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Abstract

This paper examines issues of national sovereignty in the context of a right to communicate. It first provides a historical and philosophical overview of the development of communication rights. It then focuses on exemplary cases involving the intersection of national sovereignty with communication rights. Emphasis is given to exploring the implications for democratic communication and political and cultural participation in communities.

A Right to Communicate

The concept of a human right to communicate — as distinct from freedom of expression — has become a major theoretical construct underlying a number of contemporary issues, including universal service, press freedoms, the digital divide, public access to mass media, and the monitoring and enforcement of other human rights. A major discourse leading to the first phase of the United Nation's World Summit on the Information Society has, for example, been the positing of human rights as a basis for the concept of an information society.[i]

The origin of a discourse around communication rights is most often attributed to the Universal Declaration of Human Rights.[ii] Article 19 of the declaration states: "Everyone has the right to freedom of opinion and expression: this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." [iii] Other parts of the declaration and other sources are usually cited in attempting to address all aspects of communication. These have included those that address privacy, freedom of thought, conscience and religion, the freedom of peaceful assembly, the right to education, the right to participate in the cultural life of the community, intellectual property rights, and linguistic freedom.[iv]

The evolution of ideas about communication rights has been driven in part by advances in communication technologies and evolving norms. The explicit discourse around a right to communicate was influenced by insights into the social implications of satellite-based communications in the early years of that technology. Jean d'Arcy, director of Radio and Visual Services in the United Nations Office of Public Information,

published an article in 1969 -- "Direct Broadcast Satellites and the Right to Communicate" -- in which the concept was first articulated.[v]

D'Arcy grasped that direct broadcast satellites could change the social and technological context of traditional information rights, in particular, if there was to be any hope of developing a truly democratic mode of communication free from the dominance of large public and private organizations and regulatory structures. Since the adoption of the UDHR, it had been Article 19 in particular that has been the foundation for most human rights claims in the sphere of communication. However, these statements of rights and freedoms were conceived in the context of a print and broadcasting environment in which rights were concerned about the free flow of information rather than the process of communication, a situation d'Arcy described as the "mass media mentality." According to d'Arcy "For almost a century, people in this age of mass societies have become conditioned by their 'mass media mentality' to accept as normal and ineluctable a unilateral, vertical flow of non-diversified information. " [vi] National and international communications regulatory regimes reinforced this structure of communication. However, for d'Arcy a key to understanding the difference between the traditional one-way mass media technological and social structures and the emerging environment is the difference between information and communication. In the past these two terms were often used synonymously. However, technological progress and social change were, according to d'Arcy, creating distinct meanings to these two words.

The distribution of information and the mass media mentality that arose out of the structures for its distribution were the result of the economic and technological development of mass media. In the past each new media was driven by its own mass

industry and concentration of ownership. The invention of the rotary press in the mid-nineteenth century saw the concentration of publishing and printing along with mass distribution of newspapers and other publications. The same process of concentration and mass distribution evolved in the radio, film, and television industries. These systems, dominated by a few major producers and distributors, were designed for the vertical, unilateral, mass distribution of information, not for communication. For d'Arcy communication is interactivity. The social and human rights implications of direct broadcast satellite would be more than just an improved version of cable. Its import would be that it breaks free from the controls embedded in traditional communication economic and regulatory structures. It could not be controlled. As new political and social structures are always created around new modes of communication, d'Arcy claimed there was a need "…to rethink the patterns in terms of the era of the direct broadcast satellite, the computer and the domestic high-capacity cable rather than to attempt to force tomorrow's tools into today's structures."[vii]

Ahead of his time in anticipating the potential implications of convergence and concentration for information rights, d'Arcy envisioned the emergence of new technological and social structures that would replace the outmoded models of the past that reside in each sector of mass communications. He observed "The old structures of separate sectors of mass distribution would be destabilized and driven towards one unified system." The new structure will allow for horizontal, multi-channel, interactive communication between individuals and groups. The older communication structures were concerned about the distribution of content. Consequently the rights associated with them were focused on content as well. The new, interactive, unified system is about the

process of communication, hence, the need for a new right that does not exclude considerations of content, but whose starting point is the process of communication. It is because of this new structure that "A new right for man is due to merge from it."[viii]

As d'Arcy explained, the development of earlier communication technologies into separate sectors gave rise to separate concepts of rights including right of assembly, freedom of thought, freedom of expression, freedom of the press. What d'Arcy called for was not the replacement of the traditional communication freedoms but their encompassing by a broader human right, the right to communicate. This represents a shift from freedoms associated with separate spheres of communication—assembly speech, press—to a positive human right encompassing all these freedoms and more. The right to communicate would serve as the crown of what d'Arcy called an "ascending progression" of rights and freedoms.[ix]

D'Arcy recognized that Article 19 was too narrow in a world of global interactive communications. Article 19 was formulated in the immediate aftermath of World War II when the primary concern was the free flow of information within and across borders through the mass media. As more people gained access to the means of participating in the emerging communication processes, communication would no longer be dominated by economic and political elites. Consequently, d'Arcy concluded:

> "The time will come when the Universal Declaration of Human Rights will have to encompass a more extensive right than man's right to information, first laid down-twenty one years ago in Article in 19. This is the right to communicate." [x]

Thus, the right to communicate and its social and technological environment differs from the previous era in the distinctions made:

- between the role of the individual as a passive receiver of information and the role of an active participant in interactive global communication;
- between information and communication;
- between content and process;
- and between freedoms and rights.

Canada and the Right to Communicate

One of the earliest attempts to define a right to communicate for public policy purposes appeared in Canada not long after the publication of d'Arcy's article. D'Arcy represented the UN General Secretary at the UNESCO conference in 1969 on satellite broadcasting. There his path would cross with a high level delegation from Canada including Eric W. Kierans, Minister of the Canadian Department of Communications (DOC), his Deputy Minister, Allan Gotlieb, and six other Canadian delegates. In response to satellite developments the newly elected government of Pierre Trudeau was undertaking a number of initiatives in 1968 and 1969. It created the DOC to be responsible for communications policy, the Canadian Radio-Television Commission (CRTC) to regulate broadcasting, and Telestat Canada, a crown corporation responsible for Canada's satellite program. As Gotlieb would express it later: "In those days, there was a feeling that satellites were going to change the world. … Our belief was that if we were on the leading edge with

satellites, it would give us some sovereignty protection because we would be out in front."[xi]

In addition, the DOC established an advisory body called the Telecommission. Its mandate was to recommend a communications policy for the government. The Telecommission issued the influencial report *Instant World* in 1971. Impressed by d'Arcy's 1969 paper, the Telecommission came close to a definition when it stated, "The rights to hear and be heard, to inform and to be informed, together may be regarded as the essential components of a 'right to communicate.'" [xii] Furthermore, the report stated emphatically: "If it be accepted that there is a 'right to communicate', all Canadians are entitled to it." [xiii]

After d'Arcy's paper, those attempting to define a right to communicate saw the Telecommission's report as the next milestone in the effort to formulate such a right. In his own subsequent writings d'Arcy would refer to *Instant World*. However, despite the bold assertions of the Telecommission, Canadian politicians and policy makers did not move ahead in translating the right to communicate into public policy. Indeed, the concept did not appear in any subsequent policy white papers and reports of subsequent Canadian advisory bodies. According to the Telecommission's Executive Secretary: "Resounding declarations had to give way to practical limitations." [xiv] Because the Telecommission's consultation process was confined to government policy experts, academics and legal scholars, and industry experts, there was no public discussion during its consultative process nor widespread discussion of its final report. As a result there no political support had been generated that would sustain a right to communicate movement in Canada.[xv]

In the thirty years since senior Canadian policy experts endorsed the right to communicate much has changed. The global expansion of a technology driven economy, of human rights, and of electronic communications creates an opportunity to advance communication rights as embodied in the basic right to communicate. Almost all significant advances in human rights arise out of periods of widespread social and political turmoil, wars and revolutions.[xvi] Canada is positioned to provide global leadership because both communication and human rights are integral parts of Canadian culture. Furthermore, the right to communicate provides a judicial and political framework for addressing communication issues of central concern to Canadians: cultural and linguistic identity, intellectual property rights, intellectual freedom, freedom of the press, and so on. The confluence of the universalization of global interactive communications and human rights makes Canada at this time well situated to formulate a legal and policy framework derived from a right to communicate.

Communication is infused throughout Canadian culture and society. Communications technologies have always been critical political, economic, and cultural tools in Canadian government nation building policies since the early nineteenth century. Building strong communications networks east to west through railroads, telecommunications, broadcasting, a trans-Canadian highway, and, more recently, the information highway, has been a consistent public policy strategy. Because of the economic, political, and cultural importance of communications in Canada, Canadians are among the most "plugged-in" people in the world. Household penetration rates for telephones, cable, and the Internet are among the highest in the world. As we noted, Canada was a pioneer in exploring satellite communications. Canadian intellectuals have

formulated a substantial and distinct national critical orientation to communication studies.[xvii]

Canadians are also human rights orientated and committed activists. It was the Canadian John P. Humphrey, first Director of the UN Human Rights Division, who prepared the initial draft of the Universal Declaration of Human Rights.[xviii] The province of Saskatchewan enacted Bill of Rights legislation in 1947. A federal Bill of Rights was passed in 1960. In 1975, Quebec enacted its Charter of Human Rights and Freedoms. In 1982, the Federal government adopted the Canadian Charter of Rights and Freedoms. At the international level, Canada has ratified all the major human rights covenants and treaties of the United Nations including the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, and the Convention on the Rights of the Child. More recently, Canada played an important role in the creation of the International Criminal Court. Phillippe Kirsch, member of the Bar of the Province of Quebec, chaired the International Criminal Court Preparatory Commission. He subsequently became a judge of the Court and was elected the Court's President by the other18 judges from around the world.

There is another characteristic of how Canadians value human rights that makes them especially appropriate for advancing a so-called third generation right to communicate. One of the features of third generation rights is that they can apply to both individuals and groups. The third generation of rights emerged in the closing decades of the twentieth century. They are still widely debated and, are still largely absent in international law. Third generation rights embody collective or solidarity rights such as a

right to a clean environment, to collective economic, social, and cultural development, to peace, to common heritage, to humanitarian assistance, and to communicate. Initially, they arose in the last half of the twentieth century out of the anti-colonial era (for example, the right to development) but also reflect other global concerns such as the environment. It is because they are global in nature they require the state to be interventionist, not only nationally but also internationally in insuring citizens can exercise these rights individually and as a collective.

There are two great human rights traditions among the Western nations: the Anglo-American and the French. Canada is perhaps unique in the extent to which it embodies values derived from both traditions. It reflects the Anglo-American emphasis on individual rights but it combines that respect with the French acknowledgement that such rights are exercised in the social context of the individual. Thus, Canadians strive for a balance between the rights of the individual and the rights of groups. This is reflected, for example, in the Charter's reference to Aboriginal and language rights.

This Canadian resolution of finding a balance between individual and collective rights, derived from its roots in both the Anglo-American and French human rights traditions, distinguishes Canada's constitutional language from that of the United States.[xix] As Michael Ignatieff observes in his book on the rights revolution in Canada, there is always dispute in a rights community such as Canada, but "The balance it seeks is just enough collective sense of purpose to resolve these disputes, but not so much as to force individuals into a communitarian strait-jacket."[xx] Canadian constitutional law is a continual dialogue over the issue of the rights of the individual and of the community, a dialogue that challenges the Canadian legal community and the citizens it serves to find

new ways to address third generation rights involving tensions between individual and community needs.[xxi] The constitutional conversation between individual rights and the needs of the general society makes Canada fertile ground for a right to communicate that can provide a framework for finding a balance between individual communications rights and those of groups or the nation. The right to communicate is a judicial framework through which to address issues of national sovereignty and communication rights.

Much of the debate in Canada during the 1990s about media concentration, "cultural imperialism," national identity, and so forth have been framed within traditional concepts of public interest often veiling the economic interests of a small core of media corporate interests. The right to communicate does not provide answers to all communication issues. Rather, it provides a way of framing appropriate questions the most fundamental being: how can the right to communicative opportunities be assured and enhanced for everyone? The right to communicate envisions a communicative citizen whose rights are the baseline for the consideration of any questions regarding the media and national sovereignty.

Conflicts with Sovereignty

Since 1969, the discourse around a human right to communicate has been contentious and has covered a wide range of issues. Sovereignty -- which Philpott defines as "supreme authority within a territory" -- presents unique problems for a right to communicate.[xxii] In the intersection between sovereignty and communication rights lie inter-governmental

conflicts and conflicts between individuals and their governments that are raised by the properties of communication technologies.

The general conflict between states at the intersection of sovereignty and communications is long-standing: the existence of communication technologies necessitates the control of information transmitted across borders that is deemed to be illegal or threatening to domestic authority and control. The problem is not only seen as political. It also raises cultural, technical, and economic issues as well. States and communities have been concerned about cultural aspects of communication including the encroachment of extra-cultural ideas and the ability to preserve culture through transmission of information within and across borders. The physics of broadcast technologies do not respect politically determined borders and engineering aspects of other technologies such as FAX or Internet have made cross-border communication relatively easy to establish outside the control of states.

A longstanding yet evolving conflict between individuals and states in the intersection of sovereignty and communications is over the legitimacy of states to control cross-border communications. Another threat to the state is that technologies of communication can strengthen or enable the formation of shared public cultures, socio-economic units -- part of facets of nation identity -- that have territorialities that are not coextensive with the territory of a sovereign state.[xxiii] People may be drawn together into groupings or choose to participate in some way with other individuals and entities across territories that are trans-national. As with states, the issues for individuals can be political, cultural, and economic. Individuals may wish for various non-malicious reasons to receive and impart information via telecommunication across borders.

Meanings of Sovereignty

The concept of sovereignty has been a contested area. It has been seen by many as an ambiguous, weakened, or disappearing concept.[xxiv] Adherence to sovereignty has never been as consistent as many have believed and new international orders such as the European Union challenge existing notions of it. Recent scholarship has, however, made major progress in showing that sovereignty is a viable concept.[xxv] The approach is to see it as an abstraction that is dynamic and contextualized with respect to several fundamental characteristics of the state: the source of its legitimacy, the characteristics of its authority, and the types of control it is able to exercise.

Sovereignty has been evolving since the 13th century, with new conceptions coming about through what Philpott calls "revolutions in sovereignty." These are characterized as momentous changes in ideas and norms about justice and the sources of legitimacy and authority of the state, whereas Krasner views sovereignty as being impacted by fundamental types of compromises between states that result in "deviations" in norms.[xxvi] Legitimacy is seen as the acknowledged source of authority. Authority is defined here as "the right to command and correlatively, the right to be obeyed." [xxvii] Natural law, international law, religion, tradition, and constitutions have all been used as sources of legitimacy. Authority in the context of sovereignty is necessarily defined as that authority which is supreme in the chain of command within a polity.

The development of new types of sovereignty did not necessarily result in the

disappearance of earlier forms. This has lead to the co-existence of several major types of sovereignty. Krasner defines the following types or "meanings" of sovereignty: Westphalian sovereignty, international legal sovereignty, domestic sovereignty, and interdependence sovereignty.[xxviii] These are defined by the types of interactions they address within and between polities recognized in the international community of states. They are also defined by the character of authority within them. Westphalian sovereignty describes a system that accords to polities the right to exclude other states or external entities from its structures of authority. International legal sovereignty has generally referred to what Philpott calls a "constitution of international society," in which territorially and juridically-independent polities are accorded recognition by other such polities and are entitled to enter into agreements with one another.[xxix] Domestic sovereignty refers to the recognition of the right of some supreme authority within the state to exercise control within its territory. Interdependence sovereignty refers to control by the state of the movement of material, information, or people across its borders.

We use in this paper an expanded understanding of Philpott's definition of sovereignty as given above -- "supreme authority within a territory" -- which includes his notions of authority and legitimacy and Krasner's taxonomy of sovereignty types.

Technologies of communication enable unique challenges, individually, to the different meanings of sovereignty and in some cases they create conflicts between the meanings themselves. These problems create contexts within which issues of culture, polity, and human rights must be addressed.

Bell ExpressVu Limited Partnership v. Rex

Meanings of sovereignty raised by technologies of communication can be seen in the case that we will reference. The *Bell ExpressVu Limited Partnership v. Rex* case decided by the Supreme Court of Canada exposed mainly domestic and interdependency sovereignty issues around the authority of the state to prevent individuals from receiving international satellite communications.

As is the case in many countries, citizens of Canada have developed the practice of down linking television programming from satellite-based services that are not intended for their country. These types of schemes constitute what is called a "grey market." Recently, the Supreme Court of Canada was called upon to consider the legality of such a scheme in light of the prohibition in the *Radiocommunication Act* against decoding encrypted signals. Can-Am Satellites of Maple Ridge, British Columbia, provided its customers with decoders for a U.S.-based direct broadcast satellite (DBS) service.[xxx] Can-Am also provided a U.S. address, as the U.S. company would not knowingly enable decoding by Canadian customers.

Bell ExpressVu, another Canadian firm, also distributes DBS programming to a Canadian market, but delivers its programming via Canadian-owned satellites. Bell ExpressVu is, therefore, subject to Canada's licensing scheme for providers, which includes a system of fees that are used, in part, to create program content. Bell ExpressVu brought an action against Can-Am, asking for an injunction to prevent Can-Am from continuing to facilitate the use of a foreign DBS. Bell ExpressVu argued that Can-Am's practice was economically damaging to Canadian providers, since as many as 1 million

Canadians are estimated to use a foreign-based DBS.[xxxi] It also argued that by side-stepping the Canadian licensing system, these grey market services do not contribute, through fees, to the creation of Canadian content, much less carry Canadian content. The injunction application was based on provisions of the *Radiocommunication Act.* Section 9(1)(c) states: "No person shall: [...] (c) decode an encrypted subscription programming signal or encrypted network feed otherwise than under and in accordance with an authorization from the lawful distributor of the signal or feed."[xxxii]

Can-Am argued that the provision does not bar the decoding of foreign signals and that only signals originating in Canada are subject to this law. Both the British Columbia Supreme Court and the majority in the British Columbia Court of Appeal supported this view. At the lower level, the judge hearing the application responded that to hold that the prohibition extended to all signals would make no distinction between actual theft of signals in Canada and the receipt of signals through paid subscription. He does not appear to have commented on the fact that the U.S. distributor of the signal would not have accepted the subscription from subscribers in Canada and they had to obtain a U.S. address to get the subscription.

The Court of Appeal held that the use of the definite article "the" in the phrase “lawful distributor of the signal or feed” as it occurs in section 9(1)(c), means that the prohibition in that section applies only "to signals broadcast by lawful distributors who are licensed to authorize decoding of that signal." [xxxiii] In other words, "If there is no lawful distributor for an encrypted subscription program signal in Canada, there can be no one licensed to authorize its decoding" and therefore it is impossible to contravene

section 9(1)(c). As a result, there can be no contravention of section 9(1)(c) where a person decodes unregulated signals such as those broadcast by the U.S. companies."

There were a number of cases decided at every level of court in several Canadian jurisdictions taking this restrictive interpretation approach.[xxxiv] The Ontario Court of Appeal supported this argument in its April 2001 ruling in R. v. Branton, [2001] O.J. 1445.[xxxv]

There was also another line of cases interpreting the provision so as to create an absolute prohibition, with a limited exception where authorization from a lawful Canadian distributor is received. [xxxvi]

The Supreme Court chose to follow this latter approach. The issue for the court was a straightforward question of statutory interpretation. What does section 9(1)(c) of the *Radiocommunication Act* mean? The court took as its starting point for analysis the so-called modern rule of statutory interpretation, as articulated by Elmer Driedger in his seminal work, *The Construction of Statutes* : "Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." [xxxvii]

In looking at the grammatical and ordinary sense of the provision, the court notes that it is structured as a prohibition with an exception. It sets out a prohibition against decoding any encrypted signal unless authorized by the lawful distributor of the signal. The prohibited activity is decoding, not broadcasting, so the activity at which it is directed occurred entirely within Canada. The phrase "subscription programming signal" is also defined in the Act as "radiocommunication that is intended for reception either

directly or indirectly by the public in Canada or elsewhere on payment of a subscription fee or other charge" and suggests, when used in section 9(1)(c) that the prohibition applies to all signals regardless of whether or not they emanate from Canada.

Can-Am had argued that since there was no lawful distributor of the US signal in Canada, decoding the signal shouldn't be prohibited. The court disagreed, saying:

> The definite article "the" and the possessive adjective "leur" merely identify the party who can authorize the decoding in accordance with the exception.[xxxviii] Thus, while I agree with the majority of the Court of Appeal that "If there is no lawful distributor for an encrypted subscription program signal in Canada, there can be no one licensed to authorize its decoding" (para. 36), I cannot see how it necessarily follows that decoding unregulated signals "cannot therefore be in breach of the *Radiocommunication Act*". Such an approach would require one to read words from the exception into the prohibition, which is circular and incorrect. Again, as Provost C.Q.J. stated in *Pearlman*: [TRANSLATION] "To seek the meaning of the exception at the outset, and thereafter to define the rule by reference to the exception, is likely to distort the meaning of the text and misrepresent the intention of its author." [xxxix]

The court held that the prohibition was clear and unambiguous; decoding an encrypted signal is contrary to the Act. The exception is just that, an exception.

This case and the Supreme Court's ruling have raised several media sovereignty questions and the question of whether the application of laws, such as the *Radiocommunication Act*, in this manner violate citizens' rights to communicate. The Supreme Court's ruling did not attempt to address these questions. The question of communication rights in a Canadian contexts asks in particular whether section 9(1)(c) violates one of the fundamental freedoms as guaranteed by the Canadian Charter of Rights and Freedoms: "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication." More generally, should Canada, or any other state, have the right to control the reception of communications originating outside of its territory and to what extent? Cultural considerations also force us to ask to what extent the protection or promotion of culture should be taken into consideration in deciding the media dimension of sovereignty.

Technology

To focus on the case of Bell Express Vu Partnership v. Rex, a case involving the "footprint" implications of satellite distribution, in conjunction with the right to communicate, acknowledges a common heritage that goes back to the introduction of satellite communication in the 1960s. To understand the import of a right to communicate as a public policy and judicial framework it is useful to examine the evolving relationship between technology, sovereignty, human rights, and Canadian policy. Developments such as Bell Express Vu v Rex have raised issues not only of the

notion of territoriality as integral to common conceptions of sovereignty, but also of culture, and what constitutes a legitimate polity within the context of a right to communicate.

Engineered Territoriality

Territoriality is a fundamental aspect of most understandings of sovereignty, the linking of authority to a specific set of geographic boundaries.[xl] Sovereignty identifies an entity having supreme authority, under some source of legitimacy, to exercise control over affairs of state over a territory or collection of territories. Such authority has usually assumed some measure of control over communications.

Technologies of communication are at a physical level fundamentally unamenable to this type of regime. The physics of broadcast technologies present the most difficult problems with regard to territorial control. They challenge each of Krasner's four "meanings" of sovereignty: *domestic sovereignty*, *interdependence sovereignty*, *Westphalian sovereignty*, and *international legal sovereignty*. These challenges can be examined in relation to fundamental characteristics of communication technologies. The form of the medium used to pass information across political boundaries yields unique potentials for challenging territorial authority. The two critical categories are *broadcast communications* and *networked communications*. Networking technologies here include the notion of wireless links. It might be argued that broadcast should be broadened to include all wireless technologies. However, some wireless communication technologies,

such as microwave, are more directional in nature. This type of medium does not pose the same conceptual challenges to sovereignty in that, unlike broadcast communications, cross border communications using them would probably not be an undesirable side effect of desirable communications (i.e. within the source's territory). They would occur because a transmitter is pointing intentionally or unintentionally in that direction and in either case such transmissions can be easily interdicted in their "line of sight." While networking communications are enabled mostly by technologies that can be similarly interdicted (e.g. refusing wire line entry across a border), they raise challenges to sovereignty in contexts where a desire for interdiction is not absolute and control of the medium does not (or cannot) rest completely with the state that perceives a threat.

We focus in this paper only on broadcast communications.

Broadcast Communications

Terrestrial radio and satellite-based radio cannot be controlled such that their transmission footprints are coextensive with the states that are the domestic sovereigns over their broadcasters (e.g. through corporate charter or licensing regime). The satellites that direct broadcast satellite providers use are licensed to operate in specific countries or regions, but may have broadcast ranges that extend beyond the intended territories by virtue of the physical properties of the medium. Challenges to both domestic sovereignty and interdependence sovereignty can be seen most clearly in Bell Express Vu Partnership v. Rex because of this.

Krasner's notion of domestic sovereignty characterizes the exercise of authority within the territorial limits of the polity.[xli] From the perspective of the opposition, Bell

Express Vu Partnership v. Rex was about the limits of authority the Canadian government has in controlling the communication behavior of its citizens.

Interdependency sovereignty characterizes the exercise of authority in controlling borders, in terms of flows of goods, people, or information.[xlii] As Krasner points out, a weakening of interdependency sovereignty can have transitive impacts on domestic sovereignty. In the Bell Express Vu case, territorial control was challenged not only by the basic physical nature of the technology, but also by engineering adaptations meant to solve the problems of unintended broadcast footprints. As is seen in Bell Express Vu, the creation of "engineered" broadcast areas that are smaller than their physical broadcast areas is now attempted through encryption of the broadcast signal. However, completeness of control requires secure distribution of decoding devices to authorized locations (i.e. customers) within the engineered territory and a system that is resistant to the "cracking" of both the encrypted signals and decoding devices.

Cracking of signals or piracy of official decoding devices may present problems for signal providers and law enforcement, but not for domestic sovereignty. States are generally seen as having the authority to establish domestic laws banning such practices. It can be seen, however, that the interests of service providers in extending their engineered territory and the very system they use to control its extension can encourage struggles between domestic and interdependency sovereignty apart from the physical nature of broadcast communications. Maintenance of complete interdependency sovereignty in the context of this type of technology would require not only control over signals, but the interdiction of decoding devices as well. This problem was addressed,

however, within the domestic context in the application of the Radiocommunication Act in Bell Express Vu Partnership v. Rex.

Communication technologies have been shown to raise problems for individual meanings of sovereignty. They can, however, also create conflicts between the meanings. Such conflicts may arise from an asymmetry in the applications of the meanings, which can, transitively, give impetus to seek recourse on the basis of one of the other meanings of sovereignty.

There is a clear asymmetry in the prerogatives of states and individuals in both the notions of interdependency and domestic sovereignty that are raised by supra-territorial communications. The meaning of Bell ExpressVu, for example, exists for the moment mainly in the context of one state. Though the situation arose through the actions of entities in two sovereign states, calls to halt those actions and the invocation of authority in terms of the application of domestic laws and interdependency occurred in only one. Arguably, the U.S. provider in this case was within the bounds of its domestic law in the transport of its decoding devices into Canada. The U.S. Federal Communication Commission stated in 1999:

> International DBS service from a U.S. DBS satellite may require coordination with foreign administrations. However, we see no reason why the Commission should impose any barriers on a licensee willing to provide international DBS service, in accordance with U.S. treaty obligations, from an orbital location assigned to the United States for DBS service.[xliii]

Furthermore, evidence suggests that the U.S. distributor knowingly sold cards needed to use their decoders directly to Canadian distributors.[xliv]

These two forms of sovereignty cannot by definition address this type of conflict in a symmetric way across both states. Appeals would have to be made by the U.S. provider on behalf of their Canadian "grey" market distributors or, correspondingly, appeals by the Canadian government and licensed Canadian providers to the U.S. government for intervention and redress against the U.S. provider, as examples, would probably not be viable in domestic contexts. This is in fact the type of action that prompted the Federal Communication Commission ruling cited above. The nature of the communication medium and business model allowed the U.S. operator to participate independent of Canadian domestic sovereignty.

Recourse to and protections from the asymmetries in domestic and interdependency sovereignty can be sought in a meaning of sovereignty that transcends others. Krasner's notion of "international legal sovereignty" is the ground under which symmetric responses might be attempted. International legal sovereignty refers to mutual recognition between polities and their authority to enter into legal agreements with other polities. Krasner points out that this meaning of sovereignty implies security for a state against challenges from other states to legal decisions that it has made.[xlv] On the other hand, it is also the context under which states can adopt agreements that address the types of conflicts. The North American Free Trade Agreement (NAFTA) is but one example. The U.S. schedule under the Communications Sector of Annex 6 of NAFTA, for example, prohibits a certain form of discrimination between Mexican and U.S. stations

by the U.S. Federal Communication Commission in competitive bids for broadcast retransmission licenses.[xlvi]

Additionally, the practice by states of broadcasting propaganda into other sovereign territories demonstrates violations of Westphalian sovereignty. This meaning of sovereignty implies the right of a state to be free of interference from external states in matters of internal authority and control, and it demonstrates most clearly the linking of territory with authority.[xlvii] Examples here include the U.S. Radio Free Europe broadcasts during the Cold War.[xlviii] This type of action by U.S. was an effort to weaken both the domestic control of the Soviet Union and its relations with other Eastern European states. The technological response to this type of challenge to sovereignty was "jamming," but counter-responses were demonstrated to be effective. [xlix] Jamming has continued to be applied in other political contexts.[l]

Thus, the physics of broadcast technologies creates potentials for certain types of threats to sovereignty in its various meanings. Attempts can be made to respond to each of these types threats through technological means or policymaking. It is also the case, however, that the potential for such threats arises not through technological advancement, but through policymaking. Examples of this exist and they demonstrate Krasner's perspective on the evolution of sovereignty through compromises.

A recent example is the desire of the Conservative Party in Canada to affect "the restructuring of the Canadian Radio-Television and Telecommunications Commission, reducing its mandate to registration and/or marketing of bandwidth and to dealing with international communications negotiations." (quoted from Canadian Conference of the Arts, 2004). The party in an internal policy briefing during the June 2004 made this

statement federal elections. Further, their statement called for "relaxing foreign ownership rules on Canadian industry in concert with our major trading partners in the telecommunications, broadcast distribution, and airline industry" and their intention should they come to power would be "to negotiate a reciprocity agreement with the United States to create an open market in the licensing of television satellite distribution" (quoted from Canadian Conference of the Arts, 2004). Some critics see these policies as being abdications of what are in effect Philpot's Westphalian, international legal, and interdependence meanings of sovereignty in the context of Canada's current authority over broadcast media. Reguly (June 12, 2004) and the Canadian Conference of the Arts both see such changes as potentially eliminating Canadian programming by setting up conditions for both takeovers of Canadian broadcasters and calls by companies for eliminating Canadian content requirements for competitive reasons.

Society

Radio broadcasts and television satellite transmissions were used in 1994 to report the beginning of the massacre in Rwanda to the outside world while a United Nations monitoring force refused to intervene. FAX technology was also a critical conduit for information during the Tiananmen Square massacre.[li] These were examples of the very specific life-critical social process of exchanging information -- the act of communication -- that are not addressed in a direct way by certain notions of sovereignty.

Other meanings of sovereignty have been inferred from the various social issues that have fallen out of the collisions between the technologies of communication and existing notions of sovereignty. These meanings are still to be articulated in terms of authority and control. They are, however, deterritorialized. One notion is that of media sovereignty, where authority and control have been sought over means of receiving and imparting information as a means of maintaining cultural ties. Another notion is that of sovereignty over culture itself, which depends on the capabilities of technologies to create engineered territories across which people with shared identity can be reached. The attainment of media sovereignty can be seen as an enabler of cultural sovereignty.

Cultural Sovereignty and Engineered Polities

Just as nations realized the implications of communication technologies having international reach, so too have ethnic groups and nationalist movements. This is demonstrated, for example, by the appropriation of direct broadcast satellite technologies by nationalists movements around the world.[lii] Philpott points out that sovereignty as defined in relation to territoriality does not require that people within a territory feel a part of a nation.[liii] This, of course, has been evident around the world through inter-ethnic conflicts that are partially the results of border drawing in the aftermath of empire and wars.

The result of the geographic footprints of communication technologies is that they have the potential of enabling "engineered polities." In this sense, an engineered polity

would be an organized society, composed of populations distributed across sovereign territories that are not recognized collectively under traditional meanings of sovereignty, which is produced through the strengthening of existing feelings of national identity through technologies of communication. Such characteristics of national identity, as Hall points out, include shared culture and language, common mythologies, and identification with a common homeland.[liv]

Communication is seen as filling this role partly through the binding people culturally and linguistically. Hall states that citizens "give their allegiance" to the "imagined community of shared ancestry, culture, or history to which they believe themselves to be a part." [lv] Communication is also seen as having the potential to weaken states through: the documentation and transmission of information about human rights violations, and by transcending state media monopolies that they view as being oppressive to their "nation." [lvi] These types of actions can, thus, be viewed as impulses to constitute polities using technology through the assertion, effective or otherwise, of supreme authority over their culture. This, following Philpott's construction, would be cultural sovereignty.

The notion of cultural sovereignty occupies a space in the context of international legal sovereignty within the so-called third generation of human rights, which involves collective rights. The United Nations General Assembly adopted a declaration granting the right of self-determination to colonies in 1960. It states in part: "All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development." [lvii] In one of the capstones to the International Bill of Rights, the International Covenant on Economic,

Social, and Political Rights recognizes variously in: Article 1, 1 "the right of self-determination"; and Article 15, 1.(a) "the right to take part in cultural life." [lviii] Subsequent developments have taken place in the context of an international effort to recognize the rights of indigenous peoples. Most recently, the United Nations General Assembly adopted the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities in 1992.[lix] Full realization of cultural sovereignty remains distant, however.

Conclusions

Philpott sees the operation and evolution of sovereignty occurring within what he calls "constitutions of international society." These define the nature of authority within sovereignty. The new meanings have come about through "constitutional revolutions" and "revolutions in ideas." Constitutional revolutions have forced changes in how authority is constituted in the international context. Revolutions in ideas have forced changes in norms around authority.[lx] Technologies of communication and their intersection with evolving notions of human rights have engendered both types of changes.

Absoluteness of Sovereignty and Modalities of Compromise

As we have seen, the characteristics of communication technologies forces have caused conflicts between Krasner's meanings of sovereignty. In several fundamental types of cases, as we have shown, these conflicts force the resolution of communication rights to be ceded to a dimension of territoriality over which there can be no sovereign other than some international constitution. This is not always the case in practice as has been the case in ExpressVu, but technological impacts on communication rights cannot be fully analyzed outside of the international context.

As Philpott points out, sovereignty does not necessarily connote absolute authority over all aspects of the state. States have historically ceded authority over certain matters to other spheres. Other types of modifications to sovereignty can occur, however. Krasner characterizes such "compromises" in sovereignty as including conventions, contracts, coercion, and imposition.[lxi] The convention approach can be seen in use of the UN System and International Telecommunication Union by most of the international community to define roles in regulating telecommunications. The NAFTA Annex cited above is an example of a contract, in that case between three states.

Of course, coercion and imposition as modalities of compromise in sovereignty have occurred often due to unethical motives between nations. It is, however, the human rights context in which we have seen major changes in sovereignty, beginning with second generation rights. Today the premise that it is justifiable for the international community to interfere with authority of a sovereign state for purposes of defending human rights or redressing their violations is accepted by a wide and growing number of states and individuals. This is evidenced by the wide adoption of the International

Criminal Court. Given the international dimension of most technologies of communication and the essential role of communication in protecting human rights, a properly implemented right to communicate would force states to accept compromises to sovereignty.

It is argued here that this forcing of the analysis and, in some cases, real authority, as well as the forcing of compromises have induced the new meanings of media sovereignty and cultural sovereignty and that they are implied by the notion of a right to communicate. They are necessary for both the existence and enforcement of this right.

Prerogatives and Obligations

Any meaning of sovereignty, as Philpott has shown, is characterized by the relationship between norms and constitutional authority within a polity.[lxii] Norms as he states are what "constitute polities and endow them with their basic prerogatives."[lxiii] Thus, norms define what is legitimate and obligatory under a form of sovereignty, as well as what is practiced and enforced. Within the notions of media and cultural sovereignty the highest obligation must be to the protection and enforcement of human rights, particularly in life-critical contexts.

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[i] World Summit on the Information Society, Secretariat, *Draft Declaration of Principles Document*, WSIS/PC-3/DT/1(Rev.2 B)-E, 26 September 2003, Original: English, 1. <http://www.itu.int/wsis/documents> (26 September 2003).

[ii] United Nations, General Assembly, "Universal Declaration of Human Rights," resolution 217 A(III) of 10 December 1948 in *Human Rights: a Compilation of International Instruments, Volume I (First Part) Universal Instruments*, (New York and Geneva: United Nations, 1994), 1-7, 4-5.

[iii] United Nations, General Assembly, "Universal Declaration of Human Rights," resolution 217 A(III) of 10 December 1948 in *Human Rights: a Compilation of International Instruments, Volume I (First Part) Universal Instruments*, (New York and Geneva: United Nations, 1994), 1-7, 4-5.

[iv] Jim Richstad, "Right to Communicate in the Internet Age," in *An Arsenal for Democracy: Media Accountability Systems*, ed. Claude-Jean Bertrand, (Cresskill, NJ: Hampton Press, 2003), [?page numbers?].

[v] Jean d'Arcy, "Direct Broadcast Satellites and the Right to Communicate," in *Right to Communicate: Collected Papers*, ed. L. S. Harms, Jim Richstad, and Kathleen A. Kie, Honolulu: University of Hawaii Press, 1977, 1-9. (Originally published in *EBU Review* 118, 1969, 14-18.)

[vi] Jean d'Arcy, "An ascending progression," in *The Right to Communicate: a New Human Right,* ed. by Desmond Fisher and L.S. Harms, (Dublin: Boole Press, 1983), xxi-xxvi.

[vii] d'Arcy, "Direct Broadcast Satellites," 3.

[viii] d'Arcy, "An ascending progression," xxiv.

[ix] d'Arcy, "An ascending progression," xxi-xxvi.

[x] d'Arcy, "Direct Broadcast Satellites," 1-9.

[xi] Matthew Fraser, *Free-for-All: the Struggle for Dominance on the Digital Frontier* (Toronto: Stoddart, 1999).

[xii] Canada, Telecommission, *Instant World* (Ottawa: Information Canada, 1971), 4.

[xiii] Canada, Telecommission, *Instant World,* 229.

[xiv] L. S. Harms, Jim Richstad, and Kathleen A. Kie, *Right to Communicate: Collected Papers* (Honolulu: University of Hawaii Press, 1977), 114-115.

[xv] William F. Birdsall, William J. McIver, Jr. and Merrilee Rasmussen, "Translating a right to communicate into policy," *Right to Communicate* (Web site), 2003, <http://www.righttocommunicate.org > (July 2003)**.**

[xvi] Paul G. Lauren, *The Evolution of International Human Rights: Visions Seen* (Philadelphia: University of Pennsylvania Press, 1998).

[xvii] Robert E. Babe, *Telecommunications in Canada* (Toronto: University of Toronto Press, 1993).

[xviii] Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (Philadelphia: University of Pennsylvania Press, 1999).

[xix] M.A. Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: The Free Press, 1991), 167.

[xx] Michael Ignatieff, *The Rights Revolution* (Toronto: Anansi, 2000), 34.

[xxi] Leon Trakman and Sean Gatien, *Rights and Responsibilities* (Toronto: University of Toronto Press, 1999); Patrick Macklem, "Constitutional ideologies," *Ottawa Law Review.* 20(1) (1988): 117-156.

[xxii] Daniel Philpott, *Revolutions in Sovereignty: How Ideas Shaped Modern International Relations* (Princeton, NJ: Princeton, 2001), 9.

[xxiii] Anthony D. Smith, "The Problem of National Identity: Ancient, Medieval, and Modern?," *Ethnic and Racial Studies,* 17(3). (July 1994):375-99, 381 quoted in Rodney Bruce Hall, *National Collective Identity: Social Constructs and International Systems* (New York: Columbia University Press), 9.

[xxiv] See Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton, New Jersey: Princeton, 2001), 3. and Michael Ross Fowler and Julie Marie Bunck, *Law, Power, and the Sovereign State: The Evolution and Application of the Concept of Sovereignty* (University Park, Penn.: The Pennsylvania State University Press, 1995), 1-4.

[xxv] A review of recent scholarship on sovereignty is given in Daniel Philpott, "Usurping the Sovereignty of Sovereignty?," *World Politics* 53.2 (2001): 297-324.

[xxvi] The work of the 16th century French philosopher Jean Bodin and the Treaty of Westphalia are cited among the origins of modern conceptions of soveriegnty. See Daniel Philpott, *Revolutions in Sovereignty*, 16 and Stephen D. Krasner, *Sovereignty*, 3, 25-26.

[xxvii] Philpott, *Revolutions in Sovereignty*, 16.

[xxviii] Krasner, *Sovereignty*, 3-25.

[xxix] Philpott, *Revolutions in Sovereignty*, 21.

[xxx] Direct broadcast satellite or DBS is also known internationally as Broadcast Satellite Service or BBS.

[xxxi] Sue Bailey, "Court: 'Grey-market' dishes illegal," *CNEWS*, April 26, 2002, <http://www.canoe.ca/CNEWSLaw0204/26_sats-cp.html> (July 2003).

[xxxii] Canada, Department of Justice, *Radiocommunication Act*, R.S., 1985, c. R-2, s. 1; 1989, c. 17, s. 2., Sec 9(1)(c). < http://laws.justice.gc.ca/en/R-2/95896.html> (July 2003).

[xxxiii] Canada, Supreme Court, *Bell ExpressVu Limited Partnership*, 2002 SCC 42, (26 April 2002), < http://www.lexum.umontreal.ca> (July 2003), paragraph 36.

[xxxiv] See *R. v. Love* (1997), 117 Man. R. (2d) 123 (Q.B.); *R. v. Ereiser* (1997), 156 Sask. R. 71 (Q.B.); *R. v. LeBlanc*, [1997] N.S.J. No. 476 (QL) (S.C.)*; Ryan v. 361779 Alberta Ltd.* (1997), 208 A.R. 396 (Prov. Ct.), at para. 12; *R. v. Thériault*, [2000] R.J.Q. 2736 (C.Q.), aff'd (sub nom. *R. v. D'Argy*), Sup. Ct. (Drummondville), No. 405-36-000044-

003, June 13, 2001; R. *v. Gregory Électronique Inc*., [2000] Q.J. No. 4923 (QL) (C.Q.), aff'd [2001] Q.J. No. 4925 (QL) (Sup. Ct.); *R. v. S.D.S. Satellite Inc*., C.Q. (Laval), No. 540-73-000055-980, October 31, 2000; *R. v. Scullion*, [2001] R.J.Q. 2018 (C.Q.); *R. v. Branton* (2001), 53 O.R. (3d) 737 (C.A.).

[xxxv] Bailey, "Court: 'Grey-market' dishes illegal."

[xxxvi] See: *R. v. Open Sky Inc*., [1994] M.J. No. 734 (QL) (Prov. Ct.), at para. 36, aff'd (sub nom. *R. v. O'Connor*) (1995),106 Man. R. (2d) 37 (Q.B.), at para. 10, leave to appeal refused on other grounds (1996), 110 Man. R. (2d) 153 (C.A.); *R. v. King*, [1996] N.B.J. No. 449 (QL) (Q.B.), at paras. 19-20, rev'd on other grounds (1997), 187 N.B.R. (2d) 185 (C.A.); *R. v. Knibb* (1997), 198 A.R. 161 (Prov. Ct.), aff'd (sub nom. *R. v. Quality Electronics (Taber) Ltd.*), [1998] A.J. No. 628 (QL) (Q.B.); *ExpressVu Inc. v. NII Norsat International Inc*., [1998] 1 F.C. 245 (T.D.), aff'd (1997), 222 N.R. 213 (F.C.A.); *WIC Premium Television Ltd. v. General Instrument Corp*. (2000), 272 A.R. 201, 2000 ABQB 628, at para. 72; *Canada (Procureure générale) v. Pearlman*, [2001] R.J.Q. 2026 (C.Q.), at para. 81.

[xxxvii] Elmer A. Driedger, *Construction of Statutes, 2nd ed*. (Toronto: Butterworths, 1983),[page number from Merrillee].

[xxxviii] See *Pearlman,* 2032.

[xxxix] Provost C.Q.J. stated in *Pearlman,* 2031.

[xl] Krasner, *Sovereignty,* 20; Philpott, *Revolutions in Sovereignty*, 16.

[xli] Krasner, *Sovereignty,* 11-12.

[xlii] Krasner, *Sovereignty,* 12-14.

[xliii] United States, Federal Communication Commission, "In the Matter of Amendment to the Commission's Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems and DBSC Petition for Declaratory Rulemaking Regarding the Use of Transponders to provide International DBS Service," Washington, D.C. 20554, FCC 96-14, IB Docket No. 95-41, File No. DBS-88-08/94-13DR, 22 January 1996, <http://ftp.fcc.gov/Bureaus/International/Orders/1996/fcc96014.txt> (Nov 2003).

[xliv] Jim Duff, "Copps craps out in satellite TV scandal," *Hudson Gazette*, [?date?], < http://www.legal-rights.org/hgazette2002.html> (Nov 2003).

[xlv] Krasner, *Sovereignty*, 17.

[xlvi] Canada, Mexico, United States, *North American Free Trade Agreement*, (17 Dec 1992), Annex VI, Schedule of the United States, Sector: Communications, < http://www.nafta-sec-alena.org/DefaultSite/legal/index_e.aspx?ArticleID=78> (1 Nov. 2003),

[xlvii] Krasner, *Sovereignty*, 20-25.

[xlviii] Kenneth A. Osgood, "Review Essay: Hearts and Minds: The Unconventional Cold War", Journal of Cold War Studies 4.2 (2002): 85-107, <http://muse.jhu.edu/journals/journal_of_cold_war_studies/v004/4.2osgood.html> (1 Nov. 2003). See also Peter Grose, *Operation Rollback: America's Secret War behind the Iron Curtain*, (Boston: Houghton Mifflin Company, 2000); and Gregory Mitrovich, *Undermining the Kremlin: America's Strategy to Subvert the Soviet Bloc, 1947--1956* (Ithaca: Cornell University Press, 2000).

[xlix] László Borhi, "Rollback, Liberation, Containment, or Inaction? U.S. Policy and Eastern Europe in the 1950s," *Journal of Cold War Studies* 1.3 (1999): 67-110 , 80.

[l] For example, the government of Turkey jammed the signal of the now defunct Kurdish nationalist satellite channel called MED-TV. See Amir Hassanpour, "The MED-TV Story: Kurdish Satellite TV Station Defies All Odds," *InteRadio*, Vol. 10, No. 2 (December 1998) and David Romano, "Modern Communications Technology in Ethnic Nationalists Hands: The Case of the Kurds," *Canadian Journal of Political Science / Revue canadienne de sceince politique*, 35:1 (March/Mars 2002).

[li] Joseph S. Nye, Jr. and William A. Owens. "America's Information Edge," *Foreign Affairs* (March/April 1996): 20-36.

[lii] See Hassanpour, "The MED-TV Story" and Romano, "Modern Communications Technology."

[liii] Philpott, *Revolutions in Sovereignty,* 17.

[liv] Rodney Bruce Hall, *National Collective Identity: Social Constructs and International Systems* (New York: Columbia University Press, 1999), 9.

[lv] Hall, *National Collective Identity*, 31.

[lvi] Romano, *Modern Commications Technology,* 137-138.

[lvii] United Nations, General Assembly, "Declaration on the Granting of Independence to Colonial Countries and Peoples," resolution 1514(XV) of 14 December 1960 in *Human Rights: a Compilation of International Instruments, Volume I (First Part) Universal Instruments*, (New York and Geneva: United Nations, 1994), 56.

[lviii] United Nations, General Assembly, "International Covenant on Civil and Political Rights," resolution 2200 A(XXI) of 16 December 1966 in *Human Rights: a Compilation of International Instruments, Volume I (First Part) Universal Instruments*, (New York and Geneva: United Nations, 1994), 8, 14.

[lix] United Nations, General Assembly, "Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities," resolution 47/135 of 18 December 1992 in *Human Rights: a Compilation of International Instruments, Volume I (First Part) Universal Instruments*, (New York and Geneva: United Nations, 1994), 141.

[lx] Philpott, *Revolutions in Sovereignty,* 21-72.

[lxi] Krasner, *Sovereignty*, 25-40.

[lxii] Philpott, *Revolutions in Sovereignty,* 21-22.

[lxiii] Philpott, *Revolutions in Sovereignty,* 22.

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