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## War Over the Airwaves: A Comparative Analysis of U.S. and Cuban Views on International Law and Policy Governing Transnational Broadcasts

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### Cover Page Footnote

J.D., 1995, B.A., 1992, The Florida State University; Associate, Zarco & Pardo, Miami, Florida.

# WAR OVER THE AIRWAVES: A COMPARATIVE ANALYSIS OF U.S. AND CUBAN VIEWS ON INTERNATIONAL LAW AND POLICY GOVERNING TRANSNATIONAL BROADCASTS

OMAR JAVIER ARCIA\*

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[T]he communication of an idea, whether by speech or writing, is as much an act as is throwing a brick, though different muscles are used to achieve different effects.<sup>1</sup>

## I. INTRODUCTION

It can scarcely be contested that radio and television broadcasting play a critical role in shaping and defining contemporary international relations. Over eighty countries broadcast some 22 thousand hours of international programming to over 250 million listeners daily.<sup>2</sup> Nowhere is this virtual "war of ideas" more intense than between the ninety-mile stretch of airspace separating the southernmost tip of the United States and the coast of Cuba. This

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1. *Chandler v. United States*, 171 F.2d 921, 938 (1st Cir. 1948), *cert. denied*, 336 U.S. 918 (1949) (affirming a treason conviction of a U.S. citizen for broadcasting anti-American propaganda from a German station).

2. HOWARD H. FREDERICK, *CUBAN-AMERICAN RADIO WARS* 1 (1986).

"war" is much more than a mere technological battle. It is a daily proclamation of two hopelessly irreconcilable philosophies: capitalism and communism. Only by understanding these two competing ideologies will one be able to evaluate the justifications each side advances for their broadcasting activities.

Besides these political considerations, the analysis is further complicated by the very nature of radio and television. Although physical objects, such as aircrafts, can be directed away from the territory of a given state, the boundaries of radio and television signals are undefinable. Thus, once a signal is sent out, it cannot be controlled, retrieved or directed away from the receiving nation. The consequence of this unique situation is that a radio signal unintentionally crossing into another nation's territory may be viewed by the receiving nation as a volitional act by the broadcasting nation. Further, the receiving nation may interpret the signal as containing unacceptable political, social and economic overtones. The response of many nations is to either interfere with the incoming signal or broadcast another signal containing an equally powerful but opposite message. Ultimately, either option can cause severe diplomatic tensions between nations.

The purpose of this Article is three-fold. It presents an overview of the history leading up to the present U.S.-Cuban conflict over the airwaves. It also sets forth the international law documents pertaining to U.S. and Cuban use of the international airwaves and discusses the underlying ideological philosophies and relevant domestic law of each nation with respect to freedom to impart and receive information. Finally, this Article compares and analyzes the views of the U.S. and Cuban governments on the right to the free flow of information and discusses whether such a right is superior to the rights of a sovereign nation to protect itself from unwanted broadcasts.<sup>3</sup>

## II. FOCUSING ON THE PROBLEM: AN OVERVIEW OF THE U.S. AND CUBAN WAR OVER THE AIRWAVES

Before analyzing contemporary U.S. and Cuban perspectives on transboundary broadcasts, it is essential to understand what has transpired over the last thirty-five years culminating in the present turmoil between these two nations. Understanding the genesis and history of the conflict will also be helpful in formulating possible solutions.

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3. Stephen D. Bayer, Comment, *The Legal Aspects of TV Martí in Relation to the Law of Direct Broadcasting Satellites*, 41 EMORY L.J. 541, 543 (1992).

Present conflict over the airwaves began with the ratification by the U.S. Senate of the North American Regional Broadcasting Agreement ("NARBA")<sup>4</sup> on February 23, 1960. The United States, Cuba, Canada, the Bahamas, Jamaica, the Dominican Republic and Haiti were all signatories.<sup>5</sup> NARBA not only granted the majority of clear-channel frequencies to the United States but also guaranteed the United States a majority of the total frequencies on the radio wave spectrum.<sup>6</sup>

Less than a month after the U.S. Senate adopted NARBA, President Dwight D. Eisenhower approved a covert action to commence a powerful anti-communist, anti-Castro propaganda radio campaign.<sup>7</sup> This campaign came to be known as "Radio Swan." On May 17, 1960, under the direction of the United States Central Intelligence Agency, Radio Swan began broadcasting on both shortwave and AM frequencies.<sup>8</sup>

The initial response by Cuban officials was to counteract U.S. broadcast efforts by broadcasting their own communist propaganda.<sup>9</sup> The Cuban government's first anti-American broadcast service was "La Voz de INRA" ("The Voice of INRA" — The National Institute of Agrarian Reform), broadcast on the same frequency as Radio Swan.<sup>10</sup> On January 3, 1961, the inevitable occurred. The United States officially broke off all diplomatic relations with the Cuban government.<sup>11</sup> This action was due, at least in part, to this latest conflict over the airwaves. One month later, Cuba began broadcasting what became its official government overseas service, "Radio Havana Cuba."<sup>12</sup>

As political and diplomatic tensions mounted, the CIA-sponsored "Bay of Pigs" invasion was launched on April 17, 1961.<sup>13</sup> Naturally, both sides stepped up the intensity of their broadcasts

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4. North American Regional Broadcasting Agreement, Nov. 15, 1950, 11 U.S.T. 413 [hereinafter NARBA].

5. SUBJECT TO SOLUTION: PROBLEMS IN CUBAN-U.S. RELATIONS 145 (Wayne S. Smith & Esteban Morales Dominguez eds., 1988) [hereinafter Smith & Dominguez].

6. *Id.*

7. *Id.*

8. *Id.* at 146. Although Radio Swan was transmitting on short and medium waves (AM), it was not transmitting from the U.S. mainland. Rather, Radio Swan broadcasts from Swan Island in the Caribbean. The United States claims Swan Island as a possession. This strategy cleverly avoided any violation of the NARBA, which prohibits AM transmissions from within a signatory's national borders. NARBA, *supra* note 4, 11 U.S.T. 413.

9. Smith & Dominguez, *supra* note 5, at 146.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

during the Bay of Pigs conflict.<sup>14</sup> The Cuban government sponsored a program, hosted by a fugitive black activist, called "Radio Free Dixie."<sup>15</sup> Radio Free Dixie went beyond the bounds of simple propaganda, calling on blacks in the United States to commit acts of violence and subversion against the U.S. government.<sup>16</sup>

In response to Radio Free Dixie, and only a week after the declaration by President Kennedy sparking the Cuban Missile Crisis, the U.S. National Security Council instructed the "Voice of America" ("VOA") to initiate broadcasts on the AM frequency spectrum from Florida to Cuba in apparent violation of the NARBA prohibition against transnational AM broadcasts.<sup>17</sup> During the final phases of the Cuban Missile Crisis, the CIA initiated a series of radio programs specifically targeting Russian military personnel stationed in Cuba.<sup>18</sup>

In the summer of 1963, Cuba became the first nation in the Western Hemisphere to interfere with and jam radio broadcasts.<sup>19</sup> The original objective of this strategy was to block any further transmission of the Russian-language programming to the island.<sup>20</sup> For the next seven or eight years, the intensity of the radio war between the United States and Cuba waned.<sup>21</sup> In early 1972, however, numerous unlicensed stations in South Florida began broadcasting anti-Castro messages.<sup>22</sup> These clandestine stations were created, funded and operated by Cuban exile groups and essentially replaced the Voice of America.<sup>23</sup> The Federal Communications Commission ("FCC") was unable to close down these anti-Castro stations until February 1980.<sup>24</sup>

In December 1979, the Cuban government announced its plan to make additions to its AM frequency inventory through the use of

14. *Id.*

15. *Id.* at 147.

16. *Id.*

17. *Id.* (stating that the VOA broadcasts "may involve possible violations," quoting a memo by Donald Wilson, acting director of the U.S. Information Agency, to President Kennedy); see also *supra* note 8 and accompanying text.

18. Smith & Dominguez, *supra* note 5, at 148. This radio station, named "Radio Liberty," was covertly funded by the CIA and relayed its programming from North Carolina. *Id.*

19. *Id.* Radio jamming is generally defined as "deliberate radio interference to prevent reception of a foreign broadcast." Christine M. Schenone, *Jamming the Stations: Is There an International Free Flow of Information?*, 14 CAL. W. INT'L L.J. 501 (1984).

20. *Id.* at 148.

21. *Id.* at 149.

22. *Id.*

23. *Id.* During the early part of 1973, "Cita con Cuba," a VOA program, was cut from five hours to one-half hour. *Id.* at 150. In December of 1974, the half-hour program was phased-out, and the VOA began broadcasting generic programming to Cuba. *Id.*

24. *Id.* at 150.

two 500 KW transmitters.<sup>25</sup> Three months later, after almost twenty years of feuding over the airwaves between Key West and Havana, the U.S. and Cuban governments finally agreed to discuss the volatile situation during the International Telecommunications Union ("ITU") Region II conference on medium wave (AM) broadcasting in Buenos Aires, Argentina.<sup>26</sup> The purpose of the conference was for each country to announce its frequency selections.<sup>27</sup> These selections were considered by the ITU officials and a decision on frequency allocation was delivered during a second session in Rio de Janeiro in November, 1981.<sup>28</sup> Prior to the Rio Conference, however, U.S.-Cuban bilateral talks concerning Cuban jamming efforts and radio interference were held in Washington, D.C.<sup>29</sup> These bilateral talks broke down prematurely after the Cuban delegates were notified of plans by the Reagan administration to launch "Radio Martí," an official radio station of the U.S. government allegedly created for the informational benefit of the Cuban people.<sup>30</sup> President Reagan's announcement supporting plans for Radio Martí, and its objectives, was seen by many as the catalyst which led to a second round of airwave warfare between the United States and Cuba. The only difference at this juncture was that the technology was far more advanced and carried the potential to generate greater havoc on either side.<sup>31</sup>

To demonstrate its signal jamming capabilities, Cuba jammed the Radio Martí broadcasts on August 30, 1982 with "The Voice of Cuba."<sup>32</sup> In August 1983, after a year of concerns over the ramifications of the United States broadcasting Radio Martí and broadcast jamming by Cuba, both countries held secret talks in Costa Rica.<sup>33</sup> No significant concessions were made by either side and the bilateral talks broke down, once again, under a political stalemate.<sup>34</sup>

On May 20, 1985, as scheduled, Radio Martí began broadcasting to Cuba.<sup>35</sup> That same day, the FCC requested that the International Frequency Registration Board ("IFRB"), the enforcement arm of the ITU, investigate stations in Cuba suspected of operating outside their

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25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 150-52.

29. *Id.* at 151.

30. *Id.* "Radio Martí" is named after poet and writer, Jose Martí, the father of the Cuban war of independence from Spain.

31. *See supra* text accompanying note 25.

32. Smith & Dominguez, *supra* note 5, at 152.

33. *Id.* at 153.

34. *See id.*

35. *Id.*

assigned frequency.<sup>36</sup> The FCC's actions proved futile because the IFRB lacked effective enforcement capabilities. On October 23, 1985, "Radio Mambí," a Miami-based radio station formed by members of the Cuban exile community, began transmitting anti-communist programming to Cuba.<sup>37</sup> Radio Mambí was primarily a result of the discontent felt by many Cuban exiles over the inability of Radio Martí to broadcast any significant form of anti-Castro propaganda.<sup>38</sup> Initially, Radio Mambí was heavily jammed by the Cuban government.<sup>39</sup> In response, the FCC filed a formal complaint with the IFRB charging Cuba with unlawful interference activities.<sup>40</sup> Nevertheless, by February 1986, Radio Martí increased its programming from three hours daily to seventeen and one-half hours daily.<sup>41</sup>

In July 1986, Cuban dignitaries, hoping to find some alternative means of retaliation against Radio Martí, called for a bilateral conference in Mexico City.<sup>42</sup> The United States government, however, came to the session expecting that Cuba would offer to reinstate the December 14, 1984 immigration accord<sup>43</sup> it had suspended in response to the broadcasting of Radio Martí.<sup>44</sup> The Cuban delegates, however, sought an official grant by the U.S. government for clear-channel access to U.S. AM radio frequencies.<sup>45</sup> The United States refused, and the talks collapsed.<sup>46</sup> Thus, it became evident that any future changes to U.S. and Cuban broadcast policy would have to occur under the auspices of an international regulatory entity.

Improvements in U.S. television broadcast technology, combined with an increase in the number of Cuban households with television sets, led to the next logical weapon in the U.S. broadcast arsenal: a television version of Radio Martí.<sup>47</sup> To implement this objective, President Reagan signed a bill in October 1988 creating "TV Martí."<sup>48</sup>

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36. *Id.*

37. *Id.*

38. The goal of Radio Martí is not anti-Castro, but rather, pro-Cuban. It is an attempt to deliver an authoritative source of news to the Cuban people that is "accurate, objective and comprehensive." 22 U.S.C. § 1463. Because Radio Martí is to operate under the auspices of VOA, it is bound to maintain the high standards of the U.S. Information Agency.

39. Smith & Dominguez, *supra* note 5, at 153.

40. *Id.*

41. *Id.*

42. *Id.* at 154.

43. Jose O. Salinas, *Radio Martí: Meeting the Need for Uncensored Information in Cuba*, 19 N.Y.U. J. INT'L L. & POL. 433, 451 n.99. (1987).

44. Smith & Dominguez, *supra* note 5, at 154.

45. *Id.*

46. *Id.*

47. Bayer, *supra* note 3, at 571.

48. *Id.*



On March 27, 1990, TV Martí made its debut on Cuba's channel 13.<sup>49</sup> Immediately, Cuban officials jammed the TV Martí signal by transmitting Cuban programs on the same channel.<sup>50</sup> In addition to jamming the TV Martí signal, Cuba also threatened to continue its suspension of the 1984 immigration agreement.<sup>51</sup>

As a result of complaints by the Cuban government that TV Martí was operating in violation of international law, specifically Article 35 of the 1982 I.T.U. Plenipotentiary Conference Convention, the IFRB investigated the legality of Radio Martí and TV Martí.<sup>52</sup> Following the investigation, the IFRB concluded in April 1990 that the operation of Radio Martí "is in contravention of radio regulations and requested that the United States eliminate "this harmful interference."<sup>53</sup> The IFRB also concluded that the operation of TV Martí would be in contravention of international regulations if Cuba decided to transmit through TV Martí's channel 13.<sup>54</sup> The Cuban government admitted to broadcasting through channel 13 but also alleged that it did not do so during the hours of TV Martí's transmissions and therefore Cuba failed to effectuate the IFRB finding.<sup>55</sup>

Initially, U.S. politicians feared that the continued operation of Radio and TV Martí could result in military confrontation between the United States and Cuba.<sup>56</sup> Such has not been the case. Although Radio Martí's operation was once threatened by the Cuban government's policy of imprisoning those who disseminated information heard on Radio Martí, consistent enforcement of such an initiative became an impossible burden on the Cuban government.<sup>57</sup> For similar reasons, the Cuban government attempted no similar enforcement efforts against viewers of TV Martí.

Jamming American radio and television signals has, to date, been the most politically and economically-effective tactic employed by the Castro regime.<sup>58</sup> Perhaps Castro is very much aware that American radio stations are only as successful as the number of listeners they attract. By reducing the number of possible radio listeners

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49. *Id.* at 572.

50. *Id.*

51. *Id.* at 572 n.198. This agreement would permit thousands of Cubans to enter the United States. *Id.* It had been suspended in 1985 in retaliation for Radio Martí. *Id.*

52. *Id.* at 573.

53. *Id.*

54. *Id.*

55. *Id.* at 573 n.204

56. *Id.* at 575.

57. See Salinas, *supra* note 43, at 447 (noting that over 2.13 million radios are on the island of Cuba).

58. See Bayer, *supra* note 3, at 575-76. For every million dollars the U.S. spends broadcasting information to Cuba, Cuba spends one thousand dollars blocking incoming U.S. signals. *Id.* at 576.

through jamming of U.S. stations, Castro may be injuring the American radio broadcast industry where it hurts most—financially.<sup>59</sup> Although both Radio Martí and TV Martí have become permanent fixtures of Cuban life,<sup>60</sup> frequency interference by Cuba has also become a daily concern of numerous radio stations throughout the United States.<sup>61</sup>

### III. INTERNATIONAL INSTRUMENTS AFFECTING THE FREE FLOW OF INFORMATION

A general consensus exists among nations that the validity of an international instrument largely depends on its acceptance by the nations wishing to invoke it against one another and on the intent of the signatory nations to make it legally binding.<sup>62</sup> There is, however, a complete lack of *binding* international law specifically defining the content of international broadcasts or setting forth enforceable regulatory standards applicable to both Cuba and the United States.<sup>63</sup> This explains a vast majority of the problems associated with the free exchange of information between these two countries.

Cuba and the United States have signed several international instruments dealing with communications and broadcasting.<sup>64</sup> Unfortunately, these instruments are sufficiently broad so as to allow either country to interpret the instrument's provisions according to its social and political views. These international agreements will nevertheless serve as the playing field upon which the differences in U.S. and Cuban perspectives on transnational broadcasting will manifest themselves.

59. Salinas, *supra* note 43, at 449. Some U.S. broadcasters have been forced to upgrade their equipment both to override the interference and to repair damage. *Id.*

60. *Id.* at 443. The author notes that even though the Cuban people do not outwardly admit that they listen to Radio Martí or watch TV Martí, nearly everyone, even Cuban diplomats, knows the main character of Radio Martí's soap opera "Esmeralda" and acknowledge the popularity of Radio Martí's pop music segments and TV Martí's news hour.

61. In response to the economic damage Cuba has caused and could potentially cause to U.S. stations, Congress codified a section in the Broadcasting to Cuba Act to compensate U.S. stations for damage caused by Cuban interference. See 22 U.S.C. § 1465(e).

62. EDWARD W. PLOMAN, INTERNATIONAL LAW GOVERNING COMMUNICATIONS AND INFORMATION xiv (1982); see also F.S. Ruddy, *American Constitutional Law and Restrictions on the Content of Private International Broadcasting*, 5 INT'L LAW. 102, 109 (1971) (arguing that even though the U.S. may be a signatory to a particular treaty, if that treaty somehow contravenes a specific constitutional provision, it will not be recognized by the U.S. as binding law).

63. Bruce Kessler, *Politics Among the Airwaves: An Analysis of Soviet and Western Perspectives on International Broadcasting and the Right to Exchange Ideas and Information Regardless of Frontiers*, 7 HOUS. J. INT'L L. 237, 248 (1985).

64. See North American Regional Broadcasting Agreement, Nov. 15, 1950, 11 U.S.T. 413; International Telecommunication Convention, Oct. 25, 1973, 28 U.S.T. 2495 [hereinafter ITC]; Radio Regulations, Dec. 21, 1959, 12 U.S.T. 2377.

A. *International Documents on Broadcast Content*

The leading international document recognizing the right to the free exchange of information is the Universal Declaration of Human Rights adopted by the United Nations General Assembly in 1948.<sup>65</sup> Article 19 of the Universal Declaration provides that "[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."<sup>66</sup> While the Universal Declaration on Human Rights is not legally binding on individual nations,<sup>67</sup> it was initially embraced by both Cuba and the United States<sup>68</sup> and is to be widely accepted as a general principle of international law.<sup>69</sup> While Article 19 appears to endorse the balanced flow of information, the provision is expressed in broad, general language which may be interpreted differently by both sides of the "free flow of ideas" debate.<sup>70</sup>

The right to exchange information across national borders, declared a fundamental right by Article 19 of the Universal Declaration, was officially codified as part of the International Covenant of Civil and Political Rights in 1966.<sup>71</sup> The principles of Article 19 of the Universal Declaration are expressed in substantially similar language in Article 19(2) of the International Covenant, which provides that "[e]veryone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."<sup>72</sup> In the same Article, the International Covenant also includes a provision restricting the free flow of information by permitting member states to enact laws curtailing the freedom of

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65. G.A. Res. 217, U.N. GAOR 3rd Sess., Res. pt. I, at 74, U.N. Doc. A/810 (1948) [hereinafter Universal Declaration of Human Rights].

66. *Id.* art. 19.

67. BASIC DOCUMENTS ON HUMAN RIGHTS 21 (Ian Brownlie ed., 2d ed. 1981); see Universal Declaration of Human Rights, *supra* note 67, at preamb. ("This universal declaration of human rights [is] a common standard of achievement for all peoples and all nations . . ." (emphasis in original)); Schenone, *supra* note 19, at 512. United Nations Declarations do not have the legal force of treaties and conventions. Because the Universal Declaration is not a multilateral treaty or convention it is technically not considered a legally binding document.

68. Salinas, *supra* note 43, at 440 n.27.

69. MYRES S. MCDUGAL ET AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER 274 (1980)

70. Walter E. Spiegel, *Prior Consent and the United Nations Human Rights Instruments*, 1984 MICH. Y.B. INT'L LEGAL STUD. 379, 381.

71. G.A. Res. 2200A, 21 U.N. GAOR Supp. (No.16) at 52, U.N. Doc. A/6316 (1966) [hereinafter International Covenant].

72. *Id.* art. 19, para. 2.

information under specific circumstances.<sup>73</sup> This abrogation caused the United States government to refuse to become a signatory to the International Covenant.<sup>74</sup>

Neither Cuba nor the United States is a signatory to the International Covenant and neither is legally bound by its provisions.<sup>75</sup> The International Covenant, however, was unanimously adopted by the General Assembly of the United Nations,<sup>76</sup> is an international agreement,<sup>77</sup> and thus has the effect of an international treaty. Thus, within the context of U.S.-Cuban relations, the International Covenant becomes important when either of these two countries attempt to negotiate a bilateral agreement concerning the free flow of information. Because the International Covenant has the effect of an international treaty, its provisions are the equivalent of customary international law.<sup>78</sup>

The last major international document addressing the free flow of information is the Final Act of the Conference on Security and Cooperation in Europe (also known as the Helsinki Accord).<sup>79</sup> The Accord was a synthesis of numerous existing human rights documents.<sup>80</sup> Ironically, the humanitarian provisions of the Final Act are without legal force because they were driven by political and moral, rather than legal, concerns.<sup>81</sup> Nevertheless, the United States became a signatory to the Accord.<sup>82</sup> Cuba's interests with regard to the Accord were represented by the Soviet Union, who signed and accepted the Accord's provisions.<sup>83</sup>

The Accord is not technically binding upon its signatories.<sup>84</sup> The United States, however, refers to the Helsinki Accord as if it were a legally binding agreement and invokes its provisions in various

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73. *Id.* art. 19, para. 3, stating:

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

74. Spiegel, *supra* note 70, at 381.

75. Schenone, *supra* note 19, at 517 n.103.

76. Working for Rights, BOSTON GLOBE, December 10, 1994 at 10.

77. *Id.* at 516.

78. *See id.* at 515 & n.92.

79. Conference on Security and Cooperation in Europe: Final Act, Aug. 1, 1975, reprinted in PLOMAN, *supra* note 62, at 119 [hereinafter Helsinki Accord].

80. Kessler, *supra* note 63, at 249-50.

81. *Id.* at 252. The Helsinki Accord was negotiated primarily by diplomats, rather than lawyers. *Id.* at 252 n.93. The Accord was designed to fulfill political, not legal, objectives. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

international situations.<sup>85</sup> In spite of the fact that the Accord is an instrument that initially lacked legal effect, it will acquire legal effect as it grows to reflect a legal norm or custom already recognized in international law.<sup>86</sup> The certain likelihood of this occurrence makes the Accord every bit as significant as an international legally binding instrument.<sup>87</sup>

### B. *International Technical Regulations Instruments*

Problems arising between the United States and Cuba concerning the use of the radio wave frequency spectrum are governed primarily by two multilateral treaties: the North American Regional Broadcasting Agreement ("NARBA")<sup>88</sup> and the International Telecommunication Convention ("ITC").<sup>89</sup> Each of these international treaties represents an attempt by its signatory nations to prevent harmful interference with the signals of broadcasting stations by establishing classes of broadcasting channels, designating frequencies, and limiting the power at which stations may transmit their signals.<sup>90</sup>

In the early 1950's, NARBA was adopted by numerous North American countries, including Cuba and the United States. NARBA ultimately became effective in 1960.<sup>91</sup> The purpose of NARBA is to promote the efficient use of AM channels so as to avoid objectionable interference.<sup>92</sup> NARBA also provides for the settlement of technical disputes among signatory nations.<sup>93</sup> The resolution of technical disputes proceeds through a two step progression. The first phase is the preliminary negotiation stage, whereby reconciliation of differences is encouraged through mutually agreed upon methods.<sup>94</sup> If diplomatic means fail, grievances are officially submitted for settlement.<sup>95</sup> At this juncture, the disagreement is deemed a dispute and is presented before an arbitrator if the parties so agree.<sup>96</sup> The major

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85. *Id.*

86. Thomas Buergenthal, *International Human Rights Law and the Helsinki Final Act: Conclusions*, in HUMAN RIGHTS, INTERNATIONAL LAW AND THE HELSINKI ACCORD 3, 6 (Thomas Buergenthal, ed., 1977).

87. Kessler, *supra* note 63, at 254.

88. NARBA, *supra* note 4, at 413.

89. ITC, *supra* note 64, 28 U.S.T. 2495.

90. P. Kimberly Howland, *Radio Martí and the U.S.-Cuban Radio War*, 36 FED. COMM. L.J. 69, 71 (1984).

91. *Id.*

92. *Id.*

93. NARBA, *supra* note 4, at 424.

94. *Id.* at 437.

95. *Id.*

96. *Id.* at 438-39.

obstacle in this process is that the dispute may never be resolved if the parties do not agree on arbitration.<sup>97</sup>

The Administrative (Radio) Regulations,<sup>98</sup> adopted in 1979 by the World Administrative Radio Conference, provides more comprehensive technical regulations than NARBA. These regulations were adopted within the framework of the International Telecommunications Union (ITU), a branch of the International Telecommunications Convention.<sup>99</sup> The Radio Regulations are, therefore, binding on all ITC member states, including Cuba and the United States.<sup>100</sup> The procedure followed under the Radio Regulations in the case of harmful interference requires the country harmed by the interference to notify the member nation whose station is causing the interference.<sup>101</sup> Thereafter, the interfering country is required to "promptly investigate the matter and take any necessary remedial action."<sup>102</sup> There are no other means of settling disputes in either the ITC or Radio Regulations. The only recourse available to urge compliance with the regulations is the ITU publication method.<sup>103</sup> Notice is published in the ITU Frequency Register that a frequency assignment is in nonconformance with the regulations and is not entitled to protection from interference by other member nations.<sup>104</sup> Once again, the enforcement mechanisms do not appear sufficient to compel performance by the violative member state.

#### IV. THE IDEOLOGICAL STRUGGLE

Inasmuch as Cuba and the United States compete in their economic and political philosophies, it is not surprising that they embrace different concepts of fundamental human rights. Therefore, when these two countries disagree over the implementation and interpretation of human rights, neither side is necessarily acting arbitrarily by refusing to concede to the other side's view. Rather, each side may be acting in accordance with its own political, sociological and economic ideology concerning the fundamental origins of human rights.

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97. Howland, *supra* note 90, at 72.

98. *Radio Regulations, Final Acts of the World Administrative Radio Conference*, Geneva, 1979, reprinted in PLOMAN *supra* note 62, at 245.

99. Howland, *supra* note 90, at 73.

100. *Id.*

101. *Id.* at 74.

102. PLOMAN, *supra* note 62, at 255.

103. Howland, *supra* note 90, at 74.

104. *Id.*

### A. Contemporary U.S. Democratic Ideology

The United States' view of human rights is reflected in the United States Constitution, a document shaped largely by Lockean principles. These principles view individuals as having certain rights based solely on their humanity rather than on social convention or law.<sup>105</sup> In the United States, one of these rights is the "inalienable right" to freely hold and disseminate ideas, thoughts and information.<sup>106</sup> Insofar as individuals innately possess the right to hold and broadcast thoughts and ideas, they are likewise free to protect that right against state intrusion.<sup>107</sup> Thus, the state may only abridge freedom of ideas and information in very limited and well-defined circumstances.<sup>108</sup> The U.S. democratic philosophy champions the theory that in order to truly achieve understanding among all peoples of the world and in order to alleviate the dangers associated with subjective information and propaganda, it is essential that a multiplicity of opinions and viewpoints be aired on any given topic.<sup>109</sup>

Since World War II, the United States has assumed the position of "anointed protector of world liberty," under the perceived threat of its arch enemy, communism.<sup>110</sup> The United States has waged a war against the forces of communism not through a strategy of conquering empires, nor through one of colonizing other nations, but rather, through a strategy of proclaiming and advertising its proud democratic model for foreign countries to follow.<sup>111</sup>

A distinguishing feature of the U.S. democratic model is private ownership of productive forces, or free-market economy.<sup>112</sup> This core tenet of American ideology has remained remarkably stable over the last 200 years of American history.<sup>113</sup> Private ownership and competition under the U.S. free-market model is closely tied to U.S. social policies encouraging a wide range of competing viewpoints with respect to information dissemination.<sup>114</sup> Not

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105. JOHN LOCKE, TWO TREATISES OF GOVERNMENT (1964).

106. THE DECLARATION OF INDEPENDENCE preamb. (U.S. 1776).

107. Kessler, *supra* note 65, at 257.

108. See *infra* notes 140-45 and accompanying text.

109. Kessler, *supra* note 63, at 257. This notion is consonant with Justice Holmes' traditional "marketplace of ideas" concept. See *infra* note 139.

110. FREDERICK, *supra* note 2, at 62.

111. *Id.* at 61-62.

112. *Id.* at 62.

113. *Id.*

114. *Id.* at 61-70.

surprisingly, free-market ideology is also deeply rooted in the U.S. mass communication industry.<sup>115</sup>

The U.S. mass communication industry, through the impetus of competitive market forces, has developed a network that is unique in the world for its independence from government control.<sup>116</sup> A private sector orientation and the laws of supply and demand have shaped both the applied and theoretical areas of mass media regulation in the United States.<sup>117</sup> The presence of these market forces in U.S. information policies is best exemplified in two broad categories: the legal foundations of information dissemination and access, and the economics and management of information.<sup>118</sup> The first category includes such constitutional and statutory concepts as the First and Fourth Amendments, the Sunshine Act, the Freedom of Information Act, and libel laws.<sup>119</sup> The second category embodies our underlying capitalist philosophy, wherein much of the goal in decision making is to optimize profits.<sup>120</sup> These two general categories reflect the concept that government control over the competition of ideas is entirely antagonistic to the American notion of information dissemination.

### B. Contemporary Cuban Socialist Ideology

In sharp contrast to the U.S. view of preexisting fundamental freedoms of citizens, a socialist state, such as Cuba, advances the policy that the state is the sole source of all rights.<sup>121</sup> Instead of focusing on the individual, Cuban socialist ideology focuses on the notion that humans are free to cooperate and add to the collective good.<sup>122</sup> Therefore, only the collective can grant rights to the individual.<sup>123</sup> These individual rights include access to, and dissemination of, information.<sup>124</sup> In essence, the Cuban state has chosen to reserve the right of information dissemination for itself.<sup>125</sup> Having sole control and authority over this right, the state will only disseminate information that promotes the communist cause and

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115. *Id.*

116. THOMAS L. MCPHAIL, *ELECTRONIC COLONIALISM: THE FUTURE OF INTERNATIONAL BROADCASTING AND COMMUNICATION* 198 (1981).

117. *Id.* at 198-99.

118. *Id.* at 199.

119. *Id.*

120. *Id.*

121. Kessler, *supra* note 63, at 257.

122. FREDERICK, *supra* note 2, at 65.

123. Kessler, *supra* note 63, at 257.

124. *Id.*

125. *Id.* In the communist system, the state must take the initiative in educating and transforming society towards a socialist state.



advances the goal of total destruction of capitalism.<sup>126</sup> Consequently, the freedom to receive and impart ideas and information transforms into the freedom to hold correct opinions and impart state-approved information.<sup>127</sup>

Contemporary Cuban ideology stresses anti-imperialistic notions.<sup>128</sup> Leaders of the Cuban socialist struggle insist that their wish is not to impose their form of government on foreign nations.<sup>129</sup> Instead, they prefer Cuban socialist ideology to serve as example to other revolutionary societies.<sup>130</sup> The Cuban government purports to adopt an anti-imperialistic position and, in turn, expects foreign nations to respect *Cuba's* territorial sovereignty.<sup>131</sup> Because socialist ideology professes that the state and its citizens are one in the same, a foreign influence on its citizens constitutes an influence on the state. Therefore, the Cuban government views any unwanted foreign transmission that reaches its citizens as a breach of *Cuba's* territorial sovereignty.

Although Cuban ideology evinces a desire to attain freedom of speech and of the press, it opposes the notion that a multiplicity of opinions and viewpoints should be aired in order to achieve the proverbial freedom of information.<sup>132</sup> From an American perspective, this position appears almost paradoxical. The Cuban Constitution, however, is instructive in this respect because it provides for the freedom of speech and press only if in "keeping with the objectives of socialist society."<sup>133</sup> This provision is consistent with the socialist perception that citizens should cooperate and add to the collective good, instead of engaging in a competition of ideas and information motivated by individual desires.<sup>134</sup> Freedom of speech and expression, as defined by the Cuban socialist doctrine, therefore, conceptualizes a "freedom" which is shaped by the current stage of the revolutionary movement on the island.

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126. Bayer, *supra* note 3, at 568; Kessler, *supra* note 63, at 247.

127. Kessler, *supra* note 63, at 258; Schenone, *supra* note 19, at 518 n.113 ("In some cases, passing on information obtained from a foreign broadcast may be considered disseminating false information.").

128. FREDERICK, *supra* note 2, at 65-67.

129. *Id.* at 65.

130. *Id.*

131. *Id.*

132. See Kessler, *supra* note 63, at 257.

133. CONSTITUCIÓN DE LA REPUBLICA DE CUBA art. 52 (1976).

134. FREDERICK, *supra* note 2, at 65.

## V. DOMESTIC LAW PRINCIPLES GOVERNING THE FREE FLOW OF INFORMATION

### A. Domestic Law of the United States

The First Amendment of the United States Constitution states that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." <sup>135</sup> The United States Supreme Court has recognized that the freedom of expression is a central precondition to the exercise of all other freedoms. <sup>136</sup> Although the First Amendment guarantees all Americans the freedom of speech, certain substantive limitations have been placed on that freedom through judicially-defined levels of protected speech. <sup>137</sup> These categories of protected speech are justified under the belief that by allowing an individual unrestricted freedom to communicate, the freedom of other individuals is, in turn, restricted. <sup>138</sup> Such a restriction is incongruent with the concept of preserving and encouraging meaningful social and political debate for everyone's benefit. <sup>139</sup>

Speech of a political or religious nature is afforded complete First Amendment protection due to its significant contribution to the type of open discourse which creates a free society. <sup>140</sup> Since the flow of commercial information is central to the free enterprise economy, the Supreme Court has also recognized an intermediate level of speech protection known as "commercial speech." <sup>141</sup> The third category of speech protection deals with conduct that is a combination of speech and non-speech elements. <sup>142</sup> The Supreme Court has consistently upheld that where there is an important governmental interest in

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135. U.S. CONST. amend. I.

136. *Palko v. Connecticut*, 302 U.S. 319, 326-27 (1937), *overruled on other grounds by Benton v. Maryland*, 395 U.S. 784 (1969). The Court in *Palko* stated that "[o]f that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom." *Id.*

137. Laura A. Michalec, *Trade With Cuba Under the Trading With the Enemy Act: A Free Flow of Ideas and Information?*, 15 FORDHAM INT'L L.J. 808, 810 (1992).

138. Schenone, *supra* note 19, at 517 n.105.

139. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (Justice Oliver Wendell Holmes articulated his proverbial "marketplace of ideas" concept: "the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which [men's] wishes safely can be carried out").

140. *Widmar v. Vincent*, 454 U.S. 263, 269 (1981) (recognizing full protection of religious worship and discussion); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 838 (1978) (recognizing full protection for political speech); *but see Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 648-49 (1981) (affirming that protected social or political speech is subject to reasonable time, place and manner restrictions); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 387-90 (1969).

141. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 563 (1980) (creating an intermediate level of First Amendment scrutiny for commercial speech).

142. *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968).

prohibiting the non-speech element, that government interest overcomes any incidental restriction on free speech.<sup>143</sup>

Finally, there are also limitations on the methods used to regulate speech. In accordance with the First Amendment, no statute, regulation, or injunctive order may prohibit publication or expression before it occurs.<sup>144</sup> Only under extremely unusual circumstances, such as war, are prior restraints on expression appropriate.<sup>145</sup>

### B. Domestic Law of Cuba

Article 52, paragraph 1 of the Cuban Constitution states:

Citizens have freedom of speech and of the press *in keeping with the objectives of socialist society*. Material conditions for the exercise of that right are provided by the fact that the press, radio, television, movies and other organs of the mass media are state or social property, and can never be private property. This assures their use at the exclusive service of the working people and in the interests of society.<sup>146</sup>

This provision reflects the more restrictive interpretation of freedom of information espoused by the Cuban government. It demonstrates the underlying Cuban socialist concept that rights and freedoms are inseparable from the performance of each citizen's duties.<sup>147</sup> Among those duties are the protection and promotion of the Cuban Socialist State.<sup>148</sup> A citizen's decision to exercise his freedom of information and speech in a fashion that is injurious to the State is in direct contravention of his duty to protect the State.<sup>149</sup> Recall that under a socialist regime, the people and the state are one in the same.<sup>150</sup> By mere existence in a socialist state, a Cuban citizen implicitly adopts the state's policies as if they were his own, including the state's policies regarding infringement on freedom of speech.<sup>151</sup>

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143. See, e.g., *Miller v. California*, 413 U.S. 15 (1973) (holding that obscene speech and writing should not receive the full protection of the First Amendment); *New York Times v. Sullivan*, 376 U.S. 254 (1964) (holding that laws imposing civil or criminal sanctions for libelous utterances are valid); *Dennis v. United States*, 341 U.S. 494 (1951) (holding that speech advocating participation in the active overthrow of the government may be prohibited); *Schenck v. United States*, 249 U.S. 47, 52 (1919) (holding that speech tending to incite listeners to violate a criminal law may be prohibited).

144. *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971).

145. *Near v. Minnesota*, 283 U.S. 697 (1931).

146. CONSTITUCIÓN DE LA REPUBLICA DE CUBA art. 52, para. 1 (1976) (emphasis in original).

147. See *Schenone*, *supra* note 19, at 519 n.115.

148. *Id.* at 519.

149. *Id.*

150. *Id.*

151. *Id.*

The Cuban media, like most entities on the island, is a government controlled monopoly that carefully filters and shapes the information reaching the Cuban people.<sup>152</sup> This is not considered censorship, but rather simply a means to an end of "keeping with the goals of the socialist society."<sup>153</sup> For example, the national communist party publication *Granma* reports on government decisions after they have been made.<sup>154</sup> Any public debate or response to government policy is, therefore, irrelevant.<sup>155</sup> Also, rarely will the *Granma* represent negative occurrences throughout the island, since that would be contrary to the advancement of the socialist revolutionary movement.<sup>156</sup> The Cuban government justifies this system of controlled information dissemination as necessary to avoid unnecessary confusion of the Cuban public.<sup>157</sup> In actuality, the Cuban government relies heavily on its control of the media to stay in power.

## VI. COMPARISON OF U.S. AND CUBAN PERSPECTIVES ON INTERNATIONAL BROADCASTING

Having earlier set forth the relevant international provisions concerning the content of and technical regulations governing transnational communications, this Article now turns to a comparison of how both Cuba and the United States interpret and apply these documents within the context of their differing ideological policies and domestic laws.

### A. *International Content Restrictions*

#### 1. *Universal Declaration of Human Rights*

On October 4, 1983, the U.S. Congress passed the Radio Broadcasting to Cuba Act ("RBCA").<sup>158</sup> The RBCA reflected the United States' "belief that all governments should recognize their citizens' fundamental right to [gain] access to information [so as to generate] informed judgments on the actions of their [respective]

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152. *Id.* at 518.

153. *Id.* at 518 n.114.

154. DEBRA EVENSON, *REVOLUTION IN THE BALANCE: LAW AND SOCIETY IN CONTEMPORARY CUBA* 36 (1994).

155. *Id.*

156. *Id.*

157. Salinas, *supra* note 43, at 436.

158. Pub. L. No. 98-111, 97 Stat. 749, (codified at 22 U.S.C. §§ 1465-65g).

governments."<sup>159</sup> Congress premised the RBCA on Article 19 of the Universal Declaration of Human Rights.<sup>160</sup>

Well before Congress adopted the principles of Article 19 of the Universal Declaration in the RBCA, U.S. courts had voiced their acceptance of the Universal Declaration *in toto* as customary international law.<sup>161</sup> In so doing, the United States embraced to the provisions of Article 19, and therefore, obligated itself to provide its citizens with the freedom to receive and impart information without interference.<sup>162</sup> Because the provisions of Article 19 of the Universal Declaration are consistent with the freedoms granted under the First Amendment to the U.S. Constitution and with traditional democratic ideology encouraging wide dissemination of information, the obligations on the United States are not cumbersome. Cuba, however, is another matter.

Whereas the U.S. tactic under the RBCA is to broadcast varying viewpoints on the state of Cuban affairs, Cuba's best defense has been to diffuse, or "jam,"<sup>163</sup> the incoming radio signal. In response the United States has argued that under Article 19 of the Universal Declaration, Cuba's use of jamming to suppress radio broadcasts violates the principle of freedom of information.<sup>164</sup> Even though Article 19 unambiguously protects the "freedom to hold opinions *without interference*,"<sup>165</sup> the Cuban government has continued to defend its jamming activities on two grounds.

First, the Cuban government argues that the scope of Article 19 is limited by Article 29, paragraph 2 of the Universal Declaration.<sup>166</sup> The Cuban government interprets Article 29 as endowing each individual nation with the responsibility to implement, as it sees fit, the human right to freedom of information.<sup>167</sup> This argument

159. Salinas, *supra* note 43, at 433 & n.4.

160. 22 U.S.C. § 1465(1) states "that it is the policy of the United States to support the right of the people of Cuba to seek, receive, and impart information and ideas through any media and regardless of frontiers, in accordance with article 19 of Universal Declaration of Human Rights."

161. *Filartiga v. Pena-Iralia*, 630 F.2d 876, 882 (2d Cir. 1980) (holding that the right to be free from torture "has become part of customary international law as evidenced and defined by the Universal Declaration of Human Rights . . .").

162. Schenone, *supra* note 19, at 513.

163. See *supra* note 19 and accompanying text.

164. Rochelle Price, *Jamming and the Law of International Communications*, 1984 MICH. Y.B. INT'L LEGAL STUD. 391, 393 (1984).

165. Universal Declaration of Human Rights, *supra* note 65, art. 19 (emphasis added).

166. *Id.* art. 19, para. 2., stating in relevant part:

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

167. See Spiegel, *supra* note 70, at 382-83.

unsurprisingly falls squarely within the confines of the Cuban ideological concept that the state is the ultimate right-giver and, as such, may choose to withhold certain rights from its citizens. Secondly, the Cuban government justifies signal jamming on state-sovereignty grounds. The communist regime asserts that without any standards limiting the application of Article 19, any country could legitimize virtually any broadcast to any other country;<sup>168</sup> thereby affronting the receiving country's sovereignty.<sup>169</sup>

The United States responds that as long as the U.S. chooses to broadcast merely "information and ideas" the Cuban government has no legitimate right to jam the incoming signals.<sup>170</sup> If, however, Article 19 required accuracy and responsibility in the exercise of the right to impart information, Cuba may have a legitimate right to prevent reception of political broadcasts from the United States.<sup>171</sup> Cuba's interpretation of what is accurate and responsible as reflected in their competing ideologies will likely conflict with the U.S. government's view of accurate and responsible programming.

## 2. *International Covenant of Civil and Political Rights*

Although Article 19 of the International Covenant contains almost identical language with respect to freedom of information to that found in Article 19 of the Universal Declaration,<sup>172</sup> the International Covenant sets forth specific restrictions on the freedom of information.<sup>173</sup> Further, Article 20 of the International Covenant prohibits the broadcast of propaganda and, therefore, vests in nations the sovereign right to restrict those broadcasts deemed to be propaganda.<sup>174</sup>

The greatest possibility for restrictions under Article 19(3) of the International Covenant lies in Article 19's authorization protecting public order and public morals.<sup>175</sup> These broad statements allow states wide discretion in implementing the restrictions to the free flow of information and ideas. Thus, when a receiving nation chooses to exercise its right to restrict broadcasts contrary to public

168. Howland, *supra* note 90, at 90.

169. *Id.* Taken to an extreme, the receiving country may be prevented from determining what is in its own best interest.

170. *Id.* at 91.

171. *Id.*

172. International Covenant, *supra* note 71, art. 19, para. 2.

173. Among the restrictions noted, article 19, paragraph 3 provides that countries may restrict the free flow of information "[f]or the protection of national security or of public order (*ordre public*), or of public health or morals."

174. International Covenant, *supra* note 71, art. 19, para. 1.

175. *Id.* art. 19, para. 2.

order or morality under Article 19(3) of the International Covenant, the broadcasting nation would necessarily have to obtain the prior consent of the broadcasting nation.<sup>176</sup> A receiving state could, therefore, censor any incoming broadcast which it deemed objectionable or threatening to its public order and morality.<sup>177</sup>

Consistent with its well-settled constitutional stance opposing prior restraint provisions,<sup>178</sup> the United States position is entirely opposed to any restriction sanctioned by Article 19(3) of the International Covenant. Under the prior restraint concept, not only would the restriction infringe on the rights of the individual receiving the information, but it also would infringe on the broadcaster's right to impart different information and ideas.<sup>179</sup> The right to social and political debate among competing viewpoints, according to Justice Oliver Wendell Holmes, is the cornerstone idea upon which the United States was founded. To require, prior to an international broadcast, the consent of a receiving party based on that nation's interpretation of public order and morality shatters the ideas of free and open debate envisioned by the founding fathers of the United States Constitution. Besides violating U.S. constitutional law on prior restraints, the prior consent provision in Article 19(3) of the International Covenant is also at odds with democratic philosophy in general.

The Cuban government, on the other hand, views Article 19(3)'s prior consent restrictions as being squarely within the Cuban constitutional objective of advancing only those ideas that further the socialist cause.<sup>180</sup> Furthermore, Article 19(3) confirms the socialist ideology that the right of the individual to receive information is not absolute or preexisting, but rather, is subordinate to the government's interest in protecting public order and morals.<sup>181</sup> The restriction in Article 19(3) also reinforces the Cuban argument that the Universal Declaration does not grant an unlimited right to free flow of information.<sup>182</sup>

Cuban officials argue that the appropriate interpretation of the current United Nations human rights instruments would require that Article 19 of the Universal Declaration be read in conjunction with the freedom of information restrictions found in Article 19(3) of the

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176. Spiegel, *supra* note 70, at 382.

177. *Id.*

178. See *supra* notes 144-45 and accompanying text.

179. International Covenant, *supra* note 71, art. 19, para. 3; see also Spiegel, *supra* note 70, at 383.

180. See *supra* note 146 and accompanying text.

181. *Id.*

182. International Covenant, *supra* note 73, art. 19, para. 3.

International Covenant. Although Cuba is not a signatory to the International Covenant, the Covenant appears to be an important bargaining chip for Cuba that is consistent with Cuba's domestic law and social policy initiatives.

Cuba is not alone in advocating prior consent provisions.<sup>183</sup> A majority of developing nations support such provisions under the fear that their national identities may be jeopardized if they are not allowed to regulate what programs their citizens receive.<sup>184</sup> Thus, developing countries, such as Cuba, champion the view that state sovereignty outweighs the right to freedom of information.<sup>185</sup>

### 3. *The Helsinki Accord of 1975*

The Final Acts of the Conference on Security and Cooperation in Europe, or the Helsinki Accord, was originally targeted at addressing human rights issues and promoting better relations between the Eastern and Western block countries.<sup>186</sup> Although Cuba was not a signatory to the Accord, Cuba's interest in the instrument may certainly be equated to that of the Soviet government, who was a signatory. Moreover, while the Accord lies outside the scope of binding international law, it is certainly evidence of accepted norms of customary international law.<sup>187</sup>

The Helsinki Accord provided some fresh perspectives to the field of international communications. First, the Accord removed the subject of human rights from the exclusive domestic jurisdiction of any given nation.<sup>188</sup> The Accord suggested that participating states respect and practice the principles of the United Nations Charter "irrespective of their political, economic or social systems."<sup>189</sup> However, the Accord also set forth some very broad pronouncements about state sovereignty,<sup>190</sup> and the right to be free from foreign intervention.<sup>191</sup>

183. MCPHAIL, *supra* note 116, at 201.

184. Bayer, *supra* note 3, at 545.

185. *Id.* at 547.

186. Kessler, *supra* note 63, at 249-51.

187. *Id.* at 255.

188. Helsinki Accord, *supra* note 79, at 121.

189. *Id.*

190. *Id.* at principle I. Principle I states in relevant part:

The participating states will respect each other's sovereign equality and individuality as well as all the rights inherent in and encompassed by its sovereignty, including in particular the right of every State to juridical equality . . . and to freedom and political independence.

*Id.*

191. *Id.* at 122. Principle VI of the Accord states in pertinent part:



U.S. application of the substantive provisions of the Accord may be at odds with the fact that domestic law and policies of the United States are inapplicable.<sup>192</sup> This, however, may be a blessing in disguise for the U.S. position. Inasmuch as the scope of the Accord resides outside the scope of U.S. domestic jurisdiction, it also lies outside Cuba's jurisdiction. Nonetheless, Cuba may incorporate the Accord during international negotiations.

Unable to claim a right to state sovereignty under Principle I of the Accord,<sup>193</sup> the Cuban government will inevitably find itself violating fundamental human rights as defined in Principle VII of the Accord.<sup>194</sup> The human right to freely receive and impart information is incorporated by reference in Principle VII of the Accord.<sup>195</sup> Principle VII suggests that member states act in conformity with other international instruments, including the Universal Declaration of Human Rights.<sup>196</sup> Should Cuba restrict the flow of information into the island because such information is against the objectives of the revolution, the United States can apply Principle VII of the Accord to show that Cuba has violated customary international law such as Article 19 of the Universal Declaration.

Cuba may attempt to justify its jamming activities under the Helsinki Accord by classifying such activities as a response to a U.S. violation of principle VI of the Accord, prohibiting intervention in internal affairs.<sup>197</sup> The United States, however, is likely to assert that principle VI of the Accord, as a whole, was designed to forbid armed or coercive intervention only.<sup>198</sup> Radio or T.V. Marti's programming, the United States will likely suggest, is hardly armed or coercive intervention. The U.S. government's broadcasting activities, thus,

The participating States will refrain from any intervention, direct or indirect, individual or collective, in the internal or external affairs falling within the domestic jurisdiction of another participating State, regardless of their mutual relations.

*Id.*

192. See Helsinki Accord, *supra* note 79, at 121.

193. See *id.* and text accompanying note 190.

194. *Id.* at 122. Principle VII of the Accord states in relevant part:

[Member States] will promote and encourage the effective exercise of civil, political, economic, social, cultural and other rights and freedoms all of which derive from the *inherent dignity of the human person* and essential for his free and full development.

*Id.* (emphasis in original).

195. See *id.* (stating that participating states "confirm the right of the individual to know and act upon his rights and duties . . ." in the field of human rights and fundamental freedoms).

196. *Id.* at 123.

197. Principle VI of the Helsinki Accord states in relevant part:

The participating states will refrain from any intervention, direct or indirect, individual or collective, in the internal . . . affairs falling within the domestic jurisdiction of another participating state, regardless of their mutual relations.

*Id.* at 122.

198. Kessler, *supra* note 63, at 264 n.181.

cannot reflect an affirmative coercive act of participation in the domestic policies of another state, which is what Principle VI expressly purports to prohibit.<sup>199</sup> In sum, under the Accord, not only are the relevant human rights instruments taken outside the scope of Cuba's exclusive jurisdiction, but even if Cuba possessed the requisite jurisdiction over the topic of human rights, mere opinions and criticisms voiced by American radio or T.V. would not classify under the Accord as intervention in Cuba's internal affairs.<sup>200</sup>

### B. Technical Regulations

The technical regulations provide the only source of international law signed by and binding both Cuba and the United States.<sup>201</sup> Unfortunately, the unavailability of appropriate means for settling interference disputes under these technical instruments<sup>202</sup> has rendered them almost as innocuous as the human rights documents discussed above.

#### 1. North American Regional Broadcasting Agreement (NARBA)

In order to avoid "objectional [broadcast] interference," the North American Regional Broadcasting Agreement establishes the power levels at which member nations may broadcast through the AM channels.<sup>203</sup> "Objectionable interference" is defined in section 3 of NARBA as "interference to the signals of a broadcasting station in one country caused by the signals of one or more broadcasting stations in another, in excess of that permitted by this Agreement."<sup>204</sup> The United States has applied the terms of this agreement to argue against Cuba's continuing interference activities.<sup>205</sup> Cuba initially justified its position on jamming U.S. signals by arguing that it had a right under the Geneva Convention of 1959 to interfere with stations

199. *Id.*

200. *Id.* at 267; see Helsinki Accord, *supra* note 79.

201. Schenone, *supra* note 19, at 521 (noting that as of August, 1982 both the U.S. and Cuba were members of the ITC); Salinas, *supra* note 43, at 445-46 (stating that both Cuba and the U.S. are signatories of NARBA. Cuba became a signatory in 1950 and the U.S. became a signatory in 1960).

202. See Howland, *supra* note 90, at 72-74; Schenone, *supra* note 19, at 521; David M. Leive, *Regulating the Use of the Radio Spectrum*, 5 STAN. J. INT'L L. 21, 30 (1970).

203. NARBA, Nov. 15, 1950, 11 U.S.T. 413; see also Salinas, *supra* note 43, at 445-46.

204. *Id.* at pt. 2, sec. 3.

205. Salinas, *supra* note 43, at 445 n.62. In 1981, Cuba, upon being notified of the plan for Radio Martí, revealed its intention to double its interference activities. To achieve its objective, the Cuban government added two 500 kW transmitters (ten times the power of any U.S. transmitter). Cuba effected its plan, but has not pushed its powerful transmitters to capacity. Were Cuba to do so, it would be able to interfere with every country in the Western Hemisphere except Argentina, Chile, Uruguay and Paraguay.

transmitting over the AM band.<sup>206</sup> The United States quickly countered by pointing out that Cuba had previously violated the provisions of the Geneva Convention prohibiting the use of the AM band for international broadcasts.<sup>207</sup> As such, the Cuban government was estopped from classifying broadcasting over the AM band as a violation of international law by the United States. Moreover, the United States argued that as a result of the human rights documents enacted prior to and after the 1959 Geneva Convention it became customary to air international broadcasts on the AM band.<sup>208</sup> Because Cuba could not point to any other U.S. violation under NARBA,<sup>209</sup> Cuba decided to withdraw from NARBA in 1983.<sup>210</sup>

## 2. *International Telecommunications Convention*

Article 35 of the International Telecommunications Convention ("ITC") prohibits harmful interference with the radio spectrum and states in relevant part:

All stations, whatever their purpose, must be established and operated in such a manner as not to cause harmful interference to the radio services or communications of other Members or of recognized private operating agencies, . . . which carry on radio service, and which operate in accordance with the provisions of the Radio Regulations.<sup>211</sup>

The term "such a manner as not to cause harmful interference" implies that member nations must only transmit on frequencies that are not already being used and must not overcrowd any frequency which can be used by more than one station.<sup>212</sup> The 1979 Radio Regulations provided the international broadcasting community with a more specific proposal than the general provisions of Article 35, when it stated that "[a]ll stations are forbidden to carry out: unnecessary transmissions; the transmission of superfluous signals and correspondence; the transmission of false or misleading signals;

206. Radio Regulations, Dec. 21, 1959, 12 U.S.T. 2377 (commonly referred to as the Geneva Convention of 1959) (entered into force for the United States on Oct. 23, 1961); see Salinas, *supra* note 43, at 446 (The convention prohibited transnational AM broadcasting).

207. See *supra* notes 7-11 and accompanying text (discussing history).

208. Salinas, *supra* note 43, at 447.

209. *Id.* at 446. Unlike Cuba, the U.S. uses directional antennae to avoid encroaching on the frequencies of other countries.

210. *Id.* The United States' launching of Radio Martí was also a factor in Cuba's decision to withdraw from NARBA. *Id.*

211. International Telecommunications Convention, Oct. 25, 1973, 28 U.S.T. 2497, *reprinted in* PLOMAN, *supra* note 63, at 240 [hereinafter ITC].

212. Schenone, *supra* note 19, at 521.

the transmission of signals without identification."<sup>213</sup> Pursuant to the last clause of Article 35, the 1979 Radio Regulations are incorporated into the 1973 ITC provisions.<sup>214</sup>

Conformity with Article 35 of the ITC and the 1979 Radio Regulations is a prerequisite for protection of frequency assignments under the International Frequency Registration Board (IFRB).<sup>215</sup> In order for a country to claim protection for an assignment, it must not interfere with any other nation's frequency assignments. Thus, in a harmful interference dispute, each party can strengthen its case by indicating the other's listed violations of the ITC or the Radio Regulations.

The United States argues that its broadcasts to Cuba are in conformity with both Article 35 of the ITC and the Radio Regulations.<sup>216</sup> Consequently, the United States concludes that its stations are entitled to protection from Cuba's harmful interference.<sup>217</sup> Additionally, U.S. officials argue that Cuba's jamming activities are a violation of the most fundamental principle of international law: *pacta sunt servanda*.<sup>218</sup>

Inasmuch as Cuba is a signatory of the ITC, its government is bound to follow its provisions.<sup>219</sup> More importantly, Cuba cannot invoke limitations contained in its own constitution or domestic laws to excuse performance of these obligations.<sup>220</sup> As persuasive as the *pacta sunt servanda* argument may seem, the ITC has no power to settle disputes between Cuba and the United States for two reasons. First, Cuba will never submit to a compromise seeking a forum for the purpose of harmful interference resolution. Second, even if Cuba did submit to a forum and grave violations of the ITC and Radio Regulations were found against Cuba, the ITU<sup>221</sup> would be unable to enforce its decision on an international level because the underlying

213. *Radio Regulations, Final Acts of the World Administrative Radio Conference*, Geneva, 1979, Chapter NV, Art. N16, 4997, § 2, reprinted in PLOMAN, *supra* note 62, at 254.

214. ITC, *supra* note 211, at 240.

215. Leive, *supra* note 202, at 36.

216. When the U.S. started transmitting Radio Martí, it requested and was assigned a broadcast frequency that would not disrupt any Cuban frequencies. However, when the U.S. began transmitting T.V. Martí, it broadcast on an unoccupied frequency assigned to Cuba.

217. See Ploman, *supra* note 62, at 254.

218. BLACK'S LAW DICTIONARY 1109 (6th ed. 1990) (defining *pacta sunt servanda* as "[a]greements (and stipulations) of the parties (to a contract) must be observed."); PLOMAN, *supra* note 64, at xiv. The rule binds parties to their treaties so that they may perform their obligations under such treaties in good faith.

219. PLOMAN, *supra* note 62, at 254.

220. By signing the ITC, Cuba can no longer point to their domestic laws as limiting their application of ITC's provisions.

221. Schenone, *supra* note 19, at 523. The International Telecommunications Union is a specialized agency of the United Nations charged with enforcing the provisions of the ITC. *Id.*

jamming dispute is more political than technical in nature. The dispute between these two countries transgresses the bounds of technology. The original jamming represents a daily affirmation that Cuba's socialist traditions are antagonistic to the U.S. capitalist message being broadcast.

The Cuban government, once again, does not argue that the United States has violated the provisions of the ITC or Radio Regulations.<sup>222</sup> Rather, the Cuban government justifies its jamming activities entirely as a self-help measure to counter the spread of any and all propaganda against the revolution.<sup>223</sup> This argument seems misplaced because Cuba is using its domestic constitutional law and social policy to justify international interference violations under a binding multilateral agreement. Nevertheless, as long as no technical instrument is tailored to better address and enforce the duties of the United States and Cuba under the ITC and Radio Regulations, Cuba will likely continue to jam with impunity.

## VII. CONCLUSION

The dispute between the United States and Cuba over the airwaves is a political war of ideas between the two hopelessly opposing ideologies of democracy and socialism. From these contrasting political philosophies emerge differing perceptions of the human right to impart and receive information through radio and television.

The U.S. democratic ideology strongly adheres to the notion that individuals have a fundamental right to information separate from the state. This concept is reflected in the First Amendment of the United States Constitution,<sup>224</sup> and in the independence from government control given the U.S. mass media industry.<sup>225</sup> Cuban socialism, on the other hand, views the state as the entity that ultimately determines the rights that should be granted to the people in furtherance of the objectives of socialist society. To that end, the Cuban government prefers to keep a tight leash on what is reported through mass media sources and what is talked about on the streets; the primary "marketplaces of ideas."<sup>226</sup> Therefore, it is not surprising that while the U.S. government views the right to freedom of information as being synonymous with its goals for a democratic society, Cuba views the absolute freedom to impart and receive information as a blatant violation of its state sovereignty.

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222. See *id.* at 506 n.34.

223. *Id.* at 506.

224. See *supra* notes 135-45 and accompanying text.

225. See *supra* notes 112-20 and accompanying text.

226. See *supra* notes 152-57 and accompanying text.

The dispute between Cuba and the United States concerning international broadcasting is far beyond a technical solution. In fact, a recent development involving these two nations has led to a significant increase in political tensions. On February 24, 1996, Cuban MiG fighters shot down two single engine unarmed planes belonging to Brothers to the Rescue.<sup>227</sup> Following this unwarranted attack, Cuba claimed that the civilian planes were shot down because they were violating Cuban airspace.<sup>228</sup> U.S. officials, however, argued that the downed aircrafts were flying over international waters.<sup>229</sup>

The United States refused to take military action against Cuba. Instead, President Clinton's administration compiled a six-tiered plan of political and economic sanctions against the island.<sup>230</sup> Among these sanctions, Clinton ordered increased support for Radio Martí to overcome jamming by the Cuban government.<sup>231</sup> The administration authorized an additional two million dollars in funding to increase reception of U.S. government broadcasts in Cuba.<sup>232</sup> The U.S. also sought international condemnation of Cuba's actions through the United Nations.<sup>233</sup> In short, this latest incident, and the actions resulting therefrom, demonstrate two critical factors. First, the United States still views the use of radio broadcasts into Cuba as a necessary and effective weapon in its war against communism. Second, any future negotiation between these two countries with respect to international broadcasts, or any other controversial political topic, will inevitably have to occur under the auspices of an international regulatory body such as the United Nations.

Whether a solution to the "radio war" in the Caribbean exists is questionable. With the imminent downfall of the Castro regime, we may see substantial progress in the way of free communications between the United States and Cuba. Presently, however, the ongoing war over the airwaves between these two countries serves as a fresh reminder that there is a need for mutuality in international broadcasting and international relations between Cuba, the United States and the rest of the world.

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227 "Brothers to the Rescue" is a humanitarian group formed by Cuban exiles in Miami, Florida for the purpose of performing search-and-rescue missions over the Florida Straits in search of wayward Cuban rafters. Elaine De Valle, Manny Garcia and Martin Merzer, *Downed at Cuba's Door: MiGs Blast 2 Exile Planes*, MIAMI HERALD, February 25, 1996, at 1A, 12A.

228 John Lantigua and Elaine De Valle, *Unraveling How it Happened: Was Line Crossed and By Whom?*, MIAMI HERALD, at 1A, 11A.

229. *Id.*

230 Christopher Marquis and Martin Merzer, *Making Castro Pay, Clinton: New Sanctions, No Blockade*, MIAMI HERALD, at 1A, 10A.

231 *Id.* at 10A.

232. *Id.*

233 *Id.*