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COMMUNICATION AS A HUMAN RIGHT: PICKING UP THE CHALLENGE?

Abstract

In this article we first present the historical development of the right to communicate as first internationally expressed in a call for a New World Information and Communication Order. Subsequently, we focus on its revival during the United Nations World Summit on the Information Society, which we argue to have missed the historical chance to give new momentum to the political debate, while global developments have all but intensified the need for communication processes to be recognized as a human need and to be firmly protected. We conclude with the key controversial questions surrounding the concept of a “right to communicate” in order to point to some of the most problematic issues which have yet to be resolved and identify the position of such a right within the logic of the contemporary human rights edifice. Finally, we propose a new approach to the debate, which could contribute to fine-tuning its further development and avoiding some of the historical deadlocks, which have resulted from an overly politicized discussion during the early years.

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1. Introduction

The “right to communicate” as such does not exist as a provision of international law. Nonetheless, it has sparked heated debates ever since Jean d’Arcy first uttered those three words in 1969. In the years of debate that followed, UNESCO came to be the forum of one of the great show-downs on the Cold War front when the US and the UK quit their membership in the aftermath of the MacBride Commission (1980) and the acronym “R2C” (right to communicate) vanished from the agenda of international politics to be mentioned mostly only in low voice and off the record to avoid ideological fault lines breaking open again. The World Summit of the Information Society (WSIS) in 2003/2005 has given renewed impetus to the debate, if with a strategic shift to “communication rights” as the central concept.

The internationalization of communication started more than 200 years ago. In fact, this internationalization may be seen as the very reason for the emergence of organized international cooperation. Not surprisingly then, in 1865, the first international organization to emerge was the International Telegraph Union that was to establish the first uniform standard for the use of telegraphy beyond borders. Also the evolution of civil and political rights even before the *Universal Declaration of Human Rights* (1948) must be placed in this context, given that the notions of universal service and freedom of transit for communication already began to emerge in the context of the early standard-setting bodies (McIver & Birdsall, 2002).

After World War II then it had become painfully apparent how vulnerable societies are in the face of mass indoctrination, propaganda and warmongering. So, at one of the first UN conferences, the freedom of information was to be at the centre of attention and eventually described as “the touchstone of all the freedoms to which the United Nations is dedicated”.¹ Considerable time and energy was spent on considering measures to address potential abuse of states in order to employ harmful propaganda in their international relations (Whitton, 1949). The representatives of sixty nations subsequently came up with a declaration formulating the rights to seek, receive and impart information, which at the time was thought to someday come to be regarded as the *Magna Carta* of freedom of thought and expression.² The vision of what this freedom of information further entailed – and, more controversially, what it did not – was, however, far from unitary.

Prominently, it had been the Soviet Union that had put forward its concern about the tendency of unfettered freedom to destroy freedom itself. Also, the issue of whether the role of the press ought to be specified in the sense that this freedom would come with enforceable responsibilities (for example to promote democracy or fight fascism) was hotly debated. Eventually, favoring the position put forward by the US delegation, no such responsibilities were included in the final declaration and restrictions were specifically listed.³ Already then, on the fringes of the major confrontation between East and West, there was also a group of countries that

hampered in their press services by the lack of such facilities as are enjoyed by the American press and press agencies, manifested a genuine fear of possible American domination, and this preoccupation explains why they favored certain types of governmental aid and intervention, opposed by the United States on the ground that they are inconsistent with freedom of information.

(Whitton, 1949: 77)

Some common ground between the major powers opposing each other over the permissible form and scope of limitations of the freedom of information can be found in some of the resolutions concerning false or distorted information and warmongering. Nonetheless, the deep division could not be overcome and eventually, the “Eastern Bloc” refused even to sign the Final Act. Eventually the plan to further develop the freedom of information through the work of a Sub-Commission on Freedom of Information died out with the onset of the Cold War. One outcome of this international effort to confront the potential evils of manipulation that found its entry into international law was what we know today as Article 19 of the *Universal Declaration of Human Rights*. With this Declaration, for the first time, the standard of equality and non-discrimination entered international law concerning this freedom. The Universal Declaration detailed human rights which were to apply to explicitly everyone without exceptions on the basis of race, gender, age or nationality – a true *novum* in human history.

Still, even though the value of the codification of Article 19 cannot be underestimated, it was not long before voices were to be heard that questioned its sufficiency. Since about twenty years after the codification of this basic freedom right, several arguments have been brought forward for the recognition of an even broader right:

a right that would not merely cover the transmission of information, but that would encompass communication and address the role of power played in these processes.

2. Arguments for a broader “right to communicate”

The earliest formulation of such a new right was the call for a “right to communicate”. Mainly, there are two ways of looking at the argumentative basis being brought forward for a right to communicate.

On the one hand, there is a philosophical approach to the rights-discourse, which usually centers around the need to communicate as ingrained in human nature (see Traber, 1999), or from a more deontological perspective, on a right to justification that is the consequence of a recognition of human dignity (see Forst, 1999).⁴ Here, the importance of speech for human existence and nature recognized in early Western philosophy is central (Lee, 2004). Indeed, the need to communicate with others is seen as another dimension which seems to be inherent in human nature as a being that defines itself in reference to other beings (Traber, 1999). Language is the basis for the forms of communication necessary to establish and maintain those relationships. This, according to Lee (2004), makes communication a basic human need for it is directly related to our very existence.

Also freedom, the argument goes, is defined in relation to other beings, which in turn implies the recognition of reciprocity of such freedom. Thinking along these lines, equality becomes the obvious consequence, since “true” communication – defined as a dialog – cannot be possible between individuals that consider each other as inferior. Merely an exchange of information could be envisaged under such circumstances; as would occur between a slave and his master. Translated into the modern world of mass communication, Traber points to the mere “sale of and access to media products [that] may then become substitutes for genuine communication” (1999: 6). Equality then is not to be confused with homogeneity. Quite on the contrary, it is pointed out that the recognition and preservation of identities in all their difference is indeed a prerequisite to communication since neglecting such identities in public communication may result in a “proliferation of communicative ghettos in which relatively homogenous audiences consume a narrow diet of information, entertainment and values” (Husband as cited in Traber, 1999: 6).

In order to prevent this from happening, inclusiveness is considered a necessary component of communication – especially within the public sphere. Here also lies the link between communication and power, which is often at least implicitly addressed: the assumption about the consequences of the enforcement of a right to communicate is that it would result in empowerment of the weak and oppressed. Empowerment would then occur by giving a voice to those who “want to speak out but cannot make themselves heard” (Idem: 1).

Another way of making the argument for a right to communicate is sometimes also based on the premises of a human need to communicate, but puts the emphasis rather on the technological developments to argue for an expansion of rights to answer to a changed environment with new threats to established rights and potentials for the realization of communication processes, thereby implying new rights. Already shortly after WWII developments in communication technology had partly been the incentive for a growing concern about the role of communication and its conditions on the international plane. The “race to space” had started with the launch of Sputnik by the Soviet Union in 1957. By the end of the 1960s the possibility of direct broadcasting by satellite had become a concern for nation-states fearing a threat to their sovereignty and Marshall McLuhan formulated its famous vision on the future as a “global village”.⁵ These developments must be situated in the political climate of post-colonialism, which also led to the entry of new sovereign states into the UN system. Thus, already in 1955 issues of post-colonial communication surfaced within UN debates, indicating the coming about of the non-aligned movement (Hamelink, 1994). The growing potential of technology to enable (mass) communication beyond borders sparked the call for greater participation and its use for democratizing purposes.

The man who famously linked the developments in global communication and human rights and for the first time explicitly anticipated a “right of men to communicate” - and who thereby was to coin the debate for decades to come - was Jean d’Arcy (1969). In 1969 he published an article on “Direct broadcast satellites and the right to communicate” in which he criticized the adopted rules that were supposed to address communication processes for their limited focus on content rather than process. The potential for participation of all in an interactive process of communication beyond borders that had moved within reach with satellite technology had led him to consider the conception of communication that underlay the formulation of the freedom of information in Article 19 to

be inadequate in the light of new developments. He argued that the future of global electronic communication would need a new regulatory regime and a reappraisal of its normative pinpoints in the recognition of a new human right. The first communication structures had emerged out of what d’Arcy referred to as the “mass media mentality”, which meant a concern for distribution of content and the rights needed for its protection. Every new medium since the invention of the printing press had been designed for vertical and unilateral transfer of information and had eventually led to its own industry characterized by concentration of production and mass distribution.⁶ Existing statements on communication processes contained in the Universal Declaration were the product of an environment of print and broadcasting and thus “were concerned about the free flow of information rather than the process of communication” (McIver & Birdsall, 2002: 10).

The new possibilities of interactivity in d’Arcy’s mind now required a shift in mentality away from the distribution of information to the process of communication. Correspondingly, the rights connected to those processes would have to address not only content, but would have to extend to include process as well.

Hence, rather than for replacing existing freedoms, d’Arcy argued for a right which would entail but go beyond them in order to offer a level of protection appropriate to the new forms of communication made possible by technological innovation.⁷ Whereas the introduction of radio had triggered Bertolt Brecht⁸ to write his critical “theory” on radio in which he argued for its use to encourage listeners to become producers, for d’Arcy it was the advent of direct broadcast satellites that triggered his imagination on the potential uses of this new technology. Now, he saw a possibility for “a truly democratic mode of communication free from the dominance of large public and private organizations and regulatory structures” to emerge, since it would function beyond the control of traditional economic and technological control mechanisms (Idem).⁹

3. The political history of the “right to communicate”

3.1. The Call for a New World Information and Communication Order (NWICO)

During the 1970s UNESCO was to take up the issue. The context in which the debate must be set is the process of decolonization which had brought about a new alliance of former colonies that came together in the Non-Aligned Movement (NAM). Beyond the two

ideological camps in the Cold War, those countries subsequently brought their own agenda of post-colonial independence into international politics.¹⁰ The Western understanding of freedom of expression was clearly not shared by many of those new UN member states, who were critical of what they perceived as a continuation of colonialism in Western dominance of global information flows and media monopolies. The right to communicate for them was a “means for development and independence, a rationale for their national identity” (Kuhlen, 2003: 2).

After the launch of Sputnik in 1957 the potential of the new technology for international communication and their potential impact on the cultural development even of remote regions soon became apparent. Concerns about cultural sovereignty were quickly linked to existing human rights provisions which refer to economic, social and cultural rights.¹¹ In addition to the North-South imbalance of control concerning broadcasting, newly independent countries also pointed to their relative lack of mass communication resources. Hence, in 1961, the General Assembly of the United Nations passed a resolution acknowledging that “Communication by means of satellite should be available to the nations of the world as soon as practicable on a global and non-discriminatory basis” (Hamelink 1994: 67).

During a seminar organized by the non-aligned countries in Tunis in 1975, the call for a New International Information Order (NIIO) was formulated (Lee, 2004). Later, as Mansell and Nordenstreng explain, “the NIIO echoing the anti-imperialist drive of the South and the state-sovereignty approach of the East was replaced with a less controversial [...] NWICO” (2006: 23). The central argument on the side of the non-aligned countries aimed at what was criticized as a continuation of imperialism by other means: patterns of information flows clearly still mirrored a centre-periphery power relationship concerning content as well as infrastructure. Independence would have to be translated into participation in international communication and sovereignty to include cultural and social aspects, which were conceived to be threatened by the entrance of too much foreign content (Cambridge, 2007; Thusu, 2000). In order to address this inequality, an alternative to the freedom of information was needed since the latter was seen as an aid for those in power to maintain hegemony in a one-way process of information transmission (McIver & Birdsall, 2002).

In its 18th session the UNESCO General Conference affirmed “that all individuals should have equal opportunities to participate actively in the means of communication and

to benefit from such means while preserving the right to protection against their abuses". The same year as the meeting of non-aligned countries had taken place, UNESCO's General Conference authorized the then director-general "to undertake a review of the main problems of communication in contemporary society seen against the background of technological progress and contemporary developments in international relations" (Lee, 2004: 7).

An International Commission for the Study of Communication Problems was established, chaired by Sean MacBride (referred to as MacBride Commission).¹² After a meeting of Experts on the Right to Communicate, numerous conferences and thorough research, the Commission published its final report named *Many Voices, One World: Communication and Society Today and Tomorrow*, in which it concluded that recognizing the right to communicate as an individual and social right "promises to advance the democratization of communication" (International Commission for the Study of Communication Problems, 1980, as cited in Hamelink, 2003: 157). The report also detailed a number of recommendations including number 54 in which it calls for an expansion of rights:

Communication needs in a democratic society should be met by the extension of specific rights such as the right to be informed, the right to inform, the right to privacy, the right to participate in public communication - all elements of a new concept, the right to communicate.

(International Commission for the Study of Communication Problems, 1980: 265)

In a resolution in 1980, the UNESCO General Conference subsequently referred to a "right of the public, of ethnic and social groups and of individuals to have access to information sources and to participate actively in the communication process" (Hamelink, 2003: 158). The UNESCO General Conference in Paris of 1983 adopted resolution 3.2 on the right to communicate (*idem*), which stated that

the aim is not to substitute the notion of the right to communicate for any rights already recognized by the international community, but to increase their scope with regard to individuals and the groups they form, particularly in view of the new possibilities of active communication and dialogue between cultures that are opened up by advances in the media.

(UNESCO, 1983)

Despite the endorsement of the findings of the MacBride Commission, however, “the veneer of agreement was thin; instead of bringing the sides together, the process merely exposed the gulf between them and entrenched the positions” (Alegre & Ó’Siochrú, 2005).

Supporters of the new order, including many members of the Non-Aligned Movement, were met with fierce resistance by mostly the United States and some other Western countries. The right to communicate eventually became the victim of ferocious ideological disputes, mutual distrust and incidental uprisings of paranoia which eventually made it impossible to consider the merits of all arguments in a rational manner.¹³ Whatever the reading of events one considers; the result was a clear victory of Western interests. The political debate about a NWICO – and the related call for the recognition of a right to communicate – effectively ended when in 1984 the USA, the UK and Singapore withdrew from membership of UNESCO (Lee, 2004: 8).

After this escalation, the right to communicate quickly disappeared into oblivion. Strategically, UNESCO moved away from its South-East outlook to do its “utmost to appeal to the West” (Mansell & Nordenstreng, 2006: 23) and abandoned its efforts to come closer to a formulation of a right to communicate.¹⁴ As Hamelink (2003) observes, by the early 90s the right to communicate had virtually disappeared from the UNESCO agenda. The NWICO came to be seen as politically incorrect and a taboo¹⁵ within UNESCO (Mansell & Nordenstreng, 2006) and with d’Arcy’s death in 1983 the discussion about a right to communicate also ceased within the International Institute of Communication (Birdsall, McIver & Rasmussen, 2002).¹⁶

3.2. WSIS and CRIS: Picking Up the Thread?

Already in 1972 Daniel Bell wrote about the coming about of what he called the post-industrial society. Yoneji Masuda is credited for coining the term “information society” by making it the title of a book in 1980 (Webster, 2004).¹⁷ In his 1982 report on the right to communicate Desmond Fisher dedicated a whole chapter on the changes leading to an “information society” as one of the rationales to recognize the right. By the late 1990s, discussion about the advent of the information society had “reached a new peak in numerous national, regional and international forums” (Mansell & Nordenstreng, 2007: 21).

In its 2001 report, the United Nations Development Programme focused on the potential of new technologies for human development and elaborated on the challenges to using the empowerment potential to include the “entire human race [...] - not just a lucky few” (8). Also the EU is investing in the future as perceived to be laying in the coming about of an information society. There has come a Directorate General along with a Commissioner for the “Information Society and Media” complete with a five-year policy framework called *i2010* (concerning primarily the use of ICT for so-called *eGovernment*, access to and skills for the use of Internet services).

So, there is ample agreement on the fact that information has become a major – if not the defining – factor in developing modern forms of social organization. This transition from an industrial to an information society – even if it were to be seen as a predominantly discursive transition that has shaped policy construction - also has wider implications for politics and law. As Bovens (2003: 17) points out, the dominant features of the new developments of deterritorialization, turbulence, horizontalization and dematerialization greatly impact the functioning of the state based on the rule of law. Since the nation-state is no longer firmly in control of all aspects of society due to growing internationalization, democratic control in the traditional sense within the nation-state is increasingly insufficient. Technological and social unpredictability and turbulent development then demand a sort of flexibility that could undermine legal certainty. The primacy of politics is under pressure from a shift from the arena of politics to the executive and civil society networks. Lastly, the increasing use of and reliance on information systems in executing policy (such as concerning immigration or tax collection) has converted “street-level” bureaucracies into “system-level” bureaucracies which are entirely based on stratified sets of uniform information that leave no place for individual space for manoeuvre. All these developments lead Bovens to propose a new set of rights (which he terms “information rights”), which would ensure equal opportunities, protection and participation of all citizens in addition to those classical civic, political and social rights that have come to be seen as the core of citizenship rights from the eighteenth century on. Similarly, McIver and Birdsall (2002) identify what they call a co-evolution of technological developments, international organizations and rights protection since the ascendancy of the nation-state, which nurtures their hope that the next stage in technological advance will come with a further development of rights.

A separate issue that has given new momentum to thinking about the nature of communication in modern times has been the advent of the Internet. The emergence of the technology seemingly heralded a new age of global connectivity and interactivity and claims for new human rights to go with it soon resembled and reinforced those made during the 1970s. With its introduction, much like before with the introduction of direct broadcasting satellites, a shift is anticipated leading from “the distribution paradigm to an interaction paradigm and eventually to a communication paradigm” (Kuhlen, 2004: 3). This shift then holds the promise of redistributing power by challenging the dominant position within public communication enjoyed currently by professional journalists and owners and privileged further by a traditional interpretation of the freedom of expression (Idem). So, the Internet is conceived of as a potentially revolutionary force producing “new ways of establishing public opinion, new transfer mechanisms for the use of information, and new means for generating political decisions” (Idem).

Of course, this is not the first vision of utopia accompanying the introduction of a new medium. In fact, early studies imply that not so much has changed concerning participation and that the impact of the Internet is not nearly as great as could have been expected (see *inter alia* Scheufele & Nisbet, 2001; Polat, 2005). The lack of access, skills or inclination to use ICT on the side of public authorities and large segments of the citizenry are factors that still impede a deep change in political culture. Nonetheless, the potential of the new technology remains rather breathtaking and it is undoubtedly at least partly a conscious decision about how to make use of it. This latter point is of specific relevance for proponents of a right to communicate, who see its realization not as an “automatic” consequence of technological developments, or indeed of the protection of the freedom of expression, but rather as a possible outcome of sound policy and law-making.¹⁸

The opportunities the Internet offers for communication in and between societies depend on the recognition of the rights to make use of them in the first place, thus giving people an instrument to call for public policies that are necessary to exercise them. Even if the Internet may be less troubled by problems of scarcity, inequalities in access, skills, relevant content or language representation will remain powerful obstacles to any form of empowerment. Also, it would be naïve to assume that the Internet is by its nature “uncontrollable” – the growing power of search engines and software companies,

possibilities of censorship¹⁹, and the political sensitivities involved in administering the Internet²⁰ all are issues that need to be considered.

To sum up, the most important argument for the urgency to re-think current assumptions about the adequacy of existing human rights protections tackling communication is the two-fold effect of the advent of a “information society”: it has dramatically increased the potential for communication between individuals and groups and thus may constitute a moral imperative to recognize new rights to parallel the new environment while at the same time it has generated unprecedented threats to just that communication.²¹ While certain human rights are threatened by social, political, technological and economic developments, the coming about of an information society has also brought about new opportunities for networking and thus the emergence of global social movements and an increase in awareness about problems of exclusion. The early experience of watching the idea of a right to communicate drowning in the political quagmire within UNESCO before it could be calmly thought through and freely deliberated upon brought many of its proponents to believe that it could not be states or industry, but civil society which could proceed with the necessary debate that had so abruptly been aborted.²²

A growing number of NGOs (ranging from trade unions to faith-based organizations to human rights advocates) have emerged since the end of the political debate that are concerned about one or more of the issues that relate to the right to communicate. The emergence of the technology seemingly heralded a new age of global connectivity, interactivity and empowerment and claims for new human rights to go with it soon resembled and reinforced those made during the 1970s. While not all of them relate their work to the older debates the growing awareness of problems such as the “digital divide” has started to provide some common ground again. Also, recent political and economic developments within media landscapes have triggered media reform movements in various shapes that have sometimes framed their efforts within the claim on a right to communicate (see Hackett & Carroll, 2006).

The decision in 2001 to convene a UN World Summit, which was to deal with “the information society” (WSIS) was yet another event that triggered broader cooperation and exchange between concerned actors. So even though the debate around a NWICO died out within UNESCO, by the same token that it had led to an escalation of the ideological battles

within international politics the ideal of a right to communicate continues to inspire activists and scholars alike to argue for a human rights-based approach to communication processes. One of the most important initiatives that explicitly picked up the concept was the Campaign for Communication Rights in the Information Society (CRIS, 2005), which was founded on the eve of WSIS. An alliance of NGOs had collaborated in order to “use the right to communicate to enhance other human rights and to strengthen the social, economic and cultural lives of people and communities” (Lee, 2004: 9).

More than twenty years after the escalation of the debate within UNESCO, proponents of the right to communicate now hoped for a revival of a human rights perspective on communication processes. After all, since then, trends in international communication such as increasing concentration, privatization and commercialization had not done much to address the needs and problems that underlie the original call for the right to communicate.²³ So, after the debate about a NWICO had gotten stuck in the quicksand of ideological polarization the problems underlying the earlier arguments for re-thinking the justness of the distribution of “hard” and “soft” power in the world of communication had barely changed (Mansell & Nordenstrang, 2006; Mastrini & de Charras, 2005). The “information revolution” has a select number of clear winners and many losers (Gher, 2002).

So civil society was greatly encouraged by then UN Secretary-General Kofi Annan’s announcement that this time, the World Summit was to be truly participatory and include not only the usual government representatives, but also business and – for the first time – civil society as partners on the same eye height (Padovani & Nordenstreng, 2005). The trauma of ideological escalation seemed to have abided somewhat and when then, at the dawn of a World Summit, even Kofi Annan announced that “millions of people in the poorest countries are still excluded from the *right to communicate*, increasingly seen as a fundamental human right” while the European Commission asserted that “the Summit should reinforce the *right to communicate* and to access information and knowledge” (as cited in Alegre & Ó’Siochrú, 2005, *emphasis added*), hopes were set high that this time around, the hour was ripe for the international community to go beyond old fault lines, finally address persisting injustices and introduce a perspective on information and communication that would go beyond market logic and profitability.

If the original call for a right to communicate primarily intended to introduce change on an inter-state level, the rights of individuals and groups had always underpinned the philosophy of a right to communicate. This perspective, it seems, became more pronounced and related to the effects of developments such as increasing intellectual property rights protection on access to knowledge or the corporate dominance of liberalized media markets on the diversity of information sources within the movement on the eve of WSIS. Also the events of September 11 and the subsequent measures that were taken in the name of a “war against terrorism”, such as the *PATRIOT Act* in the US, the *Cybercrime Convention* in the context of the Council of Europe or the *Framework Decision on a European Arrest Warrant*²⁴, triggered grave concern among human rights activists that pointed to disproportionate restrictions of well-established rights, also in the domain of communication, for the sake of a perceived increase in public security.

With the coming of “new media”, addressing exclusion from the infrastructure of communication had come to be a possibility but had clearly not been translated into effective policy. The concept of the “digital divide” had reformulated the imbalance that had existed earlier concerning access to other means of communication to apply to the new, digital media, referring to the “information rich” and “information poor”. In 2004, the year between the first and second phase of the World Summit, according to statistics prepared for WSIS²⁵ less than 3 out of every 100 Africans used the Internet, compared with an average of 1 out of every 2 inhabitants of the G8 countries. Indeed, there were more Internet users in London than in the whole of Pakistan while there were still 30 countries with an Internet penetration of less than 1%. Also, increasing liberalization and privatization of (media) markets during the 80s and 90s had led to an intensification of concerns about cultural diversity and content pluralism – also within developed nations and the EU – in the face of increasingly monopolistic media markets (see for example Thomas & Nain, 2004). The enduring clashes within international organizations such the World Trade Organization (WTO) between proponents of the application of free trade rules to audiovisual services, such as the US, and those advocating an *exception culturelle* concerning those services, such as notably France and Canada, illustrate those worries. The 2006 UNESCO *Convention on Cultural Diversity* may then be seen as an attempt to provide a counterweight to a perceived neoliberal bias within agreements such as the General Agreement on Trade in Services (GATS).²⁶

3.3. WSIS: No Reference in the Official Final Declaration

When the first part²⁷ of the World Summit took place in December 2003, this time hosted by the International Telecommunication Union (ITU) instead of UNESCO²⁸, the US had just rejoined UNESCO (in 2003). During the preparations for the Summit the “right to communicate” resurfaced and became the centre of a heated debate during the preparatory conference (Prepcom II) in February 2003 at Geneva. The renewed attention for the right to communicate was largely caused by the emerging reality of global interactive technologies and the expansion of social networking. These developments seemed to call even more urgently than at the time of d’Arcy’s writing for a shift from the prevailing distribution paradigm to an interaction paradigm. This shift would require a form of human rights protection for the reality of communication as conversation.

In this spirit a draft declaration on the right to communicate was proposed by representatives of civil society as a discussion document. Against this draft text representatives of the World Press Freedom Committee protested that a right to communicate would serve the purpose of muzzling the freedom of the media. This opposition was inspired by the fear that a right to communicate would re-vive the 1970s Third World aspirations to create a new world information and communication order. Also from within the human rights community the draft declaration was so forcefully attacked that the CRIS movement decided to put the right to communicate (temporarily) on the backburner. Instead the movement focussed on the more acceptable, although also contested, notion of communication rights. During the Summit in December 2003 a Statement on Communication Rights was presented to and adopted by individuals and organisations present at the Communication Rights conference convened by CRIS.²⁹

In the end, talk about relevant principles such as inclusion or participation remained limited to references to deliberately undefined standards, rendered inconsequential due to a lack of contextualization in existing governance structures concerning media and telecommunication as well as the lack of consensus on their implementation (Hamelink, 2004a). Those who had hoped for the inclusion of communication rights into the discussion and outcome of WSIS were clearly disappointed and lamented the preference for technology over people, short-sighted economic concerns over communication process and a lack of context to include cultural and socio-political dimensions of the digital divide and its related problems (Cunningham, 2005: 19). The current shift to protect speech rights rather than

speech opportunities was widely lamented. This time, it seemed, it was not the governments arguing about the right, but rather civil society organizations such as the International Federation of Journalists or ARTICLE 19, which expressed their concerns about the way in which the CRIS campaign formulated their claim for a right to communicate.³⁰

Eventually, Mr. Annan's initiative to put the right to communicate on the official agenda failed and there was no mention of it in any of the official WSIS documents – nor in the declarations nor in the action plans. Also, no commitments were made on the side of business to contribute to bridge the digital divide. The summit report on financing did not mention any new recommendations concerning novel means of mobilizing the necessary investments (Mansell & Nordenstreng, 2006).

As has become clear from the above, the “right to communicate” has led to and continues to spark much controversy. Initially, it was “Western” nations that almost intuitively distrusted the right as being a suspicious tool advocated to bring about state control and thus erode press freedom. On the other hand, socialist and Third World nations expressed concerns about the possible abuse of the right in order to keep up existing imbalances and enforce an augmentation of the unwanted import of Western culture into their countries (Fisher, 1982: 34).

Since this early juxtaposition, several different issues that are controversial about a right to communicate can be distinguished and that still keep minds busy. Especially before the WSIS took place, there was renewed debate and again “communication rights” became one of the most controversial issues during the preceding preparatory committees (Kuhlen, 2003). Beyond developments in politics and technology, though, changes have also taken place in the realm of law. While the right to communicate has not been put black on white and no “declaration of communication rights” has been adopted by nation-state actors, judicial interpretation, emerging customary law, political realities that challenge and influence legal systems and the interplay between different legal systems have all influenced the relevant areas of the law – all without the need to change a single letter. Some of the rights, which were aimed at by thinkers since Jean d’Arcy may in fact have come to be part of the human rights regime already; others may still not be properly addressed or could be addressed in a better way. In other words, the right to communicate in all its facets and implications is here understood as a work in progress, which in itself does not weaken its validity. As Birdsall aptly puts it: “The enunciation of a human right is a rhetorical statement

of principle, not a statement that can address every circumstance that can arise over time and place” (2006). Below, a brief overview of the most pertinent points of disagreement and open questions will be discussed and related to recent developments in human rights law and thinking.

4. Open questions and challenges

4.1. What kind of right?

In legal scholarship, rights are often classified into three “generations” of rights. Those three generations differ concerning who holds those rights and certainly in their degree of enforcement and recognition within the international community. Civil and political rights (as codified in the *International Covenant on Civil and Political Rights* (ICCPR), 1966) are considered “first generation” rights, economic, social and cultural rights (as codified in the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), 1966) as “second generation” rights and collective, or so-called solidarity rights as the “third generation”. Whereas the sequence should by no means indicate a moral ranking or chronological substitution, *de facto* there is a corresponding hierarchy when it comes to real-life enforcement. The first generation of rights is clearly the least controversial and best enforced category of rights in most domestic and the international legal system at large.

Still, one could argue that those rights are interdependent (as had been recognized in the original Universal Declaration, which did not differentiate between first and second generation rights) and not mutually exclusive. In fact, many rights overlap those categories (McIver & Birdsall, 2002). It would also not be correct to divide the generations of rights according to their negative or positive character, although mostly, the first generation of rights consists of so-called negative freedoms, while the second mostly contains positive rights that express certain standards of performance of states to provide certain resources considered a minimum for a dignified standard of life. Third generation rights are still much debated and have not emerged within one document that could provide an authoritative interpretation of their content. Nonetheless, a number of powerful discourses have emerged based on such rights, as for example those concerning development³¹ or the environment.³² The issues that pertain to the protection of communication as expressed in certain rights would certainly fall into all those categories. So, for example the freedom of expression and

the right to privacy are original first generation rights, which require non-intervention by public authority (albeit with positive obligations implied). The right to participate in cultural life, on the other side, clearly would require state action to enable full participation. Paradoxically, the characteristics that move the communication rights discussion into the realm of third generation rights may in fact have been the starting point of the international debate on a NWICO and still apply to current debates on the “digital divide”. As McIver and Birdsall (2002) find, whereas traditionally communication was addressed through negative freedoms, d’Arcy had called to strengthen the positive rights concerning communication processes and eventually, communication was debated as a collective right, when the social and cultural impact of broadcasting in developing countries came on the agenda.

When Bovens (2003) proposed the codification of information rights in national constitutions he also faced the problem of a variety of rights, which are not all first generation rights that can easily lead to an individual claim before a judge. While he reiterated the argumentation that the distinction between those “generations” of rights may in fact be anachronistic and overly formalistic, he proposed a three-tier conceptualization of information rights divided into primary, secondary and tertiary rights, which can be aptly applied to the wider conception of communication rights.

Whereas primary rights refer to direct claims against governments, which are clear and unequivocal enough to be adjudicated on the basis of individual claims, secondary rights refer to “supporting” rights of citizens to gain access to relevant channels of information. They are secondary since they do not entail any direct claim on access to information but merely to channels that may carry such information. This in turn means that a duty of governments to support citizens in gaining access (in liberalized markets this usually means creating conditions in which markets will in fact work in a way to maximize access rather than providing for such access itself). Tertiary rights ultimately address the fact that information held by government may not be sufficient in a time in which much relevant information citizens need to engage in meaningful participation is held in private hands. Thus, the government would then be obliged to create legal frameworks to enable access to relevant information on a horizontal basis – between private entities.

4.2. *Positive obligations*

Much of the argument for a right to communicate has been based on the inadequacy of mere negative protection rights when it comes to communication. Existing provisions such as concerning the freedom of expression would only contain a certain degree of freedom from governmental interference, but no enforceable entitlement, a positive right, to request state intervention in order to enable the effective exercise of those freedoms. When taking a closer look at the legal texts and, maybe even more importantly, the developments in judicial interpretation, it soon becomes apparent that the criticism is not (anymore) entirely warranted.

Perhaps least surprisingly, second generation rights such as those pertaining to the protection of cultural rights, contain so-called positive obligations. So, for example, the ICESCR includes obligations of states to take active measures for its promotion, as included in Article 15(2). There are, however, also explicit provisions that mention obligations to act on the part of state signatories, even when it concerns first generation rights, such as Article 2 of the ICCPR which places on states an obligation to “adopt such legislative or other measures as may be necessary to give effect to the rights recognized by the Covenant”. The right to participate in public affairs is contained in the ICCPR, Article 25. This right to participate equally holds a promise for action by the state to help create the necessary conditions to effectively exercise this right. This means that issues such as literacy, language, education and even the distribution of economic resources could be addressed within this framework. Its link with freedom of expression has been emphasized *inter alia* by the Human Rights Committee, for example in its General Comment No. 25, it states

Citizens also take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves. This participation is supported by ensuring freedom of expression, assembly and association.

(as cited in Barker & Noorlender, 2003)

More specifically, both the freedom of expression and the right to private life have clearly been interpreted to imply certain obligations by states to ensure their effectiveness by taking positive action. Consequently, in its criticism of the right to communicate as a separate new right, ARTICLE 19 keeps pointing out that there is a

“positive element” contained in the freedom of expressions and that “interpretation by courts and other authoritative bodies has *started* to

elaborate on the nature of these positive rights and, collectively, this interpretation broadly encompasses the legitimate content of the right to communicate.

(2003a: 2, *emphasis added*)

Those elements may include an implicit obligation of states to take measures to ensure a pluralistic media landscape in order to ensure the effectiveness of a public right to receive information from a variety of different sources – it is hard, however, to elaborate a more detailed standard concerning these implications since there is no authoritative elaboration on them. So, the development of these implications is largely left to the interpretation of individual judges who greatly vary in their willingness to recognize positive obligations in the first place and are sure to disagree on any more concise implications.

Also ensuring equitable access to the means of communication is an obligation of states under international law (Barker & Noorlender, 2003). This obligation is not to be understood as an individual right to access, thus there is no absolute right to broadcast (Idem). It is rather usually translated as a duty to promote diversity and access by means of public policy, such as licensing or “universal service” requirements when it comes to telecommunication infrastructure such as enshrined in the *EU Voice Telephony Directive*.³³ As a consequence, any kind of media monopoly, public or private, would constitute a serious and unwarranted restriction of the freedom of expression. Concentrations in the media market can thus clearly be related to human rights requirements and the positive obligations that come with it concerning state action.³⁴ In times of the Internet, one could argue that the obligation to provide effective access could even go further to include support to engage with the new medium by providing necessary hard- and software and training (Barker & Noorlender, 2003). Thus, an adequate level of access could be facilitated by distributing the facilities for producing media within and between societies (Cunningham, 2005). This would be what in Bovens’ (2003) systematization amounts to secondary information rights.

Another obligation which emanates from the guarantee of freedom of expression, which includes the right to seek and receive information, refers to the right to information. Clearly, here lies in fact the origin of the right, as was recognized in the early UN conference of 1946. More specifically, journalists should be granted greatest possible access to information so that they can report on matters of public interest, which is a central condition for democracy to flourish.

If there is a positive obligation included in the freedom to seek and receive information, though, this obligation thus far does *not* imply the duty to provide specific kind of information – the “unwilling speaker” problem. Enforcing access to publicly relevant information then remains in the realm of transparency and good governance provisions such as for example the *EC Regulation 1049/2001* on public access to documents rather than human rights provisions. In times of increasing importance of access to information for the functioning of citizens in an information society this is increasingly seen as a grave lacuna in the catalogue of citizenship rights (Bovens, 2003; Curtin, 2000).

Also the protection of private life comes with positive obligations that go beyond non-interference. International courts have stressed that the advance in technology and therewith the potential for surveillance of citizens must be equaled with rules to prevent an erosion of rights relating to confidentiality of communication. Thus, the potentially “chilling effect” of suspicions of Internet users they could be monitored is clearly recognized.³⁵

4.3. Substance

When one has a passing look through all the different enumerations, grids and lists that have addressed the right to communicate (or communication rights) and aimed at breaking it down into components, the possibilities seem endless and not always overlapping (see for example, CRIS, 2005; Hamelink, 2003; Harms 2002). Prominently, obviously, it is the different processes of information exchange that are at the core of the right. Still, the arguments quickly evolve to include enabling circumstances, such as access to resources or pluralism of information sources and sometimes go on to refer to a more generally conducive environment including the free sharing of knowledge, culture or literacy and education.

One of the most controversial issues which have been proposed as part of the right to communicate and hotly debated concerns the democratization of communication. It is mostly understood by its proponents as a means to further democratize public decision-making, also when it comes to communication policy (see inter alia Fisher, 1982, Harms, 2002, McIver & Birdsall, 2002).³⁶ This, however, only keeps making sense in case a certain minimum of public policy is in fact applied to sectors that have become increasingly liberalized in recent years. Another, related issue that has surfaced in discussions can be

found in “Instant World”, one of the reports that were produced by the Canadian Telecommission, inspired by d’Arcy’s work on the right to communicate, which contained a passage on what they considered to be the essential components of the right: “The rights to hear and be heard, to inform and to be informed” (as cited in Fisher, 1982: 15). In 2006 the EU Commission’s *White Paper on a European Communication Policy* considered it a matter of citizenship to have a “right to be heard” (European Commission, 2006: 13). Clearly, the empowerment sought and assumed by its proponents to be effectuated by the implementation of a right to communicate directly relates to power within political decision-making. In last consequence, amplifying the freedom of expression has the intention to give those a voice that would otherwise not be heard.

The need for such empowerment is found in a flaw in the assumptions that underlie the ideal of freedom of speech. The ideal assumes equality of rights of the individuals taking part in communication processes, who are thus enabled to deliberate on matters of common interest and ultimately reach mutually beneficial decisions. Within such an environment, relying exclusively on the protection of the freedom of expression is inadequate to address the processes of control and prevent the abuse of power. In last instance, this may seem to imply a right to be heard, since “it is no good having a right to communicate if no one is listening” (Lee, 2004: 5). While in the end, the claim to a right to be listened to refers to a deeper cultural change that is assumed to be inherent in a proper implementation of a right to communicate, naturally, the legal implications of such a claim can merely be concerned with protecting and possibly enhancing everyone’s opportunities to speak out and to have everyone potentially get access to public communication and vote; not with forcing anyone to listen.

In sum, if there is a common denominator to most of the existing work on the topic, it would be that the content and reach of the right or rights that are formulated go far beyond what is addressed by the traditional freedom of expression and information with the aim of enabling “every individual or community to have its stories and views heard” (Barker & Noorlender, 2003). Mostly, the arguments build forth on the recognition that certain minimum enabling conditions are necessary to give meaning to any freedom.³⁷ Another much cited minimum includes the rights to “inform, be informed, active participation in communication, equitable access to infrastructure and information, privacy” (Richstad & Anderson as cited in McIver, Birdsall & Rasmussen, 2003: 8).

Categorizing certain elements of the right has also brought about a variety of approaches. To distinguish the most important elements of communication, for example. However, it may be of little use to formulate specific rights and entitlements as opposed to freedoms (as Desmond Fisher has done) since positive obligations that freedoms are interpreted to imply may render this approach fruitless. Also to speak of a “hierarchy”, as has been done elsewhere by Jean d’Arcy, may trigger misleading discussions about whether or not some of the “low priority” rights should be considered fundamental human rights at all. Also, the reverse route has been proposed, which would find the meaning of a right to communicate by negatively formulating the conditions under which such a right would be violated (Hamelink, 2004b: 209).

So, despite of the numerous efforts to clarify the content and delineate more clearly the boundaries of the discourse, there is an impasse that has persisted to this day, when it comes to finding a “definition embracing both universality and legalistic precision” (Birdsall, 2006). An additional complication in defining a right to communicate stems from the possibility that people may want the recognition of their preference not to communicate. In one of the first UNESCO expert meetings on the Right to Communicate (in the 1970s) one of the participants (Gary Gumpert) raised the question about the right not to communicate. Should people be entitled to refuse communication? As a matter of fact, many legal systems in the world recognize the right to remain silent. This implies that the accused can refuse not to speak and remain silent lest they incriminate themselves. This right is recognized in international (*International Covenant on Civil and Political Rights*, ICCPR) and regional human rights instruments (for example in the *European Convention on Human Rights*, ECHR, Article (6)) and in the jurisprudence of the European Court of Human Rights (ECrHR). The right to silence is a constitutional right in countries like the US (in the *Fifth Amendment to the Constitution*), India and Ireland; it is protected in Canada under the *Canadian Charter of Rights and Freedoms*, and in Criminal Codes of France and Germany.

4.4. Should the right to silence also be accepted outside judicial proceedings?

This is a challenging proposition in societies that are increasingly communication-intensive – or even communication-saturated. In many countries one is today permanently surrounded by people who incessantly talk with others through their cell-phones or who communicate

around the clock with SMS messages. Even if you are not a politician, chances are that journalists want you to communicate your ideas about the Middle East to the world at large in the ever more popular street interview. With all this communicative pressure (some) people may want to retain their sanity. People may also realize that in many situations not communicating may be much better than communicating. In human disputes, for example, communication processes offer no guarantee that conflicts de-escalate. Communication between parties in dispute is unlikely to support de-escalation if those parties are too angry with each other, or feel too threatened.

Communication is also problematic in situations of inequality. Between unequal partners there is a strong likelihood that continued communication serves the stronger party better than the weaker party. In unequal marital relations, for example, the advice (given by professional counsellors) to continue to communicate is often fatal for the more dependent partner. He or she needs to dissociate from the relationship (maybe only temporarily), there needs to be space to self-empower, to gain a more autonomous position which is impossible as long as the exchange continues. The stronger party is too loud and leaves no space for independent thinking. Dissociation is the deliberate withdrawal to create the silence in one's head that is essential to autonomous thought and choice. Genuine communications – such as in relational communication – require moments of silence. Just like the implementation of a right to communicate would demand the proliferation of complimentary WIFI-zones, the right not to communicate needs the creation of places of silence. In many urban areas such places have been closed down out of fear of vandalism: they need to be opened again and preferably 24/7. Learning the practise of non-communicative formats like silence should also be part of communication training programmes.

4.5. Whose Right?

When the debate about the NWICO entered the international political fora, the right to communicate quickly became almost exclusively interpreted, depending on one's perspective, as a sword or shield in the hands of nation-states to either force entry into foreign markets for one's information products (as was feared for by those states sceptical of American cultural dominance) or to censor foreign inflow of information (as was assumed on the part of Western nations and the dominant media industries they hosted). The emphasis on the implications of recognizing a right to communicate for collective actors such

as communities or indeed whole states, however, may have muddied the waters by triggering overly fearful reflexes.

Certainly, taking a human rights perspective on communication is also apt to address global inequalities and to apply to collectives in addition to individuals. However, it would be rather paradoxical to start with considerations of the implications of a *human* right for the rights of sovereign nation-states in their international relations. In fact, human rights seem to be the altogether wrong category to apply to those issues at the level of international relations, since those are clearly regulated by different branches of international law. Human rights law is concerned with human beings – individuals as well as groups – whereas states are an altogether different category of legal entities, *against* which this set of rights was first pronounced. So, even if the beginning of the debate may have been overshadowed by a concentration on state actors, the root of the right to communicate should be remembered to lie in arguments concerning human dignity. The next question to address then would have to be whether the right to communicate should be understood as an individual or a collective right or whether it entails a set of rights consisting of both.³⁸

4.6. *Against Whom?*

Addressees of human rights articles are states, not private entities. Human rights were meant to be a protection against state authority, since proportionate to its powers the potential of violations by the state is great. This may seem as a contradiction to the concept of a right to communicate, since it implies certain standards to which also private entities would have to adhere.³⁹ For example, the right implies access – to infrastructure as well as content. At a first glance, this may be of more relevance to media policy makers than media professionals. In a more indirect way, however, access to the media may also mean that journalists would have to change the way they work in order to include more marginalized groups in society “behind and in front of the camera”.⁴⁰ There is a justified suspicion concerning governmental interference with media content – on the other hand, there already is wide consensus on the fact that certain content considered harmful (such as pornographic material that could harm young viewers or certain types of speeches that are considered to incite hate) can and ought to be addressed. Also, states may well play a role not necessarily by means of restriction but could extend support for the production and

distribution of alternative material. This may be considered a task which public service broadcasting would probably be most eligible to fulfil. Ultimately, democratization of public communication is the declared aim of proponents of a right to communicate (see Lee, 2004; Kuhlen, 2003) since it is expected to lead to a “distribution of communication power from the few to the many. From the elite to the grassroots” (Traber, 1999: 8).

The question, if it is then realistic or in fact desirable that governments are the sole addressees of human rights provisions, as is the case today, thus still remains relevant. Despite reasonable concerns against the application of human rights to relations between private entities⁴¹ there are also reasonable arguments in favour of at least considering an alternative reading. When one looks at the actors that violate human rights, certainly, states remain top of the list, were it only because of their (theoretical) monopoly on coercion. Still, the decisions and choices of private actors can directly affect human rights. Even ARTICLE 19, which is clearly opposed to expanding the right to communicate beyond existing provisions, recognizes a need to include private actors when considering the effectiveness of certain human rights. This goes even more so at a time when many domains of social life that have formerly been run by the state are in the process of being privatized.

4.7. Codification

The above already hinted at the possibly most controversial issue that has led to the most widespread misinterpretations, legitimate criticisms and virulent clashes.⁴² Should a new right or a new set of rights be codified in legal documents such as international treaties or domestic law? It is the question of whether introducing a positive, codified new right would undermine existing rights, which has over and over again resurfaced in the debate. For example, the World Press Freedom Committee, established in the course of the debate about a NWICO, has persistently argued that the codification of a right to communicate would eventually undermine the universal claim of the right to freedom of expression, as codified in Article 19 of the *Universal Declaration of Human Rights*, since it was “very likely to become a collective substitutive right” (Kuhlen, 2003: 2, *emphasis added*). This, in turn is considered as a dangerous path, since it could open up the door for state control over who would be allowed to communicate – also the argument in favour of defending cultural autonomy by restricting the import of foreign cultural goods could not weight up against this danger. Also today, potential government abuse ranks high among the criticisms.

However, many of the concerns that have been brought forward against the right to communicate are in fact shared by its advocates, even if they do not agree in their analyses of the negative consequences of the introduction of such a right. Also d'Arcy repeatedly emphasised that his idea never was meant to imply the abolition of existing rights and freedoms.

Rather than replace existing rights, the point of a right to communicate is to address the omissions in current protection and “correct for” inequalities in power. This could mean formulating an additional right, but might as well be realized by emphasizing the interdependence of current rights and criticize their interpretation as too narrow to cover all relevant processes to protect communication from hegemony and interference. The real problem may turn out not to be the lack of a new right, but the lack of duly implementing existing rights by mainstreaming them in all relevant areas of law and policy.

5. Concluding remarks

The introduction of any new communication technology will not per se change the world we live in – it may well broaden our options. Brecht used to wonder why radio was just imitating the uses of media before it. In his analysis, the problem was that it had not been invented for a specific social purpose and thus came short of its inherent promise. Again direct satellite broadcasting, as well as the Internet, are but mere opportunities, the impact of which largely depends on the way they are employed. How we chose to use them in turn depends on our perspective on the point of communication – whether we approach the information society from an economic point of view and emphasize the importance of the international transfer of data in order to enable more efficient production and trade in goods and services or whether we approach new technologies from a human rights perspective, focusing on its potentials for realizing human needs. The mere existence of the Internet will not foster democratic participation in the absence of a deliberate decision to develop it and encourage its use for those purposes just like direct broadcasting satellites did not per se foster global interactive communication.

In this sense, the right to communicate is an articulation of a human rights perspective that seeks to “reinforce an environment of mutual respect, and to build the capacities of all in communication” (Alegre & Ó’Siochrú, 2005) and which would make the consideration of entitlements concerning the use of old and new technologies for the

fostering of communication mandatory when formulating policy and law that determine its potential threats and contributions to opportunities for and the quality of communication. Enforcement then remains the big problem, since moral declarations tend not to be a powerful tool to ensure compliance in the absence of strong mechanisms of enforcement (Hamelink, 2004b: 211).⁴³ Still, also activists that today plead for the recognition of communication rights are aware of the problems of codifying some aspects of those rights and recognize the value of alternative standard-setting mechanisms. So, for example, the People's Communication Charter, drafted with a similar intention as the much criticized draft Declaration on a Right to Communicate, states that it "aims to bring to cultural policy-making a set of standards that represents rights and responsibilities to be observed in all democratic countries and in international law".

In the context of codification reflection on the right to communicate needs to address the observation that - in existential essence - human beings do not need the formal entitlement to communicate. The sending, receiving, and exchanging of signals is part of their biological constitution. Like most other animals humans are communicative beings. In other words: they will communicate anyway unless this facility is forcefully taken away from them which in effect means that life is denied to them. As long as the right to life is recognized and respected, there is an implicit recognition of a right to communicate. The real problem of a right to communicate emerges in relation to:

- what people communicate about: the content of communication;
- with whom they communicate: the actors people communicate with;
- what the purposes of human communication are;
- how human communication is organized; and
- what the effects of human our communication are.

What is really at stake is the legal protection of the contents, actors, effects, purposes and structures of human communication. The formally recognized right to communicate contents may imply those contents are "politically correct". This would however construct a serious obstacle to the freedom to communicate. Therefore, a right to communicate is not primarily a communication right, but a social and cultural right that demands that societies accept the reality of human differences. A right to communicate proposes that societies learn to live with the "permanent provocation" (Foucault) of living with "others" that exist in

widely differing universes. Mature societies are “agonistic” arrangements which means that people are forever in dispute about the quality, the purpose and the direction of their co-existence. Only the full acceptance of this reality creates the social environment in which a right to communicate is a sensible proposition.

5.1. Where to move from here?

Already during the earliest stages of the discussions about a right to communicate the view had been articulated that before thorough deliberations would have led to some basic common understanding “defining terms [was] like putting the cart before the horse” (Birdsall, 2006). Subsequent efforts within UNESCO, however, seem to have concentrated primarily, if not exclusively, on finding a comprehensive, universal legal formulation, which led to much frustration and friction. Again today, after the impasse as a consequence of the political éclat in the 80s and a renewed interest in the concept around WSIS, there are good reasons to remind ourselves of the arguments in favour of seeing the debate on the right to communicate/communication rights as an “open work”, as proposed by Birdsall (Idem). Making an end to the debate by proposing a final, comprehensive definition of the right(s) at stake is thus neither the intention nor within the reach of the present work. Neither is lobbying for a particular legal formulation or a specific roadmap for the implementation of such a right. Rather, inspiration is drawn from arguments that point to a lack in current legislation and policy due to a limited recognition of the relevant elements of communication processes in society in order to realize the ideal of human dignity. It is proposed that with the positive and negative changes and potentials that “information society” developments are bringing about, those arguments have gained rather than lost in relevance during the past decades.

Whereas much work has been done concerning the definition and formulation of a right to communicate, there is a lack of research that empirically investigates current developments that influence communication processes through the prism of human rights standards at the national, regional and global level. It may be that the debate around WSIS will trigger renewed research interest in communication processes from a human rights perspective. Unfortunately, so far, young researchers’ work has been very limited (see for example Dakroury, 2006; Cunningham, 2005).

A meaningful approach to thinking about the right to communicate may come from reflections on the right to health. In a series of legal instruments international law provides for a basic human right to health. Most prominently in the *International Covenant on Economic, Social and Cultural Rights* (1966) Article 12, formulated this as “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”. The right to health should be seen in the light of the description of health as provided by the constitution of the World Health Organization (WHO): “a state of complete physical, mental, and social well-being, and not merely the absence of disease or infirmity” (WHO, 1946). This right obviously makes little sense in its literal sense. No one can have a legal right to good health and claim the parallel state obligation to provide this. Good health is among others related to genetic factors that states have little influence upon.

The right to health is therefore usually seen as the entitlement to good and adequate health care, or in other words to an environment which enables the attainment of the highest standard of health. Parallel to the way in which the right to health is framed as entitlement to an enabling environment, a similar conception can be argued for communication. The right to communicate would then be framed as the entitlement to an environment that enables people to enjoy communication in the interactive sense that d’Arcy wrote about: communication in the sense of talking with others and listening to others. This communication is clearly rather different from the modality of communication that dominates most people’s daily lives. Much of people’s daily communication is interactive only in a shallow sense and is mainly tactical in nature. People ask questions, give directions, provide encouragement or mete out punishment, express praise or indignation, shout and babble. “Tactical communication” does little to bring about mutual understanding; it often contributes to misunderstanding and misinterpretation, to the confirmation of stereotypical images and firmly held assumptions about other people’s minds.

Genuine interactive communication should be understood as “relational communication”. Most people – with only few exceptions – live in communities. For these communities to be sustainable people need to share language in conversation in order to understand each other. Mutual understanding is not possible without “relational communication”. This becomes even more critical as communities – through changes in global demographics – evolve into multi-cultural and multi-religious communities. Lest these

new communities get entangled in violent and possibly lethal conflict, the freedom of their members to engage in genuine dialogue is vitally important. “Relational communication” is the essential response to the intensification of conflicts around the world between people of different origin, religious values, cultural practices and languages. It is a crucial instrument in the realization of human security.

“Relational communication” refers to interactions in which others are seen as unique individuals with faces, stories, experiences, in which others are goals and not instruments and through which we want to understand who this other is – even if he/she is a terrorist. This kind of communication requires – much like health – an “enabling environment”. Relational communication implies that people do not just talk to others but talk with each other and in this interaction feel free to say what they think and thus speak up. Relational communication also implies that people listen to each other. Not merely in the defensive sense in order to be prepared for rebuttal but with empathy and reflexivity in order to be able to see reality from a different perspective.

The key dimensions of the enabling environment for relational communication are trust and skills. For people to really speak up and talk with others about their thoughts they need to feel secure. This requires an environment in which people can trust that their interactions are not monitored by third parties. It would seem plausible that under the conditions Armand Mattelart describes in his book on global surveillance people are not enabled to realize relational communication. National measures (such as the US Patriot Act) and international instruments (such as the surveillance network Echelon) do not create a social climate that encourages people to freely speak up (Mattelart, 2008).

Participation in relational communication is an engagement with a very difficult mode of human communication. It requires the skills to question one’s own judgments and assumptions, to reflectively and actively listen and to be silent. For the training of such skills public resources need to be allocated to formal and informal educational institutions. Additionally to the dimensions of trust and skills, other requirements would include a pluralism of information media, broad access to information sources and the inclusion of all individuals and groups that are commonly excluded from societal debate and dialogue.

The proposal for the entitlement to an “enabling environment” raises the question whether this can be an enforceable and justiciable right. This may be an obvious and yet wrong question. Human rights are not necessarily the same as rights in positive law. They

primarily reflect moral aspirations about the ways people should live together. Some of these aspirations will be transformed into positive legal obligations others may not. In all cases they provide essential guides for future shaping of the national and international social order. In this context a reference to Article 28 in the *Universal Declaration of Human Rights* seems pertinent. The article states “Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized”. The records of the discussions on this article (in the drafting group of the UN Commission on Human Rights, 1948) show that this right was not seen as a justiciable right for individuals but as an acknowledgement of the view that the enjoyment of human rights does depend upon the quality of social and international relations (Eide, 1992: 435). The recognition of this rather abstract principle did have far-reaching consequences in the practice of world politics. It did inspire political measures in such field as decolonisation, racial discrimination and social development.

In a similar sense the adoption of the right to communicate could be seen as an inspiration for the international community to promote and protect the extension of the classical claims to freedom of communication from tactical communication to relational communication. In order to move ahead, as suggested above, there will be the urgent need for more academic research on the various questions that we posed and on the dimensions of the enabling environment. Equally, there will be the need for the continuation and even intensification of the activist movement that was mobilised around the WSIS. The future realisation of the right to communicate requires the combined efforts of communication scientists and communication activists.

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¹ United Nations Bulletin Vol. iv No. 9, 1 May 1948. Available online at: (http://www.un.org/Pubs/chronicle/2002/issue3/110502_unconf_freedom_achieve.html). [Retrieved on 17 March 2008].

² At the signing of the General Act, General Carlos Romulo, who had acted as the President of the Conference, had predicted this. The conference produced two drafts of an article for inclusion in the proposed UN Declaration and Covenant of Human Rights and 43 resolutions, some of which were hoped to become international conventions (Whitton, 1949). Already at this point it was accepted that the mere recognition of a freedom may not be sufficient to make it effective. For example, measures that were proposed in order to effectuate this freedom included the distribution of cheap radio sets.

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- ³ The Soviet proposition to include a prohibition of “diffusion of deliberately false or distorted reports which undermine friendly international relations” as a limitation to the freedom of information was firmly opposed by the US delegation with the argument that this would open the door to state-sponsored censorship. Paradoxically, it did not see this same danger in including such broad concepts as “national security” in its list of legitimate restrictions of this freedom (for further elaboration see Whitton, 1949).
- ⁴ More generally one could point to the different approaches to rights and the schism between natural rights doctrines such as advocated by Kant and more positivist approaches that have dominated legal scholarship especially within the Anglo-American world since Bentham and Austin rejected the assumptions of natural law (Olson, 2003).
- ⁵ The phrase was coined in his book “The Gutenberg Galaxy” in 1962.
- ⁶ In fact, at the time when d’Arcy articulated his perceptions, cable television, which at its introduction had been expected to realize greater democratic participation, was in the process of commercial concentration and regulation (Surman, 1996, as cited in Mclver & Birdsall, 2002: 10).
- ⁷ At about the same time that d’Arcy expressed his concerns about the lack in human rights protection he saw developing, similar thoughts were vented by the Organization of American States in the *American Convention on Human Rights*. Even though no direct reference to a right to communicate can be found in the document, communication was clearly put into the context of political economy and new technology, signaling a need to expand the protection of freedom of expression (Mclver, Birdsall & Rasmussen, 2003).
- ⁸ For a detailed discussion on Brecht’s ideas see Wöhrle (1988).
- ⁹ While D’Arcy’s article and formulation of a right to communicate was certainly visionary and triggered a widespread debate on such a right, his contribution did not specify the content of any such right. In fact, later attempts to define one comprehensive right to comprise all the relevant processes may have led to a lot of pointless attempts to come up with an exhausting definition.
- ¹⁰ The Western understanding of freedom of expression was clearly not shared by many of those new UN member states, who were critical of what they perceived as a continuation of colonialism in Western dominance of global information flows and media monopolies. Thus, for them, the right to communicate was a “means for development and independence, a rationale for their national identity” (Kuhlen, 2003: 2).
- ¹¹ E.g. Article 22 of the *Universal Declaration of Human Rights* (UDHR) reads: “Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality”.
- ¹² Simultaneously, the introduction of an international fund to facilitate the development of media and communication infrastructure in developing countries was discussed as a measure to prevent future deadlock. However, this so-called “Marshall Plan for Telecommunications” failed to gain the necessary financial support (Mansell & Nordenstrang, 2006: 23). The establishment of a commission can be seen as a compromise after there had been political deadlock around a draft declaration on “fundamental principles concerning the contribution of the mass media to strengthening peace and international understanding, to the promotion of human rights and to countering racialism, apartheid and incitement to war” containing references to state responsibility for the media. Perhaps more cynically, the establishment of the MacBride commission could even be seen as “the basis of a manoeuvre to play down the anti-imperialist momentum of the Non-Aligned Movement’s advocacy of a new international economic order and

to neutralize attempts designed to enable the United Nations system to set standards for the mass media" (Idem: 22).

- ¹³ It is today hard to imagine how high emotions must have ran at the time and to separate rhetoric from content, but reading about "UNESCO [...] being coopted by the Soviet bloc and its radical allies to wage warfare against the West and the free press" gives us some indication (Gulick, 1983: 8). Also Sean MacBride himself has being described as "idealist" (Mansell & Nordenstreng, 2006: 23), by some but referred to as "Moscow aligned radical", "former leader of the Irish Republican Army and a long-time Socialist radical" by others (Gulick, 1983).
- ¹⁴ In 1988, the MacBride Report went out of print. UNESCO decided not to have it republished. It took private initiatives to have it republished later Eventually the World Association of Christian Communication (WACC) did and subsequently set up an alliance of NGOs to lobby at the International Telecommunication Union to include civil society in its decision-making process (Lee, 2004: 9). In 2004, Rowman & Littlefield republished it acknowledging its importance for current debates (Mansell & Nordenstreng, 2006).
- ¹⁵ As Kuhlen reminds us, the "struggle over the r2c [right to communicate] was a shock, and the shock was so lasting that even today the mention of the r2c leads to an almost automatic, categorical refusal to include phrases to do with "communication" or "communicate" in official political documents" (Kuhlen, 2003: 1).
- ¹⁶ In the late 1990s UNESCO renewed its efforts to highlight problems of inequality in emerging information societies (without mentioning the politically sensitive term NWICO). Several conferences were sponsored during which the emphasis was to be put not on the technological developments, but the legal, social and ethical dimensions of the ongoing changes. The emphasis once more lay on access, education and the protection of rights associated with communication processes (Mansell & Nordenstreng, 2006: 21). In 1988, the MacBride Report went out of print. UNESCO decided not to have it republished. It took private initiatives to have it republished later. Eventually the World Association of Christian Communication (WACC) did and subsequently set up an alliance of NGOs to lobby at the International Telecommunication Union to include civil society in its decision-making process (Lee, 2004: 9). In 2004, Rowman & Littlefield republished it acknowledging its importance for current debates (Mansell & Nordenstreng, 2006).
- ¹⁷ While he recognized the potential for abuse by the state, his emphasis lay on technologies' potential to bring about a better life on the globe including the liberation from subsistence labour, the realization of direct democracy and education and health within everybody's reach. Other writers, such as Alvin Toffler and, prominently, Manuel Castells have contributed to the literature on the subject and the popularization of the term "information society". Whereas the former refers to the discernable changes as the "third wave" (1980), the latter published an influential trilogy on the "Information Age" (published between 1996 and 1998) and what he terms the rise of the "network society", defined as a society where the key social structures and activities are organized around electronically processed information networks.
- ¹⁸ Supposing certain social, economic or political effects as an automatic consequence of the introduction of technology is a well-known and persistent error, which may be best researched in the field of "communication for development". Much of the early efforts of using ICT to "modernize" developing nations were rendered futile as a result of an overly simplistic causal model informing interventions. The emphasis on hardware and access turned out not to bring the expected benefits and powerful critiques soon pointed out growing dependency rather than independence as a consequence of aid (Cambridge, 2007). Whereas there have been significant paradigm changes in how the issue of development, at least theoretically, is approached in order to include considerations of sustainability and context, today it seems as if the "information society" discourse is walking right ahead into the same trap called "technological determinism";

the belief that context will be “determined” by technology and not the other way around. As Negroponte puts it: “Computers are not moral; they cannot resolve complex issues like the rights to life and to death. But the digital revolution, nevertheless, does give much cause for optimism. Like a force of nature, the digital age cannot be denied or stopped. It has four very powerful qualities that will result in its ultimate triumph: decentralizing, globalizing, harmonizing, and empowering” (1995: 68). Like Negroponte expects a “force of nature” to bring harmony and empowerment by the grace of its very characteristics, Kuhlen (2004) seems to anticipate the mere existence of the Internet to bring about a shift from an information to a communication paradigm. Rather than waiting for change to just happen, however, Hamelink (2004c) asks us to recognize the necessity to change the way we deal with technological opportunity and adapt our human rights standards to utilize the new potentials if we want there to be any kind of shift for the better.

- ¹⁹ As a current example for the effectiveness of censorship of the Internet effective government action in the Burma of 2007 can be pointed to.
- ²⁰ Much of the controversy that surrounded negotiations during WSIS concerned the role of the Internet Corporation for Assigned Names and Numbers (ICANN) in Internet governance and the influence of the US on the body.
- ²¹ So, whereas the Internet has brought universal connectivity into the realm of possibility, technology also brought about previously unthinkable opportunities for activities such as data-mining and its potential abuse or scams such as phishing. Satellites have enabled truly international communication on a mass scale and have all but extinguished the problem of scarcity, while at the same time the new possibilities have also revolutionized the means of spying and surveillance in ways previously only confined to the imagination of visionaries such as George Orwell. Decoding the human genome has brought us closer to understanding and treating serious diseases, but has also generated novel potentials for privacy violations. Current policies of privatization and liberalization on a global scale hold the danger of exclusion and serious human rights violations: registering copyrights for the human genome, proposals to auction the electromagnetic spectrum to the highest bidder, conglomeration of media and telecommunication companies on a global level all are symptoms of an increasingly economic rationale that is driving developments in the information society. Post 9-11 measures have been but the latest examples of how the new environment could enable for deeper intrusion in the lives of all than had previously been possible, even in times of crisis and fear-driven decision-making that tends to overreaction. Not long ago it simply would not have been possible to have a biometric passport, genetic databases or automated face recognition used for airport controls. It has clearly become much easier for police and intelligence agencies to watch, intrude and follow. This is not to say that there is no benefit to improved methods of police work. Still, an apparent shift from investigation to prevention that goes along with a great faith in the trustworthiness of technology and benevolence and integrity of those using it is a great potential risk that warrants close monitoring and a solid basis for protection of the individual. Increasingly, the concern that has long been voiced within the civil society organizations such as Statewatch, also the scientific community is becoming aware of great changes surveillance is bringing. Initiatives such as the launch of the peer-reviewed journal “Surveillance & Society” or the German research network “Surveillance Studies” are an indications of this growing interest.
- ²² The annual meetings of journalists and academics in the form of the Mac Bride Round Table was one of those initiatives, which continued throughout 1999 (Alegre & Ó’Siochrú, 2005).
- ²³ On the contrary, the application of the international free trade rules to cultural products and the strengthening of the intellectual property rights regime was widely seen as a further threat to cultural sovereignty and access to knowledge of the least powerful.

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- ²⁴ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.
- ²⁵ Available online at: (<http://www.itu.int/wsis/tunis/newsroom/stats/>). [Retrieved 06 March 2008].
- ²⁶ For a more detailed analysis of this issue see inter alia Graber (2006), Pauwels and Loisen (2003).
- ²⁷ The second part of the Summit took place in November 2005 in Tunis. The choice of the venue had led to widespread criticism given Tunisia's human rights record and led to a boycott by some civil society participants.
- ²⁸ Even though UNESCO had led efforts to draw renewed attention to the legal, social and ethical dimensions of the "information society", the organization does not come up in the early documents concerning the WSIS (Mansell & Nordenstreng, 2006). As they further explain, ITU was at the time eager to reposition itself as an organization with the capacities to shape international communication after telecommunication policy had long been craven by privatization and liberalization policies.
- ²⁹ See online: (<http://www.worldsummit2003.de/en/web/602.htm>). [Retrieved on 12 September 2008].
- ³⁰ Notably, though, for example ARTICLE 19 did not reject the concept of a right to communicate as such, but rather came up with its own statement on its contents, derived from existing provisions of international law (ARTICLE 19, 2003a).
- ³¹ See for example the 1986 General Assembly Resolution on the Right to Development (A/RES/41/128). Again in 1993, the Vienna Declaration on human Rights affirmed the right to development as a fundamental human right. In 2003 the Secretary-General issued a report on the right to the General Assembly.
- ³² See for example the 1972 *Stockholm Declaration of the United Nations Conference on the Human Environment* or the 1992 *Rio Declaration on Environment and Development*.
- ³³ Directive 98/10/EC, 26 February 1998, OJ L101/24, 1 April 1998.
- ³⁴ See for example *Radio ABC v. Austria* (App no 19736/92) 20 October 1997.
- ³⁵ See for example *Kruslin v. France* (App no 11801/85) 24 April 1990; *Klass and Others v. Federal Republic of Germany* (App no 5029/71) 6 September 1978.
- ³⁶ As Fisher has explained this claim: "The right to communicate is an extension of the continuing advance towards liberty and democracy. In every age, man has fought to be free from dominating powers - political, economic, social, religious - that tried to curtail communication. Only through fervent, unflagging efforts did peoples achieve freedom of speech, of the press, of information. Today, the struggle still goes on for extending human rights in order to make the world of communications more democratic than it is today" (1982: 12). This even extends to the content of the very right itself.
- ³⁷ In ARTICLE 19's view, for example, even based merely on the existing norms, the right to communicate could be best seen as an "umbrella term" that could entail "the right to a diverse, pluralistic media, equitable access to the means of communication, as well as to the media; the right to practice and express one's culture, including the right to use the language of one's choice; the right to participate in public decision-making processes; the right to access information, including from public bodies; the right to be free from undue restrictions on content; and privacy rights, including the right to communicate anonymously". See for example Toby Mendel's contribution, available online at (http://portal.unesco.org/ci/en/ev.phpURL_ID=9436&URL_DO=DO_TOPIC&URL_SECTION=201.html). [Retrieved on 28 July 2008].

- ³⁸ Indeed, to our knowledge, there is no definition or description of a right to communicate that would deny that individuals are the holders of its entitlements. There are, however, strong arguments to extent protection and positive action that are implied in such a right to groups of people such as “indigenous” peoples or “the disabled”, who are systematically excluded from communication processes.
- ³⁹ For examples, some advocates of the right to communicate have argued for the imposition of legal obligations on private entities such as for example the commercial media in order to “provide the fullest possible information about local, national, and world politics; to grant access to minority voices or to contribute to social progress or cultural diversity” (Barker & Noorlender, 2003).
- ⁴⁰ For example, consistent stereotyped imaging of people with a disability would then be framed not as an issue of “political correctness” but rather as an infringement on the dignity of people with disabilities, who have a right not to be stereotyped. Interestingly, the 2006 UN Convention on the Human Rights of People with Disabilities proscribes states to “adopt immediate, effective and appropriate measures” to “combat stereotypes, prejudices and harmful practices relating to persons with disability” (Article 8(1)(b)) including to encourage “all organs of the media to portray persons with disabilities in a manner consistent with the purpose of the present Convention” (Article 8 (2) (c)). Also the stereotyped representation of other groups is often criticized by advocates of the right to communicate as a factor undermining this right (Hamelink, 2003). Beyond the representation of marginalized groups, also, the fact that there is imbalance between male and female actors in the news or between certain ethnic groups inside many newsrooms is a point in case (see Ziamou, 2001).
- ⁴¹ This is called giving the right horizontal as opposed to vertical (the right of private individuals against the state) effect.
- ⁴² This point is illustrated vividly by the reaction of prominent NGO ARTICLE 19 to the draft Declaration on the Right to Communicate that had been drawn up within the CRIS campaign preceding WSIS. While the organization points out that it endorses, “in principle, the idea of an authoritative elaboration of a right to communicate” it goes on to state that it is the “wide range of claims made in its name” that gives rise to many concerns – not least because it implies interference with content and could be abused by governments (ARTICLE 19, 2003b). This, of course, mirrors the legitimate suspicion that any formulation of a right that could effectuate influence on editorial content per definition imperils the freedom of expression since it can be abused. Clearly, however, existing provisions that provide for limitations of the freedom of speech considered legitimate e.g. for the sake of “public morals” are also prone to be misconstrued in order to unduly restrict this freedom. What makes the difference is the diligence and independence of judicial review. Still, to organizations such as the World Press Freedom Committee, the call for a right to communicate is conceived as providing for “new code words for censorship” (Bullen, 2002). Also the International Federation of Journalists (IFJ) is mainly concerned with negative effects on the freedom of expression, more specifically of the press (IFJ, 2003).
- ⁴³ This has long been a recurring dilemma. Take as an example the 1948 UN conference on Freedom of Information, when the question of whether “to attempt to impose on states the obligation to curb harmful press reports and radio broadcasts, or to fall back on moral persuasion and the activities of unofficial associations of the press, international measures going no further than the condemnation of patent abuses” had split the General Assembly (Whitton, 1949: 82).

