

VIII. INTERNATIONAL LAW, AND IN PARTICULAR, THE U.N. DECLARATION OF HUMAN RIGHTS AND THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, PROHIBIT THE COMMISSION'S INTERFERENCE WITH MBANNA KANTAKO'S MICRO RADIO BROADCASTS, WHICH VIOLATES THE RIGHT TO COMMUNICATE OF KANTAKO AND HIS COMMUNITY.

Given the facts surrounding the operation of Black Liberation Radio, prohibiting Kantako's one watt radio station appears to violate his right to freedom of expression under international law. The Declaration of Human Rights and International Covenant on Civil and Political Rights establish the principle under International law that every person is entitled to participate in and develop the cultural life of his or her community.

The long standing rule of construction first enunciated by Chief Justice Marshall is that "an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains...." The Charming Betsy, 6 U.S. (2 Cranch) 34, 67 (1804), quoted in Lauritzen v. Larsen, 345 U.S. 571, 578. Thus, in The Nereide, 13 U.S. (9 Cranch) 388, 422 (1815) Chief Justice Marshall found that in the absence of congressional enactment, United States courts are "bound by the law of nations, which is part of the law of the land." Id. Similarly, in The Paquete Habana, 175 U.S. 677 (1900) the Court stated that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." Id. at 299.

International law with regard to this right is set forth as follows:

**A. THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS:
ARTICLE 19**

The International Covenant on Civil and Political Rights was ratified by the United States Senate on April 2, 1992. This document was deposited at the United Nations by President Bush on June 8, 1992, and becomes effective on September 8, 1992. As of that date, this Human Rights document will have the force of law in the United States. Article 19 of the Covenant was based on Article 19 of the Universal Declaration of Human Rights.¹ Article 19 states that

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through other media of his choice.

¹ International Covenant on Civil and Political Rights, entered into force March 23, 1976.

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

- a. For respect of the rights or reputations of others;
- b. For the protection of national security or of public order, or of public health and morals.

In the relatively few opinions that it has rendered on Article 19 interpretation, the Human Rights Committee has somewhat inconsistently applied its provisions.² In one case involving the arrest of an individual for his political activities, the Committee determined that the,

"bare information from the State party that he was charged with subversive association and an attempt to undermine the morale of the armed forces is not in itself sufficient, without details of the alleged charges and copies of the court proceedings....[to support a defense] that the arrest, detention and trial of Grille Motta was justified on any of the grounds mentioned in Article 19(3) of the Covenant."

U.N. Human Rights Committee, Communication No. 11/1977, paragraph 17.

This appears to indicate that Article 19 requires the government to establish, and substantiate if necessary, its justification for restricting the right to freedom of expression.

However, in another opinion, the deference afforded a national government's restriction is self-evident. In that case, the Committee decided that the Finnish Broadcasting Corporation was well within its rights to disallow the broadcasting of a television program concerning homosexuality.³ The Committee stated that "a certain margin of discretion must be accorded to the responsible national authorities."⁴ The restriction was permitted based on the rationale that, "[a]s far as radio and TV programs are concerned, the audience cannot be controlled. In particular, harmful effects on minors cannot be excluded."⁵

² As with the Inter-American Court of Human rights discussed below, the number of decisions rendered by the Human Rights Committee pertaining to Article 19 is so far very limited. Most of those opinions relate to the persecution of individuals for their political view points. For now, this makes the interpretation of Article 19 somewhat difficult with respect to micro radio. One of the best means of interpretation may be a comparison with Article 13 of the Inter-American Convention. An examination of both Article 13 of the Inter-American Court of Human Rights and Article 19 of the International Covenant of Civil and Political Rights will demonstrate the close alignment of provisions regarding government "necessity". In its Advisory Opinion on Compulsory Membership of Journalists' Association, 8 EHRR 165, paragraph 45 (13 Nov. 1985), the Inter-American Court stated that Article 19 served as a model, at least in part, for Article 13 of the Inter-American Convention.

³ See U.N. Human rights Committee Communication No. 61/1979.

⁴ Id., paragraph 10.3.

⁵ Id., paragraph 10.4.

These cases indicate that the scope of the "margin of discretion" accorded states under Article 19 is still uncertain. Therefore, analogy to the jurisprudence of other tribunals is required to determine if Kantako's right to freedom of expression has been violated.

Significantly, Article 27 of the International Covenant on Civil and Political Rights also adds the following:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

(...Cite recent Human Rights Advocate intervention memorandum)

B. AMERICAN CONVENTION ON HUMAN RIGHTS: ARTICLE 13

Besides Article 19 from the International Covenant on Civil and Political Rights, Article 13 of the American Convention on Human Rights states⁶ that,

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.

2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law and be necessary in order to ensure:

- a. respect for the rights or reputations of others; or
- b. the protection of national security, public order, or public health or morals.

3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or implements or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.

4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship, for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.

5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or any other similar illegal action against any person or group of persons on any grounds including those of race, colour, religion, language, or national origin shall be considered as offenses punishable by law.

⁶ American Convention on Human Rights, entered into force July 18, 1978.

Article 13 of the American Convention on Human Rights, entered into force July 18, 1978, has been interpreted by the Inter-American Court as follows:

A comparison of Article 13 with the relevant provisions of the European Convention (Article 10) and the Covenant (Article 19) indicates clearly that the guarantees contained in the American Convention regarding freedom of expression were designed to be more generous and to reduce to a bare minimum restrictions impeding the free circulation of ideas. See Advisory Opinion of 13 November 1985 on Compulsory Membership Of Journalists' Association, 8 EHRR 165, paragraph 50. Another difference between the European and American Conventions is the list of valid exceptions which allow a government to interfere with the right to freedom of expression. The Inter-American convention lists only two: "those that are necessary to ensure: a. respect for the rights and reputation of others; or b. the protection of national security, public order, or public health and morals."⁷

Nevertheless, interpretation of the two Articles is relatively similar. Like the European Court's interpretation of the right to freedom of expression, the Inter-American Court has stated

The just demands of democracy must consequently guide the interpretation of the Convention and, in particular, the interpretation of those provisions that bear a critical relationship to the preservation and functioning of democratic institutions. Advisory Opinion of 13 November 1985 on Compulsory Membership of Journalists' Association, 8 EHRR 165, paragraph 44.

Although there are no cases directly on point, Article 13 can best be understood in the Court's application of its provisions as they relate to the factual setting presented in its Advisory Opinion on Compulsory Membership of Journalists' Association. Advisory Opinion of 13 November 1985, 8 EHRR 165. In that case, a foreign journalist was prohibited and indeed fined under a local criminal statute in Costa Rica for his professional activities. The government regulation required that journalists become members of a professional organization in order to perform certain activities associated with the media. Certain criteria were required to become a member of the organization including graduation from a state university with a particular type of degree. The Court found this to be a violation of Article 13 because it "denie[d] any person access to the full use of the news media as a means of expressing opinions or imparting information." Id.

The Court made this final determination after several findings regarding the interpretation of Article 13. Among these is the conclusion that freedom of expression "includes and cannot be separated from the right to use whatever medium is deemed appropriate to impart ideas and to have them reach as wide an audience as possible." Id., paragraph 31.

Furthermore, the Inter-American Court requires that any governmental "restrictions imposed under Article 13(2) on freedom of expression depend upon a showing that the restrictions are required by a compelling state interest" and that if there exist "various options to achieve this objective, that which least restricts the right protected must be selected." Id.,

⁷ American Convention on Human Rights, entered into force July 18, 1978.

paragraph 46 (emphasis added); Note that the Inter-American Court likened certain language in the Sunday Times case of the European Court to this same principle.

In the case involving compulsory membership of journalists, the Court determined that the ends which the government sought to achieve through its regulation, namely the encouragement of professional ethics and responsibility, and the maintenance of journalists independence in relation to their employer, simply did not fall within those authorized by the Convention.

In determining whether there has been an interference with the right to freedom of expression, the Court has concluded that the broad scope of the language of the Convention does not necessitate that there be *actual* governmental intervention. An example of this principle was given by the Court:

This might be the case...when due to the existence of monopolies or oligopolies in the ownership of communications media, there are established in practice means tending to impede the communication and circulation of ideas and opinions.
Id., paragraph 56.

In Kantako's case, the cost of complying with FCC regulations insures that the radio communications media is really not available to all citizens who wish to express their ideas, but only to those who can afford it. The justification for these regulations is outdated and unnecessary, and not the "least restrictive means" to reach the government's objective. Further, the regulations directly impede the dissemination of information and expression of ideas of an entire class of society--the poor. This issue must also be examined through the eyes of exposing racism, as the net effect of such wealth-based classification is to limit drastically the number of media outlets owned by non-whites. Such a wealth and race-based impact demonstrates that the U.S. government's implementation of the FCC regulations, lacking as they do the necessary rationale and narrowly tailored means, constitutes a violation of the right to freedom of expression as interpreted by the Inter-American Court.

C. EUROPEAN CONVENTION ON HUMAN RIGHTS: ARTICLE 10

Article 10 of the European Convention on Human Rights⁸ states that:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health and morals, for

⁸ European Convention on Human Rights, Text amended according to the provisions of Protocol No.3 which entered into force on 21 September 1970, and of Protocol No. 5 which entered into force on 20 December 1971.

the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The European Court of Human Rights stated in its Handyside judgment that freedom of expression constitutes one of the essential foundations of a democratic society. Handyside case, Judgment of 7 December, 1976, Series A No. 24, paragraph 49.⁹ Furthermore, it was noted that the application of Article 10 should extend to information which "offend[s], shock[s], or disturb[s]the State or any other sector of the population." Id. In essence, this case provides the basis from which all future cases involving freedom of expression must be interpreted. Freedom of expression remains at the very core of democratic societies.

As is the case in U.S. Constitutional Law, political speech is provided with the greatest amount of protection under Article 10 of the Convention. The Sunday Times v. The United Kingdom, Judgment of 26 April 1979, Series A No. 30, paragraph 65. This principle was enunciated in the case of The Sunday Times v. The United Kingdom in which the Court stated that it is essential for the mass media

to impart information and ideas concerning matters...of public interest. Not only do the media have the task of imparting such information and ideas: the public also has the right to receive them.

Id. The Court continued by stating that its supervision was not to be limited "to ascertaining whether a respondent State exercised its discretion reasonably, carefully and in good faith." Id., paragraph 59 The Court held that it is faced not with a choice between two conflicting principles, but with a principle of freedom of expression that is subject to a number of exceptions that must be narrowly interpreted.

Id., paragraph 65.

The Sunday Times case declared that the House of Lords was in violation of Article 10 of the Convention when it attempted to restrain the newspaper from reporting a story regarding the drug, "thalidomide". The Sunday Times wished to publish articles which detailed the history of the drug, its testing, its marketing and its manufacture. The interest in the story developed because the drug was found to have caused severe birth defects in the children of mothers who had taken the drug during their pregnancies. At the time of publication, litigation was pending against the distributors and manufacturers of the drug. A violation of Article 10 was found to exist because the Court felt that the matter was of "public interest".

Although The Sunday Times case involves the print media, certain parallels can be drawn to Black Liberation Radio. As has been previously stated, Black Liberation Radio (then WTRA) was initially formed to fill the void which Kantako felt existed in local media broadcast as it related to the reporting of matters of "public interest" to his community. Any regulation of his activities which might fall within one of the enumerated exceptions should be narrowly

⁹ The case involved the prosecution of a publisher of a book entitled "The Little Red Schoolbook", which suggested that the young people for whom the book was written should maintain a liberal sexual attitude. The Court deemed that there had been no violation of Article 10 because of the wide margin of appreciation to which the Contracting States are entitled.

construed in light of the protection afforded the right to freedom of expression by international law, especially because the speech at issue was "political speech," e.g., the broadcast which motivated the F.C.C. action criticized police behavior.

International case law which applies directly to radio broadcasting is very limited. Therefore, it is necessary to analyze the principles of the other cases in light of this consideration.

In the Autronic AG case, Judgment of 22 May 1990, Series A No. 178, involving the retransmission of television signals from a Soviet satellite, the Court maintained that the application of Article 10 could not be confined to the content of information. It stated that the protection of Article 10 must necessarily extend to the means of transmission or reception because "any interference with the means necessarily interferes with the right to receive and impart information." Id. at paragraph 47.

In this particular case, the Swiss government was found to be in violation of Article 10 in its attempt to regulate retransmission. Autronic AG clearly demonstrates the notion that the "margin of appreciation" extended to a State's decision-making entities must be considered on a case by case basis. Here, The Swiss Government's characterization of the retransmission as a telecommunication as opposed to a broadcast was deemed an ineffective and unacceptable as a means for prohibiting the project. The Court stated that:

Where, as in the instant case, there has been an interference with the exercise of the rights and freedoms guaranteed in paragraph 1 of Article 10, the supervision must be strict, because of the rights in question; the importance of these rights has been stressed by the Court many times. The necessity for restricting them must be convincingly established. Id., paragraph 61. Thus, absolute deference is not accorded to the Contracting States.

The Court did overrule the Commission's finding of an Article 10 violation in Radio Groppera v. Switzerland, Judgment of 28 March 1990, Series A No. 173. However, the facts in Radio Groppera may be distinguished from those surrounding the operation of Black Liberation Radio. The case of Radio Groppera involved the cable retransmission of radio signals from an unlicensed station in Italy. The programming content consisted predominantly of popular music. The Court arrived at its decision by balancing the interest of protecting the international communication order against the rights of the Italian broadcaster.

Ultimately, it was decided that the Swiss government had not overstepped the "margin of appreciation". The Court characterized the Italian applicant as a Swiss station operating from outside the borders. This was done, according to the Court, in an effort to bypass the statutory requirements regulating Swiss radio stations. In arriving at this determination, the Court did make an important declaration about the interpretation of Article 10 as a whole and the third sentence of paragraph one of Article 10 in particular. The Court stated that the intended purpose of the third sentence was

to make it clear that States are permitted to control by a licensing system the way in which broadcasting is organized in their territories, particularly in its technical aspects. It does not, however, provide that licensing measures shall not otherwise be subject to the requirements

of paragraph 2, for that would lead to a result contrary to the object and purpose of Article 10 taken as a whole.

Id., paragraph 62. This statement solidifies the principle that the "margin of appreciation" afforded the Contracting States is not absolute. It would seem that a state must have a valid reason for restricting the right to freedom of expression; one that is "necessary in a democratic society" in light of the conditions set forth in paragraph 2.

This interpretation of Article 10(2) is extremely relevant to the operation of Black Liberation Radio. In light of this interpretation, the validity of prohibiting radio stations with less than 100 watts must be seriously questioned. This is particularly true when considering the significant technological advancements made in satellite and cable in recent years. Many of the F.C.C. regulations were instituted due to the finite number of frequencies which once existed. Here, the governments interest in Mbanna Kantako's activities appears more closely linked to the content of his broadcasts and the remarks made regarding police brutality than to any legitimate interest set forth in Article 10.

In sum, a Contracting State must satisfy the following test in order to justify their interference with the right to freedom of expression:

- it is "prescribed by law";
- it is in pursuance of one of the legitimate aims listed in Article 10(2);
- it is "necessary in a democratic society", having regard to the "duties and responsibilities".

Anthony Lester, Freedom of Expression, p 38-39 (unpublished article), (date unknown)

The first element of the test is rather self-evident while the second requires some interpretation. The second paragraph of Article 10 sets forth a laundry list of justifications which a Contracting State may claim in order to validly interfere with the right to freedom of expression. In the Sunday Times case, the court noted that these phrases (ie..in the interest of national security, territorial integrity etc..) should be interpreted in light of the entire Convention and not simply as a matter of domestic law. The Sunday Times v. The United Kingdom, Judgment of 26 April 1979, Series A No. 30, paragraph 65. Therefore, the reason for the interference must be based on some legitimate rationale enumerated in the Article. Id., 57. The interference may not be based on some arbitrary governmental reasoning.

This element of the test is important to the analysis regarding Black Liberation Radio. Kantako had been operating his radio station for close to two years when the government shut him down. If the action taken against him had genuinely been aimed at one of the factors listed in Article 10(2), it is more likely than not that government officials would have taken action much sooner. It is simply too much of a coincidence that the radio station was shut down following Kantako's statements on the air concerning police brutality in his neighborhood.

[NOTE: One case that does seem to go against Black Liberation Radio is that of X v. The United Kingdom, 16 D & R 190 (1978). In this case, the Court stated that the valid rationale for an interference with the right to freedom of expression (listed in Article 10(2)) as the

"prevention of disorder and crime") includes those who advertise or otherwise promote pirate radio stations. Id. But here, it would be unfair to characterize Black Liberation Radio as a pirate radio station in that the government has no legitimate justification for curtailing his right to freedom of expression.]

The third element of the test, the so-called "necessity" test has received much attention from the Court. On several occasions, the Court has remarked that the word "necessary" should be interpreted to mean that the Contracting State must establish a "pressing social need" in order to account for the interference with the right guaranteed by Article 10. Handyside case, Judgment of 7 December 1976, Series A No. 24, paragraph 48-50; The Sunday Times v. The United Kingdom, Judgment of 26 April 1979, Series A No. 30, paragraph 62. As previously stated, another factor which must be balanced against the "necessity" is the public interest in the matter. The Sunday Times v. The United Kingdom, Judgment of 26 April 1979, Series A No. 30, paragraph 65-66.

In the present case, it is difficult for us to determine what, if any, is the possible pressing social need for prohibiting the airing of a radio program from a one watt station. In fact, it is more likely that Kantako's radio station fulfills a pressing social need by providing a forum in which the concerns of his community can be adequately addressed. There is a public interest in being an informed citizen so that one can properly participate in community activities.

As noted earlier, another factor to be considered is the scope of the "duties and responsibilities" associated with the expression. The nature and scope of these "duties and responsibilities" must be derived from the context of the given factual scenario. Handyside v. U.K., Judgment of 7 December 1976, Series A No. 24, paragraph 49. For example, in the case of Engel v. The Netherlands, the armed forces were involved. Engel v. The Netherlands, Judgment of 8 June 1976, Series A No. 22, paragraph 100. Therefore, the applicant had a much more difficult time overcoming the government's justification for the interference. Here, the government's justification for interference is more difficult to prove. Black Liberation Radio operated for close to two years without interruption, and without interfering with other broadcast signals. In addition, the station served the needs of the community, thereby advancing the public interest. Because the scope of these "duties and responsibilities" here differs significantly from that in Engel, government interference with Black Liberation Radio cannot be easily justified.