

2004

The Thin State in Thick Globalism: Sovereignty in the Information Age

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Adeno Addis, *The Thin State in Thick Globalism: Sovereignty in the Information Age*, 37 *Vanderbilt Law Review* 1 (2021)

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The Thin State in Thick Globalism: Sovereignty in the Information Age

*Adeno Addis**

ABSTRACT

Looking at the astonishing technological developments in mass communication over the past several decades, Professor Addis explores whether and how the resulting communication revolution has undermined the notion of territorial sovereignty. Specifically, he argues that (1) although the territorial state has faced serious challenges from the communication revolution, the question is not whether state sovereignty will survive, but how thick or thin that sovereignty will (or should) be; (2) even if it were true that the territorial state is giving way to other institutional arrangements, those arrangements may not be a decentralized system of governance in that the communication revolution is leading to institutional arrangements that are increasingly more centralized and distant from the individuals whose lives they affect; and finally that (3) the various institutional and conceptual responses that have been offered to deal with the challenges of the communication revolution—the statist, the proceduralist, and the liberal internationalist responses—misapprehend the nature of the communication revolution and consequently fail to suggest institutional structures that fully address the tension between the technological reality of routine transborder information flows and the institutional claims of the territorial state.

* William Ray Forrester Professor of Public and Constitutional Law, Tulane University. This is part of a large work designed to rethink the idea of state sovereignty in the light of the communication revolution.

Drawing from the works of prominent political philosophers and communication theorists, Professor Addis sketches an outline of “thin statism” as a more defensible response to the communication revolution. Organized by two principles (the notion of plurality (internal pluralism) and the idea of subsidiarity (external pluralism)), thin statism will allow us to reconcile the reality of transborder communication with the need for a version of a state system as a check on thick globalism. This thin state will also accommodate two commitments that are generally viewed as incompatible: universalism and the pursuit of the “politics of difference.” Just like any other boundaries, territorial boundaries “both foster and inhibit freedom.” The institutional arrangements suggested by the notion of the thin state understand and respond to this ambiguity.

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I. INTRODUCTION

Several years ago a masthead on a cyber site proclaimed: "National borders are just speedbumps on the information superhighway."¹ The astonishing developments in the last few decades in information technologies and infrastructure have made it easier to generate, package, and transmit information across the globe at an increasing speed and falling costs.² Indeed, the

1. Information and Infrastructure, at <http://akebono.stanford.edu/yahoo/>, cited in Harold M. White, Jr. & Rita Lauria, *The Impact of the New Communication Technologies on International Communication Law and Policy*, 32 CAL. W. L. REV. 1, 2 (1995).

2. See Martin Wolf, *Will the Nation-State Survive Globalization?*, FOREIGN AFF., Jan.-Feb. 2001, at 181-82; see generally MANUEL CASTELLS, *THE RISE OF THE NETWORK SOCIETY* (1996).

communication revolution³ in general and the Internet in particular have reduced cost and distance nearly to zero.

One "victim" of this dramatic decrease in distance and transaction costs, the message of the cyber enthusiast suggests, is the idea of the territorial state that has defined, and has been central to, international relations for a considerable time, at least since Westphalia.⁴ Indeed, it is now almost a cliché to announce that the nation-state is on its final legs.⁵

3. Some may question the use of the term "revolution" to refer to current communication developments as being inaccurate. But I believe the "revolution" designation is entirely appropriate. If by revolution is meant the sudden and wide transformation of social and institutional life, then we have a revolution at hand. The emergence of new communication technologies is clearly transforming how we organize and govern ourselves both locally and globally, and even how we view ourselves and others. As I shall show later, central concepts such as national sovereignty have to be rethought and with them a large body of public international law itself. Even widely accepted propositions as to what constitutes democratic governance might have to be rethought in the light of the emergence and proliferation of communication technologies. As to the suddenness of the transformation, of course the notion of suddenness is relative. But to understand how sudden all this has been one need only compare events of the last few decades with what took place in all previous years of human history. Arthur Clarke puts the changes into the context of the larger human history with this observation: "When Queen Victoria came to the throne in 1837, she had no swifter means of sending messages to the far parts of her empire than had Julius Caesar or, for that matter, Moses. . . . The galloping horse and the sailing ship remained the swiftest means of transport, as they had for five thousand years." ARTHUR C. CLARKE, *HOW THE WORLD WAS ONE: BEYOND THE GLOBAL VILLAGE* 2-3 (1992). Compare that to the fact that in the last few decades we have quickly moved from satellite communication to transborder data flow to the Internet.

4. "For three or four centuries, and certainly by the time of the Peace of Westphalia, ending the Thirty Years War, state sovereignty has been the guiding principle of international relations." KURT MILLS, *HUMAN RIGHTS IN THE EMERGING GLOBAL ORDER: A NEW SOVEREIGNTY?* 9 (1998); see also KALEVI J. HOLSTI, *PEACE AND WAR: ARMED CONFLICT AND INTERNATIONAL ORDER 1648-1989* 25 (1991) ("The Peace of Westphalia organized Europe on the principle of particularism. It represented a diplomatic arrangement—an order created by states, for states—and replaced most of the legal vestiges of hierarchy, at the pinnacle of which were the Pope and the Holy Roman Empire."); Jessica T. Mathews, *Power Shift*, *FOREIGN AFF.* Jan-Feb. 1997, at 50. The Westphalia thesis, the idea that the state system was essentially created after Westphalia, is not universally endorsed. Christian Reus-Smit writes, "[i]t was not until the middle of the nineteenth century, when a new set of constitutional values had emerged to justify the authority of [a] sovereign state, that fundamental institutions of multilateralism and contractual international law took off." CHRISTIAN REUS-SMIT, *THE MORAL PURPOSE OF THE STATE: CULTURE, SOCIAL IDENTITY, AND INSTITUTIONAL RATIONALITY IN INTERNATIONAL RELATIONS* 88 (1999); see also Andreas Osiander, *Sovereignty, International Relations, and the Westphalian Myth*, 55 *INT'L ORG.* 250, 268 (2001) ("[T]he prevalence of the Westphalian Myth . . . is the result of the nineteenth- and twentieth-century historians adopting a certain standard account of 1648, influenced by ideas that can be traced to anti-Habsburg propaganda of the Thirty Years' War.").

5. "The system of sovereign states is . . . in gradual decay." David Jacobson, Conclusion to *The Global Future*, in *OLD NATIONS, NEW WORLD: CONCEPTIONS OF WORLD ORDER* 212 (David Jacobson ed., 1994). At another point Jacobson makes a similar observation: "The classical framework of state sovereignty, national self-

For many enthusiasts of the communication revolution and other critics of the state system, the demise of the system could not come sooner.⁶ Their enthusiasm is based on the belief that the state system has been an impediment to international human solidarity and human flourishing.⁷ They offer a number of reasons to back this claim. First, in the name of protecting the integrity of the territorial border, many wars have been fought and many more tense situations exist.⁸ As one author put it: "territorial disputes have been the major cause of enduring interstate rivalries, the frequency of war and intensity of war."⁹ The historically drawn territorial border gets transformed into an almost transcendental boundary whose integrity is seen to define the integrity of the community itself. Resources that could be utilized for attending to basic needs are spent on defending, or preparing to defend, the border, "the motherland," or "the fatherland."¹⁰

determination and the nation state is crumbling in the core of the world order." *Id.* at 217. "[T]he 'state centric' system of the nineteenth and twentieth centuries is, if not at an end, at a minimum undergoing a deep reconfiguration." SEYLA BENHABIB, *THE CLAIMS OF CULTURE: EQUALITY AND DIVERSITY IN THE GLOBAL ERA* 179 (2002) (citations omitted). Actually, even as far back as 1964, scholars were announcing the obsolescence of national sovereignty. Hans J. Morgenthau proclaimed that "the sovereign nation-state is in the process of becoming obsolete." Hans J. Morgenthau, *The Intellectual and Political Functions of a Theory of International Relations*, in *THE ROLE OF THEORY IN INTERNATIONAL RELATIONS* 16 (H. V. Harrison ed., 1964).

6. Many globalists who may not be cyber literate, let alone defenders of the communication revolution, feel the same way. "[T]he 'withering away' of national sovereignty is a positive development." G. B. Madison, *Globalization and Opportunities*, available at <http://www.humanities.mcmaster.ca/~global/global.htm> (last visited Dec. 26, 2003).

7. *Id.*

8. See Mark W. Zacher, *The Territorial Integrity Norm: International Boundaries and the Use of Force*, 55 INT'L ORG. 215, 215-16 (2001).

9. *Id.* John Vasquez has written: "Of all the issues over which wars could logically be fought, territorial issues seem to be the ones most often associated with wars. Few interstate wars are fought without any territorial issue being involved in one way or another." JOHN VASQUEZ, *THE WAR PUZZLE* 151 (1993), quoted in Zacher, *supra* note 8, at 216; see also Michael Hechter & Elizabeth Borland, *National Self-Determination: The Emergence of an International Norm*, in *SOCIAL NORMS* 35 (Michael Hechter & Karl-Dieter Opp eds., 2001) ("[L]ess than four percent of the world's population lives in seven countries that have had no recent border disputes: Denmark, Iceland, Japan, Luxembourg, the Netherlands, Norway, and Portugal." *Id.*, citing WALKER CONNOR, *MEXIAN AMERICANS CONTEMPORARY PERSPECTIVE* (1985).

10. Chaim Gans observes that the notion of "the father land" is present in many languages. "Many languages have a term for the concept of the *fatherland*." Chaim Gans, *Historical Rights: The Evaluation of Nationalist Claims to Sovereignty*, 29 POL. THEORY 58, 66 (2001). Gans analogizes the tie between peoples and "their formative territories [to] that of the ties between children and their parents." *Id.* at 66-67; see also Gary R. Johnson, *In the Name of the Fatherland: An Analysis of Kin Term Usage in Patriotic Speech and Literature*, 8 INT'L POL. SCI. REV. 165, 168-71 (1987) (exploring the use of terms such as "motherland" and "fatherland" "to inspire in the listener or reader a feeling of unity with his or her fellow citizens").

Second, and perhaps more importantly, the idea of the territorial border makes it difficult, if not impossible, to treat all people as individuals and to make them the focus of our moral concern. The state system starts with the state, rather than the individual, as the unit of analysis. An individual is a citizen of this nation or that nation. He or she is within the jurisdiction and care of this or that country. One's moral (and certainly legal) obligation is informed and constrained by the often arbitrarily drawn territorial boundary. Therefore, to the extent that the state system makes one's moral, political and social obligations correspond largely to the limits of the physical boundary that defines the nation-state, it becomes that much more difficult to pursue international justice that takes the individual as one's point of departure and international human solidarity as one's objective. The assumption behind this position is, of course, that international justice would best be achieved if we took the individual, rather than the territorial state, as a point of departure for our analytical as well as prescriptive endeavors.

Third, the world organized into numerous nation-states with as numerous jurisdictional and regulatory setups is viewed as not very conducive to the development of technologies (and the worldwide benefits that would accrue from such developments), such as communication technologies. This third point is paradoxical. On the one hand, people acknowledge and rejoice in the fact that the technological revolution in the area of communication has had serious and salutary impact on the nation state, but, on the other hand, they view the decline or even disappearance of the nation-state as conducive, even necessary, for the development of the technology. The territorial state is too small to deal with the myriad global issues that face us, but it is big enough to have a negative impact on the development of alternative ways of organizing that communication technologies suggest.

The communication revolution has had two interrelated impacts on the current international scene with its emphasis on the state system. On the one hand, it is seriously undermining the hold that the notion of the territorial state has had on the international system and on our imagination. This can be referred to as the *deconstitutive* dimension of the communication revolution. By using the term "deconstitutive" I mean to suggest that the revolution is undermining

As to the cost of defending the "fatherland", the recent destructive border wars between two of the poorest nations in the world, Ethiopia and Eritrea, could be cited as an example. While their people were dying from hunger as a result of a devastating famine, the leaders of the two nations spent billions on arms and sacrificed tens of thousands of their citizens to "defend" a border that did not even exist a decade or so beforehand. And even more bizarrely, the leaders of the two countries come from the same ethnic group. The Ethio-Eritrean war is an example of how territorial borders can be a source of destructive and insane war.

the regulatory and administrative characteristics that give the territorial unit its coherence. Under the pressure of the communication revolution, the argument goes, the territorial state is increasingly ceasing to be an indivisible unit of analysis. It is perhaps ironic that at the dawn of the twenty-first century the imminent demise of the state (its “withering away,” in Marxian terms¹¹) is being announced and celebrated not by followers of Marx and Lenin, as was the case at the dawn of the twentieth century, but mostly by their ideological opposites.¹²

But the communication revolution is also seen to have had, simultaneously, a constitutive, constructive, formational aspect to it. At the same time as it is curtailing the power of the nation-state, the communication revolution is also helping cultivate a “global village”¹³ of cosmopolitan individuals and an increasingly vibrant international civil society. Although the point is often made in relation to the Internet, the general point is that the communication revolution is heralding a new world order, an order that is defined by the seemingly contradictory tendencies of decentralization and interconnection. I shall refer to this as the *constitutive* dimension of the communication revolution. For the enthusiast of the communication revolution, and for globalists generally, this is a time for celebration, a time “for dancing in the streets,” to borrow a phrase from Harry Kalven in another context.¹⁴

The purpose of this Article is to puzzle out the impact of the communication revolution on the notion of territorial sovereignty and to suggest that a more defensible way of conceiving of state sovereignty in the light of this revolution. The Article will make and defend three interrelated claims. First, though territorial sovereignty has faced serious challenges from the communication revolution, the claim of its imminent demise is highly exaggerated. As I shall indicate later, the territorial state may in fact have various resources to deploy to fight off the pressure from the communication revolution. The state may often try, and even succeed, “to design its commands into the very technologies that, collectively, are supposed to spell its demise.”¹⁵ Indeed, a new generation of communications scholars is

11. See DAVID HELD, *MODELS OF DEMOCRACY* 131 (1987). Indeed, now socialists and those generally on the left tend to be defenders of the state and the state system.

12. Here I have leaders of multinational corporations and free traders in mind.

13. The term “global village” was coined (at least, popularized) by Marshall McLuhan. See generally MARSHALL MCLUHAN & QUENTIN FIORE, *WAR AND PEACE IN THE GLOBAL VILLAGE* (1968).

14. Harry Kalven, *The New York Times Case: A Note on the Central Meaning of the First Amendment*, 1964 SUP. CT. REV. 191, 221 n.125.

15. See James Boyle, *Foucault and Cyberspace: Surveillance, Sovereignty, and Hardwired Censors*, 66 U. CIN. L. REV. 177, 204 (1997); see LAWRENCE LESSIG, *CODE*

increasingly recognizing this fact.¹⁶ Furthermore I shall argue that the communication revolution is, in fact, not entirely uncongenial to the territorial state and to its survival. Thus, for example, with current communication technologies it is becoming much easier for government authorities to keep tabs on their citizens and to have full and instant information on those who seek to enter their borders or to keep strong surveillance on those foreigners who have entered on a temporary basis.¹⁷ As communication technologies expand and as the anxiety of the state rises, the mechanisms of surveillance will likely intensify.¹⁸ In this age of uncertainties and terrorist threats, the state may use the communication revolution to reassert itself with a vengeance. The real question, therefore, is not whether state sovereignty will survive the communication revolution, but rather how thin or thick it is or should be and what would be the most defensible way of thinking of state sovereignty in the era of the information superhighway.

Second, I shall claim that even if it were true that the territorial state is giving way to other institutional arrangements, those arrangements may not be what the communication enthusiast or other globalists imagine or desire, i.e. a decentralized system of governance. The Article will show that it is more likely to be the case that the (unregulated) communication revolution will lead to institutional arrangements, private as well as public, that are increasingly more centralized and distant from the individuals whose

AND OTHER LAWS OF CYBERSPACE 44 (1999) (“[I]f the government regulates the architecture of the Net, [the Net] could be regulated in the future.”). For a newspaper account of how states are attempting to apply “geographical zoning online that mirrors geographical offline,” see Lisa Guernsey, *Welcome to the Web. Passport, Please?: Information May Want to be Free, but Courts and New Software Could Impose National Borders*, N.Y. TIMES, Mar. 15, 2001, at G1 (quoting Michael Geist, University of Ottawa law professor).

16. See, e.g., Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199, 1201 (1998).

17. Thus, for example, the Immigration and Naturalization Service (INS) has apparently developed “a web-based system to track hundreds of thousands of foreign students The system will link every U.S. consulate with every INS port of entry and all 74,000 educational institutions eligible to host foreign students.” Suzanne Gambo, *INS to Track Foreign Pupils Via Web*, ASSOCIATED PRESS, May 5, 2002; Daina Jean Schemo, *Electronic Tracking System Monitors Foreign Students*, N.Y. TIMES, Feb. 17, 2003, at A11. See generally, Orin S. Kerr, *Internet Surveillance Law After the USA Patriot Act: The Big Brother that Isn't*, 97 NW. U. L. REV. 607 (2003).

18. See, e.g., John Markoff & John Schwartz, *Electronic: Surveillance: Bush Administration to Propose System for Wide Monitoring of Internet*, N.Y. TIMES, Dec. 20, 2002, at A16 (“The Bush Administration is planning to propose requiring Internet service providers to help build a centralized system to enable broad monitoring of the Internet and, potentially, surveillance of its users.”). Indeed, as I shall show later, it is not only public, but private surveillance that grows along with what the late Ithiel de Sola Pool, more than two decades ago, called ‘technologies of freedom,’ (referring to the new communications technologies). See generally ITHIEL DE SOLA POOL, *TECHNOLOGIES OF FREEDOM* (1983).

lives are daily affected by their actions. The enthusiasts of the communication revolution and globalization generally may be mistaking the privatization of power for decentralization, but that has been a common mistake.¹⁹

Third, the last section will develop a notion of state sovereignty that I shall refer to as “thin statism,” and will then set out to defend that version of sovereignty on moral and instrumental grounds. The argument is that *liberty* and *international justice*, the twin values that many critics of the state system contend will be better served by the erosion of the power of the state system, will in fact need “a state of a certain kind.”²⁰ The “thin state” is the kind of state we need, and the kind of state likely to be available, in the information age and in the context of thick globalism if we are to promote and protect the twin values of liberty and justice. Two principles organize the institutions of the thin state: the notion of *plurality* (internal pluralism) and the idea of *subsidiarity* (external pluralism). I shall develop those principles in the last section of the article.

Part II presents the general context within which the challenge of the communication revolution to territorial sovereignty is best understood, making two points in particular. First, the impact of the communication revolution on state sovereignty is part of the general challenge that the nation-state has faced from a process that is referred to as globalization.²¹ Globalization in the economic realm, especially the role of multinationals, and the continuing universalization of human rights norms and standards have increasingly reduced the domain of authority that the nation-state had traditionally exercised.

The section argues that the communication revolution is, however, not simply another aspect of globalization, but a principal reason for it. This is a point worth emphasizing. Economic globalization is crucially assisted by the presence of new communication technologies that have enabled multinationals and others to move information and data from one operation in one country to another operation in another country with speed and efficiency. In the human rights area, the communication revolution

19. See generally RICHARD BARNET & JOHN CAVANAGH, *GLOBAL DREAMS: IMPERIAL CORPORATIONS AND THE NEW WORLD ORDER* (1994); RICHARD FALK, *PREDATORY GLOBALIZATION: A CRITIQUE* (1999); James Tully, *The Unfreedom of the Modern in Comparison to Their Ideals of Constitutional Democracy* 65 *MOD. L. REV.* 204 (2002) (arguing that apparent decentralization supports rather than counters global and regional centralization of power).

20. See LESSIG, *supra* note 15, at 5.

21. For the various understandings of globalizations see SUSAN STRANGE, *THE RETREAT OF THE STATE: THE DIFFUSION OF POWER IN THE WORLD ECONOMY* xiii (1996); Fredric Jameson, *Globalization and Political Strategy*, *NEW LEFT REV.* No. 4, July-Aug. 2000, (2d ser.), at 49.

has made it easier both to monitor a state's violation of the human rights of its citizens, and has increased the odds that other states and the international community will respond to such violations. The graphic depictions of brutality that the electronic media can often provide worldwide almost instantaneously increases the probability that some governments, especially democratic ones, may be pressured by their constituents to respond to such brutalities and tragedies. The interventions by the international community and individual states in the Bosnian, Somalian, and Yugoslavian conflicts were greatly assisted and facilitated by those horrific pictures and images appearing on television screens worldwide from those places which otherwise would have seemed rather remote.²²

Part III explores in some detail the manner in which communication technologies have affected (constrained or enabled) state sovereignty. The section gives an account of the direct impact that each medium of mass communication—print, transnational radio communications, satellite broadcasting, remote sensing by satellites, transborder data flow, and the Internet—has had on the notion of territorial sovereignty. The purpose here is to explore the various ways in which the communication revolution might be said to have undermined the claim of the state to be “the ultimate agency of self-conscious political action,” to use a description of William Connolly's.²³ Part of the purpose of reviewing the impact of the entire range of communication technologies on the idea of territorial sovereignty is also to indicate what, in my view, seems to have been overlooked in our total preoccupation with the Internet. Although it is more profound and deep-cutting, it is wrong to assume that the challenge the Internet poses to the coherence of the territorial state is *unique*.²⁴ Some of the electronic media that preceded the Internet posed the challenge in remarkably similar ways.²⁵ If we are to make

22. A decade ago, James Schlesinger, the former U.S. Secretary of Defense, made the argument that, to his regret, U.S. policies in Kurdistan and Somalia at that time were driven by television images of the tragedies in those places, a tendency he decried and equated with emotionalism. See James Schlesinger, *Quest for a Post-Cold War Foreign Policy*, FOREIGN AFF. [America and the World] 1992-93, at 17. To be sure, there have been challenges to the view that the television coverage of events inclines governments, such as the U.S. government, to intervene. See generally, e.g., Steven Livingston & Todd Eachus, *Humanitarian Crisis and U.S. Foreign Policy: Somalia and the CNN Effect Reconsidered*, 12 POL. COMM. 413 (1995). But it seems plausible to assume that democratic regimes are more likely to be pressured by their citizenry to intervene when the citizenry is exposed to disturbing images than when there is no such reporting.

23. WILLIAM E. CONNOLLY, *IDENTITY/DIFFERENCE: DEMOCRATIC NEGOTIATIONS OF POLITICAL PARADOX* 201 (1991).

24. I think Jack Goldsmith is correct in reminding us not to be swept away by the supposed uniqueness of the Internet for jurisdictional purposes. Goldsmith, *supra* note 16, at 1205-10; see also Kerr, *supra* note 17, at 327-28.

25. See *Dow Jones & Co. v. Gutnick* (2002) 194 A.L.R. 433 (Austl.). The High Court of Australia, the highest court in the country, made the point thus:

defensible and workable policy choices we must guard against the temptation of thinking of the uniqueness of the present. Neglect of the past often leads people to an exaggerated belief of the uniqueness of the present. If the current U.S. Supreme Court jurisprudence in the First Amendment area is an indication, perceiving every new medium as unique is a recipe for doctrinal and policy incoherence.²⁶

Part IV describes and critically examines the institutional and conceptual responses that are offered to deal with the challenges that are described in Part III. This section is, therefore, about the strengths and weaknesses, the virtues and vices, of the various suggestions that have been offered, sometimes explicitly but often implicitly, to deal with the tension between the technological reality of the routine transborder flow of information that seems increasingly to reduce territorial borders to speedbumps, on one hand, and the traditional and persistent claim of the territorial state that it has exclusive prescriptive, adjudicative, and enforcement jurisdiction over actors and actions within the territorial limit, on the other. At the risk of doing violence to the subtle differences among authors, I group the various responses into three broad categories—the statist (*status quo*), the proceduralist, and the liberal sovereignist (liberal internationalist) responses. After setting out the arguments of the various responses, the section then examines each response to see how it deals with the tension and what version of sovereignty is implied by its approach.

After exploring the nature and reach of these responses, I conclude that they misapprehend the nature of the communication revolution and consequently fail to suggest institutional structures that deal fully and coherently with the tension between the

In the course of argument [before the court] much emphasis was given to the fact that the advent of the World Wide Web is a considerable technological advance. So it is. But the problem of widely disseminated communications is much older than the Internet and the World Wide Web. The law has had to grapple with such cases ever since newspapers and magazines came to be distributed to large numbers of people over wide geographic areas. Radio and television presented the same kind of problems as was presented by widespread dissemination of printed material, although international transmission of material was made easier by the advent of electronic means of communication.

Id. at ¶ 38.

26. The U.S. Supreme Court First Amendment jurisprudence has been rather incoherent in that the Court has been attempting to treat each new medium as being unique and raising qualitatively different First Amendment concerns. Radio and television are different from print. Cable is yet different from radio and television. And the Internet is still different from cable. As we understand each new technology and medium better, however, we realize that the concerns are not qualitatively different and the regulatory schemes should perhaps not be very different either. For more discussion, see *infra* Part III.D.

technological reality and the institutional claims of the territorial state. I then sketch the outline of what I have referred to as "thin statism," as a more defensible alternative. I argue that thin statism will allow us to reconcile the reality (and to acknowledge and defend the importance) of transborder communication, on one hand, and the need for a version of a state system as a check on thick globalism, on the other. The version of the thin state that I defend here is also meant to accommodate two commitments that are generally viewed as incompatible, a notion of universalism sitting side by side with the pursuit of the "politics of difference."²⁷

Some might argue that what is needed to counter thick globalism is in fact a thick, not a thin, state. The argument may go this way: only a sufficiently strong state will provide the necessary counter to an increasingly imperial globalization which has been dislocating people both by weakening the bonds and cultures that have defined and sustained them and by reducing the conditions for genuine deliberative process and self-government. I have sympathy with that argument, but in the end I argue that the thick state (strong statism) is neither attractive nor even sustainable.

Part V serves two purposes. It offers a backward glance to highlight and restate the major themes of the article. And perhaps more importantly, it makes a plea that we cease to view territorial borders with the certainty that the cyber enthusiasts and the traditional statist seem to view them. While the former views territorial borders and the state system as stumbling blocks to the achievement of liberty and international justice and thus their demise as a cause for celebration rather than mourning, the latter views them as unambiguous good that must be protected from the threat of unrestrained and unauthorized flow of information across national boundaries. My plea is that we abandon the certainties that are represented by these two positions, for they misunderstand the ambiguous and even paradoxical nature of territorial boundaries, how they can simultaneously foster and inhibit freedom. In this sense, territorial boundaries are not any different from other boundaries—such as gender and cultural boundaries—that can "provide preconditions of identity, individual agency, and collective action; but they also close possibilities of being that might otherwise flourish."²⁸ This is perhaps what Russell Hardin meant when he observed: "Nation-states are contingently morally good for what they can achieve—although they are also contingently morally bad for what

27. For a description of "the politics of difference" see CONNOLLY, *supra* note 23, at 201.

28. WILLIAM E. CONNOLLY, *THE ETHOS OF PLURALIZATION* 163 (1995).

they can achieve.”²⁹ Once this ambiguity is recognized then the task becomes one of imagining institutional arrangements that will minimize the sacrifices and violence associated with territorial sovereignty without sacrificing the advantages, constitutive and instrumental, that territory based communities provide.

II. CHALLENGES TO STATE (TERRITORIAL) SOVEREIGNTY: THE GENERAL CONTEXT

A. Globalization: General

The nation-state has come under pressure from two processes that seem to lead in two different directions. One challenge seems to lead to political fragmentation whereas the other seems to indicate in the direction of larger economic, political and cultural unions. The first of these two challenges has come from within, in the form of a resurgence and intensification of nationalistic and ethnic consciousness, calling for the breaking up of empires, republics, and autocracies.³⁰ Political divorce or, as it is formally known, secession or self-determination, is the rallying cry under which the pressure is pursued and sustained.³¹ This first development, though a challenge to the state, is not really a challenge to *the state system*. In fact, it is a resounding affirmation of it. Political divorce is about multiplying territorial states, not ending them.³²

The second challenge comes from above. The globalization of economic, social, and cultural life has put into question the defining

29. Russell Hardin, *Group Boundaries, Individual Barriers*, in BOUNDARIES AND JUSTICE: DIVERSE ETHICAL PERSPECTIVES 276, 290 (David Miller & Sohail H. Hashmi eds., 2001).

30. I explore that issue in another article. Adeno Addis, *Cultural Integrity and Political Unity: The Politics of Language in Multilingual States*, 33 ARIZ. ST. L.J. 719, 722 n.7 (2001); see also Adeno Addis, *On Human Diversity and the Limits of Tolerance*, in ETHNICITY AND GROUP RIGHTS 112 (Ian Shaprio & Will Kymlicka eds., 1997).

31. Addis, *Cultural Integrity*, *supra* note 30, at 733-34.

32. In 1979 there were 150 nations, now there are 190. See HASTINGS DONNAN & THOMAS M. WILSON, BORDERS: FRONTIERS OF IDENTITY, NATION AND STATE 3 (1999). All of these new states were carved out of existing states. Some, such as Eritrea, emerged after long and protracted war against the central government. Others, such as the Czech Republic and Rumania, did so as a result of mutual and peaceful agreement of divorce. And most of the new states emerged as a result of the dissolution of the Soviet Union and Yugoslavia, the latter with considerable violence. If we compare the number of states that existed at the turn of the last century with the current numbers we realize that the increase has been more than three fold. See Wade Davis, *The Roots of Disaffection: For a Global Declaration of Interdependence*, INT'L HERALD TRIB. July 6-7, 2002, at 8.

features of state sovereignty.³³ Conventionally, state sovereignty has been understood to imply that the territorial unit we call the state is an indivisible locus of political power, at least in its relation to outsiders.³⁴ This indivisibility is premised on the notion that the unit has power to legislate as the final authority on all matters that arise within its territorial borders.³⁵ That is, it has full prescriptive jurisdiction. The state is also thought to possess a monopoly of legitimate violence that cannot be questioned or overridden by an external authority. That is, it has full adjudicative and enforcement power.³⁶ Described this way, state sovereignty has often been understood to be synonymous with the idea of self-determination.³⁷ A political unit was said to have exercised the right to self-determination to the extent that it was immune from interference from entities that are located outside its territorial boundaries.³⁸ Under the conventional theory, therefore, self-determination is

33. "Globalization at its core refers to worldwide networks of interdependence. A network is simply a series of connections of points in a system . . ." JOSEPH S. NYE, JR., *THE PARADOX OF AMERICAN POWER: WHY THE WORLD'S ONLY SUPERPOWER CAN'T GO IT ALONE* 91 (2002). For an interesting exploration of the ambiguity of the term globalization and the various senses in which the term is invoked—technological, political, cultural, economic and social—see Jameson, *supra* note 21, at 49. For my purpose, I mean to use the term in its territorial dimension. In this sense, globalization is to refer to the phenomenon when social and economic interactions and transactions defy the limits of territorial or state boundaries and thereby supersede national, and often regional, governmental decision-making processes. See also Jost Delbrück, *Globalization of Law, Politics, and Markets—Implications for Domestic Law—A European Perspective*, 1 *IND. J. GLOBAL LEGAL STUD.* 9, 10-11 (1993).

[G]lobalization as distinct from internationalization denotes a process of *denationalization* of clusters of political, economic and social activities. Internationalization, on the other hand, refers to cooperative activities of *national* actors, public or private, on a level beyond the nation-state but in the last resort under its control.

Id. For a rather skeptical view of "globalization" see STRANGE, *supra* note 21, at xiii ("The worst of them all is 'globalisation'—a term which can refer to anything from the Internet to a hamburger. All too often, it is a polite euphemism for the continuing Americanisation of consumer tastes and cultural practices.").

34. "Externally, a state is sovereign if the exercise of power internally to the state is not subject to external superior power." Neil MacCormick, *Beyond Sovereignty*, 56 *MOD. L. REV.* 1, 56 (1993).

35. JOSEPH A. CAMILLERI & JIM FALK, *THE END OF SOVEREIGNTY? THE POLITICS OF A SHRINKING AND FRAGMENTING WORLD* 16 (1992).

36. "[W]hat distinguishes the state from other institutions is its coercive authority, or as others have labeled it, *supreme coercive power*." CAMILLERI, *supra* note 35, at 17.

37. *Id.*

38. See U.N. CHARTER arts. 2(4), 2(7) (prohibiting Member States and the United Nations respectively from interfering in the internal affairs of a state); see also *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States*, G.A. Res. 2625, 25th Sess., 1883rd mtg., U.N. Doc. A/RES/2625 (XXV) (1970) [hereinafter *Declaration on Principles*].

viewed generally in external terms only.³⁹ That is, while outsiders are prohibited from interference with the external and internal affairs of a state, the rights of individuals and citizens for self-determination vis-à-vis their government or rulers was said not to be a concern of international law and international relations.⁴⁰

There are three corollaries to the conventional story of inter-border relations. First, it was states, not individuals or other entities within their territories, that were to be the bearers of international rights and obligations.⁴¹ Since it was states that were parties to the constitution of international institutions, it can only logically be the case that they would be the bearers of rights and responsibilities under these institutions.⁴² Second, although states do lose parts of their autonomy by agreeing to abide by international law, they ultimately remain autonomous, for they can withdraw from, or refuse to be part of, an agreement that they believe not to be in their interest.⁴³ A state is bound only by those norms to which it has given its consent. Indeed, the primary sources of international law—as set out in Article 38 of the Statute of the International Court of Justice—are the result of the action of states.⁴⁴ And third, in relation to their

39. See *Declaration on Principles*, *supra* note 38.

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State Each State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State.

Id. at 123.

40. A well known international law scholar argues that state sovereignty “represents the basic constitutional doctrine of the law of nations” and that sovereignty is defined as that state of affairs when the state has “(1) a jurisdiction *prima facie* exclusive, over a territory and permanent population living there; (2) a duty of non-intervention in the area of exclusive jurisdiction of other states; and (3) the dependence of obligations arising from customary law and treaties on the consent of the obligor.” IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 287 (4th ed. 1990); see also PHILIP ALLOTT, *THE HEALTH OF NATIONS: SOCIETY AND THE LAW BEYOND STATES* 418-49 (2002). Allott summarizes what he refers to as the “old regime” and what I have been calling the traditional conception of interstate relations and the legal regime regulating that relationship.

41. ALLOTT, *supra* note 40, at 418 (“International law is made by and for the states and international organizations which are the only legislators and only subjects of international law.”).

42. The classical statement is perhaps found in the *Lotus* case where the Permanent Court of Justice observed: “International law governs relations between independent states.” *S.S. Lotus (Fr. v. Turk.)* 1927 P.C.I.J. (ser. A) No. 9, at 18.

43. ALLOTT, *supra* note 40, at 419 (noting that states are thus inherently free, equal and independent sovereignties, and observing that “International law is accordingly conceived as an act of sovereignty by which a state chooses to accept limits on . . . its freedom”).

44. Customary law and treaties, the two most important sources of international law, are meant to be reflective of the consent of states.

sovereignty, states are equal.⁴⁵ No state is any more autonomous (or sovereign or legitimate) than any other state.⁴⁶ Although as an empirical matter, the idea of equality of states is, to say the least, erroneous; it is an important normative proposition and a central feature of international relations.

Central to conventional theories of international relations, international law, and international institutions is, therefore, the idea that the autonomous territorial state is the central mode of political organization. A 1989 statement by the President of Brazil, José Sarney, about the Amazon makes clear the strong hold that territoriality has on the notion of sovereignty and on our imagination.⁴⁷ In a defiant speech about the international community's concern about the fate of the tropical rain forest of the Amazon River Valley, the president is said to have declared, "The Amazon is ours. After all it is in our territory."⁴⁸ For the President of Brazil as well as for most people that think about state sovereignty, territoriality is the defining feature.⁴⁹

In the conventional story, the constitution of "international society" is viewed as analogous to the constitution of the nation-state itself.⁵⁰ In the same way that sovereign and autonomous individuals within a defined territorial unit are said to come together through a social contract (such as a constitution and the institutions established through it) to regulate and define their relationships, so is international society constituted by autonomous entities called states. States enter into a contract to regulate their interactions among

45. ALLOTT, *supra* note 40, at 418.

46. In fact, this principle is enshrined in Article 2(1) of the U.N. Charter. It reads: "The Organization [the United Nations] is based on the principle of the sovereign equality of all its Members." U.N. CHARTER art. 2, ¶ 4.

47. THOM KUEHLS, BEYOND SOVEREIGN TERRITORY: THE SPACE OF ECOPOLITICS ix (1996) (citing *Brazil Angrily Unveils Plan for Amazon*, WASH. POST, Apr. 7, 1989, at A1).

48. *Id.*

49. As Chief Justice John Marshall of the U.S. Supreme Court put it in a case decided at the turn of the nineteenth century, "the jurisdiction of the nation within its own territory is necessarily exclusive and absolute." *Schooner Exchange v. McFadden*, 11 U.S. 116, 136 (1812).

50. Erik Ringmar observes that modern European man and the modern state were born at the same time and grew up together. See Erik Ringmar, *On the Ontological Status of the State*, 2 EUR. J. INT'L AFF., 439, 439-66 (1996); see generally Edwin DeWitt Dickinson, *The Analogy Between Natural Persons and International Persons*, 26 YALE L.J. 564 (1917). It is very interesting to note that almost the entire literature on collective identity formation, such as the state, revolves around an anthropomorphization of human collectivities. And the human being that is being emulated is very much the Renaissance Man. For the proposition that the Western concept of the person has shaped international relations and world politics see generally THE EXPANSION OF INTERNATIONAL SOCIETY (Hedley Bull & Adam Watson eds., 1984).

themselves.⁵¹ In the same way that individuals in a nation-state are seen to be ultimately autonomous and sovereign, so are states in international relations.⁵² In the same way that only the parties to the social contract, individuals, can be the bearers of rights and responsibilities in the nation-state, the bearers of rights and responsibilities on the international plane are the parties to the contract, sovereign states.⁵³ Just as the formal equality of the sovereign individuals (regardless of class, creed, color and gender) is asserted by liberal theory, so do international relations theories declare the sovereign equality of states (regardless of size, region, and wealth).⁵⁴ In the same way that the liberal theory of individual sovereignty was originally adopted as a progressive egalitarian principle, so was state sovereignty adopted as a way to challenge domination by other states or empires.⁵⁵ The notion of sovereignty is a central myth to theories of both the nation-state and of interstate relations, the former takes individual sovereignty as its point of departure and the latter with state sovereignty.⁵⁶

The conventional story that maintains that, as part of the attribute of sovereignty, states have exclusive jurisdictions within their territories, has not always been in accord with reality,⁵⁷ in the same way that the liberal notion of the autonomous individual has

51. The social contract theory has recently been applied to the constitution of international society. John Rawls, whose version of the social contract has dominated political theory in the domestic context for about three decades, has in a recent book explicitly applied it to the constitution of international society and what he calls the Law of Peoples (international law). See generally JOHN RAWLS, *THE LAW OF PEOPLES; WITH 'THE IDEA OF PUBLIC REASON REVISITED'* (1999). Later in this Article I will examine Rawls' view more closely.

52. "Viewed as products of modernity, the sovereign individual and the sovereign state can be seen as mutually reinforcing constructs . . ." Tony Porter, *Postmodern Political Realism and International Relations Theory's Third Debate*, in *BEYOND POSITIVISM: CRITICAL REFLECTIONS ON INTERNATIONAL RELATIONS* 113 (Claire Jurenne Sjolander & Wayne S. Cox eds., 1994); see generally IVER B. NEUMANN, *USES OF THE OTHER: 'THE EAST' IN EUROPEAN IDENTITY FORMATION* (1999).

53. See discussion *infra* Part IV.

54. Dickinson, *supra* note 50, at 564.

55. *Id.* at 566.

56. Of course, the analogy between the sovereign state and the autonomous individual could be extended in the opposite direction. If the fully sovereign state is analogous to the self-directed, mature, individual, then there must be some states, quasi-sovereign states, which may be analogized with "individual[s] who [are] not inner-directed, not yet fully developed as individual[s]." ROXANNE LYNN DOTY, *IMPERIAL ENCOUNTERS: THE POLITICS OF REPRESENTATION IN NORTH-SOUTH RELATIONS* 150 (1996). I shall not explore that aspect of the analogy here, but suffice it to point out that aspects of the international process treat many countries from the third world as not fully sovereign, as not fully grown ups.

57. See generally STEPHEN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* (1999); Stephen D. Krasner, *Compromising Westphalia*, 20 *INT'L SECURITY* 115 (1995).

been, more often than not, a myth. Technological advance has made states more interdependent⁵⁸ and has thus tended to reduce the domain of autonomy that states were said to enjoy. Thus, for example, the economic interdependence that has evolved during the last few decades and defines the current world has reduced a state's capacity, even that of a relatively powerful state, to develop autonomously its economic and fiscal policies.⁵⁹

Among developing countries it has been a well-known fact for a considerable time that their power to devise economic policies is highly conditioned and limited by what others do (mainly developed countries and international financial institutions which are by and large dominated by developed countries).⁶⁰ Indeed, that was what led developing countries to push with varying degrees, of intensity in the 1970s and early 1980s for what they called a new international economic order (NIEO), an order that was supposed to correct what developing countries saw as an unfair international economic arrangement.⁶¹ What is different now is that more and more leaders

58. By using the word "interdependent" I only mean to suggest that states have become more interconnected. I do not mean to imply, as some that use the word seem to do, that the constituent parts of international society are mutually dependent, meaning that all relevant actors rely on some others for support, or rather satisfaction, of basic needs. What is erroneous about this view is that it tends to ignore the stratified nature of international relations where the achievement of optimal outcome desired by some actors requires an infinitely greater appropriate behavior than would be the case in relation to some other actors' pursuit of desired outcomes. So, by "interdependence" I do not mean "mutual dependence" but simply "interconnectedness," for it would be, to put it mildly, erroneous to claim that there is mutual dependence between the United States and Haiti; France and Senegal; Europe and Africa; or North and South America, and so on. In each of the above pair of relationships the interactive process is highly stratified and the wishes and needs of the second of each pair are infinitely more constrained and conditioned by the first than vice versa. I think Kenneth Waltz was right when he observed that interdependence as mutual dependence "subtly obscures the inequalities of national capabilities; pleasingly points to a reciprocal dependence and strongly suggests that all states are playing the same game." Kenneth Waltz, *The Myth of Interdependence*, in *THE INTERNATIONAL CORPORATION* 220 (C. Kindleberger ed., 1970); see also STRANGE, *supra* note 21, at xiii (noting that the term interdependence "hides the truth behind a persuasive euphemism for asymmetric dependence"). In fact, Strange's observation that the world could best be described as a relationship of "asymmetrical dependence" was made more powerfully and eloquently in the 1970s by scholars writing from the periphery of the world system. See generally, e.g., SAMIR AMIN, *ACCUMULATION ON A WORLD SCALE: A CRITIQUE OF THE THEORY OF UNDERDEVELOPMENT* (1974); FERNANDO CARDOSO & ENZO FALETTO, *DEPENDENCY AND DEVELOPMENT IN LATIN AMERICA* (1979).

59. Waltz, *supra* note 58, at 216.

60. *Id.* at 218-19.

61. See *The Declaration on the Establishment of a New International Economic Order*, G.A. Res. 3201, 29 U.N. GAOR, 6th Special Sess., Supp. No. 1, at 3, U.N. Doc. A/9559 (1974), reprinted in 13 I.L.M. 715 (1974); *Programme of Action on the Establishment of a New Economic Order*, G.A. Res. 3202, 29 U.N. GAOR, 6th Special Sess., Supp. No. 1, at 5, U.N. Doc. A/9559 (1974), reprinted in 13 I.L.M. 720 (1974).

of developed countries are also coming to realize that their capacity to devise economic policies autonomously is very limited.

Even more prominent in this regard is the role of multinationals. Technological developments have not only allowed multinationals to establish business networks across traditional boundaries and hence link various parts of the world in one coherent governance, but they have also allowed them to evade regulation by the state. Often they can even transfer data and information without the knowledge of state authorities.⁶²

It is not only in the economic but in the security realm as well where interconnectedness and mutual vulnerabilities define the current world. As a result of the spectacular advance in technologies (military and non-military), it is now increasingly the case that the safety and health of citizens of a state might be affected by what other states do within their territorial borders. Thus, for example, what one state does in terms of its environmental policy might seriously affect other states, and not only bordering states.⁶³ The

62. The disjunction between systems of economic and political governance that are rooted in territoriality and the functioning of the international markets that are increasingly conducted in cyberspace is going to grow wider. One article illustrates this with electronic commerce such as the use of ATM cards to pay for merchandise which allows the transfer of funds from the customer's account to the merchant's and the use of credit cards to make payments on the Internet. See Stephen J. Korbin, *Electronic Cash and the End of National Markets*, 107 FOREIGN POL'Y (Summer 1997), at 65. Korbin observes: "Digitalization is cutting money and finance loose from its geographic moorings . . . Territorial sovereignty implies a world . . . where economic and political control arise from control over territory . . . [Electronic commerce] is constructed in cyberspace rather than geographic space." *Id.* at 74-75. For Korbin, one of the problems this disjunction poses is how to control the money supply, for "[t]he very idea of controlling the money supply . . . assumes that geography provides a relevant means of defining the scope of the market." *Id.* at 75. Another problem is determining the source of taxable income, traditionally defined in terms of the geographic location of the economic activity that produced the income, when "many important economic transactions cannot be located, and may not even take place, in geographic space." *Id.*

For developing countries, it is not only the power of developed countries or that of the multinational companies that has continually reduced them to less than full sovereignties, but also the power and action of multilateral economic institutions such as the International Monetary Fund (IMF) and the World Bank. See Shannon Stimson, *Rethinking the State: Perspectives on the Legibility and Reproduction of Political Societies*, 28 POL. THEORY 822, 827 (2000) ("[S]tates are now more or less impotent in the face of the IMF, the World Bank and the regulatory and 'homogenizing' demands of competitive capitalism.").

63. This is, for example, the claim in the *Nuclear Tests Case*. In that case Australia and New Zealand argued that French nuclear tests conducted in French colonial possessions in Polynesia damaged their environment within their territory and hence violated their sovereignty, and, even more, there was nothing they could do unilaterally to protect themselves from the radioactive fall-out which violated their sovereignty. The Australian application to the ICJ made the following observation: the radio-active fall-out "infringed Australian sovereignty and compromised its capacity to decide for itself what . . . it would permit in the territory under its sovereignty."

affected states might neither have the capacity nor the authority to do anything about the source or the effects of those problems unilaterally. Or, alternatively, a state may be required, contrary to its desire, to control activities within its borders that may have some impact on other states, again challenging the traditional sovereign rights of that state. Both when a state becomes the victim of the environmental policy of another state and when a state is required to curtail or abandon activities within its territory on the ground that those activities will have an impact on other states, the notion of state sovereignty as outlined in the conventional story is strongly challenged.⁶⁴

Human rights, as I noted earlier, is another area where the notion of state sovereignty appears severely restricted. Increasingly, the way a state treats its citizens is becoming the concern of the international community, even when a state may not have agreed to cede that authority to an outside entity, be it international or imperial. This is so for a number of reasons. First, there is a great deal of human rights law that has developed as part of international customary law which quite often is viewed as binding on states, even those states that may not have had a role in the development of the

Nuclear Test (Aust. v. Fr.), 1974 I.C.J. 253, 433; see also Nuclear Test (N.Z. v. Fr.), 1974 I.C.J. 457, 511 (Dec. 20).

Observing that the activities of nation-states are increasingly having transborder consequences, Christopher D. Stone gives the following examples: "the recent awareness that burning fossil fuels in Boston may someday inundate Bangladesh, [and] that sulfur from Russian nickel plants rains out in Scandinavia." Christopher D. Stone, *Locale and Legitimacy in International Environmental Law*, 48 STAN. L. REV. 1279, 1280 (1996) (citing James Broadus et al., *Resisting Sea Level and Damming of Rivers: Possible Effects in Egypt and Bangladesh*, in 4 EFFECTS OF CHANGES IN STRATOSPHERE OZONE AND GLOBAL CLIMATE: SEAL LEVEL RISE 165, 171-86 (James G. Titus & U. S. E.P.A. eds., 1986)); see also Valdmir Kotov & Elena Nikitna, *Russia in Transition: Obstacles to Environmental Protection*, ENV'T, Dec. 1993, at 10, 17; Henry Shue, *Eroding Sovereignty: The Advance of Principle*, in THE MORALITY OF NATIONALISM 69 (Robert McKim & Jeff McMahan eds., 1997).

[T]here ought to be external limits on the means by which domestic economic ends may be pursued by states, limits that ought to become binding on individual sovereigns irrespective of whether those sovereigns wish to acknowledge them, just as sovereigns are already bound by both legal rights and moral rights against the domestic use of torture whatever their own opinions on the subject of torture may be—the sovereigns own opinion about torture is of no consequence legally or morally. The same should be true of some particular means of pursuing economic ends.

Id.

64. "What is needed is recognition of the reality that in many fields, especially environmental issues, it is simply not feasible for sovereignty to be exercised unilaterally by the individual nation-states. . . ." Maurice F. Strong, *ECO '92: Critical Challenges and Global Solutions*, 44 J. INT'L AFF. 287, 298 (1991); see also Geoffrey Palmer, *New Ways to Make International Environmental Law*, 86 AM. J. INT'L L. 259, 259 (1992) (noting that the world simply lacks "institutional and legal mechanisms to deal effectively with transboundary and biospheric environmental degradation").

norm or who may have even expressed reservations about it. This is done either by denominating the norm as *jus cogens* or by disallowing any significance to the state's continuous and consistent violation of the norm.⁶⁵ Second, even if the norm is part of a treaty to which the state is signatory, the interpretation of the norm upon which the intervention and criticism are based might be expansive. A state might be expected to comply with a norm that it did not believe to be implied by the agreement that it signed.⁶⁶ Third, and perhaps more importantly, the increasing willingness of states, regional groupings, and the international community to intervene militarily in other states in the defense of human rights in those states (referred to as humanitarian intervention) has posed the most profound challenge to the notion of state sovereignty.⁶⁷ Military intervention is perhaps the most visible challenge to the idea of territorial sovereignty.

To summarize, developments in the last few decades have started to destabilize the conventional, or, as David Held called it, the

65. See, e.g., *1993 Report of the Special Rapporteur on Cuba*, U.N. Doc. E/CN.4/1993/39, ¶ 83 (1993). Even though Cuba had not ratified the ICCPR and ICESCR, the Special Rapporteur who was appointed to report on allegation of a wide range of violations of civil and political rights in the country concluded that Cuba was in violation of international human rights norms. He reached that conclusion by reviewing the relevant provisions of the Universal Declaration of Human Rights which he concluded had been "universally recognized and now represent[ed] a minimum standard, regardless of the social or ideological situation prevailing in a given country." *Id.* Interestingly, not only did the report apply the Declaration as customary international law, but it also reviewed the relevant provisions of the Cuban Constitution! How more intrusive can an international organ get than to require a country to live up to the norms enunciated in its constitution. A glance through the report indicates that what the Special Rapporteur was asking Cuba to do was to basically to restructure its political and social system.

66. Perhaps a good example is the privacy provision in the International Covenant on Civil and Political Rights. Article 17 provides: "No one shall be subjected to arbitrary or unlawful interference with his privacy . . ." International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]. The article has been read (interpreted) by the ICCPR Committee as including a prohibition against the state from criminalizing (or otherwise burdening) consensual homosexual relationships. *Id.*; see *Toonan v. Austl.*, U.N. Human Rights Comm. No. 488, U.N. GAOR, 49th Sess., Supp. No 40, at 226, 235, U.N. Doc. A/49/40 (1994). A similar privacy provision in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) has been read by the European Court of Human Rights to include the rights of homosexuals to have and develop consensual relationships without interference from the government. See *Norris v. Ireland*, 142 Eur. Ct. H.R. (ser. A) (1988). Irish buggery and gross indecency laws applied to adult private consensual activities violated Art. 8(s) of the Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950, 213 U.N.T.S. 222; *Lustig-Prean and Becket v. United Kingdom*, 29 Eur. Ct. H.R. 548 (1999).

67. The United Nations intervention in Somalia, Haiti, and NATO's intervention in Kosovo (or more correctly, NATO's bombing of Yugoslavia) are examples of military interventions on behalf of human rights.

classical notion of state sovereignty.⁶⁸ The idea that states have ultimate and total authority over their economic and fiscal policies, over what rights and duties their citizens are to have, over how secure and healthy their citizens will be is, given the nature of the current international economic and human rights systems and the transnational nature of current environmental and security concerns, rather disconnected from the reality.

B. Globalization: The Role of the Communication Revolution

The communication revolution has facilitated the economic, social, and cultural globalization that I claim has challenged or, to use a term employed by U.N. Secretary General Kofi Annan, "redefined" the traditional notion of state sovereignty.⁶⁹ Take the human rights area for example. First, as a general matter, states can no longer violate the rights of their citizens without the rest of the world being aware of those violations. Whether it is individual and group communications through the Internet or the media's use of satellite communications to gather and tell stories about the conditions of citizens of this or that country, a state's human rights violations will, more often than not, be exposed instantaneously to the outside world. I think Henry Kissinger was correct when he observed: "the brutality of the repression at Tiananmen Square witnessed on television by the entire world stigmatized China as a repressive regime."⁷⁰

Second, not only is the communication revolution making it increasingly easier to find out how a state is treating its citizens, but is also increasing the odds that other states and international organizations will respond to such violations. Such interventions may, as I indicated earlier, include military intervention, the ultimate challenge to territorial sovereignty.⁷¹ When citizens of other nations see on their television screens pictures of brutality, with great visual impact, they are more likely to put pressure on their governments and the international community generally to respond to such violations.⁷² Put simply, the communication revolution is

68. See David Held, *Law of States, Law of Peoples*, 8 LEGAL THEORY 1, 2-3 (2002); see generally DAVID HELD, *DEMOCRACY AND THE GLOBAL ORDER: FROM THE MODERN STATE TO COSMOPOLITAN GOVERNANCE* (1995).

69. "[S]tate sovereignty, in its most basic sense, is being redefined . . . by the forces of globalisation and international co-operation." Kofi Annan, *Two Concepts of Sovereignty*, *ECONOMIST*, Sept. 18, 1999, at 49.

70. HENRY KISSINGER, *DOES AMERICA NEED A FOREIGN POLICY? TOWARD A DIPLOMACY FOR THE 21ST CENTURY* 144 (2001).

71. See *Nude Dancers Don Union Label*, *WASH. POST*, Sept. 1, 1996, available at 1996 WL 10729094.

72. KISSINGER, *supra* note 70, at 144 (coinciding with a period of increased emphasis on human rights).

making it easier to detect human rights violations and to mobilize sanctions.

It is not only in relation to the human rights system but also in relation to other globalizing phenomena that I noted earlier, such as the international economic system, that the communication revolution has played an important role.⁷³ Part of the story of economic globalization is the story of multinational companies being able to move a great deal of information from one part of the world to another quickly and efficiently. The ability of a multinational company to function efficiently on a global scale would require it to have the capacity to move data between the parent company and its subsidiaries located in other countries with speed and with little constraint. Economic globalization, just like globalization in the human rights area, requires, and is facilitated by, the easy and rapid movement of information across national boundaries. In many instances the movement of such data across national boundaries is accomplished without the knowledge of the government of the particular state from which the data are transferred.⁷⁴

As it is clear from the observation in the last two paragraphs, the communication revolution has facilitated globalization in the various fields of human endeavor and consequently has challenged the conventional notion of territorial sovereignty. But the challenge has also been more profoundly and directly presented by the communication revolution than the indirect effects that I outlined in the preceding paragraphs. The ease with which information can now be moved across national boundaries has seriously and directly challenged the claim of the nation-state that it is the final authority on matters that concern activities and people within its own territorial borders. This aspect of the information superhighway is what I shall explore in the next section.

III. NATIONAL BORDERS IN THE INFORMATION AGE

A. Introduction

Imagine the following: A small democratic country, call it Puritania, has, after long deliberation, determined that alcohol and cigarettes are harmful to the health of its citizens who consume them. It has also concluded that the consumption of alcohol and cigarettes is harmful to the larger economy since the public will end up paying the

73. See *id.*

74. Frank Bajak, *As Police Turn up the Heat, Neo-Nazis Build an Electronic Shield*, ASSOCIATED PRESS, June 26, 1995, available at 1995 WL 4394533.

expenses of those who will have suffered serious illness (or who would have injured others) as a result of consuming the items. Assume also that the state has determined that banning the advertising of alcohol and cigarettes on electronic media will curtail the consumption of those items and has thus adopted a law prohibiting such advertising. Let us further assume that there is a large neighboring country, call it Laxenberg, which does not have such a law. In Laxenberg people are allowed to advertise on electronic media without any restrictions. Many citizens of Puritania can and do receive much of Laxenberg's television with all the advertisement that is prohibited by Puritania law, all they need are small dishes on which to receive the television signals.

Take another case, this time involving a real country and real law. Canada has a law that makes it illegal to circulate racially offensive literature,⁷⁵ unlike the United States where the First Amendment is read by the courts to make impermissible such a prohibition.⁷⁶ Assume that there is a computer bulletin board operated on the Net by one of the white supremacist groups in the United States that spread racial hatred and advocate the extermination of certain groups. Those Canadians who wish to have access to this sort of material will have no problem doing so.⁷⁷

In both cases, what becomes clear is that an important aspect of state sovereignty is seriously challenged. If a state cannot enforce its laws within its territorial borders, or if a state cannot protect the moral and physical health of its citizens, as it has deemed them necessary, then clearly the conventional story of state sovereignty is destabilized. The state does not have "undivided and untrammelled power to make and enforce the law"⁷⁸ as classical sovereignty

75. Criminal Code, R.S.C., ch. C-46, § 319(2) (1985) (Can.); see *R. v. Keegstra* [1990] 3 S.C.R. 697 (Can.) [hereinafter Canada's Criminal Law]. Many other countries have similar laws. For example, in Germany several provisions of the criminal code are directed at expressions that are inconsistent with the "dignity of the human personality developing freely within the social community," a right that has its basis in Article 1 of the German Constitution. DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 370 (1989). Section 130 of the Criminal Code prohibits expressive attacks that incite hatred and Section 131 proscribes the production and dissemination of hate speech. *Id.*

76. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992).

77. Similar things are apparently taking place in relation to German anti-Semitic groups. Because German law prohibits the importation and distribution of Nazi propaganda and the denial of the Holocaust, many anti-Semitic groups are turning to Internet bulletin boards to have access to the sort of information to which it is illegal to have access in Germany. See §§ 86, 86a, 103(3), 220a(1) Nr.1 StGB (German Penal Code); see also Bajak, *supra* note 74. Indeed, "[t]he number of home pages operated by German right-wing extremists—usually posted anonymously on U.S.-based Internet servers to escape the reach of German law—soared to about 200 in 1998." Paul Gertner, *Germans Fight Neo-Nazis in Roosting in Cyberspace*, *TIMES-PICAYUNE*, Sept. 17, 2000, at A-31.

78. Held, *supra* note 68, at 3.

suggests. The issue here is not whether the particular laws are good or desirable, but whether a nation that cannot enforce its laws, a nation whose laws can be overridden by the laws of other countries, can properly be regarded as a sovereign nation.⁷⁹

The above two examples—satellite and Internet communications—pose, perhaps in the starkest of ways, the issue of how the communication revolution is challenging the concept of territorial sovereignty. But the challenge that is posed to territorial sovereignty by the communication revolution is more comprehensive and more ubiquitous. It is also not a sudden or a recent occurrence.

This last point needs to be emphasized. There is a tendency now among those working in the area of communication to view cyberspace and the challenges it poses to territorial sovereignty as so unique that they require a special legal regime, an almost autonomous and self-regulating legal landscape.⁸⁰ For the purposes of developing sensible policies in the communications area—by which I mean policies that are coherent and effective—I think it may be very helpful to see cyberspace as part of the general communications revolution, which it is, rather than as a unique phenomenon requiring special response.⁸¹ As I noted earlier, if the experience of First Amendment jurisprudence in U.S. courts is any guide, the consequence of viewing every new development as unique will lead to

79. As I shall show later, the state, even under these circumstances, is not without the means to respond to those challenges. But those responses are likely to be either ineffective or too costly.

80. See, e.g., David Johnson & David Post, *And How Shall the Net be Governed? A Meditation on the Relative Virtue of Decentralized, Emergent Law*, in COORDINATING THE INTERNET 62, 68 (Brian Kahn & James Keller eds., 1997); David Johnson & David Post, *Symposium: Surveying Law and Borders: Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1370-79 (1996); David Johnson & David Post, *The New 'Civic Virtue' of the Internet*, at <http://www.cli.org/paper4.htm> (last visited Dec. 26, 2003); David G. Post, *Of Black Holes and Decentralized Law-Making in Cyber Space*, 2 VAND. J. ENT. L. & PRAC. 70 (2000); David G. Post, *The "Unsettled Paradox": The Internet, the State, and the Consent of the Governed*, 3 IND. J. GLOBAL LEGAL STUD. 521 (1998); see also RESPONSIBILITY AND CONTROL FOR ILLEGAL AND HARMFUL CONTENTS IN THE INTERNET (1999) (The Bertelsmann Foundation Report). See generally Steven L. Schwarcz, *Private Ordering*, 97 NW. U. L. REV. 319 (2002), for the variety of forms that private ordering could take.

81. A well-known member of the U.S. federal judiciary has argued on a number of occasions that many activities and transactions that occur on the Internet are not much different from similar activities and transactions that take place in the physical world. Given that, the judge has argued, the same legal regimes should regulate the transactions or activities in the two worlds. See, e.g., *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1453 (7th Cir. 1996) (Easterbrook, J.) (arguing that contracts on the Internet are like any other contract and that there should not be a special regime that applies to those concluded on the Internet). Judge Easterbrook has also challenged in other fora the general notion that the Internet is unique and that special legal regimes should be applied to it. See Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207, 208 (1996).

incoherent and indefensible legal regimes.⁸² Writing over a decade ago about the problem of the trifurcated system of legal regimes—for print, broadcast, and cable—one author observed, quite correctly in my view, that as a result of the convergence of the media it was “cracking very badly.”⁸³

In the rest of this section I shall explore the direct impact that each medium of mass communication has had on the idea of territorial sovereignty so as to prepare the ground for the policy choices that I shall suggest and for the notion of state sovereignty that those policy choices imply.

B. *Print Media and the Imagining of the State*

Let us start with the first form of mass communication: print media. Although print media diffused information more widely and hence made likely internal challenges to the authority of the sovereign, it did not pose a serious challenge to the notion of territorial sovereignty. True, the emergence of print media increased the capacity, and probability, of organized challenge within the territory to the rulers in the name of a more legitimate and enlightened leadership. The capacity to communicate with more people in a short period of time significantly increased people's ability to organize and sustain opposition to the rulers. But the emergence of print did not significantly increase the vulnerability of the rulers from external sources or challenges. If the sovereign state did not wish its citizens to receive a printed item from the outside world, it simply prohibited the importation of that item. Thus, for example, if Saudi Arabia believed that sexually explicit material, such as that carried by *Playboy* or *Hustler*, is morally corrosive to its citizens or inconsistent with the teachings of Islam, it can simply ban the importation and circulation of such material.⁸⁴ The capacity of print media to evade the state's regulatory power is often very limited.

True, there are material and civic expenses associated with enforcing such a ban. And there is a possibility that some of those items might slip through the censorship process. But on the whole a state determined to censor printed items at its territorial borders is likely to do it reasonably effectively. Printed mass communication did

82. See S. Nadel, *Electrifying the First Amendment*, 5 CARDOZO L. REV. 531, 531-32 (1984).

83. See *id.*

84. Such power of the sovereign is apparently affirmed in international documents. Article 19(3) of the International Covenant on Civil and Political Rights provides that in agreeing to be parties to the Covenant sovereign states have retained the power to restrict free flow of information “[f]or the protection of national security or of public order (*order public*), or of public health and morals.” ICCPR, *supra* note 66, art. 19(3); see also Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., Supp. No. 13, at 77, art. 29, U.N. Doc. A/810 (1948) [hereinafter UDHR].

not, therefore, pose a serious challenge to the idea of territorial (external) sovereignty, though it might have had an impact on the notion of internal sovereignty.

In fact, in many ways print media served to consolidate the personality and identity of the territorial state. It became a means through which the idea of the state was imagined and consolidated. While rulers found it easy to exclude or suppress undesirable printed information, they also found it easy to utilize (and did utilize) the media to shape and cultivate a certain identity for the territorial state.⁸⁵ This was one of the important means through which diverse constituents were shaped to form a state or a nation. Benedict Anderson emphasizes the role of print media in the formation of nations, what he calls "imagined communities."⁸⁶ The printing press allowed millions of people to wake up in the morning and to read about the same events and in the process to tie themselves into an imagined community, though very few of them actually knew each other. This is especially the case with developing countries. Print media, which were invariably owned or controlled by the state, served the purpose of forging a national identity from the disparate entities that the colonial authorities had put together to rule as their colonial possessions.⁸⁷

The emergence of print media was, then, congenial to the territorial state in two senses. It provided the rulers with a powerful means through which to cultivate a sense of nationhood and territorial integrity while not denying those rulers the power to restrict the importation of information that they believed to be inconsistent with the interest of the nation-state. Indeed, the two purposes seem to assume one another. To shape disparate linguistic and ethnic entities into one nation required that the medium by which such shaping is done be strictly controlled. And the power to control information in printed form did not pose much challenge to nation-states, including those in the developing world.

85. BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* 37-46 (rev. ed. 1991).

86. *Id.* at 46 ("[T]he convergence of capitalism and print technology on the fatal diversity of human language created the possibility of a new form of imagined community, which in its basic morphology set the stage for the modern nation"). For his description of the nation as an "imagined community," see *id.* at 5-7. "I propose the following definition of the nation," he says, "it is an imagined political community—and imagined as both inherently limited and sovereign." *Id.* at 5-6.

87. Eli Noam has observed that "the single and unified nation-state, the main unit of government around the globe, was matched and served by its national monopoly communication network, usually owned and operated by the state as a public service, like the road system." Eli M. Noam, *Beyond Territoriality: Economic and Political in Telesociety*, Columbia Institute for Tele-Information, Working Paper No. 690 2 (1992), cited in MONROE E. PRICE, *TELEVISION, THE PUBLIC SPHERE, AND NATIONAL IDENTITY* 8 (1995).

C. *International Radio Communications: The Challenge to Territorial Sovereignty From Incoming Information*

The emergence of electronic communication, especially that of radiotransmission, however, posed a more serious challenge to the notion of the territorial state and to the conventional idea of sovereignty. This was especially so in relation to the state in developing countries.

To be sure, most radio broadcasting did not pose problems for, or challenges to, other countries. FM and AM signals cannot realistically be used for other than regional and national broadcasting. They cannot carry very far. Of course, there could be, in some circumstances, a spillover to border regions of other countries. Radio signals are in that sense oblivious to geographical constraints. However, those are often unintended and cover very limited border regions with rather (comparatively) minimal impact. The major problem arises in relation to high frequency (HF) shortwave transmission, the purpose of which is often to reach audiences in other countries and which can, with a strong enough transmitter, travel far and cover a wide area, threatening what a state may perceive to be its national security and cultural integrity as well as its jurisdictional and administrative authority.⁸⁸

A territorial state is not entirely without the means to respond to unwanted radio communication from external sources. It can jam the radio communication, as, in fact, do some states.⁸⁹ Jamming is a technique that involves the transmission of radio signals on the same frequency as the contested broadcast so as to render the signals unintelligible.⁹⁰ There are two types of jamming: skywave and groundwave.⁹¹ In the case of the former what the jamming party does is use powerful transmitters which are placed equidistant from the targeted audience and the broadcaster. The jammer can then radiate

88. *Id.*

89. There are other methods a state could employ to discourage the transmission of unwanted communication, but they all tended to be even more impractical than jamming. A state, for example, could forbid its citizens listening to certain broadcasts. Communist Albania did that. But this clearly will be difficult to enforce in most circumstances, unless the government has a way of controlling the nature of the receiving sets used by the population, which I think will be impossible. Nazi Germany tried to do that by manufacturing "cheap receiving sets that [were] permanently set to fixed frequencies" which were "much cheaper to buy than rival models that could be turned to a wider variety of stations." James G. Savage & Mark W. Zacher, *Free Flow Versus Prior Consent: The Jurisdictional Battle Over International Telecommunication*, 42 INT'L J. 342, 345-46 (1987).

90. See Adeno Addis, *International Propaganda and Developing Countries*, 21 VAND. J. TRANSNAT'L L. 491, 520-27 (1988), for an extended discussion of jamming as a method of response to unwanted radio transmission. The observations on jamming in the text track the discussion in that article.

91. *Id.*

signals into the ionosphere, which will reflect the signals across the path of the broadcast.⁹² Skywave jamming is effective in shielding a large area from the broadcast signals. However, the method is ineffective if there are changes in the ionosphere, such as the sun setting in the area to which the signals are directed while still shining in the area where the broadcasting originates.

Groundwave jamming uses transmitters that are less powerful than those used in skywave jamming.⁹³ The transmitters are placed near the intended audience and the jamming signals are radiated directly at the audience.⁹⁴ The intent of this form of jamming is primarily to block signals to large urban areas since the jamming signal can cover a twenty-mile area.⁹⁵ The jamming signal can be anything from an irritating "noise," to music, to a distorted voice transmitted at the same frequency as the offending broadcast.⁹⁶

Since it started to be utilized in the 1930s as a method of response to unwanted radio communication emanating from outside the borders of a nation-state, jamming's popularity has risen and fallen.⁹⁷ The two periods during which it was regularly used were World War II, when it was employed by both sides of the conflict,⁹⁸ and the long Cold War period, when the Soviet Union and its East

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. The earliest major attempt to jam international radio broadcast was in 1931 when a number of countries tried to block broadcasts from the Vatican. But by the end of the 1930s, and certainly once WWII broke out, jamming was prevalent throughout Europe. Julian Hale, *Radio Power* 128, 136 (1975); see also DAYA KISHAN THUSSU, *INTERNATIONAL COMMUNICATION: CONTINUITY AND CHANGE* 26-31 (2001).

98. "The Second World War saw an explosion in international broadcasting as a propaganda tool on both sides." Thussu, *supra* note 97, at 27. The emergence of the Nazis in Germany and the Fascists in Italy had already led to the conception of radio as a means of propaganda.

By the time the Nazis came to power in Germany in 1933, radio broadcasting had become an extension of international diplomacy. The head of Hitler's Propaganda Ministry, Joseph Goebbels, believed in the power of radio broadcasting as a tool of propaganda. 'Real broadcasting is true propaganda. Propaganda means fighting on all battlefields of the spirit, generating, multiplying, destroying, exterminating, building and undoing. Our propaganda is determined by what we call German race, blood and nation.

Id. at 27.

In Fascist Italy Under Benito Mussolini, a Ministry of Print and Propaganda was created to promote Fascist ideals and win public opinion for colonial campaigns such as the invasion of Abyssinia (Ethiopia) in 1935, and support for Francisco Franco during the Spanish Civil War (1936-39).

Id. at 27-28.

European allies jammed radio broadcasts from the West.⁹⁹ During the Cold War the Soviet Bloc regularly jammed, or at least attempted to jam, broadcasts by the British Broadcasting Corporation (BBC), the Voice of America (VOA), Radio Liberty, and Radio Free Europe,¹⁰⁰ broadcasts that were viewed as being hostile to the socialist system and socialist countries. Currently, very few countries resort to jamming as a means of insulating their citizens from unwanted communication.¹⁰¹ This is partly because of the availability of alternative media such as satellite broadcasting and the Internet that would enable the communicator to send his messages even if his radio broadcast were to be jammed. Indeed, as I shall indicate later, the communicator may, as some do, make the broadcast itself available on the Internet, hence making the traditional technique of jamming unavailable. Of course, given the unavailability of Internet connections to much of the world, especially parts of the developing world, the availability of radio broadcast on the web is not going to be a viable alternative for many people in the event that the government of the receiving nation desired and were able to jam the broadcast itself.

The legality of jamming under international law is a controversial and unsettled issue. Those who contend that it is proscribed under existing international law invoke the freedom of expression articles of the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights¹⁰² as well as Article 35 of the International Telecommunication Convention and a number of other international documents and statements.¹⁰³

99. Jamie Frederic Metzler, *Rwandan Genocide and the International Law of Radio Jamming*, 91 AM. J. INT'L L. 628, 628-29 (1997).

100. Although the United States has consistently and publicly denounced the jamming of its radio broadcasts, such as ones from Radio Free Europe and Radio Marti, it actually "developed the world's most sophisticated jamming equipment for combat and psychological warfare use. This technology was used with great success in the 1991 Persian Gulf war and the 1994 Haiti operation." *Id.* at 628.

101. Cuba does manage to jam Radio Martí that broadcasts from the United States. See Omar Javier Arcia, *War over the Airwaves: A Comparative Analysis of U.S. and Cuban Views on International Law and Policy Governing Transnational Broadcasts*, 5 J. TRANSNAT'L L. & POL'Y 199, 201-05 (1996).

102. See ICCPR, *supra* note 66, art. 19; see also UDHR, *supra* note 84, art. 19.

103. Article 35 of the International Telecommunication Convention (ITC) prohibits emissions intended to jam, or in any way unlawfully interfere with, authorized frequency which has met and continues to meet ITC's technical standard. International Telecommunication Convention, Oct. 25, 1973, art. 35, 28 U.S.T. 2495. The International Telecommunication (ITU) Radio Regulations provide for similar proscriptions. For example, Article 15.1 which prohibits all stations from engaging in "unnecessary transmissions," the transmissions of superfluous signals and correspondence, and "the transmission of signals without identification . . ." Geneva Radio Regulations, Dec. 6, 1979, art. 15.1, S. Treaty Doc. No. 21; see also Report Economic Social Council, U.N. GAOR 6th Comm., 3rd Sess., U.N. Doc. A/C.6/209 (1948); G.A. Res. 424(V), U.N. GAOR, 5th Sess, Supp. No. 20, at 44, U.N. Doc. A/1755 (1950).

Those who argue that the practice is legal under international law rely on two alternative but complementary arguments. One view holds that jamming of unwanted information is permitted simply as an aspect of the sovereign's right to have full control of its territory.¹⁰⁴ In his widely cited treatise on international law, Oppenheim advanced this particular view.¹⁰⁵ Under this view the right to exclude is an unqualified right and inheres in the principle of territorial sovereignty.¹⁰⁶ An alternative theory holds that jamming may be legally sanctioned as a legitimate means of self-defense when a nation is targeted with hostile propaganda.¹⁰⁷ Those who hold the latter view argue that though it may not be legal in all circumstances, the jamming of information that threatens and seriously impinges upon a nation's capacity to run its affairs and set its priorities is a legitimate exercise of self-defense.¹⁰⁸ Indeed, if the radio broadcast is

104. See, e.g., OPPENHEIM'S INTERNATIONAL LAW 529 (Hersh Lauterpacht ed., 8th ed. 1955).

105. *Id.*

106. The principle of exclusive sovereignty in the air space for the subjacent State, which has received general approval . . . enables that State to prohibit the disturbance of the air space over its territory by means of Herzian waves caused for the purpose of wireless communication and emanating from a foreign source.

Id. The strong deference to state sovereignty is textually provided for in Article 2 of the U.N. Charter. Article 2(1) provides that "the principle of the sovereign equality of states" is to guide the United Nations and Member States. Under Article 2(4) all Member States are to refrain from undermining the "political independence" of other Member States. And Article 2(7) of the United Nations itself is proscribed, except when the Security Council is invoking its Chapter VII authority, from interfering in the internal affairs of other states. See U.N. CHARTER art. 2, ¶¶ 1, 4, 7.

107. Perhaps the most prominent defender of this position is Derrick Bowett who argued that

Where the delict involves the broadcasting of propaganda the state may have recourse to 'jamming', which may be illegal *prima facie* but justifiable as self-defence. Thus, the decision of the British government to 'jam' the broadcast from Athens Radio in January, 1956, was justifiable as a measure of self-defence against delictual conduct by Greece

DERRICK BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW 54 (1958); see also IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 435 (1963) ("States need not submit to subversion . . . but may take all possible counter-measures on their territory and commit acts of lawful reprisal..Thus jamming of propaganda broadcasts would be lawful reprisal"). The Polish delegate at the 1950 meeting of the Sub-Commission on Freedom of Communication expressed a similar view in his defense of jamming: "each country had . . . the sovereign right to defend itself against this form of aggression [i.e. propaganda], just as it had the right to prevent opium smuggling, the sale of pornographic literature or the traffic in persons." DONALD R. BROWNE, INTERNATIONAL RADIO BROADCASTING: LIMITS OF THE LIMITLESS MEDIUM 23-24 (1982).

108. A very interesting, and rather amusing, rationale for jamming was offered in 1948 by the then minister of foreign affairs of the then Soviet Union, Andrei

denominated as war propaganda, it is clearly outlawed under Article 20 of the International Covenant on Civil and Political Rights.¹⁰⁹

Whether jamming is legal or not is, however, not my primary concern here. Nor am I concerned with the issue of what kinds of information, if any, should reasonably be excluded through the process of jamming. I have explored elsewhere both the legal and normative issues relating to jamming.¹¹⁰ Rather, my purpose here is to indicate that though external radio broadcast posed a much more significant challenge than printed mass communication to the notion of territorial sovereignty, the sovereign was not totally without power to deal with that threat. It could utilize jamming as the functional equivalent of stopping undesirable printed messages at the border.

However, on closer examination it becomes clear that the power of the territorial state to stop unwanted communication is far less effective here than it is when the means of communication is printed material. For most nations, especially many developing countries, the process is simply beyond their financial and technological capacity.¹¹¹ Most countries cannot even reach a third of their citizens much less be able to jam powerful transmitters used by radio stations from other, powerful, countries.¹¹² Uganda may be able to stop Playboy at its borders, but is unlikely to possess either the technological or financial capacity to jam a broadcast from the BBC or VOA that it may consider as inimical to its security and sovereignty. Put simply, the emergence of transnational radio communication put more pressure on the idea of territorial sovereignty. It made the territorial state more vulnerable. The claim that the sovereign had full control over its territory and the power to legislate, adjudicate and enforce as the final authority on all matters that arise within its territorial boundary, an authority that cannot be questioned or overridden by an

Vyshinsky. Speaking before the General Assembly of the United Nations and admitting for the first time that the Soviet Union indeed resorted to jamming of certain radio broadcasts went on to defend the practice this way: "the Russian people had to be prevented in the name of world peace from rising up in wrath to attack the United States as they assuredly would if they were to hear the American broadcasts." Ranjan Borra, *The Problem of Jamming International Broadcasting*, J. BROAD., Fall 1967, at 358.

109. "Any Propaganda for war shall be prohibited by law." ICCPR, *supra* note 66, art. 20(1).

110. See Addis, *supra* note 90, at 520-27.

111. When Poland ceased direct jamming in 1956, the government admitted that its limited jamming efforts had cost it US \$17.5 million a year, a figure then equal to the annual budget of the worldwide operations of the Voice of America (VOA) . . . [A] former official of the United States Information Agency has observed that it costs five times as much to jam a given programme as it does to transmit it.

Savage & Zacher, *supra* note 89, at 346-47.

112. *Id.*

external authority, was now being more effectively challenged. The state was incapable, whether for financial or technological reasons, effectively to deal with that challenge. That being the case, one can safely say that transborder (shortwave) radio broadcast heightened the vulnerability of the conventional story of sovereignty.

*D. Satellite Broadcasting: The Challenge to Territorial Sovereignty
From Incoming Information*

What transnational radio communication effectively removed as a practical possibility, other and newer forms of electronic communication are threatening to remove even as a theoretical matter. Take, for example, satellite broadcasting, especially direct broadcast satellite (DBS) communication.¹¹³ It is now possible for a broadcaster to relay signals across a national border. Intended recipients of the signals need only have small dishes to receive those signals.¹¹⁴ To take our example at the beginning of this section, Puritania's citizens would be able to receive Laxenberg's television signals with all the advertisements that were supposed to be illegal under Puritanian law. There is probably very little that Puritania could do about it unilaterally. Of course, in the same way that a country could theoretically prohibit the manufacturing or importation of radio sets so as to make sure that citizens do not receive radio broadcasts from outside the country, so could Puritania forbid all home reception by banning the manufacturing or importation of home reception dishes. But that would be too costly for the state. First, the cost of enforcing that prohibition might be very high, especially if the country is large in territory and the population is distributed over the entire territory. Even if it were possible for the government to enforce the prohibition, it would be at enormously high cost to civil liberty and the idea of a civil society. To do it effectively, the state would have to turn itself into a police state. Second, DBS has been (and will continue to be) important for countries with large territories and scattered population settlement patterns to communicate with their own citizens about things like health, education, literacy, and

113. Three kinds of satellite broadcasting are often identified by those that are familiar with the technology. The first is what is referred to as "point-to-point" broadcasting which involves a situation where an earth station transmits a message to a satellite and the satellite in turn transmits the message to a single ground station. The second is referred to as "distribution-type broadcasting" which involves community receivers. The third is direct broadcasting satellite (DBS) where the television signal is directly received by individual television sets from the satellite without the mediating function of a ground station. See CARL Q. CHRISTOL, *THE MODERN INTERNATIONAL LAW OF OUTER SPACE* 606 (1982).

114. *Id.*

security.¹¹⁵ Without the availability of DBS those governments are likely to be unable to communicate with large segments of their populations. That might be a cost many governments will be (and should be) unwilling to bear.

The type of broadcast transmitted by satellites across national boundaries could cover a wide range of issues with varying degrees of seriousness in terms of the challenge they pose to the conventional notion of sovereignty. Thus, for example, we could imagine a satellite broadcast from one big nation that is beamed regularly to the citizens of another small nation for the purpose of getting citizens of the small nation to overthrow the regime.¹¹⁶ Or, we could imagine an ethnic community that has been divided among many nation-states, such as the Kurdish minority, using satellite communication to cultivate its national identity, to create a sort of diasporic community.¹¹⁷ Such a community, of course, challenges the claim of the nation-state to be the highest point of political obligation and authority.

115. An Ethiopian-American is, for example, using satellite communications to broadcast educational programs everyday of the week in rural parts of various regions of Africa. The recipients of the broadcast, apparently, only need to strap "the small WorldSpace [the broadcasting company] antenna to the roof a car" to receive the broadcast. See Associated Press, *Ethiopian-American Radio to Spread Information*, available at http://www.hindustantimes.com.news/181_209891,001100050003.htm. In countries such as Ethiopia, where most of the population lives in rural areas and where educational opportunities and communication infrastructure are minimal, such communication apparatus as that of WorldSpace will clearly and increasingly play an important role in the process of modernization. On the other hand, such technology also clearly poses a challenge to the capacity of governmental authorities to regulate.

116. This, of course, is the situation in relation to TV Marti which broadcasts from the United States to the citizens of Cuba. See *Television Broadcasting to Cuba Act*, Pub. L. No. 101-246, 104 Stat. 15 1990 (codified as amended at 22 U.S.C.A. § 1465); see also J. H. Castro Villalobos, *The DBS Declaration of 1982: The TV Marti Case*, in PROC. 37th COLLOQUY L. OUTER SPACE 6 (1994).

117. The Kurds established MED-TV, their own satellite television, that has enabled them to broadcast to Kurds "living in Kurdish regions of Turkey, Iran, Iraq and Syria and those of Kurdish diaspora in Europe." See THUSSU, *supra* note 97, at 201. Operating from London MED-TV "took its name from Medes, the ancient people from whom the Kurds are descended." *Id.*; see also E. Ryan, *Television Nation*, *Wired*, Mar. 1997, at 42-48, 88-93.

William Connolly makes the general point about the emergence of transborder communities as a result of the new communication technologies.

[T]he speed and global scope of communication make it difficult to avoid the question of indigenous peoples in 'settler societies.' Vigorous movements by indigenous peoples in the United States, Canada, Australia, and New Zealand are magnified by the ability of these constituencies to combine their efforts through Internet connections and international conferences and to reach audiences and agencies stretching beyond the states in which they are contained.

William E. Connolly, *Speed, Concentric Cultures, and Cosmopolitanism*, 28 POL. THEORY 596, 610 (2000).

As this last example shows, it is not only in terms of neighboring states that DBS can be effectively used to undermine territorial sovereignty. Indeed, DBS can be used to beam signals from one end of the globe to another. For example, a DBS over the Pacific Ocean could transmit signals from the West Coast of the United States to the home television sets of the citizens of Indonesia. In fact, if one has three of those satellites in what is referred to as the geostationary orbit one could cover the entire globe with the signals coming from the station on the West Coast of the United States.¹¹⁸ Given the huge areas of DBS service and the prohibitive cost of the necessary technology, jamming is unlikely to be even remotely possible.

It is not only the prohibitive cost of jamming that makes DBS more effective than radio in terms of its challenge to territorial sovereignty, but also the fact that television broadcasting is not limited as much by linguistic frontiers as is radio broadcasting. Even when the language of the broadcast is different from the language of the audience, viewers may still watch the broadcast. And in many cases they will be able to follow the plot or the story even without any knowledge of the language in which the message is transmitted. The pictures and gestures of the event or plot are often sufficient to convey the message. This applies to the broadcast of news events as it does to the broadcast of cultural shows such as those exported by the United States—soap operas such as *Dallas* and *Dynasty*, or sitcoms such as *Cosby* and *Friends*,¹¹⁹ or other entertainment programs such as *Star Trek*, *Baywatch*, *ER*, and *The X Files*.¹²⁰

118. The geostationary orbit (GSO) is a circular orbit that is about 36,000 kilometers (22,300 miles) above the earth and is located directly above the equator. If a satellite is placed in this orbit that satellite will take exactly one day (23 hours 56 seconds) to go around the Earth. This means that the satellite is synchronous with the Earth's rotation—the satellite revolves at the same rate at which the earth revolves—therefore appearing to be stationary (geostationary). Such a satellite will be able to cover about 40 percent of the Earth's surface at a given moment of time. So, if one desired to cover the entire globe one would only need to place three satellites in the GSO. See ITU, Radio Regulations, art. 1, ITU Doc. No. ISBN 92-61-01221-3 (1982).

The GSO, like the radio frequency spectrum, is regarded as a limited natural resource. The estimates are that the orbit can perhaps accommodate about 1800 satellites without the risk of collision between satellites. The number is arrived at with the assumption that it would be reasonably safe to position the satellites spaced out at 0.2 degree apart. See *Efficient Use of the Geostationary Orbit*, Jan. 16, 1981, U.N. Doc. A/CONF.101/BP/7 12 (1981). As of 1998 the number of geostationary satellites is said to be 192 and 67 on order. See THUSSU, *supra* note 97, at 100.

Of course, communication satellites can be put on orbits other than on the GSO, but under those circumstances one would need to have more than three satellites to cover the Earth and one would need to continually adjust those satellites. The lower the orbit the more satellites one would need to cover the same area size.

119. It is remarkable how many Ethiopians, who have just come for a visit to this country and who do not speak or read English, I have met and talked to that tell me how they regularly watch U.S. and British programs (films, sports, sitcoms, etc.) and have no difficulty following the stories or plots in those shows. A newspaper article

To summarize, satellite broadcasting has more effectively challenged state sovereignty than did transborder radio broadcasting. This is so for three reasons. First, satellite broadcasting reaches wider areas than shortwave radio broadcasts. Second, the financial and technological cost of stopping such broadcasts is prohibitive for almost any nation, but especially for developing countries. Third, unlike radio broadcasts, for satellite broadcasting to be effective the language of the broadcast does not necessarily have to be understood by the population to which the broadcast is beamed. The picture often carries its own message, whether the picture accompanies a news item or whether it is part of an entertainment program. The linguistic handicap that may accompany radio broadcasting is less salient here.

E. Remote Sensing: Challenges from Outgoing Information

The impact that satellites have on national sovereignty has another dimension. This is a dimension that is not fully explored in the literature. In the last section I explained how satellites could be utilized to undermine the authority of a nation-state by broadcasting television programs into the territory. But satellites could also be used to gather from, and take information out of, the territory without the knowledge and consent of the authorities of that country. Territorial sovereignty can be undermined by outflow of information as it can be by inflow of information. Indeed, in many ways the outflow of information without the knowledge of the legitimate authorities of that country is perhaps the gravest threat to that nation's sovereignty.

The process by which information is gathered by satellites on or about other countries, without the knowledge or consent of the target countries, is referred to as remote sensing. Technically, remote sensing refers to satellite reconnaissance and the detection by satellites of geological or other features on, above, and below the earth's surface. Often those satellites are stationed outside the airspace of the sensed country such that the sensed country cannot legitimately complain that those satellites illegally invaded its airspace.¹²¹ The information gathered by such satellites could range

makes the same point about people in another part of the world. The writer reports that some years ago he came upon Bedouin tents in the Negev Desert, Israel, that were equipped with small antennas. The antennas were "attached to battery-operated televisions, many of which were tuned to the American prime-time soap opera 'Dallas'." Edward Rothstein, *Why American Pop Culture Spreads*, N.Y. TIMES, June 2, 2001, at B11.

120. THUSSU, *supra* note 97, at 133.

121. "The satellites have the ability to sense and photograph nations from a sun-synchronous orbit of 705 km without the knowledge and permission of the nations being sensed." HAMID MOWLANA, *GLOBAL COMMUNICATIONS IN TRANSITION: THE END OF DIVERSITY?* 43 (Robert A. White ed., 1996).

from military movements to information about mineral deposits or crop production, information that could be used to the economic and security disadvantage of the sensed nation. There is perhaps very little that the sensed nation can do unilaterally to protect itself from this phenomenon. The analogy here is being photographed from the air while one is quietly sunbathing in one's own backyard and those images used for purposes to which one did not and would not consent. The difference is that at least in the case of the latter one can avoid being in that circumstance by being fully clothed when one is outside the house. But there is no analogous remedy in relation to remote sensing. The earth cannot be fully clothed!

One of the elements that has traditionally been viewed as constitutive of sovereignty under international law and political theory is the state's capacity to have control over the natural resources found within its territorial jurisdiction.¹²² As Philip Allott aptly observed, "Our independence is a function of what we control and what we do not control."¹²³ But to have full control over one's resources also entails having access to the information about that resource at least as early as others have access to the same information. To lack access to information about natural resources in one's own territory while others (say foreign corporations) have access to that information is to be put at a great disadvantage if one were to negotiate with the information-holders about the development of those resources. A country may make decisions or enter into agreements about its resources from this position of imbalance of access to information.

The challenge that remote sensing poses to territorial sovereignty is not only in relation to the capacity of a state to have full control over the collection and dissemination of information about its resources, but also in regard to its ability to protect the privacy of its citizens.¹²⁴ Let me make it clear: The issue here is not the usefulness or otherwise of the technology and the process of remote sensing, but rather how it can be and often has been deployed to

122. The principle is affirmed through numerous U.N. General Assembly Resolutions. See generally GEORGE ELIAN, *THE PRINCIPLE OF SOVEREIGNTY OVER NATURAL RESOURCES* (1979).

123. ALLOTT, *supra* note 40, at 404.

124. Remote-sensing satellites are worrying to many, not only for what they can do in terms of sensing natural resources and information, but also in terms of what information they are capable of gathering about individuals, hence raising the issue of individual privacy. As a newspaper article put it: "commercial spy satellites are about to let anyone with a credit card peer down from the heavens into the compounds of dictators or the backyards of neighbors with high fences." William J. Broad, *Private Ventures Hope for Profits on Spy Satellites*, N. Y. TIMES, Feb. 10, 1997, at A1. These new satellites, which started operating in mid-1977, "are designed to see objects on the ground as small as a yard or so in diameter—cars and hot tubs, for example." *Id.*

undermine the capacity of the territorial state to act as a sovereign entity.

Even if a state is made aware of the fact that it has been an object of sensing and that it is offered access to the data that have been gathered about it, the effect on its national sovereignty is not necessarily trivial. First, the data may be made available to others at the same time as they are available to the sensed state which would, of course, deny the latter whatever power exclusive access to information may have provided it when negotiating with others. Second, even if simultaneous release of the data to others is not per se detrimental to the capacity of a nation to appropriate its resources in the most desired way, the released data may be of such a nature that the simultaneous release would effectively put the sensed nation at a disadvantage in relation to other nations and private entities that have access to the information.

Imagine the following. Country A was remotely sensed by corporation B, which has a policy of selling the information to the sensed country and to others who may have interest in the information at a non-discriminatory price. Assume also that the data that are being offered for sale are the raw (or even processed) data. For many countries, especially developing countries, that is essentially as bad as not having access to the information at all. Many of those countries do not have technological and financial capacity to process and interpret the data. Given that, the effect of simultaneous release will be that other parties who possess the capacity to process and interpret the data will be in possession of information about the resources of a sensed state that the state itself will be unable to have.

I shall explore later what the response of nation-states, more precisely regional groupings, has been to the threat that remote sensing poses to the notion of national sovereignty. For the moment it is sufficient to conclude by noting that the challenge of satellites to the notion of territorial sovereignty has two dimensions. It comes in the form of satellites disseminating information into a country, say in the form of television broadcast, as well as in relation to information that satellites manage to get out of the country in the form of information that those satellites have gathered about the country. In each case, the flow of information across national boundaries seriously challenges the notion that the territorial state has full prescriptive, adjudicative, and enforcement jurisdictions over matters within its territorial boundaries.

F. Transborder Data Flow (TBDF) and National Sovereignty: Challenges from Outgoing Information

Another area of information flow that has demonstrated the limits of territorial sovereignty is what is referred to as transborder

data flow (TBDF). TBDF refers to the process of computerized data transfer across national boundaries.¹²⁵ The data transfer could be between a parent company (say, a financial institution such as a bank) and its subsidiaries in other countries, for the purpose of improving managerial efficiency by moving data about the activities of the institution from one country to another. Or, it could be between a company that owned the data and a company from another country that is hired to process the data, to put it in reasonably useable form. The data transferred across national boundaries could be of a variety of kinds. It could involve personnel data such as the health and employment histories of employees, which might be transferred between a parent company and its subsidiary in another country, or between a credit bureau and another organization. Or it could be economic data transferred between banks or insurance companies or other entities whose business is one of trading on information. The capacity of private entities to move large amounts of digitalized data across national boundaries, often without the knowledge of the authorities of the particular nation, has raised a number of issues that the territorial state will find difficult to deal with absent the cooperation of other states.

Although the data transferred across national boundaries could range from economic to personnel data, here I shall only focus on the transfer of personnel data, for that seems to be the most sensitive as well as the best example to show how the information revolution is undercutting the capacity of the nation-state to perform one of its basic functions, that of protecting the welfare and privacy of its citizens. Assume that Country A has a law that prohibited the disclosure of the personal data on employees gathered as part of the employment process. Suppose a company has gathered such information and transferred it to its parent company in another country, Country B,¹²⁶ a country that does not have a similarly

125. Anne W. Branscomb, *Global Governance of Global Networks: A Survey of Transborder Data Flow in Transition*, 36 VAND. L. REV. 985, 985 (1983).

126. Actually, Country B could be the United States. The United States does not have general privacy laws that regulate the private sector. So, for example, if a company transfers personal data about its employees to its parent company in the United States from one of the countries that are members of the European Union, those data will have no federal privacy protection and very inadequate protection from some states. "American companies have . . . shown little interest in conforming to other countries' privacy laws. In most European countries, for example, companies are not allowed to sell customers' names and other personal information without customers' permission. In the United States, selling names without permission is legal and commonly done." Guernsey, *supra* note 15, at D8; see also Edmund L. Andrews, *European Law Aims to Protect Privacy of Data: Some Trade With U.S. Could be Disrupted*, N.Y. TIMES, Oct. 26, 1998, at A1; John Markoff, *Differences over Privacy on the Internet: U.S. and Europe at Odds on How to Protect Users*, N.Y. TIMES, July 1, 1998, at C1.

generous data protection law. What is Country A to do if the personal data of its citizens are disclosed in Country B pursuant to the request of an individual or an entity and the law of Country B? Perhaps it can do very little on its own other than, of course, closing down the office of the subsidiary which may or may not be economically feasible but will certainly not remedy the disclosure.

The problem gets even more complicated when one realizes that even when the country to which the data are ultimately transferred has privacy protection laws, other countries through which the data go to get to that country might not. Unlike the regular mail, electronic mail has no fixed route. Data from New York to Melbourne, Australia, might go through Paris and Toronto one time and Oslo, Norway, another time. It is impossible to tell in advance what route the electronic transmission will take. From the point of view of privacy, therefore, the degree of protection that the data get depends not only on the protection that the receiving state affords those data but also on whether the countries through which the data pass have adopted equivalent, or at least adequate, privacy laws. This becomes important given that the data will be stored, at least temporarily, in the intermediate countries. To the extent that the conventional notion of state sovereignty implied, at a minimum, the capacity of the nation-state to act unilaterally to protect the welfare of its citizens, then the failure to do so can only be understood as serious diminution of the sovereign authority of the state.

As I shall explore later, nation-states have come to realize that in relation to TBDF as in other areas of information flow (and indeed in relation to any other area of globalization such as the environment), unilateral action, assumed by the conventional notion of sovereignty, will often be ineffective to enforce a country's data protection laws, and are thus coming to deal with the issue on regional or interregional basis. In Europe, for example, where the issue of TBDF (especially the issue of privacy) has been seriously considered and debated, trans-European efforts have accompanied data protection laws of the several states.¹²⁷ The data protection laws of many European nations provide that no data shall be transferred out of their countries unless the country to which the transfer occurs has adopted laws that provide an equivalent level of protection to that provided by the data exporting country.¹²⁸ This principle is

127. Convention for the Protection of Individuals With Regards to Automatic Processing of Personal Data, Jan. 28, 1981, E.T.S. No. 108, available at <http://conventions.coe.int/treaty/en/treaties/html/108.htm> (last visited Nov. 18, 2003) [hereinafter Convention]. The Convention was based on the OECD voluntary guidelines that were issued in 1980. See OECD, Guidelines on the Protection of Privacy and Transborder Flows of Personal Data, Oct. 1, 1980, 20 I.L.M. 422.

128. See generally Data Protection Act: United Kingdom Law, at <http://www.dpalaw.info/uklaw.htm> (last visited Dec. 26, 2003).

endorsed by the Council of Europe.¹²⁹ The Convention adopted by the Council of Europe allows signatory states to prohibit the export of certain categories of personal data to another member of the treaty if that country does not have an equivalent level of protection.¹³⁰

Although the Convention is not directly binding on signatory states, it requires those states to adopt legislation that will give effect to the principles of the Convention and to provide safeguards for the processing of personal information that are common to member states.¹³¹ Of course, any state can adopt a more generous form of protection than provided for by the Convention. The core principles of the Convention are that personal information should be "obtained and processed fairly and lawfully;" that such personal information be "stored for specified and legitimate purposes and not used in a way incompatible with those purposes;" and that data processing be limited to circumstances that are "adequate, relevant, and not excessive in relation to the purposes for which they are stored."¹³²

The Council of Europe is not the only European intergovernmental entity that has attempted to deal with the privacy issues raised by TBDF. The European Union has also adopted a directive.¹³³ The directive requires equivalency as a standard for data processing within member states.¹³⁴ But outside the Union the standard by which the transfer of data is to be measured is whether the importing nation has "an adequate level of protection."¹³⁵ There have been criticisms of both the Convention and the Directive,¹³⁶ but

129. See Convention, *supra* note 127; see generally PETER SWIRE & ROBERT LITAN, *NONE OF YOUR BUSINESS* (1998).

130. Convention, *supra* note 127, art. 12(3)(a). By implication the Convention is understood to authorize states to prohibit export to non-member states which do not satisfy the equivalency standard as well.

131. *Id.*

132. *Id.*

133. European Parliament and Council Directive on the Protection of Individuals with Regards to the Processing of Personal Data and on the Free movement of Such Data, 1995 O.J. (L 281) 31 [hereinafter Directive]. The Directive was in some sense inspired not only by the Council of Europe Data Protection Convention, but also by the 1980 OECD Privacy Guideline.

134. *Id.* art. 7.

135. Article 25(1) provides that transfer of data is allowed only if "the third country in question is ensures an adequate level of protection." Convention, *supra* note 127, art. 25(1); see also *id.* pmb1, para. 8 ("[I]n order to remove the obstacles to flows of personal data, the level of protection of the rights of individuals with regard to the processing of such data must be equivalent in all Member States . . ."). Whether or not there is adequate protection is generally to be made by member countries. And there are exceptions to this general principle such as when the data subject has given consent or the transfer is done at the request of the data subject or when it is done in the vital interest of the data subject, and so on. *Id.* art. 26(1).

136. Some have for example faulted the Directive for establishing an incongruous position by requiring that there be merely adequate data protection if the importing nation is a non-member while the standard for data movement between

my purpose here is not to join that debate. Rather, the purpose of this brief account of the attempt by Europeans to deal with data privacy on a regional level is to support two propositions. First, just like satellite broadcasting or remote sensing, the issues raised by TBDF cannot be resolved by one nation alone by invoking its traditional authority of territorial sovereignty. The conventional notion of sovereignty is put under serious strain. Second, the multilateral European approach to the privacy issue not only shows that states are unable to deal unilaterally with issues raised by the communication revolution, but, perhaps even more importantly, it also suggests a way to conceive of sovereignty. In the information age, national sovereignty is not simply, or even primarily, a case of the state having "undivided and untrammelled power to make and enforce"¹³⁷ laws, but one of being able to participate in the formation of international institutions so as to provide collective protection of interests. Perhaps it is more plausible to think of sovereignty in procedural terms. I shall pursue this later in some detail.

G. National Sovereignty as "Speedbump"? The Case of the Internet

Perhaps no one mode of communication illustrates more clearly than cyberspace¹³⁸ how the conventional notion of territorial sovereignty is being challenged by the communication revolution. The announcement on a masthead on the World Wide Web with which I opened this article, proclaiming that "[n]ational borders are just speedbumps on the information superhighway,"¹³⁹ though exaggerated, has some truth in it. The ability of the nation-state to restrict or prohibit the flow of information through the Internet is

member countries is the equivalency standard. This and other criticisms are detailed in Paul Schwartz, *European Data Protection Law and Restrictions on International Data Flows*, 80 IOWA L. REV. 471, 485-88 (1995).

137. Held, *supra* note 68, at 3.

138. "Cyberspace" is used to refer to the interaction among people and among businesses over computer networks, commercial online services and electronic bulletin boards. A good example of cyberspace is the Internet. For the purposes of this Article, I shall use the terms "cyberspace" and "the Internet" interchangeably. I mean to use the term the "Internet" to refer to the globally linked and computer-generated (and computer-sustained) network (to be precise, network of networks) which enables people to have access to all sorts of information, to (virtually) meet all sorts of people and to engage in all sorts of transactions. All computers connected to the Internet share a common language or "protocol" which is known as TCP/IP (Transmission control Protocol/Internet Protocol) which allows each computer on the network to be aware of other computers on the network and to know exactly where on the "network map" each of the computers is. For a good description of the Internet, see A. Michael Froomkin, *Habermas@Discourse.net: Toward a Critical Theory of Cyberspace*, 116 HARV. L. REV. 751, 777 (2003). Dow Jones & Co. v. Gutnick (2002) 210 C.L.R. 575, 615 (Kirby, J, concurring). Justice Kirby cites a figure of 655 million of the number of estimated Internet users at the end of 2002. *Id.* at 616.

139. White & Lauria, *supra* note 1, at 2.

becoming increasingly diminished. Take, for example, the case of an Italian men's magazine called *Playmen*.¹⁴⁰ Because the courts in the United States determined that the publishers of the magazine engaged in trademark infringement against *Playboy*, they were prohibited from publishing, distributing or selling in the United States.¹⁴¹ While *Playboy* also managed to get the courts in England, France, and West Germany to enjoin the use of the *Playmen* name in those countries, the Italian courts ruled that *Playboy* was a weak mark and hence not entitled to protection.¹⁴² What *Playmen* did in response to the injunction from the courts in the United States was simply to make available two services on the World Wide Web—a free service and a subscription service.¹⁴³ Although the site was located on a machine in Italy, it was accessible worldwide.

U.S. citizens who had access to the Internet could, through the free site, call up web pages and see the cover of *Playmen* magazine, see images from the magazine, and see advertisements for the pay service containing more of the magazine's content. If they liked what they saw through the free service, they could subscribe. Subscription would allow them to browse, or even print, the pages and pictures of the magazine. The *Playmen* example indicates how cyberspace is confounding the conventional law of territorial jurisdiction and national borders.¹⁴⁴ Has *Playmen* been distributed and sold in the

140. *Playboy Enters. v. Chuckleberry Publ'g, Inc.*, 939 F. Supp. 1032 (S.D.N.Y. 1996).

141. *Id.* at 1033.

142. *Id.* at 1034.

143. *Id.* at 1035. The free service was called "Playmen Lite" and what it did was introduce potential subscribers to moderately explicit images so as to get them interested in subscribing. The subscription service was called "Playmen Pro" and once you subscribed you apparently got the entire deal. In order to access the Lite version a person contacted the publisher who issued a temporary user name and password via e-mail. To subscribe one filled out a form and sent it by fax to the publisher after which the user received by e-mail a password and login name that would enable the user to read the magazine.

144. There are other examples that indicate how the notion of territorial sovereignty is under strain. Consider, for example, the availability of Adolf Hitler's book, *Mein Kampf*, in Germany. The government of one of the states of Germany, the State of Bavaria, acquired the rights to the book as a consequence of Allied confiscation order in 1948. Pursuant to that right, new editions of the book are banned in Germany. An English version of the book could, however, still be published in the United States or the United Kingdom, because the original publisher had sold the right in these countries in 1933. The book was therefore available for purchase on the Internet at sites such as amazon.com or Barnesandnoble.com. German citizens could order online and get the material shipped to them. What they could not get in Germany they were able to purchase from the United States or the United Kingdom and the law enforcement authorities in Germany likely found it hard and expensive to keep tabs on who was buying the book. This has led German authorities to ask online sellers such as amazon.com not to take orders from German citizens. But the prospect of German authorities stopping access to the book is unlikely, because *Mein Kampf* can now be

United States in violation of the injunction?¹⁴⁵ If so, what can the U.S. courts do to enforce the injunction?

The problem is that while sovereignty has traditionally been the function of territoriality, the Internet (and indeed even satellite communication) is not conducive to that paradigm. While territorial sovereignty is premised on a world that is divided into states—those “bright, bold blocks of colour” that divide “the entire land-surface of the planet,” as Daniele Archibugi calls them,¹⁴⁶ the Internet is based on a world that is divided into networks, domains, and hosts.¹⁴⁷ In this world of cyberspace even the communicators themselves, let alone the authorities of the countries from which and to which the communication is directed, may not know that their messages are actually crossing territorial borders.¹⁴⁸ If more examples are needed

downloaded from the Internet, from a server located in the United States. As the authorities freely admit, there is nothing they can do to stop that. Given the fact that the First Amendment will surely be said to protect the provision of such material to users, German authorities are not going to get help from U.S. authorities. See Paul Geltner, *Germans Fight Neo-Nazis Roosting in Cyberspace*, TIMES-PICAYUNE, Sept. 17, 2000, at A3.

Consider another example. The Egyptian government censors the *Cairo Times*, a feisty paper that is published out of Cyprus, when the paper comes into Egypt. The government censors out portions of the paper it deems unacceptable before the printed copies are distributed. To counter this, the paper now prints “in bright red letters on the web site (cairotimes.com) everything the government takes out, in a section entitled: “The Forbidden File—See what the Censor has cut from our print edition . . . These articles were chopped apart” Thomas Friedman, *Censors Beware*, N.Y. TIMES, July 25, 2000, at A29.

Still another example: “[S]hadow media is growing exponentially along with China’s Internet, as articles from even the most obscure newspapers quickly find their way onto web sites and into chat rooms.” Elizabeth Rosenthal, *China Struggles to Ride Herd on Ever More Errant Media*, N.Y. TIMES, Mar. 17, 2001, at A3, cited in JOSEPH S. NYE, JR., *THE PARADOX OF AMERICAN POWER: WHY THE WORLD’S ONLY SUPERPOWER CAN’T GO IT ALONE* 49 (2002).

145. The issue here is whether uploading pictorial images onto a computer which may be accessed by people from a particular country constitutes a “distribution” in that country. If the analogy is someone flying to Italy and purchasing the magazine in Italy and reading it there, then, of course, U.S. territorial sovereignty has not been invaded in any sense and there has been no distribution by the magazine in the United States. The question is easily answered if the subscribers printed those images and distributed them to others.

146. Daniele Archibugi, *Cosmopolitical Democracy*, 4 NEW LEFT REV. (2d ser.) 137, 137 (2000).

147. Perhaps I should indicate here what is meant by “domain.” Domain refers to the name system which maps and identifies the many networks linked to the Internet. Thus, for example, in aaddis@law.tulane.edu, which is my e-mail address, the domain name is law.tulane.edu. Each portion of the domain name (law., tulane., edu) is referred to as a domain, and in total become the site’s domain name. In this particular case the domain site tells me that the machine is located in the United States (because there is no two-letter country code), that it belongs to an educational institution (edu), the name of the institution is Tulane (.tulane) and the machine is located in the law school (law.) of Tulane University.

148. This would be especially the case if a person is accessing a world wide web site, for most of those addresses do not indicate the nationality of the site.

of the inadequate nature of the territorial paradigm one need only think of “cybertorts,”¹⁴⁹ “cybersmuts,”¹⁵⁰ and “cyberracism.”¹⁵¹ The last two examples show that not only does the Internet destabilize our understanding of territorial (or conventional) sovereignty, but it is also putting into confusion accepted legal norms which have been developed to deal with issues of international dimension, in this case the rules of conflict of laws.

Although I have argued earlier that it will be unwise to view the Internet as being unique in its challenge to national sovereignty, as earlier technologies of communication had also put pressure on the idea of territorial sovereignty, I should not be understood to minimize the fact that the nature of the challenge from the Internet is further reaching than the impact of communication technologies that preceded it. In the same way that earlier technologies of communication posed a sharper challenge than those preceding them, say satellite compared to radio broadcasts or radio broadcasts compared to print, the Internet’s challenge is more profound than those technologies of communication that came before it such as

149. “Cybertorts” refers to the commission of a tortious act, such as defaming an individual, during the process of computer-based communication. See Rosalind Resnick, *Cybertorts: The New Era*, NAT’L L. J. July 18, 1994, at A1. Defamation could take place under many circumstances. Assume the following: an Australian posts a message on Usnet which defames a U.S. citizen. Suppose the newsgroup is moderated by a New Zealander whose data are stored in an English computer. What can the United States do to ensure that remedy is available to its citizens—assuming that there are laws in the relevant United States jurisdiction that provide for remedies under those sorts of circumstances? One lawyer is quoted as having said “The Internet created a universal jurisdiction, so that once you are on the Internet you are subject to the laws of every country in the world.” The lawyer was commenting on a number of actions taken by government officials in Germany in an attempt to control access to certain kinds of information available on the Internet. A few years ago German authorities indicated that they will prosecute an activist university student for violating government orders that bar access to a leftist magazine by providing an Internet home page that provided a link to that magazine. Prior to this episode German authorities in Munich had also indicted the head of CompuServe’s German subsidiary “on charges of aiding in the distribution of pornography and violent computer games.” This, simply because German citizens and residents could use CompuServe to get access to the prohibited information in other countries, not that CompuServe produced or promoted such information. See Edmund L. Andrews, *Germany’s Efforts to Police Webb are Upsetting Business*, N.Y. TIMES, June 6, 1997, at A1; Nathaniel Nash, *Holding CompuServe Responsible*, N.Y. TIMES, Jan. 15, 1996, at D4. And apparently, German officials are threatening “to file charges against more than a dozen Internet access providers because they failed to block access” to a particular Dutch Internet site which “carries home pages for about 6000 commercial customers.” Edmund L. Andrews, *Germany’s Internet Barriers Face a Court Test*, INT’L HERALD TRIB., June 6, 1997, at 13; see also *Dow Jones & Co. v. Gutnick* (2002) 210 C.L.R. 575.

150. This term refers to the process of sending and receiving through computer-based communication material that is defined as obscene or indecent.

151. See, e.g., Canada’s Criminal Law, *supra* note 75.

satellite and shortwave radio communications. Put simply, to deny the uniqueness of the Internet in its challenge of the conventional notion of sovereignty is not to deny that its challenge may be more deep-cutting.

Having made the observation that, although not unique, the Internet has had a qualitatively different impact on the notion of territorial sovereignty, let me now note briefly what those differences are. First, as the U.S. Supreme Court observed in *Reno v. ACLU*, the Internet is a world-wide phenomenon, accessible from all parts of the globe.¹⁵² Its decentralized character and the relatively cheap cost of access to it make its global reach easier and its control rather difficult.¹⁵³ Second, the Internet's capacity to unbundle information, and hence to allow individuals to switch packets rather than circuits, makes it more difficult to control the flow of information across national boundaries.¹⁵⁴ Third, because the medium enables an interactive and (almost instantaneous) participatory communication, the challenge to the authority of the nation-state can be effectively coordinated among those within and outside of the territorial border. Fourth, as I shall argue later, not only does the Internet challenge territorial sovereignty more profoundly than the media that preceded it, but it also seems to indicate more clearly what an alternative notion of sovereignty might look like. The Internet demonstrates the deconstitutive and constitutive dimensions of the communication revolution.

H. *The Death of the Conventional Notion of Sovereignty?*

To summarize, whether it is in relation to transborder television broadcasting, or the collection, transfer, and distribution of computerized data about a country (remote sensing) or its citizens (personal data), or the Internet, the spectacular ease with which information is now collected and disseminated across national boundaries has started in earnest to undermine the conventional

152. *Reno v. ACLU*, 521 U.S. 844, 849-53 (1997); see also *Aschcroft v. ACLU*, 535 U.S. 564, 566 (2002).

153. Henry H. Perritt, Jr., *Cyberspace and the State Sovereignty*, 3 J. INT'L LEGAL STUD. 155, 161 (1997).

All it takes to be an Internet publisher is a \$2,000 personal computer and a \$12.95 per month subscription to an Internet service provider. All it takes to be an Internet service provider is about \$50,000, most of which goes for labor costs and a high bandwidth connection between the terminal server and router into the larger Internet.

Id. In fact, the cost is now considerably less than the 1997 figures quoted by Perritt.

154. "Because of its packet switching rather than circuit switching character, it is far more difficult to impose physical border controls on the Internet than on other terrestrial wire-based or terrestrial micro-wave based technologies." *Id.*

concept of sovereignty that has been central to our understanding of international relations, international institutions, and public international law itself for a considerable period of time.

The communication revolution, especially the Internet, has facilitated the sharp challenge to state sovereignty in a number of ways. First, it has curtailed the capacity of national authorities to control the means of communication and hence the kind of information their citizens get. What is not allowed to be printed or be put on the air may be easily accessed either through the Internet or received via satellite communication. Second, the communication revolution allows the creation and cultivation of parallel communities across national boundaries, on the basis of linguistic or other ethnic characteristics or on other grounds, challenging the idea of the territorial state as the highest point of political authority and loyalty. Third, one of the consequences of the communication revolution has been that while the authority of the nation-state is in decline, the number and influence of non-governmental organizations (NGOs) have "grown spectacularly."¹⁵⁵ These NGOs use communication technologies to organize and coordinate their activities on an international scale with reduced transaction costs.¹⁵⁶ But as profound as the communication revolution's challenge to the conventional notion of sovereignty is, it does not necessarily lead to the conclusion that we should therefore abandon the idea of sovereignty altogether. Notwithstanding the counsel of many to the contrary, the lesson from the communication revolution is not that we should dispense with it, but rather that we should recast it.

IV. INSTITUTIONAL AND CONCEPTUAL RESPONSES TO CHALLENGES POSED BY THE COMMUNICATIONS REVOLUTION

A. Introduction

What have been the responses to these technological developments that appear to put great strain on the notion of state

155. ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 250 (1995). The influence of NGOs has specially been evident in the human rights and environmental areas. See generally, e.g., Steve Charnovitz, *Participation of Nongovernmental Organizations in the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 331 (1996); Michael Posner & Candy Whittome, *The Status of Human Rights NGOs*, 25 COLUM. HUM. RTS. L. REV. 269 (1994); A. Dan Tarlock, *The Role of Non-Governmental Organizations in the Development of International Environmental Law*, 68 CHI.-KENT L. REV. 61 (1992).

156. Perritt, *supra* note 153, at 169-70.

sovereignty? In actual fact, there have not been many sustained and coherent intellectual and practical responses to the issues raised by the communication revolution. Part of the reason for this may be that legal scholars, political theorists, and policy makers have not yet fully grasped the implication of the communication revolution to many of our central and organizing concepts and institutions. As a consequence, they are in no position to respond to the developments, theoretically or institutionally. One must also mention the rapid speed with which the changes have come about. To a large extent, they have left people and institutions unprepared to respond sensibly and coherently. There may also be what I shall call the "resignation factor," the belief that given the speed with which communication technologies are developing, responses, however appropriate at the time, will soon appear obsolete. This is what a friend of mine calls the "I can't win it" test.¹⁵⁷ That, in fact, is likely to be the case in many situations.

To say that there have not been coherent and sustained responses is not to claim that people have not reacted to these developments and to what they see to be their implications. Many have, in fact, responded in various ways. I shall, in this section, attempt to group these views and responses into three categories, and to explore what the notion of sovereignty means, and how it fares, under each scheme. I shall refer to these as the statist (or the status quo), proceduralist, and liberal internationalists (liberal sovereignist) responses. I shall describe and critically examine each response to see what version of sovereignty is implied by it and whether it is a promising response. After I have explored the nature and reach of these responses I shall set out what I believe to be a more defensible response to the challenge of the communication revolution. By "defensible" I mean to suggest that the response proposes a notion of sovereignty that deals fully and coherently with the information revolution.

B. *Reasserting the Conventional Notion of Sovereignty: The Statist Response (Or Thick-Statism in Action)*

The status quo response, or the statist response, as I shall refer to it from time to time, is perhaps the most familiar response, for it is the most common position advanced in international meetings and negotiations.¹⁵⁸ The statist assumes two things. He assumes the

157. David Post makes a similar argument. See David Post, *Anarchy, State and the Internet: An Essay on Law-Making in Cyberspace*, 1995 J. ONLINE L. art. 3, available at <http://www.law.cornell.edu/jol/post.html>, cited in Lawrence Lessig, *The Zone of Cyberspace*, 48 STAN. L. REV. 1403, 1405 (1996) (referring to Post's argument as "the futility argument").

158. See, e.g., *infra* text accompanying notes 169-87.

validity and desirability of the conventional notion of sovereignty, where governmental bodies or officers have an unsupervised and irrevocable authority over people and resources in the particular territorial unit. Second, he views the state as the unit that is prior to international institutions, defining the identity and structure of those institutions rather than being defined by them. For the statist, international institutions are the creatures of autonomous states in the same way that, for the social contract theorist, the state is the creature of autonomous individuals. In each case the state or individual is viewed as a unitary actor pursuing its interests through the institutions that it has created with others.

With those two assumptions, the response of the statist to the threat of sovereignty from the communication revolution is straightforward. Believing that the state system is central to the international system, and that the undivided and untrammelled power to make and enforce the laws within the territorial unit is the defining feature of the state, the statist argues that the transmission of information into or out of the territory of a country without the consent of the regime is an impermissible interference in the affairs of the particular country and its capacity for self-determination. Article 2 of the U.N. Charter and numerous declarations and resolutions of the General Assembly of the United Nations are cited as proscribing such interference and affirming that version of sovereignty.¹⁵⁹ Although a great deal of the information that crosses national borders is produced and moved by private entities rather than states, which are prohibited by Article 2(4) of the Charter from interfering with the "territorial integrity or political independence of any state," for the statist that matters naught.¹⁶⁰ For the statist and a great deal of traditional international law, the "state" is viewed as an indivisible unit in charge of all entities within its borders, or at least responsible for their actions.¹⁶¹

The policy implication here from the point of view of the flow of information is that a country (more correctly, the government of a country) is within its sovereign right to regulate the flow of information into or out of its territory. To be sure, the statist would readily admit that such regulation has to be done within the limits of what the regulating country has specifically agreed to under

159. U.N. CHARTER art. 2(4) ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."). As numerous subsequent resolutions of the General Assembly have reaffirmed, it is not only the use of force or the threat of the use of force that are prohibited, but any action of a state that undermines or interferes with the territorial integrity of another state.

160. *Id.* art. 2(4).

161. *See supra*, notes 157-60 and accompanying text.

international or regional documents, such as the International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights, and the European Convention on Human Rights.¹⁶² Those human rights instruments are, however, viewed not to restrict the inherent right of the sovereign to regulate the flow of information into and out of its territory to ensure that the territorial integrity and political independence of the state is protected.¹⁶³ Radio jamming was justified precisely on this ground. State sovereignty was put forward by many Third World countries and the then Soviet Bloc countries as the basis on which unwanted radio signals could be justifiably jammed.¹⁶⁴ As the radio jamming example shows, for the statist, unilateral action (or national framework) is regarded as the best way of ensuring the restriction of the inflow of unwanted information. Indeed, it is not only in relation to radio jamming, but in other fields of information flow as well, that states have attempted to control and regulate unilaterally the inflow of information.¹⁶⁵

And many of the “second-generation” communication scholars argue that in many of the cases when the communication revolution appears to make the nation-state unable to enforce its laws, such impotence is apparent rather than real.¹⁶⁶ Thus, when a communication entity—an Internet server, an entity that broadcasts across territorial borders by the use of satellites, or a shortwave radio communicator—sends messages across national boundaries that are illegal in the country to which the messages are beamed, the recipient state has a number of options unilaterally to enforce its laws against the offending entity. One option, of course, is the attachment of any property the offending party may have in the receiving state. Were that to be the case, enforcement of law may not be a problem.

162. See ICCPR, *supra* note 66, art. 19(3)(b); UDHR, *supra* note 84, art. 29(2); see also European Convention, *supra* note 127, art. 10(2).

163. See ICCPR, *supra* note 66, art. 19(3)(b); UDHR, *supra* note 84, art. 29(2); see also Convention, *supra* note 127, art. 10(2) (reciting a list of purposes for which states are allowed to restrict the flow of information into and out of their territories).

164. See discussion *supra* text accompanying notes 97-101.

165. In relation to the Internet, states have attempted to regulate numerous activities conducted over that medium, from gambling to the transmission of ‘indecent’ materials and from contractual relations to privacy norms. For gambling regulation see, e.g., Interactive Gambling Act, 2001, §§ 3, 14 (Austl.), available at <http://scaleplus.law.gov.au/cgi-bin/download.pl?/scale/data/pasteact/3/3465>. See also *Vacco ex rel. People v. World Interactive Gaming Corp.*, 714 N.Y.S.2d 844, 859-62 (N.Y. Sup.Ct. 1999). In relation to the regulation of the transmission of what is referred to as “indecent” material, see, e.g. 18 U.S.C. § 2252A (2002); *Reno v. ACLU*, 521 U.S. 844, 853-55 (1997). As an example of the regulation of contractual relations over the Internet see Electronic Transaction Act, 1999 (Austl.). In terms of regulatory regimes protecting privacy, see Electronic Communications Privacy Act, 18 U.S.C. § 2701(a)(1).

166. See generally, e.g., Jack Goldsmith, *Unilateral Regulation of the Internet: A Modest Defence*, 11 EUR. J. INT’L L. 135 (2000). Goldsmith argues that even in relation to the Internet unilateral regulation provides solution to the regulatory challenges that transnational communication poses.

However, the offending entity may often not have any assets in the receiving state. That is likely to be the case in relation to interborder satellite or radio communications and in relation to a great deal of Internet communication.

As I indicated earlier, the statist may suggest resorting to controlling the behaviors of the citizens of the receiving state as part of a total strategy of excluding information or modes of communication that have been made illegal in the country.¹⁶⁷ But that seems as impractical as it is unattractive. Although countries like China have attempted something like this, the cost of controlling the consumption pattern of citizens will be prohibitive both in terms of resources and developmental programs.¹⁶⁸ Closing down Internet servers, monitoring satellite dishes, or trying to jam shortwave broadcasts will not only be hugely expensive and almost impossible to sustain but to the extent that those very means of communication are needed for developmental purposes, especially in large and sparsely populated countries with poor infrastructure, it would have negative consequences.

What does the statist suggest when a country cannot protect itself unilaterally against unwanted information, as is in fact the case with a great deal of satellite, electronic, and computerized information currently going across national boundaries? The statist argues that the international community must adopt multilateral agreements prohibiting the transmission of unwanted information into the territory of a country.¹⁶⁹ The purpose of international agreements and rules is viewed as being one of reinforcing and protecting the conventional notion of state sovereignty that I outlined earlier.¹⁷⁰ One could say that the statist response conceives of the ideal world as one that approximates the condition where nation-states, more correctly governments, have total and unilateral control over their territories and people, where states are the locus of power and indivisible units of analysis.

A good example of such a position in relation to interstate flow of information is what became known as the "prior consent" principle. This is a principle that was advanced mainly by developing countries and the then socialist world during negotiations over international direct satellite broadcast (IDBS) in the 1970s and early 1980s.¹⁷¹

167. See Johnson & Post, *supra* note 80, at 1372.

168. See Arnold W. Reitze, Jr., *Environmental Policy: Is it a Time for a New Beginning*, 14 COLUM. J. ENVTL. L. 111, 116-17 (1989).

169. *Id.* at 1034.

170. See Sara Anne Hook, *Allocation of the Radio Spectrum: Is the Sky the Limit?*, 3 IND. INT'L & COMP. L. REV. 319, 322 (1993).

171. See generally Anne-Marie Slaughter, *Abram Chayes*, 114 HARV. L. REV. 682, 721-26 (2001).

During that period IDBS issues were prominently placed on the agenda of the United Nations and its agencies.¹⁷² The question was what the international community should do about transborder satellite communication that was unwanted by, and did not get the consent of, the relevant and legitimate authorities¹⁷³ of the particular country to which the signals were beamed. The position of developing countries and the then socialist world was that any international agreement on the subject should embody the principle that there be prior consent of receiving states before there could be any IDBS transmission from another state or entity connected with that state.¹⁷⁴ Note how the prior consent regime attempts to reinforce and protect two important characteristics of territorial sovereignty as conventionally understood. The first characteristic is that the regime of a country exercises an unreviewable authority—that is, unreviewable by outsiders—over the political border over which it is said to have jurisdiction. Having control over one's political border is seen as not only maintaining control over one's land and air boundaries, but also developing one's own social, political, economic, and cultural systems. The second defining feature is that in international relations (and international law) the state is an indivisible unit of analysis. This latter point is made clear not only through the insistence that citizens of a country should be spoken to by outsiders only with the consent of the state, but also through the requirement that the state be held responsible for the actions of private entities within its borders or under its jurisdiction.

Although the prior consent principle was not explicitly adopted by the United Nations, what finally came out of the negotiations—in the form of Principles Governing the Use by States of Artificial Earth Satellites for International Direct Television Broadcasting (Principles)¹⁷⁵—seems to reaffirm the statist position. The Principles

172. *Id.*

173. By "legitimate authorities" I only mean to refer to governments that are members of the United Nations and have secured recognition by the overwhelming majority of members of that body.

174. The "prior consent" principle could be invoked in all areas of cross-border communication. The principle was invoked in a 1972 UNESCO resolution which proclaimed that it was important to "reach or promote prior agreements concerning direct satellite broadcasting to the population of countries other than the country of origin of the transmission." UNESCO Res., U.N. Doc. A/AC/109, ¶ 14 (1973). The position was restated in subsequent U.N. resolutions. See U.N. Doc. 105/117, Annex 3 (1973); U.N. Doc. A/AC, 105/WG. 3(v)/CRP.1; U.N. Doc. A/AC 105/107 Annex 2 (1974).

175. G.A. Res. 37/92, U.N. GAOR, 37th Sess., Supp. No. 51, at 98, U.N. Doc. A/37/51 (1982). The document was adopted by a General Assembly resolution on December 10, 1982. The vote, although overwhelmingly positive—107 for, 13 against, 13 abstentions—was nevertheless regarded as a split vote. This is not only because in such matters consensus is desired for the obvious reason of legitimacy, but also voting against it were major Western developed countries in which most of the international media and communications companies are located—countries such as the United States, the United Kingdom and the Federal Republic of Germany—and those

which was adopted by the U.N. General Assembly provides that "States should bear international responsibility for the activities in the field of international direct television broadcasting by satellite carried out by them or under their jurisdiction. . . ."176 According to this principle, states will be required to assume responsibility for IDBS activities carried out by private entities that are under their jurisdiction, hence reaffirming the notion of the state as a spatial phenomenon with indivisible authority over its territory and population. It is important to note here that the notion of state responsibility for the actions of private entities within its jurisdiction is also found in other international agreements that deal with communication.¹⁷⁷

Also, although the Principles does not enshrine the concept of prior consent explicitly, it embodies an idea that is its functional equivalent. It requires a state proposing or authorizing IDBS service immediately to notify the proposed receiving state or states of its intention and to "promptly enter into consultation with any of the States which so requests."¹⁷⁸ An IDBS service is to be established only on the condition that an agreement or arrangement has emerged from such consultation.¹⁷⁹

The statist position as embodied in the prior consent rule or its variation set out in the Principles reaffirms that territorial sovereignty is indeed at the core of the state system and that the protection of that system is essential to the pursuit of self-

abstaining were also important Western countries such as Canada, Australia, Sweden, New Zealand, and France.

176. *Id.*

177. Thus, for example, Article VI of the Outer Space Treaty (Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies) provides that:

State Parties to the Treaty shall bear international responsibility for national activities in outer space, including the moon and other celestial bodies, whether such activities are carried on by governmental agencies or by non-governmental entities, and for assuring that national activities are carried out in conformity with the provisions set forth in the present Treaty.

Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, Jan. 27, 1967, art. 6, 18 U.S.T. 2410, 610 U.N.T.S. 205.

178. See Principles Governing the Use by States of Artificial Earth Satellites for International Direct Television Broadcasting, *supra* note 177 (particularly the principle on "consultations and agreements between states" and the principle on "duty and right to consult," which requests states to enter into consultation over IDBS matters that are likely to affect them).

179. *Id.* For a comprehensive and helpful analysis of the process through which the Principles was adopted by the United Nations see M. LESUEUR STEWART, TO SEE THE WORLD: THE GLOBAL DIMENSION IN INTERNATIONAL DIRECT TELEVISION BROADCASTING BY SATELLITE (1991). See also DAVID I. FISHER, PRIOR CONSENT TO INTERNATIONAL DIRECT SATELLITE BROADCASTING (1990).

determination.¹⁸⁰ I think the statist position is as impractical as it is unattractively conservative. It is impractical for a number of reasons. First, it is not clear how either consultation or prior consent could be arranged given the volume of communication across national boundaries and the multiplicity of modes of communication through which information is transferred. Second, in relation to some of the newer forms of communication, such as the Internet and even remote sensing, it is not even clear that the communicators always know that they are, in fact, crossing borders. There would be numerous times when a remote sensing satellite would, for various reasons, not be able to recognize that it is crossing borders. In terms of the Internet, a computer "address" (the domain name) may no longer correspond to the physical location to which it was initially assigned because the machine has moved from the territory but has retained the domain name, or an individual may have asked for and received a domain name that does not correspond to the physical location of the computer, or because an individual is using a server with ".com" domain name which may be physically located anywhere.¹⁸¹

The position is also unattractively conservative. This is so for a number of reasons. First, it is likely that the notion of prior consent, or its equivalent, will simply be used by the elite, especially those from the Third World who have assumed power and retain it by means of force rather than democratically, to insulate themselves from scrutiny and challenge. In the name of sovereignty, the power of veto will actually be used to deny the people information they will need to evaluate their leaders. Second, the notion of prior consent or its equivalent, if it is enforced, may in fact have retarding effect on the development of communication technologies since it would impose substantial practical limits on the use of such technologies.

Third, it is not quite clear to me that the thick statism the statist defends is normatively desirable.¹⁸² Although territorial sovereignty

180. As I noted earlier, it was not only at the U.N. General Assembly that the concept of prior consent was debated. It was also a subject at other international bodies such as ITU and UNESCO. Thus, a 1971 ITU conference concluded: "all technical means available shall be used to reduce, to a maximum extent possible, the radiation over the territory of other countries unless an agreement has been previously reached with such countries." Savage & Zacher, *supra* note 89, at 358. And UNESCO's seventeenth General Assembly meeting passed a resolution, with the United States being the only dissenting party, supporting the principle of prior consent, at least in relation to IBDS. *Id.*

181. See Johnson & Post, *The Rise of Law on the Global Network*, *supra* note 80, at 7.

182. By "thick statism" I simply mean to refer to the traditional notion of territorial sovereignty which is perhaps best exemplified by the Principles, the notion that governmental bodies or officers of a territorial unit have an unsupervised or irrevocable authority over the people and resources in the particular territorial unit. This implies two things. First, outside the powers that the territorial unit has, through agreements, located in international organizations or bodies, ultimate authority resides

initially emerged as a progressive and liberating concept, just as the notion of individual autonomy did, it has in recent times often acted as an obstacle to forms of human flourishing.¹⁸³ In some sense, thick statism in the international context is analogous to strong individualism in the national context, each making it very difficult to constitute a defensible form of communal life. In the national context it is often argued that a polity that is committed to strong individualism will be unable to engage in distributing efforts so as to ensure equal opportunities to its citizens.¹⁸⁴ Similarly, in the international context strong statism makes it very difficult to constitute an international community where every individual is the focus of our moral concern. An individual is within the care and jurisdiction of this or that state. My moral (and certainly legal) commitment is informed and limited by the territorial boundary within which I happen to be located.

In any case, it seems to me that not only is strong statism normatively undesirable, but it also makes the same descriptive mistake that strong individualism does. In the same way that the strong individualist takes the individual as being prior to the community in which she lives and the relation between communities and individuals a one way process, so do statist view the relationship between the state and the world as a one way street. The state is viewed as prior to international institutions, and as giving rise to and constituting the identities of those institutions. The state is never viewed as partly a creature of those institutions and processes. Of course, the reality is different. Just as the individual's identity is defined partly by the national (regional or local) community in which he lives, the identity of the state is partly a function of the international institutions and processes within which the state functions. The structuralists have made this point often enough. The international institutional structures and norms not only constrain and regulate the behavior of states, but they also constitute their very identities.¹⁸⁵ If the state is partly a construction of international

within the legitimate authorities of the territorial unit. Second, it is impermissible for any external authority, be it imperial or international, to interfere with or undermine with the internal or external affairs of a territorial unit.

183. See generally James G. March & Johan P. Olsen, *The Institutional Dynamics of Institutional Political Orders*, 52 INT'L ORG. 943 (1998).

184. *Id.*

185. See generally ALEXANDER WENDT, *SOCIAL THEORY OF INTERNATIONAL POLITICS* (1999); Jeffrey T. Checkel, *The Constructivist Turn in International Relations Theory*, 50 WORLD POL. 324 (1998) (reviewing books that adopt constructivist approaches); March & Olsen, *supra* note 183; Alexander Wendt, *Anarchy is what States Make of It: The Social Construction of Power Politics*, 46 INT'L ORG. 391 (1992). See also THE CULTURE OF NATIONAL SECURITY: NORMS AND IDENTITY IN WORLD POLITICS 22 (Peter Katzenstein ed., 1966) ("Cultural-institutional contexts do not merely constrain actors by changing the incentives that shape behavior. They also help

institutions, then clearly it is the case that state sovereignty is also a function of international institutions and processes. Sovereignty, like identity, is a relational concept. It is developed in the process of engaging others, whether the others are states or international institutions. Perhaps this is what the Permanent Court of International Justice meant when it famously observed that sovereignty is "an essentially relative question."¹⁸⁶ It is relative to, or dependent on, "the development of international relations."¹⁸⁷

Two things flow from the relational understanding of sovereignty. First, it is not the freedom from external interference that is central to sovereignty in the information age and generally in the age of globalization, but rather the freedom to engage in the constitution of, and participation in, international institutions and norms. Second, the communication process has become the central means through which the concept of international actors, as well as the norms in the context of which such interaction takes place, are constituted. Meaningful sovereignty in the age of globalization will be one of having the opportunity to participate in the shaping (imagining) of the international community within which culture and norms are produced. And the communication revolution is playing a central role in that process of imagining. In the same way that print media played a crucial role in the imagining of the nation-state in an earlier time, the new communication technologies have increasingly allowed us to imagine new forms of associations and communities and consequently new forms of legitimate authority.

C. *The Proceduralist Response: Sovereignty as a Process*

The idea that sovereignty, just like individual and group identity, is a relational and hence contingent concept and that it be viewed and understood in terms of a process has been made before.¹⁸⁸ Clearly, if identities are created in the course of engaging others, then sovereignty, that important concept in interstate relations, cannot

to constitute the very actors whose conduct they see to regulate."). After quoting this passage from Katzenstein approvingly, Christian Reus-Smit adds the following "[I]nternational institutions, it follows, define the identities of sovereign states." REUS-SMIT, *supra* note 4, at 21-22. To some extent, Hans Kelsen's theory of international law can also be viewed as structuralist. See generally, e.g., HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW (Robert M. Tucker ed., 1966).

186. Tunis-Morocco Nationality Decrees, 1923 P.C.I.J. (ser. B), No. 4, at 24 (Feb. 7) (advisory opinion).

187. *Id.*

188. For the proposition that individual and group identities are relational or contingent in nature, they are created in the process of engaging other individuals and groups, see generally CONNOLLY, *supra* note 23. See also MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW (1990); Adeno Addis, *Individualism, Communitarianism and the Rights of Ethnic Minorities*, 67 NOTRE DAME L. REV 615 (1992).

but be formed in the process of states engaging one another. It cannot but be contingent.

The nature and substance of sovereignty and the international structure within which sovereignty is asserted and practiced are defined in the course of states' interactions. If this is correct, then, as I noted earlier, the most important claim of state sovereignty is not the claim of freedom from external interference, but the right actively to engage in international relations.¹⁸⁹ Unlike for the statist position, the proceduralists approach does not aim to reinforce or re-establish any substantive notion of sovereignty, but a fair process for making international decisions.¹⁹⁰ Sovereignty here is seen as being tied to, and being a result of, a fair procedure, in the same way that procedural democrats on the domestic level view the legitimacy of a decision on controversial moral and political issues as being the function of a default procedure—quite often majority rule.¹⁹¹ Once the decision is made according to that procedure then all are expected to support, or at least to comply with, the particular decision even though this might not have been the preferred outcome from their point of view. The power of veto that the statist response provides is unavailable here.¹⁹²

In the same way that procedural democrats in the domestic context view the fairness of the procedure in terms of whether it allows each individual who has a stake in the outcome to participate in the process as an equal member or citizen, so would the international proceduralist view the fairness of the procedure in terms of whether it allows each nation that has a stake in the outcome, however small or poor it may be, to participate in the international decision making process.

Here is where the idea of an international negotiation where each nation-state is counted equally comes to play. The procedure ensures neither substantive equality among nations, in terms of

189. See CHAYES & CHAYES, *supra* note 155, at 27. For Abram and Antonina Chayes the way to think about sovereignty in the era of globalization is as a right to participate "in the regimes that make up the substance of international life . . . to be an actor within it." *Id.*

190. See generally AMY GUTMANN & DENIS THOMPSON, *DEMOCRACY AND DISAGREEMENT: WHY MORAL CONFLICT CANNOT BE AVOIDED IN POLITICS, AND WHAT SHOULD BE DONE ABOUT IT* (1996).

191. For a useful description of procedural democracy see *id.* at 26-33. Gutmann and Thompson see procedural democracy as one of three ways through which democracies deal with the unavoidable case of moral disagreements among citizens. The other two they call constitutional democracy and, their preferred method, deliberative democracy. For a skeptical view of the claim that deliberative democracy will advance simultaneously the goals of community and democracy see Lynn Anderson, *Against Deliberation*, 25 *POL. THEORY* 347 (1997). See also Iris Marion Young, *Activist Challenges to Deliberative Democracy*, 29 *POL. THEORY* 670 (2001).

192. See generally Young, *supra* note 191.

negotiation and influence, nor an agreement at the end of negotiation. It simply recognizes that each state is sovereign in that it will have the right to be represented at international meetings and to seek to induce other states to support its position through an "interactive process of justification, discourse and persuasion."¹⁹³

In the same way that individuals in a majoritarian democracy are simply accorded the right to participate in the political process and to have their votes counted equally, but, of course, without the assurance, or even pretension, that the issues they care about will win at the end of the day, the nation-states, under the proceduralist scheme, will only have the assurance that international conference halls will be open to them to plead their cases and to attempt to persuade other members of the virtue of their positions. *International meetings become the equivalent of the voting booth* in the domestic realm.

What is the implication of the proceduralists' response to the communication revolution? There are strong and weak versions of the response. The weak version would suggest that to the extent that states are not able unilaterally to control or to regulate the flow of information into or out of their territories, the only sovereign recourse that they have is to participate in international institutions with the purpose of developing an international framework that will ensure the protection of their national interests both in terms of protecting their jurisdiction as well as in persuading other states to exercise their jurisdictions mindful of the interests of other states. This is what I shall call procedural realism.

The strong version implies that even if a state is able unilaterally to regulate or prohibit the flow of international information, such action may not be properly within its sovereignty to the extent that regulation of such information may affect many or all other nations. The regulation of Internet material, especially the World Wide Web, may be a good example. A regulation by one country may have the effect of drastically altering the rights and interests of other nations or entities located outside the physical borders of the regulating state. In the information age and in the age of globalization the fates of nations are so intertwined that a unilateral assertion of rights will alter the rights of others so drastically that only proceduralism will allow others to insure that their interests are properly considered. The strong version may be referred to as normative proceduralism.

The proceduralist's argument, in both of its versions, has some merit. First, as a practical matter, in the information age sovereignty depends on procedure, being able to plead one's case at an

193. Harold Hongju Koh, *Why Do Nations Obey International Law?* 106 YALE L.J. 2599, 2636 (1997).

international meeting and hoping to win other nations, the jury of peers, over to one's position. Even though a powerful nation may often have been, and to some extent may still be, able to ensure the protection of its sovereignty either by acting unilaterally or when it is unable to do so, by pressuring others to act in its interest, it is increasingly the case that in relation to the regulation of information that crosses national boundaries, every nation needs the cooperation of other nations for the protection of its interests. The degree may differ, but the sovereignty of every nation has been made vulnerable by the communication revolution. As we saw in the *Playmen* case, even the United States, the most powerful nation on the face of the earth, may need the cooperation of other countries to protect its sovereignty and what it deems to be its interests.¹⁹⁴

Second, to the extent that the proceduralist starts with the proposition that in the age of globalization it is connection rather than isolation that is the defining feature of the international system, it has an unassailable insight. This is especially the case in relation to information. Unilateral regulation will transform, or at least affect, the interest of others. It is, therefore, normatively desirable that all those who are affected by such a decision have a say. That can only be achieved through international interactions, negotiations, and agreements. It is not the right to be let alone but rather the right to participate in the processes and institutions through which "the substance of international life" is made¹⁹⁵ that becomes central to a meaningful notion of sovereignty.

Third, one could imply from the proceduralist's position a normative proposition that may be expressed in the following way. It is not only the recognition that in this globalized world of information unilateral regulation by one state will often have effects on the information policies and regulatory regimes of other states without those states having a say in the matter. But to the extent that the media (in the broadest sense of the term) have become the means through which we have come to imagine what we refer to as the international community, it would be important that there be a procedure that would enable all members of that community (i.e. nation-states) to participate in the development of policies that affect the nature and identity of that community. The communication revolution has become the means through which we define both the contours of legitimate and illegitimate exercise of state authority and the nature and identity of the international community within which such judgments are made.

194. *Playboy Enters., Inc. v. Chuckleberry Publ'g, Inc.*, 939 F. Supp. 1032, 1041 (S.D.N.Y. 1996).

195. CHAYES & CHAYES, *supra* note 155, at 27.

To recap, the proceduralist's position is useful for a number of reasons. First, it highlights the fact that, in the information age, "sovereignty is . . . both contingent and constrained."¹⁹⁶ In relation to the communication revolution it is constrained in two senses. On one hand, information technologies have curtailed the power of the state to regulate the flow of information that has an effect on its territory and citizens in the way that sovereignty is traditionally said to entitle the state to do. On the other hand, even if a state were able to regulate the flow of such information, such regulation may often have a negative impact on many other states. The full assertion of one state's sovereignty may be the negation of the sovereignty of many other states. Regulating Internet service providers may be an example of such a consequence. When the German state of Bavaria required CompuServe to restrict access by Bavarians to certain information that CompuServe made available to its worldwide information consumers or when France demanded that Yahoo! deny French citizens access to certain material that Yahoo! made available to its worldwide audience, the effect of the demand could have been the denial of access to that information by citizens of other countries as well, countries where the relevant information was perfectly permissible.

Sovereignty is contingent in the sense that given its constrained nature, in the way that I described it in the preceding paragraph, its viability is going to depend on what the collectivity of states decides is its substance and on the procedure by which such decision is made. In other words, sovereignty has become "an essentially relative question."¹⁹⁷ It is a question of procedure and process. The proceduralist position is useful in that it alerts us that in the information age where the world is looking like a network of communication, it is participation not isolation that is going to be the defining feature of sovereignty. Indeed, there cannot be any other way.

While pointing us in the right direction, there are two problems with the proceduralist position. First, to talk about a procedural notion of sovereignty is to assume that there are distinct cultural and national entities that will take part in that process. By what institutional means would the existence of such communities be ensured so that the notion of relational sovereignty would be viable? Given the unequal distribution of economic and technological power among national communities, to conceive of international life in terms of one of simple procedure is to condemn the technologically and economically weak to the fate of a procedure that may be

196. Slaughter, *supra* note 171, at 686.

197. Tunis-Morocco Nationality Decrees, 1923 P.C.I.J. (ser. B), No. 4, at 24 (Feb. 7) (advisory opinion).

unwilling to protect their ways of life and identities. In the same way that procedural democracy (majoritarian democracy) in the domestic context is not sufficiently sensitive to the needs and interests of minorities, especially those which are economically and politically weak, international proceduralism will be less than attentive or protective of the identities and ways of life of economically and technologically weak communities. Second, although process is important here there is no indication as to what makes a process fair. After all, if sovereignty is contingent on a process then the degree of fairness in the process will determine the degree of legitimacy of the idea of sovereignty that is derived from that process.

D. Liberal Sovereignty: The Dominant Paradigm

On the other end of the spectrum from the statist conception of sovereignty is what can be referred to as liberal sovereignty. There are a number of factors that define liberal sovereignty. First, and perhaps most important, is the belief in and commitment to the idea that external legitimacy is the outward face of internal legitimacy.¹⁹⁸ That is, the extent to which state sovereignty would be allowed as a shield from external interference is the extent to which the state provides a certain minimum of rights to its citizens.¹⁹⁹ External legitimacy is, to a considerable degree, to correlate with internal legitimacy. The internally legitimate state is one within the territorial borders of which, at a minimum, exist institutionally provided guarantees for the respect of human rights and for the provision of democratic governance.²⁰⁰

Second, the normative commitment to internal legitimacy is informed by another commitment, the belief that “[a]t the deepest level . . . the social world [is] composed of persons not collectivities like societies or peoples”²⁰¹ and that “every human being has a global stature as an ultimate unit of moral concern.”²⁰² Indeed, liberal sovereignty has a conceptual as well as a descriptive dimension to it. Conceptually, it starts with the familiar proposition that the individual is the ultimate agent of action and it is to that agent that a

198. FERNANDO R. TESÓN, A PHILOSOPHY OF INTERNATIONAL LAW 57 (1998) (“A liberal conception of state sovereignty has to be congruent with the justification it offers for the legitimacy of the state generally. I suggest that a state is *sovereign* when it is *internally legitimate*. . . . Sovereignty is the outward face of legitimacy.”).

199. *Id.*

200. Habermas believes that “popular sovereignty and [individual] human rights go hand in hand.” JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS 127 (William Rehg trans., 1996).

201. See Charles R. Beitz, *Rawls's Law of Peoples*, 110 ETHICS 669, 677 (2000).

202. Thomas W. Pogge, *Cosmopolitanism and Sovereignty*, in POLITICAL RESTRUCTURING IN EUROPE: ETHICAL PERSPECTIVES 90 (Chris Brown ed., 1994).

moral right should attach. Unlike for the statist and proceduralists, the starting point is not the state, but the individual. Descriptively, the liberal sees state sovereignty as an instrumental value through which other important values such as individual autonomy, human rights, democracy, and the like are pursued and achieved.²⁰³ Although liberal sovereignty is unlike procedural and statist sovereignty in that it starts with the individual rather than the state as the point of departure, it is similar to the statist position (and unlike the proceduralist position) in that it assumes a substantive notion of sovereignty.²⁰⁴

It is not unreasonable to suggest that liberal sovereignty is the dominant paradigm currently informing a great deal of international legal scholarship and to an increasing degree legal practice as well. Human rights and humanitarian law are examples of liberal sovereignty in practice. The increasing willingness on the side of the international community, including the U.N. Security Council, to intervene in the affairs of countries which had long been thought to be internal matters is premised on the proposition that state sovereignty is to correlate with internal legitimacy.²⁰⁵

What would the liberal's response to the communication revolution and its effect on the traditional notion of sovereignty be? First, to the extent that the regime of a state is organized in a way that is aggressive externally and oppressive internally such that it is violative of minimum rights that define individuals as agents, then there is no sovereignty to respect. Such a regime cannot complain of the violation of its sovereignty whenever and however information flows in or out of its territory. Sovereignty is defined by certain relationships that the state has or should have with its citizens and the international community, and when those are lacking there is no sovereignty that outsiders are compelled to respect.

Second, liberal sovereignty would allow informational intervention, if such information would minimize the oppressiveness of the regime, and enhances the rights and autonomy of citizens that live within that territorial unit. After all, under the liberal scheme, all forms of intervention, including economic and military

203. "[S]overeignty is an instrumental value supported by moral reasons linked to human rights and respect for individual autonomy." TESÓN, *supra* note 198, at 40.

204. There are differences among liberals as to what are the minimum requirements in terms of individual rights and the provision of individual autonomy before a state's sovereignty is recognized. Compare John Rawls who applies only what he calls "a special class of urgent rights, such as freedom from slavery and serfdom, liberty (but not equal liberty) of conscience, and security of ethnic groups from mass murder and genocide" with Tesón and Beitz who seem to demand the full range of rights that are provided for in a liberal democracy. Compare *id.*, and Beitz, *supra* note 201, at 667, with RAWLS, *supra* note 51, at 79.

205. See, e.g., International Criminal Tribunal for the Former Yugoslavia, at <http://www.un.org/icty/index.html>.

interventions, in the defense of individual rights is permitted. Given the fact that adherents to liberal sovereignty may not be reluctant to advocate military intervention to ensure respect for and protection of human rights, unrestricted flow of information may in fact be viewed as the least destructive, both from the point of view of the intervener and that of the target of the intervention, and the most preferred means of undermining the hold of repressive regimes. It seems reasonable to conclude that if outsiders are permitted to intervene militarily in the defense of certain rights of the citizens of other countries, then informational intervention (public or private), which might avert the need for military or economic intervention each of which is likely to be more destructive,²⁰⁶ is permissible as well. One would be hard pressed not to conclude, for example, that the international community would have had the legal right to intervene militarily in Rwanda to avert the genocide that took place. Given that, it clearly would not have been impermissible for states individually or collectively to have intervened informationally, such as by jamming the radio broadcasts that Hutu extremists used to incite genocide against the Tutsi and the moderate Hutus.²⁰⁷

How would the unrestricted flow of information undermine the illegitimate state and create the conditions for transforming it into a legitimate state? It could do that by heightening the vulnerability of the government of the state and by providing citizens with information that suggests alternative forms of social and political life and the manner in which those alternative forms of life could be organized. Political information (such as interborder radio and TV transmissions and the Internet) may be the most obvious candidate for such transformative task. But even other types of information such as TBDF and remote sensing may be viewed as welcome means of undermining the illegitimate state to the extent that such information increases the vulnerability of the state authorities.

206. For the destructive nature of economic sanctions by individual states or the international community for the purpose of persuading or forcing the regime of the target state to change the offending policy or behavior, see generally Adeno Addis, *Economic Sanctions and the Problem of Evil*, 25 HUM. RTS. Q. 573 (2003).

207. See generally Metzel, *supra* note 99, at 628 (examining the role of radio broadcast in the Rwanda genocide). See also Joseph S Nye, Jr. & William A. Owens, *America's Information Edge*, FOREIGN AFF. Mar.-Apr. 1996, at 20, 32.

[An] information campaign to expose propaganda earlier in the Rwanda conflict might have mitigated the tragedy. Rwanda has only 14,000 phones but some 500,000 radios. A few simple measures, such as suppressing extremist Hutu radio broadcasts that called for attacks on civilians, or broadcasting Voice of America (VOA) reports that exposed the true actions and goals of those who sought to hijack the government and incite genocide, might have contained or averted the killing.

Transborder flow of information is, therefore, viewed as conducive to the emergence of a legitimate state, and hence legitimate sovereignty, because of its potential to erode the capacity of an illegitimate state to control its citizens as well as its capacity to inform the citizens of such a country about alternatives and possibilities.

Third, for those who adhere to the liberal notion of sovereignty, the unrestricted flow of information, at least information of consciousness, is not only essential for the achievement of other values such as the sustenance of democratic life, but such information is also a value in itself. The argument would go this way. To respect the individual as an autonomous being is to respect him or her as a communicating being. A state that does not recognize such a right is not legitimately sovereign. Therefore, to the extent that the new communication technologies have significantly reduced the state's capacity to control the flow of information, it is not the death but the affirmation of sovereignty.

To summarize, liberal sovereignty starts with the proposition that internal legitimacy is to correlate with external legitimacy. External sovereignty is to be defined in terms of legitimate internal sovereignty. The legitimacy of such internal sovereignty is to be defined by the institutional guarantees of individual rights and the institutionalization of some version of accountability of the government to citizens.²⁰⁸ The flow of information across national boundaries is defended both on instrumental and intrinsic grounds. It is instrumental in ushering in the internally legitimate state and it is an intrinsic value in that it affirms the communicative nature of human beings. As is apparent from the discussion in the preceding paragraphs, it is not the end of the state that adherents to liberal sovereignty desire, but rather the end of the illegitimate state. Indeed, the existence of the state is not merely tolerated but is viewed favorably. Following Kant, defenders of liberal sovereignty argue that the existence of separate states may be necessary to reduce what Kant saw as the danger of a centralized government on a global scale which he thought would lead either to despotism or anarchy.²⁰⁹ It is

208. The Security Council's intervention in Haiti to oust the generals and to restore the government of Aristide is perhaps the clearest example of this requirement.

209. *To Perpetual Peace: A Philosophical Sketch* [1795], in PERPETUAL PEACE AND OTHER ESSAYS 215 (Ted Humphrey trans., 1983) [hereinafter *Perpetual Peace*].

[The existence of separate states] is rationally preferable to [a situation where states are] overrun by superior power that melds [states] into a universal monarchy. For laws invariably lose their impact with the expansion of their domain of governance, and after it has uprooted the soul of good and a soulless despotism finally degenerates into anarchy. [T]he state of peace must be formally instituted...which can happen only in a lawful state.

not a stateless world that is desired, but rather something like a federation of liberal democracies.

Although liberal sovereignty is attractive in that, unlike the statist position, it takes the individual seriously and attempts to fashion legitimate governance on that basis, several major difficulties and unanswered questions remain both in terms of the specific understanding of sovereignty and in terms of the role that information is supposed to play in the constitution of that specific version of sovereignty. First, for proponents of liberal sovereignty legitimate sovereignty appears to be a description of liberal democracy. The spread of liberal democracy is viewed as providing the optimal condition for a just and peaceful world.²¹⁰ Kant's work is taken as having suggested that.²¹¹ This view of legitimate sovereignty is problematic for a number of reasons. It neglects the important insight of the proceduralists that a defensible notion of sovereignty, just like a defensible notion of identity, is developed in the course of the relevant actors (various communities) engaging one another where communities grant one another the standing to participate in that general conversation. The liberal democrat assumes one historical version of organizing government as universally valid.²¹²

This takes me to my next reservation. The assumption of the universality of liberal democracy is tied to another liberal assumption, the universal individual as the primary addressee of legal and political theory. This neglects two things: the importance of groups in the lives and identities of individuals and the need to endow those groups with certain rights as a way to protect the autonomy of individuals. To say that individuals are partly defined by the communities in which they live is to be somewhat skeptical about the assertion of the abstract individual as the unit of analysis for developing either the notion of autonomy or sovereignty.

Second, ironically, while liberal sovereignty has been in some way liberating in that it eliminated or tamed the arrogance of

210. There is of course some dissent from that view among some prominent members of the liberal crowd. See, e.g., RAWLS, *supra* note 51. In that book, Rawls develops his idea of a just and peaceful world in the context of diversity both in terms of how people have organized themselves as well as the multiplicity of cultures and traditions that exist in the world. Rawls' law of peoples (international law) would provide the scheme of cooperation not only among politically liberal societies ("liberal democracies"), but will include illiberal societies (which he call "decent peoples") that treat their citizens as reasonable and rational "cooperating members." *Id.* at 64.

211. See TESÓN, *supra* note 198, at 3. Tesón reads Kant as suggesting that the legitimate sovereign state is one that is a liberal democracy. Tesón's conclusion is informed by Kant's observation that "the civil constitution of every nation should be republican," which he reads as a liberal democracy, and that "the law of nations should be based on a federation of free states," which Tesón understands to mean "republican states". *Id.*

212. See *id.*

autocracies both within and outside their territories, the claim of liberal sovereignty to be the only defensible way of organizing the global community seems to reenact some version of the same arrogance.²¹³ Here comparison with the notion of the autonomous individual is instructive. The idea of the autonomous individual emerged as an emancipatory concept, liberating the individual from the supposed control of all sorts of powers—the family, tribe, clan, unaccountable rulers, etc.²¹⁴ Over time, however, the notion of the autonomous individual itself became constraining rather than liberating. The individual increasingly became viewed as an abstract entity unaffected by, and prior to, the community within which it was located.²¹⁵ In the name of autonomy the individual was transformed into an entity devoid of social depth.²¹⁶ Also, the abstract individual (read: the liberal notion of the individual) became the standard by which all other individuals were to be inscribed.²¹⁷ In the same way the liberal individual became imperial, the liberal state is assuming an imperial status as well. The legitimacy of sovereignty is to be judged by how closely it resembled liberal sovereignty.

Third, proponents of liberal sovereignty do not make the argument, at least not to my satisfaction, that internal liberalism will always suggest a corresponding liberalism internationally.²¹⁸ In fact, evidence in relation to the free flow of information seems to suggest no necessary link. Some liberal democracies that embrace the free flow of information within their polities are reluctant to allow the inflow of information from outside sources for various reasons.²¹⁹ Thus, for example, France, a country that may properly be considered a liberal state, often invokes cultural integrity as a reason for restricting incoming information.²²⁰ So does Canada.²²¹ Indeed, Canada and France are not the only liberal democracies that have made the cultural integrity argument, mainly to resist the

213. See Held, *supra* note 68, at 21.

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. It is interesting to note that the United States government apparently sought the assistance of the Qatar government to discourage one of the few, if not only, free medium in the Arab world, Al-Jazeera, from broadcasting statements from al-Qaida or Osama bin Laden. Ironically, the U.S. government was politely reminded by the Qatar government that that would be an infringement on freedom of expression. One might also note that either because of subtle pressure from the government or perhaps because of public pressure or because of patriotic feeling on the side of owners and editors, major U.S. broadcasting networks have been rather selective as to what they will put on air in terms of information emanating from sources considered to be the enemy.

219. See, e.g., Anthony DePalma, *19 Nations See U.S. as a Threat to their Cultures*, N.Y. TIMES, July 1, 1998, at E1.

220. See *infra* text accompanying note 222.

221. *Id.*

importation of U.S. cultural items.²²² Others, including the United States itself, exclude certain types of information on the ground of national security, even when such information, if it were to be produced within the country, could not be legitimately excluded on such grounds.²²³ The point is that internal liberalism and a commitment to the free flow of information internally is not necessarily an indication that there will be such a commitment in relation to the inflow of information from other countries.

Fourth, it is not clear to me that proponents of liberal sovereignty have defined the relationship between the communication revolution and the version of sovereignty that they defend. On one hand, they seem to view the communication revolution, at least information of consciousness, as the instrument of making liberal sovereignty available to the world. Under this account, defensible globalization is simply the worldwide extension of liberal sovereignty. On the other hand, there seems to be the suggestion that globalization, including informational globalization, is increasingly shaping, to borrow a phrase from David Held, 'overlapping communities of fate.'²²⁴ How this overlap takes place and what the role of the communication revolution is, if any, in the constitution of this overlap is not clear.

Fifth, it is not only the constitutive dimension of communication that seems to be unexplained, but also how a country that satisfies the conditions of liberal sovereignty must respond to incoming information that it believes undermines it and its institutions. Suppose such a state adopts a law after going through a deliberative

222. Many Latin American and European countries have made similar arguments against the same target—what is viewed as U.S. cultural dominance. See DePalma, *supra* note 219, at E1.

Officials from . . . 19 countries, including Mexico, Britain, and Brazil, came to Ottawa to discuss ways to distinguish culture from ordinary commerce, with the goal of denying the American entertainment industry easy access to their markets . . . [T]here was an outpouring of concern over a loss of a nation's culture to the marketplace.

Id. Canada, perhaps more than any other country, feels overwhelmed by the inflow of U.S. culture and the threat to its culture resulting from that inflow.

Sixty percent of all the books sold in Canada come from other countries, primarily the United States. Three-quarters of the music played on Canadian radio is not Canadian. Four of five magazines sold on newsstands in Canada are foreign, primarily American. And when it comes to films, 96 percent of what is shown on Canadian screens is foreign, the overwhelming majority of it from Hollywood.

Id.

223. See Adeno Addis, *Who's Afraid of Foreigners?: The Restriction on Foreign Ownership of the Electronic Media*, 32 COLUM. HUM. RTS. L. REV. 133, 157 (2000).

224. Held, *supra* note 68, at 21.

process, prohibiting advertising of alcohol over electronic media. Suppose a neighboring state does not have such a prohibition and citizens of the liberal state have ways of receiving the broadcast from the neighboring state easily. Is the liberal state within its sovereign right to restrict the flow of information, if it can do so unilaterally? Put simply, can the notion of sovereignty be properly used as a shield to keep out such information? Does it matter that the information is emanating from another liberal or a non-liberal state? And if it cannot unilaterally keep out such information, what mechanisms are appropriate to enable the state to exclude such information? Put simply, what are the appropriate international institutional structures that can protect liberal sovereignty (and transform non-liberal societies) in a globalized world where the communication revolution links liberal as well as non-liberal polities?

E. In Defense of the Thin State: Sovereignty as a Network of Communication

1. From the Thick State to the Thin State

I have explored three possible conceptions of sovereignty and how those conceptions deal with the threat that the communication revolution posed to the territorial state—its claim to be the highest point of identification for citizens within the territorial unit. The statist position is the position of thick statism. I argued thick statism is neither descriptively accurate in the information age nor normatively desirable. However, as I shall argue later, although the concept of the thick state seems indefensible, the idea of the state as the personification of the community that seems to be implied by the statist's position has a great deal of merit to it. While rejecting thick statism, therefore, I shall embrace and defend a version of the state (and state sovereignty) that I call the thin state that would be consistent with the communication revolution and globalization generally.

The idea of procedural sovereignty is useful in that it captures two important facts that the statist does not seem to capture in his scheme. First, it understands that in the information age (and in the age of globalization generally) sovereignty can only be understood as being both "contingent and constrained." Second, the proceduralist alerts us to the fact that in the information age, and in the age of globalization where the world is looking like a network of communication, it is participation, not isolation, that best defines real sovereignty. It is freedom to participate, not freedom from interference, that would be essential if territorial communities are to survive and flourish.

As I argued earlier, while the proceduralist notion of sovereignty as contingent and relational is attractive both because it links the notion of sovereignty to the idea of discursive engagement among the territorial actors and because it suggests that sovereignty in the information age is about the right to participate in international institutions and processes, there are problems with the approach. It does not tell us what a fair process through which sovereignty could be negotiated and developed would look like. After all, if sovereignty is contingent on a process, then clearly the degree of fairness of the process will determine the degree of legitimacy of the idea of sovereignty that is derived from that process. If the proceduralist does not fully appreciate the importance of, and does not provide for, a fair process, then the liberal sovereignist does not take communities (in this case territorial communities) seriously as participants in that process.

What I shall do in the following pages is therefore develop a notion of sovereignty that appropriates the insight of the proceduralist that sovereignty is developed relationally and contingently. I shall argue that the communication revolution will continue to play an important role in this process. The communication process has been used to define what is possible or acceptable; whose actions are human rights violations and whose are necessary for legitimate security concerns; what is an important cultural practice and what is a barbaric act; who is a terrorist and who is a freedom fighter; which is a rogue or an outlaw state and which is a state engaged in the transformation of international norms in the service of the larger public good; what constitutes an internal matter of a community and what should be a concern for outsiders.

If sovereignty is contingent on the nature of the interaction among territorial communities and if these interactions are now largely mediated through the communication revolution, as I claim to be the case, then part of what would define a defensible notion of sovereignty is a fair process both in terms of how communication resources are distributed as well as how the structure of interaction is arranged. I shall argue that the problem with the current structure is that interaction among different territorial or historic communities is often one-sided. Information is gathered, processed, and disseminated often by the international media and multilateral corporations which are, by and large, western-based. The consequence of this is that the social and political world (including what constitutes legitimate sovereignty) that is imagined through these "interactions" is partial in two senses that are mutually reinforcing. It is constructed with insufficient information, and that it is done from a specific tradition. So part of what one has to do to construct a defensible structure within which information flows across national boundaries is to

realize that the current structure has differential impact on different communities, a point that is not well understood.

Furthermore, if one is serious about interactions that would lead to legitimate international institutions, one would have to take historic communities (in our case territorial communities) seriously (unlike what appears to be the position of the liberal sovereignists) as units of cross-cultural dialogues, “negotiating cross-cultural differences over time.”²²⁵ By and large, liberal sovereignists take the individual as the primary, and often only, addressee of legality and morality.²²⁶

2. The Moral Purpose of the State: The Importance of Pluralism and Diversity in the Age of Globalization and Uniformization

a. Why the State?

Aristotle wrote: “Observation tells us that every state is an association, and that every association is formed with a view to some good purpose.”²²⁷ Different theories of the state offer different purposes for which this “association” is established. The dominant theory of the state is one that I labeled the liberal theory, which views the purpose of the modern sovereign state as one of facilitating, or providing a framework for, the achievement of individual ends and purposes.²²⁸ This story conceives of the state as an organism, social relationships or allegiances of autonomous self-directing individuals instituted to pursue their particular interests.²²⁹ The state here is seen simply as a set of arrangements, a framework, through which individuals pursue their ends in the context of respecting the

225. David Ingram, *Between Political Liberalism and Postnational Cosmopolitanism*, 31 *POL. THEORY* 359, 360 (2003).

226. *Id.*

227. ARISTOTLE, *THE POLITICS* 1.1 (T.A. Sinclair trans., 1981).

228. As Reus-Smit put it: “The moral purpose of the modern state lies in the augmentation of individuals’ purposes and potentialities, in the cultivation of social, economic and political order that enables individuals to engage in the self-directed pursuit of their ‘interests.’” REUS-SMIT, *supra* note 4, at 123.

229. The U.S. Declaration of Independence is cited as a good example of this approach.

We hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness. That, to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.

THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). Even here, it can be argued that the “we” is to refer to “the people” which is viewed as more than a collection of individuals who happened to be in the same territory at the same time. “The people” was bound by more than a territory.

interests and ends of others. Under this view, the state is no different from a whole host of associations which individuals organize to pursue their ends.

I think that is an incomplete, even erroneous, view of the state. As I shall indicate later, the state is also a framework of communal life, "the arena within which self-determination is worked out,"²³⁰ an institution through which historic communities define and protect their identities and traditions. Michael Walzer made this point eloquently long ago: "The moral standing of any particular state," Walzer observes, "depends upon the reality of the common life it protects."²³¹ Defense of state sovereignty must therefore start with the proposition that the state, as an institution, provides, at least currently, the conditions for communal integrity for historic communities.

An unregulated international informational market threatens an important virtue that we may wish to preserve and cultivate: diverse ways of life. The tendency of the international private informational market (mainly western) is, of course, to uniformize individuals. The extent to which the private informational market succeeds is the degree to which every individual is transformed into a consumer of the same or similar products. The state may be the only institution that is capable of minimizing the international tendency to uniformize cultures and individuals. That is, the fate of diverse cultures and ways of life may in fact depend on the fate of the state. The question is how one thinks of state sovereignty that provides this needed counter to international private power while not allowing the state to use that power to insulate itself from external and internal scrutiny in relation to what it does to its citizens. Put simply, the question is how to affirm and organize ourselves internationally so that we will be able to affirm and cultivate diversity internally (diversity within a nation state) and externally (diversity in the world).

I shall argue that the notion of a thin state will allow us to do just that. What does the idea of the thin state entail? In a general sense, it is an attempt to reconcile globalism and statism by suggesting that, in the information age, globalism (cosmopolitanism) and statism (nationalism) are, to use a phrase Daniel A. Farber used in the environmental context, "both fundamentally incomplete."²³² They are fundamentally incomplete in the following sense: neither

230. Michael Walzer, *The Moral Standing of States: A Response to Four Critics*, 8 PHIL. & PUB. AFF. 209, 210 (1980).

231. MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS 54 (2d ed. 1992); see also Walzer, *supra* note 230.

232. Daniel A. Farber, *Stretching the Margins: The Geographic Nexus in Environmental Law*, 48 STAN. L. REV. 1247, 1273 (1996).

the localist nor the globalist narrative is descriptively accurate. In the information age, the distinction as to what counts as local or global is rather blurred. On the other side of the story, what is often assumed to be a global interest, norm, or institution is in fact locally and partially defined.²³³ The intensity of imperial intrusion is mistaken for the universality of purpose.

But before I develop the argument for a notion of a *thin* state, let me outline why a *thin state* needs defending. There are strong cultural and political arguments. The first, and one that I have briefly mentioned earlier and one that I have developed in earlier work,²³⁴ is an argument from cultural identity. Now, the issue of cultural identity is rather complicated. There are few nation-states, if any, that are defined by cultural homogeneity. Most states are constituted by diverse cultural structures. There are three major reasons for this diversity. First, there is the history of colonialism where borders were drawn arbitrarily by colonial powers imposing geographic borders on diverse ethnic groups who had never seen themselves as being in communion with or related to their new countrymen and women.²³⁵ Second, the colonial powers themselves, such as Britain and France, are being made diverse as a result of descendants of people from the former colonies who had been brought over by or had chosen to immigrate to the centers of colonialism, the metropoli.²³⁶ Third, some countries such as the United States and Australia became diverse by the very nature of their settlement and viewed themselves as immigrant countries.²³⁷ And, of course, one also has to mention the impact of globalization that has made it easier for people to move across national borders and to settle in new places.²³⁸

So, when I say cultural identity, I should not be understood to mean that there is complete uniformity of culture in territorial states nor do I mean that cultures do not change. However, there is a sense in which one could think and talk about national cultures even under those circumstances. Rather than viewing a national culture in terms of complete uniformity one could see it "as a set of overlapping cultural characteristics—beliefs, practices and sensibilities—which different members exhibit in different combinations and to different degrees."²³⁹ If one were to think of national culture this way, then it may not be unreasonable to think and talk about the existence as well

233. See MAJID TEHRANIAN, *GLOBAL COMMUNICATION AND WORLD POLITICS: DOMINATION, DEVELOPMENT, AND DISCOURSE* 61 (1999).

234. See generally Addis, *On Human Diversity*, *supra* note 31; Addis, *supra* note 188; Adeno Addis, *Role Models and the Politics of Recognition*, 144 U. PA. L. REV 1377 (1996).

235. Addis, *supra* note 188, at 627.

236. Addis, *On Human Diversity*, *supra* note 31, at 112.

237. *Id.* at 113.

238. *Id.*

239. DAVID MILLER, *ON NATIONALITY* 85 (1995).

as the importance of national cultures. Even in the most diverse of nations such as the United States there are overlapping cultural characteristics that define citizens as Americans rather than, say, Germans. And here I am not even talking about political institutions, though those political institutions do have a constituting impact on those overlapping cultural characteristics.

Even if one were to agree with the proposition that a national culture exists, why should one also agree that the continued existence of such a culture is valuable?²⁴⁰ There are a number of reasons for it. First, culture provides a sense of identity, "a common life," to those that share it.²⁴¹ "[T]he story of my life," says Alasdair MacIntyre, "is always embedded in the story of those communities from which I derive my identity."²⁴² One of those defining communities is the national community of which one is a member. That culture provides individuals with the structure within which they can make choices and make sense of the choices that they have made.²⁴³ The argument here is that individuals are always situated in particular cultures or tradition, conditions which give meaning to the notion of individual choice by specifying the content of, and providing inspiration for, the individual's action. Unilaterally to undermine these structures is to undermine an important aspect of what makes members of that national group who they are. This is what can be referred to as the identitarian argument. A nation-state becomes necessary to provide the environment in which culture(s) can develop because it is the only institution sufficiently strong to counteract the power of the international informational market that threatens to transform citizens of every country into standardized consumers.²⁴⁴

Second, cultural diversity could be defended on what can be referred to as the multiculturalist argument. While the identitarian argument relies on the value of cultures to members of the cultural group to advance the protection and defense of cultures, the multiculturalist argument bases its defense of cultural diversity on the value of such diversity for all of us, even those of us whose

240. To the "question of whether some forms of culture and ways of life are good in themselves" John Rawls's answer is: "I believe they are." RAWLS, *supra* note 51, at 61.

241. ALASDAIR C. MACINTYRE, *AFTER VIRTUE A STUDY IN MORAL THEORY* 221 (1981).

242. *Id.*; see generally MICHAEL SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982).

243. WILL KYMLICKA, *LIBERALISM, COMMUNITY, AND CULTURE* 165 (1989).

244. Loren Lomasky, *Toward a Liberal Theory of National Borders*, in *BOUNDARIES AND JUSTICE: DIVERSE ETHICAL PERSPECTIVES* 55, 60 (David Miller & Sohail H. Hashmi eds., 2001) (stating that nations-states "afford individuals a context within which they are uniquely empowered to draw on resources that afford them the ability to construct for themselves worthwhile, meaningful lives").

cultures might not be threatened by the international private information market.²⁴⁵ The multiculturalist argument has two aspects to it. One aspect of the argument simply says that just like our commitment to maintain the various aspects of the physical (environmental and ecological) world as intact as possible it may be a good thing to think of doing the same in relation to the cultural world.²⁴⁶ This aspect of the multiculturalist argument can only be understood to suggest that cultures like the physical environment are being defended on aesthetic grounds. I have argued elsewhere that the aesthetic argument in defense of cultural pluralism is neither plausible nor attractive.²⁴⁷ There is a second dimension of the multiculturalist argument that is more plausible and more attractive. This is the argument that the existence of different national cultures is a valuable thing for the international community, for the various cultures "embody alternative life-styles that may provide models, inspiration, and guidance in the essential work of world order redesign."²⁴⁸ The argument here is based on the sensible assumption that a particular form of existence, or outlook on life, or organizational setup may not necessarily represent the best or most desirable way of organizing a community or designing institutions.

Third, I agree with John Rawls that in respecting the various national cultures that define territorial states, an important creed of liberalism—the idea of toleration—may in fact be affirmed. In the same way that a liberal state must respect its citizens' comprehensive doctrines—religious, philosophical, and moral—if it is to be faithful to its organizing principles, it must also tolerate and respect the fact that there are other legitimate ways of ordering social and political life.²⁴⁹ If members of different national communities are to employ public reason in their dealings with one another, toleration is a conceptual and practical necessity. Indeed, what William Connolly has argued over the years in relation to domestic societies may be

245. Addis, *Cultural Integrity*, *supra* note 30, at 756.

246. *Id.*

247. *Id.*; Addis, *supra* note 188, at 620-21. The aesthetic defense could have another form. George Kateb attributes to Isaiah Berlin the view that radical cultural pluralism is to be defended on the ground that there are no universal moral or rational principles by which the various cultures could be ranked and evaluated. George Kateb, *Can Cultures be Judged? Two Defenses of Cultural Pluralism in Isaiah Berlin's Work*, 66 SOC. RES. 1009, 1009 (1999).

248. See Richard Falk, *The Rights of Peoples (in particular Indigenous Peoples)*, in *THE RIGHTS OF PEOPLES* 23 (J. Crawford ed., 1988), cited in Juha Rääkkä, *The Moral Relevance of Cultural Disadvantage*, 78 AUSTL. J. PHIL. 374, 382 (2000); see also DANIEL NETTLE AND SUZANNE ROMAINE, *VANISHING VOICES: THE EXTINCTION OF THE WORLD'S LANGUAGES* 199 (2000) ("[L]oss of most of the world's languages and cultures" will result in "reduced quality of life," for such loss will "directly reduces the sum total of our knowledge about the world, for it removes some of the voices articulating its richness and variety.").

249. RAWLS, *supra* note 51, at 59-60.

relevant to the sustenance of the international community of communities. Connolly argues that what we need is a regulative ideal wherein the diverse traditions and communities acknowledge the contestability and contingency of their own deeply held convictions and cultivate a respectful engagement with those that are different from them.²⁵⁰ Connolly's observation is particularly relevant for the context of the international community, because such an attitude will not only guard against the tendency of some cultures and traditions to attempt to remake others in their image, but over time it may also, ironically, be more conducive to changes and adjustments. A culture or tradition that feels an imperial threat from another culture or tradition is one that is likely to be visceral in its opposition to all things that it associates with that imperial culture or tradition, and hence be resistant to any change.²⁵¹ Extremism is often the result of a feeling of being besieged and unheard.²⁵² There are numerous examples of that around us.

Perhaps more importantly, from the point of view of international justice, by which the liberal sovereignist is motivated when he or she urges us to treat the world as a single scheme of cooperation,²⁵³ it may be better to start with the world of nation-states, or peoples, as John Rawls call them,²⁵⁴ rather than with individuals. As I have argued earlier, the "common sympathies" arising out of a shared history and culture are profoundly valuable to individuals, and hence an adequate theory of global justice must recognize and respect this fact perhaps as a primary good. Also, as a practical matter, the individualism of the liberal sovereignist will not lead to the sovereignty of the individual but rather either to the despotism of the international market, or to a unified international political regime which is likely to preside over a "fragile empire torn by frequent civil strife as various regions and peoples [try] to gain political freedom and autonomy."²⁵⁵

While the first value that we mean to protect by endorsing a version of the state is cultural identity, the second is the viability of democracy itself. Although there is much talk about the Internet providing the condition for participatory model of politics,²⁵⁶ real and

250. WILLIAM CONNOLLY, WHY I'M NOT A SECULARIST 8, 158-60 (1999).

251. *See id.*

252. *See id.*

253. *See, e.g., Pogge, supra note 202, at 90* (noting that cosmopolitanism is "committed to a concrete political ideal of a global order under which all persons . . . are fellow citizens of a universal republic" and that "every human being has a global stature as an ultimate unit of moral concern").

254. *See generally RAWLS, supra note 51.*

255. *Id.* at 36.

256. *See generally Cass R. Sunstein, The Daily We: Is the Internet Really a Blessing for Democracy?*, 26 BOSTON REV. 4 (Summer 2001).

long lasting participation occurs in real space among people with mutual understanding and trust. Such understanding and trust require some commonality or shared identity which national culture such as a common language or history provides. John Stuart Mill made that observation long ago: "Free institutions are next to impossible . . . [a]mong a people without fellow-feeling. . . ." ²⁵⁷ Mill's analysis is as relevant in the age of the Internet and satellite communications as it was at the time he made it. Genuine democracy is not just a matter of aggregating and counting votes. It is also a deliberative and participatory process. Such a process requires a sense of commonality or shared identity to sustain it. The nation-state provides that commonality or identity, either through a common language or a shared history and culture.

Indeed, as Kymlicka and Straehle have argued, the nation-state may be the most conducive institution for the achievement of the three principles that are generally linked to (liberal) democracy: social justice, deliberative democracy, and individual freedom. ²⁵⁸ I have already noted how social justice is linked to the nation-state. To repeat the argument, social and distributive justice will be facilitated if there is fellow-feeling among members of the community. When there is such a feeling of solidarity and collective identity, members will be prepared to vote for distributive programs, not only because of the common bond that unites donors and recipients but also because there is "a high level of trust that sacrifices will be reciprocated." ²⁵⁹ That will not be the case if people feel that they are making sacrifices for anonymous others.

As to the issue of democracy, it is clear that, just like distributive or social justice, democracy also requires a high level of trust among participants such that people will be willing to consider the views and interests of others as well as a willingness to abide by the results. Such trust and willingness is a consequence of the common identity that the nation-state cultivates and develops through a common culture. Also, democracy, at least the deliberative and participatory kind, is "feasible only if participants understand one another and this seems to require a common language." ²⁶⁰ However much the communication media may have linked the world and however much the Internet may have enabled individuals to access all sorts of information, they cannot provide the condition for a deliberative

257. John Stuart Mill, *Of Nationality, as Connected with Representative Government*, in UTILITARIANISM, LIBERTY, REPRESENTATIVE GOVERNMENT: SELECTIONS FROM AUGUSTE COMTE AND POSTIVISM 392 (H. B. Acton ed., 1972).

258. Will Kymlicka & Christine Straehle, *Cosmopolitanism, Nation-States and Minority Nationalism: A Critical Review of Recent Literature*, 7 EUR. J. PHIL. 65, 68 (1999).

259. *Id.* at 69.

260. *Id.* at 70.

democracy where trust and common identity are essential ingredients. Indeed, in relation to the Internet, Cass Sunstein may well be right when he raises the question as to whether there is a serious danger that the Internet may allow and even encourage a lack of engagement among individuals by increasingly enabling them to use filtering technologies to avoid engaging the view of those with whom they disagree in ways that are not possible in the non-Internet world.²⁶¹ If this were to happen it would likely lessen the possibility of developing the shared experience necessary for deliberative democracy.

Put simply, the argument is that for democracy to work effectively certain conditions have to exist. There has to be “fellow-feeling” among participants. That “fellow-feeling” or trust is mainly a question of a common identity. The common identity is partly forged through a common culture. The territorial state provides the condition for the flourishing of that culture. As I explained earlier, some have argued recently that “cosmopolitan citizenship” is the more defensible alternative to the territorial state. But the cosmopolitan citizen will still need a local bounded community in order to be a citizen at all.²⁶² “Democratic citizenship requires commitment, commitment requires accountability and deepening of attachments.”²⁶³ There cannot be accountability and deepening of attachments in a global framework. Indeed, a great deal of the current discontent about globalization stems precisely from the fact that people believe that decisions that have enormous impact on their lives are being made by people and institutions who are not accountable to them.

As to the link between individual freedom and the nation-state, as many have argued, the common culture that the nation-state provides enables those members to have meaningful options as to how they could lead their lives,²⁶⁴ in the sense that “familiarity with

261. See generally CASS SUNSTEIN, *REPUBLIC.COM*. (2001); see also Sunstein, *supra* note 256, at 4. Sunstein argues that there are two ingredients that are required for a successful deliberative democracy: a range of common experiences and unchosen and unanticipated encounters with diverse views and topics. He then suggests that because of its ability to allow individuals to custom-design their encounters the Internet may seriously undermined the two values. To be sure, Sunstein does not have the empirical evidence to conclude that that is in fact the case, but his argument seems to indicate that he thinks that it is a real possibility. While not questioning his assumption as to what values democracy requires, some have challenged the view that the Internet may in fact undermine those values. See, e.g., Simson Garfinkel, *Mathematics of Growth*, 26 *BOSTON REV.* 10 (Summer 2001).

262. BENHABIB, *supra* note 5, at 183.

263. *Id.*

264. Avishai Margalit & Joseph Raz, *National Self-Determination*, 87 *J. PHIL.* 439, 449 (1990).

a culture determines the boundaries of the imaginable.”²⁶⁵ The communication revolution and the unrestrained or unregulated flow of interborder information weaken those cultural structures within which the individual makes choices and makes sense of those choices. The weakening or decay of the cultural structure leads to the shrinking of “the options and opportunities open to members” of the culture.²⁶⁶ Freedom in its robust sense does not define the transient and rootless individual, the individual without commitments and attachments, the individual who has shrunk “into [an] e-mail address in space.”²⁶⁷

Despite the claim that the unimpeded flow of international communications will be conducive to the development of democracy and cosmopolitanism, the inverse may in fact be the case. The current process of interborder communication could be said to undermine the conditions for the development of democracy in a number of ways, especially in the developing countries. First, quite often the entertainment and news information that circulates around the world originates mainly from the developed world. Indeed, a handful of western agencies and electronic media dominate what is to be heard and viewed. The world is defined unilaterally.

Some may argue that the Internet has no such constraint and that every individual is a publisher as well as a consumer of information.²⁶⁸ There is no one big medium that acts as the gatekeeper in terms of the information flow.²⁶⁹ But that only tells part of the story about the Internet.²⁷⁰ A close study of news information that circulates among Internet users shows that a great deal of that information originates from one of the four major international news agencies or any of the handful of electronic and print media, all of which are Western.²⁷¹

265. *Id.*

266. *Id.*

267. BENHABIB, *supra* note 5, at 182.

268. The user of the Internet could be viewed simultaneously as a publisher and a consumer to the extent that the user can send as well as receive mass messages.

269. Individuals have various alternative sources of information—radio, television, cable, Internet, etc.

270. Jacques Attali, *The Crash of Western Civilization: The Limits of the Market and Democracy*, FOREIGN POLY, Summer 1997, at 54, 60. Jacques Attali observes that free market (including unregulated information market) and democracy may be inherently contradictory. And he believes that unregulated flow of information such as the Internet “will continue to erode democratic institutions . . . Eventually, democracy will fade away, having been replaced by market mechanisms and corruption. We will have a kind of market dictatorship, a ‘lumpen market,’ without strong democratic institutions to serve as countervailing powers.” *Id.*

271. Take for example the Ethio-Eritrean war of the 1990s. The news items that circulated among Internet users about the war came from the major news agencies, The Associated Press (AP), Agence France Presse (AFP) and Reuters dominate the flow of information. In the area of newspapers, major U.S. newspapers such as the *New York Times* and the *Washington Post* as well as major European papers such as the

Second, increasingly the media, both at the domestic and international level, is being owned by fewer and fewer media conglomerates which have their headquarters in the developed Western world.²⁷² What can be read, heard, and viewed (and *how* it will be heard and viewed) will be determined by fewer and fewer institutions and entities if the international media market goes unregulated.²⁷³ Decisions about what information is to be collected and for what purpose—generally why and by whom information is to be collected and disseminated—are essentially being made in local terms and from localist perspectives, rather than from a universalist or globalist perspective, as it is often imagined. It is true that as a result of the emergence of sophisticated communication technologies people around the world will increasingly consume the same or similar cultural products, hear or view the same or similar stories at roughly the same time, and interact with people from different parts of the globe.²⁷⁴ That, however, does not make the globe a village, for the entities (private or public) that collect, process, disseminate, or appropriate information on the international level do so in the context of particular cultures and political institutions. It is these political and cultural institutions that enable the communication market to decide how the world is to be described and understood—who the virtuous and the villains are, what constitutes the good and the right—both across borders and within borders.

London Times supplied the information. And in terms of the electronic media, The Voice of America, CNN and the BBC were the sources of the information circulating in the Internet. For a general observation about the phenomenon see CEES HAMELINK, *WORLD COMMUNICATIONS: DISEMPOWERMENT & SELF-EMPOWERMENT* 43-44 (1995); Oliver Boyd-Barrett & Daya Kishan Thussu, *NWICO Strategies and Media Imperialism: The Case of Regional News Exchange*, in *BEYOND NATIONAL SOVEREIGNTY: INTERNATIONAL COMMUNICATIONS IN THE 1990S*, 177, 182 (Kaarle Nordensteng & Herbert Schiller eds., 1993) ("Most of the world news flow emanates from major transnational agencies (these include the 'big four' agencies—AP, UPI, Reuters, and the AFP—and the world's largest television news enterprises . . . many of them Western-based"). For an extended discussion of the phenomenon see Addis, *supra* note 90, at 520-27; see also THUSSU, *supra* note 97, at 151-55.

272. Boyd-Barrett & Thussu, *supra* note 271, at 177.

273. Rupert Murdoch's News Corporation is a case in point. Liberalization and deregulation have enabled the News Corporation, headquartered in Australia, to own and control various media around the world and to integrate them vertically. In its 1999 annual report, News Corporation tells us that it is "vertically integrated . . . on a global scale [and that] in the course of 24 hours [it] reaches nearly half a billion people in more than 70 countries." THUSSU, *supra* note 97, at 107. The report continues, "[w]e are reaching people from the moment [people] wake up until they fall asleep." *Id.*

274. See HAMELINK, *supra* note 271, at 83; CARLA BROOKS JOHNSTON, *WINNING THE GLOBAL TV NEWS GAME* 22 (1995); THUSSU, *supra* note 97, at 159; Richard Covington, *Television Newscasters Vie for Global Audience: CNN and BBC Act Locally to Conquer Viewers*, *INT'L HERALD TRIB.*, Apr. 23, 1997, at 1; see also Claude Moisy, *Myths of the Global Information Village*, *FOREIGN POL'Y*, Summer 1997, at 78.

Let me explain the point, taking international news as an example. The dissemination of international news has a "localist" character in two senses: on the level of *what* media institutions choose to communicate, which correlatively informs what they exclude from the act of communication;²⁷⁵ or *how* what is selected for communication gets communicated. In terms of the first, the evidence seems to show that the international media (the Western media) devotes most of its coverage to developed countries.²⁷⁶ Quite often developing countries or societies, where most of humanity lives, do not even register in the radar of the international media, unless, of course, the event implicates the interest of developed countries. The U.S. media is a good example. The U.S. media rarely goes to places or reports on events that are not viewed as implicating the interest of the United States.²⁷⁷ The first issue could, therefore, be described as one of localism affecting the *quantity* of coverage: the more an event looks to have a local dimension the more likely that it will be a news event.

The second dimension of localism could be referred to as the *qualitative* dimension. The issue here is that even when non-local (the "Other") peoples and countries get covered as more than an extension of the local, the coverage tends to be informed by a stereotypical view

275. This argument is developed by Owen Fiss in relation to the media in this country. See generally OWEN M. FISS, *THE IRONY OF FREE SPEECH* (1996); Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, (1986); Owen M. Fiss, *Why the State?* 100 HARV. L. REV. 781 (1987). In relation to the international context see generally Addis, *supra* note 90. The remarks in this paragraph track the argument in this article.

276. "The rich countries which represent some 30 percent of the world's population, account for almost 80 percent of the world's press circulation, and the poor countries with some 70 percent of the world's population have only 20 percent of the total newspaper circulation." HAMELINK, *supra* note 271, at 41. "In the market-driven media environment . . . the coverage of the South [developing world], already 'deplorably infrequent and misleading' may be further reduced." THUSSU, *supra* note 97, at 165, citing C. Patterson, *Global Battlefields*, in *THE GLOBALIZATION OF NEWS* (O. Boyd-Barrett & T. Rantanen eds., 1992).

277. An article shows that as people in the United States continue to talk about the "global village," information about that "village" is actually declining.

As a percentage of all topics covered between 1970 and 1995 [by the major networks] the share of foreign stories fell from 35 per cent to 23 per cent, and the average length of those stories dropped from 1.7 minutes to 1.2 minutes. Worse, while the networks devoted on average more than 40 percent of total news time to foreign items in the 1970s, that share had been cut to 13.5 percent of news by 1995.

Claude Moisy, *supra* note 274, at 82. I suspect as a general matter, the decline would even be more pronounced in relation to news from developing countries. And that is from an extremely low base to start with. See also Garrick Utley, *The Shrinking of Foreign News: From Broadcast to Narrowcast*, FOREIGN AFF., Mar./Apr. 1997, at 1-2.

of these societies.²⁷⁸ A developing country, for example, becomes of interest to the international media when it offers strange personalities²⁷⁹ or when there is a national disaster such as famine or a *coup d' état* or at moments when the country is regarded as stridently anti-West.²⁸⁰

The complaint here is not that the international media reports negative news about developing countries, though it does do that disproportionately—with respect to the negative news that it reports about developed countries even taking into account the possibility that there are more negative events regarding the former. Nor is the purpose to fault the media for practicing “journalism of exceptions.”²⁸¹ The international media is not alone in that. In fact,

278. A 1987 study examined how eight prestigious U.S. newspapers covered the three worlds—the First World, which consisted of the developed countries, the Second World, which referred to the then communist world, and the Third World, which referred to the developing countries—concluded that the coverage of the Third World “is skewed to the sensational.” W. James Potter, *News from Three Worlds in Prestige U.S. Newspapers*, 64 JOURNALISM Q. 73, 78 (1987). As the authors of the study observed: “News coverage about the Third World . . . is much more likely to be sensational in nature, while the coverage of Western events is more likely to display balance between government stories and sensational stories.” *Id.* at 276; see also JOHAN GALTUNG & RICHARD C. VINCENT, *GLOBAL GLASNOST: TOWARDS A NEW WORLD INFORMATION AND COMMUNICATION ORDER* 8 (1992). (“[W]e cannot escape the conclusion that reporting about the periphery countries [the Third World] will not only be scant, but also highly negative, and even more so for news about the periphery people in periphery countries.”). The literary theorist Rey Chow has called the process of reporting about the Third World as the “King Kong Syndrome” in which the Third World becomes “the site of the material that is ‘monstrosity,’ is produced for the surplus value of spectacle, entertainment . . . for the ‘First World.’” Rey Chow, *Violence in the Other Country: China as Crisis, Spectacle, and Woman*, in *THIRD WORLD WOMEN AND THE POLITICS OF FEMINISM* 81, 84 (Chandra Talpade Mohanty ed., 1991), cited in Leti Volp, *Feminism Versus Multiculturalism*, 101 COLUM. L. REV. 1181, 1188-89 (2001); see also Beverly G. Hawk, *African Politics and American Reporting*, in *MEDIA AND DEMOCRACY IN AFRICA* 157 (Goran Hyden, Michael Leslie, & Folu F. Ogunimu eds., 2002).

279. A good example is the coverage that the Western media devoted to Idi Amin in the 1970s. Idi Amin was the notorious and comical dictator who ruled over (tormented) Uganda from 1971 until 1978. Another dictator with whom the Western media was obsessed was Jean-Bedel Bokassa, who ruled over the Central African Republic from 1965 to 1979. Bokassa crowned himself as emperor of the “Republic.” Both of these personalities were simultaneously cruel and an embarrassment to their people. The reason that the Western media was obsessed with these two figures was not, however, because these two figures were cruel, for there were many other cruel leaders both in the continent and elsewhere. Rather, it was because the Western media found these personalities, especially Idi Amin, highly amusing and their stories salable to its audience. The behavior and actions of these individuals reinforced the prejudices that Western journalists have about that part of the world. For an extensive discussion of Africa’s media image internationally see generally a collection of essays in *AFRICA’S MEDIA IMAGE* (Beverly G. Hawk ed., 1992).

280. See generally Potter, *supra* note 278.

281. For the notion of “journalism of exceptions” see Addis, *supra* note 90, 518; Adeno Addis, *Recycling in Hell*, 67 TUL. L. REV. 2253, 2265 (1993). The phrase is used

"journalism of exceptions" is, to one degree or another, a defining feature of all media. Rather, the purpose is to point out that the cosmopolitan assumption of an international market of information unconstrained by the political and social culture of the community from which it originates (or by which it is informed) is, for various reasons, implausible.²⁸² How can one function, except within the context of, and defined by, the social and political culture within which one is primarily located? It is through the prism of the local that the world is made sense of.

Furthermore, it is no argument to claim that it is the consumer, rather than the media, who dictates what kind of information is to be gathered and disseminated. To start with, when the world is divided by cultural and political assumptions and commitments, as is the case between developed and developing countries and indeed among countries even within the particular grouping, and when the international media generally relies on the audience of one section of the international community for its economic survival and prosperity (that is, the consumer from the developed countries), the argument of "consumer sovereignty" begs the issue. Which consumer is sovereign? Responding to the complaint of the audience from the developing countries, that they rarely become of interest to the international media unless an event fits within the stereotype held by the West about the peoples, cultures, and institutions of these societies, by invoking the rights of the audience from the West, is not a response at all.

In addition, even as a general matter, the relationship between consumer desires and institutional actions is not often, if at all, causally one directional where the sovereign consumer dictates to the powerless institution what the latter should provide the former. As many have argued, the dynamic is quite different. Consumers' wants and desires, even what pass as needs, are socially produced, and institutions (such as the media) are part of what helps produce that predisposition.²⁸³ But the point here is that whatever the reasons, it is clear that the actions of the international media are locally constrained and hence the idea that an unregulated information market will usher in the cosmopolitan society is consequently flawed.

To summarize, the idea that international private media will help usher in the cosmopolitan society with a democratized international civil society, misconceives the nature of the information market generally and the international media specifically. Despite

to refer to the general practice of the mass media to view news in terms of unusual and exceptional events. As a general matter, an event will be regarded as a news item if, under the circumstances, it is seen to be an exceptional event.

282. Addis, *supra* note 90, at 520-27.

283. See generally WILLIAM LEISS, *THE LIMITS TO SATISFACTION: AN ESSAY ON THE PROBLEMS OF NEEDS AND COMMODITIES* (1988).

pretension to the contrary, the media views and reports issues and events from a localist perspective: localist in what it chooses to report and how it reports that which it has chosen as being news-worthy. The implications of such reporting are that the world is imagined and described from a particular tradition. Ironically, what the international media is able to do is not only to incline people in the West to think of other traditions and cultures in a particular and often stereotypical way, but it also becomes the primary means by which people in the non-western world form their own image. And this is not just about image in the abstract sense. Those images have policy consequences. They play a role in what policies governments adopt towards those societies or cultures.²⁸⁴

The third way in which democracy is undermined by the unregulated flow of information across national boundaries is the ability of corporations to move information out of territorial communities without the community having much say in the movement of such information. Good examples of this are TBDFs (such as personal information) and remote sensing activities each of which I have described in some detail in this paper. To the extent that the outflow of such information cannot be unilaterally regulated by the state, important functions of the state—protecting the privacy interest of citizens and the natural resources of the country—are undermined. If matters that have important effects on citizens and on the resources of the country are made by outsiders, then one could say that an important aspect of democracy is lacking. After all, democracy is about running one's affairs.

However, for the reasons that I set out earlier, it is also the case that in this global era a strongly autonomous state is neither politically sustainable nor even attractive. To restate the argument, the idea of the thick state is not sustainable because of the continuing globalization of economic, social, cultural and political life powerfully supported and facilitated by the communications revolution. It is not attractive, because in the name of the thick state and external self-determination, governments of various countries have often denied and will continue to deny their citizens the right of internal self-determination.²⁸⁵ External self-determination is often invoked as an excuse to restrict internal self-determination. To quote Russell Hardin: "Nation-states are contingently morally good for what they

284. U.S. media reports on Africa "tend to influence U.S. policy, especially since so few policy-makers really have a good understanding of their own of what is happening in Africa... Policy toward that continent, therefore, becomes superficial..." Hawk, *supra* note 279, at 157.

285. Russell Hardin, *Group Boundaries, Individual Barriers, in BOUNDARIES AND JUSTICE: DIVERSE ETHICAL PERSPECTIVES* 276, 277 (David Miller & Sohail H. Hashmi eds., 2001).

can achieve—although they are also contingently morally bad for what they can achieve.”²⁸⁶

b. The Thin State: Plurality and Subsidiarity

i. Subsidiarity

I mentioned earlier that the idea of a thin state might enable us to reconcile the demands of external and internal self-determinations of localism and universalism. How would the idea of a thin state institutionally manifest itself? There are two principles that organize the institutions of a thin state (thin state sovereignty), at least in relation to the interborder flow of information: the principle of *plurality* (internal pluralism) and the idea of *subsidiarity* (international pluralism).²⁸⁷

The principle of plurality suggests that a legitimate state is one that tolerates, even encourages, pluralism within its borders.²⁸⁸ Here I am in agreement with liberal sovereignists. If a state is to be viewed in its international standing as fully representing its people then there must be institutional structures in place to make the state accountable to all segments of its population. To be more precise, there must be the political and social space that ensures that citizens have full and equal opportunity to make the state responsive to their

286. *Id.* at 290.

287. The notion (doctrine) of subsidiarity was recognized in Article 5 of the Treaty Establishing the European Community, the Treaty of Amsterdam. Subsidiarity is a principle that says that powers and tasks should be lodged in subunits unless a larger and more comprehensive unit can achieve the particular goal in question. Article 5 provides:

The Community shall act within the limits of the powers conferred upon it by this Treaty and the objectives assigned to it therein. In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) 1 [hereinafter Treaty of Amsterdam]. See also George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331, 338 (1994). The doctrine began to emerge from several different venues in the early 1980s long before it was incorporated in the Basic Law of the Community in 1992 as Article 5 of the Treaty of Amsterdam. See generally Christian Timmermans, *Subsidiarity and Transparency*, 22 FORDHAM INT'L L. J. 106 (1999).

288. See RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 1 (2000).

needs and concerns.²⁸⁹ Now, there are many conditions that will facilitate the active participation of citizens and the responsiveness of the state to those citizens.²⁹⁰ One of those is an environment where there is free flow of information, unimpeded either by the (monopolistic) market or by the government itself. Indeed, many international and regional human rights documents, including the International Bill of Rights,²⁹¹ affirm the importance of free flow of information for the decency of a society's political institutions.²⁹² Free flow of information is among the necessary political incentives for the regime to secure decent economic, social, and legal conditions for citizens.²⁹³ Not only that, but even in relation to culture, as Amartya

289. On this point see *id.* ("No government is legitimate that does not show equal concern for the fate of all those citizens over whom it claims dominion."). See also Michael Walzer, *The Moral Standing of States: A Response to Four Critics*, 9 PHIL. & PUB. AFF. 209, 214 ("[A] state is legitimate or not depending upon the 'fit' of government and community, that is the degree to which the government actually represents the political life of its people.").

290. Ronald Dworkin, for example, has forcefully argued in several books, including *Sovereign Virtue*, that an essential part of why it means to be treated by government with equal concern and to have equal opportunity to make the state responsive to one's needs is to be provided with equal resources. DWORKIN, *supra* note 288. Dworkin argues that equal concern requires government to equalize the resources each of its citizens has for constructing a successful life. *Id.*

291. The phrase "International Bill of Rights" refers to three international human rights documents. See UDHR, *supra* note 84; ICCPR, *supra* note 66; International Covenant on Economic Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

292. In relation to international human rights documents see UDHR, *supra* note 84, art. 19; ICCPR, *supra* note 66, art. 19. Regional human rights documents such as the European Convention for the Protection of Human Rights and Fundamental Freedoms and the American Convention on Human Rights provide for the protection of freedom of expression and free flow of information in similar terms as those provided for by the international conventions. See European Convention, *supra* note 127, art. 10; American Convention on Human Rights, Nov. 22, 1969, art. 13, 1144 U.N.T.S. 123, 9 I.L.M. 673 (entered into force July 18, 1978).

It is interesting to note that in his *Law of Peoples*, John Rawls does include freedom of expression or freedom of speech in the list of basic human rights that are to be respected internally if the external sovereignty of a people is to be respected. RAWLS, *supra* note 51.

293. See, e.g., AMARTYA SEN, DEVELOPMENT AS FREEDOM 147-48, 154-55 (1999):

[There exist] extensive interconnections between political freedoms [such as freedom of expression] and the understanding and fulfillment of economic needs. The connections are not only instrumental . . . but also constructive. Our conceptualization of economic needs depends crucially on open public debates and discussions. . . Furthermore, to express publicly what we value and to demand that attention be paid to it, we need free speech and democratic choice.

Id. See also Thomas Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 46 (1992).

Sen has sensibly concluded, without freedom of expression and other democratic processes it may not be easy to tell which interpretation of a particular culture is a mere imposition by an authoritarian power holder and which is widely held and justifiable.²⁹⁴ One may also add that given the fact that cultures do get transformed, it is essential that such transformation take place within the context where there are opportunities for the widest possible participation of members of the community.²⁹⁵ To say this of course is to affirm the contingent nature of culture.

Note, however, how the pluralism within may have an impact on our other concern, the attempt at pluralization among nations and peoples. If we value dialogue among members of a particular territorial community as being an essential condition for developing a more defensible and sustainable cultural practice (rather than one dictated from above by a handful of people), then the same would apply to intercultural and international engagements. The defensibility of international practices and institutions resulting from intercultural and international "interactions" would depend on whether those interactions were a result of dialogues or monologues.

How does one deal with the threat of homogenization that the monologic international communication process poses? Here is where the idea of subsidiarity comes in. The notion of subsidiarity, the idea that powers and tasks be vested in subunits (nation-states) unless larger units (regional and international organizations) are sufficiently equipped to achieve the particular goals at issue, acknowledges that boundaries though historically drawn and contingent may indeed serve the important purpose of ensuring pluralism on the international level. How is international pluralism to be institutionally provided in an age of globalization where the capacity of the territorial unit to be "the ultimate agency of self-conscious political action"²⁹⁶ is being seriously challenged? It is only in terms of international agreements and coordination that the notion of subsidiarity could in fact be put in operation. Unlike in the European Union context in which the notion of subsidiarity initially emerged, the idea, as I use it here, is not only about restraining the larger unit in some circumstances so that the smaller units can act without the threat of review by the larger unit. It is also about the international

[The world is witnessing] the emergence of a community of expectation: that those who seek the validation of their empowerment [must] govern with the consent of the governed. Democracy, thus, is on the way to becoming a global entitlement, one that increasingly will be promoted and protected by the collective international processes.

Id.

294. SEN, *supra* note 293, at 227-48.

295. *Id.* at 142.

296. CONNOLLY, *supra* note 23, at 201.

community concluding an agreement empowering the smaller units, giving them the space, to develop “a scheme of social justice [and] to protect [their] distinctive culture[s]”²⁹⁷ that globalization generally and the communication process specifically are increasingly making difficult. So, subsidiarity has two dimensions: the right to be free from imperial interference; and the right to participate in the life of the international community and in the constitution of the common world.

In terms of international flow of information, subsidiarity will be ensured through two distinct but interrelated ways. The first would be the adoption of a comprehensive international agreement on interborder flow of information that should include four elements (the first dimension of subsidiarity). Such an accord should affirm and protect the flow of information over which there is an overlapping international consensus that the unimpeded flow of such information across national boundaries is important for a globalized and increasingly interconnected international society and for the cultivation of internal freedom. The free flow of news, I will suggest later, is an example of this. Of course, the other aspect of this first point is that the agreement could also prohibit the flow of information about which there is a consensus that it merits no protection. Child pornography is a good example of that. The Council of Europe has, for example, taken that position.²⁹⁸

The agreement should also provide a framework that will enable territorial communities to exclude information about whose value there is reasonable difference. Sexually explicit material directed at adults as well as what is referred to as hate and racist speech are good examples. Finally, the agreement must prescribe international minimum standards to apply with regard to the outflow of certain kinds of data. The movement of personal data is a good example. I shall explore later in more detail the form that the agreement should take.

297. MILLER, *supra* note 239, at 104.

298. See Council of Europe, Convention on Cybercrime, Nov. 23, 2001, art. 9, E.T.S. No. 185 (adopted November 23, 2001).

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally and without right, the following conduct: a. producing child pornography for the purpose of its distribution through a computer system; b. offering or making available child pornography through a computer system; c. distributing or transmitting child pornography through a computer system; d. procuring child pornography through a computer system for oneself or for another person; e. possessing child pornography in a computer system or on a computer-data storage medium.

As I mentioned earlier, subsidiarity in relation to international society has also another dimension, a positive dimension. Subsidiarity is not simply one of the international community allowing territorial states to do what they can do well without restriction or interference from the top, but it is also about affirmatively empowering nation-states to do certain things well. In this sense, subsidiarity can be understood as “empowering right”²⁹⁹ (the second dimension of subsidiarity). This second dimension of subsidiarity is about the international community empowering local communities in the various territorial states so that those communities will have the resources to be active participants in the creation and transformation of the common lifeworld that members of the international community inhabit or wish to inhabit.³⁰⁰

There are three reasons why this empowering right becomes important. First, to the extent that the lifeworld is partly and perhaps significantly constituted narratively, it becomes important that the narratives of various cultures and systems (including those from developing countries and communities) are able to interrogate one another.³⁰¹ The legitimacy of the international order, the legitimacy of the international community that is imagined, depends not only on what the institutions that are put in place do and whether they, in fact, do what they are meant to do, but also on how those institutions, and the background (common) knowledge that made their emergence and functioning possible or necessary, are created.

Second, not only would there be a fuller collective understanding of international institutions and actions if the background world (the lifeworld) were constituted with active participation of the various cultures and systems in the world, but such networks of communications also suggest that to be a full participant in the constitution of the common lifeworld, to participate in the collective imagining of the nature of the international community, is to be recognized as an equal partner. The need to provide the framework

299. HELD, *supra* note 68, at 223.

300. The concept of “lifeworld” was first used and developed by Jürgen Habermas. See JÜRGEN HABERMAS, 2 THE THEORY OF COMMUNICATIVE ACTION: LIFEWORLD AND SYSTEM; A CRITIQUE OF FUNCTIONALIST REASON 113-52 (Thomas McCarthy ed., 1987). By “lifeworld” Habermas meant to refer to the taken-for-granted world of the relevant society (national or international) that is experienced by actors as one of commonsense and unproblematic. *Id.* at 130-35. The lifeworld is a supply of collective interpretation of the world and of the actors that do the interpreting. It comes in the form of common language, culture, common history and a common system of norms that are perceived as legitimate. The lifeworld, therefore, is the common knowledge that provides actors with the repertoire of collective understanding to which they can refer when they make claims and assertions.

301. I have made this point more fully in a recent article. See Addis, *supra* note 206, at 588-99, 616.

for all nations and communities to be able to narrate their stories can therefore be justified on both utilitarian and identitarian grounds.³⁰²

Third, contrary to what critics may think, the empowering aspect of subsidiarity is premised on the possibility of gradual “fusion of horizons,” to use a Gadamerian phrase,³⁰³ rather than on the presumption of incommensurability of values³⁰⁴ and civilizations that some have asserted define the world.³⁰⁵ Informational empowerment of different communities, and the ability of various communities to participate in the naming and transforming of the world, is to prepare the condition for the possibility of more and more overlapping consensus of relatively disparate background traditions and communities where there is more (unforced) consensus and that consensus evolves into mutual understanding and perhaps fusion of horizons.³⁰⁶ Under this vision different traditions and cultures mutually enlarge and elevate one another’s views about various things such as what constitutes legitimate sovereignty, individual autonomy, the relationship between the individual and the community (individual rights vs. individual responsibilities), and democracy itself.³⁰⁷ What otherwise may appear to be closed traditions may be transformed in this way.

ii. IPDC as an Aspect of Subsidiarity

Let me give as an example (admittedly, not a robust or well developed example) of this second aspect of subsidiarity an international (intergovernmental) program in the area of communication. The International Programme for Development of Communication (IPDC) was established by the U.N. Educational, Scientific, and Cultural Organization (UNESCO),³⁰⁸ in the aftermath of an intense and truculent international debate about the international communication process that developing countries saw as biased in favor of developed countries, and as one in need of major

302. For a fuller description of the identitarian and utilitarian views (in the context of economic sanctions), see *id.*

303. See HANS-GEORG GADAMER, *TRUTH AND METHOD* 273 (1975).

304. See generally ISIAH BERLIN, *THE CROOKED TIMBER OF HUMANITY* (1990).

305. See generally SAMUEL HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* (1996).

306. See Charles Taylor, *Conditions of Unforced Consensus on Human Rights*, in *THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS* 124 (Joanne R. Bauer & Daniel Bell eds., 1999).

307. *Id.*

308. IPDC was established in 1980 by a resolution at the twenty-first session of the General Conference of UNESCO. The Programme was placed within the Communication and Information Sector of UNESCO. See UNESCO Gen. Conf. Res. 4/21 21st Sess. (1980).

restructuring.³⁰⁹ Interestingly, IPDC was sponsored and pushed by the United States which was the strongest opponent of the attempt by the developing world, assisted by the Soviet Bloc, to establish what the proponents called a new world information and communication order (NWICO).³¹⁰ The establishment of the IPDC indicated that even though many developed countries thought that the idea of NWICO was unacceptable to the extent that it envisioned empowering governments to restrict the free flow of information across national boundaries that there was in fact a legitimate complaint that the current structure within which information flowed across national boundaries was highly inequitable and very unfavorable to developing societies. In other words, the international communication process was monologic.

The premise of the IPDC was, therefore, that one way to reduce that unfavorable condition was to help these societies develop their indigenous media so that these societies would not rely on others to tell their stories not only to others but to themselves as well.³¹¹ Let me emphasize at the outset that my purpose in invoking the IPDC as an example is not to suggest the IPDC is the ideal or even the most appropriate institutional setup for the purpose of pursuing the second

309. The debate, which lasted from the mid-1970s to the late 1980s, was about whether there was a need to establish what the developing countries referred to as the new world information and communication order (NWICO). From the developing countries' point of view, the NWICO was needed, for the existing international structure within which information flows across national boundaries was thought to favor the developed world. The developed countries, on the other hand, defended the status quo and charged that leaders of developing countries, many of whom had never faced their citizens in open elections, simply wanted to control the communication process so as to ensure that there were no alternative voices to the official propaganda and that the idea of a NWICO was simply a code word for that authoritarian control. The call for NWICO focused on three types of information raising overlapping, but also distinct, issues: data processing and transmission (such as remote sensing and transborder data flow), which among other things raises the issues of national sovereignty and national security; entertainment, such as films and television programs, raising the issue of cultural invasion and the loss of cultural identity; and the structural imbalance in the gathering, selection and flow of international news.

NWICO as a political movement ran out of steam and collapsed under the pressure of the private and public institutions from the developed countries, especially the United States. The United States and Great Britain, for example, left UNESCO in 1984 and 1985, respectively, partly because of UNESCO's central role in the development of and debate about the NWICO. For the intense criticism of NWICO by the Western media, especially the U.S. media, see George Gerbner, *Unesco in the U.S. Press*, in *THE GLOBAL MEDIA DEBATE: ITS RISE, FALL, AND RENEWAL* 111 (George Gerbner et al. eds., 1993). Although NWICO as a political movement ran out of steam and collapsed, one specific project emerged out of that divisive debate and process, IPDC.

310. As it turned out, the United States left UNESCO partly because of the NWICO debate. The United States was to remain outside the UNESCO until its very recent return to the organization.

311. See MOWLANA, *supra* note 121, at 92-102, 179-81 (discussing community values and the quest for a new world order).

aspect of subsidiarity. Rather, the purpose is to indicate that if the second aspect of subsidiarity is to be pursued, one way would be through intergovernmental institutions that empower less developed countries with informational capacities. It is not the specific institutional setup that is of interest here, but the idea of such an institution.

But having made the above cautionary point, let me now briefly explore what precisely the IPDC does to support the emergence of multiple voices. The resolution establishing the IPDC declares that the intention was "to increase co-operation and assistance for the development of communication infrastructures and to reduce the gap between various countries in the communication field."³¹² The gap with which the resolution was concerned was that between developed and developing countries.³¹³ The strategy by which this gap was to be reduced, the resolution tells us, was by assisting developing countries in the development and implementation of communication infrastructure plans and the training of personnel so as to increase the production of endogenous programs as well as to promote improved exchange of international news.³¹⁴ To that end, the Council that heads the IPDC was charged to seek necessary resources from Member States and other sources to assist programs that target the development of communication infrastructures in (developing) countries.³¹⁵

Over the years since its inception, the IPDC has financed communication infrastructures in the developing countries in both the public and private sectors, focusing on infrastructures that improve the production, processing, and flow of information both within a nation and among nations, especially nations within a region.³¹⁶ Although financial contributions to the Programme have

312. See UNESCO Gen. Conf. Res. 4/21, *supra* note 308, pmb1.

313. *Id.*

314. The formation of the IPDC was seen as forming "part of the efforts for the establishment of a new, more just and more effective world information and communication order." See *id.*

315. See *id.* art. 5. The major element of the finance for the Programme comes from voluntary contributions by countries that are members of UNESCO. International and intergovernmental organizations and individuals make contributions as well. The United States, which was the major mover for the establishment of the IPDC has been rather half-hearted in its subsequent financial support for the Programme.

316. From 1996 to 2001, 244 projects were financed from the IPDC Special Account. The projects cost \$11,094,000. Of this amount, \$3,382,000 went to regional and national projects from Africa. A total of \$3,057,000 was spent on projects in Asia and the Pacific. Latin America and the Caribbean received \$2,369,000 for national and regional projects. Projects from Arab states and Europe received \$1,201,000 and \$602,000 respectively, while interregional projects were financed in the amount of \$483,000. See IPOC Report 31C/REP/17, 31st Sess. (1996-2001). The total amount of money the Commission spent in funding projects between 1982 and 1996 was \$28,451,500. The sorts of projects funded, as I indicated earlier, are ones that are seen

been less than satisfactory, the idea underlying the establishment of the IPDC, I believe, is a good one. Indeed, the establishment and development of similar programs in other intergovernmental and international institutions dealing with international communications such as the International Telecommunication Union (ITU) will be most helpful.³¹⁷ The development of the capacity of peoples from the developing countries to be participants in the market where the very identities of communities, their agency, and the common lifeworld, are constructed seems to me to be crucial. The IPDC is, therefore, an example of what I have referred to as the second aspect of subsidiarity, an attempt, to use the title of a high-profile if controversial UNESCO report on the subject of international communication to prepare the condition for "many voices, one world."³¹⁸

iii. International Agreements and Subsidiarity

As I mentioned earlier, in terms of information flow, there is another aspect of subsidiarity, what I have referred to as the first aspect of subsidiarity. That is the idea that the international community should adopt a comprehensive agreement on international flow of information across national boundaries, something as comprehensive as, say, the Outer Space Treaty.³¹⁹ The agreement, as I indicated earlier, should be guided by four objectives. The first objective would be to affirm and protect the free flow of information about which there is an overlapping international consensus that the

to help develop a nation's indigenous capacity to produce programs and to promote improved exchange of international news.

317. ITU is the international organization that is primarily responsible for the coordination and regulation of international telecommunication. It is the international equivalent of the U.S. Federal Communications Commission (FCC). For the history of the ITU see GEORGE ARTHUR CODDING, JR., *THE INTERNATIONAL TELECOMMUNICATION UNION* 131-79 (1952). Indeed, part of ITU's mission is to work towards the goal of developing telecommunications networks and services in all countries, especially developing countries by providing information and advice on policy and structural options; by promoting the development and expansion of telecommunication networks; by promoting and coordinating programs to accelerate transfer of technologies to developing countries; and to "give special assistance to the least developed countries." See International Communication Union, Final Act of the Additional Plenipotentiary Conference 1992, art. 14.

318. *INT'L COMM'N FOR THE STUDY OF COMMUNICATION PROBLEMS, MANY VOICES, ONE WORLD: TOWARDS A NEW MORE JUST AND MORE EFFICIENT WORLD INFORMATION AND COMMUNICATION ORDER* (1980). Recently, the ethics of globalization, the idea of one world with many voices, was also explored by the noted philosopher, Peter Singer. See generally PETER SINGER, *ONE WORLD: THE ETHICS OF GLOBALIZATION* (2002).

319. See Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, *supra* note 177.

unimpeded flow of such information across national boundaries is important for a globalized and increasingly interconnected international society and for the cultivation of internal freedom. To some extent this will be incorporating the ideas found in the various freedom of expression provisions of international and regional human rights documents such as Article 19 of the Universal Declaration and International Covenant on Civil and Political Rights (ICCPR) and Article 10 of the European Convention for the Protection of Human Rights.³²⁰ Those documents indicate that there is an overlapping consensus about the value of unimpeded flow of international news both for the cultivation of internal self-determination and for the process of defining a common lifeworld on the international plane.

It seems clear why the unimpeded flow of international news is important for the purpose of cultivating internal self-determination. International news connects citizens to other countries and systems, allowing them to see how others with similar problems and issues deal with them. Put simply, citizens of a country may, due to information that they have gotten through the international media, realize that there are alternative ways of organizing government or other institutions. The information may serve as the benchmark by which citizens will judge the performance of those who govern them and the institutions that they inhabit. Even if not a benchmark, it certainly will serve as a frame of reference.

As to the importance of the free flow of international news for the cultivation of a common lifeworld, such a state of affairs along with the existence of indigenous communication structures in the less developed countries (developed through programs such as the IPDC) will make it likely that the common lifeworld that we will inhabit, the international community that we will imagine and shape, will be constituted through the narratives of various cultures, systems, and regions. Indeed the point here is that the emergence of the common lifeworld requires, paradoxically, the initial pluralization of that lifeworld. In the same way that "cosmopolitan citizenship" in the Kantian sense could be possible only against a background of "the citizen's attachment to a specific republic," the development of a multicultural common lifeworld will require the existence and importance of local cultures to which individuals are attached.

The second objective of the agreement would be to prohibit the flow of information about which there is overlapping consensus that such information merits no protection. As I noted earlier, child pornography is perhaps a good example of that, but there are others.

320. See ICCPR, *supra* note 66, art. 19; ECHR, *supra* note 66, art. 10. Article 13 of the American Convention on Human Rights provides for similar protection of freedom of thought and expression. American Convention, *supra* note 292, art. 13.

Of course, the consequence of adopting such prohibition is that parties to the convention will be required to enact procedural provisions necessary for implementing the relevant provisions of the convention. The Convention on Cybercrime may provide a good example.³²¹ The Convention, which was adopted in 2001 by members of the Council of Europe, which includes the United States, requires a signatory state to “adopt such legislative and other measures as may be necessary to establish [certain acts] criminal offences under its domestic law.”³²² Indicating an overlapping consensus about the excludability of child pornography, the Convention makes it a crime to produce child pornography for purposes of distribution or making it available for others to view.³²³ I think there is such a consensus worldwide that an international convention could easily follow the Cybercrime Convention in prohibiting the production and international circulation of such information.³²⁴

The third objective of a comprehensive international agreement in this area is to provide for a framework that will enable the state, consistent with the procedures in place within the state itself, to exclude information about whose value there are reasonable international differences. Sexually explicit material directed at adults, or the gratuitously offensive portrayals of objects of religious veneration, are good examples of that. This, of course, already happens at the regional level. As the European Court of Human Rights observed in *Otto-Preminger-Institut v. Austria*,³²⁵ the reason why states should be provided a wide margin of appreciation in relation to information of this sort is that “there is no uniform conception” of morality or of “the significance of religion in society.”³²⁶ If, as the European Human Rights Court observed, there is no consensus within Europe about these matters, it is even more certain and less puzzling that such consensus does not exist on the international level. It goes without saying that the traditions and cultures that define our world are more complex and varied than

321. Convention on Cybercrime, *supra* note 298.

322. *See id.*; see also Jonathan Band, *Convention Raises Issues for ISPs*, NAT'L L.J., July 15, 2002, at B16.

323. *See* Convention on Cybercrime, *supra* note 298, art. 9.

324. Even in the United States, which is perhaps the most protective of free speech, child pornography is generally said not to enjoy First Amendment protection. To be sure, there is an outer limit to such prohibition. Thus, in *Ashcroft v. Free Speech Coalition* the U.S. Supreme Court held that a prohibition on nonobscene virtual child pornography violated the First Amendment. *See* *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 240 (2002).

325. *Otto-Preminger-Institut v. Austria*, 395 Eur. Ct. H.R. (ser. A) (1994), reprinted in 15 Hum. Rts. L.J. 371 (1994).

326. *Id.* at 376. The ICCPR has limitations within it that could be said to allow restriction of such information. But the point of course is that the ICCPR as it currently exists only allows states to restrict materials for specified purposes only if the state is capable of doing it unilaterally.

those that define a region such as Europe. Thus, there is a need to provide for an international framework to ensure that nations and communities with differing comprehensive views of the world will not be subjected to communication that they can reasonably view as undermining a central aspect of their reasonable comprehensive views, just because they are unable to restrict it unilaterally because of the nature of new communication technologies.

Another example may be what can be referred to as racist or hate speech.³²⁷ There is no international consensus as to how the balance is to be struck between liberty and equality, although the balance may favor equality.³²⁸ An international agreement should therefore enable national communities to regulate such speech in a manner consistent with how they would wish the balance between liberty and equality to be struck. In a defamation case, involving the Internet, before the High Court of Australia, Justice Michael Kirby, in a concurring opinion made the point well.³²⁹ "The law in different jurisdictions, reflecting local and legal cultural norms, commonly strikes different balances," he concluded.³³⁰ Even more directly, the

327. For a description of hate or racist speech see Henry Louis Gates, Jr., *Critical Race Theory and Freedom of Speech*, in *THE FUTURE OF ACADEMIC FREEDOM* 119-59 (Louis Menand ed., 1996). See generally Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989); Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267 (1991).

328. For example, most European Countries prohibit racist speech and the selling of Nazi memorabilia or other items that are sympathetic to Nazism or constitute holocaust denial. France, for example, has such a law (Section R645-1 of the French Criminal Code). Indeed, only a few years ago a French court (High Court of Paris) relied on such a law to require Yahoo! to block access in France of all Yahoo! auction sites that sell Nazi memorabilia or other items that are sympathetic to Nazism or could be construed as holocaust denial. TGI (Tribunal de Grande Instance) de Paris, *Ordonnance de Référé* le 22 mai 2000, (No. RG: 00/05308, 00/05309) available at <http://www.juriscom.net/txt/jurisfr/cti/tgiparis20000522-asg.htm>. The interim order of May 2000 was affirmed by the court on November 20, 2000. *Ordonnance de Référé* le 20 Novembre 2000 (No. RG: 00/05308, 00/05308). In Canada, too, hate speech does not receive constitutional protection. See *Regina v. Keegstra*, [1991] 2 W.W.R. 1. In that case a high school teacher was convicted of "communicating statements [that] willfully promote hatred against any identifiable group." The individual was convicted for conveying an anti-Semitic message to his students.

On the other hand, most of what is denominated as racist speech would be protected speech under the First Amendment of the U.S. Constitution. Or, at least, such a speech cannot be singled out for special burden. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 378 (1992). More to the point, a U.S. District Court declined to enforce the decision of the French court against Yahoo! to which I have referred in this note on the ground that to do so would violate the First Amendment of the U.S. Constitution. See *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'antisemitisme*, 169 F. Supp. 2d 1181, 1192 (N.D. Cal. 2001).

329. *Dow Jones & Co. v. Gutnick* (2002) 77 A.L.J.R. 255, ¶ 117 (Kirby, J., concurring).

330. *Id.*

ICCPR Committee made a similar point in relation to speech.³³¹ As the Committee observed in *Faurisson v. France*,³³² the negative impact of unregulated hate speech is going to depend on the specific history of the country and the conditions that prevail in the polity.³³³ Whether the particular community can manage to deal with racist speech is going to depend on a number of factors such as how entrenched and widespread the hate for a particular group in the community is, how widely available and effective the channels of counterspeech are, and how vulnerable the disfavored group is. The particular national community must be allowed to make the judgment as to what procedure to follow given the particular history of the country and the resources available for counterspeech.³³⁴

331. See *Faurisson v. France*, U.N. GAOR, Hum. Rts. Comm., 58th Sess., Annex, at 84, U.N. Doc. CCPR/C/58/O/550/1993 (1996), reprinted in HENRY I. STEIGER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS AND MORALS* 755-59 (2d ed. 2000).

332. *Id.* In this case the Human Rights Committee affirmed the conviction of a former literature professor under a French law for contesting that the Holocaust did in fact occur. In a concurring opinion, Committee members Elizabeth Evatt and David Kretzmer observed that “[t]he notion that in the conditions of present-day France, Holocaust denial may constitute a form of incitement to anti-semitism cannot be denied.” *Id.* ¶ 6. One can disagree with the empirical assessment here, but I think the general sentiment that the particular condition of the country may determine whether such legislation is necessary or not is a valid and defensible sentiment.

333. One could, however, reasonably disagree that the history of France or the current condition that prevails in the country required the sorts of legislative response from the French government that was challenged before the ICCPR Committee. But the point is that the impact of such speech should not be considered in an abstract way as if all communities and countries occupy the same environment and are subject to the same conditions and are defined by similar tendencies.

334. In this regard it seems to me that the decision of the federal district court in California to refuse to enforce a French court order against Yahoo! on the account that doing so would be violative of the First Amendment is rather problematic. See *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L’Antisemitisme*, 169 F. Supp. 2d. 1181, 1182 (N.D. Cal. 2001). In that case, the court concluded thus:

[T]he French order’s content and viewpoint-based regulation of the web pages and auction site on Yahoo.com, while entitled to great deference as an articulation of French law, clearly would be inconsistent with the First Amendment if mandated by a court in the United States. . . . Although France has the sovereign right to regulate what speech is permissible in France, this Court may not enforce a foreign order that violates the protections of the United States Constitution by chilling protected speech that occurs simultaneously within our borders.

Id. Essentially, this is an extraterritorial application of the First Amendment. To say that courts in the United States will not enforce a judgment that violates the First Amendment if the speech in question occurred simultaneously within the United States is to virtually rule out any enforcement of any judgment from anywhere regarding “speech” to the extent that the Internet is its source. This is so because there are likely to be a U.S. audience physically located within the United States among the recipients of such information. Perhaps the courts’ reading of the First Amendment should take note of the changed world in which we live. The notion of extraterritorial application seems to be premised on the world that is quickly disappearing—the

Interestingly, however there has been an attempt by the Council of Europe to include the prohibition of "racist and hate speech from the Internet by adding a protocol . . . to its cybercrime convention."³³⁵

There is a procedural dimension to the substantive issue that I have described in the last two paragraphs. Even if there is an agreement on the substantive question, an agreement on what sorts of issues are best left to the states to regulate, there is still the difficult procedural question. Whose law would or should apply when a particular transnational act raises the potential of the assertion of multiple jurisdictions?³³⁶ The obvious and yet not uncontroversial answer might be that the multilateral agreement must contain a choice of law regime³³⁷ that can serve the twin goals of conflict of laws: certainty and fairness. A multilateral conflict of law rule in the area has precedent from which to draw.³³⁸ The Hague Conference on Private International Law and the Rome Institute for the Unification of Private Law (UNIDROIT) might provide such precedent.³³⁹ Just as there are numerous accords on conflict of law rules governing a

prominence of physical borders. Also, it seems to me that the question should be asked as to who should carry the cost—the server or the nation-state whose laws are being violated by a product that the server provides—of ensuring that citizens of the United States do not lose their First Amendment right. A strong argument could be made that the entity that is benefiting from a business venture should carry the cost (it is the cost of doing business) and that may encourage that entity to develop and employ procedures that will enable it to conduct business without inflicting cost on others. See Joel R. Redienberg, *Yahoo and Democracy on the Internet*, 42 JURIMETRICS J. 261 (2002).

335. Paul Meller, *Europe Moving Toward Ban On Internet Hate Speech*, N.Y. TIMES, Nov. 10, 2001, at C3. Not surprisingly, the United States, which is a signatory to the Convention, apparently resisted the move to include hate speech in the categories of prohibited speech on the ground that that would be inconsistent with the First Amendment.

336. Think of the following defamation hypo that I gave earlier in this article. Assume that an Australian posts a message on the Usnet that defamed a U.S. citizen. The newsgroup to which the message was posted was moderated by a New Zealander whose data are stored in an English computer. We could complicate the hypothetical further by, for example, adding to the story that the communication was made while the Australian was in France at the time accessing a French computer and the American was on vacation in Spain and was accessing the news group through a Spanish computer. For a less complicated version of the problem see *Dow Jones & Co. v. Gutnick*, 77 A.L.J.R. 255 (2002). See also *Yahoo!, Inc.*, 109 F. Supp. 2d at 1181. The *Yahoo!* case is actually one of enforcement (recognition) of judgment rather than one of choice of law. *Id.*

337. The Restatement (Second) of Conflicts of Laws sets the reasons as to why there is a need for choice of law rules: "The world is composed of territorial states having separate and differing systems of law. Events and transactions occur, and issues arise, that may have a significant relationship to more than one state, making necessary a special body of rules and methods for their ordering and resolution." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 1.

338. See Matthew R. Burnstein, Note, *Conflicts on the Net: Choice of Law in Transnational Cyberspace*, 29 VAND. J. TRANSNAT'L L. 75, 113 (1996).

339. See *id.*

variety of areas, such as traffic accidents among nationals of different countries, an agreement could be reached to unify choice of law rules to resolve disputes arising from transnational communication.³⁴⁰

Now, the conventional choice of law approach may lead to unfairness. This could happen in at least two circumstances: in disputes in cyberspace where there is harm to non-cyber parties who have no reason to suspect that the disputes will be governed in account of cyberspace, and when there are data havens which immunize the potential defendant from any action.³⁴¹ But I think even with those concerns and shortcomings a reasonably workable choice of law regime could be developed. Perhaps the U.S. Supreme Court decision in *Lauritzen v. Larsen*³⁴² could form the point of departure for developing such a regime. In *Lauritzen* the issue was which country's law should apply in a maritime dispute when there are conflicts between the laws of the two countries on the subject.³⁴³ The Supreme Court held that under those circumstances the Court must balance a number of factors such as the place of the wrongful act (*lex loci delicti commissi*), the law of the flag (the analogy in cyberspace would be the law of the state in which the access provider is located, its domicile), the allegiance or domicile of the plaintiff, the allegiance of the defendant, the place of the contract, the inaccessibility of the foreign forum and the law of the forum.³⁴⁴ While imperfect, this approach may provide the basis for constructing a reasonable conflict of laws regime.

The fourth objective of such an agreement will be to prescribe international minimum standards to apply with regard to the *outflow* of certain kinds of information. The movement of personal data is a good example of that. In the information age, the collection and processing of data by private business entities have become important (and lucrative) aspects of business. They have also become very

340. Justice Michael Kirby, currently a member of the High Court of Australia, the highest court in the country, suggested a similar approach a few years ago in a report about transborder data flow among OECD countries. OECD countries, he suggested, ought to "work towards the development of principles . . . to govern the applicable law in the case of transborder (data) flows." Françoise Gilbert, *Organization for Economic Cooperation and Development (OECD) Recommendations of the Council Concerning Governing the Protection of Privacy and Transborder Flows of Data*, Practising Law Institute, Corporate Law and Practice Handbook Series, PLI Order No. B0-0102, July-Aug. 2003, at 333.

341. Data havens are countries that provide favorable laws to Internet users or data storers akin to flags of convenience in the admiralty context.

342. *Lauritzen v. Larsen*, 345 U.S. 571 (1953).

343. *Id.* at 573.

344. *Id.* at 583-93. A later Supreme Court case reaffirmed the *Lauritzen* decision but by reading it as having established a general principle that could be characterized as the "most significant relationship" test rather than for the exhaustiveness of the factors listed in that case or for the proposition that those factors be applied mechanically. See *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306, 308-09 (1970); see also LUTHER L. MCDUGAL ET AL., *AMERICAN CONFLICTS LAW* 480-85 (5th ed. 2001).

inexpensive.³⁴⁵ As part of their transborder business interests, transnational companies move all sorts of data about their business from one branch in one country to another in another country or to the headquarter of the business entity which may be located in yet another country. Indeed, the data may even be moved to a country where there is no branch of the particular business. To take personal data as an example, a multinational company may collect data about its employees (health, financial, employment history, etc.) and either move that data to its headquarters in another country as part of an attempt to improve managerial efficiency, or the data may be moved to a different country for purposes of processing it, to put it in a reasonably readable form, or even simply for the purpose of selling such data to another firm which seeks to sell its products or services to people with certain characteristics.³⁴⁶

There are good reasons why there should be a minimum international standard concerning the movement of certain data, such as personal data, across national boundaries. Take personal data as an example. It is one of the most sensitive issues as well as one that best exemplifies how the information revolution is undercutting the capacity of the nation-state to perform one of its most basic functions: protecting the welfare and privacy³⁴⁷ of its citizens, which may be damaged by the misuse or disclosure of such data to third parties. Unilateral action by a state to provide protection is unlikely to succeed. Given current technology, transnational companies can move such data without the government knowing that such has been the case.³⁴⁸ Indeed, information is often gathered and processed in a way that is invisible to the individual concerned.

345. See generally Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 STAN. L. REV. 1193 (1998) (discussing the problem of personal data specifically generated in the course of executing a cyberspace transaction).

346. See U.S. DEP'T OF COMMERCE, *PRIVACY AND THE NII: SAFEGUARDING TELECOMMUNICATIONS-RELATED PERSONAL INFORMATION* 15-16 app. (1995) (Marketing Profiles).

347. Ethan Katsh defines "privacy" as the power to control what others may know about you. See M. ETHAN KATSH, *LAW IN A DIGITAL WORLD* 228 (1995).

348. Many multinational companies, mainly American, have argued that the unimpeded flow of data is in fact already protected under international norms. They cite the free flow of information provision of the ICCPR. See ICCPR, *supra* note 66, art. 19. There are two responses to this claim. First, it is rather unpersuasive to argue that commercial data is protected under Article 19 of the ICCPR. It is almost certain that personal information was not contemplated to be part of the speech Article 19 was to protect. Second, even if it could be argued that there is conceptual and historical plausibility to such a contention, it seems clear that the presence of another article in the same covenant pushes in a different direction, towards protection of privacy. Article 17 provides that "[n]o one shall be subjected to arbitrary or unlawful interference with his privacy" and that "[e]veryone has the right to the protection of the law against such interference or attacks." *Id.* art. 17.

Even if governments were aware of it, many of those governments are likely to be reluctant to adopt stringent requirements as to how such personal data may be collected, processed, or transported outside the country. This may be because of what Professor Michael Froomkin calls "regulatory arbitrage,"³⁴⁹ the ability of a multinational to play one country against another so as to ensure that the rules it prefers are adopted by the state within which it is located or plans to locate its business. Put simply, the fear that such requirement may simply lead to a transnational company moving its business from the regulating country is likely to act as a disincentive to adopting a more stringent regulatory regime. Given the importance (and power) of multinationals in the lives of many nations, the adoption of stringent regulatory structures may not be risks that many countries are prepared to take.

If there isn't international minimum standard, there may be a race to the bottom among nation-states in terms of the level of protection afforded to such data. There is a risk that states will compete with each other so as to provide the least restrictive rules and hence attract the most commercial activity.³⁵⁰ Indeed, this has often been a problem with nation-states with federal structures where the constituting units often compete in a race to the bottom.³⁵¹ Often, central governments have responded with a legislative or judicial regulatory structure so as to ensure that such a race does not have negative consequences on individual rights and welfare.³⁵² In any case, in relation to federal structures even if there are no interventions from central governments such a race may be tolerable given the option (theoretical, as it may often be) that people have the right to move from one federal unit to another in the event that they did not agree with the level of welfare or protection that is afforded them. There is no such option at the international level, at least one

349. See A. Michael Froomkin, *The Internet as a Source of Regulatory Arbitrage*, in *BORDERS IN CYBERSPACE* 129, 142 (Brian Kahin & Charles Nesson eds., 1997).

350. Of course without international agreement or arrangement theoretically there could also be a race to the top where there will be a contest among states as to who can adopt the toughest rule that will form the basis of an international rule. Although the idea of providing more protection for individuals is attractive and may not be regarded as a problem, I think a race even to the top should be viewed with suspicion. It is likely that under such circumstances such rules are going to be set by economically powerful nations. Powerful nations will set the rules for other nations even when the circumstances in other countries will require that the balance be struck in a different way. From the point of view of national sovereignty, this should not be any less troublesome. In the same way that a German state ought not to determine as to what an Internet search engine is allowed to provide to its customers worldwide, it should not be the case that one country determines as to what regulatory regime applies to interborder flow of personal data.

351. See generally Kirsten H. Engle, *State Environmental Standard-Setting: Is There a "Race" and Is It "To the Bottom"?*, 48 *HASTINGS L. J.* 271 (1997).

352. *Id.* at 367-74.

cannot do it at will. One cannot immigrate to the country he or she believes provides the best protection unless one is deemed desirable and hence admissible by that country. Globalization may have made territorial borders speedbumps for purposes of information and capital flows, but the territorial gate is still intact when it comes to the free movement of people, with certain exceptions, such as the countries of Western Europe.

The international agreement should provide not only minimum standards, but also prescribe an equivalency standard. By "equivalency" standard I mean to refer to the idea that no data shall be transferred out of one country unless the country to which the data is transferred has laws that provide an equivalent level of protection to that provided by the country of origin. Indeed, the Council of Europe endorsed such an approach in a 1981 convention.³⁵³ The Council of Europe is not the only intergovernmental body that has attempted to deal with privacy issues raised by transborder data flow.³⁵⁴ The European Union has also adopted a directive requiring equivalency as a standard for data processing within member states as well as "an adequate level of protection" if the data were transferred outside the Union.³⁵⁵ There have been criticisms about one or another aspect of both the Convention and the Directive, but the ideas of minimum and equivalency standards are regarded as good ones, and I think such requirements on the international level would be enormously helpful.

Indeed, in testimony before the U.S. Congress, Professor Stefan Rodotà, the Chairman of the Italian Data Protection Commission who also serves as the Chairman of the Data Protection Working Group established by the European Parliament, made the point that there is "a case for an International instrument on data protection."³⁵⁶

353. See Convention, *supra* note 127. The Convention is not directly binding on signatory states, but it requires those states to adopt legislation that will give effect to the principles of the convention and to provide for safeguards for the processing of personal information that are common to member states.

354. *E.g.*, Council Directive 95/46/EC of Oct. 24, 1995 on the Protection of Individuals with Regards to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O. J. (L 281).

355. See *id.* at 31 ("The Directive has been implemented in 11 out of the 15 European countries"); see also *The EU Data Protection Directive: Implications for the U.S. Privacy Debate: Hearings before the Subcomm. on Commerce, Trade and Consumer Prot. of the House Comm. on Energy and Commerce*, 107th Cong. 1, 12 (2001) [hereinafter *Implications for the US Privacy Debate*] (testimony of Professor Stefan Rodotà).

356. *Implications for the US Privacy Debate, supra* note 355, at 13 ("In my opinion, there is therefore, a case for an International instrument on data protection, as recently stressed in the: Venice declaration' by all the colleagues convened at the 22nd International Conference on Privacy and Data Protection").

Professor Joel Reidenberg made a similar point in his testimony before the same congressional committee.³⁵⁷ He observed, “[m]any of the core differences among nations on the implementation of privacy principles touch upon fundamental governance and sovereignty questions. These types of problems will only be resolved at an international treaty level like the WTO.”³⁵⁸ Professors Reidenberg and Rodotà may settle for a more specialized and focused treaty than the more comprehensive agreement that I have advocated in this Article, but the important thing is that we are all agreed that the only way to resolve many of the issues raised by the communication revolution is through an international agreement.

Even if people agree with the contention in this article that the idea of a comprehensive international agreement on the flow of information is desirable as an abstract matter, they may think that it is politically infeasible. It may be so. Given the multiplicity of traditions, cultural outlooks, and economic and political systems, it will not be easy to arrive at an agreement that will be acceptable to all or even most. But that is always the case with any multilateral agreement. Yet there have been numerous multilateral agreements.³⁵⁹ To be sure the process leading to such agreements is often a tedious and slow process, but that is to be expected.³⁶⁰ In any case, the real risk of chaos and conflicts resulting from inconsistent regulatory regimes should counsel us that we should not use failure as an excuse not to try. To be sure, when co-existence among nation-states is organized through an international agreement, it does not follow that conflict is therefore precluded. Rather, conflict is patterned. And there is something to be said for that.

Even if a comprehensive and binding agreement appears to be unattainable in the immediate future, the international community could take steps towards that goal by advocating what the OECD has been promoting for a few years in relation to various subjects.³⁶¹ The

At the international level, I think that it will be particularly important for us to push toward an international treaty to deal with privacy. Privacy implicates core democratic values and markets, market issues, and I think only a treaty will enable us to resolve many of the conflicts that will go—that we will see in the future.

Id. at 67 (testimony of Joel R. Reidenberg).

357. *Id.*

358. *Id.* at 76.

359. I have referred to the Outer Space Treaty. *See supra* note 177. One could also refer to many international agreements including those undertaken by WIPO and the U.N. Commission on International Trade Law (UNCITRAL).

360. For example the WIPO Copyright Treaty was adopted after almost a decade of meetings. The Treaty adapted copyright rules to digital works. *See* Pamela Samuelson, *The U.S. Digital Agenda at WIPO*, 37 VA. J. INT'L L. 369, 375 (1997).

361. *See, e.g.*, OECD, Copyright Policy: The Guidelines and the Issues, The OECD Cryptography Policy Guidelines And The Report On Background and Issues of

international community could agree on general policy guidelines such as those that I have advocated in this section with the purpose of getting those guidelines to inform the rules that states adopt. It is true that general guidelines might be ignored by states and hence may not lead to uniform legal regimes, but I think four factors suggest that it may in fact be worth adopting such guidelines.

First, there is a possibility that a sufficient number of states may in fact implement those guidelines to make them effective. Second, the implementation of those general guidelines by states may offer us a chance to assess how those principles work in practice and what adjustments might need to be made in the event that agreement on a detailed and binding document becomes viable. Third, even if a binding international document cannot be adopted even after the implementation of the guidelines by various states, the actions of these states may in fact provide the basis for the emergence of customary law. Fourth, even if they are not legislatively or judicially implemented by many states, the existence of the guidelines may in fact provide the moral ground on which critics of the status quo can stand and through which they can continue to challenge the current regime. Indeed, in many ways this is similar to how international human rights norms, by and large, work. Even though we are still very far from having effective mechanisms of enforcement, that fact has not stopped the burgeoning of human rights agreements.³⁶² Many would suggest that the proliferation of such agreements has had positive impact on the conditions of human rights worldwide.³⁶³ This is so, partly because the norms embodied in these agreements provide critics and victims the vocabulary and moral standing to challenge and criticize the actions of governments that are viewed as inconsistent with those norms.

This last observation points to an important but often overlooked function that the law performs. As many, and most prominently Robert Cover, have argued, law is not merely an instrument of coercion but also a system of narrative that enables us to imagine alternative worlds.³⁶⁴ Even when a norm is not (or would not be) enforced by public authorities, it may still perform the role of

Cryptography Policy, OECD Doc. OCDE/GD(97)204 (1997); *see also* OECD, Recommendations of the Council Concerning Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data, OECD Doc. C8058 (Final) (Oct. 1, 1980), available at <http://www.oecd.org> (recognizing that countries, regardless of their specific laws, have a common interest in protecting privacy).

362. *See* MILLS, *supra* note 4, at 126-65 (discussing humanitarian access and intervention in the emerging global order).

363. *See id.*

364. Robert M. Cover, *The Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 9-10 (1983).

providing, often for the opposition and those on the margin, the means of thinking about alternative worlds.

To summarize, in this section I have argued that the idea of a thick state is no longer available because of increasing globalization of economic, political, and social life. Nor is it attractive; for in the name of a thick state and external self-determination, many regimes, especially those from developing countries, have denied and will continue to deny the right of internal self-determination.³⁶⁵ Instead of a thick state, I have advocated the notion of a thin state as a better way of reconciling the demands of external and internal self-determination. I have suggested that, in relation to the international flow of information, two principles may organize the institutions of a thin state: the principle of plurality (the pluralism within) and the idea of subsidiarity (international pluralism). The former suggests that the legitimate state is one that is tolerant, and even encouraging, of pluralism within its borders while the latter deals with the threat of homogenization that may, paradoxically, be the consequence of pluralization within the nation-state.

The institutional structures that I suggested in this section are not by a long shot exhaustive. They are meant simply to give some indication as to how the two principles—plurality and subsidiarity—could be worked out in practice. There are probably numerous other ways of puzzling through the two principles in institutional terms. The important thing is that we start thinking about concrete proposals that will give practical dimension to the idea of a thin state with which we have to reconcile ourselves in the era of the communication revolution and globalization. Jurisdiction will continue to become the rhetorical site within which the shifting conceptions of community will be discussed in the age of globalization that continues to be supported and accelerated by the communication revolution.

V. CONCLUSION

The prominent international legal scholar, Thomas Franck, opens one of his books with these words: "Never . . . have notions of sovereignty demanded as much cautious rethinking as now."³⁶⁶ Never has any process made more contribution to the need for such rethinking than the communication revolution. The communication revolution is as big and as profound as any we have had in our

365. See Addis, *supra* note 90, at 491.

366. THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* 3 (1995).

history.³⁶⁷ It has far-reaching impacts on our lives and our institutions. Time and distance, two phenomena that have defined our view of ourselves and of our relationship with our environment, are shrinking at an amazing speed.³⁶⁸ One consequence of the impact on time and distance has been on how we view communities and which communities we think deserve our allegiance, cultivation, and protection. The Internet, satellite, and other forms of communication have increasingly allowed individuals to form, and be loyal to, communities whose members are physically located in different corners of the globe.

Even more to the point for our purpose, ethnic and linguistic groups whose territories have been divided among neighboring countries are now able to sustain ethnic and linguistic solidarity by utilizing the new communication technologies. The Kurds, for example, have been able to cultivate and sustain Kurdish nationalism by using satellite communications that connects Kurds both within the divided territories and with those in the Diaspora.³⁶⁹ Of course, the cultivation of Kurdish identity will be to some extent at the expense of the supposed identities of territorial states such as Iraq or Turkey, two countries that have sizable Kurdish groups. Indeed, the Kurdish story could be repeated in relation to other ethnic and linguistic groups in other parts of the world.

One of the most visible impacts of the communication revolution, and for my purpose here the most important, has, therefore, been that on the territorial state. The revolution in the development of communication technologies and the unprecedented transnational communication that it has made possible are seriously curtailing the power of the territorial state, its claim that it has the final authority to prescribe, adjudicate, and enforce laws within its physical borders. To be sure, there have always been limits to what the territorial state could do in terms of adjudicating and enforcing its laws even in relation to activities and events that have effects on it.³⁷⁰ The state had to persuade either the international community or other states

367. Walter B. Wriston, former Chairman and Chief Executive Officer of Citicorp/Citibank, refers to the information revolution as "the third great revolution in history" as big as the first two, the Agricultural Revolution and the Industrial Revolution. See Walter B. Wriston, *Bits, Bytes, and Diplomacy*, FOREIGN AFF., Sept-Oct. 1997, at 172.

368. "Distance is indeed irrelevant if a stock can be sold instantaneously in New York or Hong Kong by an investor in Abidjan to one in Moscow." NYE, *supra* note 33, at 90.

369. See, e.g., Edip Yuksel, *Yes, I Am a Kurd*, 7 D.C.L.J. INT'L L. & PRAC. 359, 369 (1998).

370. See Robert McCorquodale, *International Law, Boundaries, and Imagination*, in BOUNDARIES AND JUSTICE: DIVERSE ETHICAL PERSPECTIVES 136 (David Miller & Sohail H. Hashmi eds., 2001).

through a bilateral agreement to give it assistance. This is especially the case in terms of enforcement of judgment. What is different in the information age is that the frequency with which the state would need to rely on others to enforce its validly enacted and applied laws is infinitely greater. What appeared to be the exception has now become the ordinary, a common event.

For some, this loss of authority is to be viewed suspiciously and even resisted strongly, for physical borders are seen as unambiguous good that must be protected from the threat of unrestrained and unauthorized flow of information across national boundaries. For others, the possible demise of the state is to be welcomed and even celebrated rather than mourned, for the state is viewed as a stumbling block to the achievement of liberty and international justice. State sovereignty is regarded as an undesirable speedbump on the information superhighway. Under this view, the demise of the state is seen as giving way to a democratized international civil society where the world will be treated as one scheme of association. This condition is thought to be much more conducive to the cultivation of freedom and to the achievement of international justice.

I have, however, argued in this article that these two polar opposite views misunderstand the ambiguous and even paradoxical nature of territorial boundaries, how they can simultaneously foster and inhibit freedom. William Connolly makes the point well in relation to all forms of boundaries, including territorial boundaries.³⁷¹ He writes:

Boundaries form indispensable protection against violation and violence; but the divisions they sustain also carry cruelty and violence. Boundaries provide conditions of identity, individual agency, and collective action; but they also close off possibilities of being that might otherwise flourish. Boundaries both foster and inhibit freedom; they both protect and violate life.³⁷²

Once this ambiguity is recognized then the task becomes one of imagining institutional arrangements that will minimize the sacrifices and violence that are associated with territorial sovereignty without sacrificing the advantages that territorially based communities provide. In this regard I have suggested that in this era of thick globalism the idea of a thin state may enable us to perform that task.

371. CONNOLLY, *supra* note 28, at 163.

372. *Id.*; see also McCorquodale, *supra* note 370, at 136 ("Boundaries are integral to international law. They are a cause of conflict and reason for peace. They establish order and lead to disorder. They provide a protection and a weapon. They include and exclude. They define and divide. They are real and imagined.").

The claim that the territorial state is on its final legs may be exaggerated,³⁷³ but it is not an exaggeration to say that the traditional view of territorial sovereignty is seriously destabilized by the communication revolution. The current paradigm whose theoretical foundation is thick statism will not be able to support international legal institutions in the twenty-first century. To paraphrase George Orwell, there is a thin state inside every thick state.³⁷⁴ And perhaps the thin state will enable a reconciliation between the two seemingly incompatible tendencies that are encouraged by globalization generally and the communication revolution specifically, the emergence of universalist commitments and ideologies accompanied by intense pursuits of the politics of difference. In any case, my hope is that this article will form part of the conversation that will be needed to reimagine the notion of sovereignty in the light of the challenges and opportunities presented by the communication revolution.

373. "If we pause to ask ourselves, at the dawn of the twenty-first century, which political institutions constitute the world's major depositories of power, we would have to reply: states. It is the same answer that any seasoned observer would have given in 1815." Archibugi, *supra* note 146, at 137.

374. "There is a thin man inside every fat man just as . . . there's a statue inside every block of stone." GEORGE ORWELL, *COMING UP FOR AIR* (1950), *quoted in* MICHAEL WALZER, *THICK AND THIN: MORAL ARGUMENT AT HOME AND ABROAD* xi (1994).

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