LEGAL IMPLICATIONS OF DIRECT SATELLITE BROADCASTING—THE U.N. WORKING GROUP

I. INTRODUCTION

Within the past twenty years the world community has been confronted with the greatest technological revolution in history. The Space Age, while revolutionizing communications and transportation, has also created legal problems concerning control of these new developments. These problems have proved to be a unique challenge to the settled system of international decisionmaking. Not long ago, Mr. [Adlai] Stevenson noted that "the conquest of outer space posed new legal, political, technical, and other problems which would not always be capable of solution by the methods employed in human relations on Earth. . . ."[1] To deal with these problems, the world community must acknowledge the interdependence of the legal and technical aspects in the field,[2] which imposes an obligation on the scientific community to keep the legal profession informed as to the latest developments in space technology.[3]

The first major international attempt to resolve these problems has resulted in the United Nations Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies,[4] which deals with the most obvious and immediate issues. This Treaty has espoused certain general philosophical principles such as freedom of use[5] and nonacquisition of territory in space.[6] However, outside of formulating general policy concerning activities wholly or predominantly carried on in outer space, the Treaty failed to consider outer space activities whose direct effects are essentially earthbound. Such activities include remote earth sensing, weather modification and direct broadcasting. These have wide political implications and have caused growing concern among many nations, especially in the case of direct broadcasting. This Note will present a survey of the legal problems created by direct broadcasting and indicate potential conflict areas.

II. DIRECT BROADCASTING AND WORLD REACTION

Direct broadcasting has been defined simply as the "transmission of

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[1] E.B. JONES, EARTH SATELLITE TELECOMMUNICATIONS SYSTEMS AND INTERNATIONAL LAW 50 (1970) [hereinafter cited as JONES].

[2] Address by Eilene Galloway, Proceedings of the Seventeenth Colloquium on the Law of Outer Space, International Institute of Space Law of the International Astronautical Federation, Sept. 30 to Oct. 5, 1974, 30 [hereinafter cited as Galloway].

[3] *Id.* at 30. Ms. Galloway quotes her own paper from the 1st Colloquium on the Law of Outer Space, emphasizing that the initial difficulties perceived by the Colloquium have persisted without solution.

[4] Jan. 27, 1967, [1967] 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205 (effective for United States Oct. 10, 1967) [hereinafter cited as Outer Space Treaty].

[5] *Id.* art. I.

[6] *Id.* art. II.

messages directly to the houses or communities of the general public via artificial space satellites."[7] There are basically two types of direct broadcasting: (1) reception of the transmissions into community receivers for rebroadcast, and (2) direct reception by private sets without the aid of a community transmitter. Technology in this field[8] has advanced to the point that transmission into a community receiver is becoming much more frequent. This type of direct broadcasting evokes little controversy since a community receiver is needed for retransmission, thereby giving the receiving state ultimate control over what is broadcast.

The legal controversy arises from broadcasting into augmented or unaugmented home receivers without the use of a community receiver. While this type of transmission may not be technically or economically feasible until 1985, concern over its potentials has been vocalized by some nations[9] and has elicited response from the United Nations. The topic of direct broadcast satellites has been included on the agenda of the Committee on the Peaceful Uses of Outer Space.[10] In 1968 the Committee established, to work as its subcommittee, a Working Group on direct broadcast satellites.[11] The aim of the Working Group is:

> [T]o study and report on the technical feasibility of communication by direct broadcast from satellites and the current and foreseeable development in this field, including comparative user costs and other economic considerations, as well as the implications of such developments in the social, cultural, legal and other areas. . . .[12]

The first controversy arose in the interpretation and determination of the actual goal of the Working Group. In November 1972, the Soviet Union introduced a resolution which was passed by the General Assembly, declaring that any formulation of general principles or regulations in the field of direct broadcasting should be enunciated in a formal convention.[13] The vote was 102 in favor of the resolution, with the only opposing vote being cast by the United States. Its opposition stems from the idea that a specific policy should not be formulated in an undeveloped area where there has been little international experience or experimentation:[14]

> The United States favors a functional and pluralistic approach in which the development of legal principles would take place in a rather prag-

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[7] Gotlieb & Dalfen, *Direct Satellite Broadcasting: A Case Study in the Development of the Law of Space Communications*, 7 CAN. Y.B. INT'L L. 33 (1969) [hereinafter cited as Gotlieb & Dalfen].

[8] For a relatively simple explanation of the technical basics of satellite transmission see A.G. HALEY, SPACE LAW AND GOVERNMENT 159-232 (1963).

[9] Galloway, *supra* note 2, at 35.

[10] *Id.* at 33-34.

[11] G.A. Res. 2453, 23 U.N. GAOR, Supp. 18, U.N. Doc. A/7218 (1968).

[12] *Id.*

[13] G.A. Res. 2916, 27 U.N. GAOR, Supp. 30 at 14, U.N. Doc. A/8730 (1972).

[14] The concern is that future technological development might be inhibited and that there might be an adverse effect on the free exchange of ideas. Galloway, *supra* note 2, at 35.

> matic, step-by-step process from a variety of complementary sources, as opposed to proceeding on an essentially abstract formulation of a single over-arching body of international law principles institutionalized in one paramount international agency.[15]

Realistically, the United States position of flexibility would appear to be the more workable solution in this case. Considering the speed of advancement in this area, any specific policy formulation would be outdated before it could be put into effect. Such a situation would call for constant and troublesome revision and would create situations for greater abuse. The United States position would allow the drafting of voluntary principles on which there is general agreement,[16] while at the same time allowing the legal aspects of the field to evolve with the technical advancement.

III. LEGAL PROBLEMS OF PROGRAM CONTENT

The main problem in defining and resolving legal issues created by direct broadcasting stems from the technical nature of satellite transmission. The biggest advantage of direct broadcasting is that a single transmission will be capable of covering a large geographical area. A particular viewing public may include populations of different political, cultural, ideological, and economic outlooks[17] which will have to be reconciled in any program planning by broadcasters. Whether or not the broadcasters' program planning should be regulated by international guidelines concerning program content is the basic legal question facing the Working Group. Attempting to reconcile the major interests may prove to be an impossible task and may result in nothing more than a vague declaration of general philosophical principles which would have little or no practical effect.

A. *Free Flow of Information and National Sovereignty*

The greatest point of debate within the Working Group has been the conflict between the advocates of the free flow of information and those who advocate supremacy of national sovereignty. Views expressed range from that of the United States, which claims that the freedom of use guaranteed by the Outer Space Treaty[18] includes the right to broadcast world wide by satellite, to the view expressed by the Soviet Union to the effect that national sovereignty of the receiving country should control what is broadcast to its populace.

Unfortunately, the issue has been used by the Soviet Union as a "back-

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[15] Rockwood, *Direct Satellite Broadcasting*, 14 HARV. INT'L L.J. 601, 602 (1973) [hereinafter cited as Rockwood].

[16] Galloway, *supra* note 2, at 35.

[17] *See* Errera, *Problems Raised by the Content of Television Programs Transmitted by Telecommunication Satellites*, in THE INTERNATIONAL LAW OF COMMUNICATIONS 85, 88 (E. McWhinney ed. 1971) [hereinafter cited as Errera].

[18] *Supra* note 4.

door" reintroduction of the post war propaganda debate.[19] At the fifth session of the Working Group,[20] the Soviet delegation introduced its most recent draft proposals[21] in which they attempted to define a program standard:

> States undertake to exclude from television programmes transmitted by means of artificial earth satellites any material which is detrimental to the maintenance of international peace and security which publicizes ideas of war, militarism, national racial hatred and enmity between peoples *which is aimed at interfering in the internal domestic affairs of other States, or which undermines the foundations of local civilization, culture, way of life, traditions or language.*[22]

The Soviet Union feels that this standard should be determined by the receiving country as an exercise of its right of national sovereignty.

The first section of the Soviet proposal gives the traditional definition of political propaganda which was given in the 1947 General Assembly Propaganda Resolution[23] and mentioned in the Preamble of the Outer Space Treaty.[24] This section will cause little dispute and all parties will probably give it at least tacit approval.

Potential problems arise in the second part of the provision where a type of "cultural propaganda" is defined. This section appeals especially to the Third World countries, who are more concerned with the cultural impact than with the political impact of foreign broadcasting.[25] As the Argentine Draft Proposals states: "Cultural programmes must respect the distinctive character, value and dignity of every culture, and the right of all States and peoples to preserve their culture as an element of the common heritage of mankind."[26] The fear of the emerging countries that their culture will be slowly eroded is not totally unfounded. Since the United States and the Soviet Union are presently the only countries financially and technically

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[19] Rockwood, *supra* note 15, at 604; *see The Legal Problems of International Telecommunications with Special Reference to INTELSAT*, 20 U. TORONTO L.J. 287, 308 (1970) (remarks by Prof. E. W. McWhinney).

[20] Report of the Working Group on Direct Broadcast Satellites on the Work of its Fifth Session, U.N. Doc. A/AC.105/127 (1974) [hereinafter cited as Working Group].

[21] Principles Governing the Use by States of Artificial Earth Satellites for Direct Television Broadcasting, U.N. Doc. A/AC.105/W6.3(v)/CRP.1 (1974) [hereinafter cited as Soviet Draft].

[22] *Id.* art. IV. (emphasis added).

[23] 1947 Anti-Propaganda Resolution, G.A. Res. 110, 2 U.N. GAOR Resolutions at 14, U.N. Doc. A/519 (1947). This states that "*The General Assembly* 1. *Condemns* all forms of propaganda, in whatsoever country conducted, which is either designed or likely to provoke or encourage any threat to the peace, breach of the peace, or act of agression . . . ."

[24] *See* Outer Space Treaty, *supra* note 4, preamble.

[25] Friendly (moderator), *The Control of Program Content in International Telecommunications: A Discussion of General Principles*, 13 COLUM. J. TRANSNAT'L L. 40, 63 (1974) (Statement by panelist F. Shakespeare) [hereinafter cited as Shakespeare].

[26] Argentine Proposal, U.N. Doc. A/AC.105/WG.3(V)/CRP.3 (1974), art. 18 [hereinafter cited as Argentine Draft].

capable of satellite broadcasting,[27] the African and Latin American states are fearful that certain programming would undermine their culture, which in many instances is the only unifying factor in an emerging nation.

While one can sympathize with the position taken by the Third World countries, the vague language in the Soviet proposal could easily be taken to ridiculous extremes and perhaps result in absolute censorship. As introduced and interpreted, the proposal would all but eliminate any possibility of commercial broadcasting. Advertising and programming are themselves a subtle form of propaganda,[28] because commercial broadcasting by its very nature is biased, reflecting the opinions and purposes of the creator. Taking the definition of "cultural propaganda" to its logical extreme, such advertising could be attacked as undermining a way of life.

Even if commercial broadcasting was not undertaken and transmissions were limited to educational or cultural events, similar problems would arise. Since truth is not mentioned as a defense to propaganda,[29] even newscasts and documentaries would have to be strictly censored to prevent the risk of having the program come under attack. The availability of a workable standard is limited because "[t]ruth accepted by one nation's interpretation may well be regarded as propaganda by other nations."[30] Even publicity of a play, film, or musical performance can contain subtle propaganda.[31] The possibility of abuse of the censorship authority is so evident that it can destroy any potential that direct broadcasting may have.

Impliedly, the United States policy on this issue has been to advocate the predominance of the free flow of information: "if states do not realize that a limit to national sovereignty is for the good of individuals, the danger exists of seeing a new instrument—with all its potential for increased freedom—contributing paradoxically to a new restriction on the free circulation of ideas and information."[32] The United States view can be supported by article I of the Outer Space Treaty which insures freedom of use.[33] However, "the freedom of broadcasting is a freedom to transmit to receiving countries, and also a concomitant freedom of the latter countries to stop it."[34] Freedom of use is not an absolute right and restraints

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[27] While the U.S.S.R. and the United States are the only individual countries capable of direct broadcasting, there are private international broadcasting agencies. Due to the agencies' international character, the cultural problems discussed would be minimized.

[28] *See* Errera, *supra* note 17, at 91.

[29] JONES, *supra* note 1, at 73.

[30] *Id. See also* E. BARRETT, TRUTH IS OUR WEAPON 65 (1953); P. Davison, *The Role of Research in Political Warfare*, 29 JOURNALISM Q. 22 (1953).

[31] Errera, *supra* note 17, at 88.

[32] d'Arcy, *Direct Broadcast Satellites and Freedom of Information*, in THE INTERNATIONAL LAW OF COMMUNICATIONS 149 (E. McWhinney ed. 1971) [hereinafter cited as d'Arcy].

[33] Outer Space Treaty, *supra* note 4, art. I.

[34] Friendly (moderator), *The Control of Program Content in International Telecommunications: A Discussion of General Principles*, 13 COLUM. J. TRANSNAT'L L. 40, 56 (1974) (statement by panelist A. Chayes).

may be placed on a broadcaster by collective action in the name of greater freedom for all.[35]

The United States also points to article 19 of the Universal Declaration of Human Rights which states that "[e]veryone has the right to freedom to hold opinions without interference and to *seek, receive and impart information and ideas through any media regardless of frontiers.*"[36] While this is a strong argument in support of the United States position, there is a drawback in the fact that the United States has failed to ratify the Declaration. Though opposition is not on this particular point, the fact that the treaty is not binding on the United States will lend little support to its position.

While it may appear that the United States policy is the ideal solution, there is a philosophical flaw in the argument. America's idea of the basic freedoms (speech, press, etc.) has a unique application in this country. The almost absolute protection of these rights is considered anarchistic by most of the world community. While the United States may have good intentions in the promotion of this policy, it would result in an imposition of a global First Amendment. Such an attempt "would be doomed to failure and would be widely misread as an attempt to reach foreign audiences for the financial profit and political advantage of this country."[37]

It is evident that before any headway can be made in solving this dispute, guidelines must be formulated to define both national sovereignty and its relationship to free flow of information and the freedom of use; perhaps then the two ideas may be reconciled. The Argentine Draft states that "[t]he principle of freedom of information and free flow of communications is not incompatible with the adoption of additional principles designed to harmonize the rights of states and to protect the economic, social and cultural values of their peoples."[38] The spirit of cooperation and discipline with respect for national sovereignty that has marked space exploration up to this point should and could be extended to the direct broadcast field.[39]

B. *Prior Consent*

A similar problem was presented by the introduction of the Soviet policy of prior consent, which states that "states may carry out direct television

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[35] Johnson, *The Emerging Customary Law of Space*, in PROCEEDINGS OF THE CONFERENCE ON THE LAW OF SPACE AND OF SATELLITE COMMUNICATIONS 34, 44 (1964) [hereinafter cited as Johnson]. An effort is made to explain the possible controls that can be utilized within the limits of present international law to discourage any attempted absolute use of outer space activity.

[36] Universal Declaration of Human Rights, G.A. Res. 217, U.N. Doc. A/810, art. 19 (1948) (emphasis added).

[37] Chayes & Chazen, *Policy Problems in Direct Broadcasting from Satellites*, 5 STAN. J. INT'L STUD. 4, 13 (1970) [hereinafter cited as Chayes & Chazen].

[38] Argentine Draft, *supra* note 26, art. 13.

[39] d'Arcy, *supra* note 32, at 153.

broadcasting by means of artificial satellites to foreign States only with the express consent of the latter."[40] The Canadian-Swedish proposal,[41] introduced at the fifth session, went even further. It called not only for prior consent, but also for participation in programming.[42] Similarly, the Argentine Draft states that "[c]onsent implies participation in scheduled activities."[43]

The vague definition of prior consent in the Soviet Draft offers no suggestion as to the type of consent that would be required. Some countries claim that the consent must be active; the broadcasting country is required to actively seek and receive positive consent from the recipient state.[44] The Argentine Draft, for example, states that "tacit or extemporaneous consent is not acceptable. . . ."[45] Other countries feel that it is up to the recipient state to affirmatively refuse the broadcast.[46] The severest type of prior consent that could be required would be to demand that the broadcaster receive consent before the launching of an operational satellite system.[47] There is also a problem in determining the extent of a consent that is to be given, whether it is to be a blanket permission to last an indefinite time or a permission that is to be renewed with each broadcast.[48] However, that consent for every broadcast would be unreasonable and would cause undue governmental interference.[49]

The debate over prior consent could cause domestic problems in the United States. Any international argreement attempting to formalize the doctrine will necessarily entail some foreign and domestic governmental control over programming. It will be difficult to reconcile America's perhaps oversimplistic ideal of freedom of speech[50] with such control. The problem is further complicated by the fact that most of the satellite broadcasting originating from the United States will be from privately owned broadcasting agencies. The possibility of control over a free enterprise will meet with some public denunciation, if not with some legal problems. Since the Working Group is of the opinion that States should bear international responsibility for activities in this field,[51] an illegal program trans-

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[40] Soviet Draft, *supra* note 21, art. V.

[41] Draft Principles Governing Direct Television Broadcasting by Satellite, U.N. Doc. A/AC. 105/WG.3/L4 (1974) [hereinafter cited as Canadian Draft].

[42] *Id.* art. V.

[43] Argentine Draft, *supra* note 26, art. 14. Article 15 of the Argentine Draft enumerates procedures and the extent of required participation. *See id.* art. 15.

[44] Gotlieb & Dalfen, *supra* note 7, at 54.

[45] Argentine Draft, *supra* note 26, art. 14.

[46] Report of the Working Group on Direct Broadcast Satellites on the Work in its Second Session, U.N. Doc. A/AC.106/66 (1971).

[47] *See* Galloway, *supra* note 2, at 37.

[48] d'Arcy, *supra* note 32, at 167.

[49] *Id.*

[50] Rockwood, *supra* note 15, at 603.

[51] Working Group, *supra* note 20, at 16. The Group uses Article VI of the Outer Space Treaty as a basis of this responsibility.

mission would necessarily have to result in the direct intervention by the United States government into the affairs of the broadcasting agency.

Another difficulty arises in the lack of practicality in the application of the prior consent proposal, considering the transmitting range of modern satellites. By 1985, a single satellite will be able to cover over one-fourth of the globe. If broadcasters were required to receive consent from every receiving country, one state's veto could block out the transmission for the consenting states. Using the rationale behind the Soviet Union's argument of governmental control over programming, this could be construed as an infringement on the national sovereignty of the consenting states.[52]

The possibilities of abuse are almost endless. The United States representative to the Working Group suggested that the Group should examine the effects of an arbitrary withdrawal of consent[53] or a situation in which consent for broadcasting is easily coerced by diplomatic threats. Parties would be forced to comply or face the possibility of having an entire satellite system rendered useless. In an area which uniquely affects the populace more than the state itself, a concerted effort should be made to keep the field as free of political disputes as possible.

It would appear that the only way to make the concept of prior consent practical and workable to any extent would be to formulate regional rather than global broadcasting systems. Such systems would group countries of similar culture, religion, and political ideologies and adapt the programming accordingly. Even this solution has its practical limitations. While satellite broadcasting is relatively accurate, it is not capable of pinpoint transmission and some of the broadcasts necessarily will cross regional boundaries.

C. *Spillover and the Right to Consult*

As mentioned in the previous section, in any satellite transmission covering a large geographical area there are bound to be spillover signals into other areas. While some of this spillover will be eliminated as satellite technology advances, some spillover will be unavoidable. The Working Group stated that "[i]t was therefore necessary to elaborate criteria on a universally accepted basis to define what was and what was not unavoidable spillover in order to avoid possible problems of interpretation on this point."[54]

The main concern is that countries will use the idea of unavoidable spillover as an excuse for intentional broadcasting of propaganda. In order to alleviate this problem, the Soviet,[55] Canadian,[56] and Argentine[57] drafts

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[52] d'Arcy, *supra* note 32, at 165.

[53] Galloway, *supra* note 2, at 36.

[54] Working Group, *supra* note 20, at 16.

[55] Soviet Draft, *supra* note 21, art. VIII.

[56] Canadian Draft, *supra* note 41, art. VII.

[57] Argentine Draft, *supra* note 26, art. 14.

propose that if the broadcaster knows that spillover is inevitable, he must immediately enter into consultations with the countries receiving the spillover transmission. There is no suggestion, however, as to what the duty to consult actually is, what form it should take, or what the results should be. One can assume that the duty to consult would result in a type of modified prior consent rule. This would create the possibility that a failure to receive consent to the spillover could blackout an entire system. However, the Argentine draft states that even though prior acceptance is needed, there is no obligation for participation in programming by the State receiving the spillover.[58]

The only benefit that may arise in consultations is that the process may force the broadcaster into using more effective procedures to limit the unavoidable spillover. In cases of unavoidable spillover, it would be hard to imagine that the world community would forbid a broadcaster to transmit if it had failed to receive consent from the receiving country.

IV. SOURCES OF CONTROL AND ENFORCEMENT

Once the legal problems posed by direct broadcasting are discovered and defined, serious problems will remain for resolution. The parties must agree to be regulated and to subject themselves to some enforcement procedure. Determining the sources of control and enforcement will be a major problem for the Working Group. In a case study by Gotlieb and Dalfen, the authors pointed out the unique situation created by the common use of outer space.

> [T]he case study rejected any notion of automaticity in the application of international law to the new realms, such as outer space, which have been opened for human activity through technological advances. Rather, it depicted a process of conscious selection by states of appropriate rules and analogies. This selection it described as an interweaving process of building on existing norms of international law and of drawing principles and analogies from related fields in both international and domestic law.[59]

Therefore, this last section will deal with the more practical and available sources of law and also with alternatives for enforcement procedures.

A. *Applicable Sources of Present Internatiomal Law*

"[T]here is a growing awareness that the existing international legal order embraces outer space and all of man's activities there."[60] Existing law, however, will probably serve only as a general foundation which will have to be adapted and assimilated.

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[58] *Id.*

[59] C. M. Dalfen, *The International Legislative Process: Direct Broadcasting and Remote Earth Sensing by Satellite Compared*, 10 CAN. Y.B. OF INT'L L. 186, 188 (1972) [hereinafter cited as Dalfen].

[60] Johnson, *supra* note 35, at 34.

Most members of the Working Group agree that the Outer Space Treaty[61] is directly relevant to direct broadcasting.[62] However, "[t]he argument was advanced that the 1967 Treaty on Outer Space did not cover earth resources and direct broadcast satellites because these particular space applications were not known at the time the Treaty was being drafted."[63] This argument is hardly tenable considering the Committee's knowledge of outer space potential and the general language of the Treaty which could be interpreted as applicable to any outer space activity. At the same time, it is the general language which may render the Treaty almost useless. The directly relevant articles are more philosophical ideas than black-letter rules: (1) international cooperation in development and exploration,[64] (2) freedom of use,[65] and (3) sovereign equality.[66] It is almost impossible to apply abstract ideas, especially when there is no agreement as to their meaning. One of the hottest debates in the Working Group is the attempt to reconcile the ideas of "freedom of use" and "sovereign equality":

> Perhaps the most optimistic view of the Treaty is that it is a hesitant attempt toward the acknowledgment that some legal authority is requisite in outer space. Therefore the Treaty may be considered as a guideline which enumerates some of the difficulties which may be encountered in outer space exploration and activities.[67]

The value of the Treaty would be to serve as a foundation which could be implemented in a more detailed manner by subsequent international agreements.[68]

Whatever application that the U.N. Charter has, it suffers from the same weakness as the Outer Space Treaty. Most of the relevant articles are of the same high sounding generalities to which all nations at least give lip service. However, there may be one area where the Charter may have a strong and important role. Chapter VI sets out procedures for the pacific settlement of disputes.[69] If the parties bring themselves under the auspices of the U.N., it could become a viable source of mediation for any dispute that may arise from inadmissable broadcasts.

There have been some conventions passed and proposed that are outgrowths of the Outer Space Treaty, and they may have some applicability

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[61] *Supra* note 4.

[62] Working Group, *supra* note 20, at 10.

[63] Galloway, *supra* note 2, at 32.

[64] Outer Space Treaty, *supra* note 4, preamble, art. I.

[65] *Id.* art. I.

[66] *Id.*

[67] JONES, *supra* note 1, at 85.

[68] *See* Gotlieb & Dalfen, *supra* note 7, at 56, 60 for a tracing of the evolution of norms for area satellite broadcasting up to the present. Agreements subsequent to the Treaty could fall in the same pattern.

[69] U.N. CHARTER, Art. VI.

to direct broadcasting. The 1972 Convention on International Liability for Damages Caused by Space Objects[70] reinforces the state responsibility doctrine of the Outer Space Treaty.[71] There is also before the United Nations Outer Space Committee a Draft Convention on Registration of Objects Launched in Outer Space[72] which would include notifying the Secretary-General of any object launched into space.

There is also general agreement that the rules and regulations of the International Telecommunications Union (ITU) should be controlling wherever applicable.[73] The ITU is a U.N. organization whose main purpose is to allocate broadcasting frequencies on an international level and to assign specific orbits for satellites. "There was disagreement on the extent to which . . . [these regulations would] apply, the difference being between those who consider that these regulations are only for technical purposes and those who hold that they provide a comprehensive framework beyond technical aspects."[74]

The delegates of the Working Group have suggested other conventions or resolutions that they feel should carry some weight in any formulation of policy and regulation in the direct broadcasting field.[75] These include: (1) Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States,[76] (2) the Universal Declaration of Human Rights,[77] and (3) the International Covenant on Civil and Political Rights.[78]

Whatever role these existing sources will play in the formulation of direct broadcasting policy, it is evident that they will have to be supplemented and adapted. How effective they become will depend on whether the parties can agree on some basic compromises concerning the language of the sources and their corresponding weight.

B. *Illegality of Broadcasts, Government Reponsibility, and the Settlement of Disputes*

Article VI of the Outer Space Treaty states that "[s]tates Parties to the Treaty shall bear international responsibility for national activities in outer space . . . whether such activities are carried on by governmental agencies or by non-governmental entities . . . ."[79] Since the Working Group has conceded the applicability of the Outer Space Treaty to direct

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[70] G.A. Res. 27777, 26 U.N. GAOR, Supp. 29, U.N. Doc. A/8429 (1971).
[71] Outer Space Treaty, *supra* note 4, art. VI.
[72] Galloway, *supra* note 2, at 31.
[73] Working Group, *supra* note 20, at 10.
[74] Galloway, *supra* note 2, at 37.
[75] Working Group, *supra* note 20, at 10-11.
[76] G.A. Res. 2625, 25 U.N. GAOR, Supp. 28, U.N. Doc. A/8028 (1970).
[77] *Supra* note 36.
[78] G.A. Res. 2200A, 21 U.N. GAOR, Supp. 16, U.N. Doc. A/6316 (1966).
[79] Outer Space Treaty, *supra* note 4, art. VI.

broadcasting, it would appear that any policy formulation in the area would demand that there be governmental responsibility for every transmission, whether it be from a public or private broadcaster. While there is general agreement that there should be governmental responsibility for transmissions, there is a divergence of opinion as to the status of the responsibility or liability.

One view, represented mainly by the USSR[80] and implicitly supported by Argentina,[81] is that unwanted broadcasts should be declared illegal and handled accordingly. The United States, on the other hand, adheres to the view that such activities should not be labelled as illegal:

> The view was expressed that the concept of illegality of broadcasts should not form the basis for formulating a provision for governing direct television broadcasting by satellites. While certain types of television broadcast by satellite emanating from another country might be considered inadmissible, it would be inappropriate to introduce the concept of illegality of broadcasts. The view was expressed that the introduction of the concept of illegality without objective criteria, which are extremely difficult to agree upon, would rather give rise to international conflicts.[82]

On its face it appears that this battle is one of semantics rather than principle. However, this "word game" will have an effect on the formulation of dispute settlement machinery. Article IX of the Soviet Draft states:

> 1. In case of transmission to any state of broadcasts which are illegal in the meaning of article VI, that state may take in respect to such broadcasts *measures which are recognized as legal under international law.*
> 2. *States agree to give every assistance in stopping illegal television broadcasting.*[83]

While the emphasis of the Working Group has been on the peaceful settlement of disputes,[84] the wording of the Soviet Draft opens for speculation the possibility of other methods being used. Under the U.N. Charter these could include: embargoes,[85] collective action,[86] and perhaps even force.[87] From a purely psychological point of view, it would be easier to rationalize the more drastic measures if the activities were labelled illegal. On the

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[80] Soviet Draft, *supra* note 21, art. IX.

[81] The Argentine Draft never specifically states the status of inadmissible broadcasts, but in one article of its proposal it states the idea of illegality implicitly. "The freedom enshrined in the 1967 treaty on Outer Space is not an unlimited freedom but is subject to international cooperation which determines the legality or illegality of any activity . . . ." Argentine Draft, *supra* note 26, art. 14.

[82] Working Group, *supra* note 20, at 18.

[83] Soviet Draft, *supra* note 21, art. IX (emphasis added).

[84] Working Group, *supra* note 20, at 19.

[85] U.N. CHARTER, art. 41.

[86] *Id.*

[87] *Id.* art. 42. Force should be used only if the Security Council considers such drastic measures necessary.

other hand, if the United States suggestion was followed and the unwanted broadcasts were labelled merely inadmissible, it would be hard to condone any other action than the recognized peaceful settlement.

Taking the second part of the Soviet Draft article to its logical extreme, it is foreseeable that it could be used as a backdoor entrance to political intervention in the name of collective security. The idea of illegality would go far in condoning such intervention to the world community. Therefore it would seem the safer course to eliminate the concept of illegality in such matters.

C. *Jamming Systems and Receiving Country Censorship*

One of the most practical sources of control over unwanted broadcasts would be the control of transmissions by the receiving country. If an effective and workable control can be found, it could eliminate many of the potential international problems that could arise if the control would have to come from the source of the broadcast.

As long as direct broadcasts have to be transmitted through ground receivers, the receiving country will have ultimate control over the program content. The problem arises when satellites will be able to broadcast directly into home receivers. For the first few years, this type of transmission into home receivers will have to be augmented with a simple, relatively inexpensive antenna. At this stage, the government could exercise control by forbidding the sale of the apparatus.[88] However, the device would be so simple it could be handmade. As the technology of direct broadcasting becomes more advanced, the receiving country will be able to exert less control.

The receiving country, however, will always have the ultimate control over any transmission. Jamming systems can be set up whereby the receiving country can block the incoming signals of the transmitter. Even though this is the most effective means of control, there are two major disadvantages that may prevent it from becoming workable over any large area. First is the expense involved. Despite the fact that the costs for a jamming system are far lower than a transmitting system,[89] the expense of a jamming system will keep it out of reach of many of the developing countries. The second problem is both technical and legal. Jamming signals, like transmitting signals, are sporadic and not easily controlled. The state that has the jamming system must use the signals only within their sovereign airspace. There will be a definite problem of spillover into countries that want to receive the broadcasts. The same problem of national sovereignty will arise, and the entire controversy over program content will still have to be confronted.

Whether the expense and the possibility of political confrontation is

[88] Dalfen, *supra* note 59, at 193.

[89] *Id.*

worth the advantages gained by the use of a jamming system is a dilemma that will have to be faced by each state. An effective and inexpensive system of receiving country censorship will be strongly supported by the United States. This will also eliminate most of the constitutional problems created by the prior consent and national sovereignty debates.

D. *Possible International Control and Enforcement Organizations*

After a policy is formulated for direct broadcasting, the next problem that arises is the establishment of an enforcement organization capable of handling the unique and sensitive problems that will be created. Whether a new organization is created or an established organization is adapted, it will have to deal with a highly technical field with unprecedented and far-reaching political and legal implications.

The most logical choice for an enforcement organization would, of course, be the U.N. However, there has been some apprehension expressed about having the U.N., as a whole, take control. One criticism is that the U.N. may not be able to balance conflicting national interests without domination by one state.[90] There is also the feeling that the General Assembly will probably act as a posteriori (after the fact), rather than as a priori (before the fact) as it has done in other areas of outer space policy.[91] States themselves will have to innovate prudently until the General Assembly formulates a policy. If the U.N. is to become a viable and effective force in this area, it will have to take the position of leader rather than follower.

Another criticism was voiced by the United States. The United States is one of only two countries able to afford a direct broadcasting system and would not want to leave its regulation in the hands of an organization with its present voting procedures — one state/one vote.[92] An alternative to this would be to have a weighted voting procedure depending on the amount of contribution to the U.N.

A unique solution has been proposed, whereby the U.N. itself would become the only worldwide broadcaster. The system would be entirely financed and controlled by a special U.N. committee. Time would be allocated to each country, during which there would be almost complete freedom of transmission.[93] While this may appear to be the ideal solution, it would probably not receive approval by the countries who support the prior consent policy. Considering its basically political nature, it seems that the most practical role the U.N. could play would be through the establishment of a separate organization under its auspices to settle disputes in this area.[94]

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[90] *See* d'Arcy, *supra* note 32, at 163.

[91] *Id.* at 156.

[92] Rockwood, *supra* note 15, at 603.

[93] Shakespeare, *supra* note 25, at 64.

[94] Chayes & Chazen, *supra* note 37, at 18.

The ITU has also been suggested as a possible enforcement body. However, there has been a considerable amount of criticism of this suggestion. An initial criticism is the complaint that the ITU is a technical body and that in its present state it is not capable of handling the sensitive political and legal problems which will undoubtedly arise. Another major criticism is that ". . . if the ITU is made responsible for direct broadcasting, it will be required to undertake far more aggressive regulation than it has in the past. Whether the organization can be adapted to such new demands is uncertain, given its long tradition of passivity."[95] Another failing of the ITU is that the U.S.S.R. is not a member, but it can be assumed that if there is enough pressure to make the ITU the controlling organization, the U.S.S.R. will probably begin to participate. The major advantage of this organization is the reputation that it has of being apolitical, furnishing the necessary stimulus to compromise.

INTELSAT (International Telecommunications Satellite Consortium)[96] a U.N. organization formed in 1967, has also been suggested for a regulatory body. The goal of INTELSAT is to establish a single global satellite system working in conformity with principles of space law and international communications.[97] However, up to the present time, its policy has seemed to have been shaped by the United States as the prime user of satellite space. This has been because the U.S.S.R., until recently, has not played an active role. In the past few years the U.S.S.R. has begun to fully participate because of the development of detente and technical advancements in the field.[98] "The main contemporary criticism of INTELSAT . . . do not concern technical performance but an alleged lack of genuinely international character, due to the substantially United States-based control of its internal voting and decision-making powers and to the United States monopoly of its managerial functions."[99] There is also the fear that giving program content and control functions to an international organization like INTELSAT puts it in the middle of political and ideological battles when it should be left to technical and functional problems.[100] However, it has the advantage of having a highly specialized staff with a more aggressive approach than the ITU.[101] In practice, it seems to be relatively nondiscriminatory as far as offering communication services, creat-

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[95] *Id.* at 17.

[96] Agreement Establishing Interim Arrangements for a Global Commercial Communications Satellite System, G.A. Res. 1721, 17 GAOR, Supp. 17, U.N. Doc. A/5100 (1962).

[97] Gotlieb & Dalfen, *supra* note 7, at 41.

[98] McWhinney, *The Antinomy of Policy and Function in the Institutionalization of International Telecommunications Broadcasting*, 13 COLUM. J. TRANSNAT'L L. 3, 10 (1974) [hereinafter cited as McWhinney].

[99] McWhinney, *The Development of an International Law of Communications*, in THE INTERNATIONAL LAW OF COMMUNICATIONS 14 (E. McWhinney ed. 1971).

[100] McWhinney, *supra* note 98, at 24.

[101] Chayes & Chazen, *supra* note 37, at 18-19.

ing opportunities for free investment, and allowing participation in design and development to all interested parties.[102]

There appears to be a practical solution to the problem of forming a regulatory body that inexplicably has been given little attention. Many of the legal and political problems that would be created by a global broadcast system could be avoided if the transmitting was done on a regional level. If broadcasting was organized and controlled by regional agencies, it would be considerably easier to formulate programming schedules. It is easier to arrange a program plan for a region that has similar economies, political leanings, and social organization. Geographically, it would be a rather easy task to divide the globe into workable regions: North America, Latin and South America, Western Europe, Eastern Europe and the Soviet Union, Africa, Near and Middle East, and the Far East. Working out the minor differences that would occur within one of these regions would certainly be easier than trying to solve the same problems on a global level. About the only problem that would be of the same magnitude as on the global level would be the problem of spillover, which was previously discussed. Even if the regional device was used only temporarily, it could be an important initial step in achieving global broadcasting by formulating policies of compromise in the different regions.

V. CONCLUSION

As mentioned in the introduction to this Note, direct broadcasting is creating unique problems for the world community. At the same time it is offering the world community a unique opportunity to create extensive compromises that could have a beneficial effect on policy-making in other fields. Whether the world community will retain the cooperative spirit that it has shown in other areas of space policy is a question that can only be answered in the future.

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[102] JONES, *supra* note 1, at 115.