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## Press Freedom in Latin America and the Emerging International Right to Communicate

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# PRESS FREEDOM IN LATIN AMERICA AND THE EMERGING INTERNATIONAL RIGHT TO COMMUNICATE

I. INTRODUCTION .....	117
II. TEN YEARS OF NWICO DEBATE .....	120
A. <i>The Mass Media Declaration</i> .....	120
B. <i>The Response to the Mass Media Declaration</i> .....	123
III. FREEDOM OF EXPRESSION IN INTERNATIONAL LAW .....	126
IV. LATIN AMERICA AND PRESS FREEDOM .....	131
A. <i>Background</i> .....	131
B. <i>Costa Rica and Law No. 4420</i> .....	135
C. <i>The Right of Reply</i> .....	139
V. CONCLUSION .....	141

## I. INTRODUCTION

Freedom of expression is often accorded preeminent status at the core of human liberty. But as the independent and inherent power of ideas rests uncomfortably within the confines of government, freedom of expression is often only ambiguously mentioned in many national constitutions. In the United States, freedom of speech and of the press were only attached to the United States Constitution as politically bartered afterthoughts in the Bill of Rights.<sup>1</sup> Even where guaranteed in the strongest terms, as in the constitution of the Soviet Union, the right to freedom of expression may be little more than a meaningless platitude. Once free speech is articulated as a guaranteed human right, the question then becomes whether it is a mere phrase of art or legal doctrine.

The United Nations Universal Declaration of Human Rights was intended as a first step toward an International Bill of Rights.<sup>2</sup> Article 19 of the Declaration provides a legal basis for freedom of expression. But the United Nations Charter does not confer a legislative function on the General Assembly, so the formulation of an international right to freedom of expression must emerge in the evolution of the customary and conventional law which binds nations.

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<sup>1</sup> See L. LEVY, *EMERGENCE OF A FREE PRESS* 234 (1985): "... the Constitution was only ratified because crucial states where ratification had been in doubt, were willing to accept the promise of a bill of rights in the form of subsequent amendments to the Constitution."

<sup>2</sup> Gross, *International Law Aspects of the Freedom of Information and the Right to Communicate*, in P. HORTON, *THE THIRD WORLD AND PRESS FREEDOM* 59 (1978).

The development of an international right of free expression has historically coursed throughout the ideological and political spectrum. In the nineteenth century Napoleon is reported to have told Metternich, "I would not undertake to govern for three months with freedom of the press."<sup>3</sup> In contrast, in the 1950s, U.S. Secretary of State John Foster Dulles said, "If I were to be granted one point of foreign policy and no other, I would make it the free flow of information."<sup>4</sup> Three decades later a similar deference to freedom of expression in the international context was a key reason for the 1984 United States withdrawal from the United Nations Educational, Scientific and Cultural Organization (UNESCO).<sup>5</sup> The pullout was in part the culmination of U.S. objections to controversial Soviet Bloc and Third World proposals for a "New World Information and Communications Order" (NWICO)<sup>6</sup> in the UNESCO forum.

The decade-long controversy regarding NWICO has substantially subsided after an exhausting storm of acrimonious debate and an endless stream of political and legal scholarship. What began as a nascent sense among Third World nations that their story as developing nations was poorly communicated to the the world at large eventually emerged as a global uproar about competing notions of freedom of the press and national self-destiny.

In the United Nations the most controversial proposals made by proponents of NWICO have not been implemented, but in Third

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<sup>3</sup> Quoted in *Les Liberties Publiques* 330 (1972) cited in T. MERON, HUMAN RIGHTS IN INTERNATIONAL LAW 181 (1984).

<sup>4</sup> Schiller, *The Free Flow of Information—For Whom?* in MASS MEDIA POLICIES IN CHANGING CULTURES 105 (1977), cited in Kraemer, *Freer Expression or Greater Repression? UNESCO and the Licensing of Journalists* 7 COMM/ENT. L.J. 39, 45.

<sup>5</sup> The United States withdrew from UNESCO because, among other reasons, of efforts in UNESCO that the Reagan administration contended would impede the "free flow" of information. See Letter from Secretary of State George Shultz to the Director-General of UNESCO (Dec. 28, 1983), reprinted in U.S. DEPARTMENT OF STATE, AMERICAN FOREIGN POLICY CURRENT DOCUMENTS 282-83 (1985). The three prime reasons stated by the Administration for the withdrawal were: 1. The NWICO controversy, 2. concern that UNESCO had become too political and 3. the UNESCO budget growth was unacceptable. See N.Y. Times, Dec. 30, 1985 at A5, col. 3.

<sup>6</sup> The concept is also known as the New World Information Order, New International Information Order and New International Information and Communication Order. Each describes concepts seeking to redress weaknesses in world-wide information and communications systems. A "new order" in the world-wide information construct has been proposed not only by the East-bloc and the Non-Aligned Movement and the Third World, but also by the Catholic Pope and the Socialist President of France. See Sussman, *The Continuing Struggle for Freedom of Information* in R. GASTIL, FREEDOM IN THE WORLD 118 (1982).

World nations there has been a steady increase in state control of news and information. One result is the emergence of a significant new body of international "right to communicate"<sup>7</sup> law building upon existing principles of freedom of expression.

While debate on a new information order proceeded in international conclaves, developing nations increasingly asserted control of the news and information flow within their own borders. Because the NWICO concept has defied clear definition it is not possible to delineate precisely where proposal and practice relate. Conceptualizing and promoting a reordering of international news flow is a dimension removed from the reality of Third World nations modernizing their news and information systems and their laws concerning freedom of expression. In doing so, most Third World nations have demonstrated little inclination to follow the American model of free speech urged upon them since the end of World War II by imperious and self-righteous American news organizations.<sup>8</sup> It is important to consider whether the triumph of NWICO opponents in UNESCO is but a pyrrhic victory in the face of heightened state control of news and information throughout the Third World.

This Note focuses on Latin America and examines the trend in the region to pass laws restricting journalists, in particular laws requiring reporters and news organizations to be licensed. As Latin America is a divergent community of relatively advanced Third World nations undergoing political turmoil, it presents a discrete, meaningful focus for an investigation of the development of the "right to communicate" in the Third World. The issue of mandatory licensing is crucial to the controversy because requiring a journalist to obtain a license implies the power to deny participation in the free flow of information. The well developed trend toward increasing state control in Latin America has global implications. In the words of Dana Bullen of the World Press Freedom Committee, "this

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<sup>7</sup> See Anawalt, *The Right to Communicate*, 13 DEN. J. INT'L L. & POL'Y 219 (1984): "The Right to Communicate seems to have emerged as a proposed legal concept in an article concerning direct broadcast satellites written by Jean d'Arcy in 1969. 'The time will come that the Universal Declaration of Human Rights will have to encompass a more extensive right than man's right to information, first laid down twenty one years ago in Article 19. This is the right to communicate.'"

<sup>8</sup> See M. BLANCHARD, *EXPORTING THE FIRST AMENDMENT* (1986). This book is an excellent and well-documented treatment of the efforts of the United States State Department and American news organizations to seek international freedom of speech through the attachment of free press guarantees based on the American model to certain peace treaties and United Nations agreements.

virus seems to be jumping to Africa, where it could spread like wildfire.”<sup>9</sup>

Part Two of the Note briefly reviews and updates the UNESCO debate concerning the proposed NWICO. Part Three evaluates the NWICO concept based upon accepted sources of international law and considers whether the products of the UNESCO debate are themselves new sources of law. Part Four examines aspects of the Latin American experience, including the important case of Stephen Schmidt, an American reporter who was convicted under a Costa Rican licensing statute in 1983. The Costa Rican government submitted the question of the statute’s validity to the Inter-American Court of Human Rights, which in 1985 held it “incompatible” with international law.<sup>10</sup> The next year the Inter-American Court handed free press advocates and Western news organizations a defeat on a different but related issue; in an advisory opinion the Court ruled that the Inter-American Convention protects the right to reply or correct “inaccurate” or “offensive” news reports.<sup>11</sup> The two cases will be detailed in a search for clues as to the nature of the emerging “right to communicate” as international law in this hemisphere. Part Five analyzes the current status of the “right to communicate” in Latin America today and questions whether that region’s development of international law in the area of freedom of expression should be considered a precursor of discouraging news for those who cherish a free press as a critical human right.

## II. TEN YEARS OF NWICO DEBATE

### A. *The Mass Media Declaration*

In 1978 the General Conference of UNESCO adopted a resolution entitled *Declaration on Fundamental Principles Concerning the Contribution of the Mass Media to Strengthening Peace and International Understanding, to the Promotion of Human Rights and to Countering Racialism, Apartheid and Incitement to War*. The Mass Media Declaration called for “a free flow and a wider and balanced dissemina-

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<sup>9</sup> Letter from Dana Bullen to David Cifrino, (Dec. 7, 1987).

<sup>10</sup> Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Costa Rica), Ser. OC-5/85 (Inter-American Court of Human Rights Advisory Opinion of Nov. 13, 1985), *reprinted in* 25 I.L.M. 123, 124 [hereinafter Opinion].

<sup>11</sup> Enforceability of the Right of Reply or Correction (arts. 14(1),1(1) and 2, American Convention on Human Rights). Ser. OC-7/85 (Inter-American Court of Human Rights. Advisory Opinion of August 29, 1986), *reprinted in* Inter-American Court Y.B. (1986).

tion of information.”<sup>12</sup> Although the resolution was more moderate than an earlier Soviet-sponsored draft proposing “complete government control of information media,”<sup>13</sup> it was widely viewed in the West as a “radical departure from the hitherto acknowledged ideal of a free and unfettered flow of information.”<sup>14</sup>

From the Third World perspective, radical changes were indeed required in “the existing order (or disorder).”<sup>15</sup> As evidence of a media imbalance, Third World representatives noted:

*As regards the Northern Hemisphere*

\* Five press Agencies, the big “five” (i.e., the two United States agencies, AP and UPI, the British agency Reuters, Agence France-Presse and the Soviet TASS) control more than 80 per cent of the world news flow;

\* Four radio networks (Voice of America, the BBC, Deutsche Welle and Radio Moscow) have a virtual monopoly of all radio programs beamed abroad; . . . .

\* Ninety percent of the available wave spectrum, i.e. the usable radio frequencies, is taken up by broadcasts from industrial countries;

\* The same is true of the production of television and newsfilms, not to mention satellites, computers, micro-processors, video-texts and the whole range of advanced technology.<sup>16</sup>

In regard to the Southern Hemisphere, African proponents of NWICO point out that

. . . the African continent, which possesses the least advanced communication system in the world, is not merely bombarded with material from outside, but is also unable to produce, emit or receive its own messages. In Gabon, for example, all that is known of Kenya or Tanzania is what Reuters and Agence France-Presse deign to select and put out from London or Paris.

It is for this reason that the new international order we advocate in the field of information and communication aims to reduce the growing inequalities we have just described and to achieve in the long run a fairer and better balanced relation-

<sup>12</sup> Article I, UNESCO Res. 4/9/3/2,20 UNESCO Res. 4/9.3/2.20, UNESCO Gen. Conf. Res., UNESCO doc. 20 C/Resolutions, at 100-04 (1978) [hereinafter Mass Media Declaration].

<sup>13</sup> *Draft Declaration on Fundamental Principles Governing the Use of the Mass Media in Strengthening Peace and International Understanding and Combating War Propaganda, Racism and Apartheid*. 19 UNESCO Gen. Conf. Rec., UNESCO Doc. 19 C/Proceedings, at 91 (1976). See Wolfe, *A New International Information Order: The Developing World and the Free Flow of Information Controversy* 8 SYR. J. INT’L & COM. L. 249, 261 (1981).

<sup>14</sup> Wolfe, *supra* note 13 at 263.

<sup>15</sup> Ping, *What the Third World Wants . . . and Why* in WORLD PRESS FREEDOM COMMITTEE, *THE MEDIA CRISIS . . . A CONTINUING CHALLENGE* 14 ( 1982).

<sup>16</sup> *Id.*

ship between North and South on the basis of equality, freedom, mutual benefit and solidarity between nations.<sup>17</sup>

Western news organizations promptly labeled the Mass Media Declaration as censorship. In particular, Article II of the Declaration was read to suggest government control over news flow and journalists: “[I]t is important that the mass media be responsive to concerns of peoples and individuals, thus promoting the participation of the public in the elaboration of information.”<sup>18</sup> Further, the goals of the Declaration as stated in the lengthy title — “Strengthening Peace and International Understanding . . . Promotion of Human Rights . . . Countering Racism, Apartheid and Incitement to War” — are understood in the United Nations to impute an anti-Western position.<sup>19</sup>

The Mass Media Declaration led to the formation of the McBride Commission, named for Commission Chairman, Sean McBride.<sup>20</sup> In an interim report, Commission member Mustapha Masmoudi proposed the introduction of a “New World Information Order” that would undertake:

1. regulation of the right to information by preventing abusive uses of the right to access to information,
2. regulation of the collection, processing and transmission of news and data across national frontiers and
3. creation of a supranational organization to oversee the correction of “false and biased news accounts.”<sup>21</sup>

In his statement, Masmoudi, Tunisia’s delegate to UNESCO, asserted: “The new world information order founded on democratic principles seeks to establish relations of equality in the communications field between developed and developing nations and aims at greater justice and greater balance.”<sup>22</sup> The McBride Report<sup>23</sup> attempted to lay out specific solutions to the media imbalance perceived by Third World nations. Although the report decried government intervention and censorship, it advocated codes of ethics

<sup>17</sup> *Id.*

<sup>18</sup> Article II, UNESCO Res. 4/9.3/2, 20 UNESCO Gen. Conf. Rec., UNESCO Doc. 20 C/Resolutions, at 102 (1978). See Wolfe, *supra*, note 13 at 262. *Citing* Gordon, *Current Legal Developments* 13 INT’L LAW. 388 (1979).

<sup>19</sup> *Id.*

<sup>20</sup> McBride, founder of Amnesty International, won both the Nobel and Lenin Peace Prizes. He died in January, 1988. See Associated Press, Jan. 15, 1988.

<sup>21</sup> See Kraemer, *supra* note 4 at 48.

<sup>22</sup> Masmoudi, *The New World Information Order*, reprinted in 29 J. COMM. 172 (1979).

<sup>23</sup> McBRIDE, ET AL, MANY VOICES ONE WORLD: COMMUNICATION AND SOCIETY TODAY AND TOMORROW (1980).

for journalists and disapproved of highly centralized private ownership of the communications infrastructure.<sup>24</sup> Following the release of the McBride Report, a NWICO work project first began proposing the issuance of identity cards to journalists.<sup>25</sup>

### B. *The Response to the Mass Media Declaration*

Condemning the licensing scheme and fearing that the proponents of the Mass Media Declaration sought to increase government control over the free flow of information, Western news agencies mobilized and launched a counter-declaration at a 1981 meeting in Talloires (hereinafter *The Declaration of Talloires*).<sup>26</sup> Asserting that Western nations would oppose any proposal to regulate journalists, *The Declaration of Talloires* flatly rejected any attempts to license journalists or impose mandatory codes of ethics.<sup>27</sup> *The Mass Media Declaration* and the response of the *Declaration of Talloires* focused debate concerning NWICO into the UNESCO arena.<sup>28</sup>

Since the withdrawal of the United States and Great Britain (and their funding) from UNESCO in 1984,<sup>29</sup> neither side has yielded any ideological ground. The perspective of proponents of NWICO was restated in a recent news item issued by the Xinhua News Agency. The story reports that the information ministers of the Non-Aligned countries remained committed to NWICO because "the present dependence of Non-Aligned countries on the information and communication infrastructure and systems of the developed world continue to constitute a serious threat to the preservation of their cultures and lifestyles."<sup>30</sup> The West remains committed to the dichotomy as evidenced by a speech by U.S. President Ronald Reagan at the United Nations on September 22, 1987. President Reagan reiterated the opposition of the West to NWICO, stating, "We cannot permit attempts to control the media

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<sup>24</sup> See Farley, *Conflict Over Government Control of Information — The United States and UNESCO* 59 TULANE L.R. 1071, 1076 (1985).

<sup>25</sup> The proposals were made in a draft calling for a Commission for the Protection of Journalists. See Singh & Gross, "McBride: *The Report and the Response*", 31 J. COMM. 104, 113 (1981).

<sup>26</sup> *The Declaration of Talloires, Voices of Freedom Conference, France* (May 15-17, 1981), reprinted in N.Y. Times, May 18, 1981 at A14, col. 1. Also reprinted in 31 J. COMM. 104, 113 (1981).

<sup>27</sup> *Id.*

<sup>28</sup> See *New World and Information and Communication Order; A Selective Bibliography*, (1984 ed.), compiled by the Dag Hammarskjöld Library of the U.N.

<sup>29</sup> Singapore also withdrew later.

<sup>30</sup> Xinhua News Agency June 12, 1987.



and promote censorship under the ruse of the so-called 'New World Information Order.'"<sup>31</sup>

Leading UNESCO during the years of discord was Director General Amadou-Mahatar M'Bow of Senegal. He was replaced on November 16, 1987 by Spaniard Federico Mayor Zaragoza with the unofficial backing of the United States and over the opposition of African and Arab nations.<sup>32</sup> Although a return to UNESCO by the United States and Great Britain is not anticipated in the near future, Mayor has expressed reservations about the information program.<sup>33</sup> Upon his election to the position of Director General, Mayor said he would seek the return of the United States, Great Britain and Singapore to UNESCO, but he would not ask these countries to rejoin "at any price."<sup>34</sup> But even as Mayor took office, renewed calls for a new world information order divided UNESCO's industrial and developing nations. In 1988, Mayor attempted to defuse the NWICO controversy referring to a "free and uninhibited flow" of news and information, rather than the more politically charged call for a "balanced" flow.<sup>35</sup> Critics of Mayor claim the new Director General has been too "timid" in seeking ways to end the four year boycott of UNESCO.<sup>36</sup> In the meantime, the United States observer to UNESCO stated recently that the U.S. has no present intention to return to UNESCO as long as its program remains unchanged, despite "a new director who is friendly to the West."<sup>37</sup>

In November of 1987, Sweden, Denmark and Japan opposed as "wasteful" a plan proposed by China, Liberia, Ghana, Mongolia, Libya and Venezuela to allot \$24 million to investigate the potential of a new world information service.<sup>38</sup> Also in 1987, in the United Nations General Assembly, Third World nations successfully secured passage of a resolution providing developing nations with greater access to new technology.<sup>39</sup> The resolution requested

<sup>31</sup> 23 WEEKLY COMP. PRES. DOC. 1051. See also Associated Press, Sep. 22, 1987.

<sup>32</sup> N.Y. Times, Oct. 19, 1987 at A1, col. 1.

<sup>33</sup> *Id.* See also Associated Press, Nov. 7, 1987.

<sup>34</sup> See N.Y. Times, Nov. 8, 1987, sec. 1 at 6, col. 1.

<sup>35</sup> Telephone interview with Leonard Sussman, Executive Director of Freedom House, New York (Sep. 14, 1988).

<sup>36</sup> N.Y. Times, July 6, 1988, A4 col. 3. The newspaper reported that "UNESCO's shrinking budget is barely enough to pay the salaries of 2,500 demoralized staff members who are waiting for the time when so called "North-South" confrontation comes to an end and UNESCO finds a sense of direction."

<sup>37</sup> *Id.*

<sup>38</sup> See Inter-Press Service, Nov. 4, 1987, *UNESCO, Renewed Debate on New World Information Order.*

<sup>39</sup> See Reuters, Dec. 8, 1987.

UNESCO and the entire U.N. system to provide all possible assistance to developing countries for their needs in the information field. The United States cast the only negative vote against the resolution, which was adopted by 136 votes with fifteen abstentions. The U.S. was again the lone dissenting vote when the General Assembly adopted a resolution (by 140 votes) approving an international program for the development of information and aimed at an alleged imbalance in that field.<sup>40</sup>

The Mass Media Declaration by UNESCO is not in and of itself legally binding upon any nation.<sup>41</sup> The Declaration merely constitutes a statement, albeit a landmark pronouncement, of a concept with many forms and agenda. That is not to say it has been without impact in the relationship of governments to news media organizations. Although UNESCO has never approved a resolution condoning the licensing<sup>42</sup> of journalists, one expert points out that "[t]he popular belief runs counter to that fact. This results from years of acrimonious debate at UNESCO during which licensing of journalists was mentioned by delegates of countries which practice licensing."<sup>43</sup> The importance of the Mass Media Declaration lies largely in its polemic role. Kaarl Nordenstreng, President of the International Organization of Journalists, noted that

The declaration came to serve as a symbol and catalyst for conflict between the forces of the new order and its adversaries. No wonder then, that this document became controversial; it stood not only for what was written in its text, but came to symbolize the struggle between conflicting forces in the world arena as well.<sup>44</sup>

While widespread discussion of licensing journalists prompted by the Declaration has raged,<sup>45</sup> Third World nations have passed laws

<sup>40</sup> *Id.*

<sup>41</sup> A declaration is generally considered a statement of policy and principle. It cannot be invoked against a signatory which violates its terms, but it may be consulted in order to interpret the provisions of binding conventions and treaties. See Gross, *supra* note 2 at 72.

<sup>42</sup> The subject of licensing has come up in numerous UNESCO meetings. For example in February of 1981 a conference explored the possibility of a Commission for the Protection of Journalists. See 31 J. COMM. 104, 113. The proposal called for the issuance of identification cards to reporters. Although the stated goal was the protection of journalists, the proposal was tabled after strong opposition from Western nations concerned about restricting journalists.

<sup>43</sup> Sussman, introduction to McCOLM, TO LICENSE A JOURNALIST, THE OPINION OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS 8 (1986).

<sup>44</sup> *The U.S. Decision to Withdraw from UNESCO* 34 J. COMM. 160 (1984), quoting K. NORDENSTRENG, THE MASS MEDIA DECLARATION OF UNESCO (1984).

<sup>45</sup> There is some debate about whether the dispute on a New World Information Order

to license their reporters and news media.<sup>46</sup> The pertinent questions, then, are (1) whether the licensing of reporters and further restrictions on independent journalism are in accord with international law and (2) whether the Mass Media Declaration provides a new source of authority for such restrictive practices.

### III. FREEDOM OF EXPRESSION IN INTERNATIONAL LAW

Whether or not a licensing program conforms to international law depends upon whether international agreements create any rights in journalists sufficient to overcome a nation's domestic jurisdiction over its own affairs. Under the principle of domestic jurisdiction states are free to exercise sovereignty within their own borders subject to the counter-balancing principle that states are prohibited from failing to fulfill their obligations under international law by invoking domestic law.<sup>47</sup> It follows that

... absent an obligation derived from customary or conventional international law, the state is the "sole judge" even though the subject matter is of concern to other states or of international concern . . . . If there is no principle or rule by which a state

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includes discussion of licensing. Assistant Professors of Communications Eileen Mahoney and Colleen Roach of the City College of New York and Fordham University, respectively, argue that the NWICO has dealt with "much broader socioeconomic and cultural issues relating to the third world's information dependence on the industrialized countries. It cannot be reduced to alleged discussions of licensing. While some member states of UNESCO may license journalists in their own countries, this was never the UNESCO position, nor is it to be found in any document or resolution dealing with the New Information Order." N.Y. Times Dec. 5, 1987, Letter to Editor, sec. 1 at 26, col. 6.

However, in a letter of rebuttal, L. Robert Primoff of New York writes that UNESCO "supported and constantly worked to develop licensing and codes of conduct for journalists, and was blocked only by the vigor of Western objections, including those of the media. Its efforts were thinly masked by code words that UNESCO participants understood, such as "protection of journalists" and "regulations of their "working conditions".

Primoff cites UNESCO's draft program and budget for 1984-85 (Document 22 c/5) in which budget approvals were sought to study "the right to communicate," "access to and participation in communication" and "the communicator's responsibilities," so as to improve understanding between journalists' "freedom" and "responsibility". By formal resolution the Director General of UNESCO was asked to implement these activities "with a view to establishing . . . a new world information and communication order."

Primoff writes "the threat was real and not media-generated; and so Congress felt when it enacted the Beard Amendment to the 1982-83 Department of State Authorization Act, calling upon Unesco to "cease efforts to attempt to regulate news content and to formulate rules and regulations for the operation of the world press and prohibiting United States funds for Unesco if that organization "implements any policy or procedure . . . to license journalists" or to "impose mandatory codes of journalistic practices or ethics." N.Y. Times, Dec. 8, 1987, Letter to Editor at A22, col. 5.

<sup>46</sup> See Sussman, *supra* note 6.

<sup>47</sup> See HORTON, *supra* note 2 at 57.

binds itself in relation to another state, it may exclude any aliens or books or newspapers or raw materials or manufactured goods.<sup>48</sup>

Article 38 of the Statute of the International Court of Justice (the principal judicial organ of the United Nations) sets forth the accepted sources of international law:

1. International Conventions, primarily treaties.
2. International Customary Law.
3. General Principles of Law Recognized by Civilized Nations.<sup>49</sup>

Critics of the Mass Media Declaration were quick to claim that it was contrary to international law as promulgated by the United Nations in that the declaration emphasized state control of news and information rather than protection of individual rights of freedom of expression.<sup>50</sup> The U.N. Charter makes only general reference to "promoting and encouraging respect for human rights and for fundamental freedoms for all,"<sup>51</sup> but Article 19 of the Universal Declaration of Human Rights (1948) states, "[e]veryone has a right to freedom of thought, conscience and religion; 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."<sup>52</sup> Unlike the United Nations Charter, the Universal Declaration of Human Rights is not legally binding. The Declaration does have force as an authoritative interpretation of the Charter.<sup>53</sup> The right in Article 19 is only vaguely limited by Article 29 which provides: "Everyone has duties to the community in which alone the free and full development of his personality is possible."<sup>54</sup>

The language of Article 19 of the Universal Declaration is found in almost identical form in the International Covenant on Civil and Political Rights,<sup>55</sup> which is binding upon the states which

<sup>48</sup> *Id* at 58.

<sup>49</sup> U.N. CHARTER, art. 92, 59 Stat. 1031, T.S. No. 993 (1945).

<sup>50</sup> See Theberge, *U.N.E.S.C.O.'s "New World Information Order": Colliding with First Amendment Values*, 67 A.B.A. J. 714, 718 (1981).

<sup>51</sup> U.N. CHARTER art. 1, para. 3.

<sup>52</sup> Universal Declaration of Human Rights, art. 19, G.A. Res. 217 (III), U.N. Doc A/810 at 71 (1948).

<sup>53</sup> See Wolfe, *supra*, note 13 at 253.

<sup>54</sup> Universal Declaration of Human Rights, art. 29(2).

<sup>55</sup> The Covenant reads:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart informations and ideas of all kinds, regardless of frontiers, either orally, in writing, or in print, in the form of art, or through any other media of his choice.

International Covenant on Civil and Political Rights, art. 19, *opened for signature* 19 Dec.

are parties to the document.<sup>56</sup> The Covenant does not guarantee freedom of expression in absolute terms. The rights are qualified by "special duties and responsibilities"<sup>57</sup> subjecting the freedom to restrictions "[f]or the protection of national security or of public order."<sup>58</sup> These qualifications are open to interpretation by states bent on exercising control of news and information for political purposes.<sup>59</sup>

The Helsinki Accords adopted in 1975 provide for the "Improvement of Working Conditions for Journalists,"<sup>60</sup> but the Conference documents are not binding.<sup>61</sup> Another international source of law frequently cited in the NWICO debate is the Geneva Conventions of 1949.<sup>62</sup> The provisions of these treaties are legally binding upon the parties to the agreements, but the provisions are activated only during times of war. Article 79 of the Geneva Conventions Protocol I permits the issuance of identification cards to journalists,<sup>63</sup> but there is no requirement that the journalist procure a card.<sup>64</sup>

In Latin America, an important source of international law regarding freedom of expression is the American Convention of Human Rights (hereinafter "the Convention") which is binding upon signing parties.<sup>65</sup> Article 13<sup>66</sup> contains language almost iden-

1966, G.A. Res. 2200, 21 U.N. GAOR, Supp. (no.16) 52, U.N. Doc. A/6316 (1966), *entered into force* Mar. 1976.

<sup>56</sup> 46 countries are parties to the Covenant, including the Latin American countries of Chile, Colombia, Costa Rica, Jamaica, Ecuador, and Barbados. *See Wolfe, supra*, note 13 at 253 n.27.

<sup>57</sup> International Covenant on Civil and Political Rights, art. 19(3), *supra*, note 55.

<sup>58</sup> *Id.*

<sup>59</sup> Wolfe, *supra*, note 13 at 254.

<sup>60</sup> Final Act, Basket III, The Final Act of the Conference on Security and Cooperation in Europe (Final Act), adopted August 1, 1975. *See BUERGANTHAL, HUMAN RIGHTS, INTERNATIONAL LAW AND THE HELSINKI ACCORD* (1977).

<sup>61</sup> *See Kraemer, supra*, note 4 at 64.

<sup>62</sup> Geneva Conventions of 1949, *entered into force* Oct. 21, 1950 6 U.S.T.3114, 75 U.N.T.S.31; 6 U.N.T.S.135; 6 U.S.T. 3516, 75 U.N.T.S. 285.

<sup>63</sup> Geneva Conventions, Protocol I, art. 79(3).

<sup>64</sup> *Id.*

<sup>65</sup> American Convention on Human Rights, *opened for signature* Nov. 22, 1969, OEA/Ser.L/V/11.50. doc. 6 (1980). As of 1986 the following Latin American countries have signed the pact: Argentina, Barbados, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Honduras, Jamaica, Nicaragua, Panama, Paraguay, Peru, United States, Uruguay, Venezuela. Mexico, Haiti and Bolivia have deposited instruments of ratification or adherence. The following states have accepted jurisdiction of the Inter-American Court of Human Rights: Argentina, Colombia, Costa Rica, Ecuador, Honduras, Peru, Uruguay, and Venezuela. *1986 Report of the Inter-American Court of Human Rights*, Appendix VII.

<sup>66</sup> *Id.* at art. 13(2).

tical to the International Covenant, including the restrictions on rights for the protection of national security and public order:

Article 13, *Freedom of Thought and Expression*

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.

2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:

- a. respect for the rights or reputations of others, or
- b. the protection of national security, public order, or public health or morals.

3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, information, or by any other means to impede the communication and circulation of ideas and opinions.<sup>67</sup>

An important statement on international law in the Western hemisphere is the 1948 American Declaration of the Rights and Duties of Man.<sup>68</sup> Article IV states that “[e]very person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever.”<sup>69</sup> In building on this foundation, the Inter-American Commission on Human Rights has stated:

Freedom of Expression is universal and its concept embodies the legal rights of all persons, individually or collectively, to express, transmit and disseminate their thoughts; parallel and correlative thereto, freedom to become informed is also universal, and entails the collective right of individuals to receive the information communicated to them by others without any interference that might distort it.<sup>70</sup>

A legal basis for NWICO often cited by its proponents is the fundamental right of sovereignty. The United Nations Charter affirms the “principle of the sovereign equality of all its members.”<sup>71</sup> This is most clearly exemplified in the Soviet view that the “freedom

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<sup>67</sup> *Id.* at art. 13.

<sup>68</sup> Adopted on May 2, 1948. Reprinted in Handbook of Existing Rules Pertaining to Human Rights, O.A.S. Doc. OEA/SER.L/V/II.50, doc.6, at 17 (1980).

<sup>69</sup> *Id.* art. IV.

<sup>70</sup> 1981 Annual Report of the Inter-American Commission on Human Rights 122 (Spanish version).

<sup>71</sup> U.N. CHARTER art. 2, para.1.

to send information [is] violative of the freedom of receiving countries to be protected from unwanted and detrimental information and communication. Soviet writers have stressed that the legal basis of international exchange of information should be national sovereignty."<sup>72</sup> Soviet legal thought "considers human rights to be a matter of domestic jurisdiction. Therefore, according to this position, protection of individual rights by an international body constitutes interference in violation of the U.N. Charter."<sup>73</sup>

A second legal basis identified as supporting the NWICO concept is "cultural protectionism," which has developed since the founding of the United Nations. The U.N. International Covenant on Economic, Social and Cultural Rights permits states to protect national culture.<sup>74</sup> Furthermore, the Civil and Political Covenant allows "government restriction upon the free flow of information in order to comply with national cultural policies by the inclusion of an *ordre public* exception to Article 19."<sup>75</sup> This ability to restrict expressions can be disapproved by the Human Rights Committee under the Optional Protocol.<sup>76</sup> Interests which may be justifiably protected in the name of "public order" are identified as:

- 1) preservation of the international community heritage
- 2) protection of national freedom of choice, or the possibility . . . [of] diversity of development
- 3) protection of local economic enterprise, and
- 4) protection of internal social and political order.<sup>77</sup>

Some proponents of NWICO suggest that the Mass Media Declaration itself has become customary law since its acceptance by acclamation in the United Nations ten years ago.<sup>78</sup> This proposition is based upon widespread acceptance of the Declaration as a uniform inter-state practice. NWICO opponents flatly reject this view:

The Mass Media Declaration stands in stark contrast to the definition of an international custom. The Declaration satisfies neither of the identified requirements for a custom. It does not embody a uniform inter-state practice. Accordingly, because

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<sup>72</sup> Raube-Wilson, *The New World Information and Communication Order and International Human Rights Law* 9 B.C. INT'L & COMP. L.R. 107, 122 (1986).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> 161 countries, including the U.S., approved adoption of the declaration. See Sussman & Sussman, *Mass Media and International Law* 7 POL. SCIENCE REV. 344 (1986).

there is no extant uniform practice, there is no legal compulsion by states to adhere to such practice.<sup>79</sup>

Even without legal binding force, it was recognized early on that the Mass Media Declaration was "indicative of a strong tendency in the direction of *dirigisme*, or state control."<sup>80</sup> Thus, the importance of the Mass Media Declaration lies not so much in attempts to endow it with the force of international law, but its articulation and justification of an international legal right to communicate which is at time at odds with traditional American libertarian notions of freedom of expression.<sup>81</sup>

#### IV. LATIN AMERICA AND PRESS FREEDOM

##### A. Background

Latin America is not hospitable to freedom of the press. Currently, eleven Latin American and Caribbean nations require journalists to be licensed: Costa Rica, Haiti, Ecuador, Panama, Peru, Brazil, Bolivia, Venezuela, Dominican Republic, Honduras and Guatemala.<sup>82</sup> Frequent reports of arrests and detentions have led the Inter-American Press Association to declare that freedom of expression is non-existent in several Latin American countries.<sup>83</sup> Freedom House, the New York based human rights organization, reports<sup>84</sup> that in 1986 a record number of journalists were murdered in Latin America, including four in Mexico alone.<sup>85</sup> In many nations repression of the press ranges from restrictive legislation to intimidation and outright violence directed against journalists. Beatings, jailings and detention of reporters have been common in Paraguay and Panama.<sup>86</sup> The overthrow of the Duvalier regime in

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<sup>79</sup> *Id.* at 357.

<sup>80</sup> Gross, *supra*, note 2 at 72.

<sup>81</sup> A right to communicate as envisioned by Jean d'Arcy, *supra* note 7, might well include a right to reply or rectification of news reports. In the United States, a right to reply was rejected in *Miami Herald v. Tornillo*, 418 U.S. 241 (1974). The court held that a Florida statute requiring newspapers to grant political candidates equal space to answer criticisms and attacks on his or her record violated the First Amendment by intruding into the function of editors to choose what material to publish and in deciding on the treatment of public issues and officials. *Id.* at 258.

<sup>82</sup> See Sussman, *Press Freedom, Secrecy and Censors* 10, in *Freedom at Issue* (1987).

<sup>83</sup> Associated Press, Mar. 20, 1980.

<sup>84</sup> See Sussman, *supra* note 82.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*



Haiti brought relative press freedom, only to be shattered by the ruling military junta:<sup>87</sup>

As the local and foreign press has reported on killings and other human rights abuses by the Army, the Army has subjected it to increasingly violent attack. These attacks are all the more striking in light of the dramatic liberalization of press freedoms that had occurred in Haiti following the flight of Duvalier in February 1986.<sup>88</sup>

Although there were some improvements upon Haiti's 1980 Press Law, the new regime incorporated a number of arbitrary and repressive provisions into a new press law following the overthrow of the Duvalier government. America's Watch, an arm of the human rights organization which monitors the Helsinki Accords, criticizes several aspects of the new Press Law, including the licensing provisions:

Article 10 removes from the owner or director of a print/broadcast medium the authority to decide who to employ. This article makes it a requirement that all licensed journalists have a university diploma or its equivalent in order to qualify for the required journalists' card. Following the Duvalier's ouster, many new newspapers and magazines began publication, a testimony to the great surge of democratic ideals being expressed throughout the country. Most are small, with limited circulation and limited means, and staffed by students. By restricting the profession of journalism to those with a university diploma, this article has the effect of reducing and limiting the number of publications, and increasing the ability of the government to control the reduced number meeting the requirements. It is certainly no incentive to freedom and diversity of the press.<sup>89</sup>

In Paraguay and Chile one commentator writes that the ruling regimes "harass the press into self-censorship. In Orwellian fashion they employ constitutions and statutes designed to protect press freedom, in order to restrict undesirable news and publications."<sup>90</sup> In Paraguay both the most important daily newspaper, ABC Color, and the most active radio station, Radio Nanduti, have been shut down and their owners imprisoned many times under the 34 year rule of General Alfredo Stroessner.<sup>91</sup>

<sup>87</sup> *Id.*

<sup>88</sup> America's Watch, *Haiti — Terror and the 1987 Elections* 41 (Nov. 1987).

<sup>89</sup> America's Watch, *Duvalierism After Duvalier* 44-45 (1986).

<sup>90</sup> Sussman, *Communication: Openness and Censorship* in R. GASTIL, *FREEDOM IN THE WORLD 1987-1988* 142 (1988).

<sup>91</sup> *Id.*

In 1987 the Inter-American Commission on Human Rights issued a highly critical Report on the Situation of Human Rights in Paraguay.<sup>92</sup> The Commission found that both the legal structure regulating free expression and the acts of the government “violate the rights guaranteed by the American Declaration of the Rights and Duties of Man [and] create an atmosphere that makes journalism difficult and dangerous, requiring courage and daring from those who would exercise it freely.”<sup>93</sup> The 1967 Paraguayan Constitution addresses freedom of expression and thought in the following terms:

Article 71. Freedom of thought and opinion are guaranteed on equal terms to all inhabitants of the republic. It is forbidden to preach hatred or class struggle among Paraguayans, or to defend crime or violence. The laws may be criticized freely, but no one may proclaim disobedience to their provisions.<sup>94</sup>

The Commission found that on the basis of prohibitions in Article 71 of the Constitution, a number of laws have been repeatedly used to “silence simple statements of disagreement by the opposition.”<sup>95</sup> For example, the Report stated,

Article 8 of Law 294 provides that if any of the crimes punishable by law on the “Defense of Democracy” are committed “by the press, radio broadcasting stations, or news and information agencies, the services of those responsible will be suspended for a period of one to six months. In the event of a repetition or recurrence it will be closed . . . .” In turn, Law 209 of 1970 on Defense of Public order and Freedom of Individuals contains provisions that because they are excessively vague and general may constitute — and in fact have already done so — serious restrictions on the freedoms of expression and opinion. Such is the case of Article 4, which stipulates one to six years in the penitentiary for anyone who “through any means shall publicly preach hatred among Paraguayans or destruction of the social classes.”<sup>96</sup>

In a similar report on human rights in Chile issued in 1985<sup>97</sup> the Inter-American Commission embraced a finding made by the

<sup>92</sup> *Report on the Situation of Human Rights in Paraguay*, OEA/ser.L/V/II.71, doc. 19 rev. 1, Sep. 28, 1987. Original: Spanish.

<sup>93</sup> *Id.* at 75.

<sup>94</sup> CONSTITUCION art. 71 (Para.).

<sup>95</sup> *Report on the Situation of Human Rights in Paraguay*, *supra* note 92 at 65.

<sup>96</sup> *Id.*

<sup>97</sup> *Report on the Situation of Human Rights in Chile*, OEA/ser.L/V/II.66, doc. 17, Sep. 27, 1985. Original: Spanish.

Chilean Association of Journalists that "the freedom to state opinions and impart information without prior censorship of any kind and by means, guaranteed by [the Chilean] Constitution, had been virtually abolished in Chile."<sup>98</sup> A recent account indicates that more than thirty laws and regulations restrict the news media in Chile.<sup>99</sup> One law prohibits coverage of the Communist party or any organization which "propagate doctrines that offend the family, propound violence or are based on a totalitarian conception of the state or on class struggle."<sup>100</sup> Following failed assassination attempts against Chilean President Augusto Pinochet, the press in Chile has suffered severe losses.<sup>101</sup> The situation in Chile is not new. The president of the National Press Association says "there has been no liberty of the press here since 1973," the year the military government took power.<sup>102</sup> The 1980 Chilean Constitution ostensibly guarantees freedom of speech with restrictions in accord with "right to communicate" concepts, including the right of every "natural or juridical person offended or unjustly alluded to in some mass communications medium . . . to have his declaration or rectification gratuitously disseminated, under the conditions determined by law, by the mass communications media in which such information was issued."<sup>103</sup> The legal apparatus plays a key role in the government repression of the Chilean press as detailed in a recent America's Watch report:

Editors and journalists of . . . publications have been harassed . . . . The harassment includes legal charges and detentions of editors. Father Renato Hevia, director of *Mensaje*, was held for two weeks in December 1984 for having published articles allegedly insulting to Gen. Pinochet. *Cauce* editor Juan Jorge Faundes and other *Cauce* journalists were arrested in August 1986 as a result of an article questioning the government's account of the discovery of clandestine arms cache. Faundes had been arrested in July in connection with an interview appearing in *Cauce*. Also in July 1986, charges were filed against 29 editors, reporters and contributors to *Analisis* in connection with articles that had appeared from January to June

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<sup>98</sup> *Id.* at 196-7.

<sup>99</sup> Unger, *How the Junta in Chile Keeps Press in Control*, Boston Globe, Jan. 10, 1988 at A-21, col 1.

<sup>100</sup> *Id.*

<sup>101</sup> Sussman, *supra* note 80.

<sup>102</sup> See *Chile's Press Wonders: Just How Free is Free?*, N.Y. Times, Nov. 7, 1987, sec. 1 at 4, col. 1.

<sup>103</sup> CONSTITUCION art. 10, *as amended*, 1970 (Chile).

in the magazine; as a result, *Analisis* editor Juan Pablo Cardenas was jailed from July 29 to August 26, 1986.<sup>104</sup>

In Nicaragua, *La Prensa*, the last newspaper opposing the Sandinista government was closed in 1986, then allowed to reopen in 1987 by agreement with President Daniel Ortega "without restrictions except those imposed by responsible journalism."<sup>105</sup> It is not clear just what may be found to be irresponsible journalism. The Catholic radio station was also shut down and only reopened as a political concession. Both outlets operate under the threat of censorship and reclosure. The heavy hand upon the press is enforced by law in Nicaragua. Early in this decade the Ministry of Internal Affairs promulgated a law which severely restricted independent journalism. Despite a statement in Article I of the law supporting freedom of expression, the draft undermines the concept at length. Article 24 states that "every publication or broadcast shall express a legitimate preoccupation for the defense or gains of the revolution, the process of reconstruction . . . and should not be the instrument of anti-popular interests."<sup>106</sup> The law created an Administration of Means of Communication (DMC) which would "process, pass judgment, and resolve with regard to authorization, suspension, renewal, and cancellation of the permits and licenses for the operation of the means of social communication . . . ." <sup>107</sup> Under the law, news organizations are required to reveal to the DMC "the sources on which their information is based."<sup>108</sup>

The licensing law conforms to general Sandinistan policy. According to one source, "[t]he Sandinista regime in Nicaragua has followed a policy of strict censorship arrests and harassment of independent journalists since 1979 when the General Law of the Mass Media of Social Communications was approved by the revolutionary junta."<sup>109</sup>

#### B. *Costa Rica Law No. 4420*

Repression of the press in Nicaragua, Chile, Paraguay and Haiti goes beyond legislation to overt repressive tactics by dictators. The

<sup>104</sup> America's Watch, *Human Rights in Chile* 42 (1987).

<sup>105</sup> GASTIL, *supra* note 90 at 144.

<sup>106</sup> R. GASTIL, *FREEDOM IN THE WORLD—POLITICAL RIGHTS AND CIVIL LIBERTIES* 115 (1982).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> See Farley, *supra* note 24 at 1080, n. 54.

actions of these governments mostly mock international law rather than contribute to its development. It is, however, among the methods of these regimes to use legislation and regulation to restrict freedom of expression — such as licensing or a provision guaranteeing a right of rectification or clarification. It is troubling to free press advocates that these same laws can be found in the legal structure of communication in freer nations of Latin America. Costa Rica, considered among the region's most stable and democratic states<sup>110</sup> submitted its licensing statute — Law No. 4420<sup>111</sup> — to the Inter-American Court of Human Rights for an advisory opinion. In a landmark decision in November of 1985, the court unanimously held that “the compulsory licensing of journalists is incompatible with Article 13 of the American Convention on Human Rights if it denies any person access to the full use of the news media as a means of expressing himself or imparting information.”<sup>112</sup>

The case involved United States reporter Stephen Schmidt who was working for *The Tico Times*, an English language weekly in San Jose, Costa Rica. Schmidt challenged Law 4420, known as the “Organic Law of the College of Journalists of Costa Rica.” The statute,

<sup>110</sup> See McCOLM, *supra* note 43.

<sup>111</sup> Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Costa Rica), Ser. OC-5/85 (Inter-American Court of Human Rights Advisory Opinion of Nov. 13, 1985. See *supra*, note 10.

The court identified the following excerpt as the relevant provisions of Public Law. No. 4420:

ARTICLE 2. The Association of Journalists of Costa Rica shall be composed of the following:

- a) Holders of Licenciante or Bachelor degree in Journalism, graduated from the University of Costa Rica or from comparable universities or institutions abroad, admitted to membership in the Association in accordance with laws and treaties,
- b) If there is a lack of professional journalists, the Association may authorize persons with a vocation for journalism to practice the profession, after certifying their merits, technical know-how and moral standing.

ARTICLE 22—The function of a journalist can only be a carried out by duly registered members of the Association.

ARTICLE 23—For purposes of this law, the phrase “practicing professional journalist” shall be understood to mean the person whose principal, regular or paid occupation it is to practice his profession in a daily or periodic publication, or in radio or television news media, or in a news agency, and for whom such work represents his or her principal source of income.

ARTICLE 25—Columnists and permanent or occasional commentators in all types of news media may, whether or not they receive pay, freely carry out their activities without being obliged to belong to the Association, however, their scope of activities shall be restricted to that specific area and they shall not be permitted to work as specialized or non-specialized reporters. *Id.* at 144.

<sup>112</sup> *Id.* at 145.

passed in 1969, created an officially sanctioned journalists' association, the Colegio de Periodistas, which was authorized to train and license journalists. Despite several years of experience as a reporter in Costa Rica and a graduate degree in interpretative reporting from Autonomous University of Central America, Schmidt was denied a license to practice journalism because the Colegio refused to recognize degrees from Autonomous University.

In January of 1983 Schmidt was acquitted at trial in a decision which marked the first time that the Universal Declaration of Human Rights and the American Convention of Human Rights had been used in a court decision in the western hemisphere.<sup>113</sup> Judge Jeanette Sanchez of the Second Penal Court of San Jose ruled that Costa Rica was required to give precedence to its treaty obligations over its domestic legislation:

Our Magna Carta, in Article 7, stipulates, in paragraph (1): "Public treaties, international agreements and concords duly approved by the Legislative Assembly, shall from time of their acceptance have authority higher than of laws."

Applying the above to the concrete case, we see that Stephen Schmidt "was seeking out, receiving, or disseminating information . . . in written form." His conduct therefore corresponds with the exercise of what may be called that higher right, which is freedom of expression, and which, as stated, must not be restricted by any indirect means. The foregoing demonstrates that the legal nature of a College of Journalists cannot be the same as is essential to other professional colleges, since in the former activity use is made of one of the most precious public freedoms of human beings, that is to express their thoughts.<sup>114</sup>

In June of 1983 Costa Rica's Supreme Court reversed the lower court and annulled the acquittal. The decision was based on a perceived need to protect the standards of professionals governed by various colleges:

[T]he public interest involved in the general exercise of the professions, which interest serves as a legitimate reason for the protectionist intervention of the State in view of the necessity for such activities to be performed by highly qualified persons, that is, those with abilities derived from university studies and the professional titles obtained in the manner stipulated in the law or regulations . . . .<sup>115</sup>

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<sup>113</sup> See McCOLM, *supra* note 43 at 15.

<sup>114</sup> *Id.* at 16.

<sup>115</sup> *Id.* at 16-17.

The case was appealed to the Inter-American Human Rights Commission in Washington which handed Schmidt an unfavorable ruling, declaring: "Costa Rican law No. 4420 . . . and the decision handed down by the . . . Supreme Court of Justice of Costa Rica . . . did not constitute a violation of Article 13 of the [American Convention on Human Rights.]"<sup>116</sup> Following defeat in Washington, the Inter-American Press Association persuaded the Costa Rican government to seek an advisory opinion from the Inter-American Court not only on the *Schmidt* case specifically, but also on the broader question of mandatory licensing of journalists. The court ruled unanimously on both issues that the licensing of journalists is incompatible with freedom of expression as guaranteed in Article 13 of the Convention.<sup>117</sup>

The court noted that Article 13(2) "stipulates in the first place that prior censorship is always incompatible with the full enjoyment of the rights listed in Article 13."<sup>118</sup> Therefore, the court said, abuse of the right of freedom of expression can be controlled only by "subsequent . . . sanctions,"<sup>119</sup> and only in accordance with a four part standard formulated by the court with heavy reliance upon the language of the Convention. Section 2 of Article 13 allows imposition of liability for abuse of freedom of expression "to the extent necessary to ensure: a. respect for the rights or reputations of others, or b. the protection of national security, public order, or public health or morals."<sup>120</sup> In its opinion, the court laid down four requirements which must be met before liability could be imposed:

- a) the existence of previously established grounds for liability,
- b) the express and precise definition of these grounds by law,
- c) the legitimacy of the ends sought to be achieved,
- d) a showing that these grounds of liability are "necessary to ensure" the aforementioned ends.<sup>121</sup>

The court emphasized that it was not enough for the government to show that the statute in question serves a useful or desirable purpose. Rather, the court wrote,

to be compatible with the convention, the restrictions must be justified by reference to governmental objectives which, because

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<sup>116</sup> Case 9178, INTER-AM. C.H.R., OEA/ser. L/V/II.63, doc. 15 (1984).

<sup>117</sup> *Id.* at 145.

<sup>118</sup> *Id.* at 132.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

of their importance, clearly outweigh the social need for the full enjoyment of the right Article 13 guarantees. Implicit in this standard, furthermore, is the notion that the restriction, even if justified by compelling governmental interests, must be so framed as not to limit the right protected by Article 13 more than is necessary.<sup>122</sup>

The court rejected the Costa Rican government's argument that the licensing scheme was justified as necessary to ensure public order, a protected interest under subsection 2(b). The court stressed that "public order . . . may under no circumstances be invoked as a means of denying a right guaranteed by the Convention."<sup>123</sup> Moreover, the court stated "that same concept of public order in a democratic society requires the guarantee of the widest possible circulation of news, ideas and opinions as well as the widest access to information by society as a whole."<sup>124</sup>

Conceding that some licensing schemes might be incompatible with the Convention, the government argued that Costa Rican Law No. 4420 was not incompatible because it did not seek to license commentators or columnists and thus did not restrict ideas or opinions. The court merely pointed out that "the Convention does not only guarantee the right to seek, receive and impart ideas but also information of all kinds."<sup>125</sup>

Western news organizations hailed the decision in the *Schmidt* case as an important landmark in international freedom of expression law.<sup>126</sup> The ruling did create a precedent, but as an advisory opinion the Costa Rican government was free to ignore the court's decision, which it has done. Law No. 4420 remains on the books and Stephen Schmidt remains a convicted felon.

### C. *The Right of Reply*

The next case to come before the Inter-American Court regarding an issue of freedom of expression involved a Costa Rican press law that guaranteed a right of reply or correction to anyone injured by an "inaccurate" or "offensive" publication or broadcast. This time the advisory opinion was a setback for press freedom groups and an important qualification upon the Schmidt decision.

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<sup>122</sup> *Id.* at 135.

<sup>123</sup> *Id.* at 140.

<sup>124</sup> *Id.* at 141.

<sup>125</sup> *Id.* at 145.

<sup>126</sup> See McCOLM, *supra* note 43



In its opinion the court held unanimously that Article 14(1)<sup>127</sup> of the American Convention of Human Rights “recognizes an internationally enforceable right to reply or to make a correction which, under Article 1(1), the State Parties have the obligation to respect and to ensure the free and full exercise thereof to all persons subject to their jurisdiction.”<sup>128</sup> The court also held that States which are parties to the Convention have an obligation “to adopt, in accordance with its constitutional processes and the provisions of the Convention, the legislative or other measures that may be necessary to give effect to this right.”<sup>129</sup>

Again, the Costa Rican government solicited an advisory opinion. In an *amicus curiae* brief several news and press freedom organizations argued that

... communications media may not be made subject to a “right of reply” under Article 14 unless they are “legally regulated,” and such regulation would have to consist of a pervasive scheme, including government licensing of the medium in question. Under the provisions of Article 12 and 13 of the *Convention*, however, imposition of a licensing requirement on the free press is contrary to the fundamental right of free expression, and thus imposition of a “right of reply” on the press contravenes the provisions of Articles 12, 13 and 14(1). [citing Advisory Opinion OC-5/85 of November 13, 1985 (compulsory licensing in an association prescribed by law for the practice of journalism)].<sup>130</sup>

The court rejected the argument that under the *Schmidt* opinion the right to freedom of thought and expression in Article 13 superseded the right of reply in Article 14:

The fact that the right of reply or correction (Art.14) follows immediately after the right to freedom of thought and expression (Art.13) confirms this interpretation. The inescapable relationship between these articles can be deduced from the nature of the rights recognized therein, since, in regulating the

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<sup>127</sup> Article 14 reads as follows:

1. Anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or to make a correction using the same communications outlet, under such conditions as the law may establish.

Enforceability of the Right of Reply or Correction (arts. 14(1),1(1) and 2 American Convention on Human Rights). Ser. OC-7/85 (Inter-American Court of Human Rights. Advisory Opinion of August 29, 1986) *See supra* note 11. at 53.

<sup>128</sup> *Id.* at 58.

<sup>129</sup> *Id.*

<sup>130</sup> *Amici Curaie* brief of Inter-American Press Association, World Press Freedom Committee, American Newspaper Publishers Association, et al. at 17.

application of the right of reply or correction, the State Parties must respect the right of freedom of expression guaranteed by Article 13. They may not, however, interpret the right of freedom of expression so broadly as to negate the right of reply proclaimed by Article 14(1) (Compulsory Membership of Journalists, *supra* 18 para. 18). It is appropriate to recall that Resolution (74) 26 of the Committee of Ministers of the Council of Europe based the right of reply on Article 10 of the European Convention, which deals with freedom of expression.<sup>131</sup>

## V. CONCLUSION

In political terms freedom of the press is often considered the most important component of freedom of expression. The *Schmidt* decision certifies the right of reporters to perform without licensing restraints. The Inter-American Court's opinion in the right of reply case, however, places equal weight on the right of individuals or the government to access the news media and participate in a two way flow of communication. This balancing approach lends credence to Third World advocates of a "right to communicate" which envisions communication as a catalyst for cultural preservation and national self determination. Read narrowly, it can be foreseen that if a court were to issue a similar, but binding, decision upon a party to the American Convention, that state would be obligated to cease that practice. In the absence of binding decisions interpreting applicable treaty law, however, the growing practice of Latin American countries to impose controls on the news media effectively repudiates claims that customary law prohibits state control of news and information.

"The purpose of international law," one commentator writes, "is to influence states to recognize and accept human rights, to reflect these rights in their national institutions and to incorporate them into national ways of life."<sup>132</sup> It is for this reason that the NWICO battle has consumed so much energy and attention in the past decade. The democratic view of the human right of freedom of expression allows for public policy restrictions such as protecting individuals from riots in crowded movie theatres<sup>133</sup> and from defamation and libel. The other extreme is the Soviet view which fails

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<sup>131</sup> Enforceability of the Right of Reply or Correction, Inter-American Court of Human Rights Advisory Opinion (1986), *supra* note 11 at 55.

<sup>132</sup> Henkin, *International Human Rights and Rights in the United States* in HORTON, *supra* note 2.

<sup>133</sup> See *Schenck v. United States*, 249 U.S. 47, 52 (1919).

to recognize any rights of communication except that of the Communist party.<sup>134</sup> Between these polar opposites is the emerging Third World view which often seeks to control news and information in a broader and political sense of public order and as a component in a claimed "right to develop." Third World nations frequently assert that until their societies achieve economic and social independence, certain civil liberties may be subordinated.<sup>135</sup>

The right of free expression was a critical goal of organizers of the United Nations after World War II: "Freedom of Information . . . is, as the General Assembly said at its first session, the touchstone of all the freedoms to which the United Nations is consecrated."<sup>136</sup> This fundamental right was eventually enshrined in the Universal Declaration, but advocates for human rights in international law are critical of the Political Covenant which goes beyond Article 29 of the Universal Declaration in allowing restriction on the freedom of information "for the protection of national security or of public order . . ."<sup>137</sup> The *Schmidt* case demonstrates how the government of Costa Rica sought to justify its licensing statute on the basis of public order. Although the Inter-American Court was clear in rejecting the argument that a mandatory licensing scheme was necessary to ensure public order, Costa Rica and ten other Latin American nations continue to license journalists. That, in combination with affirmation of a "right of reply or correction," probably means that true freedom of expression, as a political and human right, will remain an elusive goal of international law in Latin America for some time to come.

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<sup>134</sup> Humphrey, *Political and Related Rights* in MERON, *supra* note 3 at 185.

<sup>135</sup> Shestack, *The Jurisprudence of Human Rights* in MERON, *supra* note 3 at 185.

<sup>136</sup> Humphrey, *supra* note 134 at 182.

<sup>137</sup> Art. 19, Political Covenant, para 3(b).