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# The Antinomy of Policy and Function in the Institutionalization of International Telecommunications Broadcasting

EDWARD McWHINNEY\*

## I. INTRODUCTION

In a program dedicated to the memory of the late Columbia University Professor and World jurist, Wolfgang Friedmann, it is only fitting that our keynote should be Professor Friedmann's most celebrated International Law prescript—his affirmation of hope for the future of international relations that an International Law, which had been based originally on conflict between nations, and which had moved on to an International Law of Coexistence (Friendly Relations) based on mutuality and reciprocity of interest in the era of the Big Power *détente*, would eventually give way, in its turn, to a genuine International Law of Cooperation<sup>1</sup> in which nations would accept as their prime goal the attainment of human dignity through the maximization and sharing of goal values like power, wealth, respect, and enlightenment without regard to racial origin or political-ideological creeds. But Professor Friedmann, as a jurist trained in the Continental European traditions of sociology of law,<sup>2</sup> knew from Karl Renner<sup>3</sup> and Max Weber<sup>4</sup> the necessity of studying what Eugen Ehrlich had called the "living law"<sup>5</sup>—what actually happens in concrete practice with

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1. This thesis is developed, particularly, in Friedmann's *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* (1964), and in his *General Course in Public International Law*, in *HAGUE ACADEMIE DE DROIT INTERNATIONAL*, [1969] *RECUEIL DES COURS* 39, 91-119.

2. I have developed this analysis a little further in my note, *Wolfgang Friedmann and Eclectic Legal Philosophy*, 6 *IND. L. REV.* 172 (1972).

3. See, for example, K. RENNER, *DIE RECHTSINSTITUTE DES PRIVATRECHTS UND IHRE SOZIALE FUNKTION* (1929).

4. See, for example, M. WEBER, *GESAMMELTE AUFSATZE ZUR SOZIOLOGIE UND SOZIALPOLITIK* (1924); M. WEBER, *WIRTSCHAFT UND GESELLSCHAFT* (1921).

5. See, in general, E. EHRLICH, *BEITRÄGE ZUR THEORIE DER RECHTSQUELLEN* (1902); E. EHRLICH, *SOZIOLOGIE UND JURISPRUDENZ* (1906); E. EHRLICH, *GRUNDLEGUNG DER SOZIOLOGIE DES RECHTS* (1913).

human institutions and processes, quite apart from the philosopher's "ivory tower" conception of how things ideally ought to operate, to be found in the legislator's abstract, *a priori*, postulates. And Professor Friedmann also knew from Gustav Radbruch<sup>6</sup> that the path to rational community decision-making in a democratic society begins with the establishment of the different or alternative goals or options available in any problem-situation—the legal antinomies; and that while questions of ultimate values cannot be scientifically proved or demonstrated, consideration of the *means* available for realizing different values in particular situations can clarify and eventually assist the process of producing community consensus over the choice of the *ends* themselves. In no area of International Law and Organization can these basic truths be better demonstrated than in the emerging, new International Law of Communications.<sup>7</sup>

## II. THE INTERNATIONAL LAW OF COMMUNICATIONS

### A. *An Overview*

First of all, we do not have any tidy blue-print for the law of international communications, to be found contained in a single constitutional document or fundamental charter setting out general rules to govern the development of that law, both in its substantive content and

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6. As developed, especially, in his celebrated *RECHTSPHILOSOPHIE* 168 *passim* (4th ed. 1950).

7. David Leive, in a recent review of *THE INTERNATIONAL LAW OF COMMUNICATIONS* (E. McWhinney ed. 1971), published at 66 *AM. J. INT'L L.* 441 (1972), chides me with applying the generic term International Law of Communications to the congeries of special international or supra-national agencies having to do with telecommunications and satellite broadcasting, and the dependent international rule-making and administrative practice and also the related general, multilateral or limited, bilateral international accords. I think that our disagreement here goes to questions of legal theory and ultimate definition of law, rather than to issues of substantive law within this specialized area of telecommunications and satellite broadcasting. Leive seems to prefer the more traditional, neo-Austinian conception of "law" as being limited to the authoritative rules and prescriptions laid down by some duly-constituted sovereign: I have, myself, in accord with juristic teachings as diverse as Ehrlich's "living law," Sir Carleton Kemp Allen's "Law-in-the Making," Roscoe Pound's "law-in-action," and Lasswell and McDougal's "flow of decisions," refused to view law, in this area, in any static way, as being a frozen cake of doctrine that jelled once and for all in some earlier era; but, instead, have treated law, in this area not less than in other areas, as being a dynamic process of unfolding and development of norms of conduct and practice, in concrete interests-conflicts situations in the principal arenas of international interaction and confrontation. Not merely the Legal Realists but also post-Austinian analytical jurisprudes like Kelsen expressly recognize and accept this dynamic element in the law-making process, at the international, not less than at the national, level. See H. KELSEN, *REINE RECHTSLEHRE* (1934).

also in terms of its political-institutional unfolding. Instead of a single over-arching body of legal principles based upon a single, paramount international institution armed with plenary law-making and law-applying competence in regard to telecommunications and telecommunications broadcasting, we have, rather, a congeries of different and sometimes overlapping or even competing bodies of legal principles, each based upon or deriving from its own special international legal institutional base. This is a direct consequence, of course, of the historical fact that the International Law of Communications developed—not poetically like the United Nations organization with its original Founding Fathers sending it on its way in 1945 with a brand new, and purportedly all-pervasive, constitutional charter—but pragmatically and empirically as a set of more or less *ad hoc*, step-by-step, world community responses to emerging problem-situations in the area of telecommunications and international broadcasting development that seemed to demand, not so much *inter-national*, as *trans-national*, solution or regulation.

Contemporary students of the science of International Organization—what we might, more accurately, describe as the Constitutionalism of International Law and Relations—recognize that, far from being a collection of abstract fundamental charters, grouped together like dead butterflies on display in glass cases on a museum wall, International Organization today is like International Law in general, *process*—the flow of decisions (process) for solving particular tension-issues of the contemporary world community as they arise in concrete problem-situations. The analogies to other major areas of law today, both national and *supra-national*, are clear, if we look, for example, to the new conceptions of a functionally-oriented *cooperative federalism* within our respective national legal systems; and, even more strikingly, to the conscious choice of the statesmen building the new European Community, in the immediate post-World War II years, for a functional, problem-oriented methodology that would build a new, integrated Western Europe step by step—proceeding from particular key problems like coal and steel production, agriculture, atomic energy—rather than in one grand gesture like the immediate adoption of a new federal European constitutional charter.<sup>8</sup> The latter approach—the pursuit of abstract constitutionalism at the expense of concrete study of problems of power and of its sharing in the modern state—had been the fatal error of the Western European constitutional democrats in the tragic

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8. See the excursus by Carl Friedrich in *FEDERALISM AND SUPREME COURTS AND THE INTEGRATION OF LEGAL SYSTEMS* (E. McWhinney & P. Pescatore eds. 1973).

era between the two World Wars;<sup>9</sup> and their successor statesmen, pragmatic and empirical through the experience of the bitter disillusionment of the Weimar Republic and of the subsequent Hitler *régime*, were resolved not to make the same error twice.

The emerging International Law of Communications<sup>10</sup> is, like the new European Community law, pluralistic in sources and basic structure, though without, as yet, the appearance of a consciously centralizing, coordinating, integrating *rôle* such as that developed for the European Community law-making process through supervening generalist measures like the Treaty of Rome of 1958. An historical difference from the European Community law lies in the fact that where the key operational methodology for achieving supra-national integration in Europe developed as a conscious and well-calculated decision by post-World War II Western European statesmen in empirical response to the failure of the alternative, "rationalized constitutionalism" approach between the two World Wars, the pluralistic character of the new International Law of Communications, as it has emerged today,

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9. See the criticisms of the "rationalized constitutionalism" of the Continental European constitution-makers between the two World Wars in B. MIRKINE-GUETZEVITCH, *LES CONSTITUTIONS EUROPÉENNES* (1951).

10. For a general introduction to the new International Law of Communications, reference may be made to the following: A. CHAYES, T. EHRLICH & A. LOWENFELD, *INTERNATIONAL LEGAL PROCESS* 632 *passim* (1968); Laskin, *Background Paper in TWENTIETH CENTURY FUND TASK FORCE, COMMUNICATING BY SATELLITE* at 19 (1969); G. WEIL, *COMMUNICATING BY SATELLITE: AN INTERNATIONAL DISCUSSION* (1969); *Satellite Broadcasting: Implications for Foreign Policy, Hearings Before the Subcommittee on National Security Policy and Scientific Developments of the House Comm. on Foreign Affairs, 91st Cong., 1st Sess.* (1969); D. SMITH, *INTERNATIONAL TELECOMMUNICATION CONTROL* (1969); STOCKHOLM INTERNATIONAL PEACE RESEARCH INSTITUTE, *COMMUNICATION SATELLITES* (1969); CENTRE NATIONAL DE LA RECHERCHE SCIENTIFIQUE, *LES TÉLÉCOMMUNICATIONS PAR SATELLITES: ASPECTS JURIDIQUES* (1968); INTERNATIONAL TELECOMMUNICATIONS UNION, *COLLOQUE "ESPACE ET RADIOCOMMUNICATIONS"* (1969); CENTRE NATIONAL DE LA RECHERCHE SCIENTIFIQUE, *L'UTILISATION DE SATELLITES DE DIFFUSION DIRECTE* (1970); Pépin, "*Télécommunications par Satellites*" *Rapport*, in INTERNATIONAL LAW ASSOCIATION, *REPORT OF THE SPACE LAW COMMITTEE (BUENOS AIRES CONFERENCE)* at 8 (1968); D. LEIVE, *INTERNATIONAL TELECOMMUNICATIONS AND INTERNATIONAL LAW: THE REGULATION OF THE RADIO SPECTRUM* (1970); Leive, *Regulating the Use of the Radio Spectrum*, 37 *TELECOMMUNICATION J.* 268 (1970); Leive, *Regulating the Use of the Radio Spectrum*, 5 *STAN. J. INT'L STUDIES* 21 (1970); TWENTIETH CENTURY FUND TASK FORCE, *THE FUTURE OF SATELLITE COMMUNICATIONS* (1970); TWENTIETH CENTURY FUND, *PLANNING FOR A PLANET: AN INTERNATIONAL DISCUSSION ON THE STRUCTURE OF SATELLITE COMMUNICATIONS* (1971); UNITED NATIONS ASSOCIATION OF THE U.S.A., *SPACE COMMUNICATIONS: INCREASING U.N. RESPONSIVENESS TO THE PROBLEMS OF MANKIND* (1971); THE INTERNATIONAL LAW OF COMMUNICATIONS (E. McWhinney ed. 1971); Pépin, *General Legal Problems in Space Telecommunications*, 38 *TELECOMMUNICATIONS J.* 386 (1971); Chayes & Chazen, *Policy Problems in Direct Broadcasting from Satellites*, 5 *STAN. J. INT'L STUDIES* 4 (1970).

is itself a largely spontaneous and organic development, consisting of a series of *ad hoc* responses by particular decision-makers to particular problems emerging in particular arenas at particular times without, seemingly, those decision-makers having (as they did certainly, in the case of the European Community) any overriding *Weltanschauung* or master plan into which the mass of individual decisions and responses were being continually absorbed and integrated.

The prime emphasis in the emergent International Law of Communications up to date has been on *functionalism*, with the resultant institutional structure being particularly closely correlated to the technical-scientific exigencies of the individual problem being solved. This has meant, of course, that the technical-scientific considerations have tended to be dominating, in the process of decision-making, in comparison to other, non-technical considerations. And it has meant further, in a general problem-area where the relevant technical-scientific sophistication is only obtained by a non-specialist either through advanced training in science and technology or else through the blood, sweat, toil and tears of working for sustained hours on a technical brief, that the *specialists*, rather than the *generalists*,<sup>11</sup> have been dominant in the ensuing World Community policy-making. In this particular area of International Law and Organization, the technocrat, or at least the technically-sophisticated lawyer, has been King, with what one might call the legal laymen, who normally shape and determine so much of contemporary international law-making, having at best a purely secondary, subordinate *rôle*.

## B. *The I.T.U.*

This explains why, when the utilization of space and space satellites for purposes of international broadcasting became both technically feasible and also commercially practicable, the first international control and development initiatives were not entrusted to the long-established specialist international agency already existing in the telecommunications field—the International Telecommunication Union

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11. The recognition of the importance of the particular character and personality of the specialist legal skill group or groups who are dominant in a country's legal development—the so-called legal *honoratiore*s—is found in Weber's *WIRTSCHAFT UND GESELLSCHAFT* (1921). It is not, of course, suggested that the distinction between the legal *specialists* and the legal *generalists* is one of absolute dichotomy; nevertheless, in the International Law of Communications perhaps more than in many other areas of International Law, the limitations on the ability of the "legal laymen" to participate with sophistication and usefulness in technically-based policy discussions are normally patent.

(I.T.U.)<sup>12</sup>—but to an entirely new organization, specially developed *ad hoc* for the purpose—INTELSAT. While the I.T.U. certainly had a high degree of specialist expertise within the general telecommunications field, it was an expertise, nevertheless, limited essentially to posts, telegraphs, and telephones, and not including, at that time, space technology. And its specialist international bureaucratic cadre had been recruited essentially from national posts and telegraphs personnel; and the “posts and telegraphs” philosophy tended to dominate the thinking of the long-term membership of individual national delegations participating in the regular political arenas of the I.T.U. When the new problem of international utilization of space communications arose, therefore, the general consensus was clear that the I.T.U. simply would not do:<sup>13</sup> its institutional structure was oriented towards posts and telegraphs questions, and its membership (both political and bureaucratic), in the general opinion, was just not flexible enough to be able to accommodate radically new problems surpassing their normal professional expertise.<sup>14</sup>

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12. As to the International Telecommunication Union (I.T.U.), see generally G. CODDING, *THE INTERNATIONAL TELECOMMUNICATION UNION: AN EXPERIMENT IN INTERNATIONAL COOPERATION* (1952); *INTERNATIONAL TELECOMMUNICATION UNION, FROM SEMAPHORE TO SATELLITE* (1955). For the special relation of the I.T.U. to the new problems of telecommunications regulation, see Courteix, *L'Union Internationale des Télécommunications (U.T.I.) et son Rôle dans le Domaine des Télécommunications Spatiales*, in *CENTRE NATIONAL DE LA RECHERCHE SCIENTIFIQUE, LES TÉLÉCOMMUNICATIONS PAR SATELLITES: ASPECTS JURIDIQUES* 245 (1968); Lyall, *The Use of the Radio Spectrum: The Role of the IFRB*, [1969] *JURIDICAL REV.* 233; Jacobson, *International Institutions for Telecommunications. The ITU's Rôle*, in *THE INTERNATIONAL LAW OF COMMUNICATIONS* (E. McWhinney ed. 1971).

13. GROSS, *The New ITU. A Plan for the Reorganization of the Union*, 30 *TELECOMMUNICATIONS J.* 305 (1963). Leading I.T.U. officials themselves have often been fully aware of the constitutional and structural limitations of their organization, as presently constituted, and of the need for change. See, for example, the discussions by the I.T.U.'s Secretary-General Gerald C. Gross in *The New I.T.U. A Plan for the Reorganization of the Union*, 30 *TELECOMMUNICATIONS J.* 305 (1963) and *Towards the Streamlining of the ITU Convention*, 32 *TELECOMMUNICATIONS J.* 56 (1965). See also the United Nations General Assembly's review of the administrative and budgetary procedures concerning the program and budget of the I.T.U., Report of the Advisory Committee on Administrative and Budgetary Questions to the General Assembly, U.N. Doc. A/7765 (1969).

14. Restructuring of the I.T.U. against the possibility that, in the future, it may, in fact, become the prime international agency to be charged with international telecommunications broadcasting supervision and control, continues to pre-occupy specialists and students of international organization in general. See, for example, the report in *TWENTIETH CENTURY FUND, GLOBAL COMMUNICATION IN THE SPACE AGE* (1972), along with these appended essays: Chayes, *Reforming ITU?*, at 25; Jacobson, *The International Telecommunication Union: ITU's Structures and Functions*, at 38; Voge, *The International Telecommunication Union: Its Functions and Structure*, at 65. See also Courteix, *L'Union Internationale des Télécommunica-*

### C. INTELSAT

The decision to form INTELSAT, as we have said, was a *functions-based* decision in direct response to conceived scientific-technical exigencies.<sup>15</sup> Just as the progress of disarmament has been controlled by the major arms developers, the two super-powers, who have tended to dictate between themselves the content and drafting of the eventual multilateral treaties on disarmament, so international telecommunications and its international regulation has tended to be shaped and controlled, from the outset, by the United States, the prime space utilizer. It can be argued, in fact, that the particular character and form that INTELSAT took under the Interim Agreements of August, 1964,<sup>16</sup> were rendered more or less inevitable, if the objectives of a genuinely global telecommunications satellites system, to be made available "with all deliberate speed" and at operating costs within the financial reach of most countries, were to be achieved. Granted the United States' overwhelming predominance in telecommunications in terms both of scientific-technological knowledge and of the skilled scientific-technological personnel capable of developing and extending the subject, and the enormous capital input expected to be required at least initially, it was certain that the United States would have to

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*tions (U.I.T.) et son Role dans le Domaine des Télécommunications Spatiales* in CENTRE NATIONALE DE LA RECHERCHE SCIENTIFIQUE, LES TÉLÉCOMMUNICATIONS PAR SATELLITES: ASPECTS JURIDIQUES 245 (1968); D. LEIVE, THE FUTURE OF THE INTERNATIONAL TELECOMMUNICATION UNION (1972); C. VON BRAUN, DIE JURISTISCHE AUSGESTALTUNG EINES INTERNATIONALEN NACHRICHTENSATELLITENSYSTEMS, DARGESTELLT AM FALLE "INTELSAT" 25-28, 44-45 (1972); W. KLINTER, SATELLITENRUNDFUNK UND DIE PROBLEMATIK DES INTERNATIONALEN URBEBERUND LEISTUNGSSCHUTZES 88-96 (1973).

15. As to INTELSAT generally, see A. CHAYES, T. EHRLICH & A. LOWENFELD, INTERNATIONAL LEGAL PROCESS 632 *passim* (1968). For a Continental European appraisal of COMSAT, see Guépin, *Les Télécommunications par Satellites aux Etats-Unis*, in CENTRE NATIONALE DE LA RECHERCHE SCIENTIFIQUE, LES TÉLÉCOMMUNICATIONS PAR SATELLITES: ASPECTS JURIDIQUES 33 (1968). And, see generally, Trooboff, *Intelsat: Approaches to the Renegotiation*, 9 HARV. INT'L L. J. 1 (1968); Ende, *International Telecommunications: The Dynamics of Regulation of a Rapidly Expanding Service*, 34 LAW & CONTEMP. PROB. 389 (1969); Ashley, *International Communications: What Shape to Come?*, 34 LAW & CONTEMP. PROB. 417 (1969); *The Tail and the Dog: COMSAT*, THE ECONOMIST, Aug. 9, 1969, at 19; *INTELSAT and the I.T.U.*, THE ECONOMIST, Aug. 9, 1969, at 22; Office of the White House Press Secretary, Memorandum on Federal Policy on Domestic Satellite Communications, Jan. 23, 1970; N.Y. Times, Jan. 24, 1970, at 23, col. 5; J. Johnson, Organization and Activities of the International Telecommunications Consortium, U.N. Doc. A/CONF 34/VIII.22; C. VON BRAUN, *supra* note 14, at 78 *passim*; W. KLINTER, *supra* note 14, at 129 *passim*.

16. Agreement establishing Interim Arrangements for a Global Commercial Communications Satellite System, Aug. 20, 1964, 2 U.S.T. 1705, T.I.A.S. No. 5646, 514 U.N.T.S. 26.



shoulder the main burden of responsibility for international telecommunications during the first few years. Also, granted the absence of any Soviet initiative to participate jointly with the United States in such a venture—perhaps because the *post-Cold War détente* was not developed sufficiently in 1964, and, perhaps, because of a certain time-lag by the Soviet Union in this field in comparison with the United States<sup>17</sup>—it may be argued that it was politically inevitable and necessary and desirable for effective development that the United States should assume majority voting control in the new INTELSAT organization under the 1964 Interim Agreements. It also may be argued that it was necessary and desirable that the United States assume effective management direction of the new international organization through the medium of the United States domestic common carrier for profit, COMSAT.

The special institutional arrangements, under the 1964 Interim Agreements, and the United States predominance in international telecommunications that they effectively sanctioned, were very much criticized in the years immediately after 1964. But it is important to note that in so very many respects these institutional arrangements were hardly *sui generis*, and that ample precedents existed for them in other areas of international organization.

First, the two-tiered, dualist character of the international organization provided under the Interim Agreements—the governmental sector and the private sector—constitutes a system of parallel power that exists (and, indeed, that exists in much more powerful form) in the international organization for civil aviation where, in effect, the International Civil Aviation Organization (ICAO) operates as the inter-governmental agency; but where the crucial decisions as to competitive air fares and commercial traffic routes and related matters are made in the private sector by the International Air Transport Association (IATA), an international private organization of air carriers, some public-owned, some mixed governmental and private, but most privately owned.<sup>18</sup>

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17. Relative Soviet-U.S. parity was a precondition to effective Soviet-U.S. cooperation in other concrete areas of East-West *détente*, such as disarmament, during the same time period. I have developed in detail this particular discussion as to the operational methodology of Soviet-Western international legal problem-solving in the *post-Cold War détente* era in earlier studies: "PEACEFUL COEXISTENCE" AND SOVIET-WESTERN INTERNATIONAL LAW (1964); INTERNATIONAL LAW AND WORLD REVOLUTION (1967); *Pax Metternische? International Law and Power in the Era of Detente*, in Festschrift til Professor Alf Ross 335 (M. Blegvad & M. Sorenson eds. 1969); CONFLICT IDEOLOGIQUE ET ORDRE PUBLIC MONDIAL (1970).

18. See generally, THE FREEDOM OF THE AIR (E. McWhinney & M. Bradley eds.

Also, the principle of weighted voting, with the effective decision-making power linked to the degree of financial or other relevant input into the problem-area concerned, has been adopted or applied sufficiently often in the context of United Nations agencies—in the International Monetary Fund (IMF), in the United Nations Conference on Trade and Development (UNCTAD), in the International Coffee Agreement, and arguably even in the case of the U.N. Security Council itself with the built-in veto of the “Big Power,” Permanent members—to constitute a recognized exception to the principle of Equality of States as expressed in the claim “one man—one vote.” Indeed, one might suggest that the principle of weighted voting has become almost a norm in areas of international organization where the demands of functionalism are especially high and where the problem-solving competence demands special contributions, in terms of finance and skills, from certain countries.

The criticisms of INTELSAT as established under the 1964 Interim Agreements usually looked to questions of degree rather than to questions of kind. For example, we find the criticism that, even accepting the principle of weighted voting power, the United States, with its 53 per cent financial investment in the INTELSAT system, was able to exercise veto power over INTELSAT’s functions; and the further criticism that, even accepting the principle of an American-based management authority, there was a certain conflict of interests inherent in a situation where the U.S. government agency involved, COMSAT, wore “three hats” at the same time—as a U.S. internal, domestic, common carrier for profit; as the U.S. national representative to INTELSAT; and, finally, as the general managerial authority within INTELSAT itself.<sup>19</sup> A more serious indictment was that, as an international organization with a high functional orientation, established in the *post-Cold War détente* era, INTELSAT should have included the Soviet Union, which had a significant presence in space communications. This argument could be answered only by demonstrating that the door to entry into INTELSAT was never barred to the Soviet Union, which preferred, for its own reasons,<sup>20</sup> to operate its own special

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1968); T. BUERGENTHAL, *LAW-MAKING IN THE INTERNATIONAL CIVIL AVIATION ORGANISATION* (1969); McWhinney, *International Law and the Freedom of the Air: The Chicago Convention and the Future*, 1 *RUTGERS-CAMDEN L.J.* 229 (1969).

19. See, for example, the colorful comment, attributed to an unnamed English diplomat, that COMSAT “was not only Lord High Executioner, but Lord High Everything Else.” Chayes, *Unilateralism in United States Satellite Communications Policy*, in *THE INTERNATIONAL LAW OF COMMUNICATIONS* 42, 46 (E. McWhinney ed. 1971).

20. See text at p. 15, *infra*.

INTERSPUTNIK regional international organization directed towards the Communist countries;<sup>21</sup> and that U.S. majority voting interest in INTELSAT was hardly beyond re-negotiation, and possible downgrading, in the event of a serious Soviet bid to join INTELSAT.

As it was, in the absence of any direct Soviet initiative to join INTELSAT, the procedures for conversion of the Interim Agreements of 1964 into Definitive Agreements and for "democratizing" INTELSAT's institutional machinery and procedures, went on with full U.S. official encouragement.<sup>22</sup> From the original 11 partners of the INTELSAT Interim Agreements of August, 1964, the number of members has now expanded to over 80, including more and more countries of the Third World.

Further, the new, *Definitive* Agreements for INTELSAT,<sup>23</sup> to replace the 1964, *Interim* Agreements, had been agreed upon and opened for signature on August 20, 1971; and by December 15, 1972, 54 countries, the necessary number to bring the Agreements into force, had already ratified the Definitive Agreements. Superceding the 1964 Interim Agreement among Governments and the annexed Special Agreement among communications entities,<sup>24</sup> the Definitive Agreements also include an inter-governmental agreement for signature by the governments and an Operating Agreement for signature by the telecommunications entities of the member-countries or designated private entities.<sup>25</sup>

In contrast, however, to the fairly simple organizational structure established under the Interim Agreements, which essentially consisted of an Interim Committee with responsibility only for making

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21. See, in this regard, the thoughtful analysis by the Czech jurist Vladimir Kopal, *East-West Cooperation in Space Telecommunications: A Socialist Countries' Viewpoint*, in *THE INTERNATIONAL LAW OF COMMUNICATIONS* 99 *passim* (E. McWhinney ed. 1971).

22. As to the development of the detailed negotiations from 1964 onward, see C. VON BRAUN, *supra* note 14, at 154 *passim*; Ungerer, *Satellitenprobleme und Intel-sat-Verhandlungen*, 21 *AUSSENPOLITIK* 71 (1970).

23. Agreement relating to the International Telecommunications Satellite Organization "Intelsat" (opened for signature at Washington, Aug. 20, 1971), in 10 *INT'L LEGAL MAT.* 909 (1971). See also, Operating Agreement relating to the International Telecommunications Satellite Organization "Intelsat," in 10 *INT'L LEGAL MAT.* 946 (1971).

24. Special Agreement (among designated Communications Entities), Aug. 20, 1964, 2 U.S.T. 1745, T.I.A.S. No. 5646, 514 U.N.T.S. 48.

25. See generally Colino, *Intelsat: A Comparison of the Interim and Definitive Arrangements*, *EUROPEAN BROADCASTING UNION REVIEW*, Sept. 1971, at 49 *passim*; Paternmann, *Neue Gesichtspunkte für die Struktur Internationaler Organisationen*, in 1 *ZEITSCHRIFT FÜR LUFTRECHT UND WELTRAUMFRAGEN* 10 (1972); C. VON BRAUN, *supra* note 14, at 178 *passim*; W. KLINTER, *supra* note 14, at 139 *passim*.

reports and for the development of proposals for the eventual Definitive Agreements, and of the all-important Manager, the Definitive Agreements now established a new, four-tier structure for INTELSAT: the Assembly of Parties, being a general assembly of the governmental representatives meeting every two years; the Meeting of Signatories, comprising representatives of the entities who have signed the Operating Agreement, meeting annually; the Board of Governors, consisting of about 25 representatives of signatories with certain defined investment shares, who meet frequently; and the Executive Organization which, for a transitional period of six years, is to consist of a Secretary-General, with COMSAT as a management services contractor, but which will have its own permanent organizational structure, headed by a Director-General, to be progressively implemented over that same time period.

The extra institutional complexity in the transition from the Interim Agreements to the Definitive Agreements should not, however, conceal the major changes in two substantial areas: first, the disappearance of the U.S., COMSAT-based, management *rôle*, albeit a disappearance to be staged over a six-year time period; and second, the disappearance of the U.S. majority voting control from the never less than fifty per cent of the Interim Committee under the interim arrangements, to a maximum of forty per cent in the new Board of Governors, under the Definitive Arrangements.<sup>26</sup> Indeed, if under the complicated procedures for determination of voting participation in the Board of Governors, which relate directly to the individual investment shares of the signatories to the INTELSAT Agreement, the voting participation of any Governor would exceed forty per cent of such total voting participation, the excess above forty per cent is to be distributed equally to the other Governors on the Board of Governors.

### III. THE FUTURE COURSE OF THE INTERNATIONAL LAW OF COMMUNICATIONS

#### A. *Some Basic Parameters*

The substantial criticisms of the International Law of Communications that remain after the 1971 Definitive Agreements reforms and general changes to the INTELSAT structure, go to issues of the limits of functionalism and of functions-based and functions-oriented insti-

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26. Agreement relating to the International Telecommunications Satellite Organization "Intelsat" (opened for signature at Washington, Aug. 20, 1971), art. IX(g)(iv).

tutional machinery. If *functionalism*, up to date, has tended to determine and control *policy* in the *first phase* development of the International Communications Law, is it not time now for *policy* to be asserted and to begin to take over the direction of the development of the emerging *second phase* in that law?<sup>27</sup> And should not the *specialist technocrats* yield now to the *generalists* in the further elaboration of that law, particularly in those areas raising speech and communication values, and where the functional interests are, on first sight at least, perhaps more marginal?

I have referred earlier to the pluralistic character of the institutional structure and organization of International Communications Law. This pluralistic character is becoming apparent in the emergent *second phase*. Many different people and organizations are beginning to get into the act; and the initiatives tend to be most frequent and varied in those international agencies where the generalist international lawyers tend to predominate, with INTELSAT itself tending to apply something of a self-denying ordinance at this point.

It is not without significance that the main pressures for elaboration of a code of principles to govern use of satellite broadcasting—a “broadcaster’s code of ethics,” in effect—should come from UNESCO:<sup>28</sup> or that the Soviet Union should have used the U.N. Outer Space Committee as a principal forum for propagation of its own Draft

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27. In the thesis that follows, it is not suggested that *function* and *policy* are necessarily mutually exclusive, or for that matter that the *specialists* and *generalists* always belong in two separate and distinct, professional, watertight legal compartments: some jurists—Judge Lachs, for example, (*see infra*, note 38) are clearly, at one and the same time, distinguished generalists and specialists. These are not, in analytical jurisprudential terms, Hohfeld’s *jural opposites* (W. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* (1913)). They are, rather, differences in shading and emphasis but of a degree sufficient to present a clear qualitative distinction; hence the appropriateness of using Radbruch’s special system of categorization in terms of legal *antinomies* (*supra*, note 6). This qualitative distinction, in terms of basic legal thought processes and intellectual orientation, and also in terms of professional legal training and formation, becomes apparent, it is suggested, when one examines the actual legislative and administrative decision-making and also the legal personnel involved in the decision-making in any of the main technically-based, specialized U.N. agencies, as compared to the U.N. General Assembly itself or to other U.N. agencies where the technical, scientific exigencies are a little less demanding, for example, in UNESCO.

28. *See, for example*, UNESCO Declaration of Guiding Principles on use of Satellite Broadcasting for the Free Flow of Information, Spread of Education and Greater Cultural Exchange, U.N. Doc. A/AC.105/109 (1972). And *see, generally*, Courteix, *L’Organisation des Nations-Unies pour l’Éducation, la Science et la Culture (U.N.E.S.C.O.) et son Rôle dans le Domaine des Télécommunications Spatiales*, in CENTRE NATIONALE DE LA RECHERCHE SCIENTIFIQUE, *LES TÉLÉCOMMUNICATIONS PAR SATELLITES: ASPECTS JURIDIQUES* 261 (1968); Sommerlad, *Broadcasting from Space—Cooperation or Chaos?*, 38 TELECOMMUNICATION J. 399 (1971).

Convention on the same subject.<sup>29</sup> As INTELSAT, profiting perhaps from the demonstrated lessons of the political difficulties of functions-based specialist international organizations when they stray too easily from the areas of their own (functional) "special competence" into peripheral issues where the political elements run high,<sup>30</sup> has shown no marked enthusiasm for getting involved in this area of policy, the question arises as to whether the I.T.U., newly reformed and restructured for that purpose, might not be a suitable institutional base for developing and applying the principles to *policy* control of international telecommunications broadcasting.

The most recent political initiative of the Soviet Union for action in this particular area of program content control in television broad-

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29. This particular Soviet initiative had its origin in a request by the Soviet Minister of Foreign Affairs to the U.N. Secretary-General, August 8, 1972, for inclusion of the item entitled "Preparation of an International Convention on Principles Governing the Use by States of Artificial Earth Satellites for Direct Television Broadcasting," in the draft agenda for the twenty-seventh session of the U.N. General Assembly. U.N. Doc. A/8771, Aug. 9, 1972. The item was referred by the General Assembly to its First Committee.

On the report back by the First Committee to the General Assembly, U.N. Doc. A/8864 (1972), the General Assembly resolved to ask the Committee on the Peaceful Uses of Outer Space to study the Soviet Draft Convention and other documents, and to "undertake the elaboration of such principles as soon as possible." G.A. Res. 2916, 27 U.N. GAOR Supp. 27, at 35, U.N. Doc. A/8864 (1972): Preparation of an international convention on principles governing the use by States of artificial earth satellites for direct television broadcasting. See Report of the First Committee, Preparation of an International Convention on Principles governing the use by States of Artificial Earth Satellites for Direct Television Broadcasting, U.N. Doc. A/8864 (1972); Committee on the Peaceful Uses of Outer Space, Report of the Working Group on Direct Broadcasting Satellites of the work of its Fourth Session, U.N. Doc. A/AC.105/117 (1973).

As to the Committee on the Peaceful Uses of Outer Space, see Dembling & Arons, *Space Law and the United Nations: The Work of the Legal Subcommittee of the United Nations Committee on the Peaceful Uses of Outer Space*, 32 J. AIR L. & COM. 329 (1966); d'Arcy, *L'Organisation des Nations-Unies et les Communications par Satellites*, in CENTRE NATIONALE DE LA RECHERCHE SCIENTIFIQUE, *LES TÉLÉCOMMUNICATIONS PAR SATELLITES: ASPECTS JURIDIQUES* 213, at 216-19 (1968). More generally, see Abdel-Ghani, *The Role of the United Nations in the Field of Space Communications*, 38 TELECOMMUNICATION J. 393 (1971).

30. The ICAO, for example, has encountered such political difficulties when caught in the middle of various Arab-Israeli confrontations in recent years. See, for example, most recently, 18 U.N. SCOR Res. 262 (1968), concerning an Israeli "reprisal" commando attack on Beirut International Airport; the U.N. Security Council action followed on violent, but politically inconclusive, debates on the same subject within the ICAO Council; ICAO Council Resolution of June 4, 1973, concerning the Israeli shooting down of Libyan civil aircraft, ICAO News Release, June 1973; ICAO Council Resolution of Aug. 20, 1973, concerning Israeli forcible diversion and seizure of Lebanese civil aircraft believed to be carrying Palestinian terrorist leaders, ICAO News Release, Aug. 1973.

casting<sup>31</sup> is hardly surprising, granted long-range trends and directions in Soviet policy on international organization in general. Indeed, the exact form and content of the Soviet proposals could have been readily predicted in advance from past Soviet positions in particular U.N. specialized arenas.

First, there is an exaggerated Soviet emphasis on State sovereignty, omnipresent in Soviet positions taken in the detailed bilateral Soviet-U.S. disarmament discussions in the early years of the *post-Cold War détente*, when too many sensible technically-based suggestions for verification procedures went down on the rock of Soviet refusal to permit foreign observers on Soviet territory. The issue is no longer paramount in the disarmament discussions, of course, as advances in underground explosion detection technology have tended to obviate the need for on-the-spot surface inspection teams. Its survival today in other areas of Soviet foreign policy-making is probably simply another example of the continuing bureaucratic momentum of old policy constructs—in Soviet society no less than in American society—long after their original *raison d'être* has disappeared: what Dewey has characterized as the “terminal value” inherent in old ideas.

Of more immediate significance in terms of concrete Soviet positions in contemporary arenas of international confrontation or exchange is the firm Soviet opposition to “Open Society” values in the speech and communication area. Those of us who remember the originally highly stimulating, but subsequently interminable and boring,<sup>32</sup> debates carried on throughout most of the 1960's in various international arenas, both private and official, over the Principles of Peaceful Coexistence—in the United Nations' own preferred euphemism, Friendly Relations and Cooperation among States—will remember the strongly reiterated Soviet fears over what was characterized as “hostile propaganda,”<sup>33</sup> which the Soviet Union insisted as being a violation, *per se*, both of the U.N. Charter-based principle of Non-Intervention and certainly of the principles of Peaceful Coexistence themselves.<sup>34</sup>

31. See note 29 *supra*.

32. The transition occurred when the second and third diplomatic teams had succeeded the original star performers such as Gregory Tunkin, Manfred Lachs, and Sir Kenneth Bailey.

33. See, for example, Morozov, *K voprosu ob otvetstvennosti za propagandu voimii*, [1959] SOVETSKII EZHEGODNIK MEZHDUNARODNOGO PRAVA 312.

34. See generally, N. S. KHRUSHCHEV, AN ACCOUNT TO THE PARTY AND THE PEOPLE (1961); W. W. KULSKI, PEACEFUL COEXISTENCE (1959); Hazard, *Codifying Peaceful Coexistence*, 55 AM. J. INT'L L. 109 (1961); Hazard, *Coexistence Codification Reconsidered*, 57 AM. J. INT'L L. 88 (1963); McWhinney, “Peaceful Coexistence” and Soviet-Western International Law, 56 AM. J. INT'L L. 951 (1962); McWhinney, *Soviet*

The difficulty Western jurists had in debating these particular Soviet arguments lay in the fact that, as presented by Soviet jurists, "hostile propaganda" was, at best, a cloud concept without any limiting parameters; and, at worst, a device for excluding any sort of rational discussion as to the need for change in the *status quo* of international relations.

This is not the place to undertake an ultimate appraisal of the political or juridical utility of the U.N. General Assembly's Special Committee on Friendly Relations and Cooperation among States whose Labors of Sisyphus eventually culminated, on October 24, 1970, in its essentially vague and diffuse Declaration of Principles. One of the American team working on the final project, I hope tongue in cheek, has hailed the Declaration as "representing one of the major achievements of the Twenty-Fifth Anniversary Session of the United Nations."<sup>35</sup> The same observer has gone on to suggest that, as a result of all those interminable debates, the legal advisers to the Foreign Offices have had their "perceptions of the issues involved . . . clarified and sharpened."<sup>36</sup> This is damning with faint praise!

Nevertheless, because of its very generality and the abstractness, and, if you wish, the open-endedness—allowing it to mean all things to all men—the final Declaration of Principles of Friendly Relations has not presented any very troublesome moments for Western observers concerned about its potential application as an instrument of international thought-control. To criticize the final product is not, of course, to criticize the whole exercise of the Peaceful Coexistence (Friendly Relations) debate; for, in its origins, that debate clearly facilitated that vital East-West dialogue that preceded and ultimately helped to develop and extend the *post-Cold War détente*. The Declaration of Principles of Friendly Relations that finally emerged in 1970, vacuous and open-ended as it turned out to be, may be, indeed, simply an example of what the then Senator James Byrnes, in his characterization of President Roosevelt's final plan to pack the United States Supreme Court, called "Running after a bus after you have already caught it." By 1970, the East-West *détente* was already long since a concrete

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*and Western International Law and the Cold War in the Era of Bipolarity*, 1 CAN. Y.B. INT'L L. 40 (1963); McWhinney, *Le Concept Soviétique de "Coexistence Pacifique" et les Rapports Juridiques Entre l'U.R.S.S. et les États Occidentaux*, [1963] REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC 545; E. McWHINNEY, "PEACEFUL COEXISTENCE" AND SOVIET-WESTERN INTERNATIONAL LAW (1964); G. TUNKIN, *VOPROSHI TEORII MEZH DUNARODNOGO PRAVA* 5-65 (1962).

35. Rosenstock, *The Declaration of Principles of International Law Concerning Friendly Relations*, 65 AM. J. INT'L L. 713, 714 (1971).

36. *Id.* at 735.



reality. It was surely, then, an exercise in supererogation to continue to pour intellectual energies, now needed for particularizing and refining that *détente* in myriad, concrete, low-level, problem-situations, into further windy debates over high-level, abstract general principles.

### B. *The Soviet and Canadian-Swedish Proposals*

Thus, when one looks at the Soviet Draft Convention on Principles governing the use by States of Artificial Earth Satellites for Direct Television Broadcasting, deposited before the U.N. Outer Space Committee and subsequently considered by the U.N. General Assembly's First Committee and by the U.N. General Assembly itself in October and November of 1972, one can hardly avoid feeling: "I have been here before." Take Article 4 on the Draft Convention, for example:

States Parties to this Convention undertake to exclude from television programmes transmitted by means of artificial earth satellites any material publicising ideas of war, militarism, Nazism, national and racial hatred and enmity between peoples, as well as material which is immoral or instigating in nature or is otherwise aimed at interfering in the domestic affairs or foreign policy of other States.

Just imagine that Article standing up to a constitutional challenge in an American court under the United States Constitution's First (Free Speech) or Fifth (Due Process: vagueness) Amendments. In the very open-endedness and self-defining character of the terms it employs, and in the blanket character of the authoritative control that it thus seems to envisage, Article 4 is redolent of Soviet-style, Cold War era, diplomatic drafting; and so perhaps it should not be taken too seriously in the subsequent era, not merely of the *post-Cold War détente*, but of the Nixon-Brezhnev *post-détente entente*. And perhaps, also, we should extend this same polite indulgence to provisions such as Article 6 of the Soviet Draft Convention which stigmatizes as "illegal and as incurring the international liability of States" the following sample categories:

- (a) Broadcasts detrimental to the maintenance of international peace and security;
- (b) Broadcasts representing interference in intra-State conflicts of any kind;
- . . . .
- (e) Broadcasts undermining the foundations of the local civilization, culture, way of life, traditions or language;

- (f) Broadcasts which misinform the public on these or other matters.

Representative of the older, Cold War era exaggerated Soviet emphasis on State sovereignty, are the following sections of the Soviet Draft Convention (emphasis supplied):

Article 5: States Parties to this convention may carry out direct television broadcasting by means of artificial earth satellites to foreign States *only with the express consent of the latter*.

Article 6 (1): Transmission of television programmes by means of artificial earth satellites to foreign States *without the express consent of the latter* shall be regarded as illegal and as incurring the international liability of States.

Slightly more ominous-sounding, perhaps, is Article 9 of the Soviet Draft Convention:

Article 9 (1): Any State Party to this Convention may *employ the means at its disposal to counteract* illegal television broadcasting of which it is the object, *not only in its own territory but also in outer space and other areas beyond the limits of the national jurisdiction of any State*.

I take it, however, that the vaguely threatening implications of Article 9 are rendered a little more palatable by the recollection that the Soviet Draft Convention, like all other International Law projects, would have to be subjected to normal principles of construction and be so interpreted, so far as it be imprecise, compatibly with pre-existing, well-established norms of general International Law, such as the general principle of the "Freedom of the Air" established under the Chicago Convention of 1944<sup>37</sup> and related treaties, and the general principles as to the peaceful exploration and use of Outer Space as established in various U.N. General Assembly Resolutions<sup>38</sup> (and, most

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37. Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, T.I.A.S. No. 1591, 51 U.N.T.S. 295. See generally, McWhinney, *International Law and the Freedom of the Air*, 1 RUTGERS-CAMDEN L.J. 229 (1969).

38. See generally, Lachs, *The International Law of Outer Space*, [1964] HAGUE RECUEIL 27 *passim*; M. LACHS, *THE LAW OF OUTER SPACE: AN EXPERIENCE IN CONTEMPORARY LAW-MAKING* (1972).

notably in Resolution 2222 (XXI) of 19 December, 1966) and as established also in the Space Treaty of 27 January, 1967,<sup>39</sup> which latter is in fact expressly referred to in the Preamble to the Soviet Draft Convention.

We have spent some time with the Soviet Draft Convention in this particular area of Space Communications only because it has the advantage, in comparison to other, "compromise" proposals advanced in the U.N. Outer Space Committee—or in comparison to other, parallel or competing projects, in other arenas—of a certain comprehensiveness and general integrity, or wholeness of philosophy and of style. The so-called Canadian-Swedish proposal advanced to the Working Group on Direct Broadcast Satellites of the U.N. Outer Space Committee,<sup>40</sup> at the time that the Working Group was considering the Soviet Draft Convention, has the advantage of eliminating some of the more obvious cloud concepts of the Soviet draft. And on balance the Canadian-Swedish proposal does seem to tilt the balance between the conflicting societal, world community interests present in the problem-situation just a little more in the direction of general speech and communication interests than of authoritative controls and censorship.

One wonders, however, whether some greater deference to the normally understood requirements of Soviet-Western diplomatic gamesmanship—the elaborately ritualistic "rules of the game," of move and of proportionately-responsive counter-move and of reciprocal give-and-take—perfected over more than a decade of Soviet-Western diplomatic exchanges in the *post-Cold War détente* era, might not have yielded an end-result more cognizant of the broadcaster's affirmative obligations of communication of ideas. The Soviet Draft Convention, on this view, was deliberately made to contain expendible, "give-away" provisions and phrasing, drafted with the conscious knowledge that they would be objectionable to Western interests and also go well beyond Soviet needs. Diplomatic gamesmanship then required the filing of a correlative, "hard-line" Western draft as a pre-condition to bartering and exchange between the two drafts and to the production of an eventual, reasonable compromising of the different interests involved. The Canadian-Swedish "compromise" proposal, on this view, since presented without the advantage of any preliminary filing of a negotiable Western "hard-line" draft, may have unintentionally contributed

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39. Treaty on Principles governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347.

40. Canada and Sweden: Proposal "Draft Principles governing Direct Television Broadcasting by Satellite," U.N. Doc. A/AC.105/WG.3/L.4 (1970).

to an eventual downgrading of the weight to be accorded to speech and communication interests when the final diplomatic balancing of the community controls—"Open Society" interests conflict is made, and thus have "compromised" the long-range compromise solution originally envisaged in advance by both sides. It may also, of course, have prematurely jumped the gun in an area of the International Law of Communications where time is definitely not of the essence, the U.N. Working Group itself having estimated that it will not be until 1985 that direct satellite television and broadcasting into home receivers becomes operational,<sup>41</sup> and so the problem of any community control of program content becomes a concrete issue.

One curious note is that the Canadian-Swedish proposal resolutely embraces, not merely in the Preamble but also in the substantive parts, the Principles of Friendly Relations (Peaceful Coexistence), where, by comparison, the Soviet Draft Convention blithely ignores its own offspring altogether. Perhaps the difference in the two texts indicates a certain cultural lag in the Canadian and the Swedish Foreign Ministries in taking note of changes not merely in the objectives but also in the verbal formulae—the folklore—of Soviet foreign policy. I think that a Soviet jurist, presented with this point, might reply, with humor, as Judge Jerome Frank, a leader of the American Legal

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41. Committee on the Peaceful Uses of Outer Space, Report of the Working Group on Direct Broadcast Satellites on its Third Session, U.N. Doc. A/AC.105/83 at 4 (1970):

"III. Satellite Broadcasting for Individual Reception.

"15. At its first session in February 1969, the Working Group made the following reference, in its conclusions, to the estimated time-scales for broadcasting-satellites service into individual receivers:

(i) "Direct broadcast of television into augmented home receivers could become feasible technologically as soon as 1975. However, the cost factors for both the earth and space segments of such a system are inhibiting factors. . . . Therefore, it is most unlikely that this type of system will be ready for development on an operational basis until many years after the projected date of feasibility."

(ii) ". . . direct broadcast television signals into existing *un-augmented* home receivers on an operational basis is not foreseen for the period 1970-1985. This reflects the lack of technological means to transmit signals of sufficient strength from satellites."

"16. In view of the absence of any evidence that programmes were being pursued to develop the very costly and complex technology of broadcasting from satellites direct to either augmented or un-augmented home receivers, the Working Group saw no reason to revise these conclusions."

Realists, used to do, "That was then and this is now!" Why waste time debating Peaceful Coexistence (Friendly Relations) when it is already achieved as a concrete fact, and fully operational in the conduct of East-West relations?

### C. *Other Proposals*

The UNESCO statement, Declaration of Guiding Principles on the Use of Satellite Broadcasting for the Free Flow of Information, Spread of Education and Greater Cultural Exchange,<sup>42</sup> was adopted by the General Conference of UNESCO at its seventeenth session in 1972, by a vote of 55 in favor, 7 against, and 22 absentions. As adopted, the UNESCO Declaration is not legally binding on States. The UNESCO Declaration reflects, understandably enough, considering the *generalist*, non-functional character of the UNESCO delegates' approach to telecommunications, a concern with the elaboration of general codes and principles in advance of the functional achievement of international satellite broadcasting.

The Declaration also, in its freedom from formal deference to inconvenient, since limiting, technical facts, gives the impression of having been put together in a hurry, more or less in a desire to stake out one's own Balkan State-style special "territorial claim" in competition with other U.N. specialized agencies; and with its drafters either assuming, blithely, that the whole subject was *tabula rasa* or else displaying a rather cavalier lack of concern for the vast amount of work already done in the general area by other U.N. specialized agencies and for the need, in consequence, of some sort of prior consultation and effective continuing liaison with them. Beyond that, however, the same main divisions of opinion were manifest in the UNESCO discussions as in the U.N. Committee on the Peaceful Uses of Outer Space. Some states declaimed against the dangers of legally uncontrolled international satellite broadcasting and stressed the importance of strict respect for the principles of State sovereignty. Other states, in contrast, were concerned that the UNESCO Declaration did not address itself to the importance of maintaining the free flow of ideas and information. They suggested, in this regard, that adequate controls against any abuses in international satellite broadcasting could be found in the regulations adopted by the I.T.U.'s World Administrative Radio Conference for Space Telecommunications (WARC-ST) in 1971,<sup>43</sup> and in the voluntary, cooperative arrangements of the regional unions of broadcasters.

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42. U.N. Doc. A/AC.105/109 (1973).

43. See Ploman, *Observation on the World Administrative Radio Conference*

Concerning the I.T.U.'s 1971 action, it may be noted that the WARC-ST resolutions provide that all countries are to have equal rights in the use of the frequency bands allocated to various space radiocommunication services, and of the geostationary orbit, insofar as there is to be no permanent priority for these services that might create an obstacle to the establishment by other countries of their own space systems.<sup>44</sup> The WARC-ST has, in this respect, introduced new coordination procedures with a view to more efficient use of the frequency spectrum and the geostationary satellite orbit. In addition, the WARC-ST has introduced a new regulatory provision placing an obligation on a member responsible for transmissions to use technical means available to reduce, to the maximum extent practicable, the radiation of the emissions over other countries unless there has been prior agreement with the countries concerned.<sup>45</sup> It has also established significant power flux density limitations in the two lower bands available for satellite broadcasting.<sup>46</sup>

The efficacy of auto-limitation (self-restraint) in broadcasting on the part of the regional unions of broadcasters is, of course, hard to quantify in mathematically precise terms. But, as Jean d'Arcy has reminded us on more than one occasion, even in the darkest periods of government-controlled broadcasting of propaganda directed to other countries—most notably, when Dr. Goebbels, as Reich Propaganda Minister, was in control of Hitler Germany's international radio broadcasting system—the dangers from "hostile propaganda" proved to be very much exaggerated.<sup>47</sup> And so perhaps this point should be kept in mind amid the various pressures for more and more effective and comprehensive authoritative control and censorship devices.<sup>48</sup>

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for *Space Telecommunication (WARC-ST) Geneva, June-July 1971*, in TWENTIETH CENTURY FUND, *GLOBAL COMMUNICATIONS IN THE SPACE AGE* 56 (1972); Committee on the Peaceful Uses of Outer Space, Report of the Working Group on Direct Broadcast Satellites of the work of its Fourth Session, U.N. Doc. A/AC.105/117 (1973) [hereinafter cited as Fourth Session].

44. Fourth Session, at app. II, para. 5. See generally Ploman, *supra* note 43, at 60.

45. Fourth Session, at app. II, para. 3; Ploman, *supra* note 43, at 61.

46. Fourth Session, at app. II, para. 2; Ploman, *supra* note 43, at 58-59.

47. D'Arcy, *Direct Broadcast Satellites and the Right to Communicate*, EUROPEAN BROADCASTING UNION REVIEW, Nov. 1969, at 14; J. D'ARCY, *THE UNITED NATIONS AND SPACE COMMUNICATIONS* (1969); D'Arcy, *L'Organisation des Nations-Unies (O.N.U.) et les Communications par Satellites*, in CENTRE NATIONALE DE LA RECHERCHE SCIENTIFIQUE, *LES TÉLÉCOMMUNICATIONS PAR SATELLITES* 213 (1968); D'Arcy, *Direct Broadcast Satellites and Freedom of Information*, in *THE INTERNATIONAL LAW OF COMMUNICATIONS* 149 (E. McWhinney ed. 1971).

48. For a balanced analysis of the policy antinomies in this area, see Terrou,

In our consideration of the rational community response to the U.N. General Assembly Resolution 2916 (XXVII) of 14 November, 1972, directing the elaboration of principles governing the use by States of artificial earth satellites for direct television broadcasting, I would suggest the following points. First, I am doubtful of the overall utility or administrative practicability of legal statements or codes of *a priori*, abstract general principles that attempt to control content in international broadcasting; and I see real dangers of such statements being misused in unwarranted attempts to control the free flow of information and ideas.

Second, if such a *a priori* legal codes, so popular with Continental European-trained or influenced Civil Law jurists (of whom, of course, Soviet jurists are part), are to be formulated, then it is quite undesirable that their administrative elaboration and application be entrusted to specialist, functionally-developed and functions-oriented international organizations like INTELSAT, INTERSPUTNIK, or even the I.T.U. Any such "content control" responsibilities would run the risk of taking these specialist, functions-oriented organizations outside their "special competence" by involving them gratuitously in major political-ideological conflicts. This would unnecessarily impair the high technical efficiency and technical neutrality that they have so carefully and painstakingly built up. The unfortunate experiences of ICAO in recent years, when letting itself drift too easily into high "political" conflicts, should give reason for pause here.

One may ask, also, whether the I.T.U., as perhaps the most "technical" of all international agencies, showed good sense and respect for its own special technical competence and obligations in voting, at the opening of its Plenipotentiary Conference in Torremolinos, in September, 1973, to exclude South Africa and Portugal from all its meetings because of their respective "racial and colonial policies."<sup>49</sup> A technical, functions-based international organization depends, far more than overtly political organs like the U.N. General Assembly or

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*La Liberté de l'Information à l'Ère Spatiale*, in CENTRE NATIONAL DE LA RECHERCHE SCIENTIFIQUE, LES TÉLÉCOMMUNICATIONS PAR SATELLITES 175 (1968); Catala-Franjou, *Responsabilité Civile et Pénale pour Émissions Retransmisés par des Satellites de Télécommunications*, in CENTRE NATIONALE DE LA RECHERCHE SCIENTIFIQUE, LES TÉLÉCOMMUNICATIONS PAR SATELLITES (1968); J. Klein, *La Propagande de Guerre et les Satellites de Diffusion Directe*, in L'UTILISATION DE SATELLITES DE DIFFUSION DIRECTE 24 (1970); Errera, *Problems Raised by the Content of Television Programs Transmitted by Telecommunication Satellites*, in THE INTERNATIONAL LAW OF TELECOMMUNICATIONS 85 (E. McWhinney ed. 1971).

49. Press Section of the Office of Public Information of the United Nations, Press Release WS/627 (N.Y. Oct. 5, 1973).

political-cultural organs like UNESCO, on universality of membership and on consequent universal application of and respect for its technical rules, in order to remain effective.

My own preference, in fact, would be for more modest, technical formulations than either the Soviet Draft Convention or the UNESCO Declaration—formulations directed, like the I.T.U.'s 1971 WARC-ST regulations, to what we might call the *procedural* due process of international broadcasting control, rather than to the more difficult *substantive* issues on which legally meaningful international consensus seems quite unlikely, on other than a limited, regional basis,<sup>50</sup> in an era of still-continuing ideological pluralism and basic value diversity. If the I.T.U.'s WARC-ST regulations could be accepted as the working basis for elaborating any international control mechanisms, then either the I.T.U. itself<sup>51</sup> or else INTELSAT and INTERSPUTNIK, either separately and severally, or else conjointly—perhaps on a sort of European Security Conference-projected NATO-Warsaw Pact condominium arrangement<sup>52</sup>—could serve as the responsible control author-

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50. The possibilities of fruitful cooperation in a "regional" basis between countries having a substantial degree of homogeneity of basic values should not be underestimated. For developments on a continental European regional basis, see, e.g., Bourelly, *La Coopération des Organisations Européennes de Coopération Spatiale*, in E. WcWHINNEY & M. BRADLEY, *NEW FRONTIERS IN SPACE LAW* 46 (1969); Bourelly, *La Coopération Européenne dans le Domaine des Télécommunications par Satellites*, in CENTRE NATIONALE DE LA RECHERCHE SCIENTIFIQUE, *LES TÉLÉCOMMUNICATIONS PAR SATELLITES* 269 (1968); Bourelly, *L'Eurovision et les Satellites Européens de Télécommunications*, in *L'UTILISATION DE SATELLITES DE DIFFUSION DIRECTE* 31 (1970); O. GIARINI, *L'EUROPE ET L'ESPACE* (1968); Lagarge, Nouaille & Mertens, *Les Programmes Européens*, in INTERNATIONAL TELECOMMUNICATION UNION, *COLLOQUE "ESPACE ET RADIOCOMMUNICATIONS"* 56, 61, 66; Bourelly, *La Conférence Spatiale Européenne de Bad Codesburg*, 23 *REVUE FRANCAISE DE DROIT AÉRIEN* 22 (1969); BOURELY, *LA CONFÉRENCE SPATIALE EUROPÉENNE* (1970); Hondius, *International Control of Broadcasting Programmes in Western Europe*, in *THE INTERNATIONAL LAW OF COMMUNICATIONS* 69 *passim*; INTERNATIONAL BROADCAST INSTITUTE, *CONSIDERATIONS FOR A EUROPEAN COMMUNICATIONS POLICY* (1973). For a discussion of other recent initiatives in regionally-based international cooperation in this area, see Valladão, *South American Contributions to the Solution of the Juridical Problems of Telecommunications and Direct Satellite Broadcasting*, in *THE INTERNATIONAL LAW OF TELECOMMUNICATIONS* 138 *passim* (1971); Rao, *The Contribution of Telecommunications and Direct Satellite Broadcasting to Technical Assistance and Nation-Building in the "New" Countries: An Asian Viewpoint*, *id.* at 113 *passim*; Elias, *An African Viewpoint*, *id.* at 122.

51. The International Telecommunications Union can better serve as a control authority if significant reforms can be made in its own internal decision-making structure and processes along the lines proposed by the Twentieth Century Fund and American Society of International Law study groups. See TWENTIETH CENTURY FUND, *GLOBAL COMMUNICATIONS IN THE SPACE AGE* (1972); D. LEIVE, *THE FUTURE OF THE INTERNATIONAL TELECOMMUNICATION UNION* (1972).

52. In advancing the suggestion for a Soviet-Western, INTELSAT-INTER-



ity. This role could be assumed without too much danger of derogating from, or damaging, their own special technical competence of those organizations since the WARC-ST regulations-based mechanisms are of an essentially technical character.

#### IV. CONCLUSION

If the chosen way, however, is to be the pursuit of another general, *substantive* due process-oriented, multilateral convention, that attempts to steer between the Scylla and Charybdis of rival, ideologically-based attempts at *a priori*, abstract definition of the desirable limits of speech and communication, then we are likely to end up, and that only after a number of years, with an exercise very much like that of the U.N. General Assembly's Special Committee on Friendly Relations (Peaceful Coexistence). It is, perhaps, for the reasons indicated earlier, a little unfair to say of the U.N. General Assembly Special Committee's final product of October 24, 1970, that, in the words of the schoolboy's Latin proverb—"The mountain labored and brought forth a mouse." Nevertheless, we may wonder whether all the

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SPUTNIK-based cooperation in the field of international telecommunications broadcasting control and regulation, it is not, of course, implied that INTELSAT and INTERSPUTNIK are necessarily congruent as to range of membership, assets, or even functional and policy imperatives. But then, neither are NATO and the Warsaw Pact. If the path of future Soviet-Western cooperation in this area should in fact proceed not from a duality (INTELSAT-INTERSPUTNIK) of international organization but from some sort of fusion of organizations (perhaps by the Soviet Union opting to join INTELSAT with the special advantages of access to vastly increased technical facilities and capital resources that any such step would seem to offer it), then neither absolute parity of voting power between the United States and the Soviet Union, nor a voting power for the Soviet Union limited to its actual percentage of capital input (quite low, in the foreseeable future) would seem to be involved. The Soviet Union was satisfied to accept less than full parity of voting powers with the United States in the case of UNCTAD, and the United States and other Western countries were, at the same time, happy to accord the Soviet Union considerably more in voting powers than its financial contributions warranted. Changes in the Definitive Agreements for INTELSAT to take account of any such eventualities seem not beyond the intellectual capacities of the present INTELSAT family. See generally TWENTIETH CENTURY FUND TASK FORCE, COMMUNICATING BY SATELLITE 13-21 (1969); Kopal, *East-West Cooperation in Space Telecommunications*, in THE INTERNATIONAL LAW OF COMMUNICATIONS 99 *passim* (E. McWhinney ed. 1971). A species of inter-bloc cooperation in the field of international telecommunications broadcasting, transcending the old Cold War era ideological conflicts, perhaps may be found in the Franco-Soviet cooperation in telecommunications activities in space; this cooperation is based upon a formal treaty—the special accord concluded between France and the Soviet Union on June 30, 1966, for the study and exploration of space for peaceful ends. See CENTRE NATIONALE DE LA RECHERCHE SCIENTIFIQUE, LES TÉLÉCOMMUNICATIONS PAR SATELLITES 413 *passim* (1968).

time and intellectual energies involved in yet another such exhausting process of essentially abstract international lawmaking could not be better directed to other, more urgent and concrete problems of international telecommunications broadcasting, such as the need to build a bridge, here as elsewhere in the contemporary world community, between "North" and "South"—between the industrialized countries, both Western and Communist, and the "new," developing countries, and the need to devote greater attention to special problems of technical assistance and technical development involved in direct satellite broadcasting to the Third World.<sup>53</sup>

## Comments

DAVID LEIVE\*

For the sake of interest, I want to confine my comments on Professor McWhinney's very excellent discussion to those areas in which we disagree. Preliminarily, I wish to state my belief that Professor McWhinney over-emphasizes the extent to which expertise on technical aspects of international communication is needed to analyze the field. Lawyers and political scientists can discuss the whole area of international communication intelligently without a high degree of technical preparation.

As I have noted elsewhere,<sup>1</sup> I disagree with Professor McWhinney's characterization of the whole series of developments in communications during the last ten years as the first phase of the international law of communications. To call these developments an international law of communications promises too much. Developments have been pluralistic, uncoordinated and functional, as Professor McWhinney has noted. While certain areas of the field are subject to international agreements or regulatory machinery, I suspect much of the field to which he refers could better be characterized as "activities." To refer to them as the international law of communications implies a great deal more regulatory order than in fact exists.

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53. See Sarkar, *Assessing Space Telecommunications for Developing Nations*, 38 TELECOMMUNICATIONS J. 425 (1971).

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1. *Book Review*, 66 AM. J. INT'L L. 441 (1972).

Our disagreement here does not concern what developments are taking place but how best to characterize them and determine their significance. Similar patterns of development are occurring in other areas of international law and organization. Groups of specialists—representing their governments—meet to establish procedures, standards or rules of conduct, but without thinking of their activities as either building institutions or formulating international law. Nevertheless, they establish procedures which countries generally are willing to follow because the procedures are more technically oriented than political.

Professor McWhinney has also commented on a recent switch, in the direct broadcast area as well as others, from the utilization of specialist forums for dealing with important issues, such as the International Telecommunications Union (I.T.U.), to the more generalist forum of the United Nations. This switch, according to Professor McWhinney, has been accompanied by the involvement of new participants to the discussion. It is true that a change has taken place. But it is less of a switch than the addition of generalists to the discussion, foreign ministry representatives who previously left the field to specialists but now are becoming involved either because of the “sex appeal” of the subject matter or its increasing importance.

I believe it is wrong to treat the field of international telecommunications as a subject which can be neatly divided into two categories—a technical category that specialists deal with, and a more general “policy” category to be left to the generalists. There is an enormous amount of interdependence between the technical and policy aspects of the field. More precisely, the subject matter is an integrated whole, yet we have analyzed it by dividing it into separate categories. Decisions made by specialists in technical forums can, without their realizing it, predetermine policy decisions made by generalists. When a United Nations working group or the General Assembly examines direct broadcasting from a generalist’s point of view, it is treating a subject confined by certain physical parameters as well as the technical, institutional rules which have been developed and adopted.

A third characterization which Professor McWhinney has made on which I would like to briefly comment concerns the relationship between INTELSAT and the I.T.U. Professor McWhinney has stated that INTELSAT is a particularly noteworthy development because of its specialized expertise in an area of new technology where the I.T.U. was less specialized. I do not think that this is the significant difference between the two organizations.

In my opinion INTELSAT and the I.T.U. are fundamentally different kinds of organizations. The difference between them is that INTELSAT is an operational organization, even on the intergovernmental level, while the I.T.U. is a regulatory institution. I think one can compare very roughly the relationship between INTELSAT and the I.T.U. with that between A.T.&T. and the Federal Communications Commission on the U.S. domestic level. This does not mean that the I.T.U. is not indirectly involved with some operational activities, nor that INTELSAT does not perform regulatory functions for its members which the I.T.U. might otherwise have provided.

However, I think that the fundamental difference between the organizations is that INTELSAT is primarily a pragmatic and business-oriented operational organization whose objective is to establish and provide certain kinds of communication facilities. It is unlike the United Nations specialized agencies, including the I.T.U., which regulate activities carried on by their member states. And even operationally, it is concerned with a much narrower range of communications matters than is the I.T.U. The challenge for INTELSAT will be not only to maintain and expand the established satellite system but to develop as an effective and efficient international institution—balancing the divergent considerations and interests which are reflected in its complex structure and in the relationships between its various organs.

Finally, I would like to comment on the very important question Professor McWhinney has raised concerning whether or not the I.T.U. can be employed to a greater extent in dealing with direct satellite broadcasting. I think he is suggesting greater utilization of the I.T.U. in promulgating technical controls or regulations. He stops, I think quite correctly, short of recommending the grant of exclusive international jurisdiction of control over program content to the I.T.U.

The program content issue has not as yet been dealt with by the I.T.U., by its own choice, because it has no special competence to deal with the issue. It is an issue that I think can be separated from other regulatory issues arising from satellite broadcasting over which the I.T.U. will probably exercise some jurisdiction.

Two problems will arise from the inability or unwillingness of the I.T.U. to deal with program content. The first of these is, to which organization should the control of program content be delegated? The second problem is, if the United Nations or another organization is granted some jurisdiction over program content, what relationship should exist between that body and the I.T.U.? As I have noted earlier,

the problems of international communications do not lend themselves to easy compartmentalization. If no coordination between the I.T.U. and the organ which regulates program content is established, the procedures of the former, ostensibly promulgated to resolve technical disputes between countries, may be used to frustrate the policy of the latter. Thus, where a country has a procedural right—as it now has under the regulations adopted by the 1971 WARC—to object on technical grounds to a proposed direct broadcast system, it well might use this right to advance objections which are really political in origin. Although it is theoretically possible to distinguish technical from political aspects of direct satellite broadcasting, in practice this distinction would be very difficult to maintain.

If the I.T.U. were to involve itself more deeply in the area of direct broadcasting, short of the program content issue, it would have to undergo some changes which I consider unlikely to occur. Even though I.T.U. regulations with respect to space communications have had substantial consequences in non-technical areas, the organization has not been geared for dealing with a wide variety of broader non-technical considerations. For the I.T.U. to broaden the scope of its considerations, a whole range of corresponding changes must occur at national levels, because the I.T.U.'s activities necessarily reflect governments' conceptions of the I.T.U. Within many governments, little coordination exists in the communications area between agencies concerned with I.T.U. matters and agencies concerned with related U.N. or UNESCO activities. National governments would have to integrate technical expertise and policy formulation in their delegations to the I.T.U., in order for the I.T.U. to broaden its approach.

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JOSEF C. NICHOLS\*

## I. DIRECT SATELLITE BROADCASTING AND THE UNITED NATIONS

The United Nations quickly recognized the potential contribution of satellite technology to "increasing the flow of information (between nations) and furthering the objectives of the United Nations."<sup>1</sup> As early as 1961, the General Assembly resolved that "com-

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1. Resolution 1963 (XVIII), United Nations, Official Record, 18th Session, Supp. No. 16 (A/5549), at 16, 17.

munications by means of satellite should be available to the nations of the world as soon as practicable on a global and non-discriminatory basis."<sup>2</sup> The principle of the free use of outer space on a non-discriminatory basis was secured by the Outer Space Treaty of 1967.<sup>3</sup>

In 1968 the General Assembly approved the establishment of the Working Group on Direct Broadcast Satellites. After studying the technical feasibility and costs of direct broadcast satellites,<sup>4</sup> the Working Group discussed the social, cultural and legal aspects of the satellites.<sup>5</sup> During these sessions a number of opposing views emerged, views which continue to characterize the debate over the use of direct broadcasting satellites. These views and the important draft resolutions which have come to express them have taken on considerable importance since the General Assembly has approved Resolution 2916 (XXVIII) which proclaims the need

. . . to elaborate principles governing the use by States of artificial earth satellites for direct television broadcasting with a view to concluding an international agreement or agreements.<sup>6</sup>

2. Resolution 1721 (XVI), United Nations General Assembly, Official Record, 16th Session, Supp. No. 17 (A/5100), at 6, 7.

3. T.I.A.S. 6347, 18 U.S.T. 2410, Article I. The Outer Space Treaty includes a reference to Resolution 110 (II) of the General Assembly which condemns "propaganda likely to provoke or encourage any threat to the peace."

4. United Nations Document A/AC 105/51, 26 February 1969.

5. United Nations Document A/AC 105/66, December 1969 and United Nations Document A/AC/105/83, 25 May 1970.

6. United Nations General Assembly Resolution 2916 (XXVII) 1972, adopted November 9, 1972. Resolution 2916 (XXVII) was adopted by a vote of 102 countries in favor, 7 abstentions and 1 against. The sole dissenting vote was cast by the United States.

In addition to proclaiming the need for establishing principles to govern direct satellite broadcasting, the Resolution directed that these principles be based on mutual respect for sovereignty and non-intervention in the domestic affairs of a State. The delegates' discussion of Resolution 2916 (XXVII) reflected the opposing views on the direct satellite broadcasting issue which had emerged in the sessions of the Working Group on Direct Broadcast Satellites; see text *infra*.

The United States representative opposed the Resolution on the ground that it failed to "put sufficient emphasis on the central importance of the free flow of information and ideas in the modern world. . . ." United Nations Document A/PV 2081, 9 November 1972, at 21, 22. The Soviet representative, responding to a Belgian statement supporting the United States' emphasis on the free flow of information, queried:

Who is going to be at the source of this flow of information, responsible Government officials or irresponsible private firms and companies which are ready to stoop to anything for profit? Any filthy flow of information would be disseminated by them. We do not intend to call that kind of flow "free flow of information". . . . [N]obody has the right to direct these

The divergence of opinion over which principles should govern direct satellite broadcasting fell into three main camps. The United States consistently has taken the position that direct satellite broadcasting should be governed by the principle of the free flow of information and should be practiced in accordance with the fundamental principles expressed in the Universal Declaration of Human Rights.<sup>7</sup> On the other hand, the Soviet Union, France and the developing countries have stressed the importance of protecting the sovereignty of States from external interference and the need to prevent direct satellite broadcasting from becoming a source of international tension. Accordingly they have advocated the formulation of firm and definite treaty obligations to govern direct satellite broadcasting. In 1972, Mr. Gromyko, the Foreign Minister of the U.S.S.R., proposed the inclusion of an agenda item on direct satellite broadcasting for the 27th Session of the United Nations General Assembly. The proposed agenda item was accompanied by a draft convention, entitled *Principles Governing the Use by States of Artificial Earth Satellites for Direct Television Broadcasting*, which formalized the Soviet position.<sup>8</sup>

In an effort to balance these conflicting points of view, a third, compromise position has emerged. This position, known as the Canadian-Swedish proposal, is based on the belief that it would be premature and counter-productive to legislate on the foreseeable issues raised by direct broadcasting before there is some practical experience with operational systems on a regional basis. The task of codification would be easier after some use of operational systems.

While the Working Group on Direct Broadcasting Satellites was

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polluted flows and streams at other countries, to instill them in the minds of other people to whom these new "ethical values" are completely alien. . . . United Nations Document A/C. 1/PV 1870, 25 October 1972, at 46, 47.

The Soviet view received the general support of the less developed countries. The Algerian representative stated:

We could hardly over-emphasize the need to protect the sovereignty of our youthful States from all foreign interference. In fact, television broadcasting by satellite raises the question of the preservation of the cultural heritage of peoples and the originality of our national cultures. It is obvious that the interpenetration of different cultures could serve to bring peoples together, but we must make sure, here and now, that it will not become an instrument of cultural imperialism, particularly when we know that this new technique will for a long time to come still be held solely in the hands of a few, more advanced nations. . . . United Nations Document, First Committee, 1/PV, 19 October 1972, at 41, 42.

7. Ambassador Bush (U.S.A.), First Committee, Provisional Verbatim Record, 12 October 1972.

8. U.N. Doc. A/8771 (9 Aug. 1972). See text *infra*, Section II.

proceeding with its work, the United Nations Educational, Scientific and Cultural Organization (UNESCO) also began a study on the implications of direct broadcast satellites. In December 1969, UNESCO called a *Meeting of Governmental Experts on International Agreements in the Space Communications Field*.<sup>9</sup> This meeting resulted in a draft resolution, the *Declaration of Guiding Principles on the Use of Satellite Broadcasting for the Free Flow of Information, the Spread of Education and the Greater Cultural Exchange*, (hereafter the UNESCO Declaration) which was adopted by the General Conference of UNESCO in November, 1972.<sup>10</sup> The Declaration serves to establish guiding principles and has no legally binding effect.

## II. THE SOVIET DRAFT CONVENTION AND THE UNESCO DECLARATION

Although they use different phraseology, both the UNESCO Declaration and the Soviet Draft Convention emphasize the concept that direct broadcasts from satellites by one country to another require the advance authorization of the receiving country. The UNESCO Declaration, in Article IX, proclaims the need that

States, taking into account the principle of freedom of information, reach or promote prior agreements concerning direct satellite broadcasting to the population of countries other than the country of origin of the transmission.

The Soviet Draft Convention provides, in Article V, that

States Parties to this Convention may carry out direct television broadcasting by means of artificial earth satellites to foreign States only with the express consent of the latter

and further states, in Article V(1), that

Transmission of television programmes by means of artificial earth satellites to foreign States without the express consent of the latter shall be regarded as illegal and as incurring the international liability of States.

However, the UNESCO Declaration is silent on the matter of steps which could be taken where broadcasts are deemed to be unauthorized, while the Soviet Draft Convention permits States to employ

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9. See UNESCO, "Reports and Papers on Mass Communications," No. 60, "Broadcasting from Space," Paris 1971.

10. UNESCO, General Conference, XVII Session, Paris 1972. Doc. 170/98, 14 November 1972, at 2-5.



the means at their disposal to counteract illegal television broadcasting directed at their territory. This authority extends beyond the States' own territory to outer space and other areas beyond the limits of the national jurisdiction of the States involved. The Draft Convention also asserts that "States Parties to this Convention agree to give every assistance in stopping illegal television broadcasting."

The UNESCO Declaration and the Soviet Draft Convention both adhere to the principle of allowing all States equal access to direct broadcast satellites. The UNESCO Declaration states that:

The benefits of satellite broadcasting should be available to all states without discrimination and regardless of their degree of development.<sup>11</sup>

In affirming the same position, the Soviet Draft Convention specifies that all States shall have access to conduct broadcasting as well as enjoying an equal right to the benefits of direct satellite broadcasting.<sup>12</sup>

During the United Nations General Assembly's discussion of the Soviet Draft Convention late in 1972, these principles of equal access were widely welcomed. However, representatives of the developing countries pointed out that, if these principles were to be meaningful at all, practical arrangements had to be made for their implementation. A number of representatives also suggested that it would be necessary to provide the developing countries with large-scale assistance in order to enable them to take advantage of the principle of equal access to direct satellite broadcasting.<sup>13</sup>

### III. INSTITUTIONAL IMPLICATIONS OF DIRECT SATELLITE BROADCASTING

Although the UNESCO Declaration appears on the whole to be more sympathetic to a multilateral approach to the problems raised by direct satellite broadcasting than the Soviet Draft Convention, neither the Declaration nor the Draft Convention proposes new institutional arrangements to deal with these problems. This is unfortunate because the emphasis which each document places on the protection of

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11. UNESCO Declaration, Art. III (1).

12. Soviet draft Convention, Art. I, which states:

All States shall have an equal right to carry out direct television broadcasting by means of artificial earth satellites . . . [and] . . . [a]ll States shall have an equal right to enjoy the benefits arising from direct television broadcasting by means of artificial earth satellites, without discrimination of any kind.

13. See *Direct Satellite Broadcasting and the Third World*, 13 COLUM. J. TRANSNAT'L L. 68 (1974), *infra*.

national sovereignty and the equal access of States to the benefits of satellite broadcasting suggests a potential need for new institutional mechanisms.

The prospect of a State taking unilateral action against "illegal" direct satellite broadcasts, as permitted under the Soviet Draft Convention, led several representatives at the 1972 session of the United Nations General Assembly to suggest alternative approaches to the problem. Foremost amongst these suggestions was that of including a new institutional element in the proposed legal instrument.<sup>14</sup> Under this suggestion, if a State claimed that the governing legal instrument had been violated, a mechanism would exist "to assess responsibilities and apply the corresponding sanctions."<sup>15</sup>

Similar suggestions for the creation of new institutional mechanisms have arisen in connection with discussion of the guarantee of equal access for all States to the benefits of direct broadcasting satellites. Perhaps the most ambitious of these was made by the representative of the Sudan who stated:

It is possible, for instance, to visualize a democratically appointed international council or councils to deal with the administration, the policy making, the programme formulation and supervision (of direct satellite broadcasts). In other words, the project could be under international control, since it is for international benefit.<sup>16</sup>

The strength of these proposals has derived from the need to secure large scale, multilateral assistance for the developing countries if they are to share in the benefits of direct satellite broadcasts.<sup>17</sup>

Nevertheless, it would be advisable to determine whether these new functions could be entrusted to existing institutions before advocating the creation of entirely new machinery. In its preamble, the UNESCO Declaration has cited with approval United Nations General Assembly Resolution 2733 (XXV) of December 16, 1970 which recommended that:

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14. The representative of El Salvador to the General Assembly recommended consideration of establishing ". . . suitable organs with well defined powers to solve the many problems which emerge daily with the increased use of space technology." United Nations General Assembly, 27th Session, PVR of 1868th meeting of the First Committee, 19 October 1972, A/C. 1/PV 1868 at 16.

15. United Nations General Assembly, XXVII Session, 1867th meeting of First Committee, October 1972 A/C. 1/PV 1867, at 42.

16. United Nations General Assembly, 27th Session, Prov. Verbatim Record of 1867th meeting, First Committee, 18 October 1972, A/C. 1/PV 1867, at 66.

17. See text accompanying note 13, *supra*.

Member States, regional and international organizations, including broadcasting associations, should promote and encourage international cooperation at regional and other levels in order, *inter alia*, to allow all participating parties to share in the establishment and operation of regional satellite broadcasting services and/or in programme planning and production.

It is clear that existing broadcasting unions<sup>18</sup> could play a very useful role in the international arrangements for direct satellite broadcasting, not only with respect to the problem of ensuring equal access but also in connection with issues related to unauthorized broadcasts. Formal recognition of this role might remove future controversies from the political arena to consideration in a professional context, and conceivably obviate altogether the need for any new institutional mechanism.

The General Assembly has not acted on the suggestions to create new institutional arrangements but it has requested the Secretary-General to transmit all documentation relating to the discussion of the Soviet Draft Convention to the Committee on the Peaceful Uses of Outer Space. When in the future the problem of institutionalization is raised again, it will be raised by the medium-sized developing countries. Any international organ for direct broadcast satellites is likely to have strong participation by these countries, giving them some measure of institutional protection against unwanted space broadcasts beamed at them by the larger countries. On the other hand, the technically advanced countries will in all likelihood oppose the creation of new international institutions and are likely to consider such institutions an unnecessary obstacle to the free exercise either of national sovereignty or of freedom of information.

#### IV. CONCLUSION

The problem facing the international community is to find an equitable balance between the free and non-discriminatory use of outer space, the free flow of information and due respect for the sovereignty of States, whether or not this requires the creation of new institutional mechanisms. Only when these principles are harmoniously reconciled will there be any realistic prospect for direct broadcasting by satellite

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18. The existing regional broadcasting unions include: the European Broadcasting Union (EBU), International Radio and Television Organization (OIRT), Asian Broadcasting Union (ABU), Union of National Radio and Television Organizations of Africa (URTNA), Arab States Broadcasting Union (ASBU), Caribbean Broadcasting Union (CBU) and *Asociación Interamericana de Radiofusión* (AIR).

to be consonant with its real purpose, "the interest of maintaining international peace and security and promoting international co-operation and understanding."<sup>19</sup>

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F. GORDON NIXON\*

Having witnessed or participated in the development of various international telecommunications arrangements since World War II, I would like to mention in this note some of the problems and achievements which I see in this intriguing field of endeavor among nations. My comments will be confined to a discussion of three aspects of the field: the forces which have contributed to the development of international telecommunications institutions; the infusion of multidisciplinary approaches into the treatment of telecommunications issues; and the prospects for international broadcasting.

When surveying the telecommunications field, one should not overlook the frailty of international arrangements. These arrangements work only to the extent that the participating countries consider them to be serving their national interests. Thus in certain areas, such as radio frequency utilization planning, all countries find their national interests best served by concluding international agreements which establish firm standards of behavior. On the other end of the spectrum are areas, such as broadcasting, which are so fraught with political and ideological sensitivities that as yet little attempt has been made to introduce multilateral standards. Between these extremes lie areas in which arrangements have been developed to facilitate two-way public telecommunications between countries. These arrangements have been achieved only after extensive international negotiations complicated by preoccupations with national prestige and industrial competition.

Early progress toward establishing international standards in the telecommunications field resulted from a widely-held desire to exploit for civil use the unprecedented developments in radio navigation and communication devices which occurred during World War II. Coupled

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19. Outer Space Treaty, *supra* note 3, Art. III.

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with the compelling need for global uniformity in both ground and air installations to assure the full mobility of aircraft, this desire led to the formation in 1944 of the International Civil Aviation Organization (ICAO) with its strong telecommunications arm. The rapid formation of ICAO was facilitated by the concentration of international economic power in the United States and to a lesser extent in the United Kingdom.

The other great surge of collaboration in international telecommunications, which occurred after the United States' and the Soviet Union's space programs had demonstrated the feasibility of radio transmission via earth satellites, proceeded despite a less compelling need for global uniformity. With world political and economic power centers more broadly distributed by the early 1960's, the formation of INTELSAT was achieved only after difficult and often heated negotiations. Nonetheless the will to cooperate, motivated in part by a desire to share in the benefits of United States technology, prevailed and a practical, open-ended interim agreement was signed in 1964. For the first time an integrated global structure was created for the purpose of directly establishing and operating a telecommunications system.

In the past decade many other bi-lateral and multilateral arrangements have been developed. Some of these are encountering great difficulty stemming from an even greater diffusion of world political power centers, including the coming of age of the "Third World." Those arrangements which have encountered such difficulties include AEROSAT, MARSAT and DBS.

It is significant that some of the discussion of international telecommunications issues has taken place in the United Nations and that one of the features of this development has been the multidisciplinary approach which has been brought to bear on the issues. Previously the negotiating process had been dominated by engineers, communicators and to a lesser extent by broadcasters. The trend toward a wider spectrum of expertise also has begun to appear in the telecommunications organizations such as the I.T.U. and, more prominently, in INTEL-SAT. The trend toward infusing a multidisciplinary approach in international organizations can be accelerated if necessary to facilitate their resolution of emerging issues. The alternative of creating new institutions in the telecommunications field could present more problems in today's politically complex world than it solves.

The broadening of national delegations to international telecommunications organizations has not been trouble-free. Internal differences over the objectives which the national delegation should pursue, such

as those existing between postal, telegraph and telephone authorities, broadcasters, and aeronautical and marine authorities, are projected into international forums with disastrous results. These differences should be resolved at home in deference to the international community.

What hope is there for future international cooperation in the field of broadcasting? There are encouraging signs. Several countries are working hard to draft basic principles, applicable on a global basis and designed to achieve the more orderly development of international broadcasting. Because of the great sensitivities involved, the United Nations probably will continue to be the best forum for giving these principles an appropriate international status.

Once established, these basic principles can guide both the I.T.U. in performing its technical role and any new efforts undertaken to establish common operational systems for satellite broadcasting purposes. Any such new efforts are likely to emerge in a variety of forms, some on an ad hoc regional basis, others through cooperation inside or in conjunction with INTELSAT. However, the need for flexibility to accommodate the technologies of the future, as well as special interests, will remain. Precise planning should not be attempted too soon. Indeed, global standardization may not be a compelling need except for those technical matters within the purview of the I.T.U.

Where regulatory agreements prove necessary, they must be sufficiently flexible to recognize and accommodate the special circumstances of individual countries. The history of ICAO and the I.T.U. has shown this approach to be feasible. Confronted with particularly difficult issues, ICAO and the I.T.U. often have suggested *recommended* practices. Over the long run as increasing numbers of members adopt those practices which best serve their interests, binding standards evolve. Similar flexibility is necessary to assure the success of future international cooperation in broadcasting.