

January 2006

Transnational Communication and Defamatory Speech: A Case for Establishing Norms for the Twenty-First Century

David Goldberg

Follow this and additional works at: https://digitalcommons.nyls.edu/nyls_law_review



Part of the [First Amendment Commons](#), and the [International Law Commons](#)

Recommended Citation

David Goldberg, *Transnational Communication and Defamatory Speech: A Case for Establishing Norms for the Twenty-First Century*, 50 N.Y.L. SCH. L. REV. (2005-2006).

This Article is brought to you for free and open access by DigitalCommons@NYLS. It has been accepted for inclusion in NYLS Law Review by an authorized editor of DigitalCommons@NYLS.

TRANSNATIONAL COMMUNICATION AND DEFAMATORY
SPEECH: A CASE FOR ESTABLISHING NORMS
FOR THE TWENTY-FIRST CENTURY

DAVID GOLDBERG*

I. INTRODUCTION

“The development of radio broadcasting has obviously created new problems of international relations not covered by existing law.”¹

Transnational communication² is not a novel phenomenon. Despite recent concern over the consequences of communications that respect no territorial boundary, such as satellite-delivered signals and computer-generated bytes, there is a long history of disputes arising out of the cross-border (and inter-group) dissemination of opinions, ideas, and information. For example, in the sixteenth century, Francisco de Victoria, commenting on Catholic missionaries preaching to unwilling and endangered listeners, asserted that if the Spaniards were prevented “from freely preaching the Gospel, [they], after first reasoning with them in order to remove scandal, may preach it despite their unwillingness”³ Emmerich de Vattel was somewhat more temperate, acknowledging that “[i]t is certainly an uncharitable act, and indeed a vital injury

* David Goldberg teaches and researches media/information law at Glasgow Caledonian and Stirling Universities, as well as at London as the Senior Honorary Visiting Fellow, Institute of Computers and Communications Law, Queen Mary, and Oxford as an Academic Associate, Programme for Comparative Media Law and Policy.

1. C.G. Fenwick, *The Use of Radio as an Instrument of Foreign Propaganda*, 32 AM. J. INT’L L. 339, 339 (1938).

2. Transnational communication refers to all “communication across national boundaries;” “international communication” is more “commonly confined to communication between governments.” Quincy Wright, *Freedom and Responsibility in Respect to Trans-national Communication*, 44 AM. SOC’Y INT’L L. PROC. 95 n.2 (1950). Wright states that the term “transnational communication” is preferable to “international communication.”

3. *Id.* at 97 (quoting FRANCISCO DE VICTORIA, ON THE INDIANS 157 (Ernest Nys ed., John Pawley Bate trans., Carnegie Inst. of Wash. 1917)).

to a Nation, to spread a false and dangerous doctrine among its citizens.”⁴

Cross-border dissemination of ideas has also led to problems in more recent times. In the nineteenth century, conflicts arose when newspapers published in one state were circulated in another state. On occasion, the intrastate publication and circulation resulted in problems, simply because the newspapers made critical comments about goings-on in another state.⁵ In the twentieth century, the development and use of the then “new media” — wireless radio — occasioned a fresh catalyst for tension. Radio’s use — some might say its abuse — by states such as Germany, the USSR, and Italy, heightened the tensions that were developing before the Second World War. It was during this period that the world’s first and only treaty dealing explicitly with the standards for acceptable international broadcasting was adopted: the *International Convention Concerning the Use of Broadcasting in the Cause of Peace* (1936 Treaty).⁶

While so-called “new” information and communications technologies (ICTs) have created their own characteristic problems and concerns, it must be remembered that all forms of communication have at all times been capable of causing transnational/international tension. To illustrate this point by analogy: confining one’s interest to the problems posed by the “new media” is akin to being concerned about causes of conflict, but confining one’s interest to nuclear weaponry and warfare. Such a narrow focus would ignore the fact that old-fashioned, conventional, and low-tech weaponry and warfare still have great capacity to threaten everyone’s peace and security.

This article makes several points. First, all forms of communication have caused transnational tensions and legal problems; such tensions and problems are not unique to the so-called “new media.” Second, not only the form of communication, but also the genre of programming, can create international tensions. Indeed, it was a “light entertainment” program that played a background role in

4. *Id.* (quoting 2 EMMERICH DE Vattel, *THE LAW OF NATIONS* 133 (Charles G. Fenwick trans., Carnegie Inst. of Wash. 1916) (1758)).

5. See *INTERNATIONAL CONTROL OF PROPAGANDA passim* (Clark C. Havighurst ed., 1967).

6. *International Convention Concerning the Use of Broadcasting in the Cause of Peace*, Sept. 23, 1936, 4319 U.N.T.S. 186 [hereinafter 1936 Treaty].

the drafting of the 1936 Treaty.⁷ Third, although the 1936 Treaty was intended to deal with wireless/radio transmissions, it can arguably be interpreted to cover later forms of media, such as broadcast television. Finally, despite the provisions of the 1936 Treaty, this article contends that it has been ignored by the international community even as nations struggle to define the scope and meaning of norms concerning the permissible content of international and transnational communication.

This article proposes that many of the problems that arise from the cross-border dissemination of ideas could be solved through a global and collaborative effort by international jurists. The task of these scholars would be to critically appraise the 1936 Treaty to assess its current validity, determine whether there are any other generally-applicable legal standards in this area, and propose a (re)statement of such norms for the twenty-first century.

Part II of this article details the background, terms, and subsequent history of the 1936 Treaty. Part III describes certain fact situations that raise questions about whether the provisions of the 1936 Treaty have any bearing on contemporary international law norms. Finally, the conclusion presents a concrete, action-oriented suggestion in terms of Resolution 26 of the 1948 UN Conference on Freedom of Information.

II. THE 1936 TREATY

A. *Historical Events Leading Up to the 1936 Treaty*

According to Bumpus and Skelt, the “first recorded use of radio for international broadcasting seems to have been in 1915 when Germany provided a daily news report.”⁸ The USSR followed in the early 1920s, Lenin having declared that radio was “a newspaper without paper.”⁹ Domestic receivers, however, could pick up signals from elsewhere, even if they were not intended for reception in

7. See discussion *infra* Part III.

8. BERNARD BUMPUS & BARBARA SKELT, SEVENTY YEARS OF INTERNATIONAL BROADCASTING, COMM. & SOC'Y NO. 14, 7 (UNESCO 1984), *microformed on* ERIC No. ED259417 (Educ. Res. Info. Ctr.).

9. *Id.*

another country. So, in that sense, “all broadcasting could be regarded, generally, as being international.”¹⁰

Not surprisingly, the new medium of radio spawned attempts to control its use and to bring some technical order into international broadcasting. Thomas Grandin provided an early, comprehensive account, in which he described several such efforts: the wavelength coordination conferences, such as in Washington D.C. in 1927; the activities of the International Broadcasting Union, which in 1925 “passed resolutions appealing to broadcasters and governments to take every precaution against the use of the microphone in a manner calculated to prejudice good international relations;” bilateral anti-propaganda agreements; and, crucially, the events that resulted in the 1936 Treaty.¹¹

Grandin’s view was that “[p]erhaps anti-propaganda bilateral agreements *can do more than anything else* to regulate radio hostilities.”¹² For example, in 1931, Poland and Germany entered into an agreement under which each undertook “to do everything in their power to ensure that matter — whether political, religious, economic, intellectual or artistic — broadcast from their stations shall not compromise in any way the spirit of cooperation and good understanding which is necessary if broadcasting is to fulfill its mission of drawing nations together.”¹³ The catalyst to this agreement seems to have been the broadcast of events taking place at a circus held somewhere in Germany. During the show, clowns told anti-Polish jokes, which led to an official protest from the Polish to the German government and the negotiation of the treaty.

This agreement was one of the precursors to the 1936 Treaty. It is interesting to note that the agreement was not brought about by official efforts to de-stabilize the Polish state (or its ideology), but by the antics of circus clowns. This underscores the point that any and all genres of programming can be troublesome or offensive

10. *Id.*

11. THOMAS GRANDIN, *THE POLITICAL USE OF THE RADIO* 90 (Arno Press & N.Y. Times 1971) (1939). *See also* Mary Cawte, *Making Radio Into a Tool for War* (1996), <http://www.uow.edu.au/arts/sts/bmartin/pubs/96Cawte.pdf>; Howard S. LeRoy, *Treaty Regulation for International Radio and Shortwave Broadcasting*, 32 AM. J. INT’L L. 719 (1938).

12. *Id.* at 90 (emphasis added).

13. *Id.*

and provoke international reaction. While more attention is paid to the negative impact of “serious” programming, the mass-appeal of “light entertainment programs” has been, and in all likelihood will continue to be, an increasing focus of concern and reaction because of the international tension such programs are capable of generating. These programs tend to have larger audience shares than news or current affairs programs, and also influence, to a greater extent than straight news and current affairs programming, how people in one territory perceive those living elsewhere.

B. The 1936 Treaty and the Signatory States

The 1936 Treaty was the result of a process that began during the late 1920s. Meetings were held in Berlin in 1929 and in Brussels in 1930 under the auspices of the International Parliamentary Conference of Commerce. Following a Polish initiative, the World Disarmament Conference also considered the matter in 1931. The Conference’s Political Commission and special Committee for Moral Disarmament carried out studies between 1931 and 1933.¹⁴ Nothing practical resulted from these efforts. Then in September 1936, the League of Nations organized an inter-governmental conference¹⁵ because of the “serious cases in Europe. . .of radio as a source of international disagreement flaring into open hostility.”¹⁶ The result of this conference was the drafting of the 1936 Treaty.

The 1936 Treaty was intended to prevent broadcasting from being used “in a manner prejudicial to good international understanding” and to “utilise . . . the possibilities offered by this medium of intercommunication for promoting better mutual understanding between peoples.”¹⁷ The principal articles of the 1936 Treaty place limits on the content of communications that a High Contracting Party (HCP) could broadcast.¹⁸ For example, Article 1 of the 1936

14. *Id.*

15. *Id.* at 91-92.

16. WILLIAM J. WEST, TRUTH BETRAYED 31 (1987).

17. 1936 Treaty, *supra* note 6.

18. The HCPs included Albania, the Argentine Republic, Austria, Belgium, the United States of Brazil, the United Kingdom of Great Britain and Northern Ireland, Chile, Colombia, Denmark, the Dominican Republic, Egypt, Spain, Estonia, France, Greece, India, Lithuania, Luxemburg, the United States of Mexico, Norway, New Zealand, the Netherlands, Roumania, Switzerland, Czechoslovakia, Turkey, the Union of Soviet Socialist Republics and Uruguay. *Id.*

Treaty prohibits transmissions that are “of such a character as to incite the population of any territory to acts incompatible with the internal order or security of a territory of a High Contracting Party.”¹⁹ Article 2 states that the HCPs must put measures into place to ensure that transmissions do not constitute incitement to war or acts likely to lead to war.²⁰ Article 3 imposes recklessness and negligence standards on the HCPs, prohibiting transmissions “likely to harm good international understanding by statements the correctness of which is or ought to have been known to the persons responsible for the broadcast”²¹ and requiring the HCPs to rectify the broadcast of prohibited transmissions at the “earliest possible moment.”²² Article 4 states that the HCPs are required to ensure that broadcasters verify and check the accuracy of any transmissions concerning international relations.²³ Under Article 6, the HCPs are required to enact and enforce domestic legislation to impose the 1936 Treaty’s restrictions on governmental or independent broadcasters within the HCP’s state.²⁴ In Article 7 the 1936 Treaty prescribes the methods and procedures for resolving disputes among HCPs. The parties are required to battle out any disputes in an arbitral or judicial forum.²⁵ Also, “[b]efore having recourse to the procedures . . . the High Contracting Parties may, by common consent, appeal to the good offices of the International Committee on Intellectual Co-operation, which would be in a position to constitute a special committee for this purpose.”²⁶

The 1936 Treaty was opened for signature on September 23, 1936, and it was signed by twenty-eight states, including the United Kingdom (UK) and the USSR. The Convention went into effect on April 2, 1938, after it was ratified by Australia, Brazil, Denmark, France, India, Luxembourg, New Zealand, and the UK. Notable for their absences were Germany, the United States, Japan, and Italy. Research of documents in the League of Nations archive in

19. *Id.* at art. 1.

20. *Id.* at art. 2.

21. *Id.* at art. 3.

22. *Id.*

23. *Id.* at art. 4.

24. *Id.* at art. 6.

25. *Id.* at art. 7.

26. *Id.*

Geneva, however, reveals that Italy was a *participant* in the 1936 Diplomatic Conference, but withdrew from the Conference that was drafting the Treaty the day before its conclusion. Several states entered the Treaty with reservations. Belgium and Spain reserved their right to jam transmissions. The USSR reserved its “right to apply reciprocal measure to a country carrying out improper transmissions against it” pending “the conclusion of the procedure contemplated in Article 7.”²⁷ Further, the USSR stated that the Treaty created no formal obligations between parties that do not have diplomatic relations with one another.

Grandin concluded that the 1936 Treaty is “a weak convention, but it does contain well-stated criteria, from an international point of view, of what is and what is not the right kind of broadcasting.”²⁸ The need for such a treaty, however, was clear: “[G]overnments, which in many parts of the world control radio, are in no mood today for compromise. Another world war is being prepared in the ether, as well as in the armaments factories.”²⁹

The 1936 Treaty had a wide range of effects, some of which were specific to certain signatories and others more generally. According to one historian,

[t]he [real significance] of the Convention lay more in the spirit of its intent than in its effect. The articles were framed in such a way as to prohibit only manifestly serious offenses Moreover, France and the Soviet Union were the only great power signatories. The absence of the two countries whose radio propaganda was at that time causing the most serious international concern, Germany and Italy, rendered the convention virtually meaningless.³⁰

27. International Convention Concerning the Use of Broadcasting in the Cause of Peace, Apr. 2, 1936, *available at* <http://untreaty.un.org/ENGLISH/bible/englishinter/bible/partII/treaty-1.asp> (last visited Dec. 20, 2005).

28. GRANDIN, *supra* note 11, at 92. *See also* INTERNATIONAL LAW GOVERNING COMMUNICATIONS AND INFORMATION: A COLLECTION OF BASIC DOCUMENTS 169 (Edward W. Ploman ed., 1982). R

29. GRANDIN, *supra* note 11, at 93. R

30. Philip M. Taylor, *Propaganda in International Politics, 1919-1939*, in *FILM & RADIO PROPAGANDA IN WORLD WAR II* 17, 31 (K.R.M. Short ed., 1983). Taylor has also written that:

The Treaty also forced certain states to examine their adherence to a strict conception of the free speech principle. For example, the UK signed and ratified the 1936 Treaty despite the fact that it strained, nearly to the breaking point, the UK's avowed policy of not interfering with press and broadcasters' discretion as to content. This problem almost prevented the UK from joining the treaty.³¹ West quotes a Foreign Office memorandum from Sir Reginald Leeper, referring to Article 4, which states: "This [sic] would raise a very big question with the BBC . . . the Foreign Office has to walk very warily in seeming to censor News . . . If some control were established over the BBC news the Government would have to consider this aspect very carefully."³² Nonetheless, the UK signed the 1936 Treaty on May 1, 1937, "knowing," says West, "that the question of the British Broadcasting Corporation's broadcasts would now become one of considerable seriousness; indeed, infringements rendered the Government liable to subsequent action of detection or complaint."³³ In a similar vein, Downey commented: "Articles 1, 3, and 5 specifically charged the signatory states with the responsibility to control the content of broadcasts originating within their borders . . . They should have been unacceptable . . . to countries which advocated governmental non-interference in pri-

The articles were framed in such a way as to prohibit manifestly serious offences; there remained sufficient room for manoeuvre [sic] by any signatory wishing to broadcast propaganda . . . Because, by 1936, the success of the League was seen to be determined by the degree to which its professed aims coincided with the national interests of its most powerful members, the success of the Broadcasting Convention depended on the degree to which those interests were suffering at the hands of hostile propaganda. In this respect, even the British Government was forced to reappraise its attitudes towards broadcast propaganda with the dramatic escalation of anti-British Italian propaganda during the Abyssinian crisis.

PHILIP M. TAYLOR, *THE PROJECTION OF BRITAIN: BRITISH OVERSEAS PUBLICITY AND PROPAGANDA 1919-1939*, 191 (1981).

31. Another claim against the UK is that it was "coerced" into breaching its 1936 Treaty obligations within a few years of signing it — notably by establishing foreign language radio broadcasting to counter the Italian station's signals from Bari; by the plan to use radio Luxembourg to transmit German language broadcast into Germany; and by the establishment of the Joint Broadcasting Committee. See Nicholas Pronay & Philip M. Taylor, "An Improper Use of Broadcasting . . ." *The British Government and clandestine Radio Propaganda Operations Against Germany During the Munich Crisis and After*, 19 J. CONTEMP. HIST. 357 (1984).

32. West, *supra* note 16, at 25.

33. *Id.*

R

vate broadcasting. Yet Great Britain, for one, signed the Convention.”³⁴

C. The Treaty and the UN

A United Nations (UN) General Assembly Resolution (GAR) in 1946 authorized the Secretary-General of the UN to assume custodial functions over the 1936 Treaty.³⁵ Subsequently, the General Assembly asked the UN Secretary-General to prepare a draft protocol that would include new articles based on GAR 424 (V) and would preclude contracting parties “from radio broadcasts that would mean unfair attacks or slanders against other peoples anywhere and in so doing conform strictly to an ethical conduct in the interest of world peace by reporting facts truly and objectively.”³⁶ The protocol was prepared and circulated but no action was taken on it. The General Assembly also asked nations that were not parties to the 1936 Treaty to consider joining. Some nations, such as the German Democratic Republic (the former East Germany), Hungary, Czechoslovakia, and Afghanistan agreed.

On July 24, 1985, the 1936 Treaty was denounced by the UK, followed by France, the Netherlands, and Australia. Then, on August 21, 1985, the United States, which was not a signatory to the Treaty, issued a statement endorsing the action of the other states:

We welcome the announcements by several western countries recently that they have denounced the 1936 International Convention Concerning the Use of Broadcasting in the Cause of Peace. The Convention has proved to be singularly ineffective in achieving its stated goal of promoting international understanding. In acceding to the Convention, certain Communist states, including the USSR, have refused to accept the compulsory arbitration provision of the Convention, but instead have claimed a right to unilateral retaliation by the deplorable practice of jamming broadcasts. That amounts, of course, to a distur-

34. Elizabeth A. Downey, *A Historical Survey of the International Regulation of Propaganda*, 5 MICH. YBI LEGAL STUD. 341, 344 (1984) (citations omitted).

35. *Transfer of Certain Functions, Activities and Assets of the League of Nations*, G.A. Res. 24, U.N. GAOR, 1st Sess. (1946).

36. G.A. Res. 841, art. 2(b) U.N. GAOR, 9th Sess., Supp. No. 21, at 22, U.N. Doc A/2890 (1954).

tion of the Convention system, with the effect of undermining international understandings. The Convention, in fact, is inconsistent with commitments undertaken by the states signatory to the Helsinki Final Act. Although the United States is not a signatory to it we believed that denouncing this Convention serves to promote the free flow of information among nations which is in the interest of all mankind.³⁷

Nevertheless, the 1936 Treaty remains in force today.³⁸

III. CONTEMPORARY PROBLEMS CAUSED BY TRANSNATIONAL COMMUNICATION

Although the 1936 Treaty remains in force, it is rarely, if ever, invoked by signatory parties, and has had little effect on international behavior.³⁹ As the following examples demonstrate, however, transnational communications continue to exacerbate international tensions. The following section identifies several contemporary examples of problems caused by transnational communications.

37. See *Washington News in Brief*, UNITED PRESS INT'L, Aug. 22, 1985.

38. G.A. Res. 841, Preambulars 2 & 3, U.N. GAOR, 9th Sess., Supp. No. 21, at 22, U.N. Doc A/2890 (1954).

39. Several practical questions arise concerning the 1936 Treaty's applicability to present-day behaviour. Under Article 6, for example, HCPs are liable for any transmission that results in a "complaint," regardless of whether the broadcast is the result of governmental or non-governmental activity. 1936 Treaty, *supra* note 6, at art. 6. Whether the broadcaster is a governmental institution or a private entity, HCPs must give relevant guidance in an appropriate manner to the broadcaster so that it takes measures necessary to ensure observance of the rules. *Id.* The "appropriate manner" could include issuing instructions, inserting a clause in a constitutive charter, or placing conditions on licences. *Id.* Looking forward, one must ask: is this still a valid statement of the contemporary international law concerning state responsibility for broadcasting?

Second, there is no definition of the term "broadcasting" within the 1936 Treaty. As it was opened for signature in 1937, it is safe to assume that the "broadcasting" referred to was understood to apply to radio broadcasting. Can it — by extension — be taken to apply to television signals as well? Could it even be extended to apply to non-broadcast, computer-generated text or images? It is generally understood that a broadcast signal is one intended for reception by the general public. Suppose, though, that the content is delivered by a cable-television channel, pay-per-view platform, or by an encrypted satellite-television signal. Are these intended for reception by "the general public?" And if not, would the Treaty apply to them?

A. *State-Sponsored Propaganda*

In the 1980s, Iran and Iraq were busily beaming TV and radio propaganda at one another.⁴⁰ The problem was compounded by the fact that the jamming counter-measures taken by each of the two states caused reception problems in neighboring Persian Gulf States, raising the question as to whether these states had any claim for monetary damages or other relief under international law.

B. *Dramatic/Literary Programs*

In 1980 an Independent Broadcasting Authority in the UK broadcast the television program *Death of a Princess*. The program told the story of the beheading of a Saudi princess accused of adultery. A diplomatic row broke out between the UK and the Kingdom of Saudi Arabia, resulting in the expulsion of the UK ambassador from Saudi Arabia. This is an interesting case study, not only because of the gravity (in international/diplomatic law terms) of the reaction, but also because it raises the question of whether the fact that the program was not transmitted to the offended country makes (or should make) any difference to the alleged tort.

In 1977, a Saudi Arabian princess and her 19-year-old lover were publicly executed. British journalist Anthony Thomas investigated this contemporary example of Middle Eastern jurisprudence; he then transformed his research into this 1980 docudrama. Suzanne Abou Taleb played the unfortunate woman in the title of this unvarnished dramatization. The government of Saudi Arabia demanded that the film not be shown in Great Britain, but the BBC refused to buckle under. Showing the film on British TV led to a crisis in diplomatic relations between Saudi Arabia and Britain. "In the U.S., government pressure (Warren Christopher then State Secretary) 'appealed' to the network and Exxon withdrew their advertisements causing PBS to cancel further broadcasts."⁴¹

During February 1987, the U.S.-based American Broadcasting Corp. (ABC) screened a mini-series entitled *Amerika*. It purported

40. Sajid Rizvi, *The Jacksons Boogie for Iraqi Propaganda Machine*, UNITED PRESS INT'L, May 11, 1984.

41. *Decapitation by the Sword or the Axe*, at <http://www.geocities.com/Hollywood/Studio/3015/decap.htm>.

to show what life would be like in the United States under Soviet occupation, and featured a para-military force called the “UN Special Services Unit.” Opposition to the program was expressed by the Secretary-General of the UN, because of the use of a UN-style peace-keeping force, and by *Pravda*, which described the series as “a deliberate act of psychological warfare.”⁴²

On the Wings of Eagles was an American mini-series shown in the United States and slated to air in the UK. The BBC, however, withdrew the show from its schedule on the ground that it might provoke a reaction against UK citizens in Iran, as it coincided with a particularly tense time for relations between the UK and Iran.⁴³

Australia’s ABC TV started to transmit a “soap-drama [called “Embassy”] in 1991 set in and around the Australian embassy of a small fictional country in South-East Asia (presumably somewhere near Thailand or Malaysia).”⁴⁴ The country was called Ragaan. “The Malaysian government claimed to be the intended target of the series and took great offence to it, causing relations with Australia (and particularly the ABC) to be strained for years.”⁴⁵

C. News and Current Affairs

In 1988, the London *Times* reported that the BBC’s flagship current affairs program, *Panorama*, had transmitted an item concerning Rajiv Gandhi.⁴⁶ The Indian High Commission in London protested the program. A visit to India by the Secretary of State for Transport was cancelled. The Minister of State at the UK Foreign Office told a congressional dinner party in Dehli that the program was “thoroughly bad . . . unbalanced . . . grossly unfair.”⁴⁷

Another row (albeit, on this occasion, not as the result of a television program) erupted between the UK and Malaysia over the

42. Ivor Davis, *Spectrum: Starry war on the screen*, THE TIMES (LONDON), Jan. 28, 1987. See also, Guy Lometti, AMERIKA: U.S. Miniseries, <http://www.museum.tv/archives/etv/A/htmlA/amerika/amerika.htm>.

43. Shyama Perera & Gareth Perry, *Diplomatic Row Makes BBC Axe Iranian Series*, THE GUARDIAN (LONDON), June 15, 1987.

44. Marc Pasquin, Ragaan (Feb. 9, 1996), http://flagspot.net/flags/fic_emba.html.

45. *Id.*

46. Michael Hamlyn, *British Minister Attacks BBC’s Gandhi Profile*, THE TIMES (LONDON), Apr. 20, 1988.

47. *Id.*

claim that the *Sunday Times* libeled Malaysia in an article. The Malaysian Deputy Home Minister said, "We have been led to believe that insiders could have worked with the British media to smear the image of the country. The despicable acts of giving false reports to the foreign media could be viewed as treachery."⁴⁸ The dispute arose out of a report in the *Sunday Times*, which alleged that a UK construction company had been involved in negotiations to offer "bribes" to Malaysian politicians, including the Malaysian Prime Minister Dr. Mahathir Mohamed. In response, Malaysia instituted a ban on giving public sector contracts to British companies. Though the ban had the option of being lifted during July 1994, the loss of future business contracts and the consequent effect on the UK economy and jobs was a worry. The *Sunday Times* responded with an article entitled *Public's Right to Know* in which they argued that "[t]rying to minimise these risks by expecting the British press not to reveal anything nasty about doing business with Malaysia is unacceptable, especially when what the newspapers have been revealing is very much in the public interest."⁴⁹

In another example, a dispute erupted when a Greek Public Order Minister, Yiorgos Voulgarakis, had a phone conversation with the British Ambassador to Greece, David Madden, concerning an online version of an article by London *Times* journalist Laura Peek concerning an effort to breach Greek security precautions in the run up to the 2004 Olympic Games. The Minister was quoted as saying that the *Time's* behavior in trying to prove that the security arrangements were inadequate was "a little strange."⁵⁰ Greek media described it more trenchantly: "persistent negative reporting,"⁵¹ "completely distorting the facts,"⁵² and Alter TV station said the real purpose was to "denigrate [Greece's] Olympic preparations."⁵³

Another row began when the UK *Independent* carried an item detailing the German Foreign Minister's opinion that some of the

48. Ian Katz, *Malaysia Threatens Press Ban*, THE GUARDIAN, Mar. 7, 1994, at 2.

49. *Public's Right to Know*, THE SUNDAY TIMES, Feb. 27, 1994, in Features.

50. *Public Order Minister Warns Foreign Reporters Olympic Games Security No Game*, ATHENS NEWS AGENCY, May 13, 2004.

51. John Carr, *Olympic Report Angers Athens*, THE TIMES ONLINE, May 14, 2004, <http://www.timesonline.co.uk/article/0,,3-1109704,00.html>.

52. *Id.*

53. *Id.*

UK media carry impressions of Germany that are “more than three generations out of date My children are 20 and 25 and when they watch Germany in some of the British media, they think this is a picture they have never seen in their whole lifetimes.”⁵⁴ In an interview with BBC Radio 4, the Minister is quoted as saying that “people to people, there is a problem and I think the media are playing a very important role.”⁵⁵ *The Guardian*, too, had an article on the matter in the context of the November 2004 visit of the Queen of England:

Fed up with Britain’s continuing obsession with Hitler, the Germany embassy in London came up last month with a novel plan. Why not invite a group of English history teachers to Germany, put them up in a five-star hotel, throw in an opera, and hope that their positive experience of modern Germany rubs off on what they teach? . . . The unusual invitation followed an attack last week by Germany’s foreign minister Joschka Fischer, who accused the British media of perpetuating a “goose-stepping” image of Germany that was three generations out of date.⁵⁶

D. *Light Entertainment/Comedy Programs*

In February 1987, a German comedy television show carried an item showing the Ayatollah of Iran receiving a gift of ladies’ underwear.⁵⁷ As a result, Iran Air cancelled its flights from Teheran to Frankfurt, Iran closed (albeit temporarily) its consulate office in Frankfurt, and two German diplomats were expelled from Iran.⁵⁸

54. *Why Our View of Germany is Locked in a 60-Year Timewarp; Britain’s Obsession with the War Colours Its Attitudes Towards Its [sic]*, THE INDEPENDENT (LONDON), Oct. 21, 2004, at 12; Richard Beeston, *For You British the War has Never Ended, Says Fischer*, THE TIMES ONLINE, Oct. 21, 2004, available at <http://www.timesonline.co.uk/newspaper/0,,173-1320331,00.html>.

55. Luke Harding, *Foreign Minister Blames UK Media for Harming Ties With Goose-stepping Stereotype of Germans*, THE GUARDIAN, Oct. 21, 2004, available at <http://www.guardian.co.uk/britain/article/0,2763,1331975,00.html>.

56. Luke Harding, *Germans Lay on 5-Star Visit to Lure British Teachers Away from Nazi Image of History*, THE GUARDIAN ONLINE, Oct. 26, 2004, <http://www.guardian.co.uk/germany/article/0,2763,1336072,00.html>.

57. *Iran Protests W. German TV Joke*, FACTS ON FILE WORLD NEWS, Mar. 6, 1987, § B3, at 137; *Iran Envoy Demands Kohl Apology for TV Show Mocking Kohmeini*, L.A. TIMES, Feb. 21, 1987, at 17.

58. *Id.*

In another example, two Australian diplomats — a trade commissioner and an administrative officer — were expelled from Teheran after a sketch on the ABC comedy show *The Dingo Principle*. The item featured the Ayatollah and ended with him threatening to blow up the world. The Iranian authorities claimed that the show defamed Islam and Islamic values.⁵⁹

In another example, on September 28, 2003, the *Japan Times* reported that the Hungarian television station TV2 was broadcasting a show that angered the local Japanese community in Hungary. The program, “*Micuko* — the world in slanted eyes, feature[d] a Hungarian TV reporter in a black hairpiece and fake teeth who passed herself off as a goggled-eyed Japanese woman to ambush and interview Hungarian celebrities.” The Japanese Embassy filed a protest with the broadcaster, TV2, and the Hungarian Foreign Ministry. “TV2 . . . decided to suspend the show for three months.”⁶⁰ The program was to return under a new name.⁶¹

E. Conclusions

In conclusion, it seems clear from the previous illustrations that the genres of programming that have caused strained relations and, in some cases, serious international reactions and responses — expulsion of diplomats, suspension of air services, and trade embargoes — are not confined to the “political” or “ideological” in the narrow, classical sense. Indeed, the reach and impact of so-called “light entertainment” shows means that they are important, and will arguably become more important, as generators of transnational tensions and complaints. This category also includes the increasingly popular “faction” type of show, which, by blending fact and fiction, can easily be perceived as an illegitimate re-writing of history by the group or state to which it refers. Such history can be quite recent, as demonstrated by the faction dramas about the Falkland/Malvinas war, or the Irish troubles transmitted in the UK. The range of broadcast output that may potentially cause upset

59. *TV Show Protest*, NATIONWIDE NEW PTY LTD., May 6, 1987.

60. *Hungary TV Station to Suspend Japan-mocking Prime Time Show*, JAPAN ECON. NEWSWIRE, May 15, 2003; *Hungary TV Cuts Controversial Show*, JAPAN TIMES, Sept. 28, 2003, available at <http://www.japantimes.co.jp/cgi-bin/getarticle.pl5?nn20030928b1.htm>.

61. *See id.*

and, therefore, arguably should be provided for by international law is almost without limit.

IV. THE ABSENCE OF INTERNATIONAL NORMS CONCERNING DEFAMATORY TRANSNATIONAL COMMUNICATION

The 1936 Treaty does not constitute general international law regarding the norms applicable to allegedly defamatory transnational communications. Obviously, the rules specified in the Convention are not customary international law. Do they, however, express the *opinio iuris* of states? Certainly, there is now a clear divide between the *opinio* of the current signatories to the 1936 Treaty and those that have denounced it. What, if any, are the current norms of international law in this area?

Historically, the law relating to defamatory propaganda is rather vague. A useful summary, at least up to the date of its publication, is offered by John Whitton, a figure of some importance in the recent history of transnational communication.⁶² Whitton distinguishes between defamatory, seditious, and war-mongering propaganda. This article is mainly interested in the first category, which “consider[s] the words used by governments and officials, and to condemn those considered sufficiently injurious because of the damage that they are likely to cause either to other states, or to the international community, or to both.”⁶³ The law varies according to who the speaker is — government or a “private” entity. There is, in addition, a problematic category:

[W]hen the actor is neither the state nor an individual, but an organization under a greater or less degree of governmental direction. If financed, or otherwise really controlled by the state, the acts of such organization should certainly stand in the same category with regard to the resulting legal consequences.⁶⁴

As regards the UK, an interesting question arises, on Whitton’s criteria, concerning the BBC. Because it is publicly financed, does this

62. John B. Whitton, *Propaganda and International Law*, Academie de Droit International, Recueil des Cours (1948).

63. *Id.* at 607.

64. *Id.* at 607.

mean that international law should treat its acts as the acts of the UK?

Whitton attempts to answer these problems by describing various fact situations that could possibly give rise to liability under international law. They are quite complex. First, if a verbal attack is made by State A, or by one of its officials acting *intra vires*, an offense is committed. Second, if a verbal attack is made by a non-state entity, and the object of the attack is one of State B's diplomats, then State A's responsibility may be engaged. In the same situation, but with an attack on a foreign sovereign or head of state Whitton's fact situations require a national law making such an attack an offense, however, if the verbal attack contemplated the murder of the head of state there need be no specific national law. Third, attacking State B as such does not constitute an offense known to international law. There are, however, some national laws that do deal with this on the basis that it affects "friendly relations" between states. Finally, if the attack is against the policies of State B, Whitton argues that "if the object of the criticism is a clear violation of an international duty created either by treaty or general international law, this criticism is justified; even more, in some circumstances, it may even be the duty of foreign states to protest against such violation."⁶⁵ This last point is interesting and should be developed further. What is the scope of any violation of an international duty before a criticism is justified? Does Whitton mean *all* international law duties, or only *some*? How should states manifest their criticism? Is criticism the only, or the only reasonable, state reaction? Though these questions remain unanswered, Whitton's fact situations provide an excellent starting point toward the development of more substantive international law.

The basic question for international law is whether another state's adverse reaction towards allegedly defamatory programming should be considered legitimate at all. If so, this might leave the door open for an official agency located in the transmitting state to be involved in either taking action against an "infringing" broadcaster or having authority over any impending broadcast. For example, an official agency in the transmitting state could call for revision, postponement, or cancellation of a broadcast. As has

65. *Id.* at 608.

been noted, this would have implications for broadcasters' freedom of expression. The problem is further complicated by the fact that the very notion of a transmitting and/or receiving state may not always be appropriate. The paradigmatic notion of hostile/defamatory propaganda involving communication from the territory of state A to state B is not always realistic. As has been seen in the *Death of a Princess* illustration, dissemination ("publication") does not always require the transmission of the signal carrying the allegedly defamatory matter from the territory of state A to state B.⁶⁶

It is suggested that there are two differing circumstances potentially giving rise to two different international law norms. The first is that a complaint or reaction is only justified in principle when and insofar as material is intended to cross a state boundary into the territory of the "receiving" state. The second is that the nature or content of the material may *per se* legitimately trigger a complaint/reaction. Two separate scenarios help illustrate and distinguish the different legal implication of these circumstances. First, where the signal is transmitted from State A by the sender to the intended recipients in State B (which might be dubbed the electronic Trail Smelter conception).⁶⁷ Second, where the item complained of is not intentionally transmitted from the territory of State A, but is viewed by representatives of State B, who raise the issue with State A, even though it is possible that nobody in State B saw the allegedly offensive item. In this latter example, the ground of complaint would be, presumably, that an unjustifiable misperception about State B was being created in the minds of those in State A, which might create or lead to unfriendly relations between the two peoples. The difference between these two scenarios was encapsulated neatly during the 1948 UN Conference on Freedom of Information. Whitton wrote that the principal aim of the meet-

66. See *supra* text accompanying note 41.

67. The Trail Smelter Arbitration cases involved transborder air pollution. Noxious smoke containing sulfur dioxide emissions emanating from a Canadian zinc smelting complex damaged crops in the United States. Trail Smelter Arbitration (U.S. v. Can.), 3 R.I.A.A. 1905 (1938 and 1941). Scholars suggest that, while the Trail Smelter Arbitration is regarded as a significant milestone in international environmental law, the arbitration can be used as a model for other transborder international disputes. See, e.g., Daniel Barstow Magraw, *Transboundary Harm: The International Law Commission's Study of "International Liability,"* 80 AM. J. INT'L. L. 305 (1986); *Trail Smelter Arbitration, 1938/1941*, at <http://www.law.uidaho.edu/default.aspx?pid=66516>.

ing was to seek “the improvement in the means of sending information across frontiers.”⁶⁸ Resolution 2, however, states that the conference:

[C]ondemns solemnly all propaganda either designed or likely to provoke or encourage any threat to the peace, breach of the peace, or act of aggression, and all distortion and falsification of news through whatever channels, whether private or governmental, since such activities can only promote misunderstanding and mistrust between the people of the world and thereby endanger the lasting peace which the United Nations is consecrated to maintain.⁶⁹

The Resolution makes no explicit reference to dissemination across frontiers.

The examples raise the vexing question of whether there is or should be any norm regarding the existence and scope of a right or duty of a state to prescribe a right or duty to prevent the transmission of an item, if it is known in advance that there is a substantial or real risk of the serious displeasure (or worse) of another state, or to global peace and security in general.

One of the claims this article makes is that even if the rules could have been stated clearly at one time, recent and contemporary developments have thrown the matter into doubt.

V. THE NEED FOR CONSISTENT INTERNATIONAL NORMS

Although this article suggests that a major task of articulating the contemporary international norms concerning transnational communication in general, and defamatory or slanderous communications in particular, remains to be done, at another level the issue of the appropriate method to deal with the problem of such communications needs to be addressed. A number of differing mechanisms and methods have been addressed including: bilateral agreements (e.g., Grandin); administrative remedies (e.g., Whitton); changes in attitude coupled with more or better sources and

68. John B. Whitton, *The United Nations Conference on Freedom of Information and The Movement Against International Propaganda*, 43 AM. J. INT'L L. 73 (1949).

69. *Id.* at 75 n.9 (quoting G.A. Res. 2, U.N. GAOR, 2nd Sess., U.N. Doc. E/Conf. 6/C.1/19 (1948)).

flow of information (e.g., the official U.S. approach); the recall of the 1948 UN Conference on Freedom of Information; the creation of a supervisory international media council and more rigorous guidance and enforcement of conditions in broadcasters' charters, licenses etc; strengthening of domestic obligations — either in fulfillment of international obligations or as a unilateral initiative; and monitoring.

Whitton was concerned with articulating both the rules concerning international defamatory propaganda and how evidence regarding such transmissions could be gathered, albeit in a slightly different context. He became one of the seminal figures in the creation of a number of so-called "listening centers," which were set up as the Second World War got under way and the role of radio as a political weapon became clearer.⁷⁰ Some years later, in 1958, U.S. President Eisenhower addressed the UN General Assembly and made the following proposal: "I believe that this Assembly should . . . consider means for monitoring the radio broadcasts directed

70. In February 1938, John Whitton, Director of the Geneva Research Centre in February 1938, met with Ed Murrow, European representative of CBS, and became impressed with the use of radio as an international political weapon. In late 1938, the School of Public and International Affairs of Princeton University set up a committee, which included Whitton, to propose how short-wave radio propaganda should be studied. The Rockefeller Foundation financed the project and the Director of the Institute for Advanced Study donated 69 Alexander Street. For eight hours per day, six days per week, a representative sample of newscasts and topical talks broadcast from Berlin, London, Rome, Paris, and Moscow were received, recorded, and transcribed by the Centre. Biweekly digests and summaries were prepared and widely circulated. During the 1930s, international broadcasting escalated for political reasons. See Harold N. Graves, Jr., *Propaganda in the Air*, 2 PRINCETON U. LIBR. CHRON. 91 (1941). Various listening posts were created, including those by the *Chicago Tribune* and the UK Royal Institute of International Affairs in the spring of 1939. After the outbreak of World War II, official and semi-official posts were set up in Sweden, France, Britain, and Germany.

In the third month of the war, John Whitton created the Princeton Listening Centre. This would be the first of several systematic U.S. initiatives. This creation of the Stanford Listening Centre followed in September 1940. In March 1941, the FCC announced that it would "establish a 24-hour watch on all short-wave broadcasts radiated to the Western Hemisphere" *Id.* at 93.

The Princeton Centre, created by Professor John Whitton, lasted until June 1941. Thereafter, its functions were transferred to the FCC. In total, twenty Listening Centre Reports were published between December 1939 and July 1941. See PROPAGANDA BY SHORT WAVE (Hardwood L. Childs and John B. Whitton, eds., 1942).

As noted above, the decision was taken to establish a Monitoring Service of the FCC to monitor short-wave radio transmissions on a much grander scale than could be achieved by the Princeton Centre.

across national frontiers in the troubled Near East area. It should then examine complaints from these nations which consider their national security jeopardised by external propaganda.”⁷¹ In commenting on this proposal, Whitton urged that monitoring “would appear to have great potentialities, and deserves the most careful consideration.”⁷² What really impressed Whitton was that, in comparison to the Second World War efforts, there was novelty and significance in entrusting the task to a universal body. Would there be any interest or appetite for such a universal body today (ignoring the “covert” monitoring that goes on by entities as Echelon⁷³)?

Of course, methods must be related to the problem they are designed to address. Are the methods mentioned above equally applicable to the various forms of transnational communication, particularly the new information and communications technologies? The history of communication makes it clear that the modes of transnational defamation have assumed as many different forms as have media of communication.

VI. CONCLUSION

The major issue raised by this paper concerns the articulation of the norms concerning transnational defamatory communication, as spelt out by classic jurists such as Whitton. Though much has been written about this question, there are still unanswered questions. Are such descriptions a valid description of such rules and, more importantly, a description that is valid in today’s world? A 1993 Conference on Security and Co-operation in Europe (CSCE)⁷⁴ seminar on “the free media” demonstrated just how difficult it is to achieve a philosophical, intellectual, or political agreement even between the United States and the two branches of the European family.⁷⁵

71. John B. Whitton, *Radio Propaganda — A Modest Proposal*, 52 AM. J. INT’L L. 739, 745 (1958).

72. *Id.*

73. Nail McKay, *Lawmakers Raise Questions About International Spy Network*, N.Y. TIMES, May 27, 1999, available at <http://www.nytimes.com/library/tech/99/05/cyber/articles/27network.html>.

74. Now the Organization for Security and Co-operation in Europe (OSCE).

75. DAVID GOLDBERG, *FREE MEDIA: REPORT ON THE CSCE HUMAN DIMENSION SEMINAR ON FREE MEDIA (WARSAW, 2-5 NOVEMBER 1993)* (1994). *See also*, CSCE/ODIHR

A re-examination of the *opinio iuris* of states is now called for. Nothing less is adequate for the world as it enters the much-heralded era of the global information society. There has, undoubtedly, been a change in the international consensus (such as it is) during the last fifty years, albeit that, in the light of the CSCE experience mentioned above, there might not be a global *opinio iuris* at all. Downey has considered the impact on the new global order of the “new state,” or in other words, “post-colonial polities.” She notes that no Third World state has opted to accede to the 1936 Convention, stating that the “Third World has preferred to draft new agreements rather than try to enforce old ones.”⁷⁶ Further, “[t]he developing countries do not consistently favour either side of the debate [between East and West]; their goal is to obtain aid to develop their own media systems and to active more control over what the world media reports about their countries.”⁷⁷ Their aim is twofold: first, an expanded definition of propaganda which embraces the idea not only of intentionally hostile messages, but also of “technically accurate but unbalanced or one-sided information that leads to an inaccurate, incomplete understanding”;⁷⁸ and second, an effective global right of correction. It has become increasingly difficult to claim that there is an undifferentiated, homogeneous Third World view about anything, including transnational communication. In the “new world disorder,” “third worldism,” along with many other nostrums of past decades, may have to be rethought, or even jettisoned as no longer analytically useful.

Resolution 26 of the 1948 Conference on Freedom of Information calls for the “appointment of a committee of jurists to study the laws of libel, and to formulate a body of fundamental rules and principles on this subject, so closely connected with certain types of international propaganda, but in the opinion of delegates, not ready for consideration without further research.”⁷⁹ Forty-seven years later, the recommendation contained in this resolution still

Consolidated Summary, at http://www.osce.org/documents/odihr/1993/11/1769_en.pdf?PHPSESSID=62e1c7b0926d8a3543e9e4043e71cedb.

76. Downey, *supra* note 34, at 350, 359 n.81.

77. *Id.* at 349.

78. *Id.*

79. John B. Whitton, *supra* note 68, at 75.

R

R

remains valid. Implementing Resolution 26 remains unfinished business for the international legal community.⁸⁰

80. The World Summit on the Information Society in Tunis in November 2005 would have been a golden opportunity for such a reconsideration of the fundamental rules of libel. Sadly, this issue does not seem to have been on the agenda.

