaten their very survival.

The problem is not new. It has been a source of international tension since the inception of broadcast technology. The problem has however become more pointed as that technology has become ever more sophisticated. The power of radio is aptly illustrated by recalling the panic caused in 1938 by Orson Welles' famous hoax broadcast announcing the invasion of Earth by Martians. More recently commentators such as James Miles, BBC correspondent in Peking at the time, have suggested that the rebellion in China before and after the massacre at Tianamen Square was fomented, prolonged and to a degree coordinated by programmes broadcast on overseas radio stations such as Voice of America and the BBC. Television has a much greater graphic capacity than radio and is also vulnerable to abusive techniques such as subliminal suggestion and advertising. The impact of television is set for another great leap ahead as the development of High Definition Television technology proceeds apace. The development of communications satellites has greatly increased the range and quality of broadcasts.

There have been a number of attempts to address this problem but none have met with much success. The international community has polarised into two camps, one taking a position based on a very strict view of the right to freedom of expression, and the other insisting that that right yield to a degree at least

to accommodate peoples' rights to determine their own economic, social and cultural development.

This paper offers a solution to this impasse. It offers guidelines to help resolve international broadcasting disputes. The guidelines are based on the international human right to freedom of expression as viewed particularly by the two bodies responsible for drafting that right's most famous exposition in the Universal Declaration of Human Rights and in the host of other international and constitutional instruments which it inspired. It is argued that cultural relativity in the human rights context is consistent with the sources of international law specified in article 38 of the Statute of the International Court of Justice, and that by incorporating a degree of cultural relativity the guidelines advocated herein are similarly consistent with current international law. It is also shown that the view of human rights the guidelines evince is consistent with a version of constructivist human rights theory which accords with observable practice and which enjoys widespread academic support. Some alternative methods for addressing the problem arising from international broadcasting are examined and their shortcomings identified. This leads to the conclusion that the method proposed in this paper for regulating international broadcasting, notwithstanding that it is most surely within the realm of *de lege ferenda*, is both consistent with current international law and jurisprudentially defensible, and therefore better than the alternatives.

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Chapter 1

1. Introduction: an Outline of the Problem to be Addressed

1.1 Broadcasting technology

Radio and television transmissions are composed of radio waves. Radio waves are impulses which travel in beams through the air in a straight line away from the point of emission. When the distance from the crest of one wave to the next is long, the transmission is said to be long wave or low frequency because the number of waves to pass a given point each second is relatively low. Short wave length transmissions on the other hand are characterised by a shorter distance from the crest of one wave to the next and are high frequency transmissions because a high number of waves pass a given point every second. Very high frequency transmissions are known as Ultra High Frequency (UHF) or, even higher again, microwaves. In general a higher frequency transmission travels in a narrower beam and produces a better quality communication. Low frequency emissions tend to travel in a wider beam and be of lower quality.

Radio wave communication is restricted by two inherent problems. Firstly, the beams may be obstructed by other electrical atmospheric activity and by physical objects in the beam's path, such as geographic features and buildings or even rain. Physical obstruction is a particular problem for high frequency emissions. The second restriction on radio wave communication is that because radio waves travel in straight lines, the curvature of the earth restricts their reception by receivers any great distance from the transmission point.

Satellites can alleviate both these problems. A satellite is located in space and reflects back down to earth the radio waves the transmitter directs at

it. This increases the area of the earth's surface the transmitter can reach with his signals and reduces the likelihood of electrical and particularly physical obstruction of his transmission. Because the signal is travelling much further, a more powerful transmission is usually required where a satellite intermediary is used. Some satellites are 'passive' which means that they merely reflect the signals sent to them back down to earth, but others, 'active' satellites, amplify the signal and boost its power to give receivers a stronger and better quality transmission to receive. The area covered by the downward beam of radio waves is called the 'footprint' of the transmission.

The most popular position for satellites is on the 'geostationary orbit'. This is a band running parallel to the equator but above it about 36,000 kilometres¹. Satellites on this orbit and travelling at the same speed as the earth is rotating appear stationary relative to the earth giving them a static area of coverage and eliminating the need for ground stations both transmitting and receiving to constantly 'track' the satellite's position. Three satellites on the geostationary orbit give global coverage apart from the two polar regions².

Radio wave communications can be sent in two ways. They can be sent for reception by a single receiving station, in which case they are called 'point to point' transmissions, 'narrowcasting', or where a satellite is used in transmission, a 'fixed satellite service'. The other possibility is that they can be intended for reception by a whole population of individuals, in which case the transmission is called

¹ It is in fact a band of space about 30 kilometres thick and approximately 150 kilometres wide. M. L. Smith, International Regulation of Satellite Communication, p.5f.

² M. L. Smith, op. cit, p.6.

a 'broadcast', or again if a satellite is involved, a 'broadcast satellite service'. Point to point transmissions tend to be relatively low powered because reception is generally by means of a station with a large dish to receive the signal. The dish gathers in the weak signal and focuses it on the central receiving antenna. In general it is not possible for individuals to pick up such signals directly because it would be impracticable for them to construct large dishes. Broadcast signals on the other hand tend to be strong so that individuals can receive them on unaugmented radio and television sets, or at least with small relatively cheap receiving dishes.

There is a type of transmission which constitutes a narrowcast / broadcast hybrid. 'Community reception', as it is known, involves a programme which is ultimately intended for reception by a whole population of individuals, but which is initially transmitted to a single receiving station and then re-broadcast, or relayed by cable, to its ultimate users. The writer feels community reception is better classified as a type of point to point transmission, though some commentators such as Luther regard it as a type of broadcast³. Which approach is most appropriate is a moot point. On the writer's analysis the appellation 'direct' in the classification 'direct broadcast' is superfluous; on Luther's it is necessary to make the quite legitimate distinction between a broadcast proper and community reception signals which are in fact received by a single station and then subsequently redistributed by other means. Where a broadcast, or more superfluously a 'direct broadcast' is emitted in one country but received by individuals in another, it is an international (direct) broadcast and this is the subject of this paper. Technological

³ See S. F. Luther, The United States and the Direct Broadcast Satellite, p.136.

advances both in the powering of source signal transmissions and in the amplifying capacity of active satellites have made (direct) broadcasting on a truly global scale a reality.

1.2 Present level of international direct broadcasting activity

International direct broadcasting activity is widespread. In 1991 at least eighty one states were openly engaged in international direct broadcasting by radio. Broadcasts in at least seventy seven different languages were specifically targeted at people living in every continent except Antarctica⁴. Many international satellite systems have been operating for years⁵. Ross reports of television broadcasting that "[o]ver the last six years, available airtime in

⁴ This information is based on data provided in the 1991 World Radio TV Handbook. An abstract of the data provided in this publication is contained in this paper's appendix 1.

⁵ SPUTNIK was the first communications satellite. Fourteen months later the United States followed the Soviet Union's lead. In 1962 the United States authorised private operations in satellite communications and set up COMSAT to do it. COMSAT's primary function is to operate the United States' share of the western developed countries' international satellite communications organisation INTELSAT. INTELSAT is owned by 114 countries. INTERSPUTNIK, set up in 1965 using Satsionar - T and 1-10 series satellites in the C band, was the equivalent of INTELSAT for the late Eastern Bloc. Both operate in the Geostationary Orbit and there are now many other similar regional and other multinational systems there too. For example ANIK by Canada, MOLINIYA, GORIZONT, and EKTRAN by the Soviet Union, EUTEL and OTS by the European Community, SAKURA by Japan, PALAPA by Indonesia, INDSAT by India, ARABSAT by the Arab countries, BRAZILSAT by Brazil, AUSSAT by Australia, and MORELOS by Mexico. See S. L. Fjordbak, "The International Direct Broadcast Satellite Controversy", *Journal of Air Law and Commerce*, vol.55 (1990), p.903 at pp.903-905.

the EC [European Community] member states has doubled"⁶, and that "[s]ome 20 highly diverse programs are already being broadcast to the whole of Europe, from the polar circle to North Africa and from Portugal to the Balkans ..."⁷. Canadian and United States broadcasts have been "... received by international audiences for several years"⁸. Ross predicts that international direct broadcasting will continue to grow as the use of communications satellites increases⁹ and in 1990 Giffard wrote that "[s]everal countries, including Austria, Britain, Norway, Sweden and Switzerland ... are planning several new international services"¹⁰. In the same context he supplies figures to show that the number of television channels available in Europe has expanded from thirty seven in Western Europe in 1983 to seventy nine in 1987 (a growth of 114%), to ninety one in 1989 (up 136% from 1983 and 15% from 1987)¹¹. Programme hours rose 26% between 1987 and 1989. He estimated that by the end of 1992 Europe would host up to two hundred television channels broadcasting over 420,000 hours each year and that by the year 2000 this figure

⁶ Brian L. Ross, "'I Love Lucy,' But The European Community Doesn't: Apparent Protectionism In The European Community's Broadcast Market", Brooklyn Journal of International Law, vol.16 (1990), p.529 at p.535.

⁷ Brian L. Ross, *op. cit.* at p.535 n26.

⁸ S. Ruth, "The Regulation of Spillover Transmissions from Direct Broadcast Satellites in Europe", Federal Communications Law Journal, vol.42 (1989), p.107 at p.108.

⁹ Brian L. Ross, *op. cit.* at p.535 n26.

¹⁰ C. A. Giffard, "European Regulation of Transborder Television", California Western Law Review, vol.27 (1990), p.159 at p.162.

¹¹ *Ibid.*

will have risen to more than 630,000 hours¹². While he does not specifically state so, it is perhaps legitimate to infer from Giffard's article that he believes that there is a necessary correlation between the level of television broadcasting in general in Europe and transborder television broadcasting activity, and anticipates a similar rate of growth in the latter.

Of the eighty one states involved in this activity, twenty eight are countries in Europe or North America. The remainder are, with some exceptions¹³ the poorer and less technologically developed members of the international community¹⁴. Thus international direct broadcasting is certainly not the exclusive preserve of the wealthy nations. That said however, the developed countries' international direct broadcasting activities do appear to be much more extensive than their lesser developed cousins. At least twenty four or 86% of the European and North American countries just referred to above target five or more regions, and target information for two others is unknown¹⁵. By comparison only twelve of the countries comprising the remainder of the international direct broadcast community (23%) transmit to five or more regions¹⁶. Even including all those countries for which there is no target audience data this figure only rises to thirty two or 60%. A

¹² Ibid.

¹³ Such as New Zealand, Australia, Saudi Arabia, South Africa and China.

¹⁴ This information is based on data provided in the 1991 World Radio TV Handbook. An abstract of the data provided in this publication is contained in this paper's appendix 1.

¹⁵ Ibid.

¹⁶ Ibid.

position paper presented to the 1985 World Administrative Radio Conference stated on the basis of International Telecommunications Union figures that "... 90 percent of the 200-odd new satellites proposed at the end of 1984 were owned by industrialized countries or international organizations they controlled; over 50 percent belonged to just nine countries"¹⁷.

In sum therefore, international (direct) broadcasting is common, particularly by radio. It appears likely that this level of activity will increase in the future. Although a significant proportion of the international community is involved in international (direct) broadcasting activity, it is also evident that European and North American countries generally dominate the airwaves.

1.3 The nature of the problem generated by this new technology

It is possible for a receiving state to regulate an incoming transmission when it is transmitted point to point or broadcast for community reception. The government of the receiving state can physically control the construction of the (usually very expensive) stations necessary to pick up such signals as well as the cables or domestic broadcast media used for re-transmission of the signal to the ultimate users. If the programme is propagandist, injurious to public order, health or morals, or if it is defamatory, or interferes with the independent cultural development of the receiving state's population, it has the capacity to censor the programme or prohibit its distribution altogether. If the programme is broadcast direct however, no such

¹⁷ Gregory C. Staple, "The New World Satellite Order: A Report from Geneva", *American Journal of International Law*, vol.80 (1986), p.699 at p.706.

control is possible.

1.4 Options open to a state if it objects to the content of a programme broadcast to its population from outside its borders

If a receiving state objects to a programme beamed in to its population from outside its borders, there are two types of response it can take.

1.4.1 The first is to jam the signal. This involves transmitting another signal on the same frequency as the incoming programme so as to interfere with it and make reception impossible. States have consistently resorted to jamming since the 1930's¹⁸. Ruth describes jamming as the "usual" way of dealing with unwanted broadcasts from another state¹⁹, and Luther notes that "... shortwave-radio signals ... have long been combated by jamming"²⁰. Savage and Zacher conclude that jamming is not particularly effective²¹ and often interferes with local broadcasts²². They also estimate that jamming a broadcast costs five times as much as it costs to produce the programme jammed²³. Fisher points out that the development of satellite technology has made jamming even more difficult than it was in respect of

¹⁸ For an excellent brief history of jamming see J. J. Savage and M. W. Zacher, "Free Flow versus Prior Consent: The Jurisdictional Battle over International Telecommunications", *International Journal*, vol.42 (1987), p.342 at pp.347-352.

¹⁹ S. Ruth, *op. cit.* at p.123.

²⁰ S. F. Luther, *op. cit.* p.93.

²¹ J. J. Savage and M. W. Zacher, *op. cit.* at p.351.

²² J. J. Savage and M. W. Zacher, *op. cit.* at p.346f.

²³ *Ibid.*

terrestrial broadcasting. A ring around the borders of a country transmitting on a given frequency could prevent terrestrial broadcasts on that frequency from entering the country. However, a programme transmitted by satellite comes in from above. To effectively jam this type of signal a state would have to operate jamming stations set not only around its borders but also all over its interior as well²⁴.

As well as being expensive and in practical terms not particularly effective, the legality of jamming is not undisputed²⁵. It also leads to arguments and international disharmony. Arguments over jamming have arisen in the International Telecommunications Union and the General Assembly of the United Nations²⁶.

1.4.2 A second type of response to an unwanted foreign broadcast is a domestic legal one. In 1985 after frequent protests to the United States about the intrusion of television signals into Canadian territory from south of the border²⁷, the Canadian government for example imposed extremely heavy taxes on Canadian firms which bought advertising time on United States television stations beaming programmes into Canada from across the border²⁸. This type of

²⁴ D. I. Fisher, Prior Consent to International Direct Satellite Broadcasting, p.3.

²⁵ Ibid. See also UNGA Res. 424 (1950), U.N. Doc. A/1775 (1950); S. Ruth, op. cit. at p.122.

²⁶ J. J. Savage and M. W. Zacher, op. cit. at p.355f.

²⁷ F. H. Cate, "The First Amendment and the International "Free Flow" of Information", *Virginia Journal of International Law*, vol.30 (1990), p.371 at p.383f.

²⁸ T. M. Lupinacci, "The Pursuit of Television Broadcasting Activities in the European Community: Cultural Preservation or Economic Protectionism?", *Vanderbilt Journal of International Law*, vol.24

response is not particularly desirable or effective. Firstly, it clearly will not work to restrict programmes funded not by advertising but by sponsorship from foreign government sources such as Radio Liberty, Radio Free Europe and Radio Marti²⁹. It would be of similarly little use in respect of broadcasting operations such as those designed to meet a specific military purpose such as those conducted by the United States in Nicaragua and Afghanistan³⁰.

Nor will it work if the relative economic strength of the two countries involved is unbalanced. Thus in the dispute outlined above between Canada and the United States, Canada was able to enact domestic legislation because it has the economic strength to withstand the retaliatory measures enacted by the United States. This was not the case when in 1985/6 South Korea took steps similar to those taken by Canada, in this case to restrict the importation of United States television programmes, movies and videos. South Korea was unable to endure the retaliatory measures taken by the United States and was obliged to back down³¹. South Korea fared no better in 1988 when the Japanese broadcasting company NHK commenced direct broadcasting by satellite and its programmes reached homes in South Korea. South Korea

(1991), p.113 at p.149.

²⁹ Radio Free Europe is funded by the United States' Central Intelligence Agency. See J. J. Savage and M. W. Zacher, *op. cit.* at p.340. See also S. F. Luther, *op. cit.*, p.79; see also J. O. Salinas, "Radio Marti: Meeting the Need for Uncensored Information in Cuba", *New York University Journal of International Law and Politics*, vol.19 (1987), p.433 at p.453f.

³⁰ S. F. Luther, *op. cit.* p.147f.

³¹ T. M. Lupinacci, *op. cit.*, at p.147f. See also Brian L. Ross, *op. cit.* at p.556.

protested but their claims fell on deaf ears³². When international measures were promoted through UNESCO to address international communications issues, the United States withdrew at first its funding³³ and then its membership³⁴ crippling the organisation. On the other hand the United States found the shoe on the other foot in 1989 when the European Community adopted a Directive which the United States felt had the potential to severely restrict United States access to the European television broadcasting market³⁵. The United States was able to exert some pressure during the debate prior to the Directive's adoption softening it to a degree³⁶, but despite threats of reciprocal retaliatory measures³⁷, complaints under the procedures provided under the General Agreement on

³² S. Ruth, op. cit. at p.124. It is not clear whether these transmissions were intentionally broadcast to South Korean homes or whether they were spillover emissions. In either case South Korea was unable to prevent the intrusion and evidently felt that jamming and economic and / or domestic legal retaliation were not viable responses.

³³ Department of State Authorization Act, Fiscal Years 1982 and 1983, Public Law No.97-241 [S. 1193]; August 24, 1982, para 109(a), 96 STAT. 276.

³⁴ New York Times, 31/12/84, section 1, p.3 "Unesco Head Denounces U.S. Delegate".

³⁵ Council Directive on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, 89/552/EEC, 32 O. J. Eur. Comm. (No. L298) 23 (1989).

³⁶ Brian L. Ross, op. cit. at p.535. See also T. M. Lupinacci, op. cit. at p.119.

³⁷ T. M. Lupinacci, op. cit. at pp.142-151; Brian L. Ross, op. cit. at p.545f; F. H. Cate, op. cit. at p.409ff.

Trade and Tariffs³⁸, and vitriolic criticism of the Directive through the media and at the diplomatic level³⁹, the European Community seems unperturbed⁴⁰. This is probably because its members know that European Community access to the United States broadcast market is far less significant to the Community than the United States access to the European market is to the United States⁴¹. Most commentators also believe the complaint under GATT is unlikely to succeed⁴².

Moreover, even where a programme's funding structure is susceptible to this type of regulation it may produce undesirable consequences for both of the

³⁸ T. M. Lupinacci, op. cit. at pp.131-142; Brian L. Ross, op. cit. at p.544f; C. A. Giffard, op. cit. at p.168.

³⁹ The criticisms of the Directive voiced by United States government officials and broadcasting industry spokesmen have been widely reported. See for example The New York Times, Friday 9 June 1989, D1, col.3; also The New York Times 4 October 1989, A1, col.5; The Times (London), 20 May 1989, p.2 col.8; Los Angeles Times, 11 October 1989, B7, col.4; Wall Street Journal 6 October 1989, B1, col.3; Wall Street Journal, 4 October 1989, B7, col.3; Economist, 10 September 1989, p.19. See also F. H. Cate, op. cit. at p.407ff.

⁴⁰ C. A. Giffard, op. cit. at p.170.

⁴¹ United States programming dominates 28% of European television airtime. T. M. Lupinacci, op. cit. at p.124. The whole world only supplies 2% of the programmes broadcast within the United States. F. H. Cate, op. cit. at p.418. At the same time the European audiences are bigger than the whole United States and Japanese audiences combined. C. A. Giffard, op. cit. at p.166. Broadcasting exports generate half of the United States' annual trade surplus making it the United States' biggest export dollar earner after defence. T. M. Lupinacci, op. cit. at p.126. Fifty six percent of this revenue comes from Europe. Brian L. Ross, op. cit. at p.539.

⁴² Brian L. Ross, op. cit. at p.555f; T. M. Lupinacci, op. cit. at p.152f; F. H. Cate, op. cit. at p.411.

countries involved. In the case of the United States / Canadian dispute above for example, the United States responded to the Canadian taxes by passing reciprocal 'mirror' legislation. This did nothing to modify the Canadian stance and Lupinacci suggests that the long term result of the incident was that television broadcasting and programming was excluded indefinitely from the scope of the United States / Canada Free Trade Agreement of 1987⁴³ thus denying both populations some of the mutual benefits expected to flow from that treaty.

1.5 There is currently no international legal regulatory regime to govern disputes relating to international broadcasting issues

The imperfect measures discussed above are the only options currently available to parties involved in international (direct) broadcasting disputes. Although a variety of international organisations are involved in the regulation of technical aspects of international broadcasting⁴⁴ and some progress is

⁴³ T. M. Lupinacci, op. cit. at p.151.

⁴⁴ The International Telecommunications Union provides rules in the form of Radio Regulations agreed on at periodic World Administrative Radio Conferences (WARCs) to ensure that spillover is reduced to the "maximum extent practicable" (RR428A). It also provides a forum in which, and a set of procedural rules by which, disputes can be resolved. It does not set out guidelines for programme content however, and is strictly designed to ensure that transmissions in one country should not interfere unduly with legitimate signals operating on similar frequencies in a neighbouring state. See S. F. Luther, op. cit., p.101. It is "... strictly a technical guideline ...". See S. L. Fjordbak, op. cit. at p.913. See also D. I. Fisher, op. cit., p.26 where he reports that France and Sweden "... were of the view that the ITU regulations did not solve the basic legal questions associated with DBS use" and that "... while those regulations were of technical and administrative significance, there was a continued need for clear guidelines if disputes were to be avoided". See also

being made in establishing principles to govern access to the physical resources necessary to engage in this activity⁴⁵, there are no accepted principles available to members of the international community to resolve disputes arising in this field⁴⁶. This is why individuals such as Stewart and Hasse have endeavoured to develop different international legal responses to apply in such disputes⁴⁷. There have also been attempts by international organisations to meet the demands presented by this new technology. These organisations include the United Nations' Committee on the Peaceful Uses of Outer Space which maintained special working groups on international direct broadcasting since the issues associated therewith were brought into sharper focus with the development of satellite technology⁴⁸. UNESCO's work on the development of a New World Information and Communications Order represents another attempt to

p.54f where he writes of the ITU that "[t]he mandate of that organization does not ... extend to resolution of the various political and legal problems associated with the conduct of such services [as DBS]".

⁴⁵ For an examination of this progress see below chapter 5.2.2.2.

⁴⁶ M. N. Taishoff, State Responsibility and the Direct Broadcast Satellite, p.168.

⁴⁷ M. L. Stewart, To See the World: The Global Dimension in International Direct Television Broadcasting by Satellite, passim; L. Hasse, "Finding a Basis for International Communications Law: The Satellite Broadcast Example", *Case Western Reserve Journal of International Law*, vol.22 (1990), p.97.

⁴⁸ The first of these was mandated by UNGA Res. 2453 of 20 December 1968 and reported to COPUOS on 26 February 1969 (A/AC.105/51). It continued its work until 1974 when it was recessed. After that the Legal Sub Committee of COPUOS took over working on what ultimately became the Principles The Use By States Of Artificial Earth Satellites For International Direct Television Broadcasting in 1982.

fill this gap in the international legal system⁴⁹. More recently the European Community's Convention and Directive on Transborder Television has attempted a regional solution to the same problem⁵⁰. Some of these attempts will be discussed in more depth in chapter five below. For the moment it is enough to note that international law currently does not provide a solid basis on which international direct broadcasting disputes arising from the rapid advances in communications technology, in particular from the development direct broadcast satellites, can be resolved peacefully. This paper suggests a solution to this shortcoming.

1.6 The argument

From the debates and discussions surrounding the various attempts to address the problems associated with international broadcasting, two basic positions have emerged. One camp maintains that international broadcasting should not be restricted in any way. The proponents of this view oppose any regulation largely on the grounds that such control would be inconsistent with the right to freedom of expression as enunciated in the Universal Declaration of Human Rights and the variety of other global and regional international instruments, and national constitutional clones it has

⁴⁹ See chapter 5.2.2.1 below.

⁵⁰ Council Directive on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, 89/552/EEC, 32 O. J. Eur. Comm. (No. L298) 23 (1989); European Convention on Transfrontier Television, signed in Strasbourg, 5 May 1989, presented to Parliament (UK) in May 1990, as Miscellaneous No.12(1990), Telecommunication (Cm1068).

spawned⁵¹. This camp was originally occupied by most of the states in Western Europe and North America, essentially the developed world. However, the European Community's Directive on Transborder Television of 1989 suggests that the European Community may not be as firmly set in this "free flow" camp as they once were.

The other position in the international broadcasting debate insists that there must be some controls on the nature of the programmes broadcast internationally in order to safeguard all peoples right to "... freely pursue their ... cultural development"⁵² independent of foreign interference. The countries in this camp tend to be lesser developed countries concerned about the developed world's domination of the international broadcasting domain, and what used to be Eastern Bloc countries. More recently, as just noted, the countries of Western Europe may have moved closer to this position as well. The countries in this camp usually justify their call for restrictions on unfettered international broadcasting activity on grounds that regulation is necessary to permit the independent cultural development of the population of the receiving state⁵³. Advocates of this position point to

⁵¹ D. I. Fisher, op. cit., p.5f and n13; S. L. Fjordbak, op. cit. at p.99f; F. H. Cate, op. cit. at p.373f; L. Hasse, op. cit. at p.97f; J. O. Salinas, op. cit. at p.439; M. N. Taishoff, op. cit., pp.89-101 and pp.127-140.

⁵² International Covenant of Civil and Political Rights, article 1(1), Human Rights: A Compilation of International Instruments, p.18 at p.19.

⁵³ See for example the stance taken by the European Community in respect of the Transborder Television Directive. Brian L. Ross, op. cit. at p.529f; T. M. Lupinacci, op. cit. at pp.120-122; C. A. Giffard, op. cit. at p.167f. Also in a context wider than in relation just to Europe see D. I. Fisher, op. cit., pp. 5 and 34; F. H. Cate, op. cit. at pp.381-

principles of international law such as the principle of non intervention based on territorial sovereignty, and the principle of self-determination. According to countries such as these, the best means of regulating international broadcasting is to found an international legal obligation on broadcasters or their host states, to obtain the consent of all of the states into which they propose to broadcast before commencing transmission.

If these two now polarised positions are to be reconciled more has to be done than merely restating the dichotomy between free flow based on the right to freedom of information on the one hand and prior consent based on state sovereignty on the other. Fisher criticises the approach taken in the Principles adopted by United Nations General Assembly Resolution 37/92 for this very failing⁵⁴. Such reconciliation is clearly not beyond the pale; as Fisher notes that is why there have been so many attempts over such an extended period to reconcile the two positions⁵⁵. Some advocates have attempted to resolve the dispute by arguing the superiority of one of the two opposing views over the other. This approach, as will be seen in later chapters of this paper, is evident in debates conducted within the United Nations framework. Others have attempted to bridge the gap between the two positions by advocating compromises such as the consent to systems approach offered by Fisher⁵⁶. The

384.

⁵⁴ D. I. Fisher, *op. cit.*, p.47.

⁵⁵ D. I. Fisher, *op. cit.*, p.150.

⁵⁶ See D. I. Fisher, *op. cit.*, *passim*, but especially his conclusions on p.199. On this approach broadcasters would be required to obtain the consent of states receiving the signals from a new broadcasting system prior to activating the system. However, once the system was approved the receiving

system advocated in this paper is based on the right to freedom of information as expressed in article 19 of the Universal Declaration of Human Rights. It should therefore be acceptable to free flow advocates. It is designed to encourage the responsible use of international broadcast media and at the same time meet the on going cultural concerns of receiving states.

state would have no power to vet individual programmes within the system. While from each of the camps this option would perhaps be seen as better than surrendering entirely to the opposing viewpoint, it clearly does not resolve the basic differences between the two camps. It is the content of individual programmes which has the potential to bring all the benefits or wreak all the harm attendant upon the development of global mass communications systems. Any practicable regulatory regime must therefore focus on individual programme content; unless this issue is addressed directly the cultural concerns of receiving states cannot be met. On a consent to systems approach a receiving state essentially has to take the proposed broadcaster's word as to what the nature of the programmes to be disseminated will be over the indefinite life of the system, and has to estimate the probable impact of such material on what they guess will be the state of their own cultural development potentially for many years in the future. There is simply too much uncertainty to make this type of approach acceptable to countries concerned at the potential for harm attendant upon an unrestrained free flow position.

Chapter 2

2. A regulatory regime suggested for international broadcasting

The regime for regulating international broadcasting activity advocated in this paper is based on the international human right to freedom of expression. It divides programmes into three categories according to their subject matter. Class one contains programmes which constitute propaganda, which damage the reputations of others, or which are detrimental to public health or morals, or to the maintenance of national security or public order. Broadcasting programmes in this category is prohibited. Class two programmes are broadcast to achieve high-minded ideals such as those incorporated in the preamble and principles and purposes of the Charter of the United Nations. Propagation of programmes in this category is absolutely protected by the international human right to freedom of expression. By affording this protection from all interference broadcasting programmes in this category is positively encouraged. The third programme class contains material which is either not broadcast with a view to achieving such high-minded ideals or which are not objectively factual and accurate, whether by design or otherwise. Programmes in this class are afforded protection from interference by the international human right to freedom of expression provided it is not detrimental to the independent cultural development of the people receiving the broadcast.

2.1 Origin of the regulatory regime proposed; the international human right to freedom of expression

This regime for regulating international broadcasting activity reflects the views of the

delegates to the two bodies primarily responsible for drafting the right to freedom of expression as it appeared firstly in the Universal Declaration of Human Rights and subsequently in the International Covenant on Civil and Political Rights.

Article 19 of the Universal Declaration of Human Rights declares that:

"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 media and regardless of frontiers."¹

The right to freedom of expression is reiterated in article 19 of the International Covenant on Civil and Political Rights:

"Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally or in print, in the form of art or through any other media of his choice."²

The first point about the right to freedom of expression as it appears in the Universal Declaration of Human Rights and particularly in the International Covenant on Civil and Political Rights version, is that it deals primarily with the domestic or national application of the right. In relation to broadcasting, it deals with the restrictions which must or may be placed by a state on the activity of broadcasting within its own borders. This is clearly inferred from article 2(2) where it states that by signing and ratifying the Covenant a state undertakes to take "... the necessary steps, in accordance with its

¹ Human Rights: A Compilation of International Instruments, p.1 at p.4.

² Human Rights: A Compilation of International Instruments, p.18 at p.26.

constitutional processes ... to adopt such legislative or other measures as may be necessary to give effect to the rights recognised in the present Covenant"³.

That the Covenant was in this respect nationally focused is also evident from the proceedings of one of the two bodies responsible for drafting article 19. The Netherlands' delegate to the Conference on Freedom of Information suggested that "abuses" of the right to freedom of information should be determined by state judiciaries⁴ and the British Draft Declaration on Freedom of Information referred to the restrictions in the draft's article 2 as being clearly defined by law⁵. The United States' draft⁶ insists that the limits on freedom of information must be by law and the Indian⁷ and British⁸ representatives spoke in terms of restrictions imposed by state legislation. The law referred to by the Dutch, British and Indian delegates just cited is explicitly municipal rather than international law. The United States was clearly of the same opinion because its delegate, Zechariah Chafee, explained that restrictions should be operated by a judicial body and not an administrative one, or otherwise the administration would be able to censor material critical of itself, though not necessarily of the state *per se*⁹. Dr Castro, the Portuguese representative, suggested that the extent of international involvement should be to declare freedom

³ Loc. cit. at p.19.

⁴ E/CONF.6/C.1/SR/7, 29/3/48, p.8.

⁵ E/CONF.6/C.1/41, 13/4/48, p.2 (article 2).

⁶ E/CONF.6/C.1/1; E/CONF.6/C.1/SR/13, 1/4/48.

⁷ E/CONF.6/C.1/SR/7, 6/4/48, p.8 (Sir Dhiren Mitra); E/CONF.6/C.4/5, 31/3/48.

⁸ E/CONF.6/C.4/SR/8, 6/4/48, p.3 (Mr Evans).

⁹ E/CONF.6/C4/SR/9, 7/4/48, p.4.

of information a human right and that detailed delimitation of such restrictions as the international framework permitted should be left to individual states to determine¹⁰. Sir Dhiren Mitra, representing India, noted that "... there would be no compulsion on states to legislate if they had no need or no desire for such legislation."¹¹. His views were reiterated by the British delegation¹² and no criticism of this approach is evident.

Thus it can be seen that throughout the discussions in the Conference on Freedom of Information the delegates clearly envisaged that the right to freedom of expression they were drafting should be implemented at the national level. Notwithstanding that the right is included in an international legal instrument and that it is expressly said to apply "... regardless of frontiers ..." ¹³, no novel implementational structure within which the right to freedom of expression was to be given life was envisaged. The right was to be effected through municipal legal systems. In this sense, this functional sense, the right to freedom of expression contained in the International Covenant on Civil and Political Rights, was nationally rather than internationally focused.

Nevertheless, the writer suggests that the right as incorporated within both the Universal Declaration of Human Rights and in the International Covenant on Civil and Political Rights introduced to give it effect, and elaborated by the travaux preparatoires,

¹⁰ E/CONF.6/C.1/SR/10, 31/3/48, p.4.

¹¹ E/CONF.6/C.4/SR/7, 6/4/48, p.8.

¹² E/CONF.6/C.4/SR/8, 6/4/48, p.3

¹³ Universal Declaration of Human Rights, article 19, loc. cit.; International Covenant on Civil and Political Rights, article 19(2), loc. cit..

may still provide the skeleton of a implementationally international system for regulating international broadcasting. Just as in terms of the Covenant a state is obliged to prohibit propaganda and may prohibit other programmes on the grounds of national security or public order, health or morals, so too, it is suggested, the international community ought to prohibit the broadcasting of propaganda and may decide to prohibit other programmes as prejudicial to international security, international public order, health or morals. Similarly with the other features restricting the operation of article 19 suggested in the background papers in respect of the distinction between classes two and three.

The writer in no way means that the international community is in any way obliged in terms of the Covenant or Universal Declaration to adopt such an approach to international broadcasting regulation. It is simply that the regime embodied in those international instruments provided inspiration for the regulatory scheme advocated in this paper. It is suggested that the principles agreed in relation to the right to freedom of expression which the drafters envisaged would be implemented at a national level, can and should be applied to a system to regulate international broadcasting activity implemented internationally. Some modification may be required to the rules agreed on, but in the main the basic principles can be lifted from its originally envisaged national level implementational framework for the operation of the right to freedom of expression and applied to a broadcasting regulatory system placed in what is suggested would be a much more appropriate, internationally pitched implementational environment. The merits of such a transformation, whether the international community should take steps to replace the current national implementational framework with

an international one at least as it concerns broadcasting, will be discussed in chapter six. The rest of this chapter will briefly expand on the main features of the system implicitly endorsed by the drafters of the right to freedom of expression to be given effect at a national level. A few comments will also be made about the efficacy of translating these skeletal principles into an internationally pitched implementational structure.

2.2 The right to freedom of expression in the Universal Declaration of Human Rights and in the International Covenant on Civil and Political Rights is not unlimited

The right to freedom of expression, and in particular the right to "...seek, receive and impart information regardless of frontiers ... through any media..."¹⁴ appears to preclude any regulation of international direct broadcast satellite activity and to render a breach of a fundamental human right the jamming activities to which states have at times resorted¹⁵.

However, this is not the case. Drafting article 19 of the Universal Declaration of Human Rights and article 19 of the International Convention on Civil and Political Rights was largely the task of the drafting committee of the Human Rights Sub Commission on Freedom of Information and the Press¹⁶. Most of the basic drafting work however, was done on the drafting

¹⁴ Universal Declaration of Human Rights, article 19, loc. cit.; International Covenant on Civil and Political Rights, article 19(2), loc. cit..

¹⁵ J.G.Savage & M.W.Zacher "Free Flow Versus Prior Consent: The Jurisdictional Battle over Telecommunications", *International Journal*, No.2, 1987, p.342 at 347ff.

¹⁶ E/CN.4/SR.37, 13/12/47, p.17.

committee's behalf by the United Nations Conference on Freedom of Information, and article 19 in both instruments stands today substantially the same as it was recommended by that Conference to the Human Rights Sub Commission¹⁷.

The proceedings of both the Conference and the Sub Commission reveal a considerable degree of consensus about the main features characterising the system proposed in this paper for regulating international broadcasting activity. They recognise that some programmes are not protected by the right to freedom of expression because they are propaganda, because they damage the reputations of others, or are prejudicial to the maintenance of public order, health, morals or national security. This recognition ultimately resulted in the terms of article 19(3) and article 20 of the International Covenant on Civil and Political Rights. If "information" is the proper object on which the right to freedom of expression is to operate, then the Conference and the Sub Commission both regarded such material as "non-information".

Both bodies also recognised that within this class of "information" all of which does properly fall within the protective embrace of the right to freedom of expression as contained in article 19 of the Universal Declaration of Human Rights and in the International Covenant on Civil and Political Rights, some "information" should be given greater protection than other "information". Moreover, there is some indication that a greater degree of protection should be afforded when the programme broadcast meets high standards of objective accuracy and when a broadcaster has satisfied a duty to broadcast material which is designed to further objects such as those embodied in the Charter of the United Nations.

¹⁷ Compare article 19 and E/CONF.6/C.4/71, 14/4/48.

A third feature of the proposed regulatory system evident from the proceedings of the Conference and the Sub Commission is that when a broadcaster fails to satisfy such a duty or when he broadcasts material which, by design or otherwise, does not meet such standards of objective accuracy, the degree of protection afforded this less worthy type of "information", should be tempered by the application of an at least potential restriction based on cultural relativity.

2.3 Class one restrictions

2.3.1 The Conference on Freedom of Information agreed that certain programmes should be excluded from the scope of article 19 to protect the reputations of others

A number of subjects are explicitly excluded from the protective embrace of the right to freedom of expression by article 19 of the International Covenant on Civil and Political Rights¹⁸. Material which encroaches on the reputations of others is excluded. The United States' delegate to the Conference, having stressed the importance of the principle of freedom of information and its basic role in human rights¹⁹, notes that in his country restrictions are permitted to prevent libel²⁰. He thereby apparently styles such libelous material as outside the scope of article 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. The British delegation's proposal for treating freedom of information also makes specific provision for legal restrictions to be imposed to protect individuals from

¹⁸ See note 2.

¹⁹ E/CONF.6/C.1/SR/3, 25/3/48, p.3.

²⁰ E/CONF.6/C.1/SR/3, 25/3/48, p.5.

defamation²¹. Professor Dehousse, the Belgian representative, explicitly approved the imposition of limitations on the right to freedom of information to prevent libel and slander²² provided the concepts of libel and slander were clearly defined.

The need for explicit definitions of the circumstances in which restrictions may be imposed was also stressed by France and Britain²³ and the United States' proposal to impose only one broad, all encompassing restriction, rather than to specify each limit definitively, was rejected by the Conference²⁴. The nature of the limitation on the freedom of information for protecting the reputations of others was discussed by the Conference²⁵ and at first the concept involved was identical to the libel and slander of English law. This definition was considered too narrow, particularly because it could only come to bear on the reputation of individuals while groups could not be slandered or libelled. The result of this discussion saw agreement that the text under consideration should be altered to allow for restriction in the case of "publications which libelled or slandered the reputations of autrui" of the original "other persons"²⁶. The Conference on Freedom of Information therefore saw restrictions on freedom of information as permissible to protect the reputations of others and defined the circumstances in

²¹ E/CONF.6/C.1/41, 13/4/48, p.3 (article 2(g)).

²² E/CONF.6/C.1/SR/9, p.5f.

²³ E/CONF.6/C.4/SR/5, 3/4/48, p.7 (Britain) and p.8 (France); E/CONF.6/C.1/SR/11, 31/3/48, p.3f.

²⁴ Loc. Cit. p.10; E/CONF.6/C.4/SR/7, 6/4/48, p.6 (18 against, 1 for, 3 abstentions).

²⁵ E/CONF.6/C.4/SR/7, 6/4/48, p.4ff.

²⁶ E/CONF.6/C.4/SR/7, 6/4/48, p.6.

which such may be imposed as analogous to the Common Law's libel and slander, but widened to enable groups to be protected also²⁷. This opinion found final expression as article 19(3)(a) of the International Covenant on Civil and Political Rights.

The international human right to freedom of expression was thus viewed by the delegates to the Conference on Freedom of Information as limited by a restriction based on a modified form of the common law's defamation. This human right mandates national defamation laws, and it is submitted that there is nothing about the common law's concept of defamation, or about the variant proposed by the Conference, which would make it impossible to apply within an international legal structure. Just as in the domestic context a state may legislate limitations on the right to freedom of expression to protect the reputations of others, so too, applying this same principle at the international level, it would be permissible for the international community to impose restrictions on international broadcasting activity where that activity presented a threat to the reputations of others. Whether the international community should adopt such a restriction will be discussed in chapter six. For the moment it is submitted that there is nothing about the international human right to freedom of expression seen as restricted by this slightly redefined common law notion of defamation, which would prevent the application of right thus restricted at the international level in a system for regulating international broadcasting.

2.3.2 The Conference also excluded from the scope of article 19 information prejudicial to public health and morals

²⁷ No attempt was made to define which groups would be covered.

The Conference also seems to have accepted the validity of restrictions on freedom of information to protect public health or morals. This was recognised in article 19(3)(b) of the International Covenant on Civil and Political Rights. The United States appears to endorse the legitimacy of such limitations²⁸ and the British delegation proposed that restrictions be applied to prevent "obscenity"²⁹. The French representative, M. Terrou, noted that conclusions reached in two of the four committees established by the Conference, accepted that censorship in some situations is legitimate³⁰. The United States' representative, Zechariah Chafee, warned that the term "morality" was so ill-defined as to render the scope of the limitation very broad³¹. Norway's delegation also expressed dissatisfaction with vague restrictions such as morality³² but clearly accepted the principle of censorship for its spokesman regarded it as legitimate to prohibit material unsuitable for children³³. The Conference seems therefore, to accept that some degree of censorship to protect some kind of moral standard is legitimate.

Applying this principle to the internationally focused activity of international broadcasting, would see it as legitimate for the international community to consider restricting the operation of the right to

²⁸ E/CONF.6/C.1/SR/3, 25/3/48, p.5.

²⁹ E/CONF.6/C.1/41, 13/4/48, p.2 (article 2(d)).

³⁰ E/CONF.6/C.4/SR/9, 7/4/48, p.3.

³¹ E/CONF.6/C.4/SR/8, 6/4/48, p.3. The United States' stand against imprecision in this discussion is hard to reconcile with their earlier calls for a general restriction on freedom of information recorded in E/CONF.6/C.4/SR/5, 3/4/48, p.7.

³² Ibid.

³³ Ibid.

freedom of expression where a programme is prejudicial to the health or morals of the international public.

However, where the delegates to the Conference could not find any consensus was on a definition of what constituted "immoral" material. Immorality is certainly the most amorphous of the grounds on which programmes in class one may be prohibited. Defining 'immoral' material is a problem which dogs censors at the national level. However, notwithstanding its definition defying character, at that level censors do succeed in making rational and consistent if not entirely uncontroversial decisions about such material, and it could be argued that if success can be achieved at the domestic level, a similar result could be achieved internationally (regionally or globally) with on-going study, cooperation and consultation. Nevertheless, the international community has at its disposal a much more restricted range of tools for enforcing its decisions in such controversial cases than nation states. Consensus is correspondingly much more important in any practical regulatory system at the international level, and it may also be observed that the probability of achieving consensus drops as the size of the population from which the consensus is sought increases. For these reasons serious doubt must hang over the viability of including a prohibition on broadcasting material which is "immoral" in any international broadcasting regulatory system.

The same doubt need not dog a prohibition on the grounds of a programme's impact on the health of the international public, though to the writer's knowledge there has been no research on a definition of what constitutes a threat to the international public's health.

2.3.3 The Conference did not regard propaganda as

within the protective embrace of article 19

The Conference also accepted that propaganda should not enjoy the protection of the right to freedom of information. Article 20 of the International Covenant on Civil and Political Rights³⁴ represents the final product of this acceptance. The Conference considered a draft Convention on Freedom of Information which proposed imposing a moral obligation on information spreaders not to disseminate propaganda³⁵. The United States' representative accepts the validity of censorship³⁶, and while he does not expressly refer to propaganda his comments taken in context clearly indicate that his words did focus on that issue. The Norwegian delegate, Mr Lunde, also accepted that propaganda was not a proper object for protection by the right to freedom of information, though he expresses concern at the imprecision of such concepts³⁷. Mr Beekenkamp speaking on behalf of the Netherlands also expressed some doubts about the utility of introducing highly subjective, ill-defined terms into the text of their declaration³⁸ and the British and French endorsement of explicit, as opposed to general, restrictions has already been noted³⁹. The Conference seems to have agreed that propaganda should not be covered by the right to freedom of information, but, as with their exclusion of "immoral" material no consensus could be achieved on defining the term used.

A very general indication as to what the delegates had in mind when they spoke of "propaganda"

³⁴ Loc. Cit.

³⁵ E/CONF.6/C.1/2, 24/3/48, p.3f.

³⁶ E/CONF.6/C.4/SR/9, 7/4/48, p.4.

³⁷ E/CONF.6/C.4/SR/8, 6/4/48, p.3.

³⁸ E/CONF.6/C.1/SR/7, 29/3/48, p.8.

³⁹ See note 23.

may be gleaned from their association of propaganda with the information dissemination activities of Nazi Germany during the Second World War⁴⁰. This perhaps suggests that the delegates had in mind a fairly vigorous, forceful and unsubtle form of propaganda such as might be employed during an armed conflict, rather than a less direct type. It is also possible to view paragraph 1 of article 20 of the International Covenant of Civil and Political Rights as coloured by paragraph 2 of the same article which states that "[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law"⁴¹. Thus paragraph 2 of article 20 would be taken as at least semi definitional of paragraph 1 rather than as supplying a separate though clearly related restriction on the right to freedom of information.

A class one restriction based on propaganda is not so broad as to prevent its transition from the nationally focused International Covenant on Civil and Political Rights into an international regulatory regime in the broadcasting field. The merits of such a restriction shall be discussed in chapter six.

2.3.4 The Conference regarded material injurious to public order as outside the protection afforded by article 19

The Conference also saw as legitimate such limitations on the right to freedom of information as are necessary to maintain public order and this conviction now finds its most overt expression in paragraph 3(b) of article 19 of the International Covenant of Civil and Political Rights⁴². The United

⁴⁰ e.g. E/CONF.6/C.1/2, 24/3/48.

⁴¹ Loc. cit.

⁴² Loc. cit.

States delegate, in advocating the freest possible flow of information around the world notes with approval that in his country the right to freedom of information was limited where the information in question constituted incitement to rebellion⁴³. The British proposal for a Draft Declaration on Freedom of Information recognised limits on that right to prevent revolution as legitimate⁴⁴. Mr Ninoff, the Bulgarian representative, stated that the concept of public order was well defined and universally understood⁴⁵ but both the British and French delegates disagreed⁴⁶. The United States clearly did not regard this notion as indisputable since it expressly warned against the inclusion in the declaration text of vague, potentially very restrictive terms such as "public order". The United States' delegate reinforced his view by referring to a report of the International Organisation of Journalists which argued that references to public order as a basis for restricting freedom of information could be construed as preventing, for example, striking factory workers from expressing their position. Again therefore, the Conference was prepared to accept some limits on freedom of information to preserve public order, but no agreement was found on defining the extent of the limitation.

The notion of public order in the sense of *ordre publique*, needs more work on definition but it may well be that there is a greater chance of arriving at a definition in the international context than at the national level. National definitions are often going

⁴³ E/CONF.6/C.1/SR/3, 25/3/48, p.5.

⁴⁴ E/CONF.6/C.1/41, article 2(b), p.2.

⁴⁵ E/CONF.6/C.4/SR/8, 6/4/48, p.2.

⁴⁶ E/CONF.6/C.4/SR/8, 6/4/48, p.3.

to vary according to variations in cultural outlook, and given their authoritarian structure some states may also lack the arbitral mechanisms necessary to facilitate a consensus on such questions. At the international level however, there is no authoritative structure to parallel that found within states and diplomacy has accordingly always played a much more significant role. Rational discussion and debate with a view to reaching consensus may well therefore thrive more readily at the international level than in the domestic context, making the most of this structural advantage of international geopolitical reality. Certainly there seems to be nothing inherent within the notion of international public order which would prevent it being used as a ground for restricting the right to freedom of expression applied in a system for regulating international broadcasting administered at an international level.

2.3.5 The Conference saw national security as a legitimate basis for restrictions on article 19

National security was the final main ground on which restrictions on the right to freedom of information could be justified. Finding expression in paragraph 3(b) of article 19 of the International Covenant of Civil and Political Rights⁴⁷, the Conference considered a text proposed for a Convention on Freedom of Information which also permitted limitations where they were in the vital interests of the state⁴⁸. Translating this ground for restricting the right to freedom of expression into the

⁴⁷ Loc. cit.

⁴⁸ E/CONF.6/C.1/2, 24/3/48, p.3. See also E/CN.4/Sub.1/65 (article 17 II (a) of a draft Covenant on Freedom of Information). The Canadian representative to the Sub Commission held similar views (E/CN.4/Sub.1/SR.45, p.2).

international context would produce a principle that the international community has an option to make a threat to international security a ground for prohibiting the transmission of a programme across a border. The merits of such a restriction will be discussed in chapter six. Certainly the idea of international security is not so bizarre as to render impossible an international regulatory system based on a right to freedom of expression subjected to this restriction.

2.4 The Conference and the Economic and Social Council's Human Rights Sub Commission on Freedom of Information and the Press also accepted that the level of protection afforded by the right to freedom of expression may vary according to the nature of the information being broadcast

Quite apart from the restrictions imposed in respect of propaganda, national security, public order, health and morals, the Conference also seems to have recognised that programmes containing different types of other material, all of which are covered by the right to freedom of expression, that is, which are "information" programmes, should, notwithstanding their inclusion within the protective embrace of that right, be afforded different degrees of protection according to their content.

2.4.1 Class two programmes should be objectively factual

Dr Reyna, the Peruvian delegate to the Conference, agreed with the Chinese representative's observation that "information" consisted of "objective news" and "opinion" which he described as "subjective judgments"⁴⁹. Freedom of information he said, is

⁴⁹ E/CONF.6/C.1/SR/11, 31/3/48, p.6.

"freedom to state the truth and not to publish lies."⁵⁰. The object which the right of freedom of information was designed to protect was "accurate" information according to the Belgian representative at the Conference⁵¹. Even the United States, the most verdant advocate for an absolutist interpretation of article 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, acknowledged at the Conference that the right to freedom of information was limited by the moral obligation of information spreaders "to seek the truth and report the facts"⁵². The British proposal contained similar references⁵³. In the Economic and Social Council's Human Rights Sub Commission on Freedom of Information and the Press, the USSR's delegate, Mr Zonov, noted that "There were many kinds of information..."⁵⁴ and the United States' delegate distinguished four types of information; news, opinions, entertainment, and "other features"⁵⁵.

The three category classification of communication content is also supported by the Canadian representative on the Sub Commission. Having acknowledged that "This right to freedom of information and expression carries with it duties and responsibilities"⁵⁶, he asserts⁵⁷:

⁵⁰ Ibid.

⁵¹ Professor Dehousse, E/CONF.6/C.1/SR/9, 30/3/48, p.4.

⁵² Article 3 of the Draft Resolution proposed by the United States and contained in E/CONF.6/C.1/1.

⁵³ E/CONF.6/C.1/41, 13/4/48, p.4 (article 4(a)).

⁵⁴ E/CN.4/Sub.1/SR.63, 14/6/49, p.11f.

⁵⁵ E/CN.4/Sub.1/SR.66, 16/6/49, p.4.

⁵⁶ E/CN.4/Sub.1/61/Rev.1, 2/2/48, p.1.

⁵⁷ E/CN.4/Sub.1/61/Rev.1, 2/2/48, p.2.

"These restrictions ... however, should be imposed only for causes clearly defined by law. They should be confined to matters which must remain secret in the vital interests of the state; expressions which directly incite people to commit criminal acts; expressions which are obscene; expressions which are injurious to the fair conduct of legal proceedings ... and expressions about other persons which defame their reputations or are otherwise injurious to them without benefitting the public.

"Within the limits thus broadly described the right to freedom of communication should be considered absolute Nevertheless, this right confers upon all who enjoy it the moral obligation to tell the truth without prejudice and to spread knowledge without malicious intent, to help promote respect for human rights and fundamental freedoms ... to help maintain international peace and security ...".

Again three classes of content are evident. One is a series of clearly defined legally prohibited subjects, a second is communications which satisfy responsibilities to achieve the high-minded ideals of truth, knowledge, etc, while the third consists of material which though outside the class one definitions, fails to live up to these responsibilities. It is only the second class which is always entitled to protection by the right to freedom of expression.

There seems therefore to have been some consensus at the Conference that the "information" to be protected as a fundamental human right was to be objectively factual.

2.4.2 Class two programmes should also be broadcast with a view to achieving high minded ideals such as peace, international security and cooperation, and other such objectives

The other feature of this "information" which deserves the protection of the right to freedom of

expression against interference relates to the purpose for which the programme is broadcast. Freedom of Information should operate to promote participatory democracy⁵⁸. The Conference's fourth committee on Law and Continuing Machinery recommended that the right should be used to further the cause of peace and to advance political, social and economic progress⁵⁹ and the British Draft Convention similarly urged that it be used to solve the economic, social and humanitarian problems of the world and to maintain peace and security⁶⁰. Commenting on the Conference at a seminar in Italy in 1964 it was agreed that the information media should be used "... for the good of mankind and not as an instrument of tyranny."⁶¹ and "... it was agreed that information media should inter alia, strive to enhance human dignity, broaden the intellectual and moral outlook of peoples, bring about a better understanding amongst individuals, groups and nations, and enable their readers to play a responsible role in the affairs of the community and the world."⁶². This same emphasis on the purpose of the broadcast as at least partially definitive of the programmes contained in class two is also evident in the quotation given above from the Canadian representative to the Sub Commission on Freedom of Information and the Press⁶³.

The Egyptian representative on the Sub Commission suggested that the "information" to be protected by

⁵⁸ E/CONF.6/C.1/SR/5, p.6.

⁵⁹ Preamble to the Draft Convention on Freedom of Information E/CONF.6/65, 19/4/48.

⁶⁰ E/CONF.6/C.1/41, 13/4/48, p.4 (article 4).

⁶¹ ST/TAO/HR/20, p.39.

⁶² Ibid.

⁶³ See text associated with footnotes 56 and 57.

the right to freedom of expression in the Universal Declaration of Human Rights should be defined as consisting of "... facts and opinions for publication by all media, particularly those of the Press, radio and the films, for the purpose of revealing facts, helping to promote the moral and cultural development of humanity, of maintaining good relations between nations and of spreading the concept of peace throughout the world."⁶⁴. This also suggests that the scope of the freedom of expression in article 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights should, at least in its fullest, most protective form, be limited to communications which aim to achieve the high-minded purposes which define them as class two communications.

Lev Sychrava, the Czech representative agreed:

"The freedom to communicate and disseminate one's thoughts and knowledge is, like any other freedom, closely linked with the general obligation to behave without prejudice to the common interest. Therefore, such freedom may be recognised as a human right, meriting the protection of the law provided only if it is not availed of by a person to secure by deceit or threats, for himself or another person, unjustified advantages to the detriment of the rights of others, and provided his statements are - even without malice on his part - not likely to endanger the moral basis, security, freedom and other spiritual and material interests of society.

"The supreme purpose and genuine interest ... which determines the direction and limits of and desirable freedom of expression, lies in the maintenance of a durable peace, reciprocal in character, based on truth and on values that are valid for everyone and for all the world..."⁶⁵.

⁶⁴ E/CN.4/Sub.1/117, 16/5/50.

⁶⁵ E/CN.4/Sub.1/50, 21/1/48, p.1.

There are innumerable references throughout the Sub Commission's records all expressing the view that the right to freedom of expression is important because it facilitates the attainment of truth, peace, security, development and so forth⁶⁶. There is only one suggestion that communication is an end in its own right⁶⁷ and this is criticised as unrealistic⁶⁸. Similarly, in all of the recorded proceedings of the Conference, there is not one positive assertion that access to information is an end in its own right. The statement nearest to embodying such a position was that made by the United States' delegate, Mr Bolton, who at the outset of the Conference rejected all limitations on freedom of information affirming his belief that everyone is capable of distinguishing right from wrong for themselves⁶⁹. He notes however, that "... all agree ... that freedom of information is essential for individual dignity and world peace."⁷⁰. In identifying individual dignity and world peace as objectives beyond the mere receipt of information, he suggests that his words should not be seen as implying that freedom of information is an end in its own right. And his belief in the individual's ability to distinguish right from wrong appears to infer that the

⁶⁶ E.g. E/CN.4/Sub.1/30, p.2; E/CN.4/Sub.1/32, pp.5 & 12; E/CN.4/AC.1/3, p.6; E/CN.4/21, p.57; A/C.3/SR.57, p.9; E/CN.4/Sub.1/SR.36, p.2; E/CN.4/Sub.1/SR.45, p.4; E/CN.4/Sub.1/SR.63, p.17f; E/CN.4/Sub.1/37, p.3; E/CN.4/Sub.1/41, p.2; E/CN.4/Sub.1/42, p.2; E/CN.4/Sub.1/49/Rev.1, p.2f; E/CN.4/Sub.1/60; E/CN.4/Sub.1/61/Rev., p.1; E/CN.4/Sub.1/SR.64, p.6.

⁶⁷ E/CN.4/Sub.1/42, 19/1/48, p.3, per Dr Chang from China.

⁶⁸ E/CN.4/Sub.1/54, 26/1/48, p.4, per Mr Lomakin from the USSR.

⁶⁹ E/CONF.6/C. 1/SR/3, 25/3/48, p.3.

⁷⁰ Ibid.

attainment of truth is the ultimate object of the right to freedom of information, that the latter is a means rather than an end.

It seems reasonable again to conclude therefore, that the representatives to both the Economic and Social Council's Human Rights Sub Commission on Freedom of Information and the Press and to the Conference on Freedom of Information, were of the view that freedom of expression only protected against restriction by authority, such communications as were not only objectively accurate but also aimed at these specified desirable ends, class two communications.

2.4.3 But what about material which does not fall within the definitions contained in class one but which is not objectively factual or not broadcast to achieve a high-minded purpose such as those contained in the United Nations Charter?

Thus far the Conference and the Sub Commission have agreed that states may prohibit some programmes as falling within a range of narrowly defined categories (the class one restrictions), and at the same time that states are obliged to ensure by legislative or other measures that objectively factual material broadcast to achieve such high-minded objects as truth, knowledge, international peace, progress and understanding, is protected against interference. This clearly leaves a question mark hanging over programmes which are not objectively factual or for such a purpose but which are nevertheless still outside the rigorous definitions incorporated into the class one restrictions. If some types of programmes may be prohibited as defamatory, propagandist or inimical to public health, morals or order, and if states are obliged to positively protect other "information" programmes from interference by the principle of freedom of expression because they are objectively

accurate and strive to achieve the lofty aspirations referred to above, what treatment is to be accorded such information as falls comfortably in neither of these two camps? Information the purpose of which is merely to entertain, titillate or gratuitously appeal to mankind's baser instincts, appears neither to be ripe for definitive prohibition as defamatory or propagandist and so forth, nor to be clearly embraced by the concept of the right to freedom of information. Such material, while not open to prohibition, may still be unable to contest its restriction by authority by appealing to the fundamental human right to freedom of information. This suggests an intermediate class of "information" which is not entitled to as much protection by the right to freedom of expression as objectively factual "information" broadcast to further the high-minded ideals of the United Nations' Charter, but which none the less is not open to prohibition as propaganda or a threat to national security, or public order, health or morals.

2.5 The protection afforded class three programmes by the right to freedom of expression is limited by a restriction based on cultural relativism

If this third intermediate class is entitled to less protection from the right to freedom of expression than programmes in class two, but the option still does not exist for a state (or, after the scheme has been translated into the international context, ought not to exist for the international community) to restrict the transmission of such material as falling within any of the programme categories in class one, one is led inexorably to ask what level of protection should be accorded to each programme class.

Rene Maheu, a philosopher asked by UNESCO for his views on the philosophical basis of the right to

freedom of expression and information saw two classes of right; a "... primary and absolute right to information or factual knowledge ..." and a "... secondary and relative right to expression of opinion ..." ⁷¹. Having cited C.P. Scott's mot juste that "comment is free, fact is sacred" to capture the difference between "... news journalism (e.g. news agencies) and views journalism (e.g. organs of political parties)", he elaborates on the significance of this divided approach ⁷². His comments are worth quoting in full:

"The first right is one of the axioms of democracy in the same way as the right to education, of which it is the natural extension. Therefore, like the right to education, it is fundamental and unconditional.

"This does not apply to the right of expression of opinion. This right forms part of the practice of democracy and is not one of its basic principles. It has, therefore, a certain connection with historical-sociological relativity in which all concrete political reality is expressed.
...

"To admit that the right to expression of opinion should be conditioned by the historical perspective in which a particular democratic regime operates, does not mean sacrificing a human right for reasons of state. On the contrary, it means giving this right its full extension by refusing to sacrifice to an abstraction the fortunes and merits of a specific enterprise. Nor does it imply external restriction ... It means that power of self correction which is implicit in freedom and which is called responsibility. It is this responsibility which specifically delimits the right to expression of opinion.

"This responsibility is two-fold like the internal relation in accordance with which

⁷¹ E/CN.4/Sub.1/49, 21/1/48, p.2.

⁷² E/CN.4/Sub.1/49, 21/1/48, p.2f.

it derives from freedom itself.

"On the one hand all freedom is conditioned by circumstances and consequently assumes the circumstances from which it emerges at the very moment when it affirms in deeds its power to deny these circumstances. Every free expression of opinion, in order to be valid, in order to be genuine, must therefore take into account the historical-sociological perspective in which it is set.

"On the other hand, every expression of free opinion is an appeal to other freedoms ...

"Therefore, recognition of the project of the historic moment of society and respect for the freedom of others compels everyone, when expressing his opinion, to use a two-fold system of imperatives in that estimation of the possibilities, which is covered by the single word "responsibility". This is what determines the proper limits of the right to expression of opinion. Consequently these limits are likewise relative. Of course, in a strictly moral sense, no one other than the person himself is competent and entitled to weigh his responsibility But politics, as we know, substitutes for these myriads of independent individuals an abstract collective person, a reproduction of the structure of the state. Democracy in the form of government based on the principle that this person embodies the "general will" of the individual (identified ex postulato, in normal conditions with the mass of the opinion of the majority...) ..."

Elsewhere⁷³ he similarly notes that:

"... it was necessary to distinguish between two fundamental freedoms: freedom of information and freedom of opinion. Information meant the objective knowledge of facts; opinion implied a personal judgement of an interpretative or appreciative character. Freedom of Information came first in order of logic.

"In the eighteenth and nineteenth centuries, the press was used as a vehicle of personal

⁷³ E/CN.4/Sub.1/SR.27, 22/1/48, p.3.

opinion; it was now a vehicle of information. The immediate consequence of that change, was that at present the "subject of right" was the public, whose freedom of information had to be guaranteed, rather than the individual's liberty of expression.

"... freedom of information. That was a universal concept to which everyone would adhere. Then should come the right of expressing an opinion, which involved the individual's responsibility, and necessarily entailed numerous limitations."

Maheu not only acknowledges the existence of a distinction between objectively accurate communications, his news journalism, and opinion, but suggests that the former is worthy of greater, indeed "unconditional" protection by the fundamental human right to freedom of expression, while the views journalism is entitled to a lesser degree of protection. This supports the class two and three distinction postulated above. If thus far Maheu supports the classification of content suggested above, he also adds to it inasmuch as he describes the limits on expression of opinion, class three communications, in terms of historical-sociological relativity, that is in terms of what would later become known as cultural relativity. The merits of an international regulatory system which involves the notion of cultural relativity will be discussed in chapters three and six.

2.6 Recap

So far the proceedings of the United Nations Conference on Freedom of Information and the Economic and Social Council's Human Rights Sub Commission on Freedom of Information and the Press, have produced a picture of reasonable agreement that programmes should be classified according to content, that class one programmes may or in the case of propaganda must, be

prohibited by law, and that objectively accurate programmes broadcast to further high-minded purposes such as those in the Charter of the United Nations should be protected 'absolutely' by the right to freedom of expression. It also seems reasonably clear that there is an intermediate class of programmes which neither fall within the class one justifications for restriction, nor live up to the high standards of objective accuracy and purposive philanthropy required for classification within class two. This class of programme is entitled to some protection from the right to freedom of expression, but this protection is limited on the basis of cultural relativity.

This scheme, although formulated for application within a single state, can be largely translated, re-focused, into an international context. It therefore supplies a model for a system to regulate international broadcasting activity. As noted some parts of the scheme are potentially more suited to operation at an international level than within a state. It has the immediate advantage of being based on principles which met with a large degree of consensus when the right to freedom of expression was drafted. On the other hand grave doubts exist about the efficacy of some parts of the regime in the international context, even though they may well be feasible at the domestic level. The merits of executing such a translation will be discussed in chapters three to six.

There are however, two further features of the discussions which occurred in the United Nations Conference on Freedom of Information and the Human Rights Sub Commission on Freedom of Information and the Press, which warrant attention at this stage. The first is the prolonged and, it is submitted, confused debate about the role of morality in relation to human rights, and the second is the correlation between

rights and duties.

2.7 The relation of human rights and duties

The proceedings of the Human Rights Sub Commission and the Conference are both heavily laden with references to duties. Although Mr Bolton, the United States' representative, rejected limitations called "responsibilities"⁷⁴, this approach is not echoed by other members of the Conference and it is significant that by the time the United States' proposed Draft Declaration on Freedom of Information⁷⁵ was discussed later in the conference paragraph 4 of the preamble and articles 5 and 6 all accept that the freedom in question was limited by obligations⁷⁶. This sentiment survived to find expression in the draft declaration proposed to the Conference by its drafting committee⁷⁷, and the Conference's first committee, established to investigate the basic tasks of the press and other media of information as well as general problems, also said that freedom of information depended on the effective enforcement of recognised responsibilities⁷⁸. M. Terrou speaking for France stated that the idea of responsibility "underlay" the Human Rights Commission's Drafting Committee's recommended text for article 19 of the Universal Declaration of Human Rights and for the parallel article in the International Covenant on Civil and Political Rights⁷⁹. The USSR's

⁷⁴ E/CONF.6/C.1/SR/3, 25/3/48, p.3.

⁷⁵ E/CONF.6/C.1/1.

⁷⁶ E/CONF.6/C.1/SR/13, 1/4/48.

⁷⁷ E/CONF.6/65, 19/4/48, article 2.1.

⁷⁸ E/CONF.6/C.1/21, 5/4/48, p.1.

⁷⁹ E/CONF.6/C.4/SR/6, 5/4/48, p.2 and E/CONF.6/C.4/SR/5, 3/4/48, p.7.

representative agreed⁸⁰. The Sub Commission's Chairman, G.J. Van Heuven Goedhart expressly says that "... rights are linked to obligations ..."⁸¹. There are many other examples of the delegates' insistence that there must be some relationship between human rights and duties⁸².

Proceedings in both the Conference and the Sub Commission concerning the relationship between human rights and duties are confused and do not reveal a clear consensus about what impact duties should play in the operation of the right to freedom of expression

⁸⁰ E/CONF.6/C.4/SR/6, 5/4/48, p.3.

⁸¹ E/CN.4/Sub.1/39, 19/1/48, p.2.

⁸² For example E/CONF.6/C 1/SR/11, 31/3/48, at p.6 per Dr. Reyna; E/CONF.6/C 1/1; E/CONF.6/C 1/2, 24/3/48, article 22(g); E/CONF.6/C 1/SR/17, 5/4/48, at p.3; Mr Dehousse from Belgium E/CONF. 6/C 4/SR/20, 13/4/48, at p. 3; Mr Lunde from Norway E/CONF. 6/C 4/SR/8, 6/4/48, at p.3. Also see E/CN.4/Sub.1/37, p.4. See also E/CN.4/Sub.1/30, p.2; E/CN.4/Sub.1/SR/25, p.4f; E/CN.4/Sub.1/SR.43 6/2/48, p.4 and E/CN.4/80, 6/2/48, p.9 (paragraph 12(e)); E/CN.4/Sub.1/SR.26, 20/1/48, at p.4. See also E/CN.4/SR.36, 30/01/48, p.2 and E/CN.4/Sub.1/SR.39, 3/2/48, p.5 as well as E/CN.4/Sub.1/50, 21/1/48, p.1; Uruguay E/CN.4/Sub.1/SR.26, p.3; Canada E/CN.4/Sub.1/61, 28/1/48, p.1 and E/CN.4/Sub.1/61/Rev.1, 2/2/48, p.1; Britain E/CN.4/Sub.1/49/Rev.1, p.2; E/CN.4/Sub.1/39, 19/01/48, pp.2f & 5; Per Mr Chafee E/CN.4/Sub.1/SR.42, 3/2/48, p.2 "... every right entails corresponding limitations ..."; the correlation between rights and duties was also accepted in a number of resolutions by the Sub Commission - see E/CN.4/Sub.1/SR.44, 10/2/48, p.4f where the link was accepted 7 to 3; E/CN.4/Sub.1/SR.45, 6/2/48, p.4 where it was accepted 10 to nil with one abstention that "[t]he right to Freedom of Expression also confers upon all who enjoy it the moral obligation to tell the truth without prejudice and to spread knowledge without malicious intent ..."; see also United Nations General Assembly Resolution 59(I) which stated that the fundamental human right of Freedom of Information "... requires as a basic discipline the moral obligation to seek the facts without prejudice and to spread knowledge without malicious intent" (United Nations Year Book 1946-48, p.176); E/CN.4/Sub.1/49, 21/1/48, p.4. E/CN.4/Sub.1/49, 21/01/48, p.2f.

in the Universal Declaration of Human Rights or the International Covenant on Civil and Political Rights. The most that can be said is that an examination of these references to the correlation between human rights and duties suggests that the delegates tended to believe that duties in some way underlie human rights and in some way limit their operation. Given the emphasis placed by the delegates on duties playing a role in the operation of the human right to freedom of expression, the writer feels it is important to find a way of retaining this emphasis, and clarifying how duties fit in, when the freedom of expression based system suggested by the proceedings of the Conference and Sub Commission is translated into the international context and applied to international broadcasting. Both of these problems will be addressed in chapter four. The answer lies in a better understanding of the theoretical foundation of rights and the way in which they function in practice.

2.8 The role of morality in relation to human rights

There is a second feature only indirectly touched on so far which the delegates to the Conference and Sub Commission stress as important in their discussions about the right to freedom of expression. This is the role played by morality in the structure of the right as the delegates saw it. There are innumerable references to the importance of morality in relation to the right, and again for this reason it seems to the writer that some effort should be made to make sense of these references and to examine how the conclusions can be translated into an international setting suitable for application to the field of international broadcasting. Most of the references suggested that the moral dimension in human rights stood as an alternative to the legal. The idea seems to be that the human right to freedom of expression

could be either legal or moral, or alternatively that parts of it could be legal and other parts moral. A third option is to apply the moral or legal question to the character of the obligations which attend in some way⁸³ on human rights, rather than directly to the right itself.

The Uruguayan delegation believed that this distinction between class two and three communication should be based on ethical principles⁸⁴, while Dr Chang from China argued that the right to freedom of information in the Universal Bill of Rights should cover newspapers, news periodicals, radio broadcasts, and newsreels⁸⁵ and should be "moral" or "emotional" rather than legal⁸⁶. Mr Fergusson of the Canadian delegation also identifies the obligation to tell the truth and so forth as moral⁸⁷ and the United Kingdom while favouring "... a code of behaviour for the world press ..." warned that "... it was undesirable to give it a political form."⁸⁸ Although France on 2 April 1948 urged that limitations on the freedom of information be legally enforceable⁸⁹, its proposal to that effect was withdrawn for want of support⁹⁰ and by 5 April 1948 France was prepared to accept a bald reference in the text to "obligations", but was still keen for the Conference to refrain from expressly

⁸³ See chapter 2.7 above.

⁸⁴ E/CN.4/Sub.1/41, 17/1/48, p.2.

⁸⁵ Note the emphasis on "news" or class 2 communications as the proper subject matter for the right to freedom of information.

⁸⁶ E/CN.4/Sub.1/42, 19/1/48, p.1.

⁸⁷ E/CN.4/Sub.1/61/Rev.1, 2/2/48, p.2.

⁸⁸ A/C.3/SR.58, p.4.

⁸⁹ E/CONF.6/C.1/SR/15, 2/4/48, p.6.

⁹⁰ E/CONF.6/C.1/SR/16, 3/4/48, p.7.

casting them as "moral"⁹¹. The United States and Australia worried that terms at that stage employed in the discussion text such as "disciplinary action" and "enforce" might imply the application of legal sanctions and compulsion, not an interpretation they favoured⁹². The United States' draft declaration on freedom of information expressly described these obligations as "moral"⁹³, as did the Italian representative when he said that freedom of information and its abuses were moral issues⁹⁴. Although the final text recommended to the Conference by its drafting committee appears to have accepted the French compromise position, including only an unadorned reference to "duties"⁹⁵, there was clearly still some disagreement on how this term is to be construed, notwithstanding that the majority view appears to favour the United States' interpretation.

On the other hand, the Sub Commission's Chairman, G.J. Van Heuven Goedhart expressly says that "... rights are linked to obligations AND that the obligations are legal ..." ⁹⁶ and some support for that view is given by the Argentinean representative who urged the establishment of "machinery ... to enforce ..." the application of the right⁹⁷. However, Mr Van Heuven Goedhart was talking in the context of abuses of the right to freedom of expression and in terms of the three category classification suggested above, it

⁹¹ E/CONF.6/C.1/SR/17, 5/4/48, p.3.

⁹² Ibid.

⁹³ E/CONF.6/C.1/1; E/CONF.6/C.1/SR/13, 1/4/48, preamble paragraph 4, and resolution articles 5 and 6.

⁹⁴ E/CONF.6/C.1/SR/5, p.4 (Mr Sorrentino).

⁹⁵ E/Conf.6/65, 19/4/48, article 2.1.

⁹⁶ E/CN.4/Sub.1/39, 19/1/48, p.2.

⁹⁷ A/C.3/SR.57, p.9.

is probably only correct to describe as "abuse" breaches of the clearly defined prohibitions on subject matter contained in class one communications. That the Chairman was making his references to legal restrictions with class one communications in mind is confirmed by his assertion that "... the law must regulate the abuse of this right ... [in order to prevent] ... executive power from taking steps based on an arbitrary interpretation of what constitutes abuse"⁹⁸. This is strongly reminiscent of comments made in the Conference on Freedom of Information by, inter alia, Zechariah Chafee from the United States, comments made clearly in the context of class one communications⁹⁹. This suggests that consideration should be given to confining the role of morality in the right to freedom of expression to classes two and three.

Finally, in the statement of rights, obligations and practices to be included in the concept of freedom of information, having established in paragraph 7 that certain subjects should be legally prohibited as obscene, defamatory, etc (class one communications), the text proceeds in paragraph 8 to divide remaining communications into two classes based on a "... moral obligation to tell the truth ..."¹⁰⁰. This version of paragraph 8 was significantly adopted by 10 votes to nil, with only one abstention¹⁰¹.

In the writer's view it is not feasible to regard the role morality plays in relation to the right to freedom of expression as contextual. It makes no sense to talk of morality as the superset within which the

⁹⁸ E/CN.4/Sub.1/39, 19/1/48, p.3.

⁹⁹ See above note 9 and accompanying text.

¹⁰⁰ E/CN.4/Sub.1/45, 6/2/48, pp.2-4; also in E/CN.4/80, 5/2/48, p.9/10.

¹⁰¹ E/CN.4/Sub.1/45, 6/2/48, p.4.

subset of human rights exists; human rights are not a type of moral right in this sense as some writers would have them¹⁰². This will become clear after the discussion in chapter four of the role morality plays in the human rights context. For the moment however, the quite clearly legal character of the International Covenant on Civil and Political Rights demonstrates how this approach is not viable. The Covenant imposes specific international legal obligations on states parties to pass legislation or take such other constitutional steps as are necessary to give effect to the rights contained in the Covenant. If a state carried out this obligation and if the right is to be a type of moral right one would have to accept the validity of the notion of a legislated yet non-legal moral right; one would have to accept as coherent the idea of a state passing legislation stating that the right to freedom of expression was a moral right with no legal force. It is submitted that it makes little sense to talk of a legislated moral right. To describe a right embodied in legislation or enshrined in accordance with a state's constitutional processes, as still 'moral' rather than 'legal', just does not make sense.

If it is difficult to see the role morality plays in the human rights context as that of back drop, as contextual, it is also, and for the same reasons, not feasible to describe parts of the right as legal and parts moral. Even if one said that class one restrictions were set in a legal superset and that the restrictions in class three based on cultural relativity were moral, one would still be obliged to accept as sensible the notion of a legislated moral right. Again the writer submits that this idea is a

¹⁰² Maurice Cranston for example. See M. Cranston, "Are There Any Human Rights?", *Daedalus*, vol.112 (1983), p.1 at p.11.

contradiction in terms.

The only other role suggested by the Conference or the Sub Commission for morality in relation to human rights sets morality as separate from but operative on the tripartite classification. The three classes are defined as described, that is, class one by specific definitions, while classes two and three are distinguished by objective accuracy and purpose. What morality does is to act as an incentive for broadcasters to broadcast class two programmes rather than diverting their energy into class three transmissions. This option is at least feasible. The right to freedom of expression can be analyzed as creating three class of information and applying a different degrees of protection to each class. States can fulfil their international legal obligations under the Covenant and legislate that the right to freedom of expression is such that it grants different degrees of protection to different types of programme. States at the same time can leave unlegislated, that is still in the moral realm, the obligation incumbent on broadcasters to direct their energies into class two rather than class three programmes.

This third approach to the role morality plays in relation to human rights is closer to the truth, though chapter four's discussion of this issue will make it apparent that such a complete separation of morality from the structure of the human right to freedom of expression, indeed any human right, cannot be sustained. It will be suggested there that morality is not something completely external to a human right; it cannot be seen as sitting out separate from the right and operating on it in the way that this third a approach to the role of morality suggests.

Chapter 3

3. A problem With the regulatory regime proposed: cultural relativity - the problem and the concept defined

There are two main difficulties with the regulatory regime apparently though tacitly agreed upon by those responsible for drafting the Universal Bill of Rights. One is that the cultural relativist position suggested most articulately by Maheu and by the Canadian and Czech delegates on the Economic and Social Council's Human Rights Sub Commission on Freedom of Information and the Press, is by no means universally accepted.

Fernando R. Teson defines cultural relativism in the following terms:

"In the context of the debate about the viability of international human rights, cultural relativism may be defined as the position according to which local cultural traditions (including religious, political and legal practices) properly determine the existence and scope of civil and political rights enjoyed by individuals in a given society. A central tenet of relativism is that no transboundary legal or moral standards exist against which rights practices may be judged acceptable or unacceptable. Thus, relativists claim that substantive human rights standards vary among different cultures and necessarily reflect national idiosyncrasies. What may be regarded as a human rights violation in one society may properly be considered lawful in another, and Western ideas of human rights should not be imposed on Third World societies. Tolerance and respect for self-determination preclude crosscultural normative judgments. Alternatively, the relativist thesis holds that even if, as a matter of customary or conventional international law, a body of substantive human rights norms exists, its meaning

varies from culture to culture."¹

Jack Donnelly describes the cultural relativist stance as a position on a spectrum between two extreme end points.:

"The two extreme positions on cultural relativism can be called radical cultural relativism and radical universalism. Radical cultural relativism would hold that culture is the sole source of the validity of a moral right or rule. Radical universalism would hold that culture is irrelevant to the validity of moral rights and rules, which are universally valid.

"These radical views are ideal types which mark the end points of a continuum. The body of the continuum, those positions involving varying mixes of relativism and universalism, can be roughly divided into what we can call strong and weak cultural relativism."²

3.1 Universalist criticisms rejected

3.1.1 There are no positive references to cultural relativity

Arguing for what Donnelly would describe as a radical universalist position, Teson notes³ that there are no express references in positive international law to substantiate the legitimacy of cultural limits on the operation of international human rights⁴. The

¹ Fernando R. Teson, "International Human Rights and Cultural Relativism", Virginia Journal of International Law Vol.25 part 4 (1985), p.869, at p.870f.

² Jack Donnelly, "Cultural Relativism and Universal Human Rights", Human Rights Quarterly, vol.6, number 4 1984, p.400 at p.400f.

³ F. R. Teson, op. cit. at p.877.

⁴ "Positive international law" is used here and throughout this chapter to refer to what the Statute of the International Court of Justice describes in article 38 as "international conventions, whether

only possible exception he says, is article 63(3) of the European Convention on Human Rights and Fundamental Freedoms which states that the convention should apply in colonial territories with "... due regard , however, to local requirements."⁵ This article was discussed in the Tyrer case⁶ by the European Court of Human Rights which gave the clause a very restricted interpretation⁷. Nevertheless,

general or particular, establishing rules expressly recognized by the contesting states"; annexed to the Charter of the United Nations, GBTS 1946 p.67; also reproduced in American Journal of International Law, vol.39 (supplement) at p.190.

⁵ European Convention on Human Rights and Fundamental Freedoms, 213 UNTS 221, 1950.

⁶ European Court of Human Rights, Series A, no.26 judgment delivered on 25/4/78.

⁷ Evidence was produced demonstrating that a significant majority of the population of the Isle of Mann and all but one of the thirty two members of the country's parliament supported the retention of corporal punishment. The court held that this evidence on its own was insufficient to bring article 63 into play. At p.18 of the judgment the court stated that "... positive and conclusive proof ..." of a requirement of local conditions would be required. It did not however suggest what form this extra evidence could take. The imposition of this very demanding evidential burden does support Teson's contention that article 63 should be given in this sense anyway, a restricted interpretation. The writer is inclined however to believe that Teson is too quick to dismiss article 63 as a positive reference to cultural variations in the interpretation and application of international human rights norms. Firstly, quite clearly the Tyrer decision does not permit one to discount article 63 completely as a positive reference in an international human rights instrument to cultural variation in the application or interpretation of human rights. Although the court imposed a heavy evidential burden on those seeking to use article 63(3), it is still available for use. Moreover, it is interesting that the court expressly accepted that "... the [European Human Rights] Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present day conditions" (p.15).

Teson's criticism of the relativist doctrine on the grounds that there are no express references to relativism cannot be sustained.

Firstly, he is mistaken in his belief that there are no express references to relativism in positive international human rights instruments apart from article 63(3) in the European Convention on Human Rights. The preamble to the Banjul Charter states that parties should "... take into consideration the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and people's rights"⁸. Richard Kiwanuka writes that the Banjul Charter "... at least theoretically recognizes that all classes of rights (political, economic, individual and collective) are equal and synergetic."⁹ It is submitted that it is not possible to regard the two categories of rights as "equal" without acknowledging that on occasion either one may act to limit the operation of the other; if cultural rights, as an aspect of collective rights, can never restrict the operation of individual rights, if the latter must always prevail in any contest, then surely it is a misnomer to call the two classes of rights "equal". The preamble to the Draft Pacific Charter of Human Rights similarly recognises the rights "... which stem from Pacific peoples' history , philosophy of life, traditions and social structures ..." and acknowledges that these characteristics of culture are

⁸ OAU Doc. CAB/LEG/67/3/Rev.5(1981) reprinted in ILM59 (1982), Revue of the International Commission of Jurists, vol.27 (1981), p.76.

⁹ Richard Kiwanuka, "The Meaning of "People" in the African Charter on Human and Peoples' Rights", American Journal of International Law, Vol.82 (1988), p.80, at p.86.

"diverse" and "equal"¹⁰.

Secondly, even if this cannot be regarded as an express reference to the limiting action of cultural rights on individual rights, there are several implied references to such restrictions. Article 27 of the Universal Declaration of Human Rights recognizes that the individuals have the right to participate in the cultural life of his community and article 22 similarly guarantees that the individual is entitled to the realization of the "... economic, social and cultural rights indispensable for his dignity and the free development of his personality". It seems to the writer that these rights can only exist if the community is equally guaranteed the right to maintain and develop its culture. Both articles 22 and 27 depend on the existence of the community's cultural rights. An individual's right to play a particular game would be an ephemeral right indeed if the continued existence and development of the game was not also guaranteed. When a clash arises between the individual's right to participate in the cultural life of his community and his community's right to maintain its own identity and to determine its own development, if the individual right always won out, then at the very moment that it prevailed, it would effectively undermine its own foundation. If this self defeating end is to be avoided then the individual's rights at least in respect of articles 22 and 27 must be limited by the cultural standards of the community in which they operate. And if individual rights can be limited by collective rights, such as a people's right to determine its own cultural development, in respect of articles 22 and 27, there can be nothing about human

¹⁰ C. G. Powles, Universal Standards and Traditional Values: Some Pacific Thoughts on a Regional Charter on Human and Peoples' Rights and Duties, prepared for the AULSA Conference, Wellington, 1989, Appendix A, p.1.

rights by definition which denies the validity of culturally based limitations on their operation; culture and individual rights are simply too interwoven in articles 22 and 27 to sustain the universalist contention that culture is irrelevant to the application and interpretation of human rights. The interaction between individuals, their societies and rights will be addressed further in chapter four below.

This same relationship is recognised in the preamble to the International Convention on Civil and Political Rights where it is recognized that "... in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom ... can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights."

Article 30 of the Universal Declaration of Human Rights also evinces a strong implicit endorsement of the validity of the position that culture may set parameters for the operation of human rights. Article 1 of the International Convention on Civil and Political Rights clearly documents the existence of a people's right to "... freely pursue [its] ... cultural development". The preamble recognizes that this right is a right against the individual member of the community concerned¹¹. The covenants were designed to expand and give practical effect to the Universal Declaration of Human Rights. If one therefore reads article 1 of the International Covenant on Civil and

¹¹ In the fifth paragraph where it says: "Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant". Human Rights: A Compilation of International Instruments, p.18 at p.19.

Political Rights in conjunction with the Universal Declaration, on some occasions the former must be able to override some of the rights set out in the latter; otherwise, if article 1 never overrode any individual right, not only is it hard to see what "responsibility" the individual could have to the community to which he belongs, but also, in making the individual (against whom the collective rights embodied in article 1 are held) absolutely supreme on every occasion it is submitted that article 1 is effectively "destroyed" in contravention of article 30 of the Declaration.

Finally, international human rights law has roots deeper than mere positive international law. Lauterpacht, while acknowledging the important role positive international law plays in promoting the development of international human rights, notes that "[t]he view that the rights of man are grounded in positive law only is mischievous not only when related to the law of the State; it is equally objectionable in relation to the positive law of international society"¹². If human rights consist of more than just positive international law, to look only in the realm of positive law for instruction as to the character of human rights and their limitations is clearly inadequate. The absence of positive references to culturally based restrictions on the application and interpretation of international human rights would therefore not be of any overriding significance, even if it were factually accurate and even if one could overlook the strong implicit arguments in favour of such limitations.

3.1.2 Human rights are rooted in Natural Law and

¹² H. Lauterpacht, "The Law of Nations, the Law of Nature and the Rights of Man", Transactions of the Grotius Society, vol.29 (1943), p.1 at p.30.

Natural Law is universal

Accepting this final criticism, that it is insufficient to look merely at positive law to ascertain the true nature of international human rights norms, universalists may indeed try to use the origin of international human rights to support their criticisms of cultural relativism. Lauterpacht, in the article referred to above, an article which appears to have acquired the status of a classical statement of the development of human rights, traces their origin to the superior Natural Law upon which Antigone based her defence against admitted transgressions of the law of the state¹³. Henkin too says that "... human rights derive from "natural rights" flowing from "natural law"¹⁴ while Maurice Cranston notes that Stoic philosophers "... saw these rights not as rooted in civil law, but in a higher law ... [which] ... was natural law"¹⁵. Whether Natural Law is viewed as the will of God¹⁶, as an aspect of the laws which govern nature¹⁷, or as rooted in the common essence of

¹³ H. Lauterpacht, *op. cit.* at p.2ff.

¹⁴ L. Henkin, The Rights of Man Today, p.5.

¹⁵ M. Cranston, "Are there Any Human Rights?", *Daedalus*, vol.112 (1983), p.1.

¹⁶ St Thomas Aquinas saw natural law as that part of the "God-given rules governing all creation" which was ascertainable by the application of reason. See J. W. Harris Legal Philosophies, p.8. See also H. Lauterpacht, *op. cit.* at p.5 and D. Lloyd, The Idea of Law, p.80.

¹⁷ Grotius is said to have maintained that "[e]ven if God did not exist ... natural law would have the same content ...". See J. W. Harris *op. cit.* at p.11. See also R. Tuck, Natural Rights Theories: Their origin and development, p.68. Also B. H. Weston, "Human Rights", *Human Rights Quarterly*, vol.6 (1984), p.257 at p.258.

mankind¹⁸ or some kind of utilitarian ideal¹⁹, it is universal. If, as Lauterpacht, Henkin and Cranston, as well as others²⁰, argue, human rights are based on a concept as universal as Natural Law, the local variations in their substance or operation demanded by cultural relativists become, it could be argued, very difficult to accept.

Firstly however, the origin of the concept of Law of Nature is not universal. If the concept of natural law grew from the civil laws of "... certain Greek city-states ..." and developed into "natural laws" as such in the Hellenistic world as Cranston explains²¹, then the natural law concept, incubating in a cultural as well as geographically confined context, cannot be seen as particularly universal.

Secondly, even if natural law was truly universal or has become so today, it is not logically necessary that the rights which it spawned should have inherited this universal characteristic; just because a domestic constitution applies to all the citizens of the state within which it operates does not mean that all the laws made under its auspices must also apply to all. This is in fact recognized by Cranston who though

¹⁸ As did the Stoics. See J. W. Harris op. cit., p.7. See also H. Lauterpacht, op. cit. at p.4f.

¹⁹ Lloyd notes the utilitarian's dependence on the 'natural' right to equality. D. Lloyd, op. cit., p.98f.

²⁰ E.g. C.B. MacPherson who said that any "... doctrine of human rights must be in some sense a doctrine of natural rights". See C.B. MacPherson, "Natural Rights in Hobbes and Locke" in Political Theory and the Rights of Man, D. D. Raphael (ed), p.1 at p.14. See also Jacques Maritain said that "... by virtue of natural law, the human person has the right to be respected, is the subject of rights, possesses rights", The Rights of Man, p.37, quoted in M. Cranston, What Are Human Rights?, at p.7.

²¹ M. Cranston, "Are there Any Human Rights?", loc. cit. at p.3.

tracing the rights of man to a universal natural law and even stating that "[h]uman rights are a form of moral right, and they differ from other moral rights in being the rights of all people at all times and in all situations"²², still admits the validity of a degree of cultural relativism:

"Of course we cannot expect that men's moral rights shall be the same in all places and at all times. There is a connection between human rights being universal and their formulation being generalised and wide. The basic general principles of morality are minimal precisely because they are universal. Human rights rest on universal principles, but the precise moral rights of men in some communities differ from the precise moral rights of men in other communities, and this is one reason why the formulation of human rights cannot be at the same time closely detailed and of universal application. The moral rights of Englishmen today are not exactly what they were in 1688. Today it is generally agreed in England that the rights to liberty entails the right of every adult person to a vote. The right to liberty was not seen in this way in 1688, for then the great mass of Englishmen neither understood elections nor felt the lack of a vote as a limitation on their freedom.

"Similarly today in parts of Switzerland - commonly regarded as one of the most free and most democratic countries - the women have no vote; but so long as the women do not demand the vote and are content with the ancient institution of household suffrage - are content, that is to say, to allow their husbands and fathers to vote in their name - then we cannot say that a natural right is being denied in Switzerland. A right presupposes a claim; if the claim is not made, the question of a right does not arise."²³

3.1.3 The appellation "universal" suggests that international human rights cannot be viewed as

²² M. Cranston, What are Human Rights?, p.21.

²³ M Cranston, op. cit., p.81.

culturally relative

The argument is that the very title of the Universal Declaration of Human Rights reinforces the universal nature of its contents and it is hard to see how rights which are explicitly said in the preamble to be rooted in the inherent dignity of mankind per se, could possibly admit of any cultural variation.

However, the mere fact that the Declaration is labelled "universal" does not preclude many forms of relativism. Interpretive relativists would argue that the Declaration would still be universal inasmuch as it is universally applicable even though it may be construed differently in some respects from one culture to the next. Those who take what Donnelly would describe as weak relativist position would also argue that even if it had to be interpreted the same the world over, the admission of even a reasonably substantial range of culturally based limitations on the application of the rights contained in the Declaration would not make the appellation "universal" inappropriate. It would really only be a misdescription in respect of very strong or radical relativist positions.

Moreover, one must be careful not to make too much of this type of argument, based as it is on positive international law. Lauterpacht's warning against looking exclusively to positive international law in search of the true character of international human rights was noted above²⁴, and one might also instructively bear in mind that article 38 of the Statute of the International Court of Justice²⁵ specifies three other sources of international law in addition to positive international legal instruments.

²⁴ See above, footnote 12 and accompanying text.

²⁵ Loc. cit.

3.1.4 The supposed origin of international human rights in the inherent dignity of mankind

The argument that individual human beings are entitled to human rights because they are human and that therefore anyone who is human should enjoy the same rights is on its face quite compelling. However, it will be argued in chapter four that such an approach to the theoretical origin of human rights is inconsistent with constructivist rights theory, and at the end of the day cannot be sustained.

3.1.5 Cultural relativism is contrary to positive international laws on nondiscrimination

Teson points out²⁶ that to admit the claims of cultural relativists as valid would be contrary to the nondiscrimination clauses which are so common in current positive international law and would be to concede that some of the human beings in the world are not entitled to as much protection as others against abuses of state power, a view clearly untenable in the current international climate.

However, as Teson acknowledges, there are two ways of interpreting nondiscrimination clauses. When assessing whether there has been a breach of the nondiscrimination principle one necessarily compares the treatment accorded to one individual or group with that meted out to another. On one view of nondiscrimination the group against which this comparison is made, the control group as it were, may be the whole world. In this case clearly cultural relativism is, on its face, a problem. In comparing the extent and nature of the human rights accorded to group A with those enjoyed by everyone else in the whole world, any variation must lead one to conclude that different treatment has been accorded to

²⁶ F. R. Teson, op. cit. at p.878f.

different groups and therefore that the principle of nondiscrimination has been breached, even where such variation is regarded as perfectly legitimate in terms of the relativist doctrine. However, on the other view of nondiscrimination, the control group is confined to the population of the state within which group A lives. In this case, where the principle is viewed domestically, because there is a smaller control group and because that group consists of group A's compatriots there is a much smaller chance of finding the variation in treatment necessary to support allegations of discrimination. As long as there are no variations in treatment within the state, the principle of nondiscrimination will not be breached; any variations within that population will be breaches of the nondiscrimination principle but such result will generally not be inconsistent with the relativist doctrine because in most cases group A will be of the same culture as their compatriots and the relativist would similarly therefore not recognize the variations in treatment as valid since they would be intracultural and not transcultural. It follows therefore that for the most part, only when nondiscrimination is viewed internationally as opposed to domestically, is that principle inconsistent with the cultural relativist doctrine. Teson acknowledges that the domestic approach is traditional and that the international view is unorthodox²⁷ and this criticism of the relativist position based on inconsistency with the principle of nondiscrimination is accordingly weakened.

Nevertheless, the writer accepts that the criticism does appear to have some validity. In the

²⁷ F. R. Teson, op. cit. Teson acknowledges the "classical" status of the domestic version of the nondiscrimination principle at p.878f, and in footnote 46 concedes to the novelty of the international approach.

first place, where there is more than one cultural group in a state the relativist doctrine would permit variations in the degree and nature of the human rights accorded each such group while the principle of nondiscrimination would still regard such treatment as discriminatory. Thus the inconsistency does have some validity. Moreover, taking a step back from the details of the argument, it is, on the face of the matter, difficult to accept that it is legitimate to say that state A may not treat one portion of its population in a manner contrary to international human rights norms, but in the same breath to approve its actions when it applies the same treatment to its whole population; that appears quite irrational. However, these apparent inconsistencies are in fact illusory.

Firstly, not all acts of differentiation amount to discrimination. The principle of nondiscrimination endeavours to achieve equality. There are however two types of equality; formal equality and substantive equality. Formal equality involves treating everyone the same irrespective of their circumstances. If A is starving and B is not, it would be formally equal to give them both the same amounts of food. Substantively equal treatment however would involve giving A more food than B so that after a short time A and B will come to be in the same state of health, to be actually or substantively equal. It is submitted that substantive equality is to be preferred over its formal counterpart.

This is because international law, particularly human rights law has a very strong normative element. As Cranston writes:

"An ideal is something to be aimed at, but which, by definition, cannot be immediately realised. A right, on the contrary, is something which can and, from a moral point

of view, should be respected here and now."²⁸

The writer agrees. Indeed, if human rights are not regarded as normative, they must be regarded as a factual description of accepted practice and clearly that is not the case; not everyone in the world is equal or does in fact enjoy the same rights. If human rights are normative, if they do in effect set practicable standards to which the world community may aspire, it seems unreasonable to construe the various mechanisms such as the principle of nondiscrimination, which endeavour to achieve these standards, in any manner which is inconsistent with this purpose. It is submitted that to treat everyone in an identical manner irrespective of their circumstances would be "mechanical" to use Brownlie's term²⁹. It would only serve to preserve the world's existing inequalities and thereby fail to prompt any progress towards achieving the desirable goals embodied as international human rights. Operating in this manner the principle of nondiscrimination would in effect be obfuscating its *raison d'être*.

Judge Tanaka of the International Court of Justice recognised this principle in the South West Africa Case. He explained that the principle of equality means that "... what is equal is to be treated equally and what is different is to be treated differently, namely proportionately to the factual difference"³⁰. Although the principle of equality is

²⁸ Maurice Cranston, "Are There Any Human Rights?", *Daedalus*, vol.112 (1983), p.1 at p. 14.

²⁹ Ian Brownlie, Principles of Public International Law, p.599.

³⁰ I. C. J. Reports (1965) p.303. Judge Tanaka's opinion was a dissenting opinion. He differed from the majority which declined to consider the merits of the case on the grounds that the applicants had

fundamental to modern humanitarian systems it:

"... does not exclude the different treatment of persons from consideration of the differences of factual circumstances such as sex, age, language, religion, economic condition, education, etc. To treat different matters equally in a mechanical way would be as unjust as to treat equal matters differently."³¹

Later in his judgement he says:

"This is the principle of equality which constitutes one of the fundamental human rights and freedoms which are universal to all mankind. On the other hand, human beings, endowed with individuality, living in different surroundings and circumstances are not all alike, and they need in some aspects politically, legally and socially different treatment. ... Equal treatment is a principle but its mechanical application ignoring all concrete factors engenders injustice. Accordingly, it requires different treatment, taken into consideration, of concrete circumstances of individual cases. The different treatment is permissible and required by the considerations of justice; it does not mean a disregard of justice."³²

This concept of justice which determines when a factual difference in circumstances will legitimate a variation in treatment is represented in Common Law countries by the notion of "reasonableness"³³. Variations in treatment will be justified when the factual differences between the parties involved are such that a variation in treatment is reasonable and in accord with justice. It is up to the party advocating different treatment to establish such

insufficient legal standing to bring the case. His opinion in relation to the merits of the case is therefore not opposed.

³¹ Ibid.

³² Loc. cit. at p.306.

³³ Loc. cit. at p.304.

justification³⁴. Of particular significance to the relativist debate is Tanaka's all but express assertion that cultural difference is a factual variation in circumstances which justifies different treatment. Throughout his judgement he refers to the at least potential legitimacy of differentiation on the basis of language, religion, age, sex etc³⁵ and in his concluding remarks he says that "[w]e cannot imagine in what case the distinction between Natives and Whites, namely racial distinction apart from linguistic, *cultural* or other differences, may necessarily have an influence on the establishment of the rights and duties of the inhabitants of the territory"³⁶.

Similarly, looking to positive international law, there appears to be some acceptance of this approach. Article 2(4) of the International Convention on the Elimination of All Forms of Racial Discrimination³⁷ appears to accept the validity of positive discrimination as it is called, as do the host of other documents which expressly refer to special treatment for specified groups, such as, for example, lesser developed countries³⁸.

³⁴ Loc. cit. at p.307.

³⁵ See Tanaka's discussion of equality pp.302-308 passim. These features are probably all facets of "culture", see below at footnote 39 and accompanying text.

³⁶ Loc. cit. at p.312, emphasis added.

³⁷ International Convention on the Elimination of All Forms of Racial Discrimination, A/RES/1904; 660 UNTS p.194; reproduced in International Legal Materials, vol.3 at p.164.

³⁸ See for example Lome Convention, (31 October 1979), Annex XI, International Legal Materials, vol.19, p.327; World Bank: Convention establishing the Multilateral Investment Guarantee Agency (11 October 1985), para.1, International Legal Materials, vol.24, p.1598; United Nations Conference on Restrictive

The principle of nondiscrimination does not therefore preclude all acts of differentiation and therefore does not invalidate the cultural relativist position. As long as the intercultural variation permitted by the relativist doctrine is designed to achieve substantive equality it will not breach the principle of nondiscrimination.

Secondly, even if all acts of differentiation did amount to discrimination, discrimination is not a unitary concept. It is true that most of the positive international legal documents dealing with discrimination either expressly prohibit discrimination "... of any kind ..."³⁹, or supply a list of the grounds upon which discrimination is not to be permitted encompassing so many of the factors which probably constitute culture⁴⁰ that there is

Business Practices "The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices", (22 April 1980), annex C(iii), International Legal Materials, vol.19, p.1546; Draft International Code of Conduct on the Transfer of Technology, chapter 6, International Legal Materials, vol.19, p.773 (some of the text has yet to be agreed but chapter 6 is not subject to dispute). See also United Nations General Assembly Resolution 35/56, "International Development Strategy for the Third United Nations Development Decade", (5 December 1980), paras.136-155, International Legal Materials, vol.20, p.480; United Nations Conference on Trade and Development's "Group of 77 Agreement on the Global System of Trade Preferences Among Developing Countries", (13 April 1988), *passim*, International Legal Materials, vol.27, p.1204; Economic Declaration of the Paris Economic Summit (16 July 1989), International Legal Materials, vol.28, p.1293; Organisation for Economic Co-operation and Development Council "Recommendation Concerning an Environmental Checklist for Development Assistance, International Legal Materials, vol.28, p.1314.

³⁹ As in the Universal Declaration of Human Rights, article 2, *loc. cit.*

⁴⁰ While definitions of what constitutes culture abound, it is suggested that characteristics such as language, religion, race, national or ethnic origin

little to be gained from arguing that culture is nowhere expressly given as a ground on which discrimination is not to be allowed⁴¹. However, the criteria upon which discrimination is made, the effect the discriminatory practice has on the victim and the circumstances in which it occurs all affect the seriousness of the discrimination. Few would comfortably accept a close analogy between the situation of A forced to pay inflated enrolment fees at a New Zealand university because he is a national of a foreign country, and B obliged to pay the same fees because she is female or Maori; the criteria upon which the discrimination is made (nationality and sex or race respectively) distinguish the two examples. Brownlie endorses this non-unitary approach to the principle of nondiscrimination noting by way of domestic analogy that the "... principle of equality before the law allows for factual differences such as sex or age and is not based on a mechanical conception of equality."⁴² It was noted above that Judge Tanaka "could not imagine"⁴³ how race could be a factual circumstance which could justify variation in human rights treatment but accepted that "... it is possible that the different treatment in certain aspects is reasonably required by the differences of religion,

and so forth are all aspects of culture. Therefore prohibitions against discrimination on the basis of such factors in international instruments should be collectively read as positive references against discrimination on the basis of culture.

⁴¹ It is interesting to note however that there are indeed no explicit references prohibiting discrimination on the basis of culture to be found in international human rights instruments.

⁴² Ian Brownlie, *op. cit.*, p.599.

⁴³ *Loc. cit.* at p.314, cited above in footnote 36.

language, education, custom, etc ..."⁴⁴.

Similarly, the effect which the discrimination has on its victim also affects how seriously the action is regarded and how much authority it will therefore have to override other categories of right. To torture A to death for being green warrants far more condemnation than to give him one day fewer paid holidays per annum; the effect of the action complained of distinguishes the two situations.

Finally, the circumstances in which the differentiation occurs also help to distinguish the various types of discrimination. To restrict the freedom of movement of resident enemy nationals in times of war for reasons of national security is more acceptable than to take similar measures in times of peace.

Brownlie supports this view that each act of discrimination must be looked at on its own merits and that not all discrimination is of equal seriousness or of equal impact in terms of international law. He has suggested on the basis of the majority decision of the International Court of Justice in the Barcelona Traction case that only the prohibitions against discrimination on the basis of race and against any actions the result of which is to subject the individual concerned to slavery, have achieved the particularly authoritative status of *erga omnes* and are therefore universally binding on all states irrespective of their express consent or their implicit agreement as demonstrated by their conduct over time⁴⁵. Other grounds of discrimination are regarded as less serious than these and it is of special significance to note that in many cases the cultural relativist doctrine threatens neither of

⁴⁴ *Loc. cit.* at p.308.

⁴⁵ Ian Brownlie, *op. cit.*, p.598.

these erga omnes prohibitions on discrimination. For example, if one were to discriminate against two people of the same race on the basis of their culture, as for example if one were to deny to an eighth generation United States Black some right or privilege (short of reducing him to slavery) which one accorded to an indigenous Nigerian, on Brownlie's view, one clearly cannot claim that the erga omnes prohibition on discrimination on the basis of race invalidates the act of differentiation. Cultural relativity is therefore not necessarily precluded by the existence of any peremptory norm of international law⁴⁶. In the cultural relativist debate therefore the acts of discrimination defended as cultural variations in the application or interpretation of human rights will often be acts of less international significance, less authority in the hierarchy, less seriousness, than the discrimination on the basis of race and discriminatory acts which result in the reduction of the victim to slavery identified by Brownlie as peremptory norms of international law.

⁴⁶ The writer acknowledges that there is much debate about the existence and particularly the contents of international law's peremptory norms or jus cogens. While it is possible that a prohibition on discrimination on the basis of culture may be included within the jus cogens category, none of the more significant attempts to define its contents include specific references to this effect, and until such a reference is agreed upon one cannot legitimately argue that any of international law's peremptory norms necessarily invalidate the cultural relativist position. For attempts to identify the contents of the jus cogens see M. Whiteman "Jus Cogens in International Law, With a Projected List", *Georgia Journal of International and Comparative Law*, vol.7 (1977), p.609; U. S. Restatement of the Foreign Relations Law of the United States (Revised), para.702; McDougal, Lasswell & Chen, Human Rights and World Public Order, p.274; A. Verdross, "Jus Dispositivum and Jus Cogens in International Law", *American Journal of International Law*, vol.60 (1966), p.53 at p.59.

If on one side of the ledger the seriousness of acts of discrimination varies from case to case, and with it the authority of each to override culturally based judgments in respect of the application or interpretation of international human rights, on the other side of the ledger book is the actual human right allegedly overridden by the act of discrimination in question. In each case not only must one assess the seriousness of the act of discrimination in terms suggested above, but one must also take into account the importance of the human right affected by that act of discrimination. If the act of discrimination is a minor and less important aspect the culture in question and the human right affected is of particular seriousness in terms of the criteria upon which it is based, its effect on the victim and the circumstances in which it occurred, it may be that the discriminatory cultural variation will have insufficient authority to override the human right concerned in that instance. On the other hand if the aspect of culture which the act of discrimination is aimed at preserving lies at the very heart of the cultural life of the community in question, is critical to the continued survival of the culture, and the human right concerned is regarded as less significant, then the human right may have to give way to the act of discrimination in that instance. Few would countenance the extinction of a distinct cultural group because it did not accord paid holidays to its members, while surely just as few would happily see people tortured to death for adopting a mode of dress which varied in some minor respect from the traditional. Both cases would be equally "unreasonable" to use Judge Tanaka's test⁴⁷. If in some circumstances some acts of discrimination

⁴⁷ Loc. ct. at p.306, cited in footnote 33 above.

do not have the authority to override some international human rights norms, then one cannot argue that cultural relativism is always going to be inconsistent with the principle of nondiscrimination.

If discrimination is a flexible concept as has been suggested above, one cannot legitimately argue that it will always be impossible to reconcile the principle of nondiscrimination with the cultural relativist doctrine. As long as there exists a possibility that some forms of differentiation may in some circumstances not be "discrimination" and so contrary to international law, or that some acts which are discrimination may not have the authority, even though they may be strictly "illegal", to override a culturally based variation on the application or interpretation of international human rights norms, the radical universalist simply cannot argue that the principle of nondiscrimination per se invalidates the cultural relativist position. It may be that differentiation on the basis of culture, in some circumstances, will be a legitimate form of differentiation, or that in other circumstances, while undesirable it will be of insufficient strength to overcome the cultural variation at issue; whether or not it is so is a question which must be answered on a case by case basis and by arguments other than mere assertions, accurate though they may be, that cultural relativity may involve some degree of "discrimination". Unless it can be argued in each fact situation on independent grounds that differentiation on the basis of culture is "discrimination" and that it has enough authority to outweigh the importance of the variation in issue, merely pointing out that "discrimination" is a consequence of the cultural relativist position, as it unquestionably may be on occasion, cannot serve to demonstrate that that doctrine is invalid or even undesirable.

The argument in the preceding paragraph is even stronger in the case where the treatment which is purported by extra-cultural values to be discriminatory, is meted out at the request of the recipient. While it is acknowledged that such cases are probably more hypothetical than real it is still interesting to note that not only could one argue as above that positive discrimination is permissible or even to be encouraged and that cultural differentiation may be a form of such acceptable distinction, but if one places any stock in the notion that rights presuppose claims⁴⁸, it could also be argued that in such cases, since no one is claiming to be disadvantaged, there is no claim and therefore no right to be infringed by the act of discrimination is generated.

Finally, even if one accepted that all differentiation was bad irrespective of the criteria upon which it is made and irrespective of the circumstances surrounding the differentiation, it should also be noted that that does not mean that a state can treat its citizens in contravention of human rights so long as it treats them all with equal indignity. The application and quality of the treatment are two different issues.

3.1.6 Cultural relativism involves a logical inconsistency

Teson also argues that the cultural relativist:

"... affirms at the same time that (a) there are no universal moral principles; (b) one ought to act in accordance with the principles of one's own group; and (c), (b) is a universal moral principle. If it is true that no universal moral principles exist, then the relativist engages in self-contradiction by stating the

⁴⁸ See below in chapter 4.6.7.

universality of the relativist principle."⁴⁹

The first point to note is that not all relativists assert that there are no universally applicable moral principles. Only what Donnelly describes as "radical cultural relativists" would support that view⁵⁰. Not all relativists would accept the first of the three assertions set out by Teson. Many, such as Donnelly, would maintain that some, even most, moral principles are universally valid while still admitting some degree of variation from one culture to the next in their interpretation and / or application. Teson acknowledges that such variations from the absolutist wording of the first of his propositions weakens his apparent logical inconsistency⁵¹ but criticises such variations because taking an intermediate position i.e. saying that some moral rules are universal and some are valid only within the culture which formed them, requires some formula for determining which are to be universal and which should yield to exigencies of culture variation. He continues to say that even if one could discover such a formula, "... then it is difficult to see why the only principle yielded by such method would be ..."⁵² that one ought to act in accordance with the principles of one's own group.

The second point to note therefore, is that just because holding one of the positions in between radical cultural relativism and radical universalism necessarily involves some kind of test by which to determine whether a particular moral rule is

⁴⁹ F. R. Teson, op. cit. at p.888.

⁵⁰ J. Donnelly, op. cit. at p.400.

⁵¹ F. R. Teson, op. cit. at p.889.

⁵² Ibid.

universally applicable or only relevant to the culture which formed it, does not necessarily make the doctrine bad or untenable.

Thirdly, it is suggested that a proposition such as Teson's second, that one should live in accordance with the principles of one's own group, is not inconsistent with the first proposition that in fact there are no universal moral principles. The second is normative and therefore does not even purport to describe the actual position, whereas the first proposition describing the current position as it actually is, makes no judgement as to whether or not that position is desirable. To say that the world is in such and such a condition but that at the same time it should be in a different condition may be condemnatory but it is in no way contradictory.

The fourth problem with Teson's logical criticism of the cultural relativist doctrine relates to the structure of international law. One can observe that irrespective of whether they are manifested in positive form or as customary law, international legal rules do in practice operate at a variety of levels. Usually this type of analysis of the structure of international law manifests itself as a hierarchy ranging from detailed operative positive international agreements such as double taxation agreements and customary law such as the rule governing the transnational use of letters of credit, through international treaties of more general application such as international environmental treaties, finally to international constitutional documents such as the Charter of the United Nations, customary rules of statutory construction and principles such as *pacta sunt servanda*. Meron points out that this approach is probably the result of the hierarchical structure of the domestic legal systems in which international

lawyers tend to be trained⁵³. He also points out the difficulties which have been encountered by those who have attempted to detail this hierarchy. However, it is submitted that there is at least a general agreement that some rules are substantive and that some are "procedural" inasmuch as they relate to the operation of the substantive rules and not to the individual objects of international law directly. It is submitted that the second proposition put above by Teson that one ought to act in accordance with the principles of one's own group, is substantive because it deals directly with the behaviour of the individual objects of international law. The first proposition however, that there are no universally valid moral principles, clearly does not deal directly with individuals as objects of international law. Its primary focus is on the operation of international legal rules and is therefore procedural. Therefore, even if the first proposition is reworded to read 'there *should* be no universal principles' i.e. even if both propositions are identified as normative thereby undermining the writer's argument above in the preceding paragraph, because they come from different normative classes of international rules, they do not conflict, they are not mutually exclusive. The second proposition really means that one should act in accordance with the substantive principles of one's own group; it does not exclude the possibility that there may be procedural rules of universal application⁵⁴. Indeed, such an approach is entirely in

⁵³ T. Meron, "On a Hierarchy of International Human Rights", *American Journal of International Law*, vol.80 (1986), p.1 at p.3.

⁵⁴ Teson actually outlines this argument at p.892 *op. cit.* and concludes that the "... relativist principle may [therefore] be regarded as metamoral ...". The writer is not sure whether this is intended to be a criticism of the relativist position nor, if

accord with international practice. Disputes over the operation of principles such as *pacta sunt servanda* and the customary and positive rules of treaty interpretation embodied in the Vienna Convention on the Law of Treaties, are largely absent from the relativist debate which rages most hotly around alleged breaches of the substantive human rights rules such as those against racial discrimination.

3.1.7 Cultural relativism involves another logical inconsistency

Teson also argues that cultural relativism "... overlooks an important feature of moral discourse, its universalizability."⁵⁵. In essence this principle seems to assert that if A makes a moral judgement about B :

(a) should A find himself in the same predicament as B is currently experiencing, A is logically committed to act just as he says B should now act; to do otherwise would be to refuse "... to engage in meaningful moral discourse"⁵⁶, AND

(b) should A find himself in the same predicament as B is currently experiencing, A is obliged to act just as he says B should now act because, even if he is not *logically* committed to do so, to act otherwise would be to endorse "... the highly implausible position that in moral matters we can pass judgments containing proper names, and that consequently we may make exceptions in

it is, what detrimental effect it could have on that doctrine.

⁵⁵ F. R. Teson, *op. cit.* at p.889.

⁵⁶ F. R. Teson, *op. cit.* at p.889f. See also A. Gewirth, "The Basis and Content of Human Rights", *Georgia Law Review*, vol.13 (1979), p.1143 at p.1153.

our own favor"⁵⁷.

3.1.7.1 Teson sets out a relativist argument which avoids conflict with the universalizability principle⁵⁸. Emphasising the importance that A's obligation under either of the approaches enumerated as (a) and (b) above, only arises when A finds himself in circumstances identical to those in which B found himself when A judged him. The relativist would argue that where A and B belong to a different cultural grouping, that distinction counts as a significant variation in circumstances. As long, therefore, as A and B remain in different cultural families there is no logical or plausibility based need for A to behave in the manner which he had earlier adjudged was correct for B; the cultural differences between A and B mean that, so long as those differences persist, A will never be in the same moral circumstances as was B.

The writer likes this argument. Teson however, does not. He says:

"Such arguments are flawed ... because the fact that one belongs to a particular social group or community is not a morally relevant circumstance. The place of birth and cultural environment of an individual are not related to his moral worth or to his entitlement to human rights. An individual cannot be held responsible for being born in one society rather than in another, for one "deserves" neither one's cultural environment nor one's place of birth. ... If the initial conditions are not morally distinguishable, the requirement of

⁵⁷ F. R. Teson, *op. cit.* at p.889f. Although these two branches of the principle of universalizability appear to be very similar, Teson citing Rawls clearly enunciates them as different. He supports the distinction between the (a la Gewirth) logical requirement and the obligation based 'merely' on "moral plausibility".

⁵⁸ *Ibid.*

universalizability fully applies to statements about individual rights, even where the agents are immersed in different cultural environments."⁵⁹

It is submitted that Teson's criticism of this relativist argument against the application of the universalizability principle is invalid and accordingly that the argument is good, and the principle of universalizability is therefore unlikely to ever apply to human rights questions.

In the first place Teson seems to be saying that only circumstances which A brought upon himself, only environmental contingencies which A "deserves", for which he is "to blame", may be "morally relevant" circumstances. This assumption concerns the writer. It is submitted that any circumstances which are likely to affect A's moral judgement of B, be they brought on or deserved by A or imposed upon him by the vagaries of fortune, should be relevant circumstances. All will affect the outcome of his decision; A's "culpability" seems to the writer to be irrelevant. That physical circumstances of the proverbial men shipwrecked, adrift in a lifeboat and on the point of starvation, circumstances "undeserved" and dictated simply by the forces of nature, should not be relevant to their decision to eat one of their number, is not an easy proposition to accept.

Moreover, to be a morally relevant circumstance means to be a circumstance relevant to a moral decision. There is no logical call for the circumstance to be an ethical one; the appellation "morally relevant" is not rendered inappropriate by construing "circumstance" broadly enough to encompass all environmental factors which affect the decision maker's determination.

⁵⁹ F. R. Teson, op. cit. at p.891.

3.1.7.2 Secondly, it is submitted that in judging B it can not be accepted that A is "logically committed" to act likewise in identical circumstances. The universalist argument advocated by Teson in this respect, asserts that (a) to be moral discourse must be universalizable, (b) A is not speaking in universal terms, (c) therefore A is not conducting moral discourse. This sequence is logical but the whole point to the universalist / relativist debate is that relativists dispute the major premise of this argument. They do not accept that issues of right and wrong must be universally valid. In the debate over relativism the major premise of the above sequence is in fact the conclusion which universalists endeavour to reach and one cannot, without inviting quite legitimate accusations of circularity use it as the premise of any argument designed to support the universalist cause. One simply cannot validly argue that to be moral a judgment must be universally valid, relativists do not make judgments which are universally valid, therefore moral judgments must be universally valid; that is quite clearly circular.

3.1.7.3 Thirdly, Teson asserts that to deny the universalizability of ethical questions is to "endorse the highly implausible position that in moral matters we may make judgments containing proper names, and consequently we may make exceptions in our own favor"⁶⁰. However, to argue that to be valid, ethical decisions must be relevant to the group in which the decision maker is living, which is all even radical relativists assert, is a far cry from stating that such decisions need not be relevant to any group whatsoever. To make a moral decision applicable only to B exclusively because he is B and for no other

⁶⁰ F. R. Teson, op. cit. at p.890.

reason is quite different from making a decision applicable to B because he is a member of group X. The relativist debate is over the size of the group, whether it comprises the whole of mankind or whether it is made up from a number of humanity's smaller subcategories; no relativist argues that no group is relevant to moral decisions because it would follow from such an admission that cultural grouping is irrelevant to moral decisions and clearly that would be to concede the most fundamental tenet of the relativist creed.

3.1.7.4 Teson also argues that "[b]y claiming that moral judgments only have meaning within particular cultures, the relativist underestimates the ability of the human intellect to confront, in a moral sense, new situations"⁶¹. He makes this assertion based on the observation that an individual who has learned what moral terms such as right and wrong mean by applying them in his own culture "... is perfectly able to apply that concept to a set of facts which he has never encountered before"⁶². He cites Bernard Williams to support his conclusion that this observation:

"... seems to show that the ethical thought of a given culture can always stretch beyond its boundaries. Even if there is no way in which divergent ethical beliefs can be brought to converge by independent inquiry or rational argument, this fact will not imply relativism. Each outlook may still be making claims it intends to apply to the whole world, not just to that part of it which is its "own world."⁶³

The writer does not dispute the validity either of the

⁶¹ F. R. Teson, op. cit. at p.892.

⁶² F. R. Teson, op. cit. at p.891.

⁶³ B. Williams, Morality: An Introduction to Ethics, p.159. Cited in Teson, op. cit. at p.891f.

observation or of the conclusion based thereon that an individual can make a moral claim which he intends to apply universally. However that is not the issue in the relativist debate. The issue is whether or not such claims are valid at all and if they are then to what extent they can override a conflicting moral claim made by and intended to operate only within some other cultural grouping. If A makes a claim in respect of an alien culture which he intends to apply to the whole world, the mere fact that he makes the claim, or that he is capable of making a moral assessment of the fact situation in question based on his own cultural experience, does not prove the validity of the proposition that his judgment should override a conflicting assessment emanating from within the alien culture which he purports to judge.

3.1.8 Cultural Relativism is geopolitically unreal

This argument asserts that relativism is crude because it assumes the existence of distinct cultural groupings and ignores the fact that there are in reality some matters of universal concern because of their geopolitical situation. The writer agrees that some issues are of concern to the entire international community; environmental issues such as the protection of the ozone layer, and the preservation of Antarctica, the Continental Shelf and the High Seas are perhaps good examples. It is also conceded that although it is probably incorrect to equate an interest directly with a value, if all members of a group share a common interest they are more than likely to also share a common value. Thus for example, if every nation in the world is equally concerned about the progressive destruction of the ozone layer, it probably follows that they will all agree that practices which feed that progression are undesirable. However, it is submitted that the existence of such

matters of universal concern does not preclude the viability of the cultural relativist doctrine.

Firstly, relativism says that moral norms are only necessarily relevant to the group which formed them. With the possible exception of what Jack Donnelly would describe as radical relativism, the relativist doctrine does not contain any restriction on the size of the group. The group may be a single small cultural grouping, a larger perhaps regional group or even the whole world; the relativist doctrine can operate on a group of any size and does not preclude the potential existence of universal moral values. Relativism is therefore realistic in the sense that it recognises that the world consists of many different sized groups of fluctuating and overlapping membership and is flexible enough to incorporate universal values, should they exist.

Similarly, non radical relativism is realistic in that it acknowledges not only the variable size and composition of groups in the world and is flexible enough to allow all of them some degree of moral capacity, but it also acknowledges the existence of interests which are of exclusively local concern. Radical universalism and positions near that end of the universalist / relativist spectrum make little or no allowance for such issues. It is submitted that most issues decided every day will not be of general concern to the whole of humanity and that this being so, to adopt any stance tending too far away from the radical relativist end of the spectrum would be to endorse a position which though well suited to the few issues of truly universal concern, would be less than ideal when applied to the majority of questions dealt with all over the world every day. When designing a system of any sort one focuses on the normal cases, on the main categories of subject matter, and makes special allowances for the exceptions and special

cases; one does not design a system for the exceptions and then force the rule to fit into unnatural design specifications.

Thirdly, even if relativism did deny the existence of universal moral values, this denial would be completely irrelevant if no such moral values existed. Professor Morgenthau initially denied the existence of universal moral values⁶⁴ but more recently has changed his mind⁶⁵. However, what he, and others of a like mind, have so far failed to do is to identify a moral value of universal application. In a seminar held in 1979 this question was tackled and a number of possibilities were discussed but none of them seemed to withstand scrutiny⁶⁶. It was suggested above that recent awareness of international environmental issues could provide the basis for a limited number of universal moral beliefs. However,

⁶⁴ Hans Morgenthau, Politics among Nations: The Struggle for Power and Peace (5th edn), Morgenthau writes at p.250 that of the nineteenth century "... fragmentation of a formerly cohesive international society into a multiplicity of morally self-sufficient national communities, which have ceased to operate within a common framework of moral precepts ...". On the same page he continues that nationalism "... weakened to the point of ineffectiveness, the universal, supranational moral rules of conduct ...". At p.246 he states that "[t]his transformation within individual nations changed international morality ... from a reality into a mere figure of speech". The crux of Morgenthau's argument is that the dissolution of the system of personal ethics which bound together the aristocratic rulers prior to the rise of the nation state, left a moral vacuum in the international arena and removed the only moral constraint on the actions of states in relation to each other.

⁶⁵ Hans Morgenthau, Human Rights and Foreign Policy (5th edn), p.25. "... I assume there are certain basic moral principles applicable to all human beings".

⁶⁶ Hans Morgenthau, Human Rights and Foreign Policy, passim, but especially p.10ff (lying), p.15ff (killing), and p.18 (torture).

while the preservation of the ozone layer may be of general concern because of its links to global warming, clearly the immediate impact appears to fall principally in the South Pacific. Similarly, Antarctica is much closer to New Zealand and its fate is therefore much more important an issue for us than say for the population of Bolivia or Saudi Arabia. Nations which rely heavily on the sea as a source of wealth have a much greater stake in how it is managed as a resource than land locked countries or those which enjoy more land based natural resources. The whole world may well be concerned with such issues but all to different degrees, and similarly each nation is obliged by its geopolitical situation to rank such common interests differently in light of all the other interests which it is obliged to take into account when determining its international position on such issues. The degree to which each state will be prepared to allow an individual human right to override a claim by some cultural or other group will therefore differ. It is submitted that this variation makes it impossible to describe such issues as truly "universal" in a sense which has any significance in the universalist / relativist debate. The relativist asserts essentially that moral values are only necessarily valid for the group which formed them, and consequently that in some situations at least, this means individual interests must be subordinated to those of the group as a whole within which he or she lives. Individual interests and group interests must be balanced, and if such a feat is to be achieved it is clearly essential that one be able to determine how much weight can be given to each of the two competing interests. Such an assessment would be extremely difficult if various parts of the globe cannot agree even at one point in time let alone in the long term, on the degree of importance a particular environmental

issue should be given vis a vis all the other economic and political interests bearing severally on every member of the international community. In this sense terms such as "crude" and "unrealistic" are more appropriate criticisms of the universalist doctrine than its relativist competitor.

3.2 Cultural Relativism Endorsed

3.2.1 The principle of self-determination supports the cultural relativist doctrine

There are two types of self-determination; internal and external. In the Declaration on the Granting of Independence to Colonial Countries and Peoples (henceforth the Declaration on Colonial Independence) it says that "[a]ll peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development"⁶⁷. The reference to the free pursuit of their political status refers to external self-determination and the references to pursuit of their economic, social and cultural development refers to the internal part of the concept. "External self-determination means the right of peoples to decide their international status. It represents an expression of modern anticolonialist values in the international community."⁶⁸. Emerson also approaches

⁶⁷ General Assembly Resolution 1514 (XV), 14 December 1960, meeting number 947, adopted eighty nine nil with nine abstentions, U.N. Doc. A/4684, reproduced in Year Book of the United Nations 1960, at p.49f. See also Article 1 of the International Covenant on Civil and Political Rights, loc. cit.

⁶⁸ F. R. Teson, op.cit., footnote 50 on p.880.

self-determination in this way⁶⁹ and Chowdhury's criticism of what he refers to as the "anatomical dissection" of the principle of self-determination on the grounds that it "... detracts from the universality of the concept and converts a continuing, dynamic right into a static one"⁷⁰, seems to the writer unfounded. The artificiality of the dissection does not detract from its usefulness as an analytical tool.

3.2.1.1 Internal self-determination is open to two views and only one supports the relativist position

Teson opines that there are two ways in which to view the internal aspects of the principle of self-determination⁷¹. He says that if the word "freely" is taken to mean free from both internal and external interference, then self-determination "... would thus represent an expression of the entitlement of all individuals to democratic representative government and to basic human rights"⁷². He continues however, that the relativist version of this principle "differs radically from the one expressed above"⁷³. Teson levels a number of criticisms at this supposedly 'relativist' version of internal self-determination by describing a number of negative consequences which says follow from such an approach. He concludes that the support apparently afforded the relativist cause

⁶⁹ Rupert Emerson, "Self-Determination", *American Journal of International Law*, vol.65 (1971), pp.464-466.

⁷⁰ Subrata Roy Chowdhury, "The Status and Norms of Self-Determination in Contemporary International Law", *Netherlands International Law Review*, vol. 24 (1977), p.72 at p.80.

⁷¹ F. R. Teson, *op. cit.* at p.880ff.

⁷² *Ibid.*

⁷³ *Ibid.*

by the principle of internal self-determination is therefore illusory and that in fact the correct interpretation of that elusive concept adds weight to the arguments put forward by proponents of universalism. It will be argued that cultural relativism does not necessarily require the approach to internal self-determination which Teson says it does, and that even if it does, such an interpretation of the self-determination principle does not necessarily lead to the consequences alleged. It will be further argued that even if such consequences do arise, they are not always necessarily as undesirable as Teson suggests. It will be finally submitted that even if these consequences are undesirable and Teson's "democratic, anti-authoritarian"⁷⁴ view of internal self-determination has to be accepted as preferable, that view proffers no support for the universalist cause.

3.2.1.2 The 'relativist version' of internal self-determination

Teson says that in contrast to the "democratic, anti-authoritarian" view of self-determination referred to above, relativists view the word "freely" in article 1 of the International Covenant on Civil and Political Rights as meaning free from external interference only. "The relativist version of the rule ... represents the flip side of the non-intervention principle ... [and] ... in this sense represents the rights-language version of the duty of non-intervention in internal affairs"⁷⁵. Because on this approach a people exercising its right to self-determination will be protected against interference by a narrower range of people (people

⁷⁴ Ibid.

⁷⁵ F. R. Teson, op. cit. at p.881.

outside the state only as opposed to all people) this allegedly relativist version of self-determination will be referred to as the narrow view of the principle while Teson's "democratic, anti-authoritarian" approach will be styled the broad view.

3.2.1.3 Cultural relativism does not necessarily entail a narrow approach to internal self-determination

Cultural relativists are under no logical constraint to adopt a narrow view of self-determination. One can espouse without fear of contradiction the basic relativist tenet that moral norms are only relevant to the group which made them and at the same time maintain a broad line on self-determination arguing that peoples should be allowed to pursue their own cultural, economic and political destiny free from any (internal as well as external) interference. One simply cannot argue that because a non New Zealander cannot impose a moral norm on the people of New Zealand (as is the relativist contention), it therefore necessarily follows that any individual or minority group within New Zealand's borders can; in the international hokey tokey, just because A cannot put his left foot in does not mean that B can. Therefore, there is no logical necessity incumbent on cultural relativists to take a narrow view of internal self-determination⁷⁶.

⁷⁶ The writer acknowledges that the explicit reference to external interference in the 1970 Declaration on Principles of International Law Concerning the Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations (General Assembly Resolution 2625 (XXV), U.N. Doc. A/8082, 30 September 1970, meeting number 1883, adopted without vote, reproduced in Year Book of the United Nations 1972, pp.788-92, henceforth referred to as the Declaration on Friendly Relations) constitutes a strong endorsement of the narrow view of

3.2.1.4 Consequences alleged by Teson to follow from a narrow approach to internal self-determination

Teson identifies seven consequences which he says arise from the adoption of a narrow approach to internal self-determination. He says that such a view means that:

- (a) "... a people exhausts its right to self-determination when it achieves the status of a sovereign state"⁷⁷;
- (b) "[p]eople have the right to create whatever form of government they want, no matter how repressive"⁷⁸;
- (c) "[o]nce the people choose a political and cultural system, nothing in international law confers a right to change the system"⁷⁹;
- (d) a people may "... freely ... pursue their economic, social and cultural development" even where that pursuit would reduce to meaninglessness the remaining fifty-one articles of the [International] Covenant [on Civil and Political Rights]⁸⁰;
- (e) the interests of a people are "... define[d] ... in mystical or aggregative terms that ignore

internal self-determination, but submits that (a) that does not demonstrate any logical connection between cultural relativism and that view, any compulsion to adopt such an approach being due to reasons other than the relativist doctrine (namely anti-colonial sentiment), and (b) denying the validity of external interference in the internal affairs of a people still does not necessarily put a stamp of approval on internally sourced interference.

⁷⁷ F. R. Teson, *op. cit.* at p.881.

⁷⁸ F. R. Teson, *op. cit.* at p.881.

⁷⁹ *Ibid.*

⁸⁰ F. R. Teson, *op. cit.* at p.882.

or belittle individual preferences"⁸¹;

(f) atrocities such as those committed by the regimes of Ho Chi Minh and Pinochet in Vietnam and Chile respectively were exercises of internal self-determination and so immune from foreign interference⁸²;

(g) one must adopt a position which ignores the fact that internal self-determination developed in a colonial context, a context which has nothing to do with pressure for compliance with human rights norms⁸³;

3.2.1.5 Criticism of these allegations

(A) It does not follow that "[u]nder this view, a people exhausts its right to self-determination when it achieves the status of a sovereign state"⁸⁴. Firstly, this assertion is inconsistent with Teson's contention in the same paragraph that on this 'relativist' version of the principle, the right to internal self-determination is correlative to the duty incumbent on states not to interfere in the internal affairs of another state. If the two words actually describe the same concept from different perspectives, then while one lives so too does the other. It follows that if the right to internal self-determination expires when a people achieve statehood, so too must the duty incumbent on the international community not to interfere in the affairs of another state. Clearly this is not the case. States have in the past invoked the domestic jurisdiction defence and the vigorous opposition such claims have encountered has not

⁸¹ Ibid.

⁸² F. R. Teson, op. cit. at p.883.

⁸³ F. R. Teson, op. cit. at p.884f.

⁸⁴ F. R. Teson, op. cit. at p.881.

included any argument to the effect that the domestic jurisdiction defence was unavailable to the claimant on the grounds that it was a state⁸⁵. Such an approach is moreover quite inconsistent with the provisions of the General Assembly Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations 1970⁸⁶ and with article 2(7) of the Charter of the United Nations⁸⁷ both of which expressly record that the right to conduct one's affairs free from external interference is a right accorded to states. It is illogical to criticise the 'relativist' version of the principle of internal self-determination on the grounds that such a view sees a people's right to self-determination exhausted when it achieves statehood and at the same time insist that that same version of the principle sees it as the correlative right to the duty of non intervention.

Secondly, the fifth principle contained in the preamble to the Declaration on Friendly Relations also suggests that adopting a narrow view of internal self-determination does not necessarily entail the

⁸⁵ The defence of domestic jurisdiction was invoked by France in respect of Morocco, Tunisia and Algeria and at no time did opponents of the French position attempt to argue that the defence was unavailable to France on the grounds that it was a state. Nor was such an argument forthcoming when the United Kingdom and Portugal claimed the same defence in respect of Southern Rhodesia and Angola respectively. On Tunisia and Morocco see DeJany, "Competence of the GA in the Tunisian-Moroccan Questions", *Proceedings of the American Society of International Law*, vol.47 (1953), p.53. In respect of Algeria see R. Higgins, The Development of International Law Through the Political Organs of the United Nations, pp.95-97. On Angola and Southern Rhodesia see Higgins, *op. cit.* at pp.101-103.

⁸⁶ Principle 3. See General Assembly Resolution 2625 (XXV), *loc. cit.*

⁸⁷ Charter of the United Nations, *loc. cit.*

extinction of the right to self-determination when the erstwhile right holders find themselves incorporated into a sovereign state either alone or in conjunction with one or more other peoples. Paragraph 1 of that principle says that "[b]y virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development..."⁸⁸. By specifying that the interference from which peoples are immune by virtue the right to self-determination is external as opposed to both external and internal, this paragraph makes it clear that its drafters saw self-determination in the sense described above in chapter 3.2.1.2 as the "narrow" view. Teson contends that on this view the right to self-determination expires when the group exercising it is incorporated into a state⁸⁹.

However, if the principle's first paragraph expresses the narrow view of self-determination, the view which Teson describes as the rights language version of states' duty not to interfere in the domestic affairs of other states, the other seven paragraphs which make up the Declaration's fifth principle serve to define the content of the right. If the contention that the narrow view of self-determination means that the right must expire when those exercising it are incorporated into a state is to be sustained, then it must be shown that the limitations imposed on the right by its definition in paragraphs 2 to 8 of the fifth principle are such that no act directed by a people incorporated into a state against that state can still be regarded as a

⁸⁸ Loc. cit.; emphasis added.

⁸⁹ F. R. Teson, op. cit. p.881.

legitimate act of self-determination.

The main limitation on the operation of the right to self-determination contained in the Declaration on Friendly Relations is to be found in the principle's seventh paragraph. It limits the principle of self-determination described in the previous six paragraphs by stating that they shall not "... be construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States ..."⁹⁰. It will be observed that this test involves an objective element and a subjective element. It is objectively reasonably easy to determine when a country's territorial integrity has been impugned. This part of the test appears to operate against the secession of Scotland from Great Britain, the Basque province from Spain, Quebec from Canada, and Biafra from Nigeria, but conversely not against the decolonization of most of Britain's former overseas possessions in Africa or the secession of Bangladesh from the original newly created state of Pakistan. The writer agrees with Chowdhury that the "territory" must be viewed geographically so that "... the [artificial, political] device of incorporating such territory as a part of the metropolitan area of the administering State [as is the case for example in New Caledonia] affords no defence "⁹¹.

The subjective part of the test, the question of

⁹⁰ Loc. cit.

⁹¹ S. R. Chowdhury, op. cit. at p.79. This may not have been true in the earlier days of the development of the self-determination principle. The Social Democrats of Austria in the early part of the 20th century saw territory as irrelevant - see for example Otto Bauer Die Nationalitätenfrage und die Sozialdemokratie cited in translation in W. Ofuatey-Kodjoe, The Principle of Self-Determination in International Law, p.26.

the disruption or impairment of a state's political unity is a much thornier problem. The words "political unity" in this part of paragraph 7 are a later version of what was originally referred to in the 1960 Declaration on Colonial Independence⁹² as "national unity", and inasmuch as "political unity" constitutes a gloss on the 1960 wording, it is important to consider the two phrases together. Discussing the nature of national unity Chowdhury examines a number of possible grounds for determining whether a group of people constitute a national unit. He concludes that "[s]ince neither race nor language nor religion as such satisfies the test of nationhood, ... [a] nation in the scheme of the Charter is secular, multi-racial and multi-lingual where different communities share a larger national identity derived from a feeling of a common history and a common destiny"⁹³. If a nation may consist of a number of distinct racial, linguistic and religious groups, then the common history and destiny which the nation shares cannot focus on any of these spheres of human activity, and indeed once these are removed from the equation it is difficult to see a plural nation of this type as having any common perception of a shared cultural destiny or origin, even on a "larger" plane. The validity of this reasoning is reflected in the General Assembly's

⁹² Loc. cit.

⁹³ S. R. Chowdhury, op. cit. p.77. Others who have also identified this subjective element in the definition of a "nation" include for example R. Kiwanuka op. cit. p. 86; Yoram Dinstein, "Collective Human Rights of Peoples and Minorities", *International and Comparative Law Quarterly*, vol.24 (1976), p.102 at p.104; Ian Brownlie, "The Rights of Peoples in Modern International Law", *Bulletin of Australian Society and Legal Philosophy*, vol.9 (1985), p.104 at p.107; M. G. K. Nayar, "Self-Determination Beyond the Colonial Context: Biafra in Retrospect", *Texas International Law Journal*, vol.10 (1975), p.321 at pp.340 and 344; R. Emerson, op. cit. p.102.

decision to replace the "national unity" of the Declaration on Colonial Independence with the more explicit "political unity" found in the Declaration on Friendly Relations ten years later. Viewing the "political unity" of the Declaration on Friendly Relations in light of Chowhury's observations about that concept's precursor ("national unity") the suggestion is therefore that to describe a group as having "political unity" is to attribute to them a common political historical experience and a shared perception of their political destiny. To read "national unity" and "political unity" in this way as opposed to inferring some kind of broader ethnocentric or cultural commonality is also more in accord with the rejection of the latter in the second half of the twentieth century after it manifested itself as the doctrine of 'ein Volk, ein Reich' and was used to justify the annexation of the Saarland and Schleswig Holstein and the Austrian Anschluss⁹⁴. It also justifies the continued existence as two separate states of the German Democratic Republic and the Federal Republic of Germany. At least by the indicators of race and language the two states are culturally nearly identical and while their historical political experience, at least prior to World War II, is arguably very similar, until November 1989 there appeared little doubt that the people who inhabit them regarded their political destinies as distinct. On the view here proposed, whether or not the two states continue to exist as separate political entities will depend critically on the reality of this destinal dichotomy. As long as there are two distinct views of their political future there should remain two

⁹⁴ The 'final solution', as a way of keeping Germany for Germans, is also entirely consistent with the 'ein Volk, ein Reich' approach to national unity, as would be the 'ethnic cleansing' of which Serbian nationalists have been accused.

separate states; when the two views merge reunification should not be far behind. Similarly, Switzerland, the United States, Canada and India have all continued as unitary states even though they contain a range of quite distinct cultural minorities. Reading national unity in a political light allows an observer to ascribe this unitary survival to the common perception of political destiny shared by all the groups which make up the population of each of these states. Under the 'ein Volk, ein Reich' theory such states should fragment so that each of the new resultant states would only be occupied by one single, distinct cultural unit⁹⁵.

The notes above about the limitations on the operation of the right to self-determination in paragraph 7 of the fifth principle in the Declaration on Friendly Relations and its fore runner paragraph 6 of the Declaration on Colonial Independence are not meant in any way to be comprehensive but do serve to illustrate that one can adopt a narrow view of self-determination (in both its internal and external aspects) and at the same time, without inconsistency, advocate the continued existence of the right to self-determination even after the group exercising that right has been incorporated into a state. So long

⁹⁵ John Finnis believes that to describe a collection of individuals as a group depends on their having a common purpose. It is evident from his discussion that the nature of this common purpose determines the appropriate appellation of the group. Thus a sports group is a team because all its members share as their common purpose to win the game, a group involved in making widgets is a business because all the people involved are trying to maximise the enterprise's profits. A national political group, which is a nation state, exists as such because all its members share a common objective. Although he uses different terminology it is suggested that Finnis' common objective is conceptually indistinguishable from what is here described as a shared perception of political destiny. For Finnis on group constitution see Natural Law and Natural Rights, pp.150-153.

as the act of self-determination does not disrupt the territorial integrity of the state in question, and⁹⁶ as long as its population has a historical political

⁹⁶ The use of the conjunctive in paragraph 6 of the Declaration on Colonial Independence and in paragraph 8 of the fifth principle in the preamble to the Declaration on Friendly Relations suggests that both the objective and subjective parts of the test must be satisfied before paragraph 6 may be used to justify the suppression of a purported act of self-determination i.e. that an act purportedly of self-determination may still proceed against a state provided it disrupts neither the latter's territorial integrity nor its political unity. This approach is also reasonable given that it makes little sense to distinguish between two otherwise valid claims for self-determination merely on the basis of geographical location. However, paragraph 7 of the later Declaration on Friendly Relations' fifth principle uses the disjunctive and the example of the two German states suggests that an act of self-determination may proceed so long as it leaves intact and unimpaired either the territorial integrity or the political unity of the state in question i.e. that it may still be an act of self-determination even though it has disrupted either the state's territorial integrity or its political unity so long as it does not disrupt both. This also apparently consistent with practice in the case of East and West Germany. However, in view of the apparent internal inconsistency between paragraphs 7 and 8 in the fifth principle of the Declaration on Friendly Relations and the illogicality of generating different outcomes on two otherwise identical claims to self-determination merely because of their respective geographical locations, the writer tends to favour a conjunctive reading of this part of the definition of the right to self-determination. It is suggested that the division of Germany was not based primarily on considerations of self-determination but stemmed from the baser dictates of political rivalry and opportunism. If the two states continue their separate existence this would suggest that within the subjective part of the test contained in paragraph 6 of the Declaration on Colonial Independence and paragraphs 7 and 8 of the Declaration on Friendly Relations' fifth principle, "national unity" and "political unity" respectively will be achieved so long as the group concerned has either a common political historical experience or a shared perception of their political future; within the subjective element of the definition of self-determination the two parts, common experience and common future outlook, may be viewed disjunctively.

experience or a perception of its political destiny distinct from that of the group purportedly exercising the right to self-determination, the right may continue to be exercised notwithstanding that those wielding it have already been incorporated into a state structure.

This view is also supported by the rejection by the United Nations Special Committee on Friendly Relations of the alternative texts proposed by the United States and Great Britain for the 1970 Declaration on Friendly Relations⁹⁷. In respect of a people's entitlement on the one hand to carry out acts of self-determination and on the other to inclusion in a sovereign state, these two texts would both have produced something much closer to mutual exclusivity than is the case. If the Special Committee had intended the narrow view of self-determination to have the consequences alleged by Teson, it would surely have accepted these proposals not rejected them.

Thirdly, one must ask why the right to internal self-determination should expire when the group which could formerly have exercised it is incorporated, alone or in concert with one or more other distinct cultural groups, into a state. What happens to that group which could logically deprive it of the capacity to execute acts of internal self-determination? Why should the acquisition of sovereignty preclude the operation of the right to internal self-determination? The Montevideo Convention of 1933⁹⁸ states that a state is an entity which has:

- (a) a permanent population; and

⁹⁷ A/AC.125/L.75 (15 September 1969), p.4 (U.S.) and p.6 (Great Britain); cited in R. Emerson, *op.cit.*, at p.468.

⁹⁸ Convention on the Rights and Duties of States Adopted by the Seventh International Conference of American States at Montevideo, December 26th, 1933, 165 LTS 19 (registration no.3802, 1936).

- (b) a defined territory; and
- (c) a stable and effective government; and
- (d) the capacity to enter into international relations with other states.

Although what constitutes a "people" for purposes of self-determination is far from clear, a permanent population is logically necessary and it seems to be generally agreed that a people must also have at least some "... relationship with a territory, even if the people in question has been wrongfully expelled from it and artificially replaced by another population ..."⁹⁹. This territorial link reflects a liberal interpretation of the defined territory requirement not warranted at first glance, but the latter has never been very strictly interpreted¹⁰⁰ and it is submitted that the gap between the two requirements is more semantic than real. It follows that a "people" becomes a "state" when it acquires a stable and effective government and the capacity to enter into international relations with other states, and consequently, if elevation to statehood extinguishes the right to self-determination, that it must be one of these two factors which accounts for that loss. It is difficult to see why the acquisition of a stable and effective government should detract from a group's ability to "... pursue their economic, social and

⁹⁹ A. Critescu, The Right to Self-Determination, Historical and Current Development on the Basis of United Nations Instruments, paragraph 279 (p.141), E/CN.4/Sub.2/404/vol.1; R. Kiwanuka, op. cit., p.87; M. G. K. Nayar, op. cit. at p.340.

¹⁰⁰ Israel and also though less clearly Siam, Mauritania, Albania, Kuwait and Mongolia were all admitted to the United Nations, i.e. accepted as states, even though their boundaries were hotly contested.

cultural development ..."¹⁰¹; if anything one would see such a development as a major asset in the pursuit of such goals. As for the acquisition of the capacity to enter international relations with other states, the writer cannot see any reason why a group's ability to operate internationally and its capacity to pursue its own cultural, social and economic destiny should be mutually exclusive. One aspect of the capacity to enter into international relations, the capacity to make economic treaties, was described in the Austrian Customs Union Case in 1931¹⁰² as "independence"¹⁰³ and Judge Anzillotti defined independence as "... the normal condition of States according to international law; it may also be described as sovereignty (suprema potestas), or external sovereignty, by which is meant that the State has over it no other authority than that of international law"¹⁰⁴. Kiwanuka points out¹⁰⁵ that in equating self-determination of peoples with the sovereignty of states one is viewing self-determination only in its external manifestation. Teson himself defines external self-determination in a manner¹⁰⁶ which suggests that a group's capacity to act on the international stage is a matter of external self-determination rather than something which affects the ability to deal with those matters of, in his view

¹⁰¹ Declaration on Friendly Relations 1970, loc. cit.

¹⁰² Customs Regime Between Germany and Austria, Permanent International Court of Justice, Series A/B, fascicule 41.

¹⁰³ Loc. cit. at p.57.

¹⁰⁴ Ibid.

¹⁰⁵ Richard Kiwanuka, "The Meaning of "People" in the African Charter on Human and Peoples' Rights", *American Journal of International Law*, Vol.82 (1988), p.80, at p.101.

¹⁰⁶ F. R. Teson, op. cit., footnote 50 on p.880.

at least, essentially internal concern such as the pursuit of cultural, economic and social goals. Although the writer agrees with Swan¹⁰⁷ and Chowdhury¹⁰⁸ that Kelsen was wrong to conclude that the self-determination of peoples in article 1(2) of the United Nations Charter means the same as the sovereignty of states, Kelsen's observation that the principle of self-determination usually "... designates a principle of internal policy ..." ¹⁰⁹ is, in the writer's view, correct. Blay also says¹¹⁰ that the self-determination which a territory exercises when it "... emerges as a sovereign state ..." is external. Proponents of the functional theory of sovereignty such as Rosalyn Higgins also cast sovereignty as a matter of principally external relevance. It is therefore difficult to see why the acquisition of the status of a sovereign state should extinguish the right to internal self-determination. In the state circus the pursuit of cultural, economic and social development occurs in one ring while the capacity to enter into international relations is

¹⁰⁷ George S. Swan, "Self-Determination and the United Nations Charter", *Indian Journal of International Law*, vol.22 (1982), p.264 at p.273.

¹⁰⁸ S. R. Chowdhury, *op. cit.* at p.74f.

¹⁰⁹ H. Kelsen, The Law of the United Nations: a critical analysis of its fundamental problems, p.51f. The writer also feels that he goes too far in describing the detail of that internal focus as essentially political (democratic) as this ignores the cultural, social and economic aspects specifically included in the content of the principle of self-determination in favour of the issue of political status alone. Nevertheless, the general internally oriented thrust of his approach is supportive of the writer's argument.

¹¹⁰ S. K. N. Blay, "Self-Determination Versus Territorial Integrity in Decolonization", *New York University Journal of International Law and Politics*, vol. 18 (1986), p.441 at p.468f.

simultaneously taking place in another; the two acts are quite separate.

It may appear from the above that the writer is endorsing a position which holds that sovereignty is a matter of exclusively external concern. This is not the case. Although the writer rejected above Chowdhury's criticism of the external / internal self-determination division, it will be noted that this was because the separation is a useful analytical tool; it should in no way be inferred that the writer endorses any substantive division between the two aspects of the concept as a whole. To continue the metaphor started at the end of the last paragraph, although the two acts in the state circus are discreet and may both be performed simultaneously, they are still most definitely part of the same show under the one Big Top. Indeed the relationship between particularly the political aspects of internal self-determination and sovereignty has long been noted. In 1918 Woodrow Wilson said that "... the settlement of every question, whether of territory, of sovereignty, of economic arrangement, or of political relationship [should be] on the basis of the free acceptance of that settlement by the people immediately concerned"¹¹¹. Nayar states that paragraph 6 of the 1960 Declaration on Colonial Independence "... constitutes an unambiguous affirmation of the applicability of the right of self-determination to peoples inside the political boundaries of existing sovereign and independent states in situations where the government does not ..." ¹¹² represent "... the whole people belonging to the territory without

¹¹¹ U. S. Congressional Record, vol.56, part 9, Government Printing Office, Washington, 1918, p.8671.

¹¹² M. G. K. Nayar, op. cit. at p.337f.

distinction as to race creed or colour"¹¹³. This is also consistent with article 21(3) of the Universal Declaration of Human Rights¹¹⁴ in which the "... will of the people ..." is seen as not merely operative but of fundamental importance within existing states. Such an approach is also supported by those who advocate a separation of the authority for sovereignty from the exercise of the concept. Such writers argue that the initial authority for a state's emergence onto the international stage comes from the people within its territory and that this, along with ongoing international recognition by other states, is what justifies the state's continuing participation in the international game. Similarly, the wording of paragraph 7 of the fifth principle of the preamble to the Declaration on Friendly Relations¹¹⁵ reinforces this association between the political aspects of internal self-determination and sovereignty. In this relationship lies the fourth criticism of Teson's conclusion that a narrow view of internal self-determination requires that a people's right to self-determination should expire when they achieve statehood. If a government's authority to function at the international level is dependent on the ongoing endorsement of the people whom it governs, then it makes no sense to say that the right to internal self-determination dies when the people achieve

¹¹³ Paragraph 7 of the Colonial Declaration 1960, loc. cit.

¹¹⁴ Loc. ci, at p.5. See also M. G. K. Nayar, op. cit. p.338 and S. R. Chowhury, op. cit. p.80.

¹¹⁵ Loc. cit.; It effectively protects states' territorial integrity and political unity from acts of purported self-determination provided the states in question are "... conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory ...".

statehood. Indeed, if a state cannot exercise sovereignty, i.e. cannot be a true state, without the support of the people whom it governs, and if that support is contingent on the state's continued satisfaction of the people's desires in internal political, economic, and cultural terms, one can even argue that sovereignty, statehood, cannot be achieved or maintained without the continued existence of the right to internal self-determination; sovereignty depends on internal self-determination and if acquisition of sovereignty was to destroy the right to internal self-determination it would in effect be undermining its own foundations and destroying itself.

(B) Teson says that a narrow view of internal self-determination means that "[p]eople have the right to create whatever form of government they want, no matter how repressive"¹¹⁶. There are a number of points to be made here.

Firstly, it is hard to see how if a people have the right to pursue its own cultural, economic and political development free from all external interference, it can be seen to be repressing itself. If a people has the right to pursue its political, cultural and economic destiny free from external interference (i.e. the right to internal self-determination narrowly viewed), that very freedom of choice seems to preclude the possibility of repression in respect of those spheres of activity; the freedom of choice necessarily inferred by the right to internal self-determination and repression seem to the writer to be mutually exclusive. To say that a narrow view of internal self-determination necessarily leads one to conclude that a people can

¹¹⁶ F. R. Teson, op. cit. at p.881.

repress itself, is akin to arguing that if A is black, it must be white. Indeed, "repression" is a game which almost by definition seems to require at least two players and if a single people is standing on the field alone it is hard to see how the game may proceed.

Secondly, there have been no cases on this corporate self flagellation. If a right to self repression is a consequence of the narrow view of internal self-determination then it has not been endorsed or recognised in state practice, nor expressly identified in any international convention, general or particular, as a rule recognised by states. To the writer's knowledge the link between a people's right to internal self-determination and a theoretical right to repress themselves has not received much recognition by international jurists or academic commentators and as one of the "... general principles of law recognised by civilized nations"¹¹⁷ such a relationship does seem a somewhat unlikely contender.

Thirdly, even if this unsung right to repress itself was definitionally possible and was a consequence of a narrow view of internal self-determination, it is by no means clear that that is a bad thing. The writer acknowledges that domestic law analogies are not always valid in international legal discussion but it is none the less interesting to note that the illegality of masochism even to the point of suicide, in Common Law jurisdictions is by no means clearly accepted¹¹⁸. While crediting peoples with a right to repress themselves may be as much an

¹¹⁷ Article 38(1)(c) of the Statute of the International Court of Justice, loc. cit.

¹¹⁸ In R v Brown [1992] 2 W.L.R. 441 it was rather controversially held that an assault was committed even where the 'victim' of the assault consented. This decision is currently under appeal.

overstatement as ascribing to an individual a right to chop off his own foot or burn himself with cigarette butts, the conclusion that a narrow view of internal self-determination necessarily entails the recognition of a people's right to auto-repression is not in itself unduly condemnatory.

Fourthly, even if one concedes that when Teson refers in the present context to "peoples" he really means "governments", and the writer is prepared to make that concession, the assertion that governments should not repress the people whom they claim to represent is in no way inconsistent with a narrow view of internal self-determination. That governments, as opposed to peoples, may not be as repressive as they like, at least not without the approval of the people whom they are repressing, follows from what was said above about the relationship between internal self-determination (particularly in its political aspects) and sovereignty. Logically it does not follow from a narrow view of internal self-determination (that external interference in the domestic affairs of an alien people should be condemned) that internal interference should be endorsed. One can still argue that governments should be representative and should observe human rights without necessarily compromising a narrow stance on internal self-determination.

(C) Teson says of the narrow view of internal self-determination that "[o]nce the people chooses a political and cultural system, nothing in international law confers a right to change the system."¹¹⁹. There are two ways of interpreting this assertion. The first is to infer from it that Teson believes that if one adopts a narrow view of internal self-determination, one is bound to accept that

¹¹⁹ F. R. Teson, *op. cit.* at p.881.

self-determination is a one-off right and once it has been exercised no further changes to the cultural or political system selected thereby are possible. The second and more literal interpretation is that on the narrow view of internal self-determination there is no right to carry out any further acts of self-determination, though such actions may still be effected de facto. It is submitted that neither of these approaches can be sustained in the cause and effect relationship with a narrow view of internal self-determination alleged by Teson.

Firstly, if Teson means to infer that taking a narrow approach to internal self-determination necessarily involves endorsing the position that there can be absolutely no changes to a cultural or political system once the relevant people have chosen it, then if the causal link between this approach to self-determination and the alleged consequence is proven, the criticism would certainly have considerable merit. To bring about such permanence and inflexibility strikes the writer as a most undesirable state of affairs. However, this causal relationship does not withstand scrutiny. Just because no externally generated changes to the system would be permitted does not mean that absolutely no changes are possible. International law would surely still permit changes to the system effected by internal means. Changes to the system may also be brought about externally in some circumstances. The right to self-determination narrowly viewed and its "flip-side" the corresponding duty incumbent upon states not to interfere in the domestic affairs of others, has never been taken to imply that a state may never take a healthy interest in the affairs of its neighbours be they states or peoples. While the precise meaning of intervention remains an elusive concept, it is probably safe to say that the duty not to interfere

does not mean that states must ignore the domestic affairs of others nor even that they must regard them with complete moral indifference. The system of formal international diplomatic exchange and the whole gamut of irregular cultural exchanges promoted by a variety of organisations show that interest in the internal affairs of other states is not merely legitimate but indeed to be positively encouraged. Similarly states frequently express approval or disapproval at the way events in other states unfold without breaching the non-intervention principle. Indeed, states may even act on their disapproval by making formal protests to the state concerned directly or to an appropriate international organisation. They may also break off diplomatic or trade relations. The narrow view of internal self-determination does not even preclude the possibility of using force collectively as in the case of the Korean Police Action or even unilaterally as in the cases of Afghanistan and Saudi Arabia where assistance of a foreign power was sought. Only by arguing that all such expressions are invalid and that the only appropriate response to all affairs not firmly within the international arena is complete indifference and neutrality, a viewpoint not at all in accord with international practice or opinion, can one assert that the narrow approach to internal self-determination absolutely precludes changes to the cultural and political system after their selection by the people in question. The narrow view of internal self-determination is by no means the recipe for inflexibility and stagnancy which, on this interpretation of his words, Teson alleges.

Turning secondly to the more literal of the two interpretations of Teson's view, stating that the right to self-determination may only be exercised once and then no more is a marginally more general version of the argument that the right to

self-determination expires when the people exercising it achieves statehood. The latter merely tries to tie down, to sign post, the expiry more specifically than its more general progenitor. The four arguments given above in chapter 3.2.1.5 (A) apply mutatis mutandis to this criticism as well; its marginally less specific nature does not alter its invalidity. Achieving statehood is accepted as one of the ways in which self-determination may be exercised¹²⁰. Indeed, many states are inclined to view the other means of exercising self-determination potentially available to peoples with considerable dissatisfaction¹²¹. Therefore, the argument that the right to self-determination expires when the people exercising it achieves statehood is a subset of the argument that

¹²⁰ Paragraph 4 of the fifth principle of the Declaration on Friendly Relations states that "[t]he establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people". The International Court of Justice's Advisory Opinion on the Western Sahara case (International Court of Justice Reports, 1975, pp.32-33) gives the same options. See also Pomerance "Self-Determination today: the Metamorphosis of an Ideal", *Israel Law Review*, vol.19 (1984), p.310 at pp.327-30. Puerto Rico's association with the United States and the Cook Islands' special relationship with New Zealand are examples of states which thus far have opted to exercise their right to self-determination by a means something short of full sovereign independence. On Puerto Rico see J. Benitez, "Self-Determination in Puerto Rico", 67 *Proceedings of the American Society of International Law*, vol.67, p.7. On the Cook Islands see G.A. Resolution 2064 (XX), of 16 December 1965 (reproduced in the *Year Book of the United Nations* 1965, (1967), p.574).

¹²¹ For an example of the suspicion with which some states view methods of exercising self-determination other than emergence as a sovereign state see the views of the Committee of 24 discussed in R. Emerson, *op. cit.* at p.470. See also M Pomerance, Self-Determination in Law and Practice, p.25.

the right to self-determination is a one off right. One cannot argue the latter without also endorsing the validity of the former, and as was shown above in chapter 3.2.1.5 (A), such endorsement cannot be sustained under scrutiny.

(D) Teson also argues that on a narrow view of internal self-determination a people may "... freely pursue their economic, social and cultural development" even where that pursuit would reduce to meaninglessness the remaining fifty-one articles of the [International] Covenant [on Civil and Political Rights]"¹²². It is submitted that the fact that state A is forbidden by the principle of self-determination from interfering in the internal affairs of other peoples, does not necessarily make the Covenant nor its parent the Universal Declaration of Human Right meaningless. It has already been noted above¹²³ that the duty of non-intervention (on this view the "flip side" of the narrow version of the right to internal self-determination) does not preclude a range of actions by other states in respect of their neighbours, and indeed may even encourage them. Only by arguing that all such expressions are invalid and that every state should either ignore altogether events which occur outside its own domestic jurisdiction, or at least treat them with complete moral indifference, an approach which, as pointed out above, is not at all in accord with international practice or opinion, can one assert that the narrow version of the self-determination principle absolutely precludes the continued validity of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights as

¹²² F. R. Teson, *op. cit.* at p.882.

¹²³ See above chapter 3.2.1.5 (C) at p.35.

international moral norms. They may be limited to some degree but they will not be 'destroyed' and article 30 of the Declaration which deals with potential conflicts between rights, was carefully worded to allow one right to limit the operation of another, precluding only the complete "destruction" of one right by another¹²⁴.

(E) Teson also asserts that a narrow approach to internal self-determination "... often defines the interests of a people in mystical or aggregative terms that ignore or belittle individual preferences"¹²⁵. He cites¹²⁶ no lesser an authority than Karl Popper in support of the contention that the international order must "... ultimately protect human individuals, and not its units or atoms, i.e., states or nations."¹²⁷. From this, he seems to argue, the narrow approach to internal self-determination is undesirable. Though Teson does not do so, it is also possible to argue that this mystical, aggregative flaw afflicts not only the principle of internal self-determination narrowly viewed, but that it also attacks directly the cultural relativist position which that principle supports. When one considers a people's right to determine its own economic, social and cultural destiny, one is compelled to accept some method for distilling the people's view from the multitude of individual views current within that population. Just the same, in considering whether a particular moral norm is valid

¹²⁴ Universal Declaration of Human Rights, loc. cit., article 30. The article only stops one right from bringing about the 'destruction' of another right; it does not say one right cannot *limit* another.

¹²⁵ F. R. Teson, op. cit. at p.882.

¹²⁶ F. R. Teson, op. cit. at p.883, footnote 70.

¹²⁷ F. R. Teson, op. cit. at p.882.

within a given cultural group the relativist is bound to accept some device for deciding just how that group views the moral norm in question. Cultural relativism generally and the narrow view of internal self-determination thereby are both bound to "aggregate" the individual views of the members of the group with which they deal. It does not seem to the writer that this criticism is valid in either of these cases.

Firstly, both make the assumption that individual rights and interests are more important than collective rights and interests. This is perhaps an accurate reflection of feeling in the developed west, but it certainly is not the case in other parts of the world. As Kiwanuka notes "... the Banjul Charter at least theoretically recognizes that all classes of rights (political, economic, individual and collective) are equal and synergetic"¹²⁸. Irrespective of which category of right should take precedence, it has surely to be admitted that to argue the narrow view of internal self-determination is undesirable because it focuses on groups rather than on the individual, involves imposing a western moral value on to societies which need not necessarily share it. One can argue that aggregation and mystification are bad practices, relativism and internal self-determination narrowly viewed indulge therein, therefore relativism and the narrow approach to internal self-determination are bad and universalism and the broader approach to internal self-determination are to be preferred, but the major premise of the argument is by no means agreed. To make the premise firm in the face of such disagreement one either has to ignore the reality that

¹²⁸ Richard Kiwanuka, "The Meaning of "People" in the African Charter on Human and Peoples' Rights", *American Journal of International Law*, Vol.82 (1988), p.80, at p.86.

not all of the world's peoples accept its validity, clearly an unacceptable option, or one has to alter the premise from a purportedly descriptive assertion to a normatively worded proposition. Having reworded the premise to read aggregation and mystification *should* be regarded as undesirable practices (cf are undesirable practices), it follows not only that any conclusion based on that premise must also be normative, but also that the truth of that normative conclusion at the end of the day will be subject to the same conditions which justify reliance on the premise; the validity of the conclusion can only be sustained to the same extent that the major premise on which it is based can be likewise justified. One must therefore ask how one may justify the proposition that aggregation of individual interests should be regarded as bad. It seems to the writer that there are at least three possible rationales for such an assertion. Firstly, one could argue that it is legitimate for the West to impose its own moral precepts on the rest of the world because it has the economic and political power to do so. Few today would support so bald an endorsement of the cynical doctrine that 'might is right'. The second alternative is to argue that aggregation and mystification of individual interests should be regarded as bad because that is one of the immutable laws of nature, God, or whatever. Again such a proposition would surely receive scant support in today's international community. The only remaining alternative is to maintain that aggregation of individual interests should be regarded as bad because the international community as a whole believes that to be the case. This proposition involves advocating the highly doubtful assertion that international affairs are conducted not on the basis of consensus but on the assumption that an international majority may make rules which are binding not only on

themselves but also on a non-consenting minority. Moreover, even if the majority could so act, it is far from clear that the western view is in fact the majority view. Furthermore, even if such an approach to international affairs was defensible and even if the western view did command majority support in fact, it is logically untenable to employ the assumption that mystification and aggregation of individual interests should be regarded as bad because the international community says they should, in any argument which endeavours to conclude that universalism is to be preferred over cultural relativism. This would involve an obvious circularity.

Secondly, even if one accepts that the individual is more important than the group as a focus of international law, and indeed it is probably true that it has now been generally agreed that the ultimate focus of international law is the individual¹²⁹, it does not follow that the protection of individual interests must therefore be directly by international organisations or external factional agency. The debate over the respective merits of the two approaches to internal self-determination (the narrow and broad schools) is essentially one of means or agency. The question is who is best to define, in terms of economic, social, cultural and political development, what is in the best interests of an individual and her group, and then to take whatever action is necessary to secure those interests, her own group or the international community generally? Asking this question is very different from asking whether

¹²⁹ Yoram Dinstein writes that "[i]n the final analysis, human beings are the subjects of all international rights". See Yoram Dinstein, "Collective Human Rights of Peoples and Minorities", *International and Comparative Law Quarterly*, vol.24 (1976), p.102 at p.102.

securing individual interests should be the primary objective of international activity. Proponents of the narrow view of internal self-determination do not have to argue that individuals are less important than groups. They can maintain at the same time that individuals are the primary focus of international law and that their cultural, political, social and economic best interests should be interpreted and/or secured by their own kind without external interference. Similarly, on a higher level, cultural relativists can without fear of contradiction argue that the individual is the primary focus of international law and at the same time that the rights which he has should be implemented and / or interpreted by a culturally relevant group. Whether the argument based on the premise that the individual is the focus of international law is applied to attack the relativist position directly, or indirectly to undermine one of its principal supports, the right to internal self-determination, the charge that it is illogical simply cannot be refuted; the basic point remains that one marksman may shoot at the same target as another without necessarily conceding that his weapon is in any way inferior to his neighbour's. Focus and means in international law are two distinct concepts and both the cultural relativist doctrine and the debate over the alternative interpretations of internal self-determination deal with means; whether international law focuses principally on the individual or on the group is largely irrelevant to the question of means.

Thirdly, even if the criticism is valid that the cultural relativist doctrine and the narrow approach to internal self-determination both aggregate the views of the individuals who comprise the group on which those theories focus respectively, it is if anything even more of a shortcoming in relation to the

universalist cause and the broader version of the internal self-determination principle. If the task confronting the relativist and the advocate of the narrow view of self-determination is to distil a single view representative of a cultural or national group respectively, the universalist and his ally the proponent of the broad school of internal self-determination, are faced with deriving a single view from an even larger number of individuals. The aggregation process required of a universalist is far more extreme than that facing the relativist and, if aggregation is undesirable then in crying "aggregation and mystification" one points the finger far more accusingly at the universalist camp than at the adherents to the cultural relativist cause and the narrow school of internal self-determination.

(F) Teson says that proponents of the narrow version of internal self-determination:

"... would maintain that in Pinochet's takeover in Chile or Ho Chi Minh's takeover in Vietnam, the peoples of Chile and Vietnam exercised their right of self-determination, and that the governments so formed are immune from foreign interference even when they deprive people of human rights. It may well be that self-determination, external or internal, exists only as a collective right that can be exercised jointly by individuals. It is equally true, however, that self-determination is a human right, not a right of governments, whether they are headed by charismatic revolutionary leaders or military dictators. Therefore, the right to self-determination must ultimately be ascertained by reference to the wishes and rights of individuals."¹³⁰

There are a number of points to be made here.

Firstly, neither cultural relativists nor proponents of the narrow approach to internal

¹³⁰ F. R. Teson, op. cit. at p.883.

self-determination find themselves under any logical constraint to recognise the excesses committed by Pinochet and Ho Chi Minh as morally acceptable or as legitimate exercises of internal self-determination. An application of the basic tenet of the cultural relativist doctrine in either of these cases requires one to maintain that the application and interpretation of moral norms in Chile and Vietnam is a matter for the peoples of those two countries respectively. If the people of Chile regard the actions of General Pinochet as acceptable in Chile then that conclusion should be respected by the international community. Similarly, if the actions purported to be acts of internal self-determination in Vietnam do in fact represent the Vietnamese people's genuine vision of their political, economic, social and cultural destiny their choice should be accepted by the rest of the world. It is highly doubtful however, that the atrocities committed by Pinochet and Ho Chi Minh in Chile and Vietnam respectively were in fact regarded as acceptable by the peoples of those two countries in the moral sense or as accurate reflections of the people's perception of their political, cultural, economic and social future¹³¹. Even admitting the extreme cultural relativist position that culture is the only valid base for a moral norm, the actions referred to by Teson would still be regarded as wrong. Just as the cultural relativist is constrained to accept the people's right to determine its own moral norms, the advocate of the

¹³¹ See for example the comments by a former Chilean Member of Parliament on General Pinochet's human rights record in the New York Times, 26 February 1977, p.19. See also the experiences related by two Cambodian women at the hands of Pol Pot's regime in that country, New York Times, 23 December 1977, p.2. Neither woman evidently regarded the deprivations they suffered as legitimate expressions of human rights as interpreted or applied in Cambodia.

narrow view of internal self-determination is constrained to recognise the people's right to determine its own political, cultural, social and economic destiny, but neither are obliged to unquestioningly accept that every measure taken within a territory by any group, governmental or otherwise, necessarily accurately reflects the people's views.

Secondly, even if one did accept that a particular measure did accurately reflect the moral norms of a territory or was seen by its people as a legitimate act of internal self-determination, one can adhere to the cultural relativist doctrine and still reconcile his position with the narrow view of internal self-determination. Under the relativist doctrine a country can accept a people's choice in respect of internal self-determination without liking it and may acknowledge the currency within that people of a particular moral norm without necessarily sharing it. That these positions are legitimate in the present international climate was noted above in section 3.2.1.5 (C). It was also noted there that such sentiments may even be acted on in a variety of ways not falling short even of physical force. Again therefore cultural relativists and proponents of the narrow view of internal self-determination are neither obliged to accept the atrocities of Ho Chi Minh and Pinochet as accurate reflections of the moral norms of the peoples of Vietnam and Chile respectively or as legitimate interpretations of those peoples' perceptions of their economic, social, cultural and political destinies, nor are they constrained to argue that members of the international community, separately or collectively, are precluded from expressing and even acting on such non acceptance.

(G) Teson says:

"The self-determination principle has traditionally been directed against

colonialism and various tangible forms of foreign domination. It primarily guarantees to people the right to establish their own government and pursue their cultural development without external interference. Yet external pressure for human rights compliance has nothing to do with colonial domination, imperialism and the other evils against which self-determination was conceived. An analysis of the purposive dimension of self-determination, therefore, provides no support for the relativist doctrine."¹³²

Firstly, to say that the concept of self-determination developed in the "colonial" context is only half true. It is certainly true that the flag of self-determination was waved with renewed vigour during the post World War II period, particularly so in the period between the 1960 Declaration on Colonial Independence and the 1970 Declaration on Friendly Relations, when the trend towards decolonisation reached its peak. However, it is equally true that the principle of self-determination originally focused not on those countries mostly in Africa, Asia and on the Indian subcontinent now regarded as former colonies, but on the East European populations which prior to World War I made up the German, Russian and Austro-Hungarian Empires¹³³. It is submitted therefore, that it is not entirely true to maintain that the principle of self-determination developed in the traditional anti colonial context; it developed also and perhaps at a more formative level in the European political arena decades before the wave of decolonisation began to make itself felt around the world. The singularity of the principle's origin is

¹³² F. R. Teson, op. cit. at p.883f.

¹³³ M. Pomerance, Self-Determination in Law and Practice: the New Doctrine in the United Nations, chapter 1, pp.1-8; W. Ofuatey-Kodjoe, op. cit. chapter IV, pp.69-97.

not as absolute as Teson infers, and any arguments based on the purity of its conception must accordingly be treated with some care.

Secondly, even if it were true that the principle of self-determination had developed in the context of the anti-colonial movement, and the writer concedes not only that significant developments did occur during those times, but also that its origins certainly may be more appropriately sought in the history of peoples' rights rather than in the context of individual human rights, it does not seem to the writer that this justifies either the explicit statement that self-determination has "nothing to do with" human rights compliance or the implicit assertion that the separately developed individual human rights should override the peoples' right to inter alia, cultural development. Even if the right to self-determination developed in a different context that does not mean that it should be inferior; it would be equally valid (or invalid) to argue that because peas are grown in the North Island and carrots are grown in the South Island peas must be the superior vegetable. Not only would the relativist challenge the validity of the implicit value judgement that the North Island is superior (that the field of individual human rights is more fertile than that from which collective rights have grown), since for the relativist such judgements can only be valid for the culture which formed them, but, even admitting the North Island's superiority, it still does not logically follow that that territory must necessarily produce products which will always be superior to all those produced in the South.

Similarly, the writer cannot accept that "... external pressure for human rights compliance has

nothing to do with colonial domination ..."¹³⁴. Both involve a foreign power imposing particular norms of political and social behaviour on a different cultural group; the difference is again only one of value, and as noted above, this is precisely the type of judgement which relativists say can have no necessary validity outside the culture in which it is made.

Finally, even if one could accept that self-determination did develop in a purely anti-colonial context and so completely separately from individual human rights, and that that does mean that the people's collective right to self-determination is in some way inferior to individual human rights, it should be noted as Teson does, that such conclusions merely make the principle of self-determination irrelevant to the relativist / universalist debate. It does not directly attack the relativist position or deal with any of the criticisms of the universalist school discussed above, but simply denies relativists recourse to one of the weapons which would otherwise be in their arsenal.

3.2.2 Cultural relativism is much more flexible than universalism

Cultural relativism is much more flexible a concept than universalism. Flexibility is a desirable characteristic because in an ever changing world subject to constantly varying environmental needs and natural resources, a flexible doctrine is more likely to be of on going utility in providing a framework for international moral behaviour than a more rigid doctrine. Relativism is so flexible that it does not even necessarily always conflict with universalism but in fact can in some situations even reinforce that approach. If a value is formed by a very small group

¹³⁴ F. R. Teson, op. cit. at p.883f.

the relativist doctrine would maintain that that value was valid for that group but not necessarily for any other group. As the group becomes larger and larger an advocate for relativism would assert that the value formed was valid for the whole of that ever increasing population. Logically, if the group forming the value is so large that it is in reality the entire population of the planet then relativism would hold that that value is necessarily applicable to the whole of that group, to everyone in the world, i.e. universally. Relativism would in effect be flexible enough to allow for a universalist stance in a situation where circumstances demanded such an approach.

3.2.3 There is widespread academic support for cultural relativism in international human rights

Marks expressly discounts temporal universalism as empirically unsustainable¹³⁵ and Lehmann holds a similar view¹³⁶. Henkin examines beliefs about human rights in the United States, France, the Soviet Union as well as China, Nigeria and Tanzania as reflected in their constitutions¹³⁷. He concludes that human rights operate differently in each of these countries and ascribes these variations to differing perceptions of value and different social, political and historical experience¹³⁸. Gorecki accepts relativism. Although he

¹³⁵ S.P. Marks "Emerging Human Rights: A New Generation for the 1980's", Rutgers Law Review, vol.33 (1981), p.435 at p.439.

¹³⁶ R.A. Lehmann "The Human Right of Communication", New York Journal of International and Comparative Law, vol.4 (1982), p.83 at p.87.

¹³⁷ Louis Henkin, "Rights: Here And There", Columbia Law Review, vol.81 (1981), p.1582.

¹³⁸ L. Henkin, op. cit. at p.1592. See also p.1603 for the Chinese conception of human rights.

calls it "historical limitation"¹³⁹ it is clear that he regarded this as synonymous with cultural relativism. He writes that "[f]or each human right, the conditions [for acceptance] are present in some and absent in other societies"¹⁴⁰. Gros Espiell, in discussing the right to development as a human right, states that it is "a relative and dynamic concept"¹⁴¹. Brugger restricts the universal character of human rights to that part of the rights process which involves claiming¹⁴² endorsing a relativist approach in other respects¹⁴³. The United States has been steadfast in its refusal to ratify the International Covenant on Economic, Social and Cultural Rights, largely, according to Alston, because it believes (in error in Alston's view) that the values inherent in that document are at variance with those current in the United States¹⁴⁴. Alston himself rejects a substantive list of human rights in part because it

¹³⁹ Jan Gorecki, "Human Rights: Explaining The Power Of A Moral And Legal Idea", *American Journal Of Jurisprudence*, vol.32 1987, p.153 at p.166.

¹⁴⁰ *Ibid.*

¹⁴¹ Hector Gros Espiell, "The Right of Development as a Human Rights", *Texas International Law Journal*, vol.16 (1981), p.189 at p.202.

¹⁴² W. Brugger "Human Rights Norms in Ethical Perspective", *German Year Book of International Law*, vol.25 (1982), p.113 at p.115.

¹⁴³ W. Brugger, *op. cit.* at p.132 writes of human rights as they are expressed in the Universal Bill of Rights that "... one has to take into account that every culture will have its own way of filling these words with specific content ... [and] ... these will differ in minor and major degrees in varying cultural and historical settings".

¹⁴⁴ P. Alston, "U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy", *American Journal of International Law*, vol.84 (1990), p.365 at p.367.

fails to "... be relevant, inevitably to varying degrees, throughout a world of diverse value systems"¹⁴⁵. Although Sompong Sucharitkul believes that there is a hard core of universal rights¹⁴⁶ he accepts a high degree of relativity. He writes:

"We live in a multicultural world, where the light in which a person sees cultural values depends on the social environments to which he is accustomed. To admit the reality of such a wholesome world is a giant step towards a more tolerable concept of human rights. If we are aware that a world of distinct cultures exists and eventually accept it, we will recognize and ultimately tolerate different cultural values and therefore essentially different concepts of human rights."¹⁴⁷

Although Weston accepts that human rights are a regarded as a universal concept "in some sense"¹⁴⁸, he nevertheless insists that "[i]t cannot be disputed that, like all normative traditions, the human rights tradition is a product of its time"¹⁴⁹ and concludes that:

In short, the legitimacy of different human rights and the priorities claimed among them are necessarily a function of context. Because different people located in different parts of the world both assert and honour different human rights demands according to many different procedures and practices, these issues ultimately depend on time, place, institutional setting, level of

¹⁴⁵ P. Alston, "Conjuring Up New Human Rights: A Proposal for Quality Control", *American Journal of International Law*, vol.78 (1984), p.607 at p.615.

¹⁴⁶ Sompong Sucharitkul, "A Multi-Dimensional Concept of Human Rights in International Law", *Notre Dame Law Review* vol.62 (1987), p.305, at p.307.

¹⁴⁷ S. Sucharitkul, *op. cit.* at p.305. Footnotes omitted.

¹⁴⁸ B. H. Weston *op. cit.* at p.263.

¹⁴⁹ B. H. Weston, *op. cit.* at p.264.

crisis, and other circumstance."¹⁵⁰

About rights more generally Dietze writes that "... the law and the rights it defines has differed a great deal in time and space"¹⁵¹. Recognition of a degree of cultural relativism in human rights was also recognised by the European Human Rights Commission in the Sunday Times Case. The court accorded a 'margin of appreciation' to the law of the jurisdiction within which the case occurred, by which was meant that the court would tend to favour the decision of a domestic court either to a lesser or greater degree¹⁵².

3.3 Conclusion

It is submitted that from the above discussion it is clear that the 'problem' posed by the cultural relativism inherent in the system proposed in this paper, is illusory. The system advocated does indeed involve a degree of cultural relativism but the universalist criticisms of that position do not withstand scrutiny. Moreover, the relativist stance is entirely in accord with international legal practice and instruments bearing on the principle of self-determination. It is also flexible enough to allow for a degree of universalism where circumstances demand

¹⁵⁰ B. H. Weston, op. cit. at p.269.

¹⁵¹ G. Dietze, "Right Rights", American Journal of Jurisprudence, vol.25 (1980), p.38 at p.64. Professor L. Geering in a series of as yet unpublished lectures on the nature of moral rights given in Wellington, New Zealand, during October, 1990, made the same assumption that moral rights are relative, determined by the social environment within which they operate.

¹⁵² The case is reported as The Sunday Times Case, Year Book of the European Convention on Human Rights, 1979, reproduced in International Legal Materials, vol.18 (1979), at p.931. See also V. L. Wagner, Human Rights: Government Interference with the Press - The Sunday Times Case", Harvard International Law Journal, vol.21 (1980), p.260 at p.263.

such an approach, and has met with considerable academic and some international judicial endorsement as well. It will further be shown in chapter four that a culturally relative approach to international human rights is also consistent with the version of the heavily empirical, practice oriented constructivist rights theory advocated therein. Far from comprising an obstacle to the efficacy of the system for regulating international broadcasting proposed in this paper, its inherent cultural relativism provides it with additional strength.

Chapter 4

4. Another Problem With The Regulatory Regime Proposed: Definition between classes 2 and 3 Rights

The method for regulating international broadcasting activities proposed in this paper is afflicted by two main problems. The first was that of relativism in the application and interpretation of international human rights and this issue was discussed, and resolved, in chapter three. The second and perhaps most perplexing problem facing the broadcasting regime suggested here relates to the correlation between rights and duties, and it is this thorny topic which constitutes the subject matter of this chapter.

4.1 The problem explained

The method for regulating international broadcasting activities proposed in this paper involves classifying programmes broadcast across borders according to their content. Some material is prohibited because it is propaganda or injurious to public health, public order, or national security. This material is contained in class one. In class two are programmes which are not objectively factual (by design or otherwise) or not broadcast to achieve a number of high minded ideals such as the furtherance of peace, international cooperation, well being and the like. The programmes in this class are entitled to protection by a right to freedom of expression against interference but only so long as they pose no threat to the cultural identity of those receiving the broadcast. The third and final type of programme consists of material which is objectively factual and which is broadcast with a view to furthering the causes of international peace, security, well being and so forth. Programmes in this category are entitled

to unconditional protection by the right to freedom of expression from interference.

This classification of programme content is suggested by the proceedings of the various international organisations responsible for drafting the provisions in the Universal Declaration of Human Rights and the subsequent International Covenant on Civil and Political Rights in so far as they relate to the right to freedom of expression. Those same proceedings however appear to show that this method of classifying programmes is based on the understanding that the right to freedom of expression is dependant on the right holder's satisfactory fulfilment of a moral or legal duty to broadcast objectively factual material for high minded purposes. For the sake of brevity this view will be called the contingent approach to international human rights because it makes an individual's entitlement to the rights set out in the Universal Declaration of Human Rights contingent on something more than his merely being human. The problem is that traditionally human rights have been seen as rights to which individuals are entitled simply by virtue of their being human, rather than because they belong to a particular class or have performed certain actions thereby earning the particular human right in question. The conception of human rights entertained by the bodies with primary responsibility for drafting the right to freedom of expression in the Universal Declaration of Human Rights and in the International Covenant on Civil and Political Rights, as rights dependant on duties, the notion that human rights are in some way earned, does not therefore lie straight with the concept of human rights as rights to which every human being is entitled by virtue merely of being human.

In essence the problem is how to reconcile the traditional view that all human beings have the human

rights set out in the Universal Declaration of Human Rights because and only because they are human beings, with the idea that the protection afforded by the right to freedom of expression in the international broadcasting context only embraces the broadcaster if he or she satisfies certain conditions in respect of the programme's content. Before tackling this issue, the writer will first make a few comments about each of these positions to demonstrate that the problem is real.

4.2 Traditionally human rights have been seen as rights to which individuals are entitled simply by virtue of their being human

Maurice Cranston has spent many years working on the nature and origin of international human rights and it is his view that:

"[a] human right is something that pertains to all men at all times. Therefore it cannot be justified in the way we justify rights that are earned or are acquired by the enactment of special roles: human rights are not bought, nor are they created by any other specific contractual undertaking. They are not exclusive, they do not 'go with the job'. They are said to belong to man simply because he is a man."¹

Jacque Maritain has expressed a similar view:

"The human person possesses rights because of the very fact that it is a person, a whole, master of itself and of its acts, and which consequently is not merely a means to an end, but an end, an end which must be treated as such. The dignity of the human person? The expression means nothing if it does not signify that by virtue of natural law, the human person has the right to be respected, is the subject of rights, possesses rights. These are things which are

¹ Maurice Cranston, What Are Human Rights?, p. 23f; see also p.7 of the same work and Maurice Cranston, "Are There Any Human Rights?", *Daedalus*, vol.112 (1983), p.1 at p.11.

owed to man because of the very fact that he is man."²

Hersch Lauterpacht traced the history and origin of human rights and notes the parallel drawn during the Enlightenment between the newly secularised natural rights and the physical laws of nature³. The idea was that just as the laws of physics governed the physical world, so too did natural law govern the metaphysical world. Just as it was irrational to deny that the earth revolved around the sun or that objects dropped from towers always fall earthwards, so too was it irrational to deny that human beings had certain fundamental rights. Within this framework, to ask whether a given individual had earned his complement of human rights, is clearly nonsensical; no rational person would dream of asking whether or not an apple has earned the rule that it must always fall to earth when it drops from the tree.

Although the whole concept of human rights has not always enjoyed entirely uncritical acclaim⁴, the existence of human rights and their automatic derivation from nature in the guise of natural law or

² Jacque Maritain, The Rights of Man, p. 37, cited in M. Cranston, "Are There Any Human Rights?", *Daedalus*, vol.112 (1983), p.1 at p.11.

³ H. Lauterpacht, "The Law of Nations, the Law of Nature and the Rights of Man", (1943)29, *Transactions of the Grotius Society*, p.1 at p.30.

⁴ Bentham wrote that "*Natural rights* is simple nonsense; natural and imprescriptible rights, rhetorical nonsense, - nonsense upon stilts" (J. Bentham, Anarchical Fallacies, p.501, emphasis in the original) and for most of the nineteenth century and until the atrocities revealed at the conclusion of World War II the concept of rights was altogether unpopular. Maurice Cranston describes how when Wesley Hohfeld introduced the topic to his students at Yale Law School, they petitioned the university authorities to have him removed (Maurice Cranston, "Are There Any Human Rights?", *Daedalus*, vol.112 (1983), p.1 at p.2).

from some natural attribute common to all men have generally been treated as a package. Indeed, this derivation is what is generally held to distinguish human rights from other types of more mundane rights such as contractual or constitutional rights. Whether they come about automatically through the operation of Newtonian rules of nature, divine edict, or rational deduction from God given premises (all of which have at various times been labelled natural law), the basic idea is that they flow from some aspect of nature automatically, without the need for any human intercession or prompting, and to talk of human rights being derived in any other, non-automatic way, is almost a contradiction in terms.

It is hardly surprising therefore that in the atmosphere of renewed enthusiasm in which the idea of human rights has basked since the end of World War II, most people writing on the subject have persisted in the view that individuals have human rights simply because they are human beings and not because they have earned them⁵.

Sompong Sucharitkul believes that in spite of the existence of many different concepts of human rights around the world, there is a basic core of human rights common to all peoples and cultures⁶. This

⁵ H. L. A. Hart, "Are There Any Natural Rights?", *Philosophical Review* volume 64 (1955), p.175f; Joel Feinberg, *Social Philosophy*, p.85. See also Feinberg's article on "Voluntary Euthanasia" in *Philosophy and Public Affairs*, vol.7 (1978), p.97; Jack Donnelly, *The Concept of Human Rights*, p.9. The writer does not mean to suggest that any of the authors cited in this footnote necessarily endorse this traditional view of the origin of human rights, merely that they note the traditional view that human rights flow automatically, naturally from nature, god or more mystical and amorphous notions such as the essence of mankind.

⁶ Sompong Sucharitkul, "A Multi-Dimensional Concept of Human Rights in International Law", *Notre Dame Law Review* vol.62 (1987), p.305, at p.307.

common core is possessed by all men. Sucharitkul defines 'man' in a manner very much in concord with the traditional view of the origin of human rights. He writes that "[a] 'man' for the purpose of enjoyment of human rights must be understood in the biological sense of "*homo sapiens*." ⁷.

Louis Henkin gives an excellent summary of the traditional approach to the nature and origin of human rights:

"To call them human suggests that they are universal: they are the due of every human being in every human society. They do not differ with geography or history, culture, ideology, political system, or stage of development. They do not depend on gender or race, class or status. To call them "rights" implies that they are claims "as of right," not merely appeals to grace, or charity, or brotherhood, or love; they need not be earned or deserved." ⁸

Richard Flathman writes:

"Writers in the natural rights tradition of thought have stressed the universalism of at least certain fundamental rights. They have argued that certain rights accrue to persons not by virtue of any characteristic or quality distinctive of them or their society but simply by virtue of their nature or their humanity" ⁹

This traditional approach also finds expression in the Universal Declaration of Human Rights where the "... inherent dignity and ... the equal and inalienable rights of all members of the human family is recognised ..." ¹⁰ and where it expressly says that

⁷ Op. cit. p.313, emphasis in original.

⁸ Louis Henkin, "Rights: Here And There", Columbia Law Review, vol.81 (1981), p.1582 at p.1582.

⁹ Richard Flathman, The Practice of Rights, p.70.

¹⁰ Human Rights: A Compilation of International Instruments, p.1, preamble, paragraph 1.

"[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."¹¹ The International Covenant on Civil and Political Rights similarly recognises that the rights incorporated therein "... derive from the inherent dignity of the human person."¹².

The traditional view that human rights are inherent in all human beings, that they belong to men and women because they are human beings, and do not have to be earned, has therefore found its way into two international human rights instruments of primary significance, and is still very much a part of contemporary thinking on human rights.

4.3 The contingent approach to international human rights

The contingent approach to international human rights is supported by the United Nations Conference on the Freedom of Information. The Peruvian delegate described the responsibility to publish the truth as a "necessary corollary" to the right to freedom of information¹³ and the French delegate was of the view that responsibilities "underlay" human rights¹⁴. The United States' delegate, Mr Benton, rejected the idea that human rights should be subject to responsibilities which he described as

¹¹ Loc. cit., p.18, article 2.

¹² Human Rights: A Compilation of International Instruments, p.18, preamble, paragraph 2.

¹³ E/CONF.6/C 1/SR/11, 31/3/48, at p.6 per Dr. Reyna.

¹⁴ E/CONF 6/C 4/SR/6, 5/4/48, at p.2.

"limitations"¹⁵, but the United States' proposal regarding freedom of information as a fundamental human right conceded that broadcasters at least had a "... moral obligation to seek the facts without prejudice and to spread knowledge without malicious intent ..."¹⁶. Similar concessions found their way into the British proposal¹⁷ and while Australia's Mr Watt shared the United States' concern that human rights should only be linked to "moral" duties, he certainly seems to accept without question some kind of rights correlation with duties¹⁸. Other delegates¹⁹ similarly engage in the debate over whether the duties in question should be "moral" or "legal" but do not apparently question the two presumptions which underlie their participation in the debate over the nature of the obligations, namely that:

- (1) before a human being can be said to have the human right to freedom of information, she must perform some action; and
- (2) this action is required of her as a matter of duty notwithstanding considerable disagreement about the nature of that duty.

It is beyond the scope of this paper to fully explore the issues raised by the second of these assumptions namely whether there is a duty to only broadcast class

¹⁵ E/CONF.6/C 1/SR/3, 25/3/48, p.4f.

¹⁶ E/CONF.6/C 1/1; see also E/CONF.6/C 1/SR/13, 1/4/48, at p.3 "... to seek the facts without prejudice ..." and "... to seek the truth and report the facts ...". See similar views by the British delegation in E/CONF.6/C.1/41, p.4 (article 4(a)).

¹⁷ E/CONF.6/C 1/2, 24/3/48, article 22(g).

¹⁸ E/CONF.6/C 1/SR/17, 5/4/48, at p.3.

¹⁹ E.g. Mr Dehousse from Belgium E/CONF. 6/C 4/SR/20, 13/4/48, at p.3; Mr Lunde from Norway E/CONF. 6/C 4/SR/8, 6/4/48, at p.3.

three programmes and if there is whether it is a moral or legal duty. Those tasks are too major to undertake in the present circumstances. It is sufficient to sustain the thesis treated in this paper to deal with the first assumption that in a broadcasting context in order to acquire the protection afforded by the human right to freedom of expression a human being has to not only be human but also has to perform some action, specifically to broadcast an objectively factual programme with a view to furthering one or more of the aims expressed for example in the preamble to the Charter of the United Nations. Nevertheless, because the second assumption identified above presupposes the first, support for the view that satisfactory performance of a duty underlies access to the protection afforded by the right to freedom of expression will be considered.

The Economic and Social Council's Commission on Human Rights through its Sub Commission on Freedom of Information and the Press supported the correlation of rights and duties in the field of international human rights. Mr Lomakin from the Soviet Union argued that:

"Rights should be counterbalanced by duties. Freedom also presupposes responsibility. Without definable obligations and responsibilities freedom of information may and in practice frequently does, turn into freedom of non information."²⁰

This same correlation between rights and duties was endorsed by the French representative M. Geraud²¹, the

²⁰ E/CN.4/Sub.1/37, p.2. See also E/CN.4/Sub.1/30, p.2.

²¹ E/CN.4/Sub.1/SR/25, p.4f. See also E/CN.4/Sub.1/SR.43 6/2/48, p.4 and E/CN.4/80, 6/2/48, p.4.

Czech delegate²² who described the two concepts as "inseparable", as well as by the representatives of a number of other countries²³ including the United States²⁴. They affirmed their views on this point in a number of resolutions of the Sub Commission²⁵ and in United Nations General Assembly Resolution 59(I) which stated that the fundamental human right of Freedom of Information "... requires as a basic discipline the moral obligation to seek the facts without prejudice and to spread knowledge without malicious intent"²⁶.

The link between duties and human rights was also endorsed by a number of the experts consulted at the time by UNESCO which in turn passed their thoughts on to the Human Rights Commission's Sub Commission on Freedom of Information and the Press. Rene Maheu, UNESCO representative to that body, believed that freedom implies responsibility²⁷ and both Mr Halperin²⁸ of the Co-ordinating Board of Jewish

²² E/CN.4/Sub.1/SR.26, 20/1/48, at p.4. See also E/CN.4/SR.36, 30/01/48, p.2 and E/CN.4/Sub.1/SR.39, 3/2/48, p.5 as well as E/CN.4/Sub.1/50, 21/1/48, p.1.

²³ Uruguay E/CN.4/Sub.1/SR.26, p.3; Canada E/CN.4/Sub.1/61, 28/1/48, p.6 and E/CN.4/Sub.1/61/Rev.1, 2/2/48, p.1; Britain E/CN.4/Sub.1/49/Rev.1, p.2; E/CN.4/Sub.1/39, 19/01/48, p.2f & 5.

²⁴ Per Mr Chafee E/CN.4/Sub.1/SR.42, 3/2/48, p.2 "... every right entails corresponding limitations ...".

²⁵ E/CN.4/Sub.1/SR.44, 10/2/48, p.4f where the link was accepted 7 to 3; E/CN.4/Sub.1/SR.45, 6/2/48, p.4 where it was accepted 10 to nil with one abstention that "[t]he right to Freedom of Expression also confers upon all who enjoy it the moral obligation to tell the truth without prejudice and to spread knowledge without malicious intent ...".

²⁶ United Nations Year Book 1946-47, p.176.

²⁷ E/CN.4/Sub.1/49, 21/01/48, p.2f.

²⁸ E/CN.4/Sub.1/SR.28, p.2.

Organisations and Jacque Maritain²⁹, a French academic, opined that all human rights should be conditioned by reference to the utilitarian yard stick the "common good". Mahatma Gandhi's view (contained in a letter to Julian Huxley) was that "... all rights to be deserved and preserved come from duty well done ..." and that it is possible "... to correlate every right to some corresponding duty to be first performed"³⁰.

While there clearly was much debate about the nature and extent of the duties attendant on the human right which was eventually to emerge as the right to freedom of expression in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, there was apparently little question that human rights were in some way associated with duties. Again this manifests an assumption on the part of the delegates to the Sub Commission that some a human being must perform some action in addition to being human in order to avail herself of the protection afforded by the right to freedom of information. Again, as noted above in respect of views expressed in the Conference on Freedom of Information, to attempt full resolution of the argument over whether this action was required by duty and if it was what the nature of that duty is, is beyond the scope of this paper. As stressed above it is enough for present purposes to note the widespread acceptance of the first of the two assumptions identified above and to address the problem posed by it when squared off opposite the traditional approach to the origin of

²⁹ E/CN.4/Sub.1/49/Rev.1, p.8.

³⁰ E/CN.4/Sub.1/49, 21/1/48, p.4.

human rights³¹.

It is possible that the delegates to the Conference on Freedom of Information and the Human Rights Commission's Sub Commission on Freedom of Information and the Press, in making reference to rights and duties, were not thinking of those concepts in a legal or technical sense but meant their remarks to be taken more in passing as vague political assertions or ideals. However, while words such as "right" and "duty" are indeed bandied about in the media and even in academia in the most ill-defined, generalised way, the detailed and prolonged nature of their discussion in both the Conference and the Sub Commission does not bear out this suggestion. It is evident from the records that both bodies were well aware that the product of their labours would effectively define the content of instruments of positive international law³², such as the at that time

³¹ The nature of the relationship between human rights entitlement and duties will be touched on below in chapter 4.7.4.6. The purpose of that discussion will not be to comprehensively address the issues raised by the second assumption outlined above, but to lend support to the version of constructivist rights theory offered in this paper as a way of resolving the apparent conflict between the contingent and traditional theories about the theoretical source of human rights. Strictly it is sufficient to simply demonstrate that that version of constructivist rights theory is prima facie defensible and that therefore the guidelines suggested in this paper for addressing international broadcasting disputes do not amount to jurisprudential heresy.

³² Some delegates were keen that the Universal Declaration of Human Rights should have immediate force as an instrument of positive international law. See for example M. Letourneau of France E/CONF.6/C.1/SR/15, 3/4/48, p.5 and Belgium E/CONF.6/C.4/SR/21, 15/4/48, p.5. Others, on the other hand, hoped that the Declaration would set out the principles and leave it to subsequent documents to give them practical effect in the international legal arena. See for example the United States' and Australia's position in E/CONF.6/C.1/SR/17, 15/4/48,

nascent International Covenant on Civil and Political Rights. It seems likely therefore that both bodies at least thought that they were conducting their debate in a legal context.

George Panchias hypothesises that:
"... the nature of basic human rights, unlike the nature of other kinds of rights, depends on persons enjoying a specific kind of moral role - a role which is enjoyed by all basic rights holders. Basic rights, on this hypothesis, function so as to link morally all those in such roles and, in so doing, establish the context of human participation required for the ascription of basic rights to human beings."³³

Requiring "human participation" as part of the process of ascribing human rights smacks of contingent theory sympathies. It appears to make an individual's possession of basic human rights dependent on his performing some kind of activity, namely the fulfilment of some particular 'role'. Moreover, this role is specifically said by Panchias to be a moral role; if a person does not behave in accordance with the strictures of a particular ethical system, she is not ascribed basic human rights. Panchias writes elsewhere that "... P enjoys the full complement of basic rights *only when* P enjoys a complex of roles ..."³⁴. The implication is clearly that if P did not fulfil this complex of moral roles she would not possess basic human rights. Panchias' analysis of the structure of basic human rights therefore appears to endorse a contingent approach to the possession of

p.3 and in E/CN.4/Sub.1/SR.26, 20/1/48, p.2.

³³ George E. Panchias, "The Structure Of Basic Human Rights", Law And Philosophy, vol.4 (1985), p.343 at p.349.

³⁴ George E. Panchias, op. cit. at p.372, emphasis added.

human rights.³⁵

4.4 The potential solutions introduced

There are three ways of reconciling the traditional theory of human rights with the contingent theory evident in the system for regulating international broadcasting activity proposed in this paper. Firstly, one could argue that the traditional approach to human rights is wrong. Given the long history of the traditional approach, its incorporation into a range of significant international and domestic instruments, and the imposing array of authoritative commentators who have endorsed it this would indeed be no easy task. The second way is to drive a wedge between the existence of a right and its exercise. The third, and in the writer's view the most probable explanation is that the delegates to the United Nations Conference on Freedom of Information and the Human Rights Sub Commission on Freedom of Information and the Press succumbed to the confusion over legal rights which prompted Wesley Hohfeld to embark upon

³⁵ This conclusion is based on the assumption that to 'enjoy' a moral role involves volitional action on the part of the alleged right holder. Clearly, if one could 'enjoy' a moral role without being obliged to act oneself, for example by being the object of a moral action performed by someone else, the requirement of the contingent theory that a right holder earn his right by performing some action (such as satisfying a duty to broadcast across borders only material of a specifically desirable content) would not be satisfied, and Panchias' analysis could not be touted as an example of a contemporary contingent theory. It is submitted that notwithstanding the rather passive import of the term 'enjoy', it is stretching the limits of the English language to describe as a 'moral role' any role which does not involve positive action on the part of role performer. To adopt a contrary view would require one to describe the action of being assaulted as a moral role, certainly a linguistic feat unlikely in the writer's view to survive the definitional test of ordinary usage.

his seminal work on the nature of rights. Even though they understood that their discussions were of a legal nature in that their efforts would ultimately be embodied in an international legal instrument (the two international Covenants if not the Universal Declaration of Human Rights itself), the lack of precision in their thinking about notions such as rights and duties led them into a conceptual confusion which not only produced language which probably misrepresents their thoughts on international broadcasting, but may well have also prevented them from identifying the last remaining problems standing between the delegates and a workable system for regulating international broadcasting activity.

4.5 How separating the existence of a human right from its exercise is supposed to remove the inconsistency between the contingent and traditional approaches to international human rights

If one separates the existence of a right from its exercise, one maintains that all human beings have human rights for no other reason than that they are human whether those rights be universal in their interpretation and / or application or subject to the variations therein which proponents of the relativist cause suggest are appropriate. One can also argue without any logical inconsistency that the exercise of those rights is a different matter entirely and that whether or not a given individual is entitled to exercise his international human rights may well depend on his carrying out some prerequisite action (satisfactory performance of which may be demanded by some sort of duty). Patricia has an international human right to freedom of movement because she is a human being, but whether or not she is entitled to exercise it depends on her refraining from burgling other people's houses, attacking law enforcement

officers with fruit knives, or any of the other activities which in Patricia's state normally result in her being confined in gaol. As a matter of observation such restraint in most states is required by duty³⁶. The cause and effect relationship between Patricia's social behaviour and the exercise of her human rights is a quite separate matter from her possession of those rights in the first place; advocating a cause and effect relationship between (potentially duty satisfying) social behaviour and rights exercise, and adherence to the view that anyone who is human possesses human rights, are not mutually exclusive.

4.6 However, the writer does not believe that separating a right's existence from its exercise is either useful or theoretically sound

The criticism of the system for regulating international broadcasting activity proposed in this paper is that it is inconsistent with the traditionally held view that human rights are sourced in humanity alone, that human beings automatically have them simply by virtue of being human. Clearly if the division between a right's possession / existence and its exercise is valid, it provides a defence to this criticism. Therefore if drawing such a division is valid, it supports the proposal. However, as supportive as it would be, the writer believes that the division cannot be sustained.

4.6.1 The words used by the delegates to the

³⁶ That is to say she would in most states be compelled to exercise such restraint on pain of censure. As noted above however, for the purpose of this thesis it is sufficient that her exercise be contingent merely upon the exercise of restraint irrespective of the degree of obligation if any attaching to that exercise, or of the nature and source of any such obligation.

Conference on Freedom of Information and the Human Rights Commission's Sub Commission on Freedom of Information and the Press do not suggest a division between the existence and exercise of the right to freedom of expression

The language used by many of the delegates to both bodies is in many cases ambiguous, but some clearly indicate that the discussion was focused on an individual's initial entitlement to the right itself, that is to the right's existence, and not on the nature of some subsequent restriction on its exercise. The French delegate to the Conference on Freedom of Information maintained that responsibilities "underlay" human rights³⁷ and it is hardly appropriate to describe a subsequent restriction on the exercise of a right as 'underlying' the right. The Soviet Union's representative Mr Lomakin argued that the freedom in question "presupposes"³⁸ responsibility, again using language which clearly focuses attention on what happens prior to the right's creation rather than on some later restriction. Perhaps the clearest indication that the Conference and Sub Commission were looking at the initial acquisition of the right rather than its subsequent limitation is found in the views of Mahatma Gandhi. Gandhi was one of the experts consulted by UNESCO which passed his conclusions on to the Human Rights Commission's Sub Commission on Freedom of Information and the Press. Gandhi wrote:

"... all rights to be deserved and preserved come from duty well done From this one fundamental statement, perhaps it is easy enough to define the duties of Man and Woman and to correlate every right to some corresponding duty to be *first performed*. Every other right can be shown to be a

³⁷ E/CONF.6/C 4/SR/6, 5/4/48, at p.2.

³⁸ E/CN.4/Sub.1/37, p.2. See also E/CN.4/Sub.1/30, p.2.

usurpation hardly worth fighting for."³⁹

It is submitted therefore that the language used by the two bodies primarily responsible for drafting the right to freedom of expression in the Universal Declaration of Human Rights and the accompanying International Covenant on Civil and Political Rights supports a unitary approach to human rights and does not support the view that a right and its exercise are two separate things. By focusing in its discussion on how rights should be limited, on events prior to the rights' creation, both of these bodies suggest that they did not entertain the notion that the exercise of a right should be carved off from its existence.

4.6.2 Making too much of conceptual divisions introduced as analytical tools can lead to results at variance with practical international experience

While separating a right and its exercise may be conceptually valid and a useful analytical tool, from a functional point of view, making too much of the possession / exercise division is, it is submitted, dubious. The risks entailed in taking analytical structures too seriously have already been noted in the last chapter's discussion on the conceptual division between internal and external self-determination⁴⁰. In that case giving substantive life to the analytical division between internal and external self-determination would result in having to deny that matters of internal concern have any relevance to the legitimacy of a state's sovereignty, a conclusion clearly at variance with widely held contemporary views of sovereignty. That case shows how letting the conceptual structure designed to assist

³⁹ E/CN.4/Sub.1/49, 21/1/48, p.4 (emphasis added).

⁴⁰ See above, chapter 3.2.1.5.

analysis come too much to the fore can pervert the concept itself and produce functional consequences which are both unacceptable and at odds with practical international experience. Watson deals with the same issue in somewhat broader context. He criticises the approach to international human rights law which relies heavily on academic analysis and maintains that the acid test for international law is the practice of states. He emphatically rejects the "... repetitious manipulation of secondary and tertiary sources ..." ⁴¹. The writer finds Watson's view of international law excessively descriptive and retrospective ⁴². Nevertheless, the stress he places on what the players on the international stage do rather than on "... the undue emphasis on verbal sources ..." ⁴³ is sound, and adds weight to the argument that analytical reductionism in the international legal context must be treated with no little circumspection.

4.6.3 Dividing a right from its exercise has very

⁴¹ J.S. Watson, "Legal Theory, Efficacy And Validity In The Development Of Human Rights Norms In International Law", Law Forum, vol.1979, no.3 1979, p.609 at p.640.

⁴² Watson appears to be of the view that the international lawyer's role is primarily to describe the rules which govern how one state behaves towards its neighbours. He limits the normative function of international law. He writes that "... in such a decentralized [international legal] system one cannot give full rein to a teleological, idealist or naturalist approach to the substance of the legal rules ..." (op. cit. at p.635). When applying this approach to human rights he observes human rights abuses in places such as Cambodia, Chile and Uganda and asks "[h]ow can anyone talk of an international regime of human rights, knowing what we know?" (J.S. Watson, "The Limited Utility Of International Law In The Protection Of Basic Human Rights", American Society Of International Law Proceedings 1980, p.1 at p.5).

⁴³ J. S. Watson, op. cit., p.609 at p.635.

few positive advantages for the right holder, certainly not sufficient to justify a practice which leaves human rights potentially open to serious abuse.

It is submitted that from a functional point of view to say that individual A has a right to freedom of expression but in situation X the law will not permit him to exercise it, is essentially the same as saying that in situation X he has no right to freedom of expression. Whether he has never acquired the right in that situation, has acquired it and then lost it, or still possesses it but may not presently exercise it, makes no difference to A; whichever method of analysis is chosen, A is still effectively silenced. What is given with one hand is taken away with the other. The division is of no practical value to rights claimants.

It could be argued that such a division does work to the right holder's advantage in that it enables a judge to soften the blow when denying a remedy to a claimant with whom he sympathises. The unsuccessful claimant is supposed to find some solace in knowing as he leaves the court that he has a right, even though it did him no practical good inside. Donnelly has picked up on this point asserting that "... simple lack of enforcement will not establish the absence of a right"⁴⁴. He continues:

"For example, if a thief steals my car and is never apprehended, I still have a right to the car, as well as a remedy in the form of the police and the courts; if the car turns up, it is still mine, and I am certainly better off with the police looking and the threat of the courts serving as a general restraint on theft. Furthermore, although unable to enjoy the object of my right (the car), I still do have a right to it and even enjoy that right, for example,

⁴⁴ Jack Donnelly, The Concept of Human Rights, p.16.

in the legal remedies on which I draw."⁴⁵

Donnelly's point is well made. It is true that sympathy evinced by a judge obliged by legal principle or precedent to deny a right holder an effective remedy must be construed as being to the latter's advantage.

Jan Gorecki views human rights as a subcategory of moral rights⁴⁶. According to Gorecki when moral rights (which include human rights on his analysis) are denied, this may engender subsequent feelings of shame and guilt⁴⁷. While he is certainly writing of what would be regarded as 'illegitimate' denials of human rights, abuses, rather than specifically of situations in which a right is overridden by the overwhelming demands of some utilitarian consideration or by some more powerful conflicting right, the same feelings would surely be evident in both sets of circumstances. The judge, and those listening to his judgment, denying a right holder with whom they all sympathise an effective remedy, would surely feel remorse at having to sacrifice the right holder's interests in this particular case to the more demanding exigencies of, for example, legal precedent. Such feelings cannot be disadvantageous to the right holder; he is certainly better off with rather than without them, even if they do nothing more than give him the proverbial moral high ground.

In other circumstances dividing the possession / existence of a right from its exercise may allow the judge to follow a clear line of legal precedent according one party to a dispute a given right, and

⁴⁵ Ibid.

⁴⁶ Jan Gorecki, "Human Rights: Explaining The Power Of A Moral And Legal Idea", *American Journal Of Jurisprudence*, vol.32 1987, p.153 at p.154.

⁴⁷ Jan Gorecki, *op. cit.* at p.155.

yet by preventing her from exercising it, to produce a result which would otherwise grossly offend accepted standards of substantive justice.

It is certainly meritorious to soften the blow on an unsuccessful plaintiff in sympathetic cases and to deny a morally offensive claimant an effective remedy while retaining the integrity of the rule working in principle to his advantage. It is also true that the sympathy of the judge and society at large in the former case is of some advantage to the right holder, and that the preservation of the community's moral fabric in the latter case benefits the whole community as well as the person against whom the offensive right claimant was claiming. Nevertheless, it has to be asked whether such advantages are sufficiently compelling to justify a division between a right and its exercise which has no other more substantial rationale.

This is particularly so when one considers the risk of abuse which such a division entails. Dividing a right from its exercise opens the door for a state to declare that all their citizens without exception have a given right, a right to freedom of movement for example, and yet by separating the possession of that right from its exercise the state may detain large numbers of people without invalidating its claim to have accorded the right to freedom of movement to all its citizens without exception.

4.6.4 Other types of rights are separated from their exercise so why should not human rights be severed in this way too?

It has been suggested to the writer that other types of rights such as contractual rights, are routinely separated from their possession by the right holder in Common Law legal systems, and that if a right possession / exercise division operates in

respect of these rights, the same division must or should operate in respect of international human rights. The writer disagrees.

There are three situations in domestic contract law in which the exercise of a right is apparently separated from its possession / existence. One is where a court has established a breach of contract but refuses to award damages on the grounds that the plaintiff has failed to execute his duty to mitigate the loss he incurred as a result of the breach. The second is the unenforceable contract. Unenforceable contracts are an intermediate class of contract falling in between void and voidable contracts on the one hand, and valid contracts on the other. Such contracts are said to exist but are unenforceable, and thus parallel the human right which exists but which cannot be exercised. Both of these features of English contract law appear to demonstrate a conceptual division between the possession / existence of a right and its exercise. Additionally a third characteristic of contract law which at least indirectly supports the legitimacy of conceptually dissecting rights in the manner under discussion is the practice of analyzing contracts in terms of offer, acceptance and consideration. The argument runs that if it is legitimate to analytically dissect a contract it should be equally permissible to conduct a similar exercise in respect of a human right. It is submitted that all three of these arguments are unsustainable.

Firstly, drawing parallels between human rights and contracts is an argument by analogy, and such arguments can only be sustained in so far as the two things compared bear some significant likeness to each other. A mechanic, for example, who has worked exclusively on a one brand of motor car and always found that symptom X is caused by problem Y, is probably on fairly certain ground if he predicts that

symptom X on a different make of car is caused by the same problem Y. His prediction is reliable because the two vehicles are substantially similar. In relation to rights it could be argued that both contractual and human rights are rights and therefore are sufficiently similar to justify the analogy. The writer disagrees. While both types of right are indeed rights and therefore doubtless do share some common features, it is submitted that they are not similar enough, at least not in respect of any of the three features of contract law which purport to warrant the analogical conclusion that a human right's exercise may be conceptually divided from its possession or existence.

(a) A contract is based on promises and promises have never been advocated as the theoretical source of human rights. It could be argued that promises are at the very heart of social contract theory in the sense that A promises to the state in which he lives to obey all the laws in return for the state's promise to respect his human rights. In this sense promises very much do ground both contractual rights and, in the view of advocates of the social contract theory at least, human rights.

The problem with this approach is that if the state is able to promise to respect A's human rights, that presupposes that they already exist at the time the social contract is formed, and it is of course therefore logically impossible for the promises exchanged under the social contract itself to ground those rights. The theoretical source of human rights must be found in some place extraneous to the contract itself⁴⁸.

A variant on this approach is to argue that when A agrees to obey the state's laws, he gets

⁴⁸ Diana T. Meyers, "Rights-Based Rights", Law and Philosophy, vol.3 (1984) p.407 at p.409.

in return not a promise to *respect* A's pre-existing human rights, but an actual *grant* of such rights. Prior to the contract A has no rights at all. This approach avoids the problem of pre-existing rights inherent in the version of the social contract theory discussed in the preceding paragraph.

The problem with this approach is however that it leaves its advocate committed to viewing human rights in an extremely positivist light; the only human rights a citizen has are those rights accorded citizens by their state. Such a view runs counter to the long and authoritative traditional view of human rights as due to every human by virtue of the fact that he or she is a human being⁴⁹. Furthermore given that the point to advocating the legitimacy of dividing a right's exercise from its possession or existence is to find a way of reconciling the traditional and contingent theories of human rights, persisting in this argument is essentially self-defeating because by so arguing one effectively undermines the traditional approach to human rights. If one is trying to find a way of having bread and butter, in endeavouring to acquire butter there is little point in adopting a course which will see the bread effectively destroyed.

- (b) Historically contractual rights and human rights have travelled different paths. Modern English contract law developed in medieval England⁵⁰ while human rights developed from Natural Rights in Greek poleis during the Hellenistic or even

⁴⁹ See chapter 4.2 for a summary of this tradition.

⁵⁰ Cheshire, Fifoot & Furmston, The Law of Contract, 7th ed., pp.1-17.

pre-Hellenistic period⁵¹. Historically human and contractual rights share little common experience.

- (c) Contract law developed through the domestic court system while international human rights developed in an international political context. Contract law therefore was much less swayed, or much less directly at any rate, by the influences of international affairs. So different are the domestic and international legal systems that some positivist writers have refused to accept that international law is really law at all⁵². While, in the writer's opinion, such commentators go too far, one would be hard pressed to gainsay the basic point that the two legal systems are very different⁵³.

Therefore, human rights and contractual rights have very little in common in terms of their philosophical or theoretical source, in terms of historical origin, or in terms of the institutional medium in which the two concepts matured. None of

⁵¹ H. Lauterpacht, "The Law Of Nations, The Law Of Nature And The Rights Of Man", (1943)29, Transactions of the Grotius Society, p.1 pp.2-9; B. B. Ferencz, "The Future Of Human Rights In International Jurisprudence: An Optimistic Appraisal", Hofstra Law Review, vol.10 (1982), p.379 at pp.-389; B. H. Weston, "Human Rights", Human Rights Quarterly, vol.6 (1984), p.257 at 257-262; E. M. Wise, "Comparative Law And The Protection Of Human Rights", American Journal of Comparative Law, vol.30 (1982 supp.), p.365 passim.

⁵² For example see H. L. A. Hart, The Concept of Law, pp.208-231.

⁵³ Both Louis Sohn and Anthony D'Amato advise circumspection in drawing analogies from domestic law into international law. See L. Sohn, "The Many Faces of International Law", American Journal of International Law, vol.57 (1963), p.868 at p.869. See also A. D'Amato, The Concept of Custom in International Law, p.149.

these considerations point towards any overt similarities which justify drawing an analogy between substantive English contract law and international human rights.

Secondly, even if contract law was similar enough in general terms to international human rights to offer the potential for analogy in some respects, the reasons for the conceptual division of a contract into offer, acceptance and consideration, and for the existence of a class of unenforceable contracts, are in both cases entirely peculiar to contract law; the development of the analytical division of a contract and the creation of a class of unenforceable contracts are both attempts to overcome specific problems which plagued contract law in a very real way, but which simply did not, and do not, arise in relation to international human rights.

Firstly, the unenforceable contract in English law developed to meet immediate and practical procedural problems of the day, problems which simply do not pertain to international human rights, and the writer therefore contends that one simply cannot argue by analogy to the domestic unenforceable contract model, that the possession / existence of a human right may be carved off from its exercise⁵⁴.

Turning secondly to the practice of analyzing a contract in terms of offer, acceptance and consideration, Cheshire and Fifoot write that "... the doctrine of offer and acceptance first clearly emerges in the cases in Adams v Lindsell in 1818 as a mechanism for setting the moment of contracting ..."⁵⁵. Just as international human rights do not suffer from the procedural inadequacies which gave

⁵⁴ Cheshire, Fifoot & Furmston, The Law of Contract, p.205f.

⁵⁵ Cheshire, Fifoot & Furmston, The Law of Contract, p.13f.

rise to the Statute of Frauds and the unenforceable contract, nor do human rights demonstrate a 'timing' problem parallel to that which gave rise to the doctrine of offer and acceptance. Again therefore, whatever conceptual common ground domestic English contract law and international human rights do share, the characteristics of the former which purport to justify by analogy the separation of the possession and existence of a right from its exercise, namely the unenforceable contract and the doctrine of offer and acceptance, are not shared by both fields of activity; the over all similarity between the two is just not sufficient to sustain the argument by analogy.

The third source of the analogy between contractual rights and human rights is found in the doctrine of consideration. The doctrine of consideration did not arise from practical procedural difficulties nor from problems of timing, and the criticisms in the two preceding paragraphs relating to the specific dissimilarities between the contractual and international human rights therefore do not apply. The doctrine of consideration could accordingly be held up as analogical justification for the conceptual dissection of international human rights. Clearly the doctrine of consideration cannot be seen as a direct parallel to the separation of a right's existence or possession from its exercise, since where consideration is wanting there is no contract. In the absence of consideration one does not say that A has a right but cannot exercise it. Rather one says that A has no right in the first place. The only support the doctrine of consideration can give to the aforementioned conceptual division is that if it is legitimate to analyze a contract as a promise with consideration, it should also be equally permissible to draw analytical divisions within the concept of a human right. The strength of the analogy from the

doctrine of consideration is therefore fairly weak and indirect.

Moreover, in this regard it was noted in the last paragraph that the reduction of the contractual right into promise and consideration pertains exclusively to the creation of the right. Even if one were to insist on the analogy from the doctrine of consideration, indirect as it may be, it would still therefore only justify the reduction of a human right in respect of its possession / existence, not to the whole right; the doctrine of consideration could not be used by analogy to justify drawing a line between the possession / existence of a human right and its exercise because that is not the division which it in fact traces in respect of contractual rights.

The fourth and final characteristic of domestic English contract law which could by analogy justify the separation of a human right's possession and / or existence from its exercise is the so called duty to mitigate. The argument starts by noting that in contract law a successful plaintiff may be denied damages because he has failed to mitigate the loss he incurred as a result of the breach. It continues that by analogy therefore, an individual may be able to receive universal and unconditional confirmation of his human rights, and yet still be prevented from exercising them on the grounds that he has failed to perform some specified duty parallel to the contract law's duty to mitigate. A very neat argument which, if the analogy can be sustained, parallels very closely the contention that one possesses a human right purely because one is human but that its exercise is dependent on the right holder performing some positive action. In this case that prerequisite action is, moreover, required by a specified duty. A number of points are worth noting briefly.

(a) Mitigation is designed to match more closely the

possession / existence of a right and its exercise; the purpose of the separation in the human rights context is to drive them apart.

- (b) Mitigation relates to the quantification of loss rather than to the existence of the loss itself. This is another visible difference between mitigating a loss in contract and refusing to allow the exercise of a human right, and thereby undermines the validity of the analogy between the two positions. Moreover, Dworkin has observed that a right is a 'flat' mono-dimensional creature. A right, according to Dworkin, is an all or nothing affair; it has no depth. In a given situation one has a right or one does not⁵⁶. One does not have a right a little bit. Dworkin believes that this depth characteristic is what distinguishes rights from policies and principles. Yet if the right to exercise generated by the satisfactory performance of a corresponding duty is parallel to the right spawned by satisfying the duty to mitigate, it should also have this quantitative dimension; a right to exercise would be like \$1,000 in that it could be reduced to smaller units and possessed entirely or in part only. Paralleling the exercise of a human right to the mitigation of a loss in contract law sketches a picture of the right to exercise at odds with Dworkin's definition of a right.
- (c) In the contract context the duty which grounds the right to exercise is generated by the breach. Indeed it cannot exist prior to breach because you cannot be under a duty to mitigate a loss if there is no breach and therefore no loss. By contrast in the human rights context the duty is

⁵⁶ R. Dworkin, Taking Rights Seriously, pp.22-28.

supposed to be pre-existing. This observation constitutes another outward difference between the mitigation of a loss in contract law and the denial of the right to exercise a human right in the human rights context and thereby undermines the legitimacy of the analogy between the two positions.

- (d) Upon breach the contract is terminated and the subsequent interaction between the parties occurs in a context broader than that marked out by the original contract. In the human rights parallel the breach of a single human right on a single occasion does not generally terminate the social contract. Moreover, if the social contract was terminated the situation would essentially be one of revolution or anarchy. Such is the environment in which a subsequent duty prerequisite to a right to exercise human rights would have to be performed. It is an environment in which, in social contractarian terms, rights do not exist because they are created by the now defunct social contract⁵⁷ and clearly cannot persist independently of it. Furthermore, in such a world the existence of a body capable of recognising or sanctioning the exercise of any right which did

⁵⁷ On the face of the matter this takes what appears to be a rather Hobbesian view of the state of nature. According to J.W. Harris, Locke believed that natural rights existed prior to the social contract and that under the contract all that was surrendered was the right to enforce the rights. J.W. Harris, Legal Philosophies, p.10. It is submitted that a world in which everyone has the right to enforce their natural rights themselves, which is the pre social contract world Locke describes, is a world of self-help; Locke calls this freedom, Hobbes labels it chaos, but in the writer's view it is probably most accurately described as anarchy. Whatever appellation is chosen it is difficult to see how there can be rights in a world where each person can look only to himself to enforce what he perceives to be his rights.

exist must be highly doubtful. Insisting on the analogy between mitigating a loss in contract law and denying the right to exercise a human right stretches the plausibility of social contract theory, and since an endorsement of that theory is implicit in the analogy⁵⁸, the analogy is ultimately self-defeating.

None of these points logically precludes the analogy between contract and human rights, but the fewer observable similarities between the practice in relation to mitigating losses and the way human rights can be seen to operate, the less secure the analogy, and the less reasonable it becomes to infer conceptual similarity; the less similar two animals appear externally, the less analogical justification there is for concluding that they share identical internal organs. It is submitted for the reasons outlined above that the analogy between contract law and human rights cannot be sustained generally, nor specifically in relation to any of the more particular features of contract law to which the analogy would have to apply if it was to lend support to the assertion that the exercise of a human right is conceptually separate from its possession and / or existence.

4.6.5 Dividing a right's existence from its exercise creates the possibility that a right to possess freedom of expression may have an origin

⁵⁸ While perhaps not logically required, an argument insisting that human rights and contract were analogous in that the exercise of both types of right is dependent on the satisfactory performance of some (duty demanded) action, but that the possession and existence of the right in the first place stems from agreement in the case of contract and from some quite different source such as natural law in the case of human rights, would surely be implausible if not downright incredible.

different from the origin of the right to possess that freedom, but that does not mean that that is in fact the case, nor can such an inference be rationally drawn

Dividing a right's possession from its exercise does overcome or at least circumvent the problem of reconciling the traditional view that human rights subsist within all human beings because they are human, with the contingent theory apparently advocated by delegates to the Conference on Freedom of Information and the Economic and Social Council's Human Rights Sub Commission on Freedom of Information and the Press. However, in the process it creates a different problem.

The conceptual separation of the right to exercise, for example, freedom of expression, from the right to possess it means that the two rights are quite unrelated in any substantive way. It is true that there is a necessary relation between the right to exercise freedom of expression and the fact of possession of that good, because otherwise there would be no freedom to which the right to exercise could be applied. But clearly one could have the right to exercise freedom of expression without necessarily having the right to possess it (as long as one does in fact possess it). Conversely, and this is what is most important for the present purpose, one could have a right to possess freedom of expression without necessarily having a right to exercise it. The conceptual separation of the right to possess and the right to exercise does not preclude the possibility that the right to possess may exist even where the right to exercise does not, and that is all that is required to open the way for a reconciliation of the traditional and contingent theories about the origin of human rights.

However, it is one thing to acknowledge the

possibility that a right to exercise may be sourced in performance of an action by the right holder directed by duty or otherwise, while the right to possess takes its origin in humanity, but quite another to conclude that that is the case. On the face of the matter a right to exercise and a right to possess are still both 'rights' and one is therefore entitled to make the initial inference that they are probably both from the same source. If this initial inference is to be rebutted then some sort of justification must be offered and the writer questions whether any such justification is available.

One possible ground for rebutting this initial assumption is that the two rights are different because each springs from a different source. This of course is clearly circular.

Another possible ground for rebutting this initial assumption, is that the two rights are not in fact the same because one is a right to possess and the other is a right to exercise. It is submitted that a substantive difference in the concept of right in each case cannot be validly inferred from any difference in the focus or object of each.

In examining where rights per se come from, the focus must surely be on the generic character of 'a right', not on its more specific application to any number of various objects. While it operates at a more general level, the distinction between a right to possess freedom of expression and a right to exercise that freedom is really of no more significance to the generic character of 'a right' as such, than drawing a distinction between the right to possess freedom of expression and the right to possess freedom from arbitrary arrest and detention. Clearly a right to possess and a right to exercise are different in their application or focus but that in no way suggests any variation in the concept of 'a right'. The concept of

a right enhances the avowed goods listed in the Universal Declaration of Human Rights and other such instruments in the same way as a flash light illuminates all the items in a dark room; because the flash light illuminates more than one object is certainly no reason at all to start suggesting that there is more than one source of light. If one supplies any number of values for x in the mathematical function $f(x):x+1=y$, one can generate any number of solutions in terms of y , but at the end of the day the function $f(x)$ will still be the same; none of the applications can possibly provide any logical reason for challenging the constancy of the function $f(x)$. It is possible that the function may be derived in more than one way, but pointing to its application to any number of what could be quite randomly selected x values certainly does not prove the existence of any such derivational difference, nor does it really give rational grounds for questioning the sameness of the apparently identical functions. If Derek sees a man outside an ice cream shop with two ice creams and he throws one on the ground and eats the other, is Derek behaving rationally if he concludes that because one ice cream is thrown on the ground and one is eaten, therefore one may have come from a different shop? One may have indeed come from another shop, but it is not sound to infer that from the use to which each ice cream is put. So too with rights. If Derek observes two things both called 'rights', if he wishes to find evidence to support his hypothesis that each has a different origin, he cannot look to the use to which each right is put. If he can come up with no other evidence to support his hypothesis, he is left with very little to rebut the presumption that two things both called rights are in fact the same and that it is consequently more likely than not that they both come from the same source.

It follows from the above that while it is possible that a right to exercise freedom of expression may well be different from the right to possess it, that certainly cannot in any way be proven by reference to the difference of application of each right, nor indeed is it a rational inference. The writer acknowledges that the assumption that two like things are probably from the same source is not the strongest inference ever drawn, but submits that in the absence of any counteractive evidence the inference is legitimate. Moreover, it seems to be concordant with the principle of like treatment for like things⁵⁹. Feinberg notes that this principle is not only of considerable antiquity⁶⁰, but also that:

"... many writers hold that the principle of like treatment for like cases is more than simply one among many ethical principles vying for our allegiance, but is rather an instance of a more general principle that is constitutive of rationality itself."

It would of course be the case that if sufficient evidence was produced to rebut the presumption that the two rights are the same, then the same weak inference that like things spring from the same source and different things have different origins would favour ascribing a different source for each of the two rights. As it is the two rights do appear to be the same however, and the latter weak presumption favours a single source for the two rights.

⁵⁹ It is submitted that the legitimacy of such an inference flows from the principle of equality as understood by Judge Tanaka in the South West Africa case to mean that "... what is equal is to be treated equally and what is different is to be treated differently, namely proportionately to the factual difference". I.C.J. Reports (1965), p.305.

⁶⁰ He traces the principle of like treatment back to Aristotle. See Social Philosophy, p.100.

4.6.6 The only other way of interpreting the separation of a right from its exercise is logically unsound or leaves the observer in a complete epistemic void

The above arguments in chapter 4.6.5 are based on the approach that the right is the constant and that exercise and possession constitute two separate applications of the right, i.e. the exercise or possession is what the 'right' concept applies to. However, if the possession or exercise is not operated on by the 'right' then clearly the above arguments cannot be sustained. One can no longer argue that the exercise or possession, as results of the operation of right rather than causes as such, cannot affect the nature of the 'right' concept and therefore, on the presumption in favour of treating like things alike, cannot rationally give rise to the inference that the right to exercise freedom of expression may stem from origins rooted in human activity (to some degree perhaps deontological), while the right to possess that freedom may still derive from the fact of humanity alone. One is effectively interchanging the 'right' and exercise / possession so that rather than the 'right' being the subject acting on the object (possession or exercise of freedom of expression), the exercise or possession was the subject and acting on the 'right' as the object. The difference is subtle but significant. It is the difference between relating the possession or exercise of a single right to freedom of expression and relating two separate rights, one to possess freedom of expression and the other to exercise it. As explained above, in the latter case the freedom is operated on by the right and therefore cannot affect the conceptual nature of 'a right'. Taking the first approach however, one can on the face of the matter quite plausibly argue that there is a substantive difference between possessing

and exercising a right, just as there is between possessing and using a shovel. One can possess a shovel, even though one does not use it. Similarly, one can have a right to freedom of expression even though, whether as a matter of choice or compulsion, one does not use it.

This is the approach apparently taken by Vinit Haksar. In criticising David Lyons' theory that the possessor of a right to X is the person who benefits from X⁶¹, Haksar argues that failure to exercise a right to X does not necessarily indicate that the right holder is indifferent to X⁶². In doing so he clearly separates the possession of a right from its exercise. He writes:

"The very fact that you bother to exercise your right to complain shows that you are not indifferent regarding the breach of promise. But your having a right (as opposed to your exercising it) does not in every particular case presuppose that you were not indifferent to whether others performed their correlative duty."⁶³

However, there is a flaw in this approach. It will be noted from the above that on this approach the division of a right from its exercise is seen as distinguishing between on the one hand the possession of a right to freedom of expression and, on the other hand, the exercise of that same right. In the passage quoted above, it will be noted that Haksar is dealing with a single right whether it is possessed or exercised. This is in contrast to a distinction between a right to possess the freedom in question and

⁶¹ David Lyons, "Rights, Claimants and Beneficiaries", *American Philosophical Quarterly*, vol.6 (no. 3, July 1969), p.173.

⁶² Vinit Haksar, "The Nature of Rights", *Archiv fur Rechts- und Sozialphilosophie*, vol.64/2 (1978), p.183, at p.198ff.

⁶³ Vinit Haksar, *op. cit.* at p.199.

a quite different⁶⁴ right to exercise that same freedom. If the distinction is between the possession of a right and the exercise of that same right, clearly there is only one right involved (whether it be possessed only or possessed and actually used⁶⁵) and therefore it is logically quite impossible even to attempt to locate two separate sources⁶⁶, one being humanity alone and the other the performance of an action by the right holder alone (be it motivated by a sense of duty or otherwise) or some kind of humanity based action (possibly deontologically motivated) augmented amalgam. If there is only one right involved it can only have one source, and if both the

⁶⁴ The only common feature of the two rights is that they may operate on the same object (freedom of expression) which is not a commonality which either demands recognition of separate sources for the two rights, or which justifies an inference that that is the case sufficiently strong to overcome the presumption that like things should be treated alike. The logical irrelevance of the object of a right to its derivation was discussed in chapter 4.6.5.

⁶⁵ It is obvious that while one may on this approach possess a shovel but choose or be compelled not to use it, if one does exercise (use) the shovel, one must possess it first otherwise there is nothing there to exercise.

⁶⁶ Stephen Hawking gives a number of examples taken from the physical world which suggest that Newtonian physical laws do not always hold true and that from time to time events occur which appear to defy the dictates of reason. For example an experiment can be conducted which demonstrates that light particles can be in two places at the same time. See Stephen W. Hawking, A Brief History of Time, p.58f. Furthermore John Finnis has noted the paradox that the rules of logic do themselves defy rational demonstration since to apply the rules of logic to prove the rules' validity would be clearly circular. While it is possible that the rules of logic and rationality do break down from time to time, and that it may therefore be possible for a single right to stem simultaneously from two conceptually distinct sources, for the purposes of this paper, it is assumed that such rules do operate consistently.

traditional view of the origin of human rights and the contingent view thereof are to coexist without contradiction, it cannot be by carving off the possession of a right from its exercise.

Moreover, if the right is seen as the object of possession or the object of exercise, possession and exercise are styled as matters of fact; either one has a right or one does not, either one exercises it or not. As matters of fact possession and exercise are devoid of any ethical significance. Just as it makes no sense to seek ethical significance from the observation that Boris is a Golden Spaniel and Dobbin is a donkey, so too one cannot draw ethical conclusions from the fact of possession or the fact of exercise. What we are looking for in this chapter is a way to explain how human rights can have an extra base involving human action. This human action must be promoted by some normative force in order to account for the normative force of human rights. This normative motivation for the action prerequisite to the right holder's exercise of his human right, may, but does not necessarily have to, be in the nature of a duty, but it does have to involve some ethical component to avoid having to try to derive a normatively significant concept (human rights) from two independent factual bases (the fact of the right holder's humanity and the fact of his performance of a specified action). Clearly, identifying as a possible candidate for this second source something which is completely devoid of any kind of ethical significance, such as the fact of exercise, deontological or otherwise, is not going to be of any help at all. It is logically impossible for any normative statement to premise a factual conclusion. Hence reducing 'a right' into its factual components, no matter how valid such dissection may be, simply cannot assist in our quest for an ethical, perhaps

deontological, pillar on which in part at least to base an understanding of human rights.

One objection can be raised to this conclusion, namely that facts can have ethical significance. Clearly facts can have ethical significance. When three men in a lifeboat decide to eat the wounded fourth, the facts that they have been adrift for three weeks without food, and that the fourth man is badly injured and is most unlikely to survive the night in any event, certainly do have ethical significance in that they are relevant to the moral decision the three healthy survivors must make. If facts can have ethical significance then one cannot criticise the separation of the possession of the right to freedom of expression and the exercise of the same right on the grounds that such separation deprives human rights of the normative force which empirically they do have. It is however, submitted that even though facts certainly can have ethical consequences, and in that sense are far from ethically barren, facts cannot be ethically derived. One can therefore adopt the view that the right is the constant and that what distinguishes the possession of a right from the exercise of the same right is the factual difference between the two, namely the fact of possession on the one hand and the fact of exercise on the other, and one can do so without necessarily depriving the concept of human rights of its normative force.

However, what one cannot do is use this distinction to provide a rationale for ascribing the exercise and possession of the same right differing ethical bases. The point to separating the possession of a right from its exercise is to make room beside the traditional view that human rights belong to human beings simply because they are human, for a second (perhaps deontological) ethical base within the human rights concept. The only feature which distinguishes

the possession of the right to freedom of expression from its exercise is factual. It must be, because the right in both cases is the same, the right to freedom of expression. Notwithstanding that the facts of possession and exercise may have ethical consequences, it is submitted that these facts cannot be based on ethical statements. Drawing a distinction between the possession and exercise of the same right on a factual basis is simply irrelevant to the quest for a second ethical base for international human rights.

This way of viewing the separation of a human right from its exercise, seeing the division represented by the distinction between the exercise of the right to freedom of expression on the one hand and the possession of the right to freedom of expression on the other, as opposed to the distinction between the right to possession of freedom of expression and the right to exercise freedom of expression is therefore untenable.

4.6.7 Dividing the possession of a right from its exercise is difficult to reconcile with the widely held view that rights and claims are very close conceptual kin

Haksar sees rights as "... demands, or claims, or complaints that can validly be made by the person who has the right, or by those who speak on his behalf"⁶⁷. This link between rights and claims is widely held. Joel Feinberg writes:

"The conceptual linkage between rights and claiming or demanding has long been noticed by legal writers and is reflected in the standard usage in which "claim-rights" are distinguished from mere liberties, immunities, and powers, also sometimes called "rights" with which they are easily

⁶⁷ Vinit Haksar, *op. cit.*, at p.183.

confused."⁶⁸

In fact so close is the link between claiming and rights, so nearly are they synonymous, that Feinberg rejects as futile any attempts to formally define one in terms of the other⁶⁹. Indeed, he analyses rights by examining the activity of claiming.

Jack Donnelly does not view rights and claims as quite so nearly synonymous. He identifies three types of 'exercise' which he labels 'assertive exercise', 'direct enjoyment' and 'objective enjoyment'. He writes:

"I choose the term 'assertive exercise' to stress the making of a claim and the active

⁶⁸ Joel Feinberg, "The Nature and Value of Rights", *The Journal of Value Inquiry*, vol.4 (Winter 1970), p.243, at p.249.

⁶⁹ Feinberg writes:

"As we shall see, a right is a kind of claim, and a claim is "an assertion of right," so a formal definition of either notion in terms of the other will not get us very far. Thus if we are after a "formal definition" of the usual philosophical sort, the game is over before it has begun, and we can say that the concept of a right is a "simple, undefinable, unanalyzable primitive." Here as elsewhere in philosophy this will have the effect of making the commonplace seem unnecessarily mysterious. We would be better advised not to attempt a formal definition of either "right" or "claim," but rather to use the idea of a claim in informal elucidation of the idea of a right. This is made possible by the fact that claiming is an elaborate sort of rule-governed activity. A claim is that which is claimed, the object of the act of claiming. If we concentrate on the whole activity of claiming, which is public, familiar, and open to our observation, rather than on its upshot alone, we may learn more about the generic nature of rights than we could ever hope to learn from a formal definition, even if one were possible." Joel Feinberg, Social Philosophy, p.64.

pursuit by the right-holder of the enjoyment of the right and its object. 'Enjoyment', by contrast, suggests a relatively passive role for the right-holder. The terms direct and objective enjoyment are a bit awkward, but they do highlight important elements of such transactions. 'Direct enjoyment' stresses the right-holder's enjoyment of the right without the mediation of a claim. 'Objective enjoyment' underscores the fact that only the object of the right is enjoyed. "⁷⁰

It is clear therefore that Donnelly believes that rights may exist and be possessed even where there is no actual claim to the interest embodied in the right's object. Indeed, he makes the point that in most situations where rights are 'exercised' no actual claim is required because the interest making up the object of the right is recognised and acted upon before such a claim is needed, and thus "... assertive exercise is in an important sense the 'degenerate' case."⁷¹.

Nevertheless, he still accepts that "... the availability of assertive exercise is crucial to distinguishing rights from other practices, and from other grounds on which the same 'object' might be held"⁷², and that "[u]nless I can claim something as my right/title, I simply enjoy a benefit, without having a right."⁷³. It is accordingly reasonable to infer that Donnelly too sees rights and claims (or at least potential claims) as intimately connected.

Wesley Hohfeld, on whose work much of the twentieth century's writing about rights is based, describes the elements which make up his fundamental

⁷⁰ Jack Donnelly, The Concept of Human Rights, p.14.

⁷¹ Jack Donnelly, op. cit. p.15.

⁷² Ibid.

⁷³ Ibid.

jural relationships in terms of claims. Talking of rights in his narrow, technical sense as the jural correlative of duty as opposed to the wider generic use which he saw as the source of so much judicial confusion⁷⁴ Hohfeld writes that "[i]f, as seems desirable, we should seek a synonym for the term "right" in this limited and proper meaning, perhaps the word "claim" would prove the best."⁷⁵ Elsewhere he states similarly that "[a] right is one's affirmative claim against another, and a privilege is one's freedom from the right or claim of another."⁷⁶ Just as he describes the right-duty and privilege-'no-right' relationships in terms of claiming, so too does he elucidate the remaining two jural relationships which he regarded as fundamental legal concepts. He describes the power-liability and immunity-disability relationships as the ability, or absence thereof, to create or modify the right-duty and privilege-'no-right' relationships⁷⁷ and therefore

⁷⁴ Having referred to the use of the terms 'right' and 'duty' Hohfeld writes that "... the above mentioned inadequacy and ambiguity of terms unfortunately reflect, all too often, corresponding paucity and confusion as regards actual legal conceptions.". Wesley Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning", 23 Yale Law Journal (1913), p.16, at p.35f of the article as reprinted with other essays by the same author in Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays by Wesley Newcomb Hohfeld, W. W. Cook (ed).

⁷⁵ Wesley Hohfeld, op. cit. at p.38.

⁷⁶ Wesley Hohfeld, op. cit. at p.60.

⁷⁷ Ibid "... a power is one's affirmative "control" over a given legal relation as against another ...". Also at p.51 "[t]he nearest synonym for any ordinary case seems to be (legal) "ability" - the latter being obviously the opposite of "inability," or "disability.".

again, albeit indirectly, in terms of claiming⁷⁸.

Haksar says that "... you exercise your right ... by making the relevant demands and complaints ..."⁷⁹. If demanding or claiming is a necessary component of a right (defined as a valid claim / demand), and claiming / demanding is what constitutes the exercise of the right, one cannot have a right without exercising it. A right is created by a claim / demand, that is by an exercise, and without that exercise the right does not come into being at all; a right can only exist within its exercise or not at all.

It could be argued that Haksar may be wrong in saying that the exercise of a right may be defined as "... making the relevant demands and complaints ..."⁸⁰ and that some other activity may constitute 'exercise'. That would mean that claiming could remain an integral part of the conception of a right in accordance with the views of the writers cited above, while still leaving possible the detachment of an

⁷⁸ Other writers who also identify rights with claims include R. Bilder, "Rethinking International Human Rights: Some Basic Questions", *Human Rights Journal*, vol.2 (1969), p.557 at p.559; B. H. Weston, "Human Rights", *Human Rights Quarterly*, vol.6 (1984), p.257 at p.263; W. Brugger, "Human Rights Norms In Ethical Perspective", *German Year Book Of International Law*, p.113 at p.135; F. Schauer, "Rights As Rules", *Law And Philosophy*, vol.6 (1987), p.115 at p.115; H. C. Anawalt, "The Right To Communicate", *Denver Journal Of International Law And Policy*, vol.13 (1984), p.219 at p.221; L. Henkin, "Rights Here And There", *Columbia Law Review*, vol.81 (1981), p.1582 at p.1598; J. Gorecki, "Human Rights: Explaining The Power Of A Moral And Legal Idea", *American Journal Of Jurisprudence*, vol.32 (1987), p.153 at p.154; S. P. Marks, "Emerging Human Rights: A New Generation For The 1980s?", *Rutgers Law Review*, vol.33 (1981), p.435 at p.436; R. Flathman, The Practice of Rights, p.71; M. Owens, "The Notion of Human Rights: A Reconsideration", *American Philosophical Quarterly*, vol.6, no.3, July 1969, p.240 at p.244.

⁷⁹ Vinit Haksar, op. cit. at p.199.

⁸⁰ Ibid.

'exercise' composed, unlike claiming, of some other quite different activity not critical in any way to the creation and fundamental existence of the right. One could say in effect that an individual possesses, for example freedom of expression, when she lays claim to recognition of that interest and that her capacity to make claims such as this is a uniquely human characteristic. In this sense she possesses freedom of expression because she is human. At the same time however, one could argue that she may only exercise freedom of expression once she has performed some other activity different from claiming and that this activity may be prompted by ethical considerations (possibly deontological in nature). In this way one could identify two separate theoretical fonts of human rights, one natural law and one in (deontological) ethical theory. However, if this is the case, one must inevitably ask what else one can do either in addition to, or instead of, claiming the supremacy of one's own interests, when one 'exercises' a right. One must first examine what happens when a right is exercised so that any activities presenting themselves as likely pretenders for the crown of 'exercise' might be identified.

Feinberg sees rights as a special type of interest which has been transformed into a 'right' when a claim for its superiority in a given context is recognised and thereby made valid. This suggests that when 'a right' comes to issue, at least two things happen. Firstly, a claim is made to the interest concerned, say freedom of expression. Secondly, that claim is validated by recognition accorded by the system within which the claim was made. A third, optional element in the 'rights' issue is enforcement. Donnelly's approach is a little more detailed, but essentially similar. The right is an interest which can at least potentially be recognised in response to

a claim. It may however, in fact be 'exercised' in any of the three ways described briefly above, namely by 'assertive exercise', 'direct enjoyment' or by 'objective enjoyment'. Hence whereas Feinberg says interest + actual claim + recognition + (optionally) enforcement = 'a right', Donnelly says interest (object) + potential claim + recognition = 'a right' which may be 'exercised' assertively or by direct or objective enjoyment. From these analyses there emerge at least five activities which could play the role of a right's 'exercise'. They are claiming, recognition, direct enjoyment, objective enjoyment and enforcement. Haksar's presumption that the exercise of a right is constituted by the activity of claiming is perhaps therefore suspect. If 'exercise' was the activity of claiming, that would, as was noted above, identify the right's possession and exercise as effectively the one and the same thing, making it conceptually quite impossible for one to speak of human rights as having two distinct sources, one being essential humanity and the other being ethically (perhaps deontologically) based. However, if any of the other candidates for the job of 'exercise' suggested on the basis of the analyses offered by Donnelly and Feinberg could be conceptually severed from the possession of a right, and if any of these can be shown to be ethically based, a solution is provided to the problem of explaining how the right to freedom of expression in the Universal Declaration of Human Rights may be sourced in untempered humanity as proponents of the traditional human rights theorists would have it, and at the same time, in the satisfactory performance of some action motivated by ethical concerns (perhaps a sense of duty), as is required by the contingent theory of human rights.

The first scenario is that one possesses⁸¹ a right to freedom of expression by making a claim to that interest, and that one exercises that right when it is recognised by the system within which the claim is made. This position is untenable. Firstly, it appears to largely remove the distinction between a right and a mere claim. Take the following situation. Joe Citizen claims that he is free to torture and kill anyone he meets in the street. Clearly few observers would accept that this act justifies the assertion that Joe Citizen has a right to so act, even though the world may prevent him from exercising that right by withholding recognition of it. Rather they would say that he has merely laid claim to the freedom in question. Such acceptance would be required however if one were to identify the possession of a right as the unaugmented act of claiming and the exercise of that right as the recognition of the claim's validity. Common usage of the notion of 'a right' does not support the assertion that a right's exercise is synonymous with its recognition by the system in which

⁸¹ Whether the right comes into existence when the act of claiming is performed or exists prior to that and independent of its relation to a holder is a moot point. Feinberg identifies rights and claims so closely that it is hard to envisage a right having an independent existence. Moreover his analysis of rights as a special type of interest marked out from interests generally by the recognition accorded them by the relevant system upon demand, makes the idea of a right existing independent of a holder (claimant) very difficult; an interest of no-one is in the writer's view no interest at all. For the present purposes however, the point is immaterial. Whether the right is created first and then possessed at the time the claim to it is made or whether the claim both creates the right and at the same moment attaches it to some 'holder', is largely irrelevant to the debate over the separation of the possession and exercise of the right; the issue in hand is the validity of the distinction between the possession and exercise of the right and not between its existence and possession.

the possession generating claim is made⁸².

One counter argument to the last mentioned objection to equating claim and recognition with possession and exercise respectively, lies in a more subtle view of a claim. Clearly Joe's claim is outrageous and can appropriately be labelled a 'mere' claim. However, if instead of claiming freedom to torture and kill anyone he met, he had claimed freedom to leave his house and walk on the public streets wearing a green suit, one would be more inclined to agree that Joe does have that right. In that case it makes better sense to regard Joe as possessing the right when he laid claim to it, and then 'exercising' it when recognition is accorded it by the legal system refraining from censuring him when he does walk about outside in his green suit. The difference between the two examples is that if the first the claim made has never been recognised in those circumstances before, whereas in the latter society generally does refrain from censuring people who walk about town in green suits, i.e. generally does recognise the right. Because of the strength accorded the latter claim by its historic context, i.e from the fact that it has been recognised in similar circumstances on so many occasions before, common usage dictates that it is acceptable to describe Joe's claim as a 'right' and to regard its eventual confirmation as its exercise. Because it lacks this contextual strength the claim to torture and kill cannot be described as a 'right' and remains a mere claim. Thus, if one puts claims into any sort of historic or temporal context rather than just regarding them as disjunctive abstract events, accepting recognition as the exercise of the right

⁸² Alan Gewirth writes that "... claims are ... not in general sufficient to establish or justify that their objects are rights". See A. Gewirth, "The Basis and Content of Human Rights", Georgia Law Review, vol.13 (1979), p.1143 at p.1148.

possessed by making a claim to the interest addressed by the claim, does not remove the distinction between a right and a 'mere' claim; recognition is not required to make this distinction because historic context is quite capable of doing that job in its stead. It is not essential therefore that 'recognition' be reserved at the point of the right's possession to perform that function. Recognition is free to constitute the exercise of the right and offer the possibility of a second potentially deontological basis for human rights, thereby allowing one to say without contradiction that human rights are both rooted exclusively in humanity (in regard to their possession) and at the same time in the satisfactory execution of some action be it motivated by duty or otherwise (in regard to their exercise).

However, a second criticism of the position that recognition constitutes the exercise of a right is that it also leaves the person or body exercising the right (by recognising it) in the position of not actually having the right and thus creates a logical problem inasmuch as the exerciser of a right logically must have the right in the first place or else she has nothing to exercise; do we live with this logical obstacle or effectively deprive the right possessor of his right?

Thirdly and finally, and following from the last point, it styles the exercise of a right as something over which ultimately the right holder has no certain control; if recognition is what constitutes the exercise it would be more appropriate to describe the recognising society as exercising the right rather than the person who actually possesses it.

The second scenario which the above rights analysis (based on Feinberg and Donnelly) offers is that the right may be regarded as possessed once the claim has been made and has been recognised by the

system within which it is made (and possibly created at that stage too⁸³), and that it is exercised when the right is enforced. Donnelly examines this approach and states that the "[p]ossession of a right, the respect it receives, and the ease or frequency of enforcement are quite separate issues."⁸⁴. He writes:

'Having', 'enjoying' and 'enforcing' a right do go together. But they do not always go together, nor do they always combine in the same ways; in particular cases, the connection is no more necessary than that between exercise, respect and enjoyment. Therefore, simple lack of enforcement will not establish the absence of a right.

"For example, if a thief steals my car and is never apprehended, I still have a right to the car, as well as a remedy in the form of the police and the courts; if the car turns up, it is still mine, and I am certainly better off with the police looking and the threat of the courts serving as a general restraint on theft. Furthermore, although unable to enjoy the object of my right (the car), I still do have a right to it *and even enjoy* that right, for example, in the legal remedies on which I draw."⁸⁵

The writer agrees with Donnelly; indeed the mere existence of human rights 'abuses' palpably demonstrates that possession of a right does not necessarily entail its exercise / enforcement. Donnelly illustrates his conceptual separation of possession and exercise / enforcement with a real-life example:

"... Soviet citizens do have a right to free speech, in the sense that they have a valid (municipal and international) legal title. But should they actually claim the right, the attempted exercise is likely to be

⁸³ See footnote 81 above.

⁸⁴ Jack Donnelly, The Concept of Human Rights, p.16.

⁸⁵ Ibid (emphasis added).

frustrated by law and policy. Therefore, Soviet citizens don't 'have' a right to freedom of speech, in the sense of being able to enjoy it; their title is valid but not effective. Yet the fact that dissidents and human rights activists do 'have' this right/title is what makes them such an embarrassment; they are entitled to do what they are punished for doing - and everyone knows it."⁸⁶

An approach such as the one suggested by these passages from Donnelly lends support to the argument that possession of rights and their exercise are two distinct concepts and that while one may possess a right purely because one is human, one's exercise of the right may well depend on other ethical, perhaps utilitarian concerns or deontological, strictures.

Identifying the exercise of a right as its enforcement would dispose of the first of the criticisms levelled above at the scenario styling exercise as recognition. Recognition, not being required to constitute 'exercise', would be free to distinguish between rights and 'mere' claims, even if the historic context of the claims was unable to serve that function unassisted. However, the second and third criticisms identified above in relation to scenario one would still apply to scenario two. The enforcement (i.e. the exercise) would still be in the hands of some person other than the right holder and the right exerciser would still be left trying to exercise something which he did not possess.

Moreover, while Donnelly certainly does see possession and exercise / enforcement as conceptually distinct, he begins his discussion of possession and enforcement of rights by noting that "[r]ights imply

⁸⁶ Jack Donnelly, *op. cit.* p.17; at p.20 he notes that "[e]ven the Soviet authorities only deny that they are violating these rights; they too argue that Soviet citizens have them."

remedies' is an old and valuable legal maxim"⁸⁷, and regards the possession of a right in the absence of its exercise / enforcement as paradoxical⁸⁸. If one has a right which is unenforceable "... while 'only' enforcement is missing, enforcement is so important to the practice [of rights] ... that possession of the right ha[s] become 'paradoxical'."⁸⁹. Donnelly seems therefore to regard the possession of a right in the absence of its enforcement, from a functional point of view at least, as bordering on the illusory. Nor does he suggest anywhere in his book that enforcement and possession should have different ethical bases, even if the conceptual space between the two could be levered wide enough to defy the appellation 'paradoxical'.

The only other two candidates for the role of 'exercise' are direct and objective enjoyment. At first glance these seem plausible options. Recognition is left to distinguish rights from claims (alone or in conjunction with the historical context of rights claims) and the right holder, not her society, can be seen to be exercising the right inasmuch as it is she who is doing the enjoying, be it 'directly' or 'objectively'. Consequently society or its agencies are not left in the position as they are in the cases where exercise is identified with enforcement or recognition, of purporting to exercise a right which they do not actually possess. Furthermore, Donnelly's analysis seems to support this approach. He writes that "[a] right-holder exercises his right, in the generic sense of bringing it into play"⁹⁰ and that:

⁸⁷ J. Donnelly, op. cit., p.16.

⁸⁸ J. Donnelly, op. cit., p.17ff.

⁸⁹ J. Donnelly, op. cit., p.19.

⁹⁰ Jack Donnelly, op. cit., p.13.

"... right-holders usually are free to choose not to exercise their rights; some attempted exercises will fail and others will be (justly) be overridden by other rights or even powerful non-rights demands; and so forth."⁹¹

These passages suggest that the right in question is latent within the human being, waiting to be exercised and that whether or not it is exercised, the right itself will still be in there lying in wait, ready in case it is called upon. Moreover, Donnelly points out⁹² that direct and objective enjoyment make up the majority of rights exercises and in any search for a characteristic feature of 'a right' surely it makes better sense to look at the normal or characteristic cases rather than the 'degenerate' exceptions.

However, the identification of either direct or objective enjoyment of rights with the right's exercise does not withstand closer scrutiny. Firstly, it will be noted that Donnelly styles assertive exercise and direct and objective enjoyment as three subsets of 'exercise'. Assertive exercise involves claiming and for the reasons given above that renders it an unsuitable candidate for a rights exercise conceptually separate from its possession. While by no means logically impossible, it does seem odd that two such subsets should be regarded as 'separable' while one cannot be so regarded. The position one is obliged to take is that when a right is so overwhelmingly strong that it is recognised even before the holder is obliged to demand the object of the right, it has two conceptually separate, potentially ethically distinct sources, and yet when the right holder is required to actually claim that which the right demands as his due, no such division is possible. Since we are

⁹¹ Jack Donnelly, op. cit., p.15.

⁹² Jack Donnelly, op. cit., p.14f.

dealing here with an abstracted concept of 'a right' we would on this approach be obliged to maintain that sometimes 'a right' can be separated from its exercise and sometimes it cannot. Not only is this position afflicted by a most unsatisfactory imprecision, but in fact it also does nothing to sustain the contention that possession and exercise of 'a right' may have two distinct bases at least one of which may be normative. Asserting that a right sometimes has one source and at other times two demands that one next ask when does 'a right' have one and when two. The answer seems to be that it has one source when the right is recognised as so strong that there is little point in actualising the potential claim which underlies the possession and perhaps even the existence of the right. Thus the focus is cast back on the recognition element in the rights process; the immediate source of the exercise of the right is the recognition part of the claim / recognition amalgam which constitutes the right's possession and perhaps existence. But the ultimate source is the same as that from which springs the possession / existence. It is only at the point of recognition that the tree sometimes branches out to create a separately identifiable exercise; even when such branching occurs, quite clearly the branch has the same roots as the trunk from which it sprang. One can see exercise as being 'stacked on top of' possession, and therefore, even if possession and exercise are separable it is a 'horizontal' separation rather than a 'vertical' one and it is only a vertical separation which creates the potential for a two pillared ultimate generic source for 'a right'. Identifying that a cake and its icing are separate items does not show that they are each sitting on a different plate.

Moreover, identifying objective or direct enjoyment as 'exercise' makes 'exercise' look more

like a mere response to the system's recognition; recognition is the real key to exercise and as noted above recognition is outside the control of the right holder making it harder to accurately describe the latter as exercising the right.

Finally, Donnelly clearly regards the assertive exercise as 'real' exercise, describing rights talk in situations involving direct and objective exercise as 'inappropriate' and not 'sensible'⁹³. Where direct exercise is employed he writes that "... no rights have been exercised"⁹⁴ and of objective enjoyment he states that "[i]t is even misleading to speak of enjoying rights here: if I 'enjoy' anything it is the objects of my rights ... , not my rights."⁹⁵. He thus sees the direct and objective enjoyment of a right as more of a consequence of the potential for the right's assertive exercise, rather than as exercises themselves. Neither direct nor objective enjoyment of 'a right' is therefore a suitable pretender for the throne of 'exercise', and even if one of them were, such a separate exercise would be 'horizontal' rather than 'vertical', and therefore still not spawn the potential for a two pillared at least partially ethical base for the concept of human rights.

4.6.8 Article 29 of the Universal Declaration of Human Rights suggests that the existence of human rights should be separated from their exercise

It could be argued that article 29(2) of the Universal Declaration of Human rights supports the conceptual separation of a right's existence from its exercise. Article 29(2) states that:

"[i]n the exercise of his rights and

⁹³ Jack Donnelly, op. cit., p.14.

⁹⁴ Jack Donnelly, op. cit., p.13.

⁹⁵ Ibid.

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 for meeting the just requirements of morality, public order and the general welfare in a democratic society."⁹⁶

This article expressly applies to the exercise of the rights contained in the declaration and it could be suggested that it therefore implicitly recognises the validity of separating a right from its exercise. Finnis appears to make this assumption. He restricts the application of article 29(2) maintaining that it does not operate on some of the rights in the Universal Declaration. Nevertheless, in relation to the other rights in that instrument, he implicitly accepts that they should be restricted *in their exercise*, by article 29(2)⁹⁷.

However, it is submitted that article 29(2) does not constitute an endorsement of the conceptual separation of a right's existence and its exercise. The references to morality and public order suggest that the restrictions which article 29(2) is laying down are in fact the same limitations as were discussed at length in the United Nations Conference on Freedom of Information and the Economic and Social Council's Sub Commission on Freedom of Information and the Press and which have been fitted into the international broadcasting regulatory scheme advocated in this paper as class one restrictions. It was noted in chapter two that these two bodies saw freedom of expression as only applying to 'information' and that information was not seen as including material

⁹⁶ Universal Declaration of Human Rights, article 29(2), *loc. cit.*

⁹⁷ J. Finnis, Natural Law and Natural Rights, pp.210-218.

prejudicial to inter alia public order or morality. This view does not stifle the 'restrictions' constituted by the demands of morality and public order as on the exercise of the right to freedom of expression. It is submitted that it quite clearly views the right to freedom of expression as inapplicable ab initio to such material. It is not that one has a right to broadcast snuff movies subject to a restriction on the exercise of that right by article 29(2); the proceedings of both the Conference and the Sub Commission demonstrate one does not have that right in the first place because such material is not covered by the right to freedom of expression⁹⁸. The restrictions in article 29(2) therefore do not relate to the exercise of a right independent of its existence, but rather 'restricts' the scope of the right as a unified concept.

4.6.9 The separation of a right's possession and existence from its exercise is therefore not valid

The separation of a right's possession and existence from its exercise is therefore not valid. None of the activities involved in the life of a right (claiming, recognition, enforcement, and direct or objective enjoyment) can be separated from the possession of the right, and it is therefore as conceptually sound to argue that 'a right' may have two ethical sources as it is to insist that the one tree came from more than one seed. The theoretical division between a right and its exercise cannot be used to generate two distinct concepts which could generically be labelled 'a right', one with its roots in humanity itself, natural law, human nature, and other such amorphous notions, and the other in the possibly deontological brand of motivist ethics

⁹⁸ See chapters 2.2 and 2.3.

entailed by the method of regulating international broadcasting activity suggested by the United Nations Conference on Freedom of Information and the United Nations Subcommittee on Freedom of Information and the Press. The conflict between traditional and contingent approaches to the origin of human rights remains therefore unresolved.

It is worth noting that if this conclusion is wrong, and it is legitimate to draw a distinction between the possession / existence of a right and its exercise, the division would favour the system proposed in this paper for regulating international broadcasting. It would provide another line of defence against the criticism that system proposed is inconsistent with the traditional belief that human beings have human rights simply because they are human. However, the writer is of the opinion that for the reasons given the division is erroneous. It is accordingly necessary to take a closer look at the jurisprudence of human rights in order to demonstrate that contemporary human rights theory is such that it can accommodate the traditional view of the origin of human rights, while at the same time admitting the core demands of the contingent human rights theory.

4.7 Theories about the origin of Human rights

It is submitted that traditional and contingent theories about the origins of international human rights are not incompatible and that this compatibility reveals itself through a greater appreciation of what goes to make up a right, and in particular how rights may relate in two quite distinct ways to duties. If one were trying to identify the ingredients which go to make up a loaf of bread, slicing up the loaf into slices, no matter how thin is not going to aid the analysis any more than trying to slice off the exercise of a right from its possession

/ existence furthers a better understanding of 'a right'. One has to understand what goes into the bowl in the first place and what happens in the baking process. This understanding is either lacking or so deeply embedded in their subconscious that most writers on human rights find themselves arguing at crossed purposes or tangled in an abortive and never ending chicken / egg debate. Much of what has been written about rights is sound but tends to be quite narrowly focused, and if rights writers have slipped up it is not so much in what they have written as in their failing to appreciate the breadth of the concept of a right and / or in their neglecting to put their more narrowly focused contributions to the debate into that broader picture. I shall try to suggest an outline for just such a picture and to show that it eliminates the problem posed by the apparent conflict between the contingent and traditional theories about the origin of human rights.

4.7.1 The intellectual setting of contemporary human right jurisprudence

4.7.1.1 Human rights are not self-evident

Diana Meyers notes that "[p]roponents of human rights long ago abandoned the claim that any rights are self-evident and set about accounting for the rights they esteemed"⁹⁹. In fact the only school of legal thought with which 'self-evident' human rights

⁹⁹ D. T. Meyers, "Rights-Based Rights", Law and Philosophy, vol.3 (1984), p.407 at p.407. See also A. Gewirth, "The Basis and Content of Human Rights", Georgia Law Review, vol.13 (summer 1979), p.1143 at p.1143 where he writes of "... substantive arguments which try to prove or justify that persons have rights other than those grounded in positive law" that "[a]ppeal to positive recognition is obviously insufficient for answering these substantive questions".

is consistent is that of legal positivism¹⁰⁰. All the other schools of thought have sought to justify human rights in some way or other notwithstanding that they do on occasion refer to them as 'self-evident'. For example the American Declaration of Independence refers to "certain inalienable rights" as being "self-evident"¹⁰¹, yet at the same time, rights holders are said to be "endowed by their Creator" with the rights.

¹⁰⁰ See J. W. Harris, Legal Philosophies, p.16f. Intuitionist views of human rights are consistent with legal positivist theory. However, because most positivists, such as Hart, regard some form of externally enforceable sanction as an essential element in any legal system, a feature not demonstrated by the international legal system, international human rights have received little attention from legal positivists. If they had turned their minds to the subject, they would probably have taken an intuitionist approach just as they did in relation to municipal law.

Marxists are often said to reject the concept of human rights. In fact however, what they rejected was not human rights as such but human rights as traditionally viewed stemming from some source other than the state. Even in the pre 1990 Soviet Union human rights did exist and were entrenched in the federation's constitution. It is just that the Soviet conception of human rights is different from that of the West. For the Marxist, human rights are those rights granted as such to individuals by the state. In a sense therefore, the Marxist conception of rights is intuitive in the same way as is the legal positivist conception of human rights; both regard human rights as those which individuals have in fact been granted by the legal system in which they live. Strictly speaking however, because the source of the Marxist state's authority is ultimately the dialectic, a dimension lacking in truly intuitive theories, the Marxist view of individual rights does not constitute an intuitive approach to human rights. Legal positivists do not care where the rights came from, Marxists do, and this distinguishes the two. The writer acknowledges with appreciation the assistance of Dr Andrew Sharpe of Auckland University in clarifying these points.

¹⁰¹ Thomas Jefferson wrote of "certain inalienable Rights" as "self-evident" - see B. H. Weston, "Human Rights", *Human Rights Quarterly*, vol.6 (1984), p.257 at 260.

What is self-evident is not the rights themselves but the justification, the cause / effect relationship between the rights and their justification or source, in this case, God. Finnis makes this same distinction. He asserts that there are seven basic goods which are self-evident but nevertheless insists that the justification for human rights and other aspects of natural law derived from these self-evident goods is an essential element in any coherent natural rights theory¹⁰².

¹⁰² Finnis regards justification as essential. See Natural Law and Natural Rights, p.18f. He identifies seven basic goods in his chapters III and IV (pp.59-99). On the self-evidence of these basic goods see Finnis, op. cit. at pp.64-73, and on the distinction between the self-evident basic goods and the morally obligatory natural law and human rights derived from them and which must be justified, see p.100f.

Two further points should be made in relation to Finnis' stance on self-evidence. Firstly, it should also be noted that Finnis is what he calls a 'descriptive' social scientist. Notwithstanding that he accepts value judgement as inevitable in the descriptive approach to social science (see op. cit. p.3), his theory about natural law, being descriptive, is essentially objectively underpinned. It is submitted that for a descriptive rights theorist such as Finnis, to say a proposition is self-evidently true is to say that it conforms to the objective reality manifested by the practices and beliefs current in society. Seen in this light 'self-evidence' is not as far reaching or demanding a concept as that criticised by Meyers. For her to say a proposition is self-evident is to insist that it is true either without offering any validating criteria at all or based on faith in some abstract conception of an ideal, absolute truth not discovered or even discoverable by mankind.

Secondly, while Finnis refers to his approach to natural law as 'descriptive' in that it essentially attempts to formulate a theory to account for, to 'describe', how natural law does in fact operate within the observable world, in the writer's view he is detailing what other writers such as Dworkin would term the constructive approach to natural law and rights. This note is only meant as a alert the reader to the impending discussion of the characteristics of constructivism in this context contained below in chapter 4.7.3 from which it will be seen that the whole idea behind constructivism is to 'construct' a theory which explains as well as can be achieved for

Meyers is therefore correct that there is widespread acceptance, and has been for centuries, that human rights must be explained somehow, must come from somewhere, have some sort of justification.

4.7.1.2 Traditional human rights justifications and their failings

Traditionally human rights justifications have taken the form of cause / effect propositions. There are three parts to the structure of such justifications; the 'cause', the 'effect' (which is of course human rights) and the relationship between the two. From Aquinas to Paine it was argued that human beings have human rights because God ordained that that be the case¹⁰³. God caused human rights. During the Enlightenment this approach was secularised and Nature supplanted God as the determiner of the rights of man¹⁰⁴. Grotius, Clarke, Vazquez, Suarez, Locke and Kant saw Reason as the determining factor¹⁰⁵. Others

the moment what one sees around one at present. If the principles underlying such a theory are self evident it really means no more than that the theory for which they validly provide the foundation does empirically fit one's observations of the world.

¹⁰³ H. J. McCloskey, Meta-Ethics and Normative Ethics, pp.17-23; also J. W. Harris, op. cit., p.8, but see footnote 108 below.

¹⁰⁴ According to Finnis attempts to derive substantive judgements about right and wrong by reference to conformity to Nature are evident in pre renaissance texts, even in Aquinas. See J. Finnis, Natural Law and Natural Rights, p.33ff.

¹⁰⁵ A. Gewirth, "The Basis and Content of Human Rights", *Georgia Law Review*, vol.13 (1979), p.1143 at p.1144 for Kant. Grotius, Clarke, Vazquez and Suarez all saw right and wrong as determined by reference to reason. See Hugo Grotius, De Jure Belli ac Pacis, I, c. i, sec. 10, para. 1, "Jus naturale est dictatum rectae rationis, indicans actui alieni, ex ejus convenientia aut disconvenientia cum ipsa natura rationali ac sociali, inesse moralem turpitudinem aut necessitatem moralem ..." ["The Law of Nature is a

such as Rousseau saw the general will as the source of 'natural' rights¹⁰⁶. Marxists rejected the notion of human rights as traditionally perceived and saw individuals' rights as ultimately reflective of the stage of historical development attained at the time by the society in which they lived¹⁰⁷.

These justifications have all been afflicted by at least one of two major failings. The first failing relates to the epistemological standing of the 'cause'. The cause component of some of the above justifications is subjective. For example on the Thomist theory that man is endowed with human rights because it is God's will¹⁰⁸, if there is no God there can be no human rights. Since the existence of God is still a healthy subject of philosophical contention, a serious epistemological cloud remains lodged over this version of the natural law justification of human

dictate of right reason, pointing out that for any action there is an inherent moral offensiveness or moral compulsion [arising] from its concordance or discordance with rational and social nature itself ..."]. For Clarke, Vazquez and Suarez see Finnis, op. cit., pp.44-6. For Locke see his Second Treatise of Government, p.4. Locke saw natural rights as surviving through the social contract from the state of nature. See J. W. Harris, op. cit., pp.10 and 262; See also D. Lloyd, op. cit. p.84.

¹⁰⁶ J. W. Harris, op. cit., p.10f.

¹⁰⁷ See J.W. Harris, Legal Philosophies, p.245; A. Gewirth, "The Basis and Content of Human Rights", Georgia Law Review, vol.13 (1979), p.1143 at p.1144.

¹⁰⁸ See H. J. McCloskey, Meta-Ethics and Normative Ethics, pp.17-23; also J. W. Harris, op. cit., p.8. It should be noted that Finnis argues that Aquinas did not insist on the existence of God as a prerequisite for the existence of natural law but actually saw conformity to nature as the derivation of natural law, and hence, on the traditionalist view of human rights, as the ultimate origin of human rights. Harris appears to be prepared to concede this point suggesting that "[p]erhaps the Thomist writers of the seventeenth century and afterwards, ... changed Aquinas' conceptual structure ..." (op. cit. at p.16).

rights. Wherever there is a doubt concerning the validity of the 'cause', the same doubt necessarily dogs the 'effect'.

The second failing relates to the relationship between the 'cause' and the alleged 'effect' (human rights). For example while there is much dispute about the existence and nature of God, Newtonian physical laws are widely accepted as valid because they can be empirically sustained. But even so, that still does nothing to demonstrate that all human beings must have human rights. Notwithstanding the validity of the 'cause' component of the justification, if the justification is to stand up to scrutiny, the cause / effect relation between these 'laws of nature' and human rights must also be demonstrated. As long as the validity of the cause / effect relationship between an admitted 'cause' and human rights (the 'effect') cannot be demonstrated but must be accepted on faith, the justification as a whole remains seriously flawed.

These two failings amount to the same problem, lack of objectivity, focused on two different parts of the traditional cause / effect justifications of human rights. The problem has been long commented on by numerous authors¹⁰⁹.

¹⁰⁹ Winfried Brugger criticises the natural law doctrine as excessively objective but at the same time rejects the view that just because "... moral questions cannot be answered with the precision we expect in mathematical knowledge or research ..." is no reason to reject all objectivism altogether. See W. Brugger, "Human Rights Norms In Ethical Perspective", German Year Book Of International Law, vol.25 (1982), p.113 at pp.122-124, passage quoted at p.123f. Sinha is more roundly critical of subjectivist theories of human rights for having "... no objective criterion of truth ...". See S. P. Sinha, "Why And How Human Rights", International Journal Of Legal Information, vol.10 (1982), p.308 at p.312; also see S. P. Sinha, "The Anthropocentric Theory Of International Law As A Basis For Human Rights", Case Western Reserve Journal Of International Law, vol.10 (1978), p.469 at p.486f. Gewirth describes intuitionist rights theories (which

4.7.1.3 A number of attempts have been made to remedy this shortcoming and one of them is by Marxist theorists

Marxists for example have endeavoured to make a virtue of the vice by rejecting empiricism as merely reflective of an existing, and in their view inferior, world condition. In their view individual rights derive ultimately from the dialectic, a purely theoretical construct; not only is it unnecessary to find an objective validation for either the 'cause' or its relationship to the 'effect', but that would be positively undesirable since it would be seeking validation by reference to a 'real world' warped by bourgeois domination. In the writer's view this 'solution' is vacuous, the 'head in the sand' solution to problem solving. This is particularly so in the international legal field since the validatory touchstones of international law expressly include "... general practice accepted as law", the notion of 'practice' being an almost definitionally objective anchor¹¹⁰.

4.7.1.4 Another potential solution is offered by the logical school of human rights

hold that "... humans' possession of certain inalienable rights is self-evident ...") as "impotent". See A. Gewirth, "The Basis And Content Of Human Rights", Georgia Law Review, vol.13 part 4 summer 1979, p.1143 at p.1145 and p.1146 respectively; Also J. Gorecki, "Human Nature and Justification of Human Rights", American Journal of Jurisprudence, vol.34 (1989), p.34 at p.43f; also A. D'Amato, The Concept of Custom in International Law, p.134 where he writes that "...it is an extremely dubious proposition to rely on the *arguments* of governments ... rather than their acts" (italics in the original).

¹¹⁰ Article 38(1)(b) of the Statute of the International Court of Justice; annexed to the Charter of the United Nations, GBTS 1946 p.67; also reproduced in American Journal of International Law, vol.39 (supplement) at p.190.

Another potential solution to the problem of subjectivity is offered by a group of writers who could best be described as the logical school of human rights. The arguments they propose come in a variety of forms but all attempt to deduct human rights from some empirically sustainable major premise. This class of argument solves the problem of subjectivity in so far as it applies to the relationship between the 'cause' and 'effect' by using the syllogism. In this respect the logical school is reasonably secure. Advocates of this approach contend that (1) values (universally held or relative) form the major premise of the syllogism, and (2) a statement of fact comprises the minor premise. The difference between universalists and relativists within this school is that the former insist that there are universally valid values to form the major premise, and that any variations in the resultant human right (which constitutes the conclusion) is due to variations in the interpretation of the factual minor premise. Relativists, by contrast deny this assertion¹¹¹.

The logical school's use of the syllogism instead of, or rather more to demonstrate the validity of, the cause / effect relationship between the 'cause' and human rights, certainly answers the objectivist criticism of subjectivity in relation to the nexus between the 'cause' and the 'effect', but it does nothing to validate the major premise. Because human rights empirically do have significant normative content, this premise must be normative to avoid either producing a concept of human rights patently at variance with reality or impaling the justification on

¹¹¹ Jan Gorecki describes these two versions of the solution offered by the logical school for the problem of subjectivity. See J. Gorecki, "Human Nature and Justification of Human Rights", *American Journal of Jurisprudence*, vol.34 (1989), p.43 at p.56.

the Humean spike of noncognitivism¹¹², and therefore, being of necessity abstract, its existence and nature are always going to be subject to dispute. Perrott distinguishes two types of value assertion which from time to time are labelled rights¹¹³. The first is a "... bare subjective value or preference ..." ¹¹⁴ and defies objective verification inasmuch as it merely expresses a preference. The other type of value statement is a "... justified value or preference ..." ¹¹⁵. He writes:

"Of course, even if the speaker can explain and justify his statement in these ways, his opponent may well still reply that general acceptance as a value is no guarantee of "genuine" value, or that in the instant case some other value, which may be equally generally accepted, is in conflict with the speaker's justifying value ..." ¹¹⁶

The essential problem with normative statements is that, unlike factual ones, their existence and character simply cannot be empirically verified.

¹¹² D. Hume, A Treatise of Human Nature, (1740), Book III. part 1, section 1, p.469 in P. H. Nidditch's edition. See also J.W. Harris, op. cit., p.12. Finnis (op. cit. pp.36-42) plausibly argues that Hume was not really even concerned to demonstrate that normative conclusions cannot be derived from factual premises, but rather that the demonstration of any proposition, factual or normative, as true will not necessarily justify a conclusion that a person should behave in conformity with that proposition. Nevertheless, Hume is generally credited as the first to articulate the principle of non cognitivism and as Finnis notes (op. cit. at p.37) "... if Hume is not to be credited with announcing the logical principle in question, somebody else is to be; and the important thing is that the principle is true and significant."

¹¹³ D.L. Perrott, "The Logic of Fundamental Rights", in Fundamental Rights, p.1 at p.5f.

¹¹⁴ D. L. Perrott, op. cit. at p.6.

¹¹⁵ Ibid.

¹¹⁶ D. L. Perrott, op.cit. at p.7.

Because it is abstract the truth and meaning of a normative statement is always at least potentially subject to dispute. Even when the truth of the statement is forcefully argued, as noted in the quote from Perrott above, it is still always going to be open to question simply because it is abstract and cannot be validated by reference to the physical realities of the observable world. As Alan Gewirth writes:

"... it does not seem true to say that persons are born having rights in the sense in which they are born having legs. At least their having legs is empirically confirmable, but this is not the case with their having rights."¹¹⁷

Jan Gorecki's examination of one of the proposed 'causes', namely human nature, is an example of this flaw¹¹⁸. Gorecki hypothesises that it is possible to objectively validate the proposition that there are "... basic ethical inclinations expressed in universally accepted norms"¹¹⁹. He concludes that it is not possible to sustain the hypothesis¹²⁰. He openly and hopefully admits that this does not demonstrate that no objective 'cause' for human rights so viewed, or norm making fact as he terms it, exists, but merely that it cannot be objectively demonstrated to be human nature¹²¹.

¹¹⁷ A. Gewirth, "The Basis and Content of Human Rights" Georgia Law Review, vol.13 (1979), p.1143 at p.1145.

¹¹⁸ J. Gorecki, "Human Nature and Justification of Human Rights", American Journal of Jurisprudence, vol.34 (1989), p.43.

¹¹⁹ J. Gorecki, op. cit. at p.47.

¹²⁰ J. Gorecki, op. cit. at p.59.

¹²¹ J. Gorecki, op. cit. at p.59f. The self imposed limitations of Gorecki's article must be noted. Gorecki is only examining the objective

Some attempts have been made to deal with the problem of subjectivity as it relates to the 'cause' part of human rights justifications. One of the more intriguing is that proposed by Alan Gewirth¹²². He endeavours to solve the problem of cause subjectivity by a two step process. First he tries to show that every agent is, on pain of self-contradiction, required to assert that he has rights. The second step sees him endeavouring to show that every agent is logically obliged, again on pain of the same self-contradiction, to accept as an ultimate moral principle, the injunction "Act in accord with the generic rights of your recipients as well as of yourself"¹²³. In the writer's view the argument fails.

The rationale for the first step of Gewirth's argument is summarised as follows:

"The argument may be summed up by saying that if any agent denies that he has rights to freedom and well-being, he can be shown to contradict himself. For, as we have seen, he must accept (1) "My freedom and well-being are necessary goods." Hence, the agent must also accept "I, as an actual or prospective agent, must have freedom and well-being," and hence also (3) "All other persons must at least refrain from removing or interfering with my freedom and well-being." For if other persons remove or interfere with these, then he will not have what he has said he must have in order to be

validation of one aspect of one of the 'causes' offered for human rights; he is only dealing with *human nature perceived as universally held ethical inclinations*. His examination is not meant to prove that no value judgment can be empirically sustained. It is offered merely as an example of the difficulty encountered by one writer, and ultimately of his failure, in objectively verifying a normative and therefore abstract proposition.

¹²² A. Gewirth, "The Basis and Content of Human Rights" Georgia Law Review, vol.13 (1979), p.1143.

¹²³ A. Gewirth, op. cit. at p.1155.

an agent. Now suppose the agent denies (4) "I have rights to freedom and well-being." Then he must also deny (5) "All other persons must at least refrain from removing or interfering with my freedom and well-being." By denying (5) he must accept (6) "It is not the case that all other persons must at least refrain from removing or interfering with my freedom and well-being," and hence he must also accept (7) "Other persons may (are permitted to) remove or interfere with my freedom and well-being." But (7) contradicts (3). Since, as we have seen, every agent must accept (3), he cannot consistently accept (7). Since (7) is entailed by the denial of (4), "I have rights to freedom and well-being," it follows that any agent who denies that he has rights to freedom and well-being contradicts himself."¹²⁴

The very first statement in the chain of reasoning offered by Gewirth asserts that every actual or prospective agent "must accept" that freedom and well-being are necessary goods, freedom and well-being being catch-all phrases for all those abilities and conditions necessary to carry out any purpose. Gewirth says that every agent regards his own purposes as good according to whatever ethical system he embraces. Therefore, to be consistent, he must also regard as good the conditions necessary for him to achieve those purposes.

The first objection is that this conclusion by no means follows from the premise. Just because one regards the ends as good does not mean that one is logically obliged to also regard the means as good too. When Captain Oates stepped outside in Antarctica in early 1912 his purpose was to secure the survival of the other members of the team. In the writer's view it does not follow that he was therefore logically obliged to regard his certain and imminent frostbitten death in a dark, frozen Antarctic wasteland as a

¹²⁴ A. Gewirth, op. cit. at p.1153.

necessary good. The most that can really be said is that he regarded the means (his death) as necessary and the end (survival of the others) as good. The population of New Zealand have been constantly told for years that hundreds of thousands of them have to endure a subsistence standard of living or worse so that in the future they may have productive sustainable jobs. Not many outside no 1 The Terrace would venture to suggest that such social and economic privation is in any way good. Gewirth merges the ends and the means in a way which is just not empirically sustainable¹²⁵.

The second objection to Gewirth's theory relates to the jump from 'I must have freedom and well-being' to 'I must therefore have rights'. As long as an agent does in fact have the conditions and abilities necessary to achieve his ends, prerequisites which Gewirth labels freedom and well-being, that is sufficient, indeed sufficient by definition, to achieve his ends. To get from Wellington to Auckland I need a car. As long as I in fact do have a car I can achieve my purpose; I do not need to have a right to the car to achieve it. I could have stolen the car and have no right to it at all but as long as I do possess it I can achieve my purpose.

¹²⁵ Gewirth acknowledges this means-end problem but insists that by viewing the assertions about the moral worth of an agent's ends as claims made by the agent rather than as a general moral statement, the problem is eliminated. At p.1152 of op. cit. he writes: "[f]or the assertion about necessary goods is now not a mere factual means-end statement; on the contrary, because it is by the agent himself from within his own conative standpoint in purposive agency, it carries his advocacy or endorsement". Simply putting a normative statement in indirect speech, which is effectively what Gewirth is doing, does not make it any less abstract or any easier to empirically validate. At the end of the day, if anything at all can be empirically validated it will only be the agent's expression of the statement not the substance of the statement itself.

The third objection to Gewirth's theory is that it is inherently conditional on the agent achieving his purposes. At the very beginning of Gewirth's reasoning chain when the agent says 'my ends are good' therefore I must have freedom and well-being, freedom and well-being being necessary to achieve my ends', all he is saying is that *if I am to achieve my ends I will require x, y, and z*. Similarly, when he says 'therefore I must have rights', what he is really saying is '*therefore, if I am to achieve my purposes, I must have rights*'. The necessity only arises if the implied protasis of the condition is fulfilled. This same restriction passes through the whole of Gewirth's chain of reasoning because limitations on a premise logically must apply equally to the conclusion. Deduction is arguing from the general to the specific, and it is therefore impossible to arrive at a conclusion more general than the premise.

Gewirth acknowledges the necessity of justifying the agent's inherently subjective assertion that his purposes are good "... by a valid moral criterion or principle"¹²⁶, but offers only one possible justification. This offering is the injunction: "Act in accord with the generic rights of your recipients as well as of yourself"¹²⁷. Gewirth labels this principle the "Principle of Generic Consistency" and maintains that every agent is logically required to adhere to it on pain of self-contradiction. The problem is that the self-contradiction which requires adherence to the Principle of Generic Consistency is the same self-contradiction which requires "... that every agent ... must accept the generalization that all prospective purposive agents have the generic

¹²⁶ A. Gewirth, op. cit. at p.1155.

¹²⁷ Ibid.

rights to freedom and well-being"¹²⁸. It was argued in the second objection offered above to the first part of Gewirth's theory, that the agent's assertion that he must have freedom and well-being if he is to achieve his ends, does not logically require him to accept that he must have rights to freedom and well-being if he is to achieve his ends. Moreover, even if it did it was noted in the previous paragraph that such necessity is logically subject to the implied condition that the agent should be permitted to achieve his purposes, which is exactly what is the Principle of Generic Consistency is designed to establish; it is quite clearly circular to argue that the Principle of Generic Consistency is required by a proposition (acceptance of the generalisation that all agents have rights to freedom and well-being) the validity of which is itself dependent on acceptance of the Principle of Generic Consistency.

The logical school have therefore resolved the problem of subjectivity in relation to the second of the two failings ascribed to the traditional cause / effect style human rights justifications stated above, but they have not dispelled the inherent subjectivity of a 'cause' which is of necessity normative and which therefore defies conclusive empirical validation.

4.7.2 The Constructivist Theory of Human Rights

The constructivist theory about the origin of human rights can be seen as a third attempt to overcome the basic problem of subjectivity in human rights theory. It was noted above that the problem of subjectivity in the justification of human rights is not an issue for positivists (or would not be if they turned their minds to that subject), because they do not care where rights came from; for them it was

¹²⁸ Ibid.

enough that they existed at all.

It is ironic that the first seeds of the constructivists' attempt to explain the origin of human rights should have been sown during the inimitably positivist years between the first and second world wars, and by one of that generation's most renowned legal theorists, Wesley Hohfeld. Hohfeld's analysis of rights as fundamental jural relationships provides a good framework within which to analyze rights not only because of Hohfeld's seminal place in twentieth century rights scholarship¹²⁹, but also because it sets out clearly what it means in concrete terms to have a right. It also draws a clear distinction between on the one hand what rights actually are, which, in deference to the author's day, forms the principal focus of his work, and on the other where they come from. In respect to this latter aspect of his work Hohfeld's contribution is both good and bad. It is bad in that there is very little of it¹³⁰. It is good however in the sense that what there is of it is empirically based, no doubt due to the positivist predilection for description and their concurrent emphasis on objective reality as the primary test of legal validity.

4.7.2.1 Hohfeld's analysis of rights as fundamental jural relationships

Hohfeld identifies four basic jural relationships all of which at various times are described in rights

¹²⁹ For example see Richard Flathman, The Practice of Rights, p.38, where he opines that Hohfeld's analysis of rights has become "more or less standard in jurisprudence".

¹³⁰ As will become clear, it was left to later writers to take up and develop the few clues he did leave.

language. The first is the claim-right / duty¹³¹ relationship. If A agrees to paint B's house and B gives good consideration for A's promise, B has a right to have his house painted by A and A has a correlative duty to paint it. B's right consists of an affirmative claim against A which can be exercised through whatever institutional machinery is provided by the system in which the jural relationship between A and B operates. B's claim-right and A's duty are necessarily correlative inasmuch as the one cannot be destroyed without the other meeting the same fate; the right and duty are two sides of the same coin, two different perspectives on the one single jural relationship. It follows that neither can precede or ground the other. The right cannot be based on this duty; what the parties create by their agreement is not a right or a duty singly but a single jural relationship which has two aspects to it. To advocate the separation of these two aspects would be as pointless as trying to conceive of a finite line with only one end or trying to extract the yellow from a green pigment without changing its colour. Indeed Hohfeld regards this correlativity as definitional¹³².

In the example given above, B had an affirmative claim against A and is therefore said to have a

¹³¹ The term 'claim-right' is not employed by Hohfeld but is a term introduced by later writers to avoid confusing the strict narrow sense of the term 'right' developed by Hohfeld from the looser use of the term (which includes its denotation of privileges, immunities and powers) which prompted him to embark upon his analysis in the first place. For this same reason this same approach has been adopted here.

¹³² Wesley Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning", 23 Yale Law Journal (1913), p.16, at p.38 of the article as reprinted with other essays by the same author in Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays by Wesley Newcomb Hohfeld, W. W. Cook (ed).

claim-right against him (and A has a correlative duty to B). If the facts were altered and B had not given good consideration, B would not have an affirmative claim against A, and accordingly would not have a claim-right. Instead Hohfeld would say that he has the opposite of a claim-right, a 'no-right' which means that he lacks an affirmative claim against A¹³³. The 'no-right' is the logical jural opposite of a claim-right. It follows that if B has no affirmative claim against A, A is under no correlative duty to B to paint his house. Hohfeld describes this 'no duty', this freedom from any purported affirmative claim B may make, as a 'privilege' i.e. as the logical jural opposite of a 'duty' and as the logical correlative of a 'no-right'¹³⁴.

Thus far Hohfeld has identified two distinct jural relationships. The claim-right / duty relation and the 'no-right' / privilege relation. The two aspects of each relationship are inseparable. The two relations are themselves related inasmuch as the claim-right aspect of the first of the two relations is the exact jural opposite of the 'no-right' aspect of the second, the former being B's affirmative claim against A, the latter being B's lack of an affirmative claim against A. Similarly, the privilege aspect of the second relation is the precise opposite of the duty aspect of the first, the former being A's freedom from any affirmative claim B may make, and the latter being the lack of such freedom.

Hohfeld also identifies another pair of jural relations related to each other in the same way as the claim-right / duty and 'no-right' / privilege relations are. He also describes the power / liability relation in which C's 'power' is defined as her

¹³³ Wesley Hohfeld, *op. cit.*, p.38f.

¹³⁴ *Ibid.*

authority to 'control' her legal relations with D, and D's liability is his inability to do anything legal about it. Thus in the second fact situation given by way of example above, B could give consideration thereby altering the fact situation in a way which modifies the nature of his jural relationship with A. A cannot legally prevent B from giving such consideration. B has a 'power' because he has the authority to control his legal relations with A, while correlatively, because he is subject to that control of B, A is said to be under a liability. At the same time it will be noted that not only does A lack freedom from B's authority to control their legal relations, but he also cannot himself do anything to control them. A is therefore said to be under a disability because he lacks the authority to control his legal relations with B. It will be noted that a disability is the precise jural opposite of a power, the latter being the B's authority to control legal relations with A and the former being A's lack of authority to control them. Similarly A's liability which is correlative to B's power (because if B has authority to modify his legal relationship with A by giving consideration, A by definition cannot prevent him, or otherwise B could not be said to have the authority which his power ascribes him) is the exact opposite of an immunity. An immunity is C's freedom from D's authority to control her legal relationship with C, and a liability is the lack of that freedom.

The following will perhaps make the pattern clearer:

In any single fact situation A may, against B:

1.

EITHER

HAVE an affirmative claim i.e.
A CLAIM-RIGHT

which
logically
means that B
HAS NO FREEDOM
FROM A's
affirmative
claim i.e. HAS
A DUTY

OR

NOT HAVE an affirmative
claim i.e.
A NO-RIGHT

which
logically
means that B
HAS FREEDOM
FROM any
affirmative
claim A may
make i.e. HAS
A PRIVILEGE

AND

2.

EITHER

HAVE authority to control
legal relations with B i.e.
have POWER

w h i c h
logically
means that B
IS SUBJECT to
that relation
with A i.e. is
under a
LIABILITY

OR

NOT HAVE authority to control
 legal relations with B i.e.
 have A DISABILITY

w h i c h
 l o g i c a l l y
 means that B
 IS NOT SUBJECT
 to legal
 relations with
 A i.e. has an
 IMMUNITY

As Cook¹³⁵ and Finnis¹³⁶ point out, in most situations in which 'a right' is in issue, the right in question is in fact a little (or not so little) bundle of (generic) rights, that is a bundle of claim-rights, privileges, powers and / or immunities along with their necessarily correlative duties, no-rights, liabilities and / or disabilities. Cook uses what Salmond describes as 'a right to ownership' as an example of this feature of rights usage and writes that "[t]o say that A has the "fee simple" of a piece of land is, therefore, to say not that he "owns a particular kind of right in the land" but simply that he has a very complex aggregate of rights, privileges, powers and immunities, available against a large and indefinite number of people, all of which rights, etc, naturally have to do with the land in question."¹³⁷.

Hohfeld's analysis of rights has been widely accepted. Sucharitkul writes that "... Professor Hohfeld's jural relationship provides a practical,

¹³⁵ Wesley Hohfeld, *op. cit.*, p.96.

¹³⁶ J. Finnis, Natural Law and Natural Rights, p.201.

¹³⁷ W. N. Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays by Wesley Newcomb Hohfeld, W. W. Cook (ed), p.12.

analytical test to measure the scope and effectiveness of a human right ..."¹³⁸. According to George Panchias "... the structure of a basic right is the structure of a set of active rights viewed as multital rights"¹³⁹. By 'active rights' he means Hohfeldian immunity rights¹⁴⁰ and 'multital rights' is a term invented by Hohfeld to describe rights against the whole world¹⁴¹. Feinberg not only employs the analysis but describes Hohfeld as "[t]he classic source for the analysis of legal relations into rights, liberties, powers, and immunities ..."¹⁴².

Some writers have argued that Hohfeld's analysis does not comprehensively describe the entire rights spectrum. Finnis for example notes that on Hohfeld's analysis all rights have three elements, a person, an act, and another person and that these three elements are all necessary to constitute one of Hohfeld's jural relationships. He asserts that this analysis fails to account for lawyers' common ascription of right in things¹⁴³, a general usage of rights in the abstract which only involves two elements, a thing (physical or

¹³⁸ S. Sucharitkul, "A Multi-Dimensional Concept Of Human Rights In International Law", *Notre Dame Law Review*, vol.62 (1987), p.305 at p.311.

¹³⁹ G.E. Panchias, "The Structure Of Basic Human Rights", *Law and Philosophy*, vol.4 (1985), p.343 at p.366.

¹⁴⁰ G. E. Panchias, *op. cit.*, p.356.

¹⁴¹ W. N. Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays by Wesley Newcomb Hohfeld, W. W. Cook (ed), 1923, p.72.

¹⁴² J. Feinberg, Social Philosophy, p.56n1.

¹⁴³ Hohfeld analyzes rights in rem as a raft of identical jural relationships which an individual has with every other person in the world. W. N. Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays by Wesley Newcomb Hohfeld, W. W. Cook (ed), p.72.

metaphysical) as the object of the right, the thing within which the right subsists, and a person to hold it. Finnis says that this practice of viewing rights as subsisting within things is contrary to Hohfeld's analysis and at the same time is superior to his view because it provides the law with a "constant focus" for its concern¹⁴⁴. The writer is inclined to accept that people do use 'right' in this two element way which Dworkin would describe as the 'right' of grand political rhetoric. It is also conceded that this type of rights usage is probably not covered by Hohfeld's analysis. However, it is submitted that the existence of such a usage does not detract from the analytical merit of Hohfeld's approach.

It is submitted that while lawyers may well use the term 'right' in its grand rhetorical political sense, they do not do so in a formal legal context. If one stood in the public gallery in a court room, one would see case after case heard involving a plaintiff trying to compel a defendant to hand over property, to stop interfering with his ordinary use and enjoyment of his land, to do something. One would see example after example of disputes involving rights containing three elements in the Hohfeldian sense. One would stand there a long time waiting for a case which only involved a plaintiff and a thing. It is submitted therefore that in spite of lawyers' use of the grand political rhetoric 'right' in everyday situations, that usage is not a 'legal' usage and Hohfeld's analysis of the legal usage of the term 'right' cannot be validly criticised on the grounds that it does not account for what it is suggested is an essentially non-legal usage. Finnis seems to accept this by building in a process of what he calls rights

¹⁴⁴ J. Finnis, Natural Rights and Natural Law, p.202.

'specification'¹⁴⁵. This process involves transforming a two element 'grand' right, which in the writer's opinion is much more closely akin to an assertion of value than to a description of a legal state of affairs, into a three element Hohfeldian jural relationship. The law can maintain a constant focus on the goods embodied in 'grand' rights as well as other assertions of good not dressed up for effect in the language of rights, without necessarily invalidating in any way Hohfeld's analysis of legal rights.

Finnis also criticises Hohfeld because he does not deal with where rights come from but devotes his attention to a primarily descriptive examination of how they function¹⁴⁶. While it is true that this was not the primary focus of Hohfeld's work and that Finnis is probably correct in insisting that some explanation for identifying when a particular jural relationship arises must be provided before Hohfeld's analysis can be applied, it will be seen below¹⁴⁷ that Hohfeld was aware of this point and did leave posterity some clues to assist in this quest. In the writer's view Hohfeld intended to describe how the term 'right' was used in legal usage, not to explain where rights came from, and one cannot criticise his functional description of rights usage for not providing such an explanation. To do so would be like criticising MacBeth on the grounds that Shakespeare did not write novels.

Finnis' final criticism of Hohfeld is related to this same point. He says that some sort of unifying theory for rights must be provided, that is some theory which explains what all right generating jural

¹⁴⁵ J. Finnis, op. cit., p.219.

¹⁴⁶ J. Finnis, op. cit., p.202ff.

¹⁴⁷ Chapter 4.7.2.3.

relationships have in common¹⁴⁸. He notes briefly the inadequacy of the choice and benefit theories in this regard. It is submitted that a unifying theory to explain 'why' rights is indeed needed to supplement Hohfeld's functional analysis of 'how'. But it is again suggested that Hohfeld's analysis of the practice of rights in legal context cannot be criticised for failing to provide such a theory. It is submitted that such a theory may be provided by the version of constructivist rights theory advocated below. This approach to the theoretical source of rights will be discussed in some detail below¹⁴⁹.

4.7.2.2 Application to International Broadcasting

Turning to the 'right' to freedom of expression on which the method for regulating international broadcasting activity advocated here is based, two bundles of slightly different composition can be identified. This is because the system proposed sees the right to freedom of expression as operating in two different fact situations. The prototypical class two situation involves a broadcaster B broadcasting objectively factual material for high minded purposes across a border to individuals C, D, E, and F, while in class three situations the material broadcast is either not objectively accurate (by design or otherwise) or is being broadcast for some purpose other than the furtherance of international peace, cooperation, understanding and the like. Applying Hohfeld's analysis to class two situations shows that B's 'right' to freedom of expression in class two would in fact be a bundle consisting of:

1. a no-right - B has no legal affirmative claim on C, D, E or F in the sense that he cannot

¹⁴⁸ J. Finnis, *op. cit.*, p.203.

¹⁴⁹ See chapter 4.7.3.

- positively or directly make them take some course of action; AND
2. a privilege - B is free from any affirmative claim which C, D, E, or F may try to make against him (this privilege type of 'right' protects him from any such claim); AND
 3. a power - B has the authority to control his legal relations with C, D, E and F inasmuch as he can choose to continue to broadcast objectively factual material in his endeavours to achieve laudable ends or he could start to transmit fiction, lies put up as the truth, or data which is factually accurate but for purposes not in accord with the avowed general aims of international law; AND
 4. an immunity - B is free from any authority the recipients of his programme may purport to exercise against him, i.e. there is nothing that C, D, E, or F can do to alter their legal relations with B in so far as they relate to broadcasting.

Correlatively, each of C, D, E and F have:

1. a privilege - C, D, E and F are all free from any affirmative claim which B may try to raise against them; AND
2. a no-right against B - each of them has no affirmative claim against B; AND
3. a liability - if B chooses to change the nature or purposes of his broadcast there is nothing C, D, E or F can do about it (they have no shield to protect them if B makes such a decision); AND
4. a disability - there is nothing C, D, E, or F can do to alter the nature of their legal relationship with B (they have no sword with which to unilaterally modify the nature of their

legal relationship with B.

Compare this situation with class three where B's 'right' to freedom of expression would consist of:

1. a no-right - B still cannot legally compel C, D, E or F to do any particular thing, i.e. he has no affirmative claim against them; AND
2. a duty - C, D, E, or F would now have an affirmative claim against B - they can legally compel B to broadcast material which is concordant with, or at least not destructive of their own cultural values and norms or not broadcast at all; AND
3. a power - B still has the authority, by virtue of his control over programming, to modify his programme content to make it objectively factual and to broadcast for high-minded purposes, thereby altering the nature of his legal relations with C, D, E, and F; AND
4. an immunity - because it is B who has control over the programming, there is still nothing C, D, E or F can legally do to modify the nature of their legal relation with B

Correlatively of course C, D, E and F would all have:

1. a privilege - B still cannot legally compel them to do any particular thing i.e. they are free from any affirmative claim which B might try to raise against them; AND
2. a claim-right - they can legally compel B, by means of an affirmative claim, to broadcast only material compatible with the self-determined development of their own culture; AND
3. a liability - B still has the legal authority to modify his programme content thereby altering the

nature of the legal relations between himself and his audience, and there is still nothing the latter can do; AND

4. a disability - just as they are still subject to B's power, so too they still cannot themselves do anything else to modify their legal relations with B.

It will be noted that what distinguishes the composition of the two bundles of jural elements which constitute the right to freedom of expression in each case, in each fact situation, is that in class two situations the bundle includes a privilege / no-right relation between B on the one hand and each of C, D, E, and F on the other, while in class three situations that relation is replaced by a duty / claim-right relation as between B and his audience respectively. B's privilege is replaced by its jural opposite, his duty. In every other respect the bundles which go to make up the right to freedom of expression in each case are the same.

A critic¹⁵⁰ would argue that this observation is all very interesting but still does not explain why one of those two different prototypical fact situations should give rise to a duty on B's part and the other a privilege. She would argue that no reason has been offered to explain why B's right to freedom of expression could not be seen to always consist of a no-right, privilege, power and immunity. The critic would also maintain that this reductionist analysis of the right to freedom of expression does not help to identify a second at least potentially ethically distinct pillar on which human rights could be based, thereby eliminating the apparent conflict between the traditional and contingent theories of human rights.

¹⁵⁰ Such as Finnis for example - see above chapter 4.7.2.1.

These criticisms must be addressed.

4.7.2.3 Some clues left by Hohfeld

Hohfeld does not discuss where the rights he analyses come from. The times in which he was writing were very much positivist years, and though there is anecdotal evidence to suggest that he harboured Natural Law sentiments¹⁵¹, the thrust of his two most significant articles on the nature of rights¹⁵² reflects the intellectual milieu of the day. He also professed a commitment to demonstrating the practical value of the study of 'Jurisprudence'¹⁵³, an entirely appropriate commitment given that his audience consisted primarily of students, practitioners and others who were playing or would ultimately play out their legal careers in a practical legal environment. It is hardly surprising therefore that he places such a positivist emphasis on judicial practice as the basis of his analysis of rights. Hohfeld's principal task was to describe how rights worked rather than where they came from; for him where rights came from was less important. Accordingly, Hohfeld is less helpful than he might have been in our quest to

¹⁵¹ He is said to have urged his students at Yale to give serious consideration to the views propounded by the Natural Law school. It is also said that their response to this suggestion was to petition the university to remove him from his position. See Maurice Cranston, Are There Any Human Rights?, p.2.

¹⁵² "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, I", vol.23 (1913), Yale Law Journal, 16, and "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, II", vol.26 (1917), Yale Law Journal, 710. Both articles are contained in Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays by Wesley Newcomb Hohfeld, W. W. Cook (ed).

¹⁵³ W. N. Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays by Wesley Newcomb Hohfeld, W. W. Cook (ed), p.26; see also Cook's introduction at p.5.

understand where rights come from, with a view to demonstrating that the traditional and contingent approaches to human rights are not mutually exclusive nor even incompatible. For the students and practitioners for whom Hohfeld was writing, and in the positivist atmosphere of his day, why there are any human rights and where they come from were at the most a secondary issues of largely academic interest only, and at the least nonsense¹⁵⁴. Today however, now that post war renewed enthusiasm for the concept of natural law has once again given fresh impetus to the notion of human rights¹⁵⁵, and improved communications has

¹⁵⁴ Some positivists such as Hart do not regard international law as law at all since law is determined ultimately by a fundamental rule of recognition and is capable of being enforced, neither of which features characterise the international 'legal' system generally nor that part of international law comprising human rights. Such writers regard human rights as aspects of morality only. See H. L. A. Hart, The Concept of Law, pp.208-231. Other positivists while perhaps accepting that international human rights law was law, would nevertheless not question where human rights came from but simply accept that as a matter of fact they do exist and insist that a lawyer's legitimate role is to describe how they function. See J. W. Harris, Legal Philosophies, p.16f.

¹⁵⁵ While in the writer's view there is no necessary correlation between natural law and human rights, "[w]ithin Western philosophy there has been a long and venerable tradition of using the concept of "Natural Law" in the definition and identification of fundamental rights" - see D. L. Perrott, "The Logic Of Fundamental Rights", in Fundamental Rights, p.1 at p.11. See also H. Lauterpacht, "The Law of Nations, the Law of Nature and the Rights of Man", (1943)29, Transactions of the Grotius Society, p.1 at p.30; L. Henkin, The Rights of Man Today, p.5; M. Cranston, "Are there Any Human Rights?", Daedalus, vol.112 (1983), p.1 at p.1; J. Morsink, "The Philosophy of the Universal Declaration", Human Rights Quarterly, vol.6 (1984), p.309 at p.316. On the revival of the concept of natural law since 1945 see E. M. Wise, "Comparative Law and the Protection of Human Rights", American Journal of Comparative Law, vol.30 (1982) supp., p.365 at p.373f; B. H. Weston, "Human Rights", Human Rights

highlighted the range of variations in the concept of human rights making themselves felt in the post colonial era, such unquestioning acceptance is no longer sufficient¹⁵⁶.

Nevertheless, Hohfeld does not leave us completely lost but supplies a few helpful signposts pointing to the answer to this question. Firstly, he asserts that the contents of the rights bundle an individual has at any particular time depends on the fact situation in which he finds himself; the constituency of a rights bundle is determined by the events which have happened in the past and by the catalogue of events which could occur in the future. That is the first clue, and it is a useful one particularly because by tying the concept of a right to observable events, it supplies a characteristic of a right which is objectively ascertainable and thereby provides the concept of human rights with an important antidote to the poisonous cries of abject subjectivity

Quarterly, vol.6 (1984), p.257 at p.261. On the renewed international enthusiasm for human rights directly (without necessarily tying the concept of human rights to natural law) see L. Sohn, "The International Law of Human Rights: A Reply to Recent Criticisms", Hofstra Law Review, vol.9 (1981), p.347; B. B. Ferecz, "The Future of Human Rights in International Jurisprudence: An Optimistic Appraisal", Hofstra Law Review, vol.10 (1982), p.379 at p.388f.

¹⁵⁶ Diana Meyers notes that "[p]roponents of human rights long ago abandoned the claim that any rights are self-evident and set about accounting for the rights they esteemed". D. T. Meyers, "Rights-Based Rights", Law and Philosophy, vol.3 (1984), p.407 at p.407. See also R. Flathman, The Practice of Rights, p.2 where he writes that "[c]ontrary to the impression often given by natural rights theorists from Locke to Nozick, rights are not natural, divine, primitive, or brute facts. Nor are they somehow self-justifying or self-evidently justified."

sometimes levelled at it¹⁵⁷.

The second signpost Hohfeld left his successors relates to these determining facts. He writes:

"A change in a given legal relation may result (1) from superadded fact or group of facts not under the volitional control of a human being (or human beings); or (2) from some superadded fact or group of facts which are under the volitional control of one or more human beings"¹⁵⁸

Hohfeld thus recognises that events both beyond and within human control play a part in determining the constituency of a particular rights bundle.

4.7.2.4 Hohfeld's clues were picked up by later writers

Although that is about the extent of Hohfeld's

¹⁵⁷ Winfried Brugger criticises the natural law doctrine as excessively objective but at the same time rejects the view that just because "... moral questions cannot be answered with the precision we expect in mathematical knowledge or research ..." is no reason to reject all objectivism altogether. See W. Brugger, "Human Rights Norms In Ethical Perspective", German Year Book Of International Law, vol.25 (1982), p.113 at p.122-124, passage quoted at p.123f. Sinha is more roundly critical of subjectivist theories of human rights for having "... no objective criterion of truth ...". See S. P. Sinha, "Why And How Human Rights", International Journal Of Legal Information, vol.10 (1982), p.308 at p.312; also see S. P. Sinha, "The Anthropocentric Theory Of International Law As A Basis For Human Rights", Case Western Reserve Journal Of International Law, vol.10 (1978), p.469 at p.486f. Gewirth describes intuitionist rights theories (which hold that "... humans' possession of certain inalienable rights is self-evident ...") as "impotent". See A. Gewirth, "The Basis And Content Of Human Rights", Georgia Law Review, vol.13 part 4 summer 1979, p.1143 at p.1145 and p.1146 respectively. See also D'Amato, The Concept of Custom in International Law, p.17f.

¹⁵⁸ W. N. Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning I", in Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays by Wesley Newcomb Hohfeld, W. W. Cook (ed), at p.50f.

contribution to explaining why certain fact situations should determine the constituency of specific corresponding rights bundles, the basic ideas contained in these clues have been taken up and developed by later writers¹⁵⁹. These writers may be termed the constructivist school. They have flourished during the years since 1945, years less beset by positivism and more receptive to the concept of human rights than those in which Hohfeld was able to write. Their task has been to fill in the gap between Hohfeld's now classic descriptive analysis of what rights empirically are and the 'operative fact situations' from which he said rights came. Consciously or otherwise the scant clues left by Hohfeld relating to this have provided a rough framework within which to arrange their work.

A The first clue

Weston for example writes that it "... is a common observation that these demands [for human rights] are often fully frustrated by social as well as natural forces ..." and that this observation is one of the two in which human rights are "deeply rooted"¹⁶⁰. Weston thus recognises that natural events do play a role in determining the success or failure of human rights demands.

Gorecki writes that whether or not a human rights

¹⁵⁹ Richard Flathman is typical of post war writers who, while conscious of the value of Hohfeld's work, regard it as only a beginning to a real understanding of human rights. He writes of Hohfeld's work that "... as useful as it is for making a first sorting of common uses of *rights*, it does not begin to fully identify the full logic of the several uses it distinguishes". The Practice of Rights, p.63. Hohfeld was a product of his times and those times, unlike the post war period, did not encourage academic scratching beneath the surface of observable legal activity.

¹⁶⁰ B. H. Weston, "Human Rights", *Human Rights Quarterly*, vol.6 (1984), p.257 at p.257.

claim is accepted as valid "... depends on a complex set of social and ecological conditions ..." ¹⁶¹. He gives examples of some of the elements in this social and ecological complex factors clearly beyond the volitional control of human agency in any but the most remote sense. They include population density, mortality rates, and the availability of food and economic resources ¹⁶².

Sucharitkul argues that human rights to food, freedom from disease and health are much more important in Africa and Asia than in the United States because food is short in those climes and life threatening disease is more widespread than in the West ¹⁶³. Sucharitkul thus also recognises the significance of natural events in determining the "... contents as well as ... [the] emphasis and priority" ¹⁶⁴ of human rights.

Brugger argues that human rights are a response to elementary experiences of injustice. Brugger obviously feels that injustice probably should involve the some kind of moral wrongfulness on the part of the perpetrator of the injustice. This inclination crates a problem for Brugger since it does appear to rule out a role for non-volitional events in determining the constituency of Hohfeldian rights bundles; they are not perpetrated by human agency and are amoral rather than immoral. The problem is significant for Brugger because he clearly accepts that empirically such events do contribute to human perceptions of

¹⁶¹ J. Gorecki, "Human Rights: Explaining the Power of a Moral and Legal Idea", *The American Journal of Jurisprudence*, vol.32 (1987), p.153 at p.163.

¹⁶² *Ibid.*

¹⁶³ S. Sucharitkul, "A Multi-Dimensional Concept of Human Rights in International Law", *Notre Dame Law Review*, vol.62 (1987), p.305 at p.315.

¹⁶⁴ *Ibid.*

injustice, and therefore do in fact play a role. Clearly he cannot simply close his eyes to this gap between his theory and the reality it purports to explain. In the end therefore, rather than modify his theory about the origin of human rights to account for this ill-shapen piece of the jigsaw puzzle, he side steps the issue writing that "[i]t leaves the question open whether injustice is done to human beings whose needs are threatened not by other persons but by uncontrollable conditions or events, such as in nations stricken with poverty or devastated by natural catastrophes."¹⁶⁵. Nevertheless it is an important issue and a few words should be devoted to it because, if only events which are within the volitional control of human beings can constitute the source of human rights, a shadow is cast over Hohfeld's suggestion to the contrary. By no means fatal to the constructivist approach to human rights generation, such a blow would certainly undermine the theory's credibility. The theory endeavours to explain how one gets from A (events as the source of human rights) to B (human rights), and if questions are raised about the definition of A, it certainly does the explanation no good; if Janet were trying to explain to John how to get from Wellington to Auckland, John would be less confident in Janet's explanation if half way through the explanation it turned out that she had been explaining how to get to Auckland from Gisborne.

Brugger writes that "[t]here arise most difficult questions of accountability which I can only point out, without resolving them"¹⁶⁶. He refers to the U.S.

¹⁶⁵ W. Brugger, "Human Rights Norms in Ethical Perspective", *German Year Book of International Law*, vol.25 (1982), p.113 at p.118f.

¹⁶⁶ W. Brugger, *op. cit.* footnote 16, p.118.

cases of Regents of University of California v Bakke¹⁶⁷ and Fullilove v Klutznick¹⁶⁸, in which dissenting judges expressed the view that distinguishing between individuals on the basis of factual differences is generally undesirable but not always impermissible. There is therefore doubt about the significance of accountability even in the highly individuated conception of human rights held in the United States. It will be recalled that Judge Tanaka of the International Court of Justice in the South West Africa Case was less ambivalent. His view was that "... what is equal is to be treated equally and what is different is to be treated differently, namely proportionately to the factual difference"¹⁶⁹. He therefore clearly envisaged that factual differences between individuals beyond their own or anyone else's volitional control are relevant in the process of determining an individual's rights¹⁷⁰. The notion of accountability in the sense that for me to have a right someone else must have done something wrong is in direct conflict not only with the no-fault principle which underlies rather revolutionary schemes such as the New Zealand Accident Compensation Act 1982, but also much more mundane domestic legislation such as those Acts which provide for rights (Hohfeld would call them powers) for individuals generally to vote, obtain passports, apply for building permits and

¹⁶⁷ Regents of University of California v Bakke 438 U.S. 265, at 360-61 (1978).

¹⁶⁸ Fullilove v Klutznick, 65 Lawyer's Edition 2d, 902, at 907.

¹⁶⁹ I. C. J. Reports (1965) p.305.

¹⁷⁰ Throughout his judgement Judge Tanaka refers to the at least potential legitimacy of differentiation on the basis of language, religion, age, sex etc none of which can possibly be construed as products of any individual's immorality. See Tanaka's discussion of equality pp.304-310 passim.

so forth. The same applies to the powers conferred upon certain individuals such as ministers of the crown to make determinations such as when to declare a public emergency, make special grants of citizenship, issue permits for foreigners to acquire land and so on. None of these clearly recognised rights presuppose that some individual somewhere has committed some immoral act. Similarly with the common law. The rights to a fair hearing and to seek judicial review do not presuppose another person's immorality. It is submitted that basing the legitimacy of an individual's rights claim on events which only involve the commission of a moral sin by someone else cannot be supported by reference to empirical observation of the practice of rights either at the international or municipal level; Brugger's discomfort is well founded and the role for events beyond the volitional control of human agency in determining the composition of Hohfeldian rights bundles is secure.

B The second clue

If there is relatively little written about the merits of Hohfeld's first source of rights, namely non-volitional events, the same cannot be said about the second. The importance of volitional events both past and potential in determining the content of rights, especially the human rights subcategory thereof, has received a great deal of attention. Also, by contrast to the relatively uncontroversial role played by non-volitional events, there is a wide range of views concerning the significance of volitional events in the rights creation process.

David Lyons writes that "[a] common view is that ... a right consists of an area of free choice protected by prohibitions against interference"¹⁷¹.

¹⁷¹ D. Lyons, "The Correlativity of Rights and Duties", *Nous*, vol.4 (1970), p.45 at p.49.

Oscar Schachter is of the opinion that human rights are one aspect of the broader concept of the 'dignity of the human person' and 'human dignity'¹⁷². He defines human dignity in terms of the Kantian injunction 'treat each person as an end in himself not merely as a means' and justifies this definition on the grounds that such a definition would probably be universally acceptable¹⁷³. He argues that this Kantian injunction requires that individual choice be accorded a high priority in social, political and legal arrangements¹⁷⁴. Schachter therefore is of the view that volition is a significant feature of the source of human rights.

Flathman is more adamant still. He bases his analysis of rights on observations about how they operate in practice. One of his observations is that:

"Although individuals cannot unilaterally determine what rights they have, the practice of rights leaves the individuals who have them a large measure of discretion in deciding whether to exercise them in a particular situation, whether to waive them temporarily or even permanently, whether and how to defend them against attacks and encroachments. . . . Although not unqualified, this large element of individual discretion is perhaps the single most distinctive feature of the concept of rights."¹⁷⁵

He notes that the ascription of rights to animals and inanimate objects not capable of volition suggests that choice is not a logical precondition to the possession of a human rights¹⁷⁶. However, it is clear

¹⁷² O. Schachter, "Human Dignity as a Normative Concept", *American Journal of International Law*, vol.77 (1983), p.848 at p.853.

¹⁷³ O. Schachter, *op. cit.* at p.849.

¹⁷⁴ *Ibid.*

¹⁷⁵ R. Flathman, *The Practice of Rights*, p.71.

¹⁷⁶ R. Flathman, *op. cit.*, p.73.

that he regards such ascription as somewhat dubious. He writes that "[a]lthough more and more common, in such cases the distinction between being the holder of a right and being the subject of a good or bad policy or good or bad treatment disappears"¹⁷⁷. In his "paradigmatic" rights situation all rights holders are capable of "... understanding, evaluation, and choice ..."¹⁷⁸. For Flathman then, whose approach to rights is, like Hohfeld's, essentially empirical and therefore objectively verifiable, volition is at the very least a feature of rights of primary importance. Indeed, aside from cases involving the rights of animals, geographical entities such as the seashore, and collectivities incapable of choice such as generations yet to be born, it is probably fair to say that volition is a dominant enough feature of rights to warrant ascribing it near definitional status.

Most writers on rights do not express their endorsement of the role of volition at the source of human rights in terms as explicit as Flathman and Schachter. Rather than openly saying that human rights come from some source strongly characterised by human volition, they write instead of the role morality has to play in the rights process. To assert that human rights are rooted in morality necessarily presupposes that volition has an important role in the creation of a human right because morality is all about choosing.

Alan Gewirth has tried to validate this contention by effectively identifying morality and volition. He argues that anyone who make choices *must* be engaging in moral discourse essentially because when selecting between two alternative courses of action an individual's selection has to be based on some criteria of his choosing. The actor has to be

¹⁷⁷ R. Flathman, *op. cit.*, p.74.

¹⁷⁸ *Ibid.*

saying that course of action A is better than course B. Whether or not one agrees with the criteria is irrelevant; the point is that he is engaging in value judgement and that makes his behaviour 'moral'. In this way Gewirth in effect equates choice and morality.

Gewirth identifies two uses of the term 'moral'. The first is its pejorative use. In this sense it denotes an act which is assessed to be good, right by reference to the substantive rules which constitute a particular ethical system. Thus if A is standing on a beach in New Zealand when he sees a child drowning and dives in and saves the child's life, this action is moral because in terms of traditional western moral norms currently regarded as valid in New Zealand saving the child was a good act. Gewirth would however, also describe the act as moral in a second broader sense. He would also say the act is 'moral' because it is an action which is capable of moral assessment by reference to an ethical system. The example used is of action which is moral in both senses of the word. However the second sense is better illustrated by an action which is only moral in this second, broader way. Suppose for example, instead of rescuing the drowning child A went the movies leaving the struggling infant to meet his maker. In the second, broader use of the term A's act would still be a moral act. While it would certainly be regarded as immoral in qualitative terms, as a bad act, the fact that it was a bad act still makes the appellation 'moral' appropriate in the second non-qualitative sense of the word because it was an action capable of ethical assessment; it is meaningful to subject the action to moral discourse. Gewirth believes that any action which the actor can choose to do or not to do is an act which is capable of being good or bad, and therefore moral, because the actor must decide to do

it or not and must therefore have some criteria by which to assess the merits of the alternative courses of action open to him.

In the writer's view Gewirth's conclusion that volition and morality are effectively coextensive is based on an empirically unsustainable definition of moral behaviour. By defining as moral any behaviour involving choice, he is styling as moral acts to which ordinary usage would not ascribe any such character. It is inappropriate to describe some volitional acts as moral acts. Even in Gewirth's broader sense it has to be asked if tooth brushing is really a meaningful subject for moral discourse; if it is it is surely trivial. Gewirth's view that volition and morality are coextensive is erroneous¹⁷⁹. It cannot be argued therefore that every act of volition is a moral act, and therefore that all arguments in favour of accepting that morality is in part at least responsible for generating human rights can be taken as endorsing Hohfeld's view that volitional acts of human agency constitute one of the two sources of rights.

Nevertheless, the contention that those who argue that morality must play a role in the generation of rights must also concede that human volition has a role in the same process, can still be sustained. If a man dies of old age it may be sad for those left behind and in that sense is a bad thing, but to describe him or anyone else as committing a moral wrong over-stretches the bounds of linguistic credibility. The man has no choice but to die, and

¹⁷⁹ Brugger concurs with this conclusion. He writes: "The first element of moral discourse is the human choice...". Brugger's reference to a first element suggests that there must be others also and that therefore moral discourse and choosing are not the same thing. See W. Brugger, "Human Rights Norms in Ethical Perspective", German Year Book of International Law, vol.25 (1982), p.113 at p.137.

therefore he cannot be held accountable, nor can his action (dying) be ascribed any kind of moral significance. Nor can the finger of moral reprehensibility be pointed at anyone else. The observation that actions (such as dying of old age) are not regarded as good or bad where the actor had no choice but to do as he did is offered as evidence that the assertion that volition on the part of the actor is a necessary condition for moral decision making, can at least be inductively sustained. Even though Gewirth is wrong in concluding that all volition necessarily involves "playing the moral game", that is, even allowing that some acts of volition are not proper subjects for meaningful moral discourse, it is still reasonable to infer that all moral behaviour must involve volition. It follows that support for moral input into the generation of human rights, while it may not be attributed to Hohfeld in any direct or conscious way, is nevertheless consistent with the limited clues left by him to guide his successors in their search for an empirically sustainable basis for human rights.

Such support is as prolific as is the variety of opinions regarding the nature of the role which morality plays in the rights creation process. It was noted above that Brugger sees morality constituting the motivation to make a claim of right. He sees human rights as "... unmistakable responses to elementary experiences of injustice"¹⁸⁰. Gorecki too sees morality as providing the initial stimulus for a human rights claim; a "morally relevant stimulus"¹⁸¹, that is "... feelings of what is right and wrong, our

¹⁸⁰ W. Brugger, *op. cit.*, p.113 at p.118.

¹⁸¹ J. Gorecki, "Human Rights: Explaining the Power of a Moral and Legal Idea", *American Journal of Jurisprudence*, vol.32 (1987), p.153 at p.157.

embarrassing feelings of guilt and shame"¹⁸² prompt us to initiate the rights process. Gorecki evidently feels that this motivational role is significant enough to warrant describing human rights as moral rights¹⁸³. Marks also seems to view societal values as the preceding the claim which initiates the right generation process. Marks sees claiming as the process by which individuals' needs and social values seek elevation to the more concrete status of an international human right¹⁸⁴. He also therefore sees morality's contribution to the generation of human rights as preceding the claim, probably as motivating the process by which a right is created¹⁸⁵. A number of other writers acknowledge the role morality has to play in the creation of a right but are less specific about the nature of the role. Sinha for example simply assumes that human rights are entirely normative¹⁸⁶ and Drinan asserts that "the basic concept of human rights is ... the moral notion that the violation of human rights anywhere violates the rights of all people"¹⁸⁷. Henkin examines the beliefs about human rights in the United States, France, the Soviet Union

¹⁸² J. Gorecki, op. cit. at p.156.

¹⁸³ J. Gorecki, op. cit. at p.154.

¹⁸⁴ S. P. Marks, "Emerging Human Rights: A New Generation for the 1980's", Rutgers Law Review, vol.33 (1981), p.435 at p.436.

¹⁸⁵ Marks does not explicitly ascribe morality a motivational role in the rights generation process but in the writer's view it is probably a reasonable inference. Locating the moral input at a time temporally antecedent to the claim, it is hard to see what other role he could reasonably ascribe it.

¹⁸⁶ S. Prakash Sinha, "Why and How Human Rights", International Journal of Legal Information, vol.10 (1982), p.308 at p.311.

¹⁸⁷ R. F. Drinan, "International Human Rights in the 1980's", Utah Law Review, 1982, p.219 at p.221.

and China, as well as Nigeria and Tanzania as they are reflected in the constitutions of those states, and concludes that human rights operate differently in each country. He ascribes these differences to the differing perceptions of value and to differing social, political and historical experience¹⁸⁸. Weston too ascribes an indeterminate role for morality in the rights creation process. He writes that:

"Human rights partake of both the legal and the moral orders, sometimes indistinguishably. They are expressive of both the "is" and the "ought" in human affairs."¹⁸⁹

Lehmann takes a similarly indeterminate approach accepting McDougal's analysis of human rights as the product of a process involving "... the shaping and sharing of values"¹⁹⁰. Panchias argues that human rights must be sourced in morality because it is logically impossible to derive normatively significant conclusions from factual premises. He writes that "[s]o long as basic rights are conceived as having moral import - of entailing quite specific proscriptions regarding human behaviour - the possession of non-relational, evaluatively neutral attributes is logically inadequate to account for the

¹⁸⁸ L. Henkin, "Rights Here and There", *Columbia Law Review*, vol.81 (1981), p.1582. At p. 1592 he writes that "... a theory of rights, I suggest, tells much about what a society believes ...".

¹⁸⁹ B. H. Weston, "Human Rights", *Human Rights Quarterly*, vol.6 (1984), p.257 at p.263.

¹⁹⁰ R. A. Lehmann, "The Human Right of Communication", *New York Journal of International and Comparative Law*, vol.4 (1982), p.83 at p.87. The reference to McDougal is to M. McDougal, H. Lasswell & L. Chen, Human Rights and World Public Order at p.85.

nature and implications of basic rights"¹⁹¹. He therefore sees moral input into the generation of human rights as essential. As for the precise role morality plays in this process, he argues that:

"... a coherent, minimal account of the structure of basic human rights entails that all who have such rights do so only if they participate in a specifiable, complex moral relationship where basic rights are correlative with basic duties. This hypothesis does not hold that the idea of basic human rights is exhaustive of morality per se, nor does it say that all moral theories, on risk of incoherence, must explicitly designate a system of basic human rights. What the hypothesis does insist upon, however, is that the nature of basic human rights, unlike the nature of other kinds of rights, depends on persons enjoying a specific kind of moral role - a role which is enjoyed by all basic rights holders. Basic rights, on this hypothesis, function so as to link morally all those in such roles and, in so doing, establish the context of human participation required for the ascription of basic rights to human beings."¹⁹²

Panchias therefore clearly sees performance of a moral role, moral behaviour as prerequisite to the existence of human rights. So important does he regard the part morality has to play in the generation of human rights, he repeatedly refers throughout his article to human rights as a type of moral right¹⁹³.

Finnis notes the historic connection between what is 'right' and a 'right'¹⁹⁴. He writes that historically the term 'right' was used in the time of

¹⁹¹ G. Panchias, "The Structure of Basic Human Rights", *Law and Philosophy*, vol.4 (1985), p.343 at p.347.

¹⁹² G. Panchias, *op. cit.* at p.349.

¹⁹³ See for example pp.349, 355 and 371.

¹⁹⁴ J. Finnis, Natural Law and Natural Rights, pp.206-210.

Aquinas to express 'the just thing itself' with the emphasis on the 'just' part, but that by the time Suarez and Grotius were writing, the emphasis had shifted to the 'thing'. He suggests that this shift in emphasis provided the opportunity for the likes of Hobbes and later positivists to drive a wedge between 'a right' and morality. While Finnis sees no need to return to the Thomist emphasis on justice in rights theory he does acknowledge that morality still has a significant role to play in the rights process.

According to Rawls rights are generated by a process which involves constant balancing and fine tuning intuitive moral concepts and Rawls' two fundamental principles derived under his hypothetical veil of ignorance. Rawls labels this continuous process of adjustment and balancing the process of reflective equilibrium. Quite clearly the role of intuitive moral notions is critical to Rawls' reflective equilibrium. If morality were removed from the equation the balancing and adjustment which constitutes the process of reflective equilibrium would be impossible and there could be no rights on Rawls' model.

Dworkin adopts Rawls' model of rights generation. He re-states Rawls' theory and then proceeds to use it as the premise of his criticism of traditional natural law theories about the origin of rights. In Dworkin's view, and the writer concurs, the immutable nature of rights seen from the traditional view point is incompatible with the constant on-going evolution of the substantive rights produced by the process of reflective equilibrium and the inherent at least temporal relativity of reflective equilibrium is inconsistent with the absolute objective reality of morality insisted upon by traditional natural rights

theorists¹⁹⁵. Rawls' reflective equilibrium, and the vital role morality plays in that process, is central to Dworkin's criticism of the traditional theories of the origin of rights.

Dworkin also criticises the traditional English law predilection for divorcing the legal meaning of concepts from the meanings ascribed them by ordinary usage on the grounds that it ignores the role moral concepts play in rights. He states that notwithstanding this insistent legalism, the lawyer's on-going concern over the definition of key legal concepts, his consistent attempts to evaluate novel fact situations with his clear understanding of such concepts, demonstrates that subconsciously he cannot divorce these legal definitions from their 'moral' counterparts. Dworkin also argues that the two responses to this inadequacy of the traditional English approach to jurisprudence fail for the same reason. The sociological school of jurisprudence developed by Pound insisted that all questions of jurisprudence should be determined by sociological factors and others, such as McDougal and Lasswell, argued that the answers to such questions would be the ones which most furthered specified social goals. According to Dworkin both these responses to the insulation of law from its social and political context also fail because both ignore the "... crucial fact that jurisprudential issues are at their core issues of moral principle ..."¹⁹⁶.

4.7.3 Salient features of the Constructivist Theory of Human Rights

For the reasons given above the Marxist and logical solutions to the problem of the subjectivity

¹⁹⁵ R. Dworkin, Taking Rights Seriously, p.166.

¹⁹⁶ R. Dworkin, op. cit. at p.7.

of the traditional view of the theoretical origins of human rights are unconvincing. However, the third, and in the writer's view best, attempt to overcome the inherent subjectivity of traditional human rights justifications comes from the constructivists. They have dispensed altogether with the cause / effect justification model and instead view human rights as the result of a sociological process rather than as springing immediately or by deductive process from some normative source which, by dint of its abstraction, cannot be objectively validated. Instead constructivists accept as a starting point the intuitive moral beliefs and judgments current in society putting aside the question as to whether or to what degree those beliefs and judgments conform to some as yet undiscovered absolute objective moral reality. The currency of a moral belief is, to be sure, not beyond argument but it lends itself to objective validation far more than does the absolute substantive truth of the belief in question. In this way constructivists overcome to a large extent the problem of subjectivity which afflicts traditional cause / effect based rights theories. Constructivists focus their energy on developing a theory which unifies society's collection of moral beliefs and judgements and which can be used to resolve moral issues arising in novel fact situations in a manner to a greater or lesser degree consistent with society's existing morality. It is the sociological process by which this theory, specially 'constructed' to unify existing moral belief and judgements, operates to progressively develop society's understanding of specific concrete rights which replaces the cause / effect relation which characterises traditional theories.

There are many variations on the constructivist theme, many different views on the nature of the

process by which rights concepts develop. Some of the features of two of the most important, those of Donnelly and Feinberg were described above in chapter 4.6.7. Rawls' process of reflective equilibrium is another¹⁹⁷. However, in general constructivists tend to view the creation of a human right as involving essentially three steps; claiming, justification and recognition.

4.7.3.1 General description of the constructivist rights process: the prima facie rights doctrine

When two interests clash the interest holders both assert the priority of their interests. They do this by claiming that their interest is superior to the other's and at that point the legal system in which the contest is occurring weighs the two interests and either recognises one over the other without altering the existing configuration of the two interests in question, or it will redefine one or both of the interests in dispute to achieve a just resolution of the conflict. Either way, the result of such a process is that one of the interests is given priority over the other, one of the claims is "... recognised and protected by law ..." ¹⁹⁸. It is justified within the system of rules governing the contest and is therefore "valid", and in the language of this rights theory, to say that the victor has a "valid claim" is to say that she has a "right" ¹⁹⁹.

Over a period of time such contests will see that "... the boundaries between rights, while always in

¹⁹⁷ Dworkin also appears to accept Rawls' reflective equilibrium as the process by which current morality is extrapolated into new fact situations. What this involves will be discussed in more detail below. See chapter 4.7.3.2 - 4.7.3.4.

¹⁹⁸ Joel Feinberg, Social Philosophy, p.24.

¹⁹⁹ Joel Feinberg, *op. cit.*, p.67.

some degree of flux, become relatively fixed and stable; away from the boundaries, within each right's "central core," there will be more and more security."²⁰⁰ Every time there is a dispute about the border between two claims to right, both rights become a little better defined. However, the range of possible rights border disputes is unlimited and it is impossible to predict absolutely the circumstances of every possible future conflict between rights. One can never be sure that a particular claim hitherto recognised and protected by the law even in every case of conflict with other claims, will not one day meet an even mightier claim and succumb to its superior authority. This aspect of the constructivist rights creation theory is called the prima facie rights doctrine²⁰¹. Feinberg summarises the doctrine thus:

"On this view, it is tacitly understood that recognition of a right can always be withdrawn or qualified when necessary to permit satisfaction of a conflicting claim. There are no absolute rights which always have the right of way when collisions threaten. Put another way, "the right to X" is always to be understood as "the right to X unless some stronger claim shows up," the "unless clause" being tacitly understood.

²⁰⁰ Joel Feinberg, op. cit., p.73.

²⁰¹ It is not strictly accurate to describe the prima facie rights doctrine as an aspect of constructivist rights theory since it is quite possible to adhere to the constructivist rights theory while refuting the prima facie rights doctrine. One simply maintains that the constructivist process occurs once at the 'beginning' of a right which then persists immutable and permanent thereafter; a unifying theory is constructed at the beginning and thereafter remains monolithically immutable. Such a position has however, to the writer's knowledge, never been taken and moreover, the essentially mutable picture painted by the prima facie rights doctrine of rights is difficult to reconcile with the traditional cause / effect model justifications of rights as generated from some immutable source such as nature or God. To describe the doctrine as an aspect of the constructivist theory is therefore not inappropriate.

According to this theory, since there is no foolproof way of knowing when a stronger claim will turn up, reliance upon our rights should always be tempered with scepticism; a right is no ironclad guarantee. Possession of a discretionary right creates only a presumption in a given case at a given time that one also has a specific right normally derivable from it."²⁰²

Put mathematically, if A = a claim, X = arguments in favour of according A recognition, and Y = arguments against such recognition, then if $A + X - Y > A$ then A = a valid claim i.e. a right. Unless X can be of infinite value, a consideration so weighty that at no time ever, under any circumstances whatsoever, is it possible that any one could regard any other consideration as of more import, then one cannot say that claim A will always and unconditionally be a right. To adhere to the prima facie rights doctrine is to acknowledge that the range of potential human conflict is unlimited, that no one can predict the circumstances of every possible human interaction.

One criticism of the prima facie rights doctrine is that it removes the distinction between a right defined as a valid claim and a 'mere' claim, that is a claim which has not yet had its superiority to some other specified interest in a given situation tested and confirmed by the system of rules within which it is made. This, it is asserted, reduces a right to nothing more than a claim, nothing more than an expression of the claimant's opinion that his interest should, in a particular situation, be given priority over all other competing interests²⁰³. The writer concedes that if this argument is valid it poses a significant threat to the viability of the prima facie rights doctrine. However, it is suggested that this

²⁰² Joel Feinberg, op. cit., p.73f.

²⁰³ Joel Feinberg, op. cit., p.74.

threat is in fact illusory.

Firstly, the prima facie rights doctrine does not mean that a 'right' is in effect nothing more than a 'mere' claim. To equate a 'mere' claim with a 'prima facie' right ignores the strong predictive power acquired over time by an often validated claim, and tends to view the rights creation process out of context. From time to time claims may arise in situations which have never occurred before and which bear no resemblance at all to any previous situations in which the same interests have clashed; a claim for the recognition of a brand new interest will be made for the first time against another brand new claim never before tested. Such a claim might appropriately be labelled a 'mere' claim since the outcome of the clash is unknown and indeed unpredictable. The clash really can be regarded as a discreet little unit of human interaction. However, that is not the case with a 'prima facie' right. A prima facie right is a special type of claim because of the additional weight ascribed to it by its context. Because of previous experience in other claims clashes involving one or both of the same competing interests in the same or similar circumstances, or even in completely different circumstances, something is known of the claims asserted. This contextual relationship to past events gives the claim additional, presumptive weight which not only allows one to distinguish it from a 'mere' claim but which also legitimates the appellation 'prima facie right'. The presumptive force which justifies calling a particular type of claim a 'prima facie right' also differentiates it from all other claims lacking such weight which for that reason may be called 'mere' claims. The distinction between 'mere' claims and those claims which may be labelled (prima facie / presumptive) 'rights' is maintained notwithstanding that one acknowledges that the

presumption involved in the latter may be overturned in some situations. In a horse race acknowledging that a completely unknown horse never before raced may possibly come from behind and win does not mean that every horse in the race enjoys the same chances. The favourites are still favourites and still constitute a special minority sub class of the field of entrants as a whole. Similarly with rights, acknowledging that all claims are defeasible does not mean that there are no other criteria, such as the presumptive weight ascribed to one or both of the competing claims by their respective experiences in previous conflicts with each other or with different interests, which may serve to distinguish some of them as 'prima facie rights' from their less presumptive cousins. In this theory of rights the distinction then is not strictly between a 'mere' claim and a 'validated claim' / right, so much as between a 'mere' claim and a claim of such presumptive force that it warrants the description 'prima facie right'. The superset 'claims' does not contain a subset 'valid claims'. Rather it contains a sub set of particularly weighty claims which in a wide range of situations in the past have squared up against its present competitor in such and such a fashion. The concept of a valid claim is therefore not destroyed by the prima facie rights doctrine so much as relabelled to high-light more correctly the contents of the sub class; the sub class does not contain valid claims but claims which in similar situations in the past have been validated. The conceptually important distinction between claims generally and this special category from which rights ultimately stem is not destroyed by the prima facie rights doctrine's redefinition of the sub categories grouped together under the title 'claims'.

This line of reasoning also elucidates the temporal nature of the rights creation process. The

conceptual criticism of the prima facie rights doctrine discussed in the preceding paragraph also ignores this temporal aspect of rights. When a right is created a series of events take place. First one has a claim to recognition and protection of a specific interest or interests. Then it is tested by the rules of the system in which the claim is made. Once the claim has succeeded in those terms, then it may properly be called a 'right'²⁰⁴. It remains a right until that same claim conflicts with some other claim and at that time in those circumstances it becomes a claim again albeit one of those claims with a degree of presumptive force which justifies its description as a 'prima facie / presumptive right'. A 'right' according to the prima facie rights doctrine is in fact a retrospective expression. Therefore, when examining claims as a generic class, to try to define a sub class of claims in terms of 'right' is premature. A 'right' is a consequence of a sequence of events and does not really lend itself to use as a definitional criterion. If the terms 'right' and even 'valid claim' are inappropriate at the time the claim contest is acted out, if they are really just predictions of the expected or desired future of an incomplete present situation, it hardly seems to matter whether the distinction between 'right' / 'valid claim' and 'mere' claim is blurred or even obliterated. That distinction is not really there in the first place; when the claiming is happening strictly speaking no 'right' or 'valid claim' exists (just 'mere' claims and prima facie rights / presumptive rights / claims often victorious in previous conflict situations), and later once the

²⁰⁴ It is acknowledged that in common usage pre-validation claims with strong presumptive force are called 'rights'. As Finnis noted even lawyers use the term in this way. See above chapter 4.7.2.1.

claim has been validated and there can be said to be a 'right', the distinction between a 'mere' claim (the loser of the contest) and the 'right' / 'claim which has (on this particular occasion) been validated' is quite clear.

A second criticism of the prima facie rights doctrine is that it breaks down the distinction between 'rights' and 'mere privileges'²⁰⁵. This criticism asserts that adherence to that doctrine eliminates the distinction between a Hohfeldian claim-right and a privilege. The prima facie rights doctrine maintains that all rights are defeasible. It follows therefore that what this criticism of the doctrine must be saying is that the only distinction between a claim-right and a privilege-right is that the one of them (by implication the former) is indefeasible while the other (again by implication the latter) is not. Otherwise it could not be argued that the prima facie rights doctrine removed the distinction between the two classes of right; if there was any other distinguishing feature it would take more than that doctrine to make the two indistinguishable. Clearly such an assertion is not so. From the brief summary above of Hohfeld's analysis of rights it will be noted that the primary feature distinguishing claim-rights from powers, immunities and privileges is that the former grounds specific second party duties while privileges, immunities and powers do not; the writer cannot see how duty grounding can be equated with defeasibility, and such an identification is the only way in which the contention that the prima facie rights doctrine eliminates the distinction between privileges and claim-rights can be sustained; otherwise there will always be the duty grounding distinction to differentiate claim-rights from

²⁰⁵ Joel Feinberg, *op. cit.*, p.74.

liberties and privileges.

Having thus surveyed in general terms how the constructivist theory explains the creation of rights, a brief examination of the salient features of each of the three main steps in the process will demonstrate how rights are created and explain how this theory is able to accommodate the critical elements of both the contingent and traditional theories about the origin of human rights.

4.7.3.2 Claiming

The extreme importance of claiming in the rights creation process has been discussed above²⁰⁶ and little can be added. The observation that claiming is a integral part of the generation of human rights is widely made and commonly accepted. No such unanimity is to be found however, in relation to the motivation for the claim which heralds the birth of a human right.

It was noted above that Brugger believes that the primary motivation for making a claim in the rights context is an elementary experience of injustice²⁰⁷. It was also argued above that Brugger was wrong to suggest that humanly engineered injustice has a monopoly on generating this response. While as a rule human rights claims are in response to injustice perpetrated by governments or other groups or individuals, it is also true that events which are non-moral in the sense that they are not the product of human volition but occur naturally, events such as floods, famines, storms and so forth, also influence people to make claims to human rights. For example, a person caught in a severe famine has a much greater

²⁰⁶ See chapter 4.6.7.

²⁰⁷ W. Brugger, "Human Rights Norms in Ethical Perspective", German Year Book of International Law, vol.25 (1982), p.113 at p.118.

incentive to claim the human right to food than has a person living in a land of plenty.

Gorecki accepts this point. He argues more broadly that a human right starts as a "morally relevant stimulus"²⁰⁸, that is any "... feelings of what is right and wrong ..." ²⁰⁹. Mostly these feelings are subconscious²¹⁰ since there is no challenge to the activity in question to focus attention on the right. Gorecki clearly accepts that one can be stimulated to make a human rights claim by events occurring non-volitionally. He gives as an example of a morally relevant stimulus seeing a starving child. He writes:

"The person witnessing a starving child may previously have internalized such general norms as "help the needy" or "protect human life," or, having encountered or imagined a similar case before, s/he might have internalized a more detailed norm, "rescue starving children." If any of these norms has been internalized already, it becomes easily activated now: witnessing a starving child arouses the feeling of duty to feed it."²¹¹

Feinberg adopts a similarly broad approach. He sees rights claims as motivated by desire. The rights process operates on some of the "relatively permanent desires present in all men"²¹² to ultimately produce rights. In a similar vein Dworkin following Rawls appears to accept that "self-interest" provides the

²⁰⁸ J. Gorecki, "Human Rights: Explaining the Power of a Moral and Legal Idea", *American Journal of Jurisprudence*, vol.32 (1987), p.153 at p.157.

²⁰⁹ J. Gorecki, *op. cit.* at p.156.

²¹⁰ J. Gorecki, *op. cit.* writes at p.158 that "... our experiences of rights are [not] always strong; to the contrary, most often they are not only weak, but they occur below the threshold of consciousness."

²¹¹ J. Gorecki, *op. cit.* at p.157.

²¹² J. Feinberg, *Social Philosophy*, p.24.

impetus necessary to keep the rights process moving²¹³. The principles initially agreed on in the hypothetical original position and individuals' intuitive understanding of moral concepts are constantly balanced against each other and fine tuned to determine the outcome of the competing demands of individuals whose self-interest was restored to them when the veil of ignorance characterising the original position was lifted.

The problem with seeing desire as the motivation for rights claims is that sometimes people have rights to things which they do not desire. Feinberg explains this anomaly and tries to deal with it by insisting on a rather broad interpretation of 'desire'. He writes:

"A person is often said to "have an interest" in something he does not presently desire. A dose of medicine may be "in a man's interest" even when he is struggling and kicking to avoid it. In this sense, an object of an interest is "what is truly good for a person whether he desires it or not." Even interest defined in this second way may be indirectly but necessarily related to desires. The only way to argue that X is in Doe's interest even though Doe does not want X may be to show that X would effectively integrate Doe's total set of desires leading to a greater net balance of desire-fulfilment in the long run. If most of Doe's acknowledged important desires cannot be satisfied so long as he is ill, and he cannot become well unless he takes his medicine, the taking the medicine is in Doe's interest in this desire-related sense"²¹⁴,

It could however, be argued that even construing 'desire' in this long term light, desire still does not provide an adequate definition of the motivation to claim a right. If all rights claims are motivated

²¹³ R. Dworkin, Taking Rights Seriously, chapter 6 passim, pp.150-183. See also J. Rawls, A Theory of Justice, pp.48-51.

²¹⁴ J. Feinberg, Social Philosophy, p.26.

by desire, no one should ever have a right to something which he does not desire at least in the long run, and yet in fact people do have such rights. For example in New Zealand every adult man is free to engage in homosexual sex (Hohfeld would describe this as a privilege) yet most men would have no desire whatsoever to exercise this right and could in no way see possession of the right as leading to a "greater net balance of desire fulfilment" even "in the long run"²¹⁵. This criticism is however misguided. It will be recalled that the prima facie rights doctrine argues that the rights creation process is an on-going affair, constantly redefining rights boundaries. What is said to be a 'right' to do A is in fact a prediction, based on a whole range of past individual claiming / justification / recognition processes, that interest A's clash with interest B in the particular set of circumstances at hand will be resolved in favour of interest A. When A says "I have a right to homosexual sex" he is not at once bound to admit that he wants to indulge in such behaviour. All he is saying in asserting the right is that in the past in circumstances similar to the present, *other* men who have wanted to practice homosexuality have had their claims to be allowed to do so validated, and therefore he feels able to predict that *if* he so claimed, his claim would be validated too. It cannot be said therefore that if all rights ultimately start out from desire, no one should ever have a right to something which he does not desire at least in the long run; A has a right because *other* people (one of whom *may* be A) in the past have desired it. The distinction is quite simply between a right and a claim. A claim clearly is motivated by the claimant's desire at least in the long term to possess the right, while the

²¹⁵ Ibid.

possession of a right (or more correctly a prima facie right) can, and usually will, be largely derived ultimately from the desires of others in the past. It is fair to say therefore that rights claims can be motivated by desire, though not in the rather more simplistic way described by Feinberg.

Other rights writers are very fond of identifying need as the primary, even exclusive, motive to make a rights claim. The advantage to this approach is supposed to be that it is objectively ascertainable and therefore enables one to bridge the gap between factual and normative statements thereby solving the problem which it was noted above afflicts the traditional cause / effect human rights justification model²¹⁶.

Simone Weil sees human rights as stemming from an eternal, immutable obligation incumbent upon every human being to respect his fellow man. She writes that this "... obligation is only performed if the respect is effectively expressed in a real, not a fictitious, way; and this can only be done through the medium of Man's earthly needs."²¹⁷ She continues:

"Consequently, the list of obligations towards the human being should correspond to the list of such human needs as are vital, analogous to hunger.

"Among such needs there are some which are physical, like hunger itself. They are fairly easy to enumerate. They are concerned with protection against violence, housing, clothing, heating, hygiene and medical attention in the case of illness. There are others which have no connection with the physical side of life, but are concerned with its moral side. Like the former, however, they are earthly and not directly related, so far as our intelligence is able

²¹⁶ H. J. McCloskey, "Human Needs, Rights, and Political Values", *American Philosophical Quarterly*, vol.13, no.1 January 1976, p.1 at p.1.

²¹⁷ Simone Weil, The Need for Roots, p.6.

to perceive, to the eternal destiny of Man. They form, like our physical needs, a necessary condition of our life on this earth. Which means to say that if they are not satisfied, we fall little by little into a state more or less resembling death, more or less akin to a purely vegetative existence."²¹⁸

She expressly distinguishes these needs driven motivations for human rights from "... desires, whims, fancies, and vices"²¹⁹.

Sinha's anthropocentric theory of human rights insists that "... the human rights imperative becomes the fulfilment of man's needs of his planetary existence with justice"²²⁰.

Kaufman argues that a need based human rights theory is superior to desire based theories because what people desire does not always correspond with what they ought to want in their own best interests²²¹.

²¹⁸ Simone Weil, op. cit. at p.6f.

²¹⁹ Simone Weil, op. cit. at p.9. The writer does not mean to infer that Weil is a constructivist, simply that she sees needs as underlying human rights, as the ultimate arbiter of the legitimacy of any asserted human right.

²²⁰ S. Prakash Sinha, "The Anthropocentric Theory of International Law as a Basis for Human Rights", Case Western Reserve Journal of International Law, vol.10 (1978), p.469 at p.501.

²²¹ A. S. Kaufman, "Wants, Needs, and Liberalism", Inquiry, vol.14 (1971), p.191 at p.192. Other writers who endorse the role need has to play in grounding human rights include T. J. Farer, Towards a Humanitarian Diplomacy: Primer for Policy, p.20: "The priority of "survival rights" or "basic needs" is a virtual corollary of the right to personal security"; Park argues that the United Nations Charter, the International Bill of Rights, various regional human rights sub-organs as well as international law generally all endorse the view that basic human needs essentially underlie all other so called human rights, see "Human Rights and Basic Needs: Using International Human Rights Norms to Inform Constitutional

Finnis also appears to endorse need as a factor common to all rights and in the context of a discussion about what it is in theoretical terms that gives rise to rights²²².

The writer is inclined to agree with McCloskey that it is untenable to regard human need as the exclusive basis for human rights. He puts this down to two reasons. Firstly, needs do not explain many of the human rights people do in fact have in terms of instruments such as the International Declaration of Human Rights and the Covenants²²³. Secondly, he argues that such a theory, as well as effectively illegitimizing such acknowledged rights, requires one to accept rights to objects which few would regard as much short of ridiculous²²⁴. Furthermore, Feinberg makes the point that just what constitutes a 'basic'

Interpretation", University of California Los Angeles Law Review, vol.34 (1987), p.1195 at pp.1215-1231; See also J. Donnelly, "Recent Trends in Human Rights Activity: Description and Polemic", International Organ, vol.35 (1981), p.633 at 643; D. Raphael, The Rights of Man and the Rights of the Citizen", in Political Theory and the Rights of Man, D. Raphael (ed), p.101 at p.115; A. Rosenbaum's introduction to The Philosophy of Human Rights: International Perspectives, A. Rosenbaum (ed), p.3 at p.30f; Dienes, "To Feed the Hungry: Judicial Retrenchment in Welfare Adjudication", Californian Law Review, vol.58 (1970) p.555 at p.598.

²²² J. Finnis, Natural Law and Natural Rights, p.205.

²²³ He refers to the rights to education, family, property and privacy. See H. J. McCloskey, "Human Needs, Rights, and Political Values", American Philosophical Quarterly, vol.13, no.1 January 1976, p.1 at p.10.

²²⁴ H. J. McCloskey, op. cit. at p.2 where he writes that "... we may have a need for affection; it is not clear that any sense can be given to a claim that we have a right, even a prima facie negative right to affection."

need is notoriously flexible²²⁵. Certainly there is a wide range of opinion regarding what constitutes a basic human need. Kaufman²²⁶ does not explain what the Marxist 'human needs' are. Sinha has a list of five primary needs and three secondary needs²²⁷. Weil divided needs into earthly needs and needs of the soul²²⁸. In her view the latter were analogous to hunger and therefore every bit as basic as the need for food. Park equates them with social and economic rights or welfare rights²²⁹ as do Donnelly²³⁰ and Rosenbaum²³¹. McCloskey acknowledges this flexibility, this arbitrariness, and examines two options for distinguishing between basic and non basic needs. The first is differentiation on the basis of some kind of

²²⁵ J. Feinberg, Social Philosophy, p.111.

²²⁶ A. S. Kaufman, op. cit.

²²⁷ S. Prakash Sinha, "The Anthropocentric Theory of International Law as a Basis for Human Rights", Case Western Reserve Journal of International Law, vol.10 (1978), p.469 at p.497f. The primary needs are air, food, water, procreation, and protection of life from war, crime disease, starvation, and "killers of modern life". The secondary needs are economic betterment, cultural enrichment, and achievement of intangible values such as freedom and liberty.

²²⁸ S. Weil, op. cit. The need of the soul are order, liberty, obedience, responsibility, equality, hierarchism, honour, punishment, freedom of opinion, security, risk, private property, collective property and truth.

²²⁹ A. I. Park, "Human Rights and Basic Needs: Using International Human Rights Norms to Inform Constitutional Interpretation", University of California Los Angeles Law Review, vol.34 (1987), p.1195 at pp.1215-1231.

²³⁰ J. Donnelly, "Recent Trends in Human Rights Activity: Description and Polemic", International Organ, vol.35 (1981), p.633 at 643.

²³¹ A. Rosenbaum's introduction to The Philosophy of Human Rights: International Perspectives, A. Rosenbaum (ed), p.3 at p.30f.

higher 'natural' law. McCloskey regards this as untenable²³². The second method is to distinguish a need as basic if it is necessary for any person to fulfil the "... potentialities inherent in human nature"²³³. What constitutes a basic need in terms of this definition is, he writes, in turn entirely relative, dependant on both physical / environmental and social factors²³⁴. Being at least in part dependant on the value judgments included among these social factors, clearly the advantage of objectivity alleged to favour needs based human rights theories evaporates. Green too notes that "... it is quite unrealistic not to see its [the needs based human rights theory's] in-built normative structure"²³⁵.

One is left with the conclusion that need, or what is at least perceived by a claimant to be his need, *may* motivate a rights claim, but that to ascribe need a monopoly over this function is to go too far.

In the writer's view the fact is that claims may be motivated by physical or biological needs, desires, elementary experiences of injustice, or any other 'morally relevant stimulus'. It is also apparent that the effect of the rights process is to transform individual needs, desires, and moral views into the definitionally social concept of a right. Even though

²³² H. J. McCloskey, "Human Needs, Rights, and Political Values", *American Philosophical Quarterly*, vol.13, no.1 January 1976, p.1 at p.6.

²³³ H. J. McCloskey, "Human Needs, Rights, and Political Values", *American Philosophical Quarterly*, vol.13, no.1 January 1976, p.1 at p.7.

²³⁴ H. J. McCloskey, "Human Needs, Rights, and Political Values", *American Philosophical Quarterly*, vol.13, no.1 January 1976, p.1 at p.8.

²³⁵ R. H. Green, "Basic Human Rights/Needs: Some Problems of Categorical Translation and Unification", *Review - International Commission of Jurists*, vol.27 (December 1981), p.53 at p.56.

a right is ultimately rooted in the desires, needs and moral beliefs of individuals, the example of the privilege of homosexual sex discussed above shows that a right in the prima facie / predictive / non-specific sense employed in for example the International Bill of Rights, has a life of its own and exists independent of any one of its originating motivations. Not only is a right as opposed to a claim necessarily social²³⁶ but it is also largely impersonal.

4.7.3.3 Justification

Once an individual has made a claim, whether motivated to do so by desire, need, elementary experience of injustice, or by a 'morally relevant stimulus', the next step in the constructivist theory of rights is justification. During this phase, the claimant explains why her claim should be recognised.

A. Justification is necessary and on-going

As Meyers notes "[p]roponents of human rights have long ago abandoned the claim that any rights are self-evident and set about accounting for the rights they esteemed"²³⁷. Other writers also advocate the need for justification to be involved in the rights process. Brugger, for example, writes that "... the way to answering the question as to which specific

²³⁶ The rights process involves a claimant and at least one other person to hear his claim. The last man on earth will have prima facie rights, in that in the past he and others have been able to successfully obtain recognition of certain demands. But because there is no one to whom he can address his claim he cannot instantiate his prima facie right, he cannot confirm the claim and say that in this particular instance the right claimed is confirmed. In any case, there is little likelihood of his making a claim since there is no one around to stop him doing whatever he likes.

²³⁷ D. T. Meyers, "Rights-Based Rights", Law and Philosophy, vol.3 (1984), p.407 at p.407.

claims may be regarded as human rights, leads to a normative discussion ..."²³⁸

Schauer believes that once created a right, like a rule, acquires its own momentum, independent of its initial justification, but he quite clearly accepts that justification is required²³⁹.

Finnis does not write of justification as such but does incorporate into his theory about rights a process labelled 'specification'

"... in which various reasonable solutions may be proposed and debated and should be settled by some decision making procedure which is authoritative but which does not pretend to be infallible or to silence further rational discussion of to forbid the reconsideration of the decision."²⁴⁰

Those who persist in their pursuit for a cause / effect justification for human rights tend to look for a single, one-off justification. Gewirth for example attempts to source all human rights from his principle of generic consistency²⁴¹.

However, if any credence is given to the prima facie rights doctrine, the justification of a given human right, such as for example the right to freedom of expression, must be regarded as an on-going, recurrent affair. That doctrine views a "right" as a prediction that a particular claim will be validated by recognition because that is how the same or very similar claims have been treated in similar

²³⁸ D. T. Meyers, op. cit at p.124.

²³⁹ P. Schauer, "Rights as Rules", Law and Philosophy, vol.6 (1987), p.115-119.

²⁴⁰ J. Finnis, Natural Law and Natural Rights, p.220.

²⁴¹ A. Gewirth, Reason and Morality, (1978), chapter 3 (pp.129-199). See also A. Gewirth, "The Basis and Content of Human Rights", Georgia Law Review, vol.13, part 4 Summer 1979, p.1143 at p.1155-1158.

circumstances in the past. Before the presumption can be confirmed in a given instance, it must endure the rights process. While the central core of content is generally quite clear, the precise boundaries of a right are in a constant state of flux, being ever redefined by the on-going constructivist rights generation process.

The same conclusion, that rights justification must be an on-going process, is also consistent with the relativist approach to human rights advocated in chapter three. Clearly the minimum frequency of the justifications necessary to accommodate temporal and geographic relativity is much less than is required by the prima facie rights doctrine, but nevertheless, if human rights were not capable of at least broadly periodic redefinition there could be no temporal or geographic relativity, a result clearly at odds with the conclusions reached in chapter three. Dworkin agrees that constructivism is consistent with relativity and endorses both concepts on the grounds that they are compatible with Rawls' reflective equilibrium²⁴².

Rawls' also sees the justification process constituted by his reflective equilibrium as on-going and an essential part of his theory of rights. Reflective equilibrium cannot be understood as a one-off event; the balancing and fine tuning it involves is definitionally processional²⁴³. Dworkin writes of

²⁴² R. Dworkin, Taking Rights Seriously, p.166 where he writes that the equilibrium technique "... will yield different results for different groups, and for the same group at different times, as the common ground of confident intuition shifts". Dworkin's reliance on Rawls' reflective equilibrium as a yardstick to evaluate the merits of constructivist as opposed to 'natural' theories about the origin of rights is evident throughout his book but is particularly to the fore at p.163ff.

²⁴³ J. Rawls, A Theory of Justice, pp.48-51.

Rawls' reflective equilibrium that "... [w]e can expect to proceed back and forth between our immediate judgments and the structure of explanatory principles in this way, tinkering first with one side and then the other, until we arrive at what Rawls calls the state of reflective equilibrium in which we are satisfied, or as much satisfied as we can reasonably expect"²⁴⁴ and acknowledges that arrival at that happy state of satisfaction is by no means certain²⁴⁵.

B. The significance of justification

Two very important and related points need to be made in relation to this justification step in the rights generation process. Firstly, the individual claimant has wide discretion in respect of the terms in which he couches his justification. Secondly, he can choose the recipient, the addressee, of his justification. These choices will be tempered or conditioned by a number of considerations. Obviously the claimant will want to choose the addressee most likely to accept the arguments at his disposal. At the same time however, the claimant will observe that in the event that it is recognised and thereby individuated, confirmed in retrospection, the scope or range of the right in that instance is effectively set by the breadth of the addressee group. A third consideration in selecting the addressee of a justification consists of the means at the disposal of the addressee group in fact for enforcing its recognition on any of its members who may dissent from the decision to award recognition, and how willing the

²⁴⁴ R. Dworkin, *op. cit.*, p.156.

²⁴⁵ Dworkin concedes (*loc. cit.*) that "... [i]t might be that no coherent set of principles could be found that has independent appeal and that supports the full set of our immediate convictions; indeed it would be surprising if this were not often the case".

group is likely to employ them. The strength of dissent will obviously be relevant to this issue as well. The efficacy of the right should it achieve recognition, is thus set by the amount of power in fact possessed by the addressee group vis a vis those within the group who dissent from the general view that recognition is appropriate, and the likelihood of the majority's willingness to use it to coerce conformity.

It is also suggested that the choice of addressee tempered by these considerations is ultimately what determines the label attached to the resultant right, what largely determines the right's description as a moral right, a legal right, international human right, a civil or political right and so forth. If the addressee's recognition is sought through more formalised institutional machinery, such as domestic law courts, political decision making bodies and international judicial institutions, the right resulting from recognition will tend to be labelled 'legal', particularly where the recognising body has an abundance of direct coercive power at its disposal and is wont to use it freely. On the other hand, where the addressee is not characterised by formal institutions and / or lacks the power in relation to dissenters to directly coerce their conformity, or is generally disinclined to use what power it does have, the specific, instantiated right resulting from recognition, is more likely to be described as a 'moral right'.

Dworkin agrees that there are a variety of institutions within which an individual may choose to make his claim²⁴⁶. He gives as an example the chess player's appeal to the rules of the chess tournament

²⁴⁶ R. Dworkin, *op. cit.* at p.101.

and a plaintiff's appeal to legislation²⁴⁷. He notes that some such social institutions are more insulated from general considerations of political morality than others but that at the end of the day, in Dworkin's 'hard cases', the outcome of such disputes will be determined on the basis of broader considerations such as the general character of the institution and its role and function in broader social terms and ultimately in accordance with moral principle²⁴⁸.

The terms in which the justification is put also impact on the label attached to the right stemming from their successful argument. Arguments which justify a claim by reference to statute books and precedent in the domestic context or to custom as evidence of a general practice accepted as law in the international arena, colour the resulting rights as legal whereas those relying heavily on appeals to notions of right and wrong, religious dogma and other somewhat more amorphous concepts such as the 'inherent dignity of mankind' lend such rights as they successfully justify a 'moral' hue. Dworkin seems to effectively define rights as 'legal' by reference to the terms in which the justificatory argument is put. He looks at the types of considerations his hypothetical super-lawyer Hercules would consider in resolving a hard legal case. Essentially Hercules looks to the national constitution, to statutes and to the Common Law²⁴⁹. Dworkin certainly seems therefore to accept that the terms in which a justificatory argument is couched do constitute a relevant consideration in determining the label to be attached to a particular right.

The breadth of the addressee group similarly

²⁴⁷ Ibid.

²⁴⁸ R. Dworkin, *op. cit.*, pp.101-105.

²⁴⁹ Ibid.

affects the labels attached to rights. Recognition of the right to freedom of expression by the population of New Zealand generally or through its institutional organs, tends to be designated a 'civil right', while the same basic freedom in the international context emerges from the justification process as an international 'human' right. Civil rights activists in the United States of America during the 1950's and 1960's were addressing their claims primarily to the government of the United States, and have gone down in history as *civil rights* activists. Amnesty International's periodic reports by contrast deal with *human rights* abuse because, it is submitted, that terminology is more appropriate where the addressee group from whom recognition is sought, in the case of Amnesty International an international moral community, is not contained within the politically, factually real boundaries of a single state.

The observations offered in the last three paragraphs are not intended to constitute a definitive system for classifying different types of rights. It is simply to illustrate how other more traditional rights classifications are accommodated by the version of constructivist rights theory advocated in this paper. It also highlights the flexibility and indeed the substantive irrelevance of the classificatory labels often encountered in rights literature²⁵⁰. When rights are viewed from the constructivist perspective recommended in this paper, the labels attached to different rights are not only vague but are in any case consequences of the choices instrumental in the generation of the rights in question, and as such can have no definitional role in relation to the concepts

²⁵⁰ Green is similarly suspicious of rights labels and classifications. See R. H. Green, "Basic Human Rights/Needs: Some Problems of Categorical Translation and Unification", Review of the International Commission of Jurists, vol.27 (Dec 1981), pp.53-58.

they denote. In any given instance what makes a right a human right rather than a civil right or a moral right or even a contractual right, is nothing about the origin of the right, nothing directly to do with the process by which the right was generated. It is a *human* right as a consequence of the combination of the claimant's choice of addressee with his selection of certain terms of reference for his justification, and the political power realities of the context in which those choices were made.

C. The nature of justification for international human rights

Because this paper is dealing specifically with *human* rights, the following points from the last section might be usefully highlighted. A right in its general, *prima facie* sense, is, on the constructivist view advocated in this paper, a prediction that in a given fact situation, recognition for a certain claim will be forthcoming. Notwithstanding the ill-defined nature of rights classifications, the right will tend to be a *human* right when the basis of that prediction is constituted by a series of past examples of the rights process (claiming, justification and recognition) in which the addressee has been broadly enough constituted to transcend state boundaries. The terms of the justification will characteristically have been by reference to basic concepts of justice and equity, the dignity of man, and other such relatively amorphous 'moral' concepts, heavily tempered by arguments based on international instruments such as those contained in the International Bill of Rights, principles of law recognised by countries other than that state against which the claim is directed, and international judicial opinions such as that produced by the International Court of Justice in the South West

Africa case. These general features of the 'paradigmatic' human rights situation recur over time in a range of specific instances, and, it is submitted, are what tends to make the resultant general or prima facie right a *human right*.

The tendency for specific, instantiated human rights to sport justifications with heavy 'moral' input explains the widespread insistence that human rights are a type of 'moral right'. The general connection between morality and human rights was noted above in chapter 4.7.2.4 B. Writers such as Gorecki and Brugger clearly see moral input as entering the rights process earlier at the pre-claim phase where it motivates the claimant to make his claim²⁵¹. On the other hand, Sinha in discussing the justification of human rights claims, rather than what initially prompts them, insists that because human rights are imbued with a strong normative flavour, logic demands that a human rights justification must also be normative²⁵². Brugger, although allowing moral input as motivating the rights claim, also sees it contributing further to the rights process at the justification stage. He writes that "... the way to answering the question as to which specific claims may be regarded as human rights, leads to a normative discussion ..."²⁵³. At the end of the day, the 'moral' character of human rights probably stems from both the

²⁵¹ J. Gorecki, "Human Rights: Explaining the Power of a Moral and Legal Idea", *American Journal of Jurisprudence*, vol.32 (1987), p.153 at p.157; W. Brugger, "Human Rights Norms in Ethical Perspective", *German Year Book of International Law*, vol.25 (1982), p.113 at p.118.

²⁵² S. P. Sinha, "Why and How Human Rights", *International Journal of Legal Information*, vol.10, no.8, 1982, p.308 at p.311.

²⁵³ W. Brugger, "Human Rights Norms in Ethical Perspective", *German Year Book of International Law*, vol.25 (1982), p.113 at p.124.

role played by moral conceptions such as duty, justice and so forth at the motivational stage of the rights process, as well as from the moral input characteristically introduced into the process at the justification phase²⁵⁴. Again it must be stressed that it is beyond the scope of this paper to attempt an examination of where these moral concepts come from; it is enough for present purposes to simply note that those engaged in the rights generation process as outlined in this chapter are influenced by such 'moral' considerations in the ways described.

4.7.3.4 Recognition

Little need be said about recognition. The addressee of the claim weighs the justifications offered and either recognises the claim or not. If they accept the justification as valid, the claimant is said to have a right²⁵⁵. This right is a specific right in a specific instance, stripped of the provisional, prima facie nature which the general right possessed. The scope of the right depends, as noted above, on the composition of the addressee group, and its efficacy on the means at its disposal for coercing those amongst the recognising body, or those whom that body represents, who disagree with the

²⁵⁴ Trying to evaluate the relative weight or importance of each of these contributions to the 'moral' character of human rights is not important for the present purposes.

²⁵⁵ Writers who endorse the importance of recognition in the development of rights include: H. Gross Espiell, "The Right of Development as a Human Right", *Texas International Law Journal*, vol.16 (spr.1981), p.189 at pp.192-195; W. Brugger, *op. cit.* p.113 at p.134: "Both, deliberation and the sense of justice, naturally presuppose a practice - gained in the educative process - of *gauging* disputed interests"; J. Gorecki, "Human Rights: Explaining The Power Of A Moral And Legal Idea", *American Journal Of Jurisprudence*, vol.32 (1987), p.153 at p.163; Joel Feinberg, *Social Philosophy*, p.65f.

group's prevailing sentiment.

4.7.4 Advantages of the constructivist theory of human rights generation

It is submitted that the version of the constructivist approach to human rights described above is better than any of the alternative traditional justifications.

4.7.4.1 The other options are afflicted with inherent subjectivity while the constructivist theory offered here is empirically sustainable

The alternative theories to the one offered in this paper are all based on the cause / effect justification model and suffer from the objectivity related flaws noted in chapter 4.7.1.2. It has already been seen how in broad jurisprudential terms constructivism avoids this pitfall and the considerable degree of recognition which has accordingly been forthcoming for this school of thought. The empiricism underlying constructivism has however received particular support and recognition in the international legal field.

Morgenthau has stressed the importance of an empirical base for any theory which purports to explain how states behave in any area of international activity, including that of international human rights. The very first words of his Politics Among Nations read:

"This book purports to present a theory of international politics. The test by which such a theory must be judged is not *a priori* and abstract but empirical and pragmatic. The theory, in other words, must be judged not by some preconceived abstract principle or concept unrelated to reality, but by its purpose: to bring order and meaning to a mass of phenomena which without it would remain disconnected and unintelligible. It must meet a dual test, an empirical and a logical one: Do the facts as they actually

are lend themselves to the interpretation the theory has put upon them, and do the conclusions at which the theory arrives follow with logical necessity from its premises? In short, is the theory consistent with the facts and within itself?"²⁵⁶

Watson has taken this emphasis on the importance of international social theory being empirically underpinned and applied it more specifically to international law. He writes that:

"The proponents of an international regime of human rights have been content with the repetitious manipulation of secondary and tertiary sources and have failed to respond to the social facts of international life. They ignore political reality because it undermines the viability of a humanistic supranational law, the system their theories claim to have established. No amount of academic industry can alter the fact that hypothetical legal systems do not achieve concrete results. The confusion of natural law with international law, the insistence on the political superiority of international law over domestic law, and the failure to understand the mode of operation of the current system have produced a genre of international law that dispenses with both validity and efficacy as salient features of a normative order. *Lex lata* and *lex ferenda* have thus become merged into an attractive, but futile, philanthropy"²⁵⁷.

Other writers have shared this insistence that international law should be firmly underpinned by actual practice, by international experience²⁵⁸. While

²⁵⁶ H. Morgenthau, Politics Among Nations: The Struggle for Power and Peace, p.3. Italics in the original.

²⁵⁷ J. S. Watson, "Legal Theory, Efficacy and Validity in the Development of Human Rights Norms in International Law", *Law Forum*, vol.1979, p.609 at p.640f. Italics in the original.

²⁵⁸ See footnote 110 in which support is cited for constructivism from writers in the more general jurisprudential field as well as those writing more specifically about international human rights.

Watson has responded to the subjectivity of the cause / effect theories about the origin of human rights by casting human rights off the international legal stage, these writers have instead tried to find solutions to the problem. Nevertheless, notwithstanding their differing responses to the problem, all are certainly agreed that lack of objectivity is a serious flaw in the more traditional theories about the origin of human rights.

The constructivist theory by contrast is critically based on practice²⁵⁹. Its essential roots can be traced to Wesley Hohfeld whose analysis is heavily descriptive in keeping with the positivist times in which he wrote²⁶⁰. Moreover, the constructivist theory advocated here incorporates the prima facie rights doctrine which effectively defines rights in their provisional, prima facie sense as a rational prediction based on actual past experience. An actual instantiated right in the non prima facie sense is seen in effect as a retrospective concept, the provisional character of the general right being removed only after the confirmatory validation process of justification and recognition. The prima facie character of a human right in the version of the constructivist theory here advocated therefore critically ties the concept of human rights to actual, observable practice. It therefore overcomes the criticism of those writers who object to human rights in international law on the grounds that the idea of human rights is generally justified on articles of faith and the empirically unsustainable assertions of academic writers.

4.7.4.2 Constructivist theory is structurally

²⁵⁹ See chapter 4.7.3.

²⁶⁰ See chapters 4.7.2.1 to 4.7.2.4.

consistent with international law

Constructivist theory is structurally consistent with international law. D'Amato adopts the term "entitlements" as a synonym for "rights" to avoid the prejudices attaching to the latter term, and then analyses the contemporary international legal system in terms of these entitlements. He concludes that "... a substantive human rights law is capable of fitting comfortably into the existing system of international legal enforcement"²⁶¹. His analysis is empirically based and therefore escapes the criticism of the likes of Watson²⁶² that the concept of human rights ignores the realities of international practice²⁶³.

4.7.4.3 Constructivist theory is consistent with the idea of custom as evidence of a practice accepted as international law

Constructivist theory is consistent with the notion that international law may be constituted by "international custom, as evidence of a general practice accepted as law"²⁶⁴. D'Amato argues that international human rights are formed, as are other substantive components of customary international law, by one of two processes. The first is the "... classic kind of example of a practice ripening into a rule of law" by which "state X acts, state Y reacts, and either X's action or Y's reaction or some other

²⁶¹ A. D'Amato, "The Concept of Human Rights in International Law", *Columbia Law Review*, vol.82 (1982), p.1110 at p.1112.

²⁶² See J. S. Watson, "Legal Theory, Efficacy and Validity in the Development of Human Rights Norms in International Law", *Law Forum*, vol.1979, p.609 at p.640f.

²⁶³ A. D'Amato, *op. cit.* at p.1112.

²⁶⁴ Article 38(1)(b) of the Statute of the International Court of Justice, *loc. cit.*

resolution of the issue is accepted or becomes operative between X and Y"²⁶⁵. It is submitted that this "classic" customary international law formation process is conceptually similar to the constructivist approach to the formation of international human rights. Claiming is certainly a type of action, and D'Amato's 'acceptance' seems to parallel the constructivist's 'recognition'. Though this synthetic, Millian model does not specifically allow for the justification phase of the constructivist's right creation process, this sub-process appears to find a comfortable home under the 'resolution' stage of D'Amato's "classic" approach to the formation of customary international law.

Fensterheim describes the "conservative approach to the determination of customary international law"²⁶⁶ as requiring two things; a practice and recognition (*opinio juris*) that the practice is required by international law. On this view the practice must be general and the recognition pretty much universal. This, says Fensterheim, is why customary international law develops so slowly²⁶⁷. This analysis of the formation of customary international law is consistent with the constructivist theory about the origin of international human rights in that it describes the formation of rules of international law as a process involving the aggregation of a series of discrete events over time plus recognition. Fensterheim advocates a slightly broader approach to the formation of customary international law by which a state may

²⁶⁵ A. D'Amato, *op. cit.* at p.1130.

²⁶⁶ G. D. Fensterheim, "Towards an International Law of Human Rights Based Upon the Mutual Expectations of States", *Virginia Journal of International Law*, vol.21 (1980), p.185 at p.190.

²⁶⁷ *Ibid.*

find itself bound by a rule to which it has not expressly consented if all its statements as well as its actions objectively assessed create an expectation on the part of its neighbours in the international community that it would be bound. Even under this more progressive approach to the formation of customary international law, while there is no exact parallel to the justification and recognition phases of the constructivist theory, customary international law, or more precisely, the process by which a practice is transformed into a general rule of international law, is seen as an on-going process involving the application of principles derived from an aggregation of a collection of past events (the events generating the expectation on the part of other states in the "human rights community"²⁶⁸).

Article 38 of the Statute of the International Court of Justice, stressing the significance of 'acceptance' as the ultimate source of customary international law, offers a very close parallel to the constructivist process by which rights develop. In constructivist terms, what is required for there to be a right in the instantiated, non-prima facie sense, is *recognition* of a claim. In the development of international customary law more generally, 'acceptance' seems to fill the same bill. In terms of having a general, prima facie right, the constructivist view is that A has such a right if there has been a practice of such persons having claims to the same or a similar interest recognised in similar circumstances in the past. In the wider international law context, again, it can be said that there is a general customary international law that states should behave in a certain way in certain circumstances if one can point at a whole series of

²⁶⁸ G. D. Fensterheim, *op. cit.* at p.205.

past instances in which acceptance that that is the case has been forthcoming.

Professor Watson argues forcefully for an approach to international law which takes an "a posteriori" focus. He describes this a posteriori approach as focusing "... attention on the activities of men and states, with the rules performing an essentially descriptive function"²⁶⁹ and writes that this series of activities, of past events, is "... the essence of custom, the basis of all international obligation, and it is clearly evident in recognition, territoriality, and the regimes of the high seas and of air and space"²⁷⁰. Watson's traditional approach to international law styles the rules thereof, which includes international human rights rules, as very closely tied to past events constituting a practice. Watson is not at all keen to see any gap between what states habitually do and international law. This emphasis on what states and men have done in the past as an indicator of the present state of international law inevitably sees international law as growing from a process over time involving the aggregation of a series of discrete events, and this view supports the constructivist approach to the development of international human rights.

There is one aspect of Watson's approach to the formation of customary international law which may be at variance with the version of constructivist theory. Constructivist theories do two things. Firstly, they construct a theory which explains (unifies) the intuitive moral concepts current in society, whatever

²⁶⁹ J. S. Watson, "Legal Theory, Efficacy and Validity in the Development of Human Rights Norms in International Law", Law Forum, vol.1979 (no.3), p.609 at p.614.

²⁷⁰ J. S. Watson, op. cit. at p.626.

they may be and wherever they may come from²⁷¹. Secondly, they provide a mechanism by which that unifying theory can be applied to novel fact situations with a view to resolving them consistently with past experience while at the same time allowing sufficient flexibility to accommodate gradual changes in society's moral attitudes. Thus a fully constructivist theory about the origin of rights looks both backwards and forwards²⁷². Watson on the other hand appears to insist on a strictly "a posteriori" approach²⁷³.

Watson's primary criticism however, seems to be directed against those of his contemporaries who endeavoured to base their assessments of current international law not on "social facts" and "political reality" but on secondary and tertiary sources²⁷⁴. It is probable that in his attack on this practice and in the stress he lays on the value of past factual occurrences as determinative of contemporary customary international law, Watson does not intend to deny the validity of a prospective role for legal theory. Certainly, endorsing the value of past practice in this context does not logically preclude a prospective, developmental role for legal theory; the description of a thing and its function are conceptually distinct and Watson's primary concern is with the methods used by his contemporaries to describe international law. There is no reason to

²⁷¹ It is beyond the scope of this paper to explore or explain the origin of these moral concepts. It is enough for present purposes that empirically they do exist.

²⁷² This aspect, this bi-focal character, of the version of constructivist theory advocated in this paper was discussed briefly above in chapter 4.7.3.

²⁷³ J. S. Watson, op. cit. at p.614.

²⁷⁴ J. S. Watson, op. cit. at p.640f.

suppose anything about the purpose of international law on the basis of Watson's comments about how this descriptive exercise should be achieved. Watson nowhere expressly insists that international law's only function is to describe international political activity and he also does write that the descriptive function he ascribes the rules of international law is only "essentially" descriptive perhaps inferring that there may exist for legal theory some other prospective function, a non descriptive one at any rate. Notwithstanding the immediate inferences evident in his insistence on an "a posteriori" approach to international law and in the vigour of his assertion that the rules of international law are "essentially descriptive", it is therefore suggested that Watson is not denying that international law once determined on the basis of state practice, should not then be used to indicate the extent of parties' obligations in analogous operative fact situations in the future.

Such a position would in any case be quite untenable. Dworkin writes that any complete theory of law must have not only a descriptive part but also a normative part, that is a part which provides a mechanism for determining what the law should be in the future²⁷⁵. Ascribing an exclusively descriptive function to international law would deny the normative capacity of international law. Louis Henkin has argued convincingly that empirically international law does have normative effect, does impose on the players on the international political stage a sense of

²⁷⁵ R. Dworkin, *op. cit.*, p.i. Clearly Watson does not entertain an idea of law bereft of obligation since he expressly states that practice (reality) is "... the essence of custom, the basis of all international obligation, and it is clearly evident in recognition, territoriality, and the regimes of the high seas and of air and space", *op. cit.* at p.626.

obligation²⁷⁶.

Further, to deny that international law has room for the notion of obligation, would be to deny the validity of the role played by the concept of opinio juris in the formation of customary international law. Opinio juris as noted above is the sense of obligation attaching to a practice which elevates the latter to the status of law, which in Hart's terms would make conformity to that pattern of activity 'a rule' rather than a form of behaviour adopted merely 'as a rule'²⁷⁷. Certainly such denial would not be new. Ever since Geny conceptualised international customary law as an amalgam of practice and opinio juris, opinion has varied as to which of these two components of customary international law is the most critical. Kelsen regarded opinio juris as practically nonsensical in relation to states on the grounds that psychological conditions such as those involved in opinio juris cannot be formed by collective entities such as states²⁷⁸.

It is suggested however, that this position is untenable. It was noted in the preceding paragraph that empirically customary international law does have normative effect. Also article 38 of the Statute of the International Court of Justice stipulates that custom is only evidence of an international practice, and that the practice must be accepted as law. The actual source of customary international law, as

²⁷⁶ L. Henkin, How Nations Behave, passim.

²⁷⁷ H. L. A. Hart, The Concept of Law, pp.54-59.

²⁷⁸ Hans Kelsen, "Theorie du droit international coutumier", 1 Revue de la Theorie du Droit (New Series) (1939), p.253 at p.264ff, cited in D'Amato, Concept of Custom in International Law, p.52 n11. See also De Visscher, Wolfke, Sefriades (also cited in D'Amato op. cit. at p.54).

Lauterpacht has pointed out²⁷⁹, must in fact be not the acts of states themselves, but the acceptance of them as legally obligatory. Important as observable facts undoubtedly are as evidence of a practice and as evidence of the acceptance by the international community that to conform to such a practice is obligatory, customary international law as perceived through article 38 of the Statute of the International Court of Justice and obligation, *opinio juris*, are intimately connected²⁸⁰.

4.7.4.4 Constructivist theory is consistent with the idea of treaties as a source of international law

There is some support for the constructivist approach to rights formation to be found in "international conventions, whether general or particular, establishing rules expressly recognized by the contesting states"²⁸¹. Article 38 of the Statute of the International Court of Justice itself, refers to conventions and principles of law *recognised* by states, and practice *accepted* as law. The writer does not wish to make too much of this point because the constructivist rights creation process is not "*expressly recognised*" as required by article 38 and no direct support can therefore be derived from paragraph (1)(a) of that article. Nevertheless,

²⁷⁹ H. Lauterpacht, International Law, vol.1, p.63.

²⁸⁰ It cannot be stressed enough that the writer leaves open the clearly most difficult issues surrounding the source and legitimacy of international legal obligation. Those questions are far beyond the scope of the present paper. For present purposes it is enough to note that as a matter of observation there does exist a sense of obligation in international law and that such a state of affairs is consistent with a broadly constructivist theory of rights.

²⁸¹ Article 38(1)(a) of the Statute of the International Court of Justice, *loc. cit.*

express reference is made in article 38 to the role played by recognition and acceptance in the creation of international laws generally and in so far as this 'recognition' element is also critical in the constructivist theory of human rights formation, article 38's paragraph (1)(a) must lend at least some weight to the constructivist argument that the same recognition element is involved in the generation of that subset of international laws, namely international human rights.

4.7.4.5 Constructivist theory has widespread academic support

There is widespread academic support for all the salient features of the constructivist theory. Most writers tend to focus on separate elements within the overall process and are either unaware of, or tacitly assume, the broader constructivist context within which such elements operate. Nevertheless, the analysis above of the three fundamental parts of the rights generation process shows that most writers accept that claiming, justification and recognition all have roles to play somewhere in the process²⁸².

²⁸² Writers who identify rights as involving claims include: Joel Feinberg, Social Philosophy, pp.24, 67, and 73; Joel Feinberg, "The Nature and Value of Rights", The Journal of Value Inquiry, vol.4 (Winter 1970), p.243, at p.249; Vinit Haksar, "The Nature of Rights", Archiv fur Rechts- und Sozialphilosophie, vol.64/2 (1978), p.183, at p.183; Jack Donnelly, The Concept of Human Rights, p.14; Wesley Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning", 23 Yale Law Journal (1913), p.16, at pp.38, and 60 of the article as reprinted with other essays by the same author in Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays by Wesley Newcomb Hohfeld, W. W. Cook (ed); R. Bilder, "Rethinking International Human Rights: Some Basic Questions", Human Rights Journal, vol.2 (1969), p.557 at p.559; B.H. Weston, "Human Rights", Human Rights Quarterly, vol.6 (1984), p.257 at p.263; W. Brugger, "Human Rights Norms In Ethical Perspective", German

4.7.4.6 The constructivist theory provides a possible solution to the rights / duties debate

This approach to the generation of human rights also suggests a possible solution to the rights / duties argument. The debate over whether rights or

Year Book Of International Law, p.113 at p.135; F. Schauer, "Rights As Rules", Law And Philosophy, vol.6 (1987), p.115 at p.115; H. C. Anawalt, "The Right To Communicate", Denver Journal Of International Law And Policy, vol.13 (1984), p.219 at p.221; L. Henkin, "Rights Here And There", Columbia Law Review, vol.81 (1981), p.1582 at p.1598; J. Gorecki, "Human Rights: Explaining The Power Of A Moral And Legal Idea", American Journal Of Jurisprudence, vol.32 (1987), p.153 at p.154; S. P. Marks, "Emerging Human Rights: A New Generation For The 1980s?", Rutgers Law Review, vol.33 (1981), p.435 at p.436; R. Flathman, The Practice of Rights, p.71; M. Owens, "The Notion of Human Rights: A Reconsideration", American Philosophical Quarterly, vol.6, no.3, July 1969, p.240 at p.244.

Writers who advocate or assume that rights involve justification include:

D. T. Meyers, "Rights-Based Rights", Law and Philosophy, vol.3(1984), p.407 at p.407; W. Brugger, "Human Rights Norms In Ethical Perspective", German Year Book Of International Law, p.113 at p.124; P. Schauer, "Rights as Rules", Law and Philosophy, vol.6 (1987), p.115-119; R. Dworkin, Taking Rights Seriously, p.vii ("[a] general theory of law ... must have a theory of adjudication") and pp.81-131 passim; A. Gewirth, Reason and Morality, chapter 3 (pp.129-199); See also A. Gewirth, "The Basis and Content of Human Rights", Georgia Law Review, vol.13, part 4 Summer 1979, p.1143 at p.1155-1158.

Writers who associate rights with recognition include: H. Gross Espiell, "The Right of Development as a Human Right", Texas International Law Journal, vol.16(spr.1981), p.189 at pp.192-195; W. Brugger, "Human Rights Norms In Ethical Perspective", German Year Book Of International Law, p.113 at p.134 "Both, deliberation and the sense of justice, naturally presuppose a practice - gained in the educative process - of *gauging* disputed interests"; J. Gorecki, "Human Rights: Explaining The Power Of A Moral And Legal Idea", American Journal Of Jurisprudence, vol.32 (1987), p.153 at p.163; Joel Feinberg, Social Philosophy, p.65f.

duties come first manifested itself in the deliberations within the United Nations Conference on Freedom of Information and the Human Rights Commission's Sub Commission on Freedom of Information and the Press²⁸³. It has also had considerable airing since then. From the material covered in this chapter it clear that duties are both correlative to rights and at the same time at least potentially antecedent to them. They are correlative to a claim-right in the logical sense explained by Hohfeld; it is logically impossible for A to have a claim-right without there also existing a duty incumbent on some other person. A claim-right is defined by Hohfeld in terms of the existence of a correlative duty.

At the same time however, the concept of duty can precede the 'creation' of a claim-right / duty jural relationship in at least two ways. Firstly, the ethical considerations incorporated into the justification phase of the rights creation process may include notions of duty. Modern ethical theories may be divided into three broad categories. Motivist ethical theories maintain that an act is good if it was done for a 'good' reason. Consequentialist theories such as utilitarianism argue that an act which produces beneficial results is 'good' irrespective of the actor's motivation, while the deontological theories (also known as 'duty ethics') focus on the nature of the act itself and rely heavily on the notion of obligation as a central concept. Application at the justification stage of the rights creation process of one of the theories in this latter class of theory, by definition introduces the concept of duty into a human right and at a stage clearly prior to the point at which one can say that the right in its confirmed, non-prima facie, specifically

²⁸³ See above chapters 4.3 and 2.7.

instantiated sense is established. The most significant motivist theory of modern times is that of Kant who believed that an act done out of duty was the only 'good' act. Duty as a concept therefore occupies a critical or highly significant role in two of the three types of ethical theory. It is also far from absent from consequentialist theories. It is submitted that consequentialist theories, indeed any ethical theory, surely must involve the tacit injunction that one should act in the manner determined to be 'good' by the theory's application²⁸⁴. This introduces the notion of obligation in a very fundamental way into every ethical system and the application of any such theory at the justification stage of the rights creation process therefore legitimates the assertion that the notion of duty precedes the creation of a 'right' in the sense of a specific, instantiated Hohfeldian claim-right / duty jural relationship.

The second way the idea of duty can also be introduced into the rights process is as a motive for making a claim. It has already been noted that Gorecki accepts that duty can motivate a rights claim²⁸⁵. McCloskey too discusses the idea of 'ought' as a reason for acting²⁸⁶. The concept of duty therefore can also be introduced at the pre-claim stage of the rights process, and again one can legitimately

²⁸⁴ It is submitted that this tacit, injunctive part of ethical theory does enjoy widespread support. Although there are a range of different theories about what should determine a person's actions, each of them views its own pet determining factor as at least instrumentally 'good'. For a brief discussion of some different theories of conduct see J. Hospers, An Introduction to Philosophical Analysis, p.595.

²⁸⁵ J. Gorecki, "Human Rights: Explaining the Power of a Moral and Legal Idea", *American Journal of Jurisprudence*, vol.32 (1987), p.153 at p.157.

²⁸⁶ H. J. McCloskey, Meta-Ethics and Normative Ethics, p.126ff.

maintain that a right in the Hohfeldian sense of claim-right is based on duty.

One criticism of this argument is that while duty may be a central concept in the world of personal ethics, it is not necessarily so in situations involving interaction between states. Whereas duty may well motivate individuals to make claims and may well be necessarily involved in the justification phase of the process by which an individual's rights are generated in the municipal context, it does not necessarily follow that it plays a similar role in an international setting generating either a right for one state against another or for an individual against a state. This argument is particularly relevant because in the context of international broadcasting, states nearly always will be involved in such disputes as arise in relation to the freedom of expression. The critic will argue that there are enough externally observable differences between a state and an individual to cast serious doubt over the analogy between the two²⁸⁷, thereby undermining the empirical grounds for assuming that the rules governing the behaviour of the latter also determine the actions of the former. She would argue that it follows from the principle of the independence and sovereign equality of states that relations between states are governed by consent, not on a sense of underlying obligation as personal ethical theories insist, all of them tacitly, and deontological and Kantian motivist theories overtly. She would also add that the prime motivation driving states' actions is self-interest and that moral concerns deontological or otherwise play no role in international affairs.

Taking the first of these criticisms, it has to be conceded that there are significant observable

²⁸⁷ See Hans Morgenthau, Politics Among Nations, chapter 16, especially pp.245-8.

differences between individuals and states, and that therefore one probably ought not assume that inductively sustainable conclusions concerning the behaviour of individuals will automatically apply to states. It is submitted however, that states and individuals are similar enough where it counts to sustain the analogy. It is not enough to just point out differences between states and individuals. One has to ask what are the necessary prerequisites for an individual to behave morally, and then, do states share these characteristics. At the end of the day all other differences or similarities are irrelevant. It was noted above that moral behaviour necessarily involves making choices²⁸⁸. Volition is essential to individual moral behaviour. It is a characteristic possessed by all non vegetable human beings albeit to differing degrees. The next step is to ask whether states are capable of volition. Certainly they are. Germany chose to annex the Sudetenland in 1938 just as the United States chose to annex Texas in 1854. States therefore possess one characteristic prerequisite to an individual's operation of an ethical system.

In spite of Gewirth's view to the contrary, it was also noted above that volition is not enough on its own to necessarily entail 'moral behaviour', where the latter phrase is used to denote the application of an ethical system as formulated in the personal ethics context²⁸⁹. To make a moral decision an individual not only needs to be capable of choice, but as a matter of observation, the decision must be in relation to a subject matter, an issue, appropriate for moral discourse. Any action or proposed action by one individual in relation to another is appropriate subject matter for individual moral discourse. The

²⁸⁸ See above, chapter 4.7.2.4 B.

²⁸⁹ See above, chapter 4.7.1.4.

more remotely related to another individual an action proposed is, the nearer it is to being what Mill described as a 'self-regarding act'²⁹⁰, the more inappropriate it is as a subject for moral discourse. Driving under the influence of alcohol is thus an appropriate topic for moral discourse, whereas tooth brushing is not. Again, if other regarding acts are necessary for an individual to participate in a moral system of the type under discussion, states cannot be ruled out of bounds for dissimilarity on this count either. States are capable of other regarding action just as individuals are.

A third characteristic possessed by an individual which one can by observation ascribe as necessary to engage in a system of personal ethics imbued, as noted above, with the concept of duty, is a value system. If the choice made in a decision is made randomly or by reference to some evaluative mechanism based on chance, such as tossing a coin or rolling a dice, it is not generally described as a 'moral' choice. Some writers such as Hans Morgenthau at least at one time argued that self interest dictated the actions of states in the international arena. He denied that a system of values operated in that context. He argued in effect that states were incapable of ethical behaviour²⁹¹. This reasoning is erroneous.

²⁹⁰ J. S. Mill, On Liberty, chapter IV "of the limits to the authority of society over the individual", passim, pp.131-149 in Acton's edition of Utilitarianism, On Liberty, and Considerations on Representative Government.

²⁹¹ In Politics Among Nations, Morgenthau writes at p.245 that:

"[u]ntil virtually the end of the nineteenth century, aristocratic rulers were responsible for the conduct of foreign affairs in most countries. In the new age their place has been taken by officials elected or appointed regardless of class distinctions".

Morgenthau's argument boils down to insisting that the actions of states are dictated by self-interest only, therefore they do not engage in moral behaviour. Gewirth argued that to be moral an action must be determined to be good by some, any, evaluative criterion²⁹². Clearly self-interest is such a criterion. In Gewirth's wider sense therefore, even by Morgenthau's own admission, states may be behaving 'morally'.

Furthermore, even if self-interest could be ruled outside the range of legitimate 'moral' evaluative criteria, Henkin has convincingly argued that states' actions are not in fact motivated purely out of self-interest but that more orthodox conceptions of right and wrong do enter into their calculations²⁹³. Moreover, to view states' actions as exclusively motivated by self-interest, would render nothing more than mere farce all the protestations of humanitarian

He continues on p.246 that:

"[t]his transformation within the individual nations changed international morality as a system of moral restraints from a reality into a mere figure of speech ... When we say that the British Commonwealth of Nations, or even Great Britain alone, has moral obligations toward the United States or France, we are making use of a fiction. By virtue of this fiction international law deals with nations as though they were individual persons, but nothing in the sphere of moral obligations corresponds to this legal concept."

He concludes on p.247 that:

"[i]n any case, the reference to a moral rule of conduct requires an individual conscience from which it emanates, and there is no individual conscience from which what we call international morality of Great Britain or any of the other nation could emanate."

²⁹² Above, chapter 4.7.1.4.

²⁹³ L. Henkin, How States Behave, passim.

concern, international cooperation and involvement in international and regional human rights organisations. If self-interest was the only factor to determine a state's actions there would be no reason for all such protestations, for all the efforts taken by states to justify their actions as good, as in compliance with international values often expressed in terms of human rights in their manifesto sense. No doubt self-interest does play a role, but the writer concurs with Henkin's conclusion that notions of right and wrong, value statements, also help to determine the decisions states make in respect of each other.

Whether it be Morgenthau's self-interest or Henkin's somewhat more amorphous international morality, evaluative criteria are applied in the international context, just as they are in the context of personal ethics. Absence of evaluative criteria cannot therefore be identified as a difference between individuals and states which could undermine the analogy from the personal ethics setting to the world of international affairs. A state is certainly different from an individual, but in so far as regards the prerequisites for behaviour which is ethical in the sense that such terms are applied in the context of personal ethics, that is as regards volition, appropriateness of subject matter, and the existence of evaluative criteria for adjudging actions good or bad, it is submitted that states and individuals are not that different. It is suggested that in these ways they are similar enough to sustain the analogy, notwithstanding any number of differences which may distinguish the two types of entity in other regards.

In any case, there is nothing essentially personal about the classification of ethical theories as motivist, consequential, and deontological. The labels attached to them describe the nature and emphasis of the theories and bear little on the nature

of the actor applying them; the classification of theories as motivist, consequential and deontological and the observations those terms reflect are, in the writer's view, sufficiently general to apply equally well to corporate as well as personal ethical decisions.

Finally, the concept of duty is, as a matter of fact, far from absent from the world of international affairs. The imperative pact sunt servanda underlies the idea of treaties as a source of international law²⁹⁴. In addition, notwithstanding the uncertainty surrounding the content of international law's jus cogens, it has to be acknowledged that the existence of a class of rule which behooves all states to conduct themselves in a certain way, irrespective of their consent, necessarily involves the concept of duty. Anthony D'Amato has argued that treaties may at least supply evidence of the opinio juris required to generate a general rule of international law binding on all states irrespective of their consent²⁹⁵. Fensterheim has argued a similar though even broader line²⁹⁶. He argues that all the actions and statements of states may be taken into account in determining general rules of international law. As long as there is in international law a class of treaties the provisions of which impose obligations on states which are not parties to the treaties as such, one cannot argue, as a matter of fact, that the notion of duty is

²⁹⁴ Article 38 of the Statute of the International Court of Justice, loc. cit.

²⁹⁵ A. D'Amato, "The Concept of Human Rights in International Law", *Columbia Law Review*, vol.82 (1982), p.1110.

²⁹⁶ G. D. Fensterheim, "Towards an International Law of Human Rights Based on the Mutual Expectations of States", *Virginia Journal of International Law*, vol.21 (1980), p.185.

absent from international legal experience²⁹⁷.

4.7.4.7 The constructivist theory is consistent with the cultural relativist position advocated in chapter three

The constructivist theory views human rights in their prima facie, general form as constantly changing and developing. They are seen as having a central core of certainty but as in a constant state of flux around the edges. A view such as this is clearly consistent with a position of temporal relativity.

Moreover, by limiting the effective scope of such rights as are recognised in a given instance to the community chosen by the rights claimant and from which such recognition is obtained, the constructivist theory of rights generation is also consistent with a geographic relativity. It was noted above that in the case of human rights, the justification offered in support of a rights claim will normally be heavily laden with arguments of a moral nature, arguments appealing to the values and beliefs of the body from which recognition is sought. Since sharing common values and beliefs plays an important role in distinguishing one culture from another, it seems reasonable to infer that the constructivist theory of rights in so far as it is applied to human rights, is not only temporally and geographically relative, but that it is inclined to favour ordering that geographic

²⁹⁷ It is again acknowledged that there is considerable debate about the nature and sources of these aspects of the concept of duty manifested both in the international legal arena and more generally. It is beyond the scope of this paper to consider these issues. It is merely suggested that as a matter of fact the sense of duty exists in these forms, does therefore offer an at least potential solution to the debate about the relationship between rights and duties, and that the offering up of this potential solution in turn makes the constructivist school of rights theories attractive.

relativity along cultural lines.

It is submitted therefore that the constructivist theory also derives support from its compatibility with the culturally relativist position advocated in chapter 3.2²⁹⁸.

4.7.4.8 An important note about the significance of the above exposition of the constructivist approach to the origin and development of rights

The purpose of the discussion of the main generic features of constructivist rights theory in this thesis is to demonstrate that the requirement inherent in the method advocated herein for regulating international broadcasting activity, namely the requirement that an individual's entitlement to human rights not only stems from their being human but also from their performance of some volitional action, is not jurisprudentially indefensible. The description of the constructivist school's theory is fuller than is strictly required to sustain the thesis addressed by this paper. It was noted at the outset of this chapter that it is sufficient to show that on the view taken by constructivist rights theorists an individual has a human right to freedom of expression because not only he is human but also because as a result of his own volitional actions, he has taken some positive step or steps to secure them, to bring himself within its protective embrace²⁹⁹. It is submitted that this has been achieved.

It is however acknowledged that the description has gone beyond that, is more detailed than is

²⁹⁸ Dworkin's concurrence on this point has already been noted above in chapter 4.7.3.3 A.

²⁹⁹ See chapter 4.3 above.

strictly required to achieve that end³⁰⁰. In going that extra distance the writer accepts that he has touched on some difficult issues, treatment of which is neither feasible nor appropriate in the present circumstances. These issues include particularly the origin and legitimacy of international legal obligation and the nature of the concept of duty in a broader context. The extra distance has nevertheless been travelled in the interests of presenting a more coherent picture of a 'typical' constructivist rights theory. A *reasonably coherent* picture of constructivism is needed to sustain the suggestion that the method of regulating international direct broadcast activity advocated in this paper is jurisprudentially defensible. A *complete and unassailable defence* of constructivism however is neither necessary nor intended, nor perhaps is it even definitionally possible³⁰¹. The reader may decide that any aspect of the very broad version of constructivism offered here, such as the picture it paints of the correlation between rights and duties or the assumption it makes that obligation exists in an international legal context, or even the basic experiential underpinning of the entire constructivist school, is misguided. Such a conclusion may ultimately

³⁰⁰ By touching on whether the action required to 'earn' the human right to freedom of expression is required by duty, the writer has gone further than is strictly necessary to sustain the thesis. See chapter 4.3 above.

³⁰¹ It will be recalled that a constructivist rights theory is based on the norms and values which as a matter of observation do exist in a given society. The theory is 'constructed' to explain as well as can currently be achieved that existing corpus of values and norms. It does not insist that that corpus is the only or ultimately the best set of values, nor does it purport to justify them in any substantive way; it is more about how they interrelate than about why they exist, or should exist. See chapter 4.7.3.

prove to be correct; one day an absolute and indisputable set of moral norms may well be discovered by rational inquiry or be revealed to a fortunate mankind by a benevolent deity, or it may be finally demonstrated that moral norms, universal or otherwise, are entirely ephemeral. Nevertheless, it is submitted that the broad class of theories within the general constructivist camp, for the moment and on the basis of observations of the world as it currently is, does present a viable explanation, *description*, of how rights develop (as distinct from (a) the separate normative question as to whether that is the way they should develop, and (b) whether the values and norms upon which any given constructivist theory is based are themselves independently justified). It is accordingly further submitted that constructivist rights theory does therefore render the international broadcasting regime advocated in this paper jurisprudentially defensible.

4.7.5 How the constructivist theory accommodates both the traditional and contingent approaches to the origin of human rights and dispels the apparent doubt over the distinction between class two and class three programmes

The traditional view is essentially that human beings possess human rights simply by virtue of being human. The contingent theory is that they must do something to earn such rights. The constructivist theory about the generation of human rights can accommodate both of these approaches. A number of features of the constructivist theory are possessed by all human beings. From time to time all human beings experience desire, need, a sense of injustice and, for whatever reason, have feelings of obligation toward his fellow man. All are capable of responding to these stimuli by claiming. All are capable of reason and

expression, and therefore can make the choices and arguments involved in justifying their claims. Engaging in all of these activities is something which is characteristically human; claiming, choice and reasoned argument are as much part of being human as 'having legs'³⁰². To say that A is capable of performing these activities is to say that A is capable of having rights.

When he does engage in the process and secures recognition or does not have to because the activity which he is acting out is so clearly accepted as within his rights, he has rights. It is hard to envisage a biological human being who at some stage of his life does not engage in the rights creating process. Even if such a person did exist, he still cannot avoid being caught up in the rights process because as noted above, the prima facie character of the rights generated by the constructivist rights process has the effect of depersonalising rights. B can have rights which she does not want or even know about because her complement of rights is determined not only by her own participation in the on-going rights process but also, indeed primarily, by the participation therein of others before her³⁰³.

These will be labelled 'human rights' when she obtains recognition by putting their justification, usually addressed to the international community or some international organ, in terms consistent with the values expressed internationally such as for example the objects and goals embodied in the Charter of the United Nations, and in terms of the human rights in

³⁰² A. Gewirth, "The Basis and Content of Human Rights" *Georgia Law Review*, vol.13 (1979), p.1143 at p.1145.

³⁰³ See above, chapter 4.7.3.2.

the sense of 'grand rights of political rhetoric'³⁰⁴ in resolutions of the United Nations or in subordinate or other international bodies, or does not have to obtain it because recognition is clearly so likely that no one attempts to interfere with the activity at issue. Where the addressee selected is the broader international community, the label 'international human right' is appropriate. Where the same justification is put to a community within a state, it is generally more appropriate to label the rights stemming from recognition as civil or political rights, rather than domestic human rights, which term has no currency.

Thus the possession of rights per se, in their prima facie general sense, is something which not only depends on being human but which is unavoidable for any human because of his necessary participation in contemporary human society³⁰⁵ and the role played by others in the on-going process of generating and shaping rights, his historical setting as it were. Rights in this sense flow *automatically* from being human and are moreover, inalienable. C cannot alienate his human rights because they are not only his rights; the human rights which exist within a single individual are in essence a single aspect or manifestation of a broader societal function. That right of individuals in society generally as opposed

³⁰⁴ Dworkin's colourful phrase. See R. Dworkin, Taking Rights Seriously, p.93.

³⁰⁵ It has been put to the writer that it is open to any individual to 'opt out' of society by simply denying his membership in a particular group. While this may be possible in some cases involving certain types of group such as Finnis' chess tournaments. It is however submitted that an individual's membership in society at large is not similarly optional. Nor in the international context it is open to a state, in the writer's view, to 'opt out' of the international community and thereby avoid the international legal obligations incumbent on states.

to C's particular instantiation of it, will be marginally weaker for such purported rejection, but certainly cannot be destroyed by it.

At the same time however, the notion of duty could be very much part of the rights generation process. It was noted above that it is not necessary to sustain the argument in this paper to show that the action prerequisite to entitlement to the human right to freedom of expression in the international broadcasting context, is regarded as demanded by duty³⁰⁶. Nevertheless, if one did take that view, there would clearly be room for the concept of duty within the rights generation process.

It may motivate individuals to make the claims which over time will come to constitute a right. It may also be introduced during the justification phase of the process where reference is made to ethical theories, in particular to those which fall within the deontological or motivist classifications³⁰⁷. This 'duty' is in either case antecedent to recognition's erasure of the prima facie nature of the right in a particular instance. Thus it is perfectly accurate to state that the right (confirmed in its individual application in a particular instance) comes after and depends on the satisfactory execution of some duty. At the same time, if the right stemming from recognition falls within the category of the Hohfeldian claim-right, or more correctly if the bundle of rights stemming from recognition includes a claim-right in this sense, it also has a logically correlative duty; it is simultaneously founded on and correlative to duty.

The apparent incompatibility between the

³⁰⁶ See particularly chapters 4.3, 4.7.4.8 and 4.7.4.6, and footnote 298..

³⁰⁷ See chapter 4.7.4.6.

contingent and traditional theories about the origin of human rights is therefore an illusion. The traditionalists' inflexibility, perhaps stemming from the historical dominance of natural law theories in the human rights context, kept them trapped within the cause / effect mind set. The contingent theory's sympathizers within the bodies responsible for drafting the right to freedom of expression in the Universal Déclaration of Human Rights as well as in academia, failed to recognise either the inherently human and natural characteristics of the key elements in the series of events which constitutes the process by which rights are continually remodelled and reshaped, and that the social context within which the process occurs makes human rights flow *automatically* and *unavoidably* from those characteristics. Both factions failed to recognise that the concept of duty can play two distinct and not mutually exclusive roles in the rights process. The version of the constructivist theory offered in this paper therefore shows up as illusory the alleged incompatibility between the contingent and traditional theories about the origin of human rights and thereby dispels the cloud of uncertainty and doubt which that incompatibility appeared to cast over the distinction between the second and third programme classifications involved in the system proposed here for regulating international broadcasting activity.

Chapter 5

5. Some other options for regulating international direct broadcasting activity

In this chapter five alternative systems for regulating international direct broadcasting will be discussed, and their shortcomings identified. The first of these is a system based on the human right to freedom of expression but implemented through municipal legal systems employing conflicts of laws rules. The second alternative is a system implemented internationally but based on the New World Information and Communications Order. The third is a similar system but based on the Common Heritage of Mankind. The first alternative was envisaged by the United Nations Human Rights Sub Commission of Freedom of Information and the Press and the United Nations Conference on Freedom of Information. The second and third are advocated by Stewart. She incorporates both, proposing a single system based on the New World Information and Communications Order as well as the Common Heritage of Mankind. Nevertheless, Stewart offers them as two discrete pillars on which her system could be based and does not rule out the possibility that others may also be included as well. Notwithstanding that the two concepts are undoubtedly related, since they can in this way stand alone, they are treated in this chapter as two separate alternative bases upon which a system for regulating international direct broadcasting could be based. The fourth attempt examined is that embodied in United Nations General Assembly Resolution 37/92 on 10 December 1982 entitled Principles Governing The Use By States Of Artificial Earth Satellites For International Direct Television Broadcasting. The fifth method for regulating international broadcasting

is that developed in the European Community.

5.1 The system apparently envisaged by the United Nations Conference on Freedom of Information and the Economic and Social Council's Human Rights Sub Commission on Freedom of Information and the Press

The two organisations responsible for drafting the right to freedom of expression in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights were the United Nations Conference on Freedom of Information and the Economic and Social Council's Human Rights Sub Commission on Freedom of Information and the Press. It was noted in chapter two that those organisations envisaged that that human right would be given effect through the national legal systems of member states¹. The efficacy of translating the right as viewed by these bodies into an international implementational environment was also discussed. It must be asked why it is necessary to effect such a translation. Could not the international human right be applied to regulate international broadcasting through municipal legal systems?

On this approach, private international law, the conflicts of laws rules as they are called, would determine which national legal system ought to be applied to resolve disputes arising in the context of international broadcasting. International broadcasting disputes can arise in two ways. One scenario is that a population targeted by a broadcast regards it as undesirable on the grounds, for example, that it is defamatory, or prejudicial to national public morality, or harmful to the population's independent cultural development. The other scenario is that a broadcaster finds that his programmes to a particular

¹ See chapter 2.1.

target audience are being jammed by the receiving state's government and feels that his broadcast should be protected by the right to freedom of expression.

5.1.1 Scenario one

It is submitted that a regulatory regime implemented through national legal systems would not deal adequately with the problems presented in either of these scenarios. In scenario one the complainants have two choices. They can petition the courts of their own state to declare the programme outside the protective embrace of the right to freedom of expression or they can address their complaint to a court in the state from which the broadcast emanates.

5.1.1.1 Scenario one, choice one

If they choose the first option the first hurdle they must overcome is to persuade the court to take jurisdiction. In Commonwealth countries the conflict of laws rule is that jurisdiction depends on the presence of the defendant within the territory over which the court concerned has jurisdiction, or on his submission to that court's authority². Strictly applied this rule would surely almost always require a court to refuse to take jurisdiction in international broadcasting disputes.

In practice however, courts do not apply this presence or submission rule strictly³. They tend to accept other grounds for determining jurisdiction and

² See McGechan's introductory note on New Zealand's High Court Rule 219, p.237.

³ Mann is extremely critical of a strict approach to territorial jurisdiction and the rather more relaxed approach taken by courts, at least in Commonwealth countries, perhaps demonstrates a degree of sympathy with Mann's sentiments. See F. A. Mann, "The Doctrine Of Jurisdiction In International Law", *Recueil des Cours*, vol.111 (part 1, 1964), p.1 at pp.28-40.

accordingly hear a wider range of cases than the strictly applied rule would allow. In New Zealand this is reflected in the High Court rules detailing when a summons may be served on a defendant outside New Zealand. Rule 219(a) permits the service of a summons on a defendant outside New Zealand without special leave of court when the act complained of was done in New Zealand. Because leave is not required it is inferred that jurisdiction in such cases is thought to be routine. Even though the defendant is not present within the court's territorial jurisdiction, and even if he has not submitted, proceedings may still be issued against him if the act for which attempts are being made to hold him to account was done in New Zealand⁴.

A Jurisdictional problem number one: where does a broadcast occur?

The problem faced by complainants in scenario one broadcasting disputes even on this broader approach to the presence or submission rule, is that it is not clear that the broadcast was 'done' in the receiving country, for example, New Zealand. Over twenty five years ago Mann discussed how difficult it can be to determine where an event occurred and the problems this causes for territorially based concepts of jurisdiction⁵. More recently the same difficulty has been addressed specifically in relation to broadcasting.

Discussion about how to define 'broadcast', that is, at what point a broadcast can be said to be

⁴ Similar rules are operate in numerous other countries. See McGechan's note on New Zealand's High Court Rule 219, p.237f.

⁵ F. A. Mann, "The Doctrine Of Jurisdiction In International Law", Recueil des Cours, vol.111 (part 1, 1964), p.1 at p.36f.

complete, has taken place in the intellectual property context. Some writers such as Karnell⁶, believe that a 'broadcast' takes place at the point at which a programme is transmitted. This is the 'emission' theory. Others endorse the 'Bogsch' or 'footprint' theory which views a broadcast as not being complete until it has been made available for public reception. This would define a broadcast as starting in the emitting country but continuing until the signal is actually present in the receiving state's airwaves. This makes it feasible to argue that the broadcast, or at least a part of it, occurred in the receiving country, and that as an act done in that country, it is subject to jurisdiction of its courts.

National treatment rules favour the emission theory

Advocates of the emission theory argue that the Bogsch theory is inconsistent with the provisions in the Berne Convention on Copyright which relate to national treatment⁷. The rights of persons in a footprint country are to be secured by the requirement that the emitting country treat them no worse than its own domiciliaries, not by redefining the definition of 'broadcast' to require that the law of the footprint country be taken into account in the emitting country or, even more radically, to give the footprint country's courts jurisdiction. This argument is not conclusive. National treatment means that the same rules applied to locals must be applied to foreigners; it says nothing about the content of the rules. As long as the Bogsch theory's definition of broadcasting is applied to all international broadcasters

⁶ Gunnar W. G. Karnell, "A Refutation of the Bogsch Theory on Direct Satellite Broadcasting Rights", *International Business Lawyer*, June 1990, p.263-266.

⁷ Gunnar W. G. Karnell, *op. cit.* at p.265.

broadcasting from within the state to other countries irrespective of whether they are domiciliaries of the emitting state or not, the national treatment principle is adhered to just as it would be if an emission theory definition of broadcasting was imposed on all broadcasters operating from within the state. The principle of national treatment deals with a rule's application and has nothing to do with its substance which could contain the Bogsch or emission rule definition of 'broadcast'.

Compulsory licensing rules also favour the emission theory

Emission theory advocates also argue that the Bogsch theory definition of broadcast is inconsistent with the compulsory licensing provisions in article 11(2) of the Berne Convention⁸. Through the imposition of compulsory licences a state may impose restrictions on the rights of any copyright owner including a broadcaster. Article 11(2) states that a compulsory licence shall have no effect beyond the borders of the state imposing the restriction. The argument seems to be that compulsory licences may be applied to 'broadcasts', compulsory licences cannot have effect beyond the borders of the state of imposition, therefore a broadcast cannot be defined as extending beyond the borders of the emitting state. This argument also fails. Just because a restriction on rights in relation to a broadcast can only apply within the granting state, does not mean that the activity to which the restriction applies must only occur within the same borders; it just means that only that part of it which occurs within the granting state can be subject to the restriction.

⁸ Gunnar W. G. Karnell, op. cit., at p.265f.

These arguments are refutable but the uncertainty over what it is to broadcast leaves a jurisdictional problem for a domestically implemented international broadcasting regulatory regime

These arguments, even if they could not be refuted, only indirectly endorse the emission theory by criticising an alternative to it. Indeed the only argument positively in favour of the Bogsch theory seems to be that in the interests of justice a broadcaster's rights need to be afforded some protection in the footprint country. Clearly merely identifying a need, the potential for injustice to be done, does not automatically generate a right to prevent it⁹, and certainly does not require that one adopt one particular solution to addressing the issue in preference to another. On the other hand the arguments offered in support of the emission theory all appear to be manifestly spurious or are negative, and Karnell's argument¹⁰ that the rights of a broadcaster in a footprint country are adequately safeguarded by a free market and negotiation in lieu of legal protection seems to the writer quite unsustainable. At this stage all one can conclude is that very few positive arguments have been offered in favour of any definition of 'broadcast', that the negative ones are weak, and that where a broadcast may be said to be 'done' remains a moot point. As long as this state of affairs persists, jurisdiction is going to remain a problem for plaintiffs in scenario one situations who choose to seek redress in the courts of their own state.

B Jurisdictional problem number two: Sovereign

⁹ See chapter 4.7.3.2.

¹⁰ G. W. G. Karnell, *op. cit.* at p.266.

immunity

The other problem they may have to deal with is also jurisdictional. Because states are heavily involved in broadcasting¹¹, a plaintiff suing in his own country's courts to stop a broadcast which emanates from abroad and which is prejudicial to that country's public order or cultural development and so forth, will often find that the defendant is a foreign state. This introduces the additional jurisdictional problem of sovereign immunity. Even if it can be established that the act of broadcasting was 'done' in the footprint country, and therefore that its courts prima facie have jurisdiction, the principle of sovereign immunity as an exception to territorial jurisdiction may yet nip the plaintiff's hopes in the bud.

The absolute theory of sovereign immunity

There are two theories about the extent of sovereign immunity. One is the absolute theory according to which whatever a state does cannot be called into question by the courts of another state. In older decisions the absolute theory is evident in relation to actions in personam particularly. For example in the Parliament Belge it was admitted by the plaintiff that no proceedings could be issued in personam against a foreign sovereign¹². In the Charkieh Sir Robert Phillimore introduced the question of sovereign immunity and then wrote that "[t]he sovereign prince ... is exempted from the operation of this principle, absolutely, so far as his person is

¹¹ Writing in 1987 Taishoff noted for example that "... over 80 per cent of the world's television systems are government controlled". See M. N. Taishoff, State Responsibility and the Direct Broadcast Satellite, p.131.

¹² The Parliament Belge, (1880) 5P.D. 97(CA), 203 at 204f.

concerned ..."¹³.

This view was been endorsed in a number of subsequent cases¹⁴ until 1977 when Denning MR decided that international practice favoured the application of a restrictive theory of sovereign immunity, that this practice was sufficient to constitute a rule of international law, and finally that the doctrine of incorporation operated to automatically import this rule of international law into the English legal system¹⁵. It should be noted however that Lord Denning MR's comments are in fact obiter. He bases his decision in the final analysis on his finding that the Central Bank of Nigeria was not a government department, that is, not a sovereign.

Stephenson LJ in the same case evinces some sympathy for this view but again found that the defendant, the Central Bank of Nigeria was not in fact an organ of state, i.e. not a sovereign¹⁶. His comments on the merits of the restrictive doctrine of sovereign immunity are therefore also obiter.

If the absolute approach were adopted to the sovereign immunity exception to jurisdiction, a

¹³ The Charkieh, (1873)L.R.4 A.E.59 at 88.

¹⁴ Mighell v Sultan of Jahore [1894] 1 Q.B. 149 at 159 per Esher MR, Compania Merchantil Argentina v United States Shipping Board (1924) 133 L.T. 388, Baccus S.R.L. v Servico Nacional del Trigo [1957] 1 Q.B. 438, Thai-Europe Tapioca Service Ltd v Government of Pakistan, Directorate of Agricultural Supplies [1975] 1 W.L.R. 1485, The Philippine Admiral [1976] 2 W.L.R. 214(JCPC). See also I Congresso del Partido, [1983] 1 A.C. 224 (H.L.) at 261 where Wilberforce LJ writes that "[u]ntil 1975 it would be true to say that England ... continued to adhere to a pure, absolute, doctrine of state immunity in all cases".

¹⁵ Trendtex Trading Corporation Ltd v Central Bank of Nigeria, [1977] 1 All E.R. 881 (CA).

¹⁶ Trendtex Trading Corporation Ltd v Central Bank of Nigeria, [1977] 1 All E.R. 881 (CA) at 897.

plaintiff in the footprint country would be hard pressed indeed to persuade the courts of his own state to take jurisdiction in any case where the broadcaster was a foreign sovereign. Even if the act of broadcasting was found to be done in the footprint country, the sovereign immunity exception to jurisdiction would tag the plaintiff out on second base. Given the substantial level of state involvement in broadcasting world wide, the jurisdictional problem posed by the principle of sovereign immunity constitutes a serious obstacle for the plaintiff who chooses to seek a remedy in his home state's courts for broadcasting in breach of the principles established by or implicit in the international human right to freedom of expression as expressed in the International Bill of Rights.

The restricted theory of sovereign immunity

As it happens since Denning MR delivered his judgement in Trendtex Trading Corporation Ltd v Central Bank of Nigeria the restrictive theory of sovereign immunity has become more popular. Even before then it would seem that most of the international community had adopted the restrictive theory of sovereign immunity¹⁷.

The first case in which the decision was based on the application of the restrictive doctrine of sovereign immunity was I Congresso del Partido¹⁸ in 1983. In that case Wilberforce LJ affirmed "unhesitatingly" the restrictive theory of sovereign

¹⁷ I Congresso del Partido, [1983] 1 A.C. 224 (H.L.) at 261 per Wilberforce LJ. See also Trendtex Trading Corporation Ltd v Central Bank of Nigeria [1977] 1 All E.R. 881(C.A). For the United States of America's position see also the Tate Letter of 19 May 1952, 26 State Dept. Bull. 984 L.Ed.2d 321.

¹⁸ I Congresso del Partido [1983] 1 A.C. 224 (H.L.).

immunity¹⁹. While this restrictive approach to the sovereign immunity jurisdictional exception offers more hope to the scenario one plaintiff seeking redress in the courts of his home country against a foreign government engaged in broadcasting, jurisdiction in such cases will still depend on the plaintiff being able to establish that broadcasting is an actus jure gestionis. The rules for making this distinction are by no means clear.

In the earlier cases the purpose of the transaction at issue seems to have determined the character of an act as jure gestionis or jure imperii. See for example The Parliament Belge, (1880)²⁰ where reference is made in several places to the plaintiff's claim being that sovereign immunity should not apply because the ship was being used for commercial purposes. A similar assumption appears to be made in The Philippine Admiral²¹ though here the inference is less clear because in the paragraph preceding the reference to purpose as the criterion for distinguishing between acta jure gestionis and imperii, Lord Cross insists that to make the distinction one should "... consider both the past history of the vessel in question since she became the property of the foreign state and also the use to which she is likely to be put by that state in the future". Although purpose features prominently in this test, other factors going to make up the over all character of the act also play a part.

In I Congresso Del Partido determining whether an act is jure gestionis or imperii is analyzed as

¹⁹ At p.261.

²⁰ The Parliament Belge, 5 P.D. 97(CA), (1880), 203 at 219f.

²¹ The Philippine Admiral, [1976] 2 W.L.R. 214(JCPC) at 230.

involving two separate issues. The first is what constitutes the act to be assessed. In I Congresso Del Partido the action was for breach of contract and the discussion focused on whether the act was the breach which specifically gave rise to the claim or whether one had to look at the whole series of events leading up to the suit, the whole claim in context. The distinction between the whole series of actions which go to making up a contract and the act which constitutes its breach is not paralleled in a broadcasting dispute. To broadcast is a relatively simple, unitary activity compared to contract and is not naturally vulnerable to this sort of reductionist problem. However, the second issue brought out in I Congresso Del Partido is what test should be applied to the relevant act to determine whether it is *jure gestionis* or *imperii*. Wilberforce LJ formulates a test which he describes as the "ultimate" test. He writes that "... it is not just that the purpose or motive of the act is to serve the purposes of the state, but that the act is of its own character a governmental act, as opposed to an act which any private citizen can perform". This comment suggests that if "everything done ... by [the state claimed against] could have been done ..." by a trader, the act should be deemed commercial. Diplock LJ agrees with Wilberforce LJ's test and Edmund-Davies LJ concurs that the purpose of the act should not form the basis of the *gestionis / imperii* distinction.

If one applied this test in the broadcasting context, that is if one were to ask *could* the broadcast have been executed by a non state entity, clearly the answer would be in the affirmative. Broadcasting internationally is certainly within the technical capabilities of commercial organisations. On the face of the matter this would normally assist the scenario one plaintiff's attempts to get the courts of

his own country to take jurisdiction.

However, this issue is more complex than that. In spite of what Wilberforce LJ says about the test to be applied, he does not appear to actually use it. In his decision on the Playa Larga case he seems to focus heavily on the purpose of the act assessed²². In respect of the Marble Islands he apparently asked not *could* but *would* a non state have done this²³. He must be asking 'would' and not applying the 'could' test because clearly a non state *could* give sugar away free just as a non state *could* have decided to refuse to unload the cargo which would have produced the conclusion that the act was *gestionis* and therefore that there is no immunity, that is the opposite conclusion from the one Wilberforce LJ reached.

Moreover, both Wilberforce and Diplock LJ also choose to apply the test not to the claim in context, the broader picture, but to different, specific incidents within that picture. Although as noted above, this problem of what act to focus on, is not really a problem in the broadcasting context, the inconsistency between what Wilberforce LJ says and what he actually does in the case, does impact on the credibility of the test he offers.

If one were to do what Wilberforce LJ does rather than what he says, one would have to look at the purpose of the broadcast which could be either commercially motivated or intended to achieve a more 'imperii' end. Alternatively, if one were to ask not *could* but *would* a non state have broadcast in these circumstances, clearly there is much more scope to argue that the act was *jure imperii* rather than *jure gestionis*. Taking this approach to the *imperii* /

²² For example at p.268 he refers to the acts being performed for "political and non-commercial reasons".

²³ See pp.269-272.

gestionis distinction, would diminish the plaintiff's chances in the broadcasting context of persuading his own country's courts to take jurisdiction against a foreign governmental agency engaged in broadcasting into the country from without. The application of the doctrine of sovereign immunity in such cases would always be arguable, and this uncertainty, in Commonwealth countries at least, certainly poses an obstacle to an international broadcasting regulatory system implemented through national legal systems and the conflicts of laws rules.

C Jurisdictional problem number three: stay of proceedings

In Common Law countries a court may also issue a stay of proceedings even where it could on the face of the matter take jurisdiction. This poses a third problem for a plaintiff suing in the courts of his own state to stop a defendant broadcasting from outside the borders. Where there is another state which could have jurisdiction over the case, the court may issue a stay of proceedings even if the other state's courts were not currently hearing it, where that forum is the most 'convenient' place to hear the case. This forum non conveniens argument for persuading a court not to take jurisdiction was established in The Spilliada²⁴, has been applied in other cases such as McConnell Dowell²⁵ and in New Zealand has been incorporated into High Court Rule 477. Although the issue of a stay in every case will depend on the facts of that case, in the international broadcasting context there will always be another state the courts of which could take jurisdiction, namely the state from which the

²⁴ The Spilliada [1986] 3 All E. R. p.843.

²⁵ Unreported judgment, New Zealand Court of Appeal, per Cooke P., 17 December 1987.

broadcast emanates, and there is always a possibility that the claim of forum non conveniens will be put, and may therefore pose yet another obstacle for the plaintiff trying to persuade his home state's courts to take jurisdiction.

D Enforcement may be harder out of jurisdiction

Finally, of course, there is the problem of enforcement. Even if the plaintiff persuaded the court to find in his favour, enforcing the judgment in another state while not impossible can be more difficult than at home. It would be unwise to make too much of this difficulty, but it nevertheless creates another barrier at which the plaintiff's endeavours could be thwarted.

5.1.1.2 Scenario one, choice two

Suppose the plaintiff in such a case decided in view of these jurisdictional problems to address his case not to the courts of his own country, but to the courts of the country from which the broadcast emanated. In this event, some of the jurisdictional problems faced by a plaintiff suing in his own state's courts would be obviated. There could be little doubt that the act complained of, broadcasting, did occur within the territory over which the courts petitioned have jurisdiction. Whether one applied the definition of broadcasting suggested by the emission theory or the Bogsch theory discussed above, the act would take place, in substantial part at least if not entirely, within the territory of the state from which the broadcast emanates. Similarly, the courts of the state from which the broadcast emanated would not be confronted by the problem of sovereign immunity if the programme broadcast was sponsored by the government of that state. Although most countries embrace the notion of crown immunity, an aspect of the broader concept of

sovereign immunity, which would continue to cause a plaintiff difficulties, because on this scenario a foreign sovereign is not involved as defendant, the issue of sovereign immunity would not be as significant as it would be if he chose to pursue his claim in his own country's courts. The possibility of arguments for a stay of proceedings are also unlikely to arise. Subject to the impact of local crown immunity rules, there is nothing to stop a defendant from raising the forum non conveniens arguments in an attempt to secure a stay. However, this argument depends on the availability of another forum with jurisdiction. In arguing forum non conveniens a defendant would therefore be conceding that the receiving state's courts did have jurisdiction; they would effectively be estopped from denying it. Since making such a concession would be to surrender the 'home town' advantage, most defendants would clearly try to avoid this situation. Faced with the choice of defending in the courts of his own country or raising the forum non conveniens argument in favour of a stay, and having the case thrown back into the jurisdictional embrace of courts of the plaintiff's own state, the defendant is ill advised to make the application. If he has to defend somewhere, it may as well be on his own turf.

This however raises other problems which help to render a national level implementational framework for a regime to regulate international broadcasting activity unsuitable. Firstly, suppose the courts of the state from which the broadcast emanated did undertake to hear the case. The court will find itself in the very uncomfortable position of having to make decisions about values in another country, about the needs of a foreign people in terms of their independent cultural development, about such issues as what degree of restriction is appropriate in another

country in the interests of national security or to preserve public order. It is submitted that it is entirely inappropriate for the courts of country A to decide such questions in respect of country B.

Furthermore such decisions are inevitably going to be heavily charged politically, even where the defendant is not actually an organ of the emanating state, and regrettably, there is always the possibility of political interference, subtle or overt, in the judicial process. Even where no such influence is brought to bear, a decision favouring the broadcaster is almost inevitably going generate the suspicion that it was. This same argument of course applies in reverse where the case is brought before the courts of plaintiff's state. Using domestic legal systems to implement an international regulatory system obliges a choice between legal systems and inevitably raises the spectre of influence by or partiality in favour of the party whose own home country's courts are hearing the case.

Moreover, even if the courts were prepared to deal with these issues, the plaintiff has to confront the practical problems which always face someone conducting legal proceedings from abroad. The costs of bringing witnesses in from abroad, the problems of participating in proceedings in an unfamiliar legal system in a foreign country possibly in a foreign language all count against the plaintiff's chances of success. These can to some extent be obviated by employing local counsel, but not completely and it is submitted that implementing an international broadcasting regime through national legal systems is always going to put one party or the other at a disadvantage vis a vis the other. The notion of a level judicial playing field is just not feasible in a system which forces a choice between two legal systems one of which suits better the interests of a

the plaintiff and the other the defendant.

5.1.2 Scenario two

In scenario two the plaintiff is the broadcaster. His broadcast into a foreign country is being jammed by the government of the receiving state and his claim under the regulatory regime proposed is essentially that his broadcast lives up to the standards of accuracy and objectivity which he is duty bound to meet, and that his programme is therefore entitled to protection against interference by the right to freedom of expression. Again the plaintiff has two options. He can choose to sue in the courts of the receiving state or to take his case in his own country's legal system.

5.1.2.1 Scenario two, choice one

If a broadcaster attempts to stop jamming by a receiving state by appealing to the receiving state's courts for recognition and enforcement of the rights to which he would be entitled under the international regulatory regime proposed in this paper, he would not confront the same jurisdictional problems as face a scenario one plaintiff addressing his own country's courts. Clearly the defendant, the government orchestrating the jamming is present within the territory over which the court petitioned has jurisdiction. Secondly, the problem of sovereign immunity also does not arise because the court petitioned is not faced with a foreign sovereign as defendant. Nor is the question of a stay is unlikely to arise because to get a stay requires that there be a foreign court with possible jurisdiction, and in this case with the defendant present in the forum addressed and the act complained of (the jamming) done entirely within the same forum's jurisdiction, there is little to suggest that the broadcasting state's

courts should take an interest in the matter. As far as enforcement is concerned, since the jamming occurs within the forum's jurisdiction a positive result for the plaintiff will not face problems associated with the enforcement of foreign judgments.

Nevertheless, a scenario two plaintiff presenting his case to the courts of the receiving state, still has to overcome the problems which present themselves to any plaintiff taking a case in a foreign legal system and which were touched on briefly above.

A more serious problem however is presented by the terms of the International Covenant on Civil and Political Rights. The implementation of an international broadcasting regulatory system through domestic legal systems is predicated on the assumption that article 2(1) of the International Covenant on Civil and Political Rights requires states to extend the right to freedom of expression as presented in article 19 not only its own people but also to foreigners. This assumption is false.

Each state party to the International Covenant on Civil and Political Rights undertakes in article 2(1) "... to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognised in the present covenant ..."²⁶ Quite clearly, when a dispute arises about a programme broadcast into one state from outside its borders, the broadcaster is not "within its territory" nor "subject to its jurisdiction". The receiving state is therefore under no obligation to extend to the broadcaster any of the protection offered by the right to freedom of expression which it is required to guarantee by legislative or other means to the people within its

²⁶ International Covenant of Civil and Political Rights, article 2(1), Human Rights: A Compilation of International Instruments, p.1 at p.19. Emphasis added.

own borders. States could deny a foreign broadcaster any protection by the right to freedom of expression without breaching its obligations in terms of the International Covenant on Civil and Political Rights.

5.1.2.2 Scenario two, choice two

If a scenario two plaintiff decided to take his case before his own country's courts, he would find himself in jurisdictionally deep water. The defendant is not present and is unlikely to submit. The act complained of is entirely performed in another jurisdiction and is almost certainly conducted by a foreign sovereign. Whatever enthusiasm the plaintiff can engender in the court to take jurisdiction will have to overcome the court's natural disinclination to deal with questions pertaining to matters such as the reasonable requirements of national security, public order and the independent cultural development of a foreign state. The only factor which connects the case to the broadcaster's state is the presence of the plaintiff, and this is unlikely to overwhelm these difficulties just mentioned.

5.1.3 Conclusion

It is submitted in conclusion that for the reasons given above, to implement a system for regulating international broadcasting activity through national legal systems would be neither appropriate nor feasible. International broadcasting is not a subject which lends itself to such implementation. The features of the system proposed based on the international right to freedom of expression are simply incompatible with the nature of existing rules relating to jurisdiction. Since jurisdiction is a consequence of the doctrine of state sovereignty, states are unlikely to respond positively to attempts to undermine these rules. To accept such an attack

would be to surrender more of their sovereignty than states are currently prepared to do. It is submitted that to be feasible the system proposed must be implemented at an international level. An international system does not advantage one party over the other, avoids the suggestion of influence being brought to bear, and gives the successful plaintiff access to all the enforcement mechanisms available at international law. Moreover, by using the international legal system one neatly avoids having to extend the existing scope of state sovereignty as reflected in the rules pertaining to jurisdiction, that is the rules which determine the boundaries between competing legal systems. Implementing a new regulatory regime for broadcasting in the international legal system would not be novel. Lots of treaties are entered into all the time and while all of these to some degree involve the surrender of a little bit of sovereignty in the sense that they impose restrictions on what a state can do in certain situations, such concessions are regarded as acceptable. The modifications which would have to be overcome to implement the system through domestic legal systems by contrast would be relatively radical in jurisdictional terms and more difficult for the international community to accept, indeed prohibitively difficult.

5.2 The Stewart System

Another regulatory option is to be found in the work of M. LeSeur Stewart. Her energies have focused narrowly on the regulation of international direct television broadcasting by satellite. This excludes radio broadcasting as well as any broadcasting across borders which does not employ satellite technology. In the writer's view this restricted approach is

unwarranted²⁷, but the system she proposes, in as much as it is designed for what amounts to a microcosm of the broader broadcasting problem, still offers an interesting alternative to both the regulatory regime advocated in this paper and the municipally implemented version of it stemming from the International Covenant on Civil and Political Rights discussed above.

Stewart writes that:

"... that there must be a common basis of agreement on which to establish and begin to build the operation of international direct television broadcasting by satellite and a fundamental standard to this effect should be incorporated into the basic legal instrument governing this activity."²⁸

She identifies the basic legal instrument governing international direct television broadcasting by satellite as the Principles Governing the Use by States of Artificial Earth Satellites for International Direct Television Broadcasting (the 'Principles')²⁹. She offers as the "common basis of agreement" on which to base her regime an interesting admixture of the principles represented by the New World Information and Communications Order and the Common Heritage of Mankind³⁰. She writes that these two concepts are widely accepted by the international community and so are likely to be acceptable to all and broad enough to encompass the diverse interests of all the participants in the international television

²⁷ See below chapter 5.2.1.

²⁸ M. LeSueur Stewart, To See the World: The Global Dimension in International Direct Television Broadcasting by Satellite, p.61.

²⁹ Op. cit. at p.3.

³⁰ M. L. Stewart, op. cit. at pp.66-91.

broadcasting debate³¹. There are of course two issues here. One is the level at which the regulatory system she advocates should be adopted, and the other is the principle or principles on which the substance of the regime should be based (Stewart's common basis of agreement).

5.2.1 International adoption and implementation

Stewart argues that the regulatory system which she advocates should be adopted at the global level through modifications to the Principles. She gives a number of reasons for this global approach. Firstly, she suggests that the nature of the technology involved is consistent with a global approach³². It is pertinent at this point to recall that Stewart is dealing exclusively with programmes broadcast by satellite. The argument seems to be that satellites are involved, and satellites are equipment by nature international, therefore regulation of the programmes which they transmit should also be similarly international. One can quite plausibly argue that the means by which a programme is transmitted is entirely irrelevant in a discussion about the level at which its content should be regulated. If one state broadcasts material to incite civil disorder and violence in another, why should it matter one iota whether it does so by satellite or by terrestrial means? It could also be noted that satellites do not have to be used internationally. The SITE experiments for example used satellites to broadcast from main centres in India to remote villages within that

³¹ See chapter 5.2.2 below.

³² M. L. Stewart, op. cit. at p.51 where she writes that "[s]pace satellite technology is capable of transcending national and regional geographic boundaries ...". See also p.33 "... IDTBS technology is inherently global in nature ...".

country's borders³³. It is also true that what is being sought is not a system to regulate the use of satellites, but a system for regulating, in Stewart's case, international direct television broadcasting, and that to focus on the means of transmission is merely to divert one's attention from the real issue, namely, the programmes broadcast.

Nevertheless, it is conceded that satellites are generally used to transmit signals from one country to another rather than domestically³⁴, and that this does give satellites an international flavour. International broadcasting is 'international' by definition, and this both supports an international solution to the problems associated with that activity, and characterises satellites, by virtue of their involvement in that activity, as 'international' technology. One cannot state therefore that the involvement of satellites in international broadcasting means that international broadcasting ought to be internationally regulated. The involvement of satellites is symptomatic of the international nature of international broadcasting. It does not cause it in any way, but inasmuch as it is reflective of the international character of the activity itself, the involvement of satellites does constitute an

³³ See A/AC.105/289, 10/6/81, which contains a report on the SITE experiments and their success. See also A/AC.105/83.

³⁴ Some large countries use satellites internally. Australia for example uses the AUSSAT satellite system principally to broadcast to the far flung reaches of its own territory (see the primary footprint areas listed against the AUSSAT entry in the World Radio TV Handbook 1991, p.401f). It was reported in 1982 to COPUOS that 87% of the USSR too received internally broadcast transmissions via satellite (A/AC.105/308 Add.1, 3/8/82). Nevertheless, footprint information in the 1990 World Radio TV Handbook (pp.401-414) though limited does demonstrate the tendency for satellites to be used for broadcasting from one state to another, rather than within the borders of a single state.

observable manifestation of that character and therefore does tend to support an international approach to the adoption of a regulatory system.

Secondly, Stewart also argues, convincingly in the writer's view, that the system ought to be adopted globally because the potential benefits are global, and because the problems to be overcome in relation to the regulation of the activity are essentially global³⁵. Again it is conceded, and in all probability Stewart would also, that there is no cause / effect relationship between the global nature of the benefits likely to stem from the regulation of international broadcasting activity, or the problems to be overcome, and the adoption of a scheme at the international level. Nevertheless, it is submitted that Stewart is correct in her assertion that the benefits of such regulation are international and this certainly provides an incentive for all nations to find a workable regulatory system, and the resulting involvement of the international community certainly tends, in the writer's view, to make an internationally adopted regulatory system more likely³⁶. Similarly, the problems to be overcome in developing such a system are indeed of an

³⁵ M. L. Stewart, op. cit. at p.51 "This global potential should not be disaffirmed ..."; see also p.33 where Stewart writes that international direct broadcasting "... is unique in its ability to point out the global potential of this new activity and the global opportunities it can bring to the worldwide general public", and at the same page "[t]here are uniquely global problems, issue and events for which solely national, bilateral or regional efforts to resolve are not enough".

³⁶ See A/AC.105/219, 15/5/78, p.36f where the USSR's delegate to COPUOS discusses the potential benefits for all countries, especially the lesser developed nations, of international direct broadcasting, and the potential problems. For similar views see A/AC.105/289, 10/6/81, A/AC.105/290, A/AC.105/292, 17/7/81.

international character, issues such as state sovereignty and human rights, and while again this does not logically require that a system designed to regulate trans-border broadcasting be adopted internationally, it certainly makes such an approach more probable.

Stewart also plausibly argues that a global system was envisaged by the bodies involved in attempting to develop a system for regulating the activity in question³⁷. She argues that this intention was overtaken by the problems of trying to develop an entirely negative, prohibitive scheme for regulating international direct television broadcasting (trying to compile a list of programme subject matter which was universally accepted as unacceptable)³⁸. Not only

³⁷ M. L. Stewart, op. cit. at p.34 "[a] global basis for satellite broadcasting was initially envisioned by the General Assembly"; p.39 "[o]ther forums within the United Nations system, specifically the General Conference of UNESCO and intergovernmental conferences under UNESCO's auspices have also adopted resolutions recognizing a global dimension to communication"; p.42 "... provisions of diverse international legal instruments setting forth the global potential and scope for communication further illustrate an historical legal basis for the express recognition of a global approach to communication ...".

³⁸ M. L. Stewart, op. cit. at p.46:

"A global scope for IDTBS is conceivable when the purposes and objectives for IDTBS programme content are universally seen as "positive" rather than as "negative". The Purposes and Objectives for IDTBS set forth in the Fourth Report of the WG on DBS were all positive; the fears and apprehensions concerning IDTBS were set forth therein under Programme Content and other subject areas. By the fifth and final Session of the WG on DBS the controversy surrounding free flow of information vs. national sovereignty, a separate topic in and of itself epitomizing the fears and apprehensions of the receiving States, was also being discussed under the subject area heading of Purposes and Objectives as well

would a smaller group of states have a better chance of reaching agreement on this list³⁹, but also because most international direct television broadcasting activity in the foreseeable future is unlikely to affect lesser developed countries because of the level of technological and economic development required to pick up such programmes⁴⁰, a regional approach would again be better, at least initially. Thus what we have ended up with is a definition of international direct television broadcasting which is set "... in terms of geographical coverage rather than programme content"⁴¹. Stewart is critical of this approach⁴² and evidently believes that the original intention of the international community prior to their diversion also supports the international adoption of a solution to the little part of the international direct broadcasting debate with which she deals. Certainly it is possible to argue that whatever the international community originally envisaged is not important, and that what counts is that they now view a scheme adopted at the regional or even sub-regional level as the most feasible. After all there is nothing to

as Programme Content. This tended to focus the discussion during the initial designation of subject areas for IDTBS Principles on the everpresent dichotomy of free flow of information vs. national sovereignty, thus, inhibiting the WG on DBS from going forward with its attempt to concentrate in the Purposes and Objectives Article on the positive benefits that the new technology could and should bring." (Footnotes omitted).

³⁹ M. L. Stewart, *op. cit.* at p.34.

⁴⁰ *Ibid.*

⁴¹ M. L. Stewart, *op. cit.* at p.60.

⁴² *Ibid.*, "[a] revolutionary technological activity such as IDTBS, with potentially revolutionary benefits, demands more from the United Nations".

prevent the international community from changing its mind if after due consideration it decides that its initial response to a particular problem was misguided. However, the point is that the community has not consciously changed its mind; it has just drifted away from its original focus, distracted by other factors which are themselves neither carved in stone nor necessarily require a regional or sub-regional approach to regulation. The original focus may well still be the conscious preference of the international community and indeed that the debate has continued in international organisations such as the Committee on the Peaceful Uses of Outer Space and the United Nations Economic, Social and Cultural Organisation, rather than being dispersed to regional or sub-regional organisations for consideration suggests that a global approach may well still be seen as the best option. Also, as Stewart notes⁴³, the global nature of the problems to be overcome and the benefits likely to accrue from the solution has been reiterated regularly in these international bodies. Finally, it should be recalled that insofar as direct television broadcasting by satellite is concerned, notwithstanding the distraction caused by the international community's probably unconscious preoccupation with a negative approach to the international broadcasting question, the Principles were nevertheless still adopted by a United Nations General Assembly resolution. In spite of all the difficulties involved with trying to secure consensus at that level for an essentially negative, prohibitive regulatory system, the international community still chose to adopt the Principles by means of a multilateral treaty within the General Assembly.

Although she does not deal with them it is also

⁴³ M. LeSueur Stewart, *op. cit.* part one chapter two pp.33-60.

timely to recall the problems confronting a system based on laws created at a national level discussed above⁴⁴.

The writer therefore tends to agree with Stewart that whatever regulatory system is adopted to govern international broadcasting, it should be adopted at the international level. This is not, of course, to insist that the system so adopted should necessarily be *implemented* at a global level. Indeed the writer is of the view that a system adopted internationally but implemented regionally or sub-regionally is just as viable as, and indeed preferable to one which functions exclusively at the global level.

Firstly, it seems unnecessary to bring in the whole international community on every broadcasting dispute. Some questions may only concern two countries or a small group of countries. For example, in a dispute between Bolivia and Chile it has to be asked what the point is in involving members of the international community such as Rumania, Iran or Mozambique. It is submitted that such involvement would be both unnecessary and potentially unhelpful.

Secondly, permitting the implementation of the system at the regional or sub-regional level where that is in keeping with the nature of the facts in issue, or for global implementation where the interests of a larger portion of the international community is involved, allows for greater sensitivity to local needs and values, and for more flexible solutions to disputes.

Thirdly, allowing a complainant in a dispute to select the forum in which he wishes to put his case accords with the important role played by choice in the constructivist rights theory advocated in chapter four.

⁴⁴ See chapter 5.1.

Fourthly, the system advocated in this paper is based on the human right to freedom of expression, and allowing for implementation at a less than global level is consistent with the existence of a range of regional human rights organisations to develop and apply concepts of human rights with special reference to regional conditions and needs.

In conclusion therefore, the writer agrees with Stewart that international adoption is desirable, but feels that a strictly global implementation of the regulatory system is less appropriate than allowing implementation at a more restricted level where the circumstances permit such an approach.

5.2.2 The substance of the regulatory system

Stewart offers as the "common basis of agreement", on which to base the scheme she advocates for regulating international direct television broadcasting, an interesting admixture of the principles represented by the New World Information and Communications Order and the Common Heritage of Mankind. These two concepts constitute the substance of the regulatory regime she advocates. She writes that both the Common Heritage of Mankind principle and the New World Information and Communications Order are widely accepted by the international community and are therefore likely to be acceptable to all and broad enough to encompass the diverse interests of all the participants in the international television broadcasting debate⁴⁵. In practical terms Stewart's approach would see the propriety of the content of an internationally broadcast programme being determined by reference to a series of principles based on these

⁴⁵ Stewart writes that both concepts "... have presently achieved a sufficient level of international agreement and acceptance to be incorporated into the IDTBS Principles", op. cit. at p.68.

two concepts. A programme would be measured up against these standards and if it survived scrutiny it would be deemed acceptable. If it did not, the opposite conclusion would be reached. It is submitted however that neither of these concepts provide a suitable base for an international direct broadcasting regulatory system.

5.2.2.1 The New World Information and Communications Order

The New World Information and Communication Order (NWICO) is essentially a package term for the response of the lesser developed world to what they perceive as the inequitable consequences of the developed world's domination of the international broadcast media. Stewart writes that a "... NWICO is viewed as an equitable remedy to the imbalance in and distortion of the media coverage of developing countries and world issues and events"⁴⁶. Cate described it as a call "... for an international information flow that is not only free, but also balanced"⁴⁷. Mustapha Masmoudi stated that for the developing countries the NWICO is "... the right of each nation to utilize its own communication system to protect its sovereignty, defend its political, moral and cultural values, and communicate its interests and aspirations to the world"⁴⁸. Fisher views it as "... an effective rejection of the concept of free information flow (to the extent that this concept would permit a unilateral

⁴⁶ Ibid.

⁴⁷ F. H. Cate, "The First Amendment and the International "Free Flow" of Information", Virginia Journal of International Law, volume 30 (1990), p.371 at p.372.

⁴⁸ M. Masmoudi, "The New World Information Order and Direct Broadcasting Satellites", Syracuse Journal of International Law and Commerce, volume 8 (1981), p.323 at p.329.

flow of information across national frontiers) and advocacy of a balanced flow of information"⁴⁹. The New World Information and Communications Order is in effect a demand by a significant portion of the international community that the free flow of information be balanced by a raft of other interests such as political sovereignty, cultural independence and equitable access to limited natural broadcasting resources. The debate has been aired in a number of international fora. It is submitted that in none of these do proceedings demonstrate a degree of consensus on the New World Information and Communications Order anywhere nearly sufficient for it to serve as the basis of a practical system for regulating international broadcasting.

The concept of the NWICO developed primarily in UNESCO⁵⁰. Cate describes the response of the United States to the initial development of the concept as one of "little interest"⁵¹. However, the call for the introduction of the NWICO persisted, particularly after the publication of the MacBride report in 1980⁵², prompting discussion in the United States House Committee on Foreign Affairs⁵³, legislation withholding that country's contributions to UNESCO's

⁴⁹ D. I. Fisher, Prior Consent to International Direct Satellite Broadcasting, p.184.

⁵⁰ J. J. Savage and M. W. Zacher, "Free Flow versus Prior Consent: The Jurisdictional Battle Over International Telecommunications", International Journal, vol.42 (1987), p.342 at p.361.

⁵¹ F. H. Cate, *op. cit.* at p.373.

⁵² Published as Many Voices, One World, (1980).

⁵³ Hearings Before the Subcommittee on Human Rights and International Organizations and on International Operations of the House Committee on Foreign Affairs, 98th Congress, 2nd session 13-17 (1984).

funds⁵⁴, and ultimately the complete withdrawal of the United States from the organisation⁵⁵. Singapore and the United Kingdom also withdrew a year later⁵⁶. The United States at withdrawal contributed 25% of the organisation's funds and the United Kingdom, when it terminated its membership, 4.61%⁵⁷.

In the World Administrative Radio Conference held at Geneva in 1985 (the so called 'Space WARC') under the auspices of the International Telecommunications Union, the NWICO again came to attention. This time it manifested itself as an argument over whether limited natural broadcasting resources, in particular satellite sites on the Geostationary Orbit, should be distributed on the basis of first come first served to maximise the use of the resource, thereby maximising international information flow, or whether the less developed countries should be able to have some sites reserved to guarantee them access for when they had developed enough technologically to use them. In this case the interest by which the free flow principle was to be balanced was equitable access to limited natural resources. Staple writes of "... almost 4 weeks of deadlock on the key issues ..." ⁵⁸ and of a "... mounting protest from the nonaligned group ..." ⁵⁹. At

⁵⁴ Department of State Authorization Act, Fiscal Years 1982 and 1983, Public Law No.97-241 [S. 1193]; August 24, 1982, para 109(a), 96 STAT. 276.

⁵⁵ New York times, 31/12/84, section 1, p.3 "Unesco Head Denounces U.S. Delegate".

⁵⁶ A Chronology of UNESCO 1984-1987, Paris, December 1987, LAD.85/WS/4 Rev, p.44.

⁵⁷ A Chronology of UNESCO 1984-1987, Paris, December 1987, LAD.85/WS/4 Rev, p.92.

⁵⁸ G. C. Staple, "The New World Satellite Order: A Report From Geneva", American Journal of International Law, volume 80 (1986), p.699 at p.713.

⁵⁹ Ibid.

the end of the conference the Western Developed countries had made a grudging theoretical concession to the equitable access principle, but had secured in practical terms the status quo in respect of the bulk of the radio spectrum, and both the United States and Great Britain made it quite clear that they would make no financial contributions to any practical implementation of the equitable access principle⁶⁰.

Stewart cites⁶¹ two United Nations resolutions as evidence that the notion of a NWICO has been accepted within the United Nations General Assembly⁶². She also cites a report to the General Assembly by the Committee to Review United Nations Public Information Policies and Activities in 1979 and she writes that following General Assembly Resolution 33/115 and 34/182 "... the United Nations, each year thereafter, in resolutions adopted by the General Assembly on questions relating to information, has reaffirmed the importance of the establishment of a NWICO ..."⁶³. She also cites in footnotes an impressive number of UNESCO resolutions⁶⁴. There are a number of problems with this evidence. Firstly, of course, UNESCO resolutions do not indicate acceptance of the concept of a NWICO by the General Assembly. Secondly, the perennial reaffirmation of a NWICO is supported by references to documents dated up to no later than 1985, significantly the year that the western developed countries expressed their opposition to the concept of

⁶⁰ G. C. Staple, op. cit. at pp.717-718.

⁶¹ M. L. Stewart, op. cit., at pp.70 and 73.

⁶² General Assembly Resolution 33/115B (18/12/78), 33 U.N. GAOR Suppl.45 at 72, U.N. Doc. A/33/45 (1978) and General Assembly Resolution 34/182 (18/12/79), 34 U.N. GAOR Suppl.46 at 83, U.N. Doc. A/34/46 (1980).

⁶³ M. L. Stewart, op. cit., p.73.

⁶⁴ M. L. Stewart, op. cit., footnote 192.

equitable access at the gruelling Geneva Space WARC, the year following the United States' withdrawal from UNESCO due to its opposition to the developments occurring therein in relation to the NWICO, and the year Singapore and Great Britain withdrew for similar reasons. It would seem therefore that the perennial endorsement of the NWICO concept in the General Assembly is not quite as perennial as Stewart suggests. That leaves a single General Assembly resolution each year from 1979, when, according to Stewart⁶⁵, the concept first appeared within the General Assembly, until 1985. It is submitted that this a fairly weak foundation on which to base a claim that the concept of a NWICO has widespread current support within the General Assembly. This is especially so given that during those early years the western developed countries' understanding of the significance of the concept was still developing⁶⁶.

It is accordingly submitted that Stewart's assertion that the notion of a NWICO has "... presently achieved a sufficient level of international agreement and acceptance to be incorporated into the IDTBS Principles"⁶⁷ is difficult to sustain. The "... increasing recognition and acceptance within the United Nations of the need for a NWICO in the conduct of international mass media communications"⁶⁸ is not as advanced as she would have it and it is submitted that her acknowledgement that the NWICO is still an "evolving legal concept"⁶⁹ is heavily understated. In the writer's view, the NWICO has achieved an

⁶⁵ M. L. Stewart, op. cit., p.70.

⁶⁶ F. H. Cate, op. cit. at p.373.

⁶⁷ M. L. Stewart, op. cit., p.68.

⁶⁸ Ibid.

⁶⁹ Ibid.

acceptance by the international community nowhere nearly widespread enough to constitute the basis of a system to regulate international broadcasting activity with any hope of practical operation.

Moreover, the concept is not comprehensive enough to deal with all programme types. Stewart tacitly acknowledges this in trying to extend the scope of the NWICO to include not just news but also educational material⁷⁰. Even broadened to this extent however, the NWICO concept would not provide any basis for regulating programmes broadcast purely to entertain. It also makes no reference to how programmes which are defamatory, propagandist, or prejudicial to national order or security should be treated. This also renders it unsuitable as a basis for regulating international broadcasting activity.

Finally, even in its most developed form, as embodied in UNESCO documents for example, it is couched in most imprecise terms. It refers to imbalances and inequalities in the existing order, to the desirability of replacing it with one based on "equality, justice, and mutual benefit ..."⁷¹, and to the *possibility* and desirability of *studies* to establish underlying principles which *could* serve as basis for establishing a NWICO⁷². It is submitted that at this level of generality the NWICO, even if it was universally endorsed and even if one were to ignore its rather limited scope, would be of little practical value in a search for a reasonably concrete foundation for a workable international broadcasting regulatory system. The concept has simply not yet descended out

⁷⁰ M. L. Stewart, op. cit., pp.77-85.

⁷¹ UNESCO Resolution 4/19 (1980), article 14(a) (x).

⁷² United Nations General Assembly Resolution 35/201 (16/12/81), article I(2), U.N. GAOR Suppl.48 at 93f, UN Doc. A/35/48 (1981).

of the diplomatic ether into the field of legal practicality.

5.2.2.2 The Common Heritage of Mankind

The other element of Stewart's basis for the substance of her scheme for regulating international direct television broadcasting activity by satellite is the Common Heritage of Mankind. Stewart argues that like the NWICO the Common Heritage of Mankind is a concept which has "... presently achieved a sufficient level of international agreement and acceptance to be incorporated into the IDTBS Principles"⁷³. The writer again believes Stewart's assertion is overstated and that the Common Heritage of Mankind is unsuitable as a substantive foundation for an international broadcasting regulatory system.

The meaning of the common heritage of mankind is not clear. This of itself does not assist Stewart's case. Nevertheless, Goedhuis does state that:

[a]lthough ... the import of this term is far from agreed upon, the following basic implications of this concept are generally recognized: first, that the area to which it applies cannot be appropriated; second, that it requires a system of management in which all countries share; third, that it requires an active sharing of benefits of exploration of the resources between all countries; and fourth, that it requires the dedication of the area to exclusively peaceful purposes."⁷⁴

This analysis has been followed by later writers⁷⁵.

⁷³ M. L. Stewart, op. cit. at p.68.

⁷⁴ D. Goedhuis, "Some Recent Trends in the Interpretation and the Implementation of the Rules of International Space Law", Columbia Journal of Transnational Law, vol.19 (1981), p.213 at p.218f.

⁷⁵ See for example A. Kiss, "The common heritage of mankind: utopia or reality?", International Journal vol.40 (summer 1985), p.423 at p.424; B. Larschan & B. C. Brennan, "The Common Heritage of Mankind Principle

Stewart argues that this concept has been widely accepted. She cites for example the Chilean delegate to COPUOS who suggested that the concept was applicable to international law generally⁷⁶, and Kuwait referred to it as "... in essential part of the progressive development of international law in all areas which lie beyond the limits of national jurisdiction"⁷⁷. Kiss however, notes that "... some of the most important states considered it unrealistic and even dangerous ..."⁷⁸. He also writes that "... there has certainly been an ebb in the support for the concept of common heritage, just as there has been less support for other generous and altruistic ideas which played an important role in the developments of the 'sixties and 'seventies"⁷⁹. Taylor has written in respect of the common heritage of mankind as a principle of customary international law that "... the

in International Law", Columbia Journal of Transnational Law, vol.21 (1983), p.305 at p.305; C. Christol, The Modern International Law of Outer Space at p.286, n11; Flemming, Du Charme, Jekhu and Longman, "State Sovereignty and the Effective Management of a Shared Universal Resource: Observations From Examining Developments in the International Regulation of Radiocommunications", Annals of Air & Space Law, vol.10 (1985), p.327 at 330.

⁷⁶ A/AC.105/C.2/SR.289 (1978) at p.4.

⁷⁷ A/C.1/PV.1978 (1973) at p.672. It is interesting to note that by 1977 Kuwait's view of the level of acceptance enjoyed by the common heritage of mankind principle was rather more measured. Mr Imam commented during debates in COPUOS that industrially advanced states were reluctant to accept the application of the principle. See A/C.1/32/PV.41 at p.26.

⁷⁸ A. Kiss, "The common heritage of mankind: utopia or reality?", International Journal vol.40 (summer 1985), p.423 at p.432.

⁷⁹ Op. cit. at p.437.

only certainty is uncertainty."⁸⁰ Goedhuis notes that with its requirement that all nations should benefit in the proceeds of the exploitation of an area constituting the common heritage of mankind, the concept has been labelled "a system of international socialism ..."⁸¹. Larschan and Brennan assess the standing of the concept in customary international law and write that:

"[o]ne must therefore conclude that no *opinio juris* has emerged on the CHM. It could even be argued that, at this time, the CHM as a legal concept is dead."⁸²

In a footnote to the passage just quoted, they state that:

"[p]arenthetically, one must add that if custom is measured by practice, then the developed states' position is clearly favored. They alone have exploited or have the capability to exploit the benefits of space, the seabed or Antarctica. It is almost tautological to say, therefore, that theirs is the only practice. No practice favors the third world position."⁸³

Smith notes that "[i]f such a CHM regime had been applicable during the exploration of Earth, this author doubts that Columbus would ever have received

⁸⁰ P. E. Taylor, International Law and the Greenhouse Effect: Danger or Opportunity, p.241.

⁸¹ D. Goedhuis, "Some Recent Trends in the Interpretation and the Implementation of the Rules of International Space Law", Columbia Journal of Transnational Law, vol.19 (1981), p.213 at p.231f.

⁸² B. Larschan & B. C. Brennan, "The Common Heritage of Mankind Principle in International Law", Columbia Journal of Transnational Law, vol.21 (1983), p.305 at p.336.

⁸³ Loc. cit., n114

financial backing"⁸⁴. The common heritage of mankind prompted the United States to withdraw from negotiations in respect of the Law of the Sea Convention⁸⁵.

Dangerous, dead, unrealistic, socialism writ large, wanting in opinio juris and unsupported by practice; in the writer's view this does not paint a picture of a concept which has "... presently achieved a sufficient level of international agreement and acceptance ..."⁸⁶ to be used as the substantive base for an international direct broadcasting regulatory system.

All the documents which Stewart offers to evidence her claim that the common heritage of mankind principle is widely accepted within the international community, consist of documents relating to the exploration and exploitation of outer space. Besides the fact that the common heritage concept is, as noted in the preceding paragraphs, ill-defined and a subject of considerable controversy, there are two other problems with Stewart's argument, and both relate to this evidence.

Firstly, it is submitted that the application of the common heritage principle to activities in outer space is far from certain. Therefore, even if the principle were to be generally accepted in other international legal contexts such as in respect of the Law of the Sea or Antarctica, its application in relation to space would still be dubious.

⁸⁴ M. L. Smith, "The Commercial Exploitation of Mineral Resources in Outer Space", chapter 6 in Space Law: Views of the Future, p.45 at p.55.

⁸⁵ R. A. Goldwin, "Common Sense vs. "The Common Heritage"", chapter five in Law of the Sea: U.S. Policy Dilemma, p.59 at p.59.

⁸⁶ M. L. Stewart, op. cit. at p.68.

International efforts to regulate activities in space focus on activities on the moon and other celestial bodies, on outer space itself, and on the geostationary orbit. The Moon Treaty⁸⁷ purports to regulate the exploration and exploitation of the moon. It expressly makes the moon part of the common heritage of mankind⁸⁸. However, the treaty took eight years to establish, five years to secure the five signatures needed to become operative in 1984, and to date only thirteen states have signed it altogether. Only seven of those have ratified it since then, and as at 31 December 1989 there had been no further signatures or ratifications since 27 February 1986⁸⁹. Moreover, the principle is very loosely defined in the treaty⁹⁰. Finally, if one applies the four parted test devised by Goedhuis quoted above for the common heritage of mankind, it appears that notwithstanding the express assertion that the moon is the common heritage of mankind, it does not make the grade in practical terms. Although the parties agree to establish an international management regime⁹¹ to ensure the 'equitable' distribution of the benefits⁹² of activities on the lunar surface, no such scheme is in fact established by the treaty. Furthermore, the treaty prohibits the acquisition of property rights

⁸⁷ Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, 5/12/79, U.N. Doc. A/RES/34/68.

⁸⁸ Article XI(1).

⁸⁹ Multilateral Treaties Deposited with the Secretary General: Status as at 31 December 1989.

⁹⁰ M. L. Smith, "The Commercial Exploitation of Mineral Resources in Outer Space", chapter 6 in Space Law: Views of the Future, p.45 at p.52.

⁹¹ Article XI(5).

⁹² Article II(7)(d).

over natural resources "in place" on the moon's surface⁹³, but does not stop a state from obtaining such rights once the resource in question has been removed. Goedhuis believes this to be in conflict with the facet of the common heritage which prohibits appropriation⁹⁴. Taylor argues that non appropriation is not an essential element of the common heritage of mankind principle properly viewed in its historical and jurisprudential context⁹⁵. She does however accept that the international community does not currently embrace this broader approach to the principle but views it more narrowly as an issue relating to property rights and territorial sovereignty⁹⁶. Therefore notwithstanding the Moon Treaty's express reference to the common heritage of mankind, the absence of machinery to deliver the equitable distribution of benefits arising from the exploitation of the lunar surface and the dubious practical effect of the version of the non appropriation principle espoused in the Moon Treaty, must make the assertion that the moon should be the common heritage of mankind seem rather hollow and wanting in practical terms. Therefore, it is submitted, even if the concept of the

⁹³ Article XI(3).

⁹⁴ D. Goedhuis, "Some Recent Trends in the Interpretation and the Implementation of the Rules of International Space Law", *Columbia Journal of Transnational Law*, vol.19 (1981), p.213 at p.224. See also B. Larschan & B. C. Brennan, "The Common Heritage of Mankind Principle in International Law", *Columbia Journal of Transnational Law*, vol.21 (1983), p.305 at p.329.

⁹⁵ P. E. Taylor, *op. cit.*, p.218 and pp.223-6.

⁹⁶ Taylor, *op. cit.* at p.222f writes that states "... appear to treat [the common heritage of mankind] as a sovereignty issue ...", and at p.224 she discusses how states' perception of the common heritage of mankind differs from that suggested by its lineage and jurisprudence. For the reasons for this difference see *op. cit.* p.210 and p.213f.

common heritage of mankind were accepted in international law in relation to other areas of activity, such as Antarctica and the deep seabed, the argument that it applies to affairs of outer space cannot be sustained in respect of the rules purporting to govern the moon and other celestial bodies.

Activities in outer space other than on the lunar surface, or the surface of any other celestial body, are governed by the Outer Space Treaty⁹⁷. While this treaty has been signed by a substantial number of states⁹⁸, it does not expressly apply the common heritage of mankind. It stipulates that activities in outer space should be conducted "for the benefit and in the interests of all countries"⁹⁹ and that outer space is the "province of all mankind"¹⁰⁰. Some states have inferred from these references that the common heritage principle has been incorporated into the treaty¹⁰¹. Article II prohibits appropriation of outer space, but it says nothing about whether resources extracted from space may be appropriated¹⁰², it does

⁹⁷ Treaty on the Principles Governing the Activities of States in the Exploration and Use of Outer Space including the Moon and Other Celestial Bodies, 27/1/67, 610 U.N.T.S. 205; 18 USTS 2410.

⁹⁸ As at 1 January 1991 ninety eight states had signed the Outer Space Treaty. See Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 1991.

⁹⁹ Article I.

¹⁰⁰ Ibid.

¹⁰¹ B. Larschan & B. C. Brennan, "The Common Heritage of Mankind Principle in International Law", *Columbia Journal of Transnational Law*, vol.21 (1983), p.305 at p.327.

¹⁰² B. Larschan & B. C. Brennan, *op. cit.* at p.328; D. Goedhuis, "Some Recent Trends in the Interpretation and the Implementation of the Rules of International Space Law", *Columbia Journal of Transnational Law*, vol.19 (1981), p.213 at p.231f.

not establish an international management regime to manage the resources in the common heritage area¹⁰³, and the restriction on non peaceful use extends only to a prohibition on placing in orbit around the Earth nuclear weapons or other such weapons of mass destruction¹⁰⁴. The assertion that the principle of the common heritage of mankind applies to activities in outer space cannot therefore be sustained by reference to the rules governing activities in that area contained in the Outer Space Treaty.

The third set of rules which apply (or purport to) in space are those devised by the International Telecommunications Union to determine access to the Geostationary Orbit (the GSO). Kiss writes that:

"[i]nternational regulations adopted in the framework of the International Telecommunications Union have established the principle of sharing the spectrum among all the states of the world on an equitable basis, thus avoiding the simple application of the first come, first served rule. This has led to co-operative planning, in particular for the use of the high-frequency bands allocated to the broadcasting service"¹⁰⁵.

Kiss points out that the application to broadcasting of the common heritage of mankind is not express. It

¹⁰³ M. L. Smith, "The Commercial Exploitation of Mineral Resources in Outer Space", chapter 6 in Space Law: Views of the Future, p.45 at p.46. See also D. Goedhuis, op. cit. at p.219; B. Larschan & B. C. Brennan, op. cit. at p.328.

¹⁰⁴ Article IV(1).

¹⁰⁵ A. Kiss, "The common heritage of mankind: utopia or reality?", International Journal, vol.40, summer 1985, p.423 at p.429f; see also for a discussion of the development of this 'equitable access' principle in the International Telecommunications Union see also G. C. Staple, "The New World Satellite Order: A Report From Geneva", American Journal of International Law, volume 80 (1986), p.699 passim.

is merely that the rules adopted "... correspond to the criteria of this newly formulated concept"¹⁰⁶. It has already been noted in the context of the NWICO that the battle between equitable access and the first come, first served principle in the International Telecommunications Union was extremely hard fought, and that while at the end of the day the developed countries did yield a grudging theoretical recognition of the former, that concession is severely restricted in practical terms¹⁰⁷.

Stewart's assertion that the common heritage principle is widely accepted, even confined within the context of space, is therefore difficult to sustain.

The second problem stemming from Stewart's argument in favour of applying the common heritage principle to international broadcasting on the grounds that it is widely accepted at least in the context of space activities, is that the application of the principle is indirect. Often the distinction will not matter because often international broadcasting is via satellite. In these circumstances, if the concept were accepted in principle by the international community at large (which as argued above, it has not been) or if it were accepted as operative at least within the confines of space activities (which again it was argued above is not the case), one could reasonably argue that broadcasting by virtue of its utilisation of satellites is a use of outer space, the common heritage of mankind concept is accepted as one of the principles governing the use of outer space, and therefore it is legitimate to apply it to international broadcasting. In these circumstances it would be valid to justify the application of the principle of the common heritage of mankind to

¹⁰⁶ Loc. cit.

¹⁰⁷ See above in chapter 5.2.2.1.

international broadcasting by demonstrating the degree of acceptance the concept has enjoyed in relation to the exploration and use of outer space. However, even if the concept was as widely accepted as Stewart asserts, generally or only in respect of activities in space, it must be remembered that the principle's application would nonetheless still be indirect. Where international broadcasting is by terrestrial means the chain of reasoning would no longer hold good. Because the broadcast in these circumstances would not involve satellites it would not be a use of outer space, and the application of the principle of the common heritage of mankind would no longer automatically follow. Because Stewart is focusing only on international direct broadcasting *by satellite* this set of circumstances is of no concern to her; within her own (rather restrictive) parameters it is quite legitimate to cite as evidence of international community's acceptance of the common heritage of mankind in relation to international direct broadcasting, material which on its face (though, as shown above, not in fact) evidences acceptance of the principle in relation to the use of outer space. Nevertheless, in a comprehensive scheme for the regulation of all international direct broadcasting, whether it be by satellite or terrestrially, demonstrating that the common heritage of mankind has been widely accepted as a guiding principle of real significance in relation to the use of outer space, even if that demonstration could be sustained, is simply not sufficient. One could opt for a fragmented approach to regulating direct international broadcasting that would see the involvement of satellites in a direct international broadcast somehow altering the character of the act to an extent significant enough to justify applying rules to the regulation of the broadcast's programme content

different from those which would apply had the broadcast been effected by terrestrial means. It is submitted that drawing such a distinction would be quite arbitrary and would provide no assistance to terrestrial international broadcasters. In the writer's view if one were to justify using the common heritage of mankind principle to regulate international direct broadcasting on the basis that it has been widely accepted, generally or in respect of activities conducted in space, one must demonstrate that it has been widely accepted *in relation to broadcasting*, not merely the use of outer space. It will be recalled from above that the only direct reference to the principle in respect of broadcasting is not express and is far from uncontentious.

Moreover, even though these rules represent a direct if implicit application in the broadcasting context of what Kiss refers to as the basic features of the concept of the common heritage of mankind¹⁰⁸, it should be noted that the rules apply to access to the geostationary orbit, not to the nature of the programmes broadcast using it. There is nothing in the ITU rules dealing with programme content. Therefore, even if the criteria which Kiss regards as definitional of the concept did constitute a direct application of the common heritage of mankind principle in the context of broadcasting, it does not seem to apply it to the issue of programme content which the international broadcasting system must address. The concept of the common heritage of mankind has been applied to regulate the exploitation of resources in areas which are outside the territorial

¹⁰⁸ It should be noted that Kiss' definitional criteria for the common heritage of mankind are rather less stringent than the traditional offering of Goedhuis quoted above. See A. Kiss, *op. cit.* at p.432-441 and also D. Goedhuis, *op. cit.* at p.218f.

jurisdiction of individual states¹⁰⁹. Attempts have been made to apply it to mineral reserves on the deep seabed¹¹⁰, in Antarctica¹¹¹, and on the moon¹¹². Its attempted application to the GSO parallels these situations. The GSO can be described as a natural resource, and the ITU rules govern access to it. But to apply it in a system to regulate the content of international broadcasts would require one to label programme content a 'resource'. Such a description would in the writer's view be a misnomer. Programme content is not a resource and does not lend itself to regulation by means of a concept designed to regulate resource exploitation. The European Court of Justice has endorsed this view of a broadcast as something other than a resource. In State v Sacchi the European Court of Justice found that a television broadcast was a service not a product, and was therefore not covered by the rules in the Treaty of Rome relating to the

¹⁰⁹ A. Kiss, *op. cit.* at p.423f. For the historical antecedents of the common heritage principle see B. Larschan & B. C. Brennan, "The Common Heritage of Mankind Principle in International Law", *Columbia Journal of Transnational Law*, vol.21 (1983), p.305 at p.312-318.

¹¹⁰ R. A. Goldwin, "Common Sense vs. "The Common Heritage"", chapter five in Law of the Sea: U.S. Policy Dilemma, p.59; B. Larschan & B. C. Brennan, *op. cit.* at p.320-326; A. Kiss, *op. cit.* at p.429f.

¹¹¹ B. Larschan & B. C. Brennan, *op. cit.* at p.331ff; A. Kiss, *op. cit.* at p.428f.

¹¹² M. L. Smith, "The Commercial Exploitation of Mineral Resources in Outer Space", chapter 6 in Space Law: Views of the Future, p.45 at p.52. For other discussions of the application of the principle of the Common Heritage of Mankind to the moon and other celestial bodies see also D. Goedhuis, *op. cit.* at p.224; also B. Larschan & B. C. Brennan, *op. cit.* at p.329.

free movement of goods¹¹³. This finding was approved in Procureur du Roi v Marc Debauxe and others¹¹⁴ and Bond van Adverteerders v The State¹¹⁵.

Taylor argues that the common heritage of mankind should not be regarded as principle for regulating the

¹¹³ State v Sacchi, [1974] 2 Common Market Law Reports 177. The court stated at p.201 that the basic question before them was "... whether television broadcasts must be assimilated to products or goods within the meaning of Articles 3(a) and 9 and of the introductory rubric to Title I of the Second Part of the Treaty". The court answered this question in the following terms:

"In the absence of express provisions to the contrary in the Treaty [of Rome], a television broadcast must, because of its nature, be regarded as a supply of services. While it is not entirely excluded that services provided normally against remuneration may fall under the provisions relating to the free movement of goods, such, however, is only the case, as emerges from Article 60, inasmuch as they are governed by such provisions. It follows that the transmission of television broadcasts, including those having a publicity character, belong as such, to the rule in the Treaty relating to the supply of services." (p.201f)

It is submitted that this decision lends support to the view that a broadcast generally, and in particular its content, is not "because of its nature" a product, not a resource, and as such is not a proper focus for the attention of concepts such as the common heritage of mankind which are designed to address issues of resource allocation.

¹¹⁴ Procureur du Roi v Marc Debauxe and others, [1981] 2 Common Market Law Reports 362 at 393.

¹¹⁵ Bond van Adverteerders v The State, [1989] 3 Common Market Law Reports 113. Both the questions posed to the European Court of Justice by the petitioner and the findings of the court assumed that broadcasts by cable or over the airwaves did constitute services within the meaning of article 60 of the Treaty of Rome. The argument was whether or not they were services of that special type which were to be frozen and progressively removed under the freeze and roll back provisions in article 59.

exploitation of a resource, but more as encapsulating an international environmental protection ethic¹¹⁶. She plausibly argues that properly construed it should be applied to protect the environment not to divide up natural resources, and that this makes it an ideal principle upon which to base a legal response to current threats to the global ecosystem¹¹⁷. It is submitted that Taylor is correct. It follows that the argument in the preceding paragraph that programme content is not a resource and therefore not a subject matter for a principle the primary focus of which is resource exploitation, would be inapplicable. It is submitted nevertheless that the argument is still good. Taylor is writing *de lege ferenda*; she accepts that the common heritage principle is currently regarded as a principle for regulating the exploitation of natural resources, notwithstanding her convincing argument that in terms of its theoretical and political lineage it should not be so construed¹¹⁸. The above argument is therefore still valid within the principle's current politico-legal context. Moreover, even if Taylor's argument was accepted in the future by the international community, and the common heritage was accepted as primarily an environmental protection principle, that would in no

¹¹⁶ P. E. Taylor, *op. cit.* at p.211 and p.215.

¹¹⁷ P. E. Taylor, *op. cit.* at p.248 (not suitable as a principle for regulating resource exploitation as it is antithetical to the notion of property rights), and at p.247 (environmental protection is a key feature of the common heritage principle properly construed).

¹¹⁸ P. E. Taylor, *op. cit.* at p.222f writes that states "... appear to treat [the common heritage of mankind] as a sovereignty issue ...", and at p.224 she discusses how states' perception of the common heritage of mankind differs from that suggested by its lineage and jurisprudence. For the reasons for this difference see *op. cit.*, p.210 and p.213f.

way make it any more suitable as a basis for regulating international broadcasting activity. The airwaves are not degraded by use so environmental protection is not directly an issue for international broadcasting. Therefore, even if Taylor's broader view of the common heritage of mankind were taken on board by the international community, it would still not be an appropriate basis for approaching the regulation of international broadcasting. Just as it is difficult to see programme content as a resource, making it inappropriate to apply the common heritage principle as currently viewed as a means of regulating resource exploitation, it is no easier to regard it as an aspect of the natural global environment such that it would be fittingly regulated on the basis of the common heritage of mankind as viewed by Taylor as an environmental protection principle.

It is therefore submitted that the Common Heritage of Mankind is not accepted generally in international law, is not even accepted narrowly in relation to activities in space. It is suggested that as a concept it is unsuitable for application to a system purporting to regulate the content of programmes broadcast internationally. Moreover, even if it was suitable and was accepted even narrowly, it would only apply indirectly and inferentially to international broadcasting and only to those programmes broadcast via satellites.

5.2.3 Conclusion

Stewart is correct that a system to regulate international direct broadcasting activity should be adopted at an international level. Her insistence that the system be implemented exclusively at a global level, in the writer's view, is too restrictive. Regional or sub regional implementational alternatives should also be incorporated into the system. In regard

to the substance of the system, neither the New World Information and Communications Order nor the Common Heritage of Mankind provides a suitable base on which to found a practicable international direct broadcasting regulatory system.

5.3 General Assembly Resolution 37/92: the DBS Principles

A fourth attempt to devise a system for regulating international direct broadcasting activity is to be found in the Principles Governing The Use By States Of Artificial Earth Satellites For International Direct Television Broadcasting¹¹⁹.

This document was adopted by the UN's Special Political Committee on 22/11/82¹²⁰ and by the United Nations General Assembly on 10/12/82¹²¹. The basic ground work on it was done by the Legal Subcommittee of COPUOS, recommended to the Special Political Committee and thence to the General Assembly¹²².

The purposes and objectives of the Principles refer to both the sovereign rights of states, specifically the principle of non intervention, and the "... right of everyone to seek, receive and impart information and ideas as enshrined in relevant United Nations instruments"¹²³. It calls on states engaged in international direct television broadcasting to focus their efforts on cultural and scientific programmes to

¹¹⁹ Henceforth the 'Principles'.

¹²⁰ Year Book of the United Nations 1982, p.172.

¹²¹ A/RES/37/92, 4/2/83. Also reproduced in Year Book of the United Nations 1982, p.173ff.

¹²² M. LeSueur Stewart, To See the World: The Global Dimension in International Direct Television Broadcasting by Satellite, p.1 n5. Year Book of the United Nations 1982, p.172f.

¹²³ Article A1.

"... assist in educational, social and economic development ..." ¹²⁴ particularly of developing countries, and particularly calls for respect for the "political and cultural integrity of States" ¹²⁵. It requires states to be responsible for the conduct of all entities engaged in international broadcasting activity within their jurisdiction ¹²⁶. It also requires any state which intends to broadcast to receivers within another state to notify all receiving states within the footprint of the proposed transmission before commencing transmission into another state ¹²⁷. The receiving state may then require the broadcasting state to "... promptly enter into consultations with the requesting state ..." ¹²⁸ before commencing transmission.

While Stewart may well be correct that the Principles are "... one of the most basic and fundamental legal instruments which has been adopted within the United Nations system in the area of international broadcasting by satellite ..." ¹²⁹, they nevertheless do not provide a sound basis for a regulating international direct broadcasting activity.

Firstly, the Principles were adopted by majority only. In the Special Political Committee the draft of the declaration which ultimately became the Principles was passed by a vote of eighty eight for, fifteen against and eleven abstentions ¹³⁰. In the General

¹²⁴ Article A2.

¹²⁵ Ibid.

¹²⁶ Articles F8 and F9.

¹²⁷ Articles J13 and J14.

¹²⁸ Article J13.

¹²⁹ M. LeSueur Stewart op. cit. at p.1.

¹³⁰ M. LeSueur Stewart, op. cit., p.3.

Assembly it fared no better being adopted by one hundred and seven votes for, thirteen against with thirteen abstentions also¹³¹. According to Stewart, "[t]he vote represented the first time in the history of the COPUOS that a set of legal principles governing activities in outer space elaborated by the LSC [Legal Sub Committee] for adoption by COPUOS for submission to the General Assembly had not been adopted by consensus ..."¹³². To exacerbate the significance of this shortcoming the states which abstained or voted against the Declaration included most of the states most actively involved in international broadcasting activity¹³³. Fisher writes that "[a] major reason for the unpopularity of the declaration among those states voting against it or abstaining was the view that the principle of prior consent embraced by that text was inconsistent with the principle of freedom of information"¹³⁴. Stewart shares the same view¹³⁵ as

¹³¹ D. I. Fisher, Prior Consent to International Direct Satellite Broadcasting, p.45f n11. See also M. L. Stewart, op. cit., p.3 and n12.

¹³² M. L. Stewart, op. cit., p.3f. See also Taishoff, State Responsibility and the Direct Broadcast Satellite, p.153.

¹³³ D. I. Fisher, loc. cit. See also S. Ruth, "The Regulation of Spillover Transmissions from Direct Broadcast Satellites in Europe", Federal Communications Law Journal, vol.42 (1989), p.107 at p.123.

¹³⁴ D. I. Fisher, op. cit., p.46.

¹³⁵ See M. L. Stewart, op. cit., p.19 where she writes that "[d]isagreement regarding the elaboration of two principles, Prior Consent and Participation, Programme Content, was apparent from the beginning of the discussion in the United Nations of the issue surrounding the elaboration of Principles governing international direct television satellite broadcasting. Differences first articulated in the WG [working group] on DBS [direct broadcasting by satellite] were maintained throughout the discussion of IDTBS [international direct television broadcasting

does Luther¹³⁶ and Taishoff¹³⁷. In the writer's view this absence of consensus has dealt a heavy blow to the utility of the Principles as a basis for regulating international direct broadcasting activity. Henkin has believes that in considering the significance of a General Assembly resolution "... [i]nvariably, one must give less weight to a majority vote ..." ¹³⁸. The practical effect of the Principles Declaration specifically seems minimal; reference to the Principles is often omitted from otherwise thorough monographs on direct television broadcasting by satellite and the states represented on the Council of Europe, who play a significant part in global international direct broadcasting activities but none of whom voted for the Principles declaration, do not rate them even a mention in the European Community's Council Directive on Transfrontier Television Broadcasting. Stewart believes they have positive potential but even she believes it is only possible to realise this potential by introducing two new concepts which have "... achieved a sufficient level of

by satellite] Principles in the LSC [Legal Sub Committee], the COPUOS, the SPC [Special Political Committee] and the General Assembly".

¹³⁶ S. F. Luther, The United States and the Direct Broadcast Satellite. Luther writes at p.88 that in spite of some progress towards consensus during the mid to late 1970's "United States opposition to the remaining central issues - prior consent, program-content restrictions, and possible recourse to stop unwanted broadcasts - stymied further progress". See also S. L. Fjordbak, "The International Direct Broadcast Satellite Controversy", *Journal of Air Law and Commerce*, vol.55 (1990), p.903 at pp.917 and 923.

¹³⁷ M. N. Taishoff, State Responsibility and the Direct Broadcast Satellite, p.152.

¹³⁸ L. Henkin, How States Behave, p.180.

international agreement and acceptance ..."¹³⁹ to provide a specific legal basis for regulating international direct television broadcasting¹⁴⁰.

Secondly, the Principles, even if they had been adopted by consensus, are embodied in a General Assembly Resolution and are therefore recommendatory and not legally binding. According to article 10 of the Charter of the United Nations under which the General Assembly is established, "[t]he General Assembly may *discuss* any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and ... may *make recommendations* to the Members of the United Nations or to the Security Council or to both on any such questions or matters"¹⁴¹. The only reference to an authority more strident than this general recommendatory power is found in article 21. It provides that "[t]he General Assembly shall adopt its own rules of procedure"¹⁴², clearly confining this rule making authority to matters of procedure not substance.

General Assembly resolutions could perhaps be treated as evidence of the *opinio juris* required to ascribe to a practice the obligatory character necessary to elevate it to the status of customary international law. However, to meet the terms of article 38(1)(b) of the Statute of the International

¹³⁹ M. L. Stewart, *op. cit.*, p.68; also see generally *op. cit.*, pp.66-91.

¹⁴⁰ The two concepts are of course the New World Information and Communications Order (as amended to accommodate the educational focus Stewart argues is appropriate) and the Common Heritage of Mankind. See above in chapter 5.2.2.

¹⁴¹ Charter of the United Nations, GBTS 1946 p.67; also reproduced in *American Journal of International Law*, vol.39 (supplement) at p.190.

¹⁴² *Ibid.*

Court of Justice two further elements would probably be necessary to sustain the contention that the sentiments expressed in the resolution were legally binding as customary international law. The first is a practice consistent with the view expressed in the resolution. Clearly there is no such practice. That is the very reason why the Principles were formulated, and why the other attempts discussed above were undertaken to regulate international direct broadcasting. Fisher also believes that the terms in which the Principles are enunciated indicate those responsible for promoting the instrument regarded it as firmly within the realm of *de lege ferenda*¹⁴³ and the writer agrees. That being the case, it is clearly impossible for the resolution to constitute *opinio juris* that an existing practice is obligatory and therefore binding on all members of the international community irrespective of their express consent. Some writers have argued that it is necessary to "... deemphasize the "practice" prong of the traditional test of customary international law"¹⁴⁴ because "[o]nly in this way can an aspirational, progressive role for international law be realized"¹⁴⁵. Fensterheim cites Judge Kaufman of the U.S. Court of Appeals in Filartiga v Pena-Irala¹⁴⁶ in support of his argument but in the writer's view such an approach threatens to deprive customary international law of the objective foundation which its dependence on empirically observable practice gives it. It is also

¹⁴³ D. I. Fisher, *op. cit.* p.53.

¹⁴⁴ D. Fensterheim, "Towards and International Law of Human Rights Based on the Mutual Expectations of States", *Virginia Journal of International Law*, vol.21 (1980), p.185 at p.199.

¹⁴⁵ *Ibid.*

¹⁴⁶ Filartiga v Pena-Irala, 30 June 1980, 630 *Federal Reporter 2nd Series*, p.876.

submitted that such an approach is quite inconsistent with the wording of article 38(1)(b) of the Statute of the International Court of Justice¹⁴⁷ and, when specifically applied in respect of General Assembly resolutions, the terms of article 10 of the Charter of the United Nations itself¹⁴⁸.

The third shortcoming of the Principles Declaration is that while it acknowledges the essential conflict between the principles of state sovereignty and the international human right to freedom of information as enunciated in inter alia the Universal Declaration of Human Rights, it offers no mechanism for reconciling the two principles. In article A1 they are merely juxtaposed. Although the compulsory consultation provisions would, if adhered to, force emitting and receiving states to discuss such a reconciliation, it gives the participants no guidelines to assist them to achieve a mutually acceptable solution to their dispute. It is suggested that in the absence of such guidelines a positive outcome is very unlikely; the principles of state sovereignty and freedom of information have been discussed for decades in a whole range of international fora without guidelines with no solution to date¹⁴⁹, and it is difficult to see why this experience should suddenly alter when conducted under

¹⁴⁷ Annexed to the Charter of the United Nations, GBTS 1946 p.67; also reproduced in American Journal of International Law, vol.39 (supplement) at p.190.

¹⁴⁸ Ibid.

¹⁴⁹ Taishoff notes the inability of the international community to arrive at a solution for meeting the demands of both the principles of freedom of information and state sovereignty and writes that "[i]t is this predicament that has hindered various international bodies from arriving at a convention capable of regulating DBS". M. N. Taishoff, State Responsibility and the Direct Broadcast Satellite, p.135.

the Principles. If anything having the negotiations forced on parties by the compulsory consultations of the Principles rather than entered into freely may even reduce the chances of a successful outcome.

The fourth failing of the Principles is one of focus. Commenting on the proceedings of the COPUOS Legal Sub Committee and the special Working Group on Direct Broadcast Satellites, Stewart notes that their primary concern was which programmes should be "illegal and inadmissible"¹⁵⁰ and therefore excluded. Stewart believes that this negative focus was ultimately passed on to the Principles. She writes:

"In attempting to focus on the negative side of the international transmission of information, the LSC [Legal Sub Committee] became bogged down in age old fears. This study, as an alternative approach, focuses instead on the positive side of IDTBS [International Direct Television Broadcasting] ..."¹⁵¹

Stewart's alternative approach endeavours to correct this failing. For the reasons given above in chapter 5.2 it is the writer's view that her alternative is not viable, but her suggestion that a positive approach is appropriate in view of the substantial positive benefits to be gained from responsible international broadcasting activity¹⁵². Inasmuch as the approach in the Principles as they stand is still inherently negative, with the possible exception of article A2, they do not provide an adequate base on which to regulate international direct broadcasting activity.

Finally, the Principles are narrowly focused on

¹⁵⁰ M. L. Stewart, op. cit., p.21.

¹⁵¹ M. L. Stewart, op. cit., p.62.

¹⁵² See chapter 5.2.1 above.

television broadcasting by means of satellite technology. It was noted in the introduction to this paper that while advances in satellite technology have exacerbated the problems associated with international broadcasting the problem is by no means new. Nor are these problems necessarily confined to the television medium. Television presents more graphic images and is vulnerable to undesirable techniques such as subliminal message insertion, but in principle the problems are the same in respect of radio, and are certainly more widespread in that international radio broadcasting is now common whereas international television broadcasting is still a relatively uncommon occurrence. While there is perhaps nothing wrong with tackling the international broadcasting issue in a piecemeal fashion focusing initially on the area of greatest concern to most countries, it is submitted that a principled solution to the debate should not recognise these distinctions except insofar as they are justified in terms of the factual differences between the two media generated by the technological capacity and character of each. It would certainly seem a waste of a good opportunity to address the whole question of international broadcasting, be it terrestrial or by satellite, by radio or television.

5.4 The European regulatory environment

The European Community has developed its own regional method for addressing international broadcasting disputes. This regulatory framework is still evolving apace. Whilst in such a state of flux it is premature to assert its success or failure. Nevertheless, because this region has been most active in developing a solution to the international broadcasting problem, its approach warrants brief comment. Because of its advanced state of development Europe has felt the exacerbating effects of

technological improvements in the broadcasting area.

European international broadcasting regulation stands on three legs. The Treaty of Rome¹⁵³, the European Convention on Transfrontier Television¹⁵⁴, and most recently, the [European Community] Council Directive on Transfrontier Television¹⁵⁵. A brief history of the development of the European regime for dealing with international broadcasting disputes will be offered focusing in particular on each of these main legs in turn to illustrate the current European international broadcasting regulatory environment. The strengths and some of the most notable criticisms will be identified.

5.4.1 The Treaty of Rome

The Treaty of Rome was signed in 1957. A number of the provisions in the Treaty of Rome bear on the international regulation of broadcasting within the European Community.

Article 59 states that "... restrictions on freedom to provide services within the Community shall be progressively abolished". Article 62 states that "... Member States shall not introduce any new restrictions on the freedom to provide services which have in fact been attained at the date of the entry into force of this Treaty". Article 60 defines "services" for the purposes of interpreting the

¹⁵³ Signed in Rome 25 March 1957; 24 April 1958, 298 U.N.T.S. 11.

¹⁵⁴ European Convention on Transfrontier Television, signed in Strasbourg, 5 May 1989, presented to Parliament (UK) in May 1990, as Miscellaneous No.12(1990), Telecommunication (Cm1068).

¹⁵⁵ [European Community] Council Directive on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, 89/552/EEC, 32 O. J. Eur. Comm. (No. L298) 23 (1989).

Treaty as those services provided for remuneration and specifically *including* activities of an industrial or commercial character, as well as those of craftsmen and the professions. These articles together freeze and roll back restrictions on "services" passing from one member state to another. Article 8 provides that the regime which these provisions embody should be implemented during a "transition" period of twelve years, divided into three stages of four years each. At the end of the transition period a Common Market in goods and services with no restriction unless expressly provided for by the Treaty, would be in place. This transformation was to be achieved by domestic legal measures:

"Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks."¹⁵⁶

The significance of this regime for broadcasting lies in the findings of the European Court of Justice that broadcasting is a "service" in the meaning ascribed in the Treaty. In State v Sacchi¹⁵⁷ the Court expressly found that broadcasting was a "service" in terms of the Treaty¹⁵⁸. This decision was followed in Procureur du Roi v Marc Debaue and Others¹⁵⁹ and was

¹⁵⁶ Article 5.

¹⁵⁷ State v Sacchi, [1974] 2 Common Market Law Reports 177.

¹⁵⁸ See footnote 113 above.

¹⁵⁹ Procureur du Roi v Marc Debaue and others, [1981] 2 Common Market Law Reports 362. See also footnote 114 above.

assumed in Bond van Adverteerders v The State¹⁶⁰. In Coditel v Cine Vog Films the Court indicated that only very narrow exceptions to the Treaty of Rome's preclusion of restrictions on intra Community international exchange of services would be permissible¹⁶¹.

On first glance the regime constituted by these provisions is quite sweeping. All existing restrictions on international broadcasting were to be removed by 1969. However, this rosy picture proved rather over optimistic. By the mid 1980's, if not earlier¹⁶², it became apparent that the Common Market was proving elusive. In 1985 the European Commission issued a White Paper¹⁶³ identifying all the objectives in the Treaty of Rome which had not been achieved. The response was the passing of the Single Europe Act 1987¹⁶⁴. This instrument is much more specific than the Treaty. It identifies a large number of practical measures which Member States are committed to action in order to attain a Common Market by 31 December

¹⁶⁰ Bond van Adverteerders v The State, [1989] 3 Common Market Law Reports 113. See also footnote 115 above.

¹⁶¹ Coditel v Cine Vog Films, [1981] 2 Comm. Mkt L.R. 362; 1980 E. Comm. Ct J. Rpts, 881;

¹⁶² See for example the Report of the Three Wise Men in 1979 (Report on European Institutions Presented by the Committee of Three to the European Council, 1979), and even the Tindemans Report of 1976 (European Union Report by Mr Leo Tindemans to the European Council, in Bulletin of the European Communities, supplement 1/1976, The Commission, 1976).

¹⁶³ White Paper On Transfrontier Television; Television Without Frontiers, Green Paper on the Establishment of the Common Market for Broadcasting, Especially By Satellite and Cable, Communicaion from the European Community Commission to the European Community Council, Commission of the European Communities, 1984.

¹⁶⁴ Single Europe Act 1986

1992.

In the case of broadcasting the European Community has chosen two mechanisms to give life to the Treaty of Rome and the Single European Act 1987. Firstly, in May 1989 the Council of Europe adopted the European Convention on Transfrontier Television¹⁶⁵. The second mechanism selected was the Directive issued by the European Community Council on 3 October 1989¹⁶⁶. Each of these mechanisms will be briefly discussed in turn.

5.4.2 The European Convention on Transfrontier Television

This instrument (the "Convention") was adopted by the European Council on 5 May 1989¹⁶⁷.

The Convention sets down minimum standards for the conduct of international television broadcasting within the European Community. The amount of advertising is restricted¹⁶⁸, and there is a complete ban on advertising tobacco¹⁶⁹. Advertising of medical treatments is restricted¹⁷⁰. Alcohol advertising is acceptable unless it is specifically aimed at minors or associates alcohol and social and / or sexual success¹⁷¹. Members are required to ensure that broadcasters within their jurisdictions do not disseminate programmes which are "indecent" or

¹⁶⁵ Op. cit.

¹⁶⁶ Op. cit.

¹⁶⁷ Op. cit.

¹⁶⁸ Articles 11 to 15.

¹⁶⁹ Article 15(1).

¹⁷⁰ Article 15(3) and 15(4).

¹⁷¹ Article 15(2).

"pornography"¹⁷². Broadcasters are required to refrain from broadcasting any item which is "... likely to impair the physical, mental or moral development of children and adolescents ..." ¹⁷³. Persons whose interests are damaged by a broadcast will be granted a right of reply¹⁷⁴. Films are not to be broadcast until two years after their release in the cinemas¹⁷⁵. Finally, and most controversially, at least 51% of transmission time (excluding that devoted to "... news, sports events, games, advertising and teletext services"¹⁷⁶) must be devoted to programmes of European origin.

There are a number of drawbacks to the minimum standards set out in the Convention. ~~Most important is the fact that the Convention was adopted by the European Council. This institution developed as a result of regular summit meetings by Member States' Heads of State or leading government ministers. This Council is required to meet at least twice each year¹⁷⁷ and Member States' foreign ministers are required to meet at least four times a year along with a representative of the European Commission to discuss foreign policy matters¹⁷⁸. It discusses broad political issues and makes political declarations. It has no power to bind Member States, but if measures agreed by the Council are ratified by individual~~

¹⁷² Article 7.

¹⁷³ Article 7(2). Such material is acceptable at times at which minors are not likely to be viewing.

¹⁷⁴ Article 8.

¹⁷⁵ Article 10(4).

¹⁷⁶ Article 10(1).

¹⁷⁷ Single European Act 1986, op. cit., article 2.

¹⁷⁸ Single European Act 1986, article 30(3)(a).

"European Council" refers to the Council of Europe, an organisation of states established in 1949. This is not the same body as the Council of the European Communities established under the Treaty of Rome in 1957 and able to issue Directives.

~~states they become binding~~¹⁷⁹. According to the 1990 European Year Book no state had ratified the Convention and as such it has no significant legal standing. At best it carries weight merely as a common expression of general political will¹⁸⁰. Moreover, even in this less incisive context one is inevitably led to ask, if the content of the Convention is universally accepted within the Community, why have states been so loathe to ratify it?

There are also difficulties with the substantive minimum standards set out in the Convention. Firstly, the issue of programme content is only addressed in three cases; in the advertising context, pornographic and indecent material, and in some circumstances in respect of children and adolescents (at times when such persons are likely to be viewing). While it is acknowledged that the standards in the Convention are intended to be *minimum* standards, it is suggested that it would be helpful to include rather more guidance than is evident in this document in respect of usual programme content. Secondly, the scope of the Convention is restricted to the television medium. A third potential problem stems from the European Council's broad political nature and the fact that it is not born directly from the Treaty of Rome. The jurisdiction of the European Court of Justice does not appear to extend to disputes involving States' obligations under instruments adopted by the European Council¹⁸¹. Thus it may be that there is no

¹⁷⁹ C. A. Giffard, "European Regulation of Transborder Television", California Western Law Review, vol.27 (1990), p.159 at p.160.

¹⁸⁰ See article 29(2) which states that the Convention will only come into force when ratified, accepted or approved by seven states including at least five from the Council of Europe.

¹⁸¹ Treaty of Rome, articles 164 to 192.

international legal machinery to support the implementation of the Convention. A person or state with a grievance under the Convention must either address it at a political level or seek redress through domestic legal systems with all the problems attendant on that implementational mechanism. Finally, the Convention, even if it were ratified, is expressly subject to existing European Community law; the provisions of the Convention always lose if they conflict with European Community rules¹⁸².

However, the Convention should not be disregarded. It may prove to have some worthwhile features and a number of relevant points can be taken from the Convention. Firstly, in the preamble it recognises article 10(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms¹⁸³. Thus those responsible for drafting the Convention were evidently very conscious of the human rights implications of international broadcasting. Secondly, the controls on advertising are quite clear and the right of reply does provide some mechanism by which individuals suffering harm from an international broadcast could, if the Convention were ratified, and subject to problems associated with attempting legal solutions through a foreign domestic legal system, obtain practical redress for their losses. Thirdly, the Convention does provide a disputes resolution procedure involving conciliation by the Standing Committee set up under article 20, followed in the event of the Committee's failure by arbitration¹⁸⁴. The procedure is a little weak in that the arbitration is entirely voluntary, but nevertheless the appendix to the Convention does detail the method for selecting

¹⁸² Article 27(1).

¹⁸³ Op. cit. See also article 4.

¹⁸⁴ Article 26.

an arbitrator and the emphasis on reaching a "friendly Settlement"¹⁸⁵ is certainly positive.

5.4.3 The European Community's Council Directive on Transfrontier Television (the "Directive")

An initial draft was prepared in 1986. It was revised in 1988 and finally issued on 3 October 1989 as The Council Directive On the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities¹⁸⁶. The terms and substance of the Directive are very similar to those contained in the Convention. There are comprehensive restrictions on advertising volume and again there is an outright ban on advertising tobacco¹⁸⁷ and restrictions on alcohol advertising content¹⁸⁸. Article 22 provides the same level of protection for minors from pornography, gratuitous violence and other such material as might impede the moral, physical or mental development of minors. The restrictions on pornography (and unlike the Convention, gratuitous violence) in the Directive appear to apply only in the context of minors. The same temporary two year embargo is placed on broadcasts of newly released films¹⁸⁹, and individuals have a right of reply if they suffer damage from a broadcast¹⁹⁰. Unlike the Convention the Directive requires a minimum of 10% of transmission time be devoted to programmes produced by independent European

¹⁸⁵ Article 25.

¹⁸⁶ Op. cit.

¹⁸⁷ Chapter IV - articles 10-21.

¹⁸⁸ Article 15.

¹⁸⁹ Article 7.

¹⁹⁰ Article 23.

producers¹⁹¹ and again at least 51% of transmission time (again excluding that devoted to "... news, sports, games, advertisements and teletext services") must be devoted to programmes of European origin¹⁹².

The Directive has fewer drawbacks than the Convention. Directives have much more bite than the instruments adopted by the European Council. Article 189 of the Treaty of Rome states that "[a] directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods"¹⁹³.

Furthermore, the Directive states in article 25 that "[m]ember States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than 3 October 1991.". Thus a clear deadline for compliance with the provisions of the Directive is expressly specified. The European Commission is required to report to the European Parliament by 3 October 1994 on members' compliance with the terms of the Directive¹⁹⁴. Whether this machinery, this extra implementational compulsion, proves to be effective will only become apparent after the Members have reported back in terms of article 26 at the end of 1994.

The Directive, like the Convention, assimilates article 10 of the European Convention on Human Rights as well as relevant articles from the Treaty of Rome. It also confirms that broadcasting is a service within

¹⁹¹ Article 5.

¹⁹² Article 4.

¹⁹³ Giffard opines (op. cit. at p.160) that this is a "political obligation" to coordinate laws and regulations to comply with the Directive by 3 October 1991. But clearly it has legal status and is more than merely "political".

¹⁹⁴ Article 26.

the meaning of the Treaty, and again the controls on advertising are quite clear and there is provision for a right of reply. Unlike the Council of Europe, the European Community Council is expressly subject to the jurisdiction of the European Court of Justice¹⁹⁵. Individuals may therefore utilise the Community's legal institutional machinery to seek redress for harm suffered.

Nevertheless, the Directive still suffers from the same disadvantages as the Convention in respect of its substance. Perhaps the most difficult and certainly the most vocal criticism of both the Convention and the Directive, particularly the latter, is that the protection provided for European producers in articles 4 and 5 of the Directive (and in article 10 of the Convention), is not in reality based on the cultural issues alleged in the preamble, but in fact is simply commercial protectionism. Reference to this dispute was made in chapter 1¹⁹⁶. It is beyond the scope of this paper to examine the merits of the views presented in this debate. The argument presented by the United States is essentially that the European Community has adopted an instrument of economic protectionism disguised as an act of cultural self determination. The European Community insists otherwise. There are some interesting technical arguments such as the scope of the terms of the General Agreement on Tariffs and Trade, but the central issue in this debate is the nature of the relationship between law and economics. To attempt a theoretical study of that magnitude must be deferred to another day. For present purposes an examination of such depth is in any case not necessary. The purpose of this chapter has been to identify some attempts to

¹⁹⁵ Treaty of Rome, articles 177, and 145 to 154.

¹⁹⁶ At p.11f.

"European Council" refers to the Council of Europe, an organisation of states established in 1949. This is not the same body as the Council of the European Communities established under the Treaty of Rome in 1957 and able to issue Directives.

regulate international broadcasting, particularly global ones, and their strengths and weaknesses with a view to identifying parameters within which to assess the system described in chapter 2. The European example is interesting inasmuch as it operates in an environment of high technological development in the area of broadcasting, and in a region where a large number of states coexist in a relatively small geographical area. It is also interesting in that it is regional. In chapter six it will be seen that flexibility in respect of implementational scope or geographical focus is an important advantage in any system for regulating international broadcasting. A system such as the European one may therefore with modification (to unravel the economic and cultural aspects of the Directive particularly) fit comfortably within a broader global framework such as that advocated in this paper. The writer also wishes to be clear that the criticisms of, and support for, the current European regulatory model are currently incapable of empirical verification. The success of the Directive in compelling compliance with its terms and the efficacy of the system established thereby cannot be properly assessed until the first reports on compliance have been filed and collated. This is due to occur in October 1994. Nevertheless, the examination of the method for addressing international broadcasting problems in this section is interesting and does serve to reinforce those arising from the foregoing discussions of other approaches in this field.

Chapter 6

6. The system outlined in chapter two advocated

In chapter two a system for regulating international broadcasting activity was outlined. It is based on the right to freedom of expression as it appears in the Universal Declaration of Human Rights and in the International Covenant on Civil and Political Rights, and as interpreted by the two bodies responsible for drafting that right, the United Nations Conference on Freedom of Information and the Economic and Social Council's Human Rights Sub Commission on Freedom of Information and the Press. Although the system suggested by these two bodies envisioned implementation by means of domestic legal systems, the regime proposed in this paper translates similar principles into an international implementational environment. Chapter two also contained a few brief comments about the efficacy of such a translation in respect of each of the main characteristics of the regulatory system proposed. Chapters three and four dealt with two problems of special significance related to the system advocated in chapter two. Chapter five identified five alternative approaches to the regulation of international direct broadcasting activity and discussed their shortcomings. In this the sixth chapter the merits of the system advocated in chapter two will be explained.

6.1 Lessons learned from chapter five's examination of the shortcomings of alternative systems for regulating international direct broadcasting activity, and how they do not afflict the system described in chapter two

6.1.1 The level of implementation ought to be

international, but not necessarily global

In discussing the failings of the five alternative regulatory options examined in chapter five, a number of parameters emerged within which any workable system governing international direct broadcasting must fit. A system based on the human right to freedom of expression but implemented through state legal systems as envisaged by the two United Nations bodies responsible for drafting the right, meets serious problems in relation to jurisdiction and enforcement¹. This suggests that a practicable international direct broadcasting regulatory system should be implemented at an international level. Such an approach is also consistent with the definitionally 'international' character of international direct broadcasting and is reflected in the frequent use of satellites which are by virtue of their function and location tarred by the international brush². Stewart plausibly argues that the benefits stemming from regulating international broadcasting will be of advantage to the whole international community giving a real incentive to find a solution to the problem at the international level³. She also argues that the international organisations charged with developing a regulatory system originally envisaged an international approach⁴. A practicable international direct broadcasting regulatory system must therefore be implemented at an international level.

On the other hand it was suggested that Stewart's insistence on an exclusively global approach was

¹ See chapter 5.1.

² See chapter 5.2.1.

³ See chapter 5.2.1.

⁴ Ibid.

unnecessary and potentially unhelpful⁵. It was argued⁶ that a system flexible enough to be implemented at regional or sub regional level where appropriate as well as at a full global level should the facts of the case demand such a broad sweep, would allow for the system to operate with a greater degree of sensitivity to the special needs and values of the parties. It would also be consistent with the important role choice plays in the version of constructivist rights theory advocated in chapter four and would be in keeping with the existence of a range of regional international human rights organisations.

The system described in chapter two meets these requirements. It is internationally implemented thus avoiding the jurisdictional and enforcement problems associated with a domestically focused scheme such as that originally envisaged by the United Nations Conference on Freedom of Information and the Economic and Social Council's Subcommission on Freedom of Information and the Press, and implicit within the International Covenant of Civil and Political Rights. It is also flexible enough to be implemented at the international level regionally or globally. Indeed, international human rights regimes with legal machinery attached already exist at both these levels⁷. Not only does this support the efficacy of an

⁵ Ibid.

⁶ Ibid.

⁷ At the global level there is the International Court of Justice, and at the regional level there are the Inter-American Court of Human Rights (chapter VIII, *American Human Rights Convention*, E. J. Osmanczyk, *The Encyclopedia of The United Nations and International Relations*, p.391 at p.393), the Arab Court of Human Rights (section two of the Charter on Human and People's Rights in the Arab World, articles 55-61, E. J. Osmanczyk, *op. cit.*, p.393 at p.395), European Court of Human Rights (article 19(2) of the European Human Rights Convention, E. J. Osmanczyk, *op.*

international broadcasting regulatory regime, based as it is on human rights, implemented at either level to meet the special needs of individual cases, but it also offers existing international legal machinery for applying the system. The need for new, separate legal machinery was a major cause for concern amongst those who opposed the 1982 Law of the Sea Convention⁸. With the broadcasting system described in chapter two however, no new international machinery would be required. It could be applied by a variety of existing international legal bodies such as the European Court of Justice or of Human Rights, the International Court of Justice, or the Human Rights Court of the Organisation of American States.

6.1.2 The substance of the system ought to be universally accepted

A workable system for regulating international direct broadcasting activity must be based on an

cit., p.395 at p.396, UNTS vol.213, pp.222-261 at p.234). In Africa there is no regional court of human rights as such, a fact lamented by Osita C. Eze ("The Organization of African Unity and Human Rights: Twenty-Five Years After", Nigerian Journal of International Affairs, vol.14, no.1, 1988, p.154 at p.178). Nevertheless, the African Commission of Human and Peoples' Rights in conjunction with the Assembly of Heads of State, both convened under the auspices of the Organisation of African Unity, has a fact finding function, and notwithstanding that its recommendations are non binding it "... could be assimilated to a quasi-judicial process" (O. S. Eze, op. cit at p.176). A similar system has been proposed for the Pacific region (see A Report on a Proposed Pacific Charter of Human Rights, prepared under the auspices of Law Asia, May 1989, pp.62-68 and Some Pacific Thoughts on a Regional Charter on Human and Peoples' Rights and Duties, prepared by C. G. Powles for presentation at the AULSA Conference in Wellington, July 1989, appendix A, pp.9-12).

⁸ R. A. Goldwin, "Common Sense vs. "The Common Heritage"", chapter five in Law of the Sea: U.S. Policy Dilemma, B. H. Oxman, D. D. Caron, C. L. O. Buderl (eds), (1983), p.59 at p.61f.

underlying principle or principles which have achieved a wide degree of acceptance by the international community. This requirement was ignored in relation to the Law of the Sea Convention of 1982 and the Moon Treaty opened for signature in 1979⁹. Attempts were made in both of these instruments to incorporate the contentious and ill-defined principle of the common heritage of mankind and both have remained essentially hollow instruments of little practical import. Worse yet, attempts to use numerical superiority within the international legal system to compel the acceptance of disputed concepts can lead to a break down in the international legal system itself; witness the result of lesser developed countries' attempts to compel the acceptance of the concept of the New World Information and Communications Order in UNESCO¹⁰.

Human rights however, are widely accepted by the entire international community. While there is inevitably going to be disagreement as to their interpretation and application in specific instances, as a concept they have been widely accepted. The notion of human rights has a pedigree centuries, arguably two millennia, old¹¹. They are recognised in the preamble of the Charter and constitute one of the

⁹ See chapter 5.2.2.2; also see B. Larschan & B. C. Brennan, "The Common Heritage of Mankind Principle in International Law", *Columbia Journal of Transnational Law*, vol.21 (1983), p.305 at p.326; R. A. Goldwin, *op. cit.*, p.59 at p.59.

¹⁰ See chapter 5.2.2.1.

¹¹ Lauterpacht for example traces the historical roots of the concept to the Hellenistic period. See H. Lauterpacht, "The Law of Nations, the Law of Nature and the Rights of Man", (1943)29, *Transactions of the Grotius Society*, p.1 at p.30. See also W. Brugger, "Human Rights Norms in Ethical Perspective", *German Year Book of International Law*, vol.25 (1982), p.113 at p.116; J. Gorecki, "Human Nature and Justification of Human Rights", *American Journal of Jurisprudence*, vol.34 (1989), p.43 at 43.

purposes of the United Nations¹². The Universal Declaration of Human Rights¹³, the International Covenants of Civil and Political Rights¹⁴ and Economic, Social and Cultural Rights¹⁵, as well as a veritable host of other international instruments all testify to the universality of consensus enjoyed by the concept of international human rights¹⁶. The degree of acceptance enjoyed by the concept of human rights is in a quite different league from lesser notions such as the Common Heritage of Mankind and the New World Information and Communications Order; there is simply no comparison.

The international community has also accepted that the regulation of direct broadcasting activity is a human rights issue. In 1970 the first committee's working group on direct broadcasting by satellite met for the third time and concluded that next to the

¹² Second preambular paragraph of the Charter of the United Nations, GBTS 1946 p.67; also reproduced in American Journal of International Law, vol.39 (supplement) at p.190. One hundred and fifty nine states belong to the United Nations (United Nations Handbook 1990, p.6).

¹³ Human Rights: A Compilation of International Instruments, United Nations, p.1.

¹⁴ Human Rights: A Compilation of International Instruments, United Nations, p.18.

¹⁵ Human Rights: A Compilation of International Instruments, United Nations, p.7.

¹⁶ Sixty seven of these instruments are reproduced in A Compilation of International Instruments, and this does not include regional agreements such as those referred to in footnote 7 above. Ninety six states have signed the International Covenant of Economic, Social and Cultural Rights, ninety two of them have ratified it. Ninety three states have signed the International Covenant on Civil and Political Rights, with eighty eight ratifications, and fifty two states have signed the Optional Protocol thereto. See Human Rights - Status of International Instruments (ST/HR/5), which contains a chart of ratification update to 31 March 1991.

Charter of the United Nations the Universal Declaration of Human Rights was the most important international instrument in the direct broadcasting context¹⁷. Indeed the right to freedom of expression is especially strongly supported by those states which oppose regulation¹⁸. The main argument offered against introducing a system to regulate international direct broadcasting is that such a system contravenes the international human right to freedom of expression¹⁹. While such enthusiastic endorsement of the right to freedom of expression does not guarantee that its advocates will accept a regulatory system based thereon, it surely presents cause for optimism. Opponents of regulation may be driven by perceived short or medium term self interest from the path of theoretical consistency to adopt a line at variance with international legal practice, but such a result would be at odds with the position taken to date by such states. It perhaps goes too far to insist that they are actually estopped from denying the merits of a system based on that right but the particularly tenacious adherence to the right by these nations certainly makes a regulatory system based on the same right more likely to meet with universal approval than approbation.

6.1.3 The system ought to be comprehensive in terms of programme content and applicable irrespective of the medium by which it is disseminated

The system must be comprehensive. The New World Information and Communications Order was criticised in

¹⁷ Report of the Working Group on Direct Broadcast Satellites on its Third Session, U.N. Doc.A/AC.105/83, p.15 para.69.

¹⁸ D. I. Fisher, Prior Consent to International Direct Satellite Broadcasting, p.5f.

¹⁹ See chapter 1.6.

chapter five on the grounds that it was too narrow a concept to deal adequately with the whole range of programmes broadcast internationally and with the concerns which arise in that context²⁰. Not all programmes are non fiction broadcast for high minded purposes. Many are broadcast to entertain or for commercial reasons²¹. While it may be that broadcasters are said to have a moral duty to direct their energies into class two programming²², it has to be accepted that some broadcasters will nevertheless be motivated by commercial interest to focus their energies on class three programmes. Notwithstanding the desirability of class two programming class three does occur and a practical international direct broadcasting system has to take them into account.

It was also suggested that drawing a distinction between radio programmes and television programmes, or between programmes broadcast via satellite and those propagated by terrestrial means are artificial²³.

Both of these aspects of the demand for a comprehensive scheme are satisfied by the system advocated in this paper. It regulates programme content rather than the means by which programmes are broadcast. It is therefore applicable to both television and radio. It is, moreover, broad enough to encompass all types of programmes, not just the objectively accurate educational or news programmes

²⁰ See chapter 5.2.2.1.

²¹ Stewart notes the problems posed by programmes of a commercial and entertainment nature. She recalls that the COPUOS Working Group on Direct Broadcasting by Satellite were unable to agree that the IDTBS rules they were attempting to develop should apply to such programmes (M. L. Stewart, To See the World: The Global Dimension in International Direct Television Broadcasting by Satellite, p.46).

²² See chapters 2.8 and 4.7.2.4 B.

²³ See chapters 5.2.2.1 and 5.2.2.2.

which are the focus of more narrowly based regulatory systems such as Stewart's grounded on the New World Information and Communications Order and the Common Heritage of Mankind.

6.1.4 The system ought to be positive

Stewart also suggested that a system for regulating international direct broadcasting should be positive²⁴. The system should not only discourage certain programmes, but should positively encourage others. The world as a whole has too much to gain from responsible international broadcasting to focus international regulatory energy on only the negative aspects of the activity. Moreover, a negative approach involves compiling a list of subjects which may not be broadcast. Obviously these concepts have to be very clearly defined, and while such precision may be feasible in respect of a limited number of cases, to predict the nature of every programme which could conceivably grace the international airwaves and produce detailed legal definitions of all of them would be an impossible task. Finally, the initial constituency of the list would inevitably be extremely contentious and constant revision would be necessary.

The system described in chapter two avoids this list making pitfall, and broadcasters are given a real incentive to satisfy the moral duty regarded as incumbent upon them by the international community (to judge by the comments of the delegates to the United Nations Conference on Freedom of Information and the Economic and Social Council's Human Rights Subcommittee on Freedom of Information and the Press and other commentators²⁵). If they meet this moral imperative to broadcast class two programmes they earn

²⁴ See chapter 5.2.1.

²⁵ See chapters 2.8 and 4.7.2.4 B.

for their programmes entitlement to the full protection of the right to freedom of expression.

At the same time however, the system recognises that on occasions some broadcasters are going to resist that declared duty and, prompted by other considerations such as commercial interest, focus instead on producing less worthy programmes. Accepting that such programmes while not deserving as much protection as class two material, are nevertheless entitled to some, albeit less all encompassing protection against interference, is not only realistic (such programmes are going to be produced and have to be catered for), but is entirely in accord with the liberal tradition; unless it is shown that an activity is actually detrimental in some way, there is no justification for prohibiting it. Programmes in class two are prima facie protected but that protection is vulnerable to attack on the grounds that it, alone or in a broader programming context, undermines the independent cultural development of the receiving population.

6.1.5 Conclusion

In conclusion then, what is required is a system adopted internationally and flexible enough to be implemented globally, regionally or sub-regionally as most suits the circumstances of each individual case. It ought to be based on a principle or principles widely accepted as valid by the whole international community. It should cover the whole range of programmes broadcast and irrespective of the medium (radio or television), and should not only prohibit the broadcast of a limited range of clearly defined subjects but should also encourage the positive use of the international direct broadcasting for the benefit of the whole international community. For the reasons given above, it is submitted that the system outlined

in chapter two meets these criteria.

6.2 There are also other advantages associated with the system advocated in this paper

In addition to the advantages noted in chapter 6.1 there are three other points supporting the adoption of the regulatory regime described in chapter two. Two of them have been covered in some depth in chapters three and four, and so need only be recalled briefly here.

6.2.1 The system proposed involves cultural relativism

In chapter three it was argued that the principle of self-determination as represented in international instruments and revealed in international practice supports the doctrine of cultural relativity. It was also argued that there is considerable academic and judicial support for that doctrine. It follows that a system which incorporates a degree of cultural relativity, as the regulatory system proposed in this paper does, can also draw support in its turn from the same sources of international law. In this way the system described in chapter two is consistent with international practice and instruments relating to self-determination, and may also find strength in the academic and judicial support enjoyed by that doctrine.

6.2.2 The system proposed is consistent with the version of constructivist rights theory advocated in chapter four

The system proposed is consistent with the variant of the constructivist theory about the origin of human rights offered in chapter four. The reasons supporting that theory were given in chapter 4.7.4. They focused heavily on the practice of rights

generally, thereby providing the theory with firm empirical underpinning. It was also noted that constructivist theory has an extremely sound academic pedigree, its various elements finding widespread support from commentators throughout the twentieth century²⁶. Thus, not only can the regulatory regime for international broadcasting described in chapter two be said to be theoretically sound in the sense that it is consistent with a reasonably coherent jurisprudential theory of rights, but the theory from which it draws such support again accords with practice, both internationally and domestically and enjoys strong academic endorsement.

6.2.3 The substance of the proposed regulatory regime was effectively accepted over forty years ago and has been effectively reinforced ever since

Consensus does not in itself constitute international law, nor does it lead inevitably to the incorporation of the subject of consensus within the international legal system. Consensus is not one of the sources of international law specified in article 38 of the Statute of the International Court of Justice²⁷. Nevertheless, the views of those who express a consensus do suggest a common understanding of the subject matter in issue which one could easily be tempted to describe as a "general principle of law recognised by civilized nations", that is, as international law in terms of article 38(1)(c) of the Statute of the International Court of Justice²⁸. Even if one resists such temptation, consensus on a subject

²⁶ See chapter 4.7.4.5.

²⁷ Annexed to the Charter of the United Nations, GBTS 1946 p.67; also reproduced in American Journal of International Law, vol.39 (supplement) at p.190.

²⁸ Loc. cit.

quite clearly does give cause for optimism that the views so agreed may eventually find their way into the international legal system either by finding expression as an international practice supported by *opinio juris* or by being formally incorporated into international treaty law. It is therefore submitted that a demonstrated consensus must be regarded as favouring the adoption of an international legal instrument to govern international broadcasting activity.

It was noted in chapter two that the substance of the system advocated in this paper for regulating international direct broadcasting activity, was based on views which achieved a high degree of consensus in the two bodies responsible for drafting the international human right to freedom of expression for inclusion in the Universal Bill of Rights²⁹. At the time the Universal Declaration of Human Rights was drafted there was therefore general agreement (subject to the confusion discussed in chapter four regarding the structure of human rights generally and the roles morality and duty play therein³⁰) on the basic shape of the human right to freedom of expression. It was generally accepted that that right did not apply to 'non-information', that is to propaganda, material prejudicial to the maintenance of public order, health or morals or to national security. It was also generally accepted that 'information' within the protective embrace of the right to freedom of expression could be significantly divided into two classes on the basis of its objective accuracy and the purpose of its transmission. There was also some agreement that cultural differences could legitimate variations in human rights in the less demanding of

²⁹ See chapter 2.1.

³⁰ See chapter 2.8.

these two types of 'information'.

This initial consensus has not suffered over the years since the inception of the Universal Declaration of Human Rights³¹. The basic notion that the right to freedom of expression may not be absolute, that is that there exists a class of non-information communications, has been reiterated in other more recent international human rights instruments such as article 10 of the 1950 European Human Rights Convention³², article 19 of the 1966 International Covenant on Civil and Political Rights³³ and article 13 of the 1969 American Human Rights Convention³⁴. In 1982 the Banjul Charter indirectly recognised the same notion by imposing duties on individuals not to exercise their rights under the Charter, including the right to freedom of expression in article 9, without "due regard" for, inter alia, morality and national security³⁵. The proposed Pacific Charter of Human

³¹ The consensus referred to here as initial is only initial in the sense that it constitutes the historical starting point for the international regulatory regime advocated in this paper. Some of the features characterising the consensus clearly predate the Universal Declaration of Human Rights. For example the right to freedom of expression obviously has a much longer pedigree and the idea that there existed an 'illegal' class of non information outside the protective embrace of that right was clearly current in the 1930's; witness the International Convention concerning the Use of Broadcasting in the Cause of Peace of 1936. 186 LNTS 301, signed 23/9/36, entered into force 2/4/38.

³² UNTS vol.213, pp.222-261, at p.234, Also in E. J. Osmanczyk, op. cit., p.395 at p.396.

³³ Loc. cit.

³⁴ E. J. Osmanczyk, op. cit., p.391 at p.393.

³⁵ Banjul Charter of Human and Peoples' Rights, International Legal Materials, vol.21 (1982), articles 27 and 29. The Banjul Charter also recognises the significance in the human rights context of African cultural values. See articles 22(1) and 29(7) and

Rights would subject the right to freedom of expression to such restrictions as are necessary to preserve "public peace, order, health, or security or the rights or freedoms of others"³⁶.

The existence of a class of non information excluded from the scope of the right to freedom of expression is also evident in more recent discussions within the United Nations concerning the regulation of international direct broadcasting. For example in its draft "Declaration of Basic Principles Governing the Activities of States pertaining to the Exploration and Use of Outer Space" the USSR included a ban on using space technology (including communications satellites) for propaganda purposes³⁷. Brazil made a similar proposal³⁸ as did the United Arab Republic in 1966³⁹. In 1970 the USSR again included reference to programmes classified as "illegal" in its "Model General Principles for the Use of Artificial Earth Satellites for Radio and Television Broadcasting"⁴⁰. Similar references are to be found in subsequent Soviet draft documents bearing on the regulation of direct satellite broadcasting⁴¹. A French proposal

preambular paragraph 4.

³⁶ A Report on a Proposed Pacific Charter of Human Rights, prepared under the auspices of Law Asia, May 1989.

³⁷ Draft "Declaration of Basic Principles governing the Activities of States pertaining to the Exploration and Use of Outer Space" submitted by the USSR, U.N. Doc. A/AC.105/C.2/L.1 (1962), paragraph 5.

³⁸ U.N. Doc. A/C.1/SR.1296, p.247 (paragraph 9).

³⁹ U.N. Doc. A/6431, annex III, p.33 (22/9/66).

⁴⁰ U.N. Doc. A/AC.105/83, annex IV, p.27f, (25/5/70).

⁴¹ Draft "Convention on Principles Governing the Use by States of Artificial Earth Satellites for Direct Television Broadcasting". U.N. Doc. A/8771,

recognised that 'news' was covered by the right to freedom of information, that advertisements presented 'special problems', and that there should be an express prohibition on propaganda or material prejudicial to international peace or the receiving state's internal public order⁴². Saudi Arabia proposed amendments to one of the Soviet draft instruments to expressly refer to the right to freedom of expression but still proposed the exclusion of propaganda and pornography from the ambit of that human right⁴³. There was therefore throughout the debates within the United Nation's First Committee widespread agreement that some types of programme should be excluded from the scope of the right to freedom of information or be 'illegal'.

The regulatory framework suggested in chapter two also limits the operation of the right to freedom of information in some cases when the unfettered application of the right threatens the independent cultural development of the receiving population⁴⁴. It was noted above that a French proposal suggested that a programme constituting a threat to a receiving state's cultural development should be regarded as

p.4ff, (9/8/72); draft "Principles Governing the Use by States of Artificial Earth Satellites for Direct Television Broadcasting". U.N. Doc.A/AC.105/127, annex II (2/4/74).

⁴² Reproduced in Annex V of U.N. Doc. A/AC.105/83 (25/5/70). Prohibited material also includes programmes detrimental to the intellectual, moral or physical development of children or to the receiving state's civilization, culture, religion or traditions.

⁴³ For example Saudi Arabia proposed amending the draft's preamble to expressly refer to the right of freedom of information but did not attempt to remove the propaganda and pornography prohibition. See D. I. Fisher, Prior Consent to International Direct Satellite Broadcasting, p.116.

⁴⁴ See chapter 2.5.

outside the scope of the right to freedom of information. This suggestion is also evident in discussions in the First Committee⁴⁵. Even the United States submitted a draft set of principles to govern international direct television broadcasting by satellite which accepted that the right to freedom of information must take "... into account differences amongst cultures ..."⁴⁶. The legitimacy of the use of culture based criteria to distinguish between programmes in classes two and three as offered by the system proposed in chapter two, again therefore seems to have been widely accepted.

The distinction between classes two and three also considers the purpose of the broadcast. The idea that the purpose of an act of expression plays a significant role in determining whether the act can avail itself of the protection offered by the right to freedom of expression, has also been widely accepted over a long period of time. Francis Canavan surveyed the works of nine writers whose views in his opinion represent significant developments in the growth of the concept of freedom of expression⁴⁷. Canavan argues that each of them championed freedom of expression strictly within implicit boundaries set by reference to purpose; insofar as freedom of expression inhibits the attainment of truth, reason, moral and political development, it should be excluded from the scope of

⁴⁵ See for example comments by Iran, Indonesia, Paraguay, Madagascar, Colombia and Brazil. See respectively U.N. Doc.s A/AC.105/PV.115, p.18, A/C.1/PV.2052, p.72, A/C.1/PV.2053, p.68, A/C.1/32/PV.45, p.37, A/SPC/34/SR.19, p.16, A/SPC/34/SR.18, p.6.

⁴⁶ A/AC.105/WG.3(V) (1974).

⁴⁷ F. Canavan, Freedom of Expression: Purpose as Limit. Interestingly one of the writers whose work he discusses is Zechariah Chafee, one of the United States delegates to the United Nations Conference on Freedom of Information and the Press.

the right. In his conclusion he states:

"The foregoing review of major sources in the development of the freedom of expression shows that these sources argued almost exclusively in terms of reason, truth, and moral and political development."⁴⁸

Indeed, he believes, and the writers agrees, it is these objects, these 'limits' on the right to freedom of expression, which gives it its value, which makes it a concept of such capital importance:

"If expression need serve no goals beyond itself, if all "expressions" are on the same level because they are all identical in the only essential respect, that of being expressions, then to say that they are all equally valuable is tantamount to saying that they are all equally valueless."⁴⁹

"The value of "expression" is the value of that which is expressed, nothing more."⁵⁰

This general consensus on so many of the central features of the regulatory regime proposed in chapter two is also reflected in the practice of states. Luther argues that the United States First Amendment, that country's domestic expression of the Universal Declaration of Human Rights' article 19, is subject to restrictions⁵¹. Other writers have drawn similar conclusions⁵².

⁴⁸ F. Canavan, op. cit. at p.143.

⁴⁹ F. Canavan, op. cit., p.145.

⁵⁰ F. Canavan, op. cit., p.146.

⁵¹ S. F. Luther, The United States and the Direct Broadcast Satellite, pp.96-101.

⁵² See for example F. H. Cate, "The First Amendment and the International "Free Flow" of Information", *Virginia Journal of International Law*, vol.30 (1990), p.372 passim; S. L. Fjordbak, "The International Direct Broadcast Satellite Controversy", *Journal of Air Law and Commerce*, vol.55 (1990), p.903 at p.153.

6.3 Conclusion

In chapter two a system for regulating international direct broadcasting is described. It is based on the international human right to freedom of expression as it appears in the Universal Declaration of Human Rights and in the International Covenant of Civil and Political Rights, and as interpreted in light of the near consensus reached in the two bodies responsible for drafting the international human right to freedom of expression, a consensus which has persisted broadly since that time.

That system was originally envisaged as operating through domestic legal systems, but contains nothing which prevents its application at the international level. Four of the five grounds on which programmes ought to be restricted are capable of translation into an international implementational environment. All except that of 'immorality' are either are reasonably well defined already or offer every prospect of becoming so with a modicum of discussion and negotiation within one of the fora provided by the United Nations.

The system is better than any of the alternatives offered because it is to operate at the international rather than domestic level, and because it is flexible enough to be applied at the global or regional, or even sub-regional level. It can be applied through existing international legal machinery, and is based on human rights, a concept which is very widely supported throughout the whole international community and which has a long and auspicious intellectual pedigree. Of particular significance is the degree of support given to the concept of human rights by those states which have been inclined to oppose the introduction of a system to regulate international direct broadcasting. In the past such states have opposed regulation of this activity on the grounds

that it contravenes the right to freedom of expression; surely such a stance offers every reason to hope that a system based on that very right will meet the approval of those objectors. Certainly, they would be hard pressed to discount it without the most earnest consideration.

The system proposed is universal in the sense that it applies to all programmes, not just that class of 'information' consisting of news and educational or technical material. It is also applicable to programmes broadcast on radio or television, via satellite or by terrestrial means. It is positive, thereby avoiding the propensity to make lists as impracticable as they are inflexible, of prohibited programmes, and encouraging the positive use of international broadcasting to the advantage of the whole of mankind. Broadcasters are given a real incentive to focus their energies into the production of class two programmes.

Last, but by no means least, the system incorporates the doctrine of cultural relativity, a doctrine strongly supported by practice, international instruments and academic and judicial commentators in relation to self-determination. It is also theoretically sound in that it is consistent with a version of the constructivist theory about the philosophical origin of human rights, that theory being solidly empirically underpinned by, indeed based on, the practice of rights and academic opinion.

Chapter 7

7. Implementation: a hypothetical example

In the Abstract to this paper reference was made to James Miles' allegation that the rebellion in China leading up to the Tianamen Square massacre was fomented, prolonged, and even coordinated, through programmes broadcast into China from outside its borders. To illustrate how the regulatory system suggested in this paper might be implemented it is proposed to use this fact situation as the basis of a hypothetical dispute between the governments of China and the United Kingdom.

7.1 The hypothetical fact situation

For the sake of illustration it will be assumed that a British private broadcaster carried a half hour programme received in affected parts of China every night at approximately seven o'clock each evening. It will be assumed that each programme is in Chinese and devoted entirely to the rebellion in China. The programme format is such that it will start with a five minute round up of significant events in each of the main centres of unrest. This information is sourced from Chinese government press releases and such data as foreign correspondents located in various centres in China could unearth and relay out to their editorial masters on foreign soil. The rest of the programme is devoted to interviews with Chinese students living in Australia including some related to key leaders in the rebellion and press statements by the Chinese government. Commentary is provided by political scientists teaching at universities in London, Sydney and Tokyo, all experts in Asian politics. The views of Chinese political exiles residing in Taiwan are also included.

7.2 Hypothetical resolution in the current actual international legal framework

It was noted in chapter 1.4 that parties to an international dispute over broadcasting either have to seek redress in domestic legal systems or take practical 'self-help' remedies such as jamming the signal. The signal in this case is assumed to have been transmitted on fifteen separate frequencies and to be broadcast via an active satellite situated on the geostationary orbit directly above China. The signal is therefore strong, widespread and effectively impossible to jam. Because the programme is not defamatory it does not breach the terms of any British law and there is accordingly no domestic legal remedy available in the United Kingdom's legal system. While for the sake of argument it is assumed that Chinese law does provide a remedy in the form of an injunction, the broadcaster has no property in China and there exists no treaty between China and the United Kingdom providing reciprocal enforcement of judgments. In these (hypothetical) circumstances the Chinese government has no legal remedy at all. At the political level China can protest to the British diplomatic representatives in Peking and voice objections to the broadcast in the United Nations. For the purposes of this illustration it will be assumed that the Chinese government has pursued both these avenues. It will be similarly assumed that the British response was to the effect that it has no control over private broadcasting agencies within its territory and constitutionally could not interfere with the content of the programming. The result is impasse. In the absence of structured means to facilitate a peaceful solution the parties search for other tools to achieve a resolution. The result might be that a range of commercial trade transactions between British and Chinese firms are in jeopardy facing punitive import

and export restrictions and customs duties¹. There may even be sufficient tension to suggest that negotiators discussing the return of Hong Kong to China may have to temporarily abandon their task. This unhappy scenario is entirely hypothetical yet it is one which is perhaps not entirely beyond the realm of possibility. The next step is to postulate a system for dealing with international broadcasting disputes such as that outlined in chapter two.

7.3 The nature of the regime within which the dispute could be resolved

The method for dealing with disputes over international broadcasting is that described in chapter two. For the purposes of this hypothetical example it has been incorporated into an International Convention on the Resolution of Transfrontier Broadcasting Disputes². This convention has been developed within the framework of the United Nations and has been ratified by 102 countries including both China and the United Kingdom, both without reservation. Thus the parties at once have access to the international judicial machinery which operates under the auspices of the United Nations. It will be assumed that in this case the parties have taken their case to the International Court of Justice, although it could equally well be applied in a regional international legal institution should the circumstances have warranted it. At once they have an

¹ Similar to the taxes imposed in both Canada and the United States 'tit for tat' in their 1985 broadcasting dispute. See T. M. Lupinacci, "The Pursuit of Television Broadcasting Activities in the European Community: Cultural Preservation or Economic Protectionism?", *Vanderbilt Journal of International Law*, vol.24 (1991), p.113 at p.149.

² A draft of such a convention is offered in appendix 2 at the end of this paper.

outlet for the dispute. It can be confined to a legal framework thus avoiding the 'fall-out' which generally ensues when disputes are elevated to the more emotive political stage.

7.4 The task facing the Court

The first step for the court is to classify the particular programme which is the subject of the complaint.

7.4.1 Class one programmes, it will be recalled, consist of those which are propaganda, which damage the reputations of others, or which are detrimental to public health or morals, or to the maintenance of national security or public order.

The programme is probably not within the fairly narrow definition of propaganda suggested by the Conference on Freedom of Information. It does not resemble the vigorous, forceful and unsubtle form of propaganda such as might be employed during an armed conflict³.

The programme is not defamatory in the sense of the somewhat expanded Common Law variant of defamation suggested by the Conference on Freedom of Information⁴. The court in reaching this conclusion would essentially have regard to the same factors which are considered by domestic Courts in Common Law jurisdictions in defamation cases. While this is not the place for a detailed description of the Common Law

³ According to Fisher (D. I. Fisher, Prior Consent to International Direct Satellite Broadcasting, pp.168-170) this narrow view of propaganda is also consistent with the approach taken in the Outer Space Treaty, United Nation General Assembly Resolution 110 (II) and the 1936 International Convention Concerning the Use of Broadcasting in the Cause of Peace (signed 23 September 1936, 186 L.N.T.S. 301).

⁴ See above chapter 2.3.1.

of defamation, the Court could for example determine whether the programme 'tended to lower the plaintiff in the estimation of right-thinking members of (international) society generally'⁵. If it found aspects of the programme to have defamatory meaning, defences such as justification in respect of assertions of fact and fair comment in respect of opinions expressed in the programme could be similarly considered. The public nature of the plaintiff could may also be relevant.

It was noted above that the Conference indicated that the Common Law approach to defamation could be extended when the rule is translated into an international environment by allowing groups to bring actions in defamation as well as individuals⁶. The International Court could include this variation in its considerations.

Determining such matters may on occasion be no easy task, and in the international context the assistance of a jury would not be available. Nevertheless it is suggested that the Court would have sufficient guidelines to decide whether the programme complained of did fall within the scope of 'international defamation' and so sit in class one or not. For the purposes of the example it will be assumed that it is not.

For the reasons offered in chapter 2.3.2 public morals is probably too amorphous a notion to translate into the international arena as a definitional criteria for classifying programme content. On the hypothetical facts of this example public morality does not seem particularly relevant in any case. Nor

⁵ See for example Sim v Stretch [1936] 2 All E.R. 1237 at 1240, per Atkin LJ.

⁶ See chapter 2.3.1. cf Knupffer v London Express Newspapers Limited [1944] A.C. 116 at 124 per Porter LJ.

is any serious public health issue evident.

The issue of national security and public order translated into the international context as international security and international public order is more complex on the facts. Nevertheless as noted in chapters 2.3.4 and 2.3.5 such concepts are common themes within existing international discourse and it is submitted that reaching a decision on such matters is not beyond the capacity of the International Court of Justice. Relevant considerations could include the presence or otherwise of malice on the part of the defendant, the degree to which the subject matter of the programme is truly international, academic and judicial views of the application of article 2(4) of the Charter of the United Nations and consistency with other relevant international instruments. Again for the purposes of this example, a narrow view of 'international security threat' and 'threat to international public order' will be assumed so that the programme is found to fall outside the definitional parameters of class one. The Court will therefore find that the programme is not prohibited outright.

7.4.2 Class two, it will be recalled, consists of programmes which are objectively factual and dedicated to achieving high minded ideals such as peace, international security and cooperation, and other such objectives. Whether the programme in its entirety or in part constitutes class two programming is a matter of fact which the Court would have to determine. There is little to be gained by attempting here to perform such an exercise on entirely hypothetical facts but again it is submitted that the task facing the International Court of Justice in this example is not significantly different from that executed by domestic

courts engaged in making determinations in respect of questions of fact.

Determining purpose is perhaps more problematic. It is clearly no easy task to determine whether the broadcaster was motivated to achieve the laudable objectives suggested above. Nevertheless, and again, domestic courts in their criminal jurisdiction regularly draw conclusions about the mental processes or mens rea concurrent with the actions which the Police allege render a person in breach of the criminal law. The decision in each case must be on its merits and it is submitted that it would be doing the judges of the International Court of Justice a grave disservice to hold them incapable of performing the same task.

For the purposes of this example it will be assumed that at least some of the programme subject to Court scrutiny is not objectively factual and / or is not found to be broadcast in pursuance of suitably high minded ends. The Court will therefore find that the broadcast is not subject to unqualified protection based on the international human right to freedom of expression.

7.4.3 If the programme is found to fit neither in classes one or two, it must be in class three. Thus the Court must ask whether the programme, or rather those parts of it which could not be classified as class two material and therefore immune from the plaintiff's attack, is consistent with Chinese conceptions of international human rights standards. Again the Court's decision in each case will depend on the merits of the case under examination. The question is again essentially one of fact. Without wishing to limit the factors which the Court may be invited to consider, Chinese reports to international organisations concerned with international human

rights standards and statements by the Chinese delegates in international or even domestic fora concerning human rights matters may be relevant. Rational argument offered to explain how the particular conception of human rights advocated by each party is derived from their different political or philosophical perceptions may strengthen one case or the other or may prove rationally unsustainable.

7.5 Some concluding notes

The hypothetical example used above to illustrate how the regulatory system outlined in chapter two *could* be implemented was set in a judicial context. In practice the potential availability of an international judicial resolution of the dispute along the lines suggested above, may induce the parties to effect a consensual solution based on the same principles and considerations before actually resorting to formal judicial measures. This could perhaps be facilitated by including in the convention appropriate mediation or arbitration provisions. As was noted in chapter 6.1.1⁷ the forum is essentially irrelevant; what matters is that the parties have a series of agreed principles, a framework within which to pursue a solution to the dispute.

⁷ See also chapter 4.7.3.3 B in which it is suggested that choice of forum is a matter for the claimant in the rights process to determine by reference to efficacy and the nature of the justificatory arguments at his or her disposal.

APPENDIX I - BROADCASTING DATA
(Sourced from the World Radio TV Handbook 1991)

Appendix Abbreviations

A	=	Africa
As	=	Asia
CA	=	Central America
E	=	Europe
NA	=	North America
P	=	Pacific
SA	=	South America
X	=	Broadcasting activities recorded under the entry for another country.
?	=	International broadcasting activities declared but the information in question (transmission destinations, frequency numbers, or broadcasting languages) not specifically identified.

Country	Destination	Frequencies	Languages
Afghanistan	ME, As, E	9	7
Alaska	X	-	-
Albania	E, ME, A, As, P, SA	33	20
Algeria	?	4	2
Andora	-	-	-
Angola	?	3	3
Anguila	-	-	-
Argentina	ME, A, NA, SA, FE, CA	3	7
Aruba	X	-	-
Ascension	X	-	-
Australia	?	35	7
Austria	SA, NA, CA, ME, E, P	12	5
Azores	X	-	-
Bahamas	-	-	-
Bahrain	-	-	-
Bangladesh	?	6	5
Barbados	-	-	-
Belgium	A, P, E, NA, As, SA	10	2
Belize	-	-	-
Benin	-	-	-
Bermuda	-	-	-
Bhutan	-	-	-
Bolivia	-	-	-
Botswana	-	-	-
Brazil	A, NA, E	4	2
Brunei	-	-	-
Bulgaria	E, A, ME, SA, NA	29	11
Burkina Faso	-	-	-
Burundi	-	-	-
Cameroon	-	-	-
Cambodia	-	-	-
Canada	ME, E, As, CA, NA, A, P	63	11
Canary Islands	-	-	-
Cape Verde	-	-	-
Cayman Islands	-	-	-
Cent African Rep.	-	-	-
Chad	-	-	-
Chile	-	-	-
China	NA, As, E, CA, SA, A, P	17?	36
Christmas Islands	X	-	-
Cocos Islands	X	-	-
Colombia	-	-	-
Comoros	-	-	-
Congo	-	-	-
Cook Islands	-	-	-
Costa Rica	-	-	-

Country	Destination	No Frequencies	Languages
Cote D'Ivoire	-	-	-
Cuba	ME, CA, E, NA, SA, A	26	8
Cyprus	-	-	-
Czechoslovakia	As, E, NA, SA, CA, A, P	11	4
Denmark	?	-	-
Diego Garcia	X	-	-
Djibouti	-	-	-
Dominica	-	-	-
Dominican Rep.	-	-	-
Easter Island	X	-	-
Ecuador	ME, E, NA, SA, P	32	12
Egypt	CA, E, NA, ME, As, SA, A	12?	29
El Salvador	-	-	-
Equatorial Guinea	A?	2	1
Ethiopia	A	3	?
Falkland Island	-	-	-
Faroe Islands	X	-	-
Fiji	-	-	-
Finland	E, NA, SA, As, ME, A, P	15	5
France	ME, A, NA, CA, As, SA, E	81	12
Gabon	A	2	-
Gambia	-	-	-
Germany	P, As, N, S&CA, E, ME, A	211	51
Ghana	?	1	-
Gibraltar	-	-	-
Greece	E, ME, SA, NA, CA, A, P	11	15
Greenland	-	-	-
Grenada	-	-	-
Guadeloupe	-	-	-
Guam	X	-	-
Guatemala	-	-	-
Guiana (Fr)	X	-	-
Guiana	-	-	-
Guinea-Bissau	-	-	-
Guyana	-	-	-
Haiti	-	-	-
Honduras	-	-	-
Hong Kong	X	-	-
Hungary	E, NA, ME, SA, As	8	7
Iceland	-	-	-
India	ME, As, P, A, E	66	16
Indonesia	?	5	9
Iran	ME, As, E,	20	17
Iraq	ME, NA, As, E	18	8
Ireland	-	-	-

Country	Destination	No Frequencies	Languages
Israel	NA, E, P, As, A, SA	24	12
Italy	ME, CA, NA, E, As, A, P	23	26
Jamaica	-	-	-
Japan	ME, SA, E, CA, As, A	44	20
Jordan	SA, ME, CA, A, NA	3	-
Kenya	-	-	-
Kiribati	-	-	-
Korea N	ME, As, NA, E, CA, A	26	8
Korea S	E, ME, As, NA, SA, A	20	11
Kuwait	-	-	-
Laos	As?	2	4
Lebanon	-	-	-
Lesotho	-	-	-
Liberia	-	-	-
Libya	?	9	-
Lord Howe Is	X	-	-
Luxemburg	-	-	-
Macau	-	-	-
Madegaskar	-	-	-
Madeira	X	-	-
Malawi	-	-	-
Malaysia	?	5	6
Maldives	-	-	-
Mali	-	-	-
Malta	?	3	1
Marshall Is	-	-	-
Martinique	?	5	-
Mauritania	-	-	-
Mauritius	-	-	-
Mayotte	-	-	-
Mexico	-	-	-
Micronesia	-	-	-
Monaco	?	14	36
Mongolia	As, E, A	9	4
Montserrat	-	-	-
Morocco	?	4	-
Mozambique	-	-	-
Myanmar	-	-	-
Namibia	-	-	-
Nauru	-	-	-
Nepal	?	?	1
Netherlands	ME, NA, SA, P, As, E, A	48	6
Neth. Antilles	NA, SA, CA	10	2
New Caledonia	X	-	-
New Zealand	?	4	?
Nicaragua	-	-	-
Niger	-	-	-
Nigeria	A	1	1
Niue Is	-	-	-

Country	Destination	No Frequencies	Languages
Norfolk Is	X		
Nthn. Marianas	As, P, ?	19	15
Norway	As, N&SA, A, ME, P	30	1
Oman	-	-	-
Pakistan	ME, As, E, A	30	14
Palau	-	-	-
Panama	-	-	-
PNG	-	-	-
Paraguay	-	-	-
Peru	-	-	-
Philippines	As, P, E, ME	49	31
Poland	E, A, ME	10	11
Polynesia (Fr)	X		
Portugal	ME, As, A, E	22	3
Puerto Rico	-	-	-
Qatar	-	-	-
Reunion	-	-	-
Romania	E, A, ME, P, NA, CA	52	12
Rwanda	-	-	-
Samoa (Am)	-	-	-
Samoa (W)	-	-	-
San Marino	-	-	-
Soa Tome	-	-	-
Saudi Arabia	A, As, E	16	11
Senegal	?	?	-
Seychelles	ME, As, A	19	-
Sierra Leone	-	-	-
Singapore	-	-	-
Solomon Is	-	-	-
Somalia	?	1	8
Sth Africa	A	25	5
Spain	ME, A, E, N&C&SA, P, As	31	7
Sri Lanka	As, E, ME, A	11	6
St Kitts & Nevis	-	-	-
St Lucia	?	4	1
St Vincent	-	-	-
Sudan	-	-	-
Surinam	?	1	1
Swaziland	A	18	19
Sweden	As, E, NA, ME, CA, A, P	23	7
Switzerland	As, ME, A, CA, SA, NA, P	30	3
Syria	-	-	8
Tanzania	A	?	-
Thailand	?	5	8
Togo	-	-	-
Tonga	-	-	-

Country	Destination	No Frequencies	Languages
Trinidad & Tobago	-	-	-
Tunisia	?	2+	2
Turkey	ME, A, As, E, NA, P	20	15
Tuvalu	-	-	-
Uganda	-	-	-
UAE	E, A, NA	4+	4
UK	E, A, ME, As, P, N&C&SA	158	36
Uruguay	-	-	-
USA	E, A, ME, As, P, N&C&SA	145	44
USSR	E, A, ME, As, P, N&C&SA	?	77
Vanuatu	-	-	-
Vatican	E, A, ME, As, P, N&C&SA	31	34
Venezuela	?	?	1
Vietnam	As, E, A, CA	7	11
Yemen	-	-	-
Yugoslavia	E, A, ME, As, P, N&C&SA	25	10
Zaire	-	-	-
Zambia	-	-	-
Zimbabwe	-	-	-

APPENDIX II - DRAFT CONVENTION

**International Convention on the Peaceful
Resolution of International Broadcasting
Disputes**

Preamble

The States Parties to the present Convention:

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Affirming that the international human right to freedom of expression as set down in the Universal Declaration of Human Rights constitutes one of the essential principles of a democratic society and one of the basic conditions for its progress and for the development of every human being,

Recalling reference to the right to freedom of expression in numerous international instruments, in particular in the International Covenant of Civil and Political Rights,

Convinced that the continued development of information and communications technology should serve to further the right, regardless of frontiers, to seek, to receive and to impart information and ideas whatever their source,

Reaffirming the importance of broadcasting for the development of culture and the free formation of opinions to promote a peaceful and pluralistic world,

Believing that international cooperation and the principles and values of the Charter of the United Nations will be promoted by maximising international exchanges of information of all types,

Recalling United Nations General Assembly Resolution 2916(XXVII) of 9 november 1972 which stressed the need for the development of international principles governing the use by states of artificial earth satellites for international direct television broadcasting,

Noting the principles set forth in United Nations General Assembly Resolution 37/92 of 4 February 1983,

Agree on the following articles:

Part I
Purpose & scope

Article 1

The purpose of this convention is to:

- (a) encourage international broadcasters to disseminate information which is objective and accurate and which promotes the values and ideals embodied in the Charter of the United Nations;
- (b) restrict certain information which is contrary to those principles and ideals;

- (c) ensure that international broadcast programming is consistent with peoples' rights of self-determination by virtue of which right they freely their political status and peruse their economic, social and cultural development.
- (d) provide for the effective and peaceful resolution of disputes arising in relation to international broadcasting in accordance with the spirit of cooperation of the Charter of the United Nations

Article 2

Each State Party to this convention undertakes by appropriate means both individually and through international cooperation and assistance to ensure compliance with the terms of this convention.

Article 3

- (1) This convention shall apply to any programme transmitted or retransmitted by entities or by technical means within the jurisdiction of a Party, whether by terrestrial transmitter or satellite, on any medium, and which can be received directly or indirectly within the territory of one or more other Parties.
- (2) This convention shall extend to all parts of federal States Parties without further extension.

Part II **Programme content**

Article 4

Every programme or part thereof which constitutes propaganda, which damages the reputations of others, or which is detrimental to public health, or to the maintenance of international security or public order shall be prohibited.

Article 5

Every programme or part thereof which constitutes objectively factual information broadcast to promote the values and ideals embodied in the Charter of the United Nations shall be protected from all interference by any means whatsoever, such restrictions being inconsistent with the right to freedom of expression.

Article 6

Every programme or part thereof which is not governed by articles 4 or 5 of this convention shall be protected from interference to the extent that such protection is consistent with the right of self-determination of the people or peoples receiving the broadcast.

Part III **Disputes resolution**

Article 7

In the event of a dispute arising about the application of this convention the States Parties involved shall:

- (a) notify forthwith the Secretary General of the United Nations of the dispute including its substance and the parties involved; and
- (b) attempt to resolve the dispute in a friendly and cooperative manner and in the utmost good faith.

Article 8

- (1) States Parties involved in a dispute may, if all involved parties agree, request the assistance of any state or international organisation prepared to assist to facilitate a friendly solution. The Secretary General of the United Nations shall be notified forthwith of the decision to attempt a mediated solution to the dispute.

Article 9

- (1) In the event that a dispute cannot be resolved in accordance with the provisions of articles 7 and 8 each State Party shall:
 - (a) advise the Secretary General of the United Nations accordingly; and
 - (b) nominate a state not previously involved in the dispute as arbitrator. No state shall be obliged to act as an arbitrator if it does not wish to do so.
- (2) The appointment of arbitrators shall be notified to the Secretary General of the United Nations within one month of the notification that resolution of the dispute by mediation had failed.
- (3) If one or more States Parties to the dispute fail to name an arbitrator the Secretary General of the United Nations shall consult with the States Parties which have failed to nominate an arbitrator and then, at his or her discretion, refer the matter to the International Court of Justice.
- (4) The states appointed as arbitrators in terms of this article shall attempt to achieve a friendly solution to the dispute consistent with the principles set forth in this convention.
- (5) At the completion of the arbitration the arbitrators shall notify the Secretary General of the results of the arbitration.

Article 10

- (1) In the event that the Secretary General has been notified in terms of article 9(3) that the arbitration process could not be commenced, or in terms of article 9(5) that the arbitration has proved unsuccessful, the Secretary General shall refer the matter to the International Court of

- Justice or such other international or national judicial body as he or she may consider appropriate after consulting with States Parties to the dispute.
- (2) The Court, or other international or national judicial body to which the Secretary General has seen fit to refer the dispute, shall then deal with the dispute.
 - (3) The Court or other international or national judicial body dealing with the dispute shall follow its own procedures but in deciding the case shall apply the principles established in Part II of this convention.

Part IV
Administrative Matters

Article 11

- (1) This convention is open for signature by any state.
- (2) This convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary General of the United Nations.
- (3) This convention shall enter into force on the expiration of a period of three months from the day on which thirty five states have deposited instruments of ratification with the Secretary General of the United Nations.
- (4) The Secretary General of the United Nations shall inform all State which have signed this convention of each instrument of ratification deposited in terms of paragraph (3) of this article.

Article 12

This convention of which the Chinese, English, French, Russian and Spanish texts are all equally authentic, shall be deposited in the archives of the United Nations.

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