

**DEFINING INTERNATIONAL SATELLITE
COMMUNICATIONS AS WEAPONS OF
MASS DESTRUCTION:
THE FIRST STEP IN A COMPROMISE
BETWEEN NATIONAL SOVEREIGNTY AND
THE FREE FLOW OF IDEAS**

I. INTRODUCTION.....	390
II. INTERNATIONAL LAW GOVERNS TELECOMMUNICATIONS SATELLITES BUT FALLS SHORT OF PROVIDING A COMPREHENSIVE REGULATORY SCHEME	393
A. <i>Corpus Juris Spatialis Provides Universally Acceptable Authority for Regulating Violent Propaganda.....</i>	396
B. <i>Various Other Sources of International Law are Contradictory but are Beginning to Compromise.....</i>	399
III. MODERN REGULATION AND REGULATORY PROPOSALS FAIL TO BALANCE THE EXPECTATIONS OF ALL INTERESTS.....	402
A. <i>Increasing Destruction to Social, Cultural, and Economic Norms Require Regulation over the Content of International Communications</i>	403
B. <i>Only Self-Help Remedies are Available Because The Modern Regulation System is Ambiguous and Unenforceable.....</i>	408
C. <i>Proposals for Regulation Reform Have Lacked Efficiency and Improperly Favored Either National Sovereignty or Freedom of Expression</i>	409

IV. BY EXAMINING RESULTS FROM THE PAST WE SEE MORE CLEARLY THE PRESENT NEED FOR REGULATION .	416
A. <i>Rwandan Genocide Facilitated by Radio- Télévision Libre des Milles Collines</i>	417
B. <i>Cuban Interference with US Economic Interests by Self-Help Jamming of TV and Radio Martí</i>	420
V. A SOLUTION CAN BE FOUND THAT BALANCES EXPRESSION AND SOVEREIGNTY	424
VI. CONCLUSION	427

*You Americans complain about drug traffickers in Asia, and meanwhile you flood the world with the electronic equivalent. Our children know the names of your rappers and movie stars, and nothing about the heroes of their own people. Maybe they know who Stephen King is, but they don't know who our King Stephen was—the founder of our nation. . . . It's an invisible conquest, with satellites and broadcast transmitters instead of artillery.*¹

I. INTRODUCTION

As the technological developments of the information age continue to expand at an increasingly rapid rate, there is little doubt that domestic and international use of satellite technology will continue to play an increasingly larger role in the world's affairs. Even now, the space and satellite industry occupies a significant portion of the economy of the United States and other developed nations around the globe.² In 1999, the commercial space industry generated \$61.3 billion in the United States economy, with just over ninety-two percent, or \$56.7 billion

1. ROBERT LUDLUM, THE JANSON DIRECTIVE 445 (2003) (relating a fictional conversation between a Hungarian bartender and an American "tourist").

2. Art Dula, Space Ports—The New Mandate of Heaven (Sept. 22, 2003) (unpublished manuscript, on file with author).

being accounted for by the satellite industry.³ And, while it appears that the United States populace had been gradually losing interest in the activities of space, it looks as though the curiosity and interest surrounding space are due for a resurgence. The recent scientific and technological triumph of placing the *Spirit* and *Opportunity* rovers on Mars, coupled with President George W. Bush's new vision for the space program, create just the atmosphere to foster a renewed spirit.⁴ The economic, social, and political effects are sure to follow.

Numerous events of profound historical significance have occurred since the beginning of the new millennium, but do these events have any significance in relation to past, present, or future endeavors in space? Although it may be counter-intuitive, the question should be answered in the affirmative. The relevance is, perhaps, most clear when violent acts are considered. Violent events, such as those typified by the creation of mass gravesites in New York City and Washington, D.C. on September 11, 2001, the overthrow of Saddam Hussein's regime in Iraq, and the suicide bombings in Israel and the Middle East with the accompanying retaliatory strikes directed toward Palestine,⁵ have not only shaped the world in which we currently live, but also the history for future civilization. Collectively, these events define a generation in a way that matches historical events of the past defined other generations—events such as the bombing of Pearl Harbor in December 1941,⁶ the

3. *Id.*

4. See Office of the Press Secretary, *President Bush Announces New Vision for Space Exploration Program* (Jan. 14, 2004) at <http://www.whitehouse.gov/news/releases/2004/01/20040114-1.html>.

5. As used in the text, the use of the word "retaliatory" is based solely on the greatest weight of information propagated through the Western media. While a look at whether Israel's attacks are indeed retaliatory is interesting, it is not the subject of this Comment. The author takes no position on whether the true nature of the strikes is truly retaliatory. Debate on this subject is left to other authors so inclined to tackle the hotly contested controversy. For more background on the subject, see generally CALVIN GOLDSCHIEDER, *CULTURES IN CONFLICT: THE ARAB-ISRAELI CONFLICT* (2002) (chronicling the tension, build-up, and resulting violent conflict in the Middle East between the Israeli and Arab world).

6. *Pearl Harbor Attack*, 9 *THE NEW ENCYCLOPEDIA BRITANNICA: MICROPÆDIA* 227 (15th ed. 1989).

assassination of John F. Kennedy in November 1964,⁷ and the *Challenger* disaster in January 1986.⁸

Drawing from these recent historical events and the momentum surrounding the rekindled interest in space (and as a way of putting this Comment in context), this Comment studies the interplay that exists between international telecommunications satellite systems and the causes of generation-defining events throughout the world. Specifically, this Comment examines: (1) the current status of international law; (2) the marginal role that international law currently plays in harnessing the power of international communications; (3) proposed regulatory schemes to protect national interests and sovereignty; (4) the devastation to political, cultural, economic, and social stability that will continue to result in calamitous events as long as this modern technology goes unchecked and under-regulated; (5) past failures of the modern regulatory scheme in the context of historical case studies; and (6) an alternative solution and a recommendation for international action that will begin to regulate the content of international satellite communications.

Emphasizing the entire body of international law that may provide for the regulation of trans-border transmission of satellite signals, Section II reveals that any attempt to understand international regulation of telecommunications systems results in ambiguity. Section III examines the regulatory schemes that are currently employed to protect a sovereign's own interests and an alternative international regulatory structure proposed at the 2003 World Summit on the Information Society.

To highlight the deficiencies of these regulatory systems, Section IV introduces two case studies that highlight the harmful and destructive consequences that are potential results from unregulated or under-regulated trans-border communications. Based on the problems of present regulatory schemes described in Section III, and the potential harmful

7. *Kennedy, John Fitzgerald*, 6 THE NEW ENCYCLOPEDIA BRITANNICA: MICROPÆDIA 798–800 (15th ed. 1989).

8. *Space Shuttle*, 11 THE NEW ENCYCLOPEDIA BRITANNICA: MICROPÆDIA 62–63 (15th ed. 1989).

consequences highlighted in Section IV, Section V proposes an alternative regulatory system, providing for the United Nations and the International Telecommunications Union (ITU) to have expanded roles in the non-exclusive regulation over the content of trans-border communications. In essence, the solution lies in realizing that the ITU must be able to act with efficacy to immediate and violent threats, while also balancing the too heavy a burden that would be placed on the ITU if it were required to continuously monitor mass-communication signals. Section VI provides a summary of the article, and concludes with the recommendation that the ITU be granted decisionmaking power to react to imminent threats of lawless action, and to initiate judicial process where international propaganda presents threats that are less imminent.

II. INTERNATIONAL LAW GOVERNS TELECOMMUNICATIONS SATELLITES BUT FALLS SHORT OF PROVIDING A COMPREHENSIVE REGULATORY SCHEME

The regulation of satellites essentially began with the launch of the Soviet *Sputnik I* satellite in 1957.⁹ *Sputnik* marked the basic entry into space, and was the catalyst that initiated the development of the Law of Outer Space, or *corpus juris spatialis*.¹⁰ As coincides with the development of most new areas of law, the law that now governs space and satellite technology evolved into complementary sets of both substantive and procedural law—the substantive law to *create* rights and duties, and the procedural law to *enforce* or regulate those rights.¹¹ Paired with the need for basic substantive and

9. NATHAN C. GOLDMAN, *AMERICAN SPACE LAW: INTERNATIONAL AND DOMESTIC* 27 (1988). The argument can be made, however, that the law began much earlier by asserting that the United Nations' principles declared in 1947 relating to international broadcasting are also relevant to broadcasting through satellite technology. See *Measures to Be Taken Against Propaganda and the Inciters of a New War*, GA Res. 110, at 14, U.N. Doc. A/Res/110 (1947) (condemning propaganda designed or likely to provoke or encourage any threat to the peace, breach of the peace or act of aggression).

10. The phrase is derived from the Latin meaning for "body of space law". Ty S. Twibell, Note, *Circumnavigating International Space Law*, 4 ILSA J. INT'L & COMP. L. 259, 263 n.17 (1997).

11. See BLACK'S LAW DICTIONARY 1221, 1443 (7th ed. 1999) (defining procedural and substantive law).

procedural rules to guide the international community, the United Nations General Assembly specifically recognized the international challenges that space exploration could present and in 1958 created an ad hoc committee to specifically address these challenges.¹² The Committee on the Peaceful Uses of Outer Space (COPUOS) was formed and began focusing on developing workable international standards, policy, and law that takes into account these new and developing challenges and their potential threat to international peace.¹³ The following year, with the ever-increasing attention being paid to space by the United States and the Soviet Union,¹⁴ the United Nations formalized COPUOS as a permanent body.¹⁵

Soon thereafter, COPUOS developed a series of principles, treaties, and conventions that were subsequently adopted by the General Assembly.¹⁶ Among the most influential of the early declarations of principles related to outer space law was the 1963 Declaration on Outer Space Exploration.¹⁷ The Declaration on Outer Space Exploration influenced the formation of and provided the foundation to the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space (Outer Space Treaty).¹⁸ In 1967, the United Nations

12. United Nations Office for Outer Space Affairs, *Committee on the Peaceful Uses of Outer Space: History and Overview of Activities*, available at http://www.oosa.unvienna.org/COPUOS/cop_overview.htm (last modified Oct. 19, 2000). Established in 1958, the Committee had four initial objectives—one of which was “to consider the activities and resources of the United Nations, the specialized agencies and other international bodies relating to the peaceful uses of outer space.” *Id.*

13. *Id.*

14. On January 31, 1958, four months after the launch of Sputnik I, the United States also officially entered space as it launched *Explorer-I* as its first artificial earth satellite. See NASA, *Explorer-I and Jupiter-C*, available at <http://www.hq.nasa.gov/office/pao/History/sputnik/expinfo.html> (last visited Jan. 1, 2005).

15. See *International Co-operation in the Peaceful Uses of Outer Space*, G.A. Res. 1472, U.N. GAOR., 14th Sess., 856th plen. mtg., at 5, U.N. Doc. A/4354 (1959) [hereinafter *International Co-operation*]; United Nations Office for Outer Space Affairs, *supra* note 12.

16. See BRUCE A. HURWITZ, *THE LEGALITY OF SPACE MILITARIZATION* 10–13 (1986).

17. *Declaration of Legal Principles Governing the Activities of States in the Exploration and Uses of Outer Space*, G.A. Res. 1962, U.N. GAOR, 18th Sess., Supp. No. 15, at 15, U.N.Doc. A/15515 (1963).

18. See Treaty on Principles Governing the Activities of States in the Exploration

General Assembly adopted the Outer Space Treaty by consensus.¹⁹ As a supplement to the other purposes and provisions of the treaty,²⁰ the Outer Space Treaty specifically recognized the “common interest of all mankind in the progress of the exploration and use of outer space for peaceful purposes.”²¹

Of the declarations of principles proposed by COPUOS and adopted by the United Nations, the Principles Governing the Use by States of Artificial Earth Satellites for International Direct Television Broadcasting²² (Principles on TV Broadcasting) provides the most focused look at the potential influence the United Nations expected satellite broadcasts to exert across international boundaries.²³ Under the Principles on TV Broadcasting, international direct television broadcasts are specifically to be conducted under the international law as set forth by the UN Charter and the Outer Space Treaty.²⁴ Additionally, the Principles on TV Broadcasting also promotes the free exchange of cultural and scientific knowledge among countries, with special regard to the needs of developing countries, but also seeks to combat transmissions that do not give due respect to the political and cultural integrity of the nations.²⁵ Further considerations of the declaration are that the party nations be governed by principles of non-intervention to develop the strong interest that all nations collectively hold in

and Use of Outer Space, including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205 (entered into force Oct. 10, 1967) [hereinafter Outer Space Treaty]; see also Twibell, *supra* note 10, at 263–64 (addressing the impact of the prior UN resolutions and treaties in leading to the Outer Space Treaty).

19. See HURWITZ, *supra* note 16, at 11–12.

20. The Outer Space Treaty provides the foundation for all other space treaties adopted through COPUOS, as well as the appropriation clause that prohibits national appropriation by claim of sovereignty to outer space. See Outer Space Treaty, *supra* note 18; see also *infra* notes 29–35 and accompanying text.

21. Outer Space Treaty, *supra* note 18.

22. See *Principles Governing the Use by States of Artificial Earth Satellites for International Direct Television Broadcasting*, G.A. Res. 92, U.N. GAOR, 37th Sess., 100th plen. mtg., at 51, U.N. Doc. A/RES/37/92 (1982) [hereinafter *Principles on TV Broadcasting*].

23. See *id.*

24. *Id.* at ¶ 4.

25. *Id.* at ¶ 2.

maintaining international peace and security.²⁶

The collection of international law that governs regulation of international communications is comprised not of a single or limited series of instructions, but a mishmash of treaties and other sources that were created without much inkling of the power that such communications provided. Although the regulations come from a jumble of sources, one source is principal. The first part of this section examines this principal source, the *corpus juris spatialis*, and considers whether it provides any guidance in the search for international authority to enact workable regulation. The second part considers some of the other vast sources of law that may govern trans-border communications.

A. *Corpus Juris Spatialis Provides Universally Acceptable Authority for Regulating Violent Propaganda*

Here, the *corpus juris spatialis* is the starting point for finding the compromise that will lead to internationally acceptable regulation of international communications and propaganda. This important start is developed from the express prohibition against the placement of weapons of mass destruction in orbit around the earth. Although the definition of weapon of mass destruction may be unclear, the nations have universally consented to regulating propaganda supportive of violence or war.

While the principles as outlined by COPUOS are important in the policies behind international space law, the Outer Space Treaty is arguably the most important text in all of outer space law.²⁷ Since the Outer Space Treaty in 1967, COPUOS has continued to promote the peaceful use of outer space and has supervised the United Nations' vital role in the development of international *corpus juris spatialis*.²⁸ COPUOS expanded

26. *Id.* at ¶¶ 2, 3.

27. See CARL Q. CHRISTOL, THE MODERN INTERNATIONAL LAW OF OUTER SPACE 19–20 (1982) (recognizing that the 1967 Outer Space Treaty is “the main base for the legal order of the space environment”). Accordingly, the Outer Space Treaty may appropriately be considered the “constitution of outer space.”

28. See *International Co-operation*, *supra* note 15, at 5 (requesting that the Committee: (1) maintain close contact with governments and organizations concerned

various important, yet vague, provisions in the Outer Space Treaty and created four additional treaties that supplement the Outer Space Treaty and provide the way and means to accomplish the altruistic goals set forth by the Outer Space Treaty.²⁹ The Rescue Treaty,³⁰ the Liability Convention,³¹ the Registration Convention,³² and the Moon Treaty³³ complete the set of COPUOS treaties widely considered to make up the largest portion of international *corpus juris spatialis*.³⁴ Each of the subsequent four treaties builds off of the Outer Space Treaty.³⁵ Within the Outer Space Treaty, Article IV is the most relevant to the uses of satellites in space.³⁶ Under Article IV,

with space; (2) facilitate the voluntary exchange of information relating to space activities; and (3) assist in the promotion of international cooperation in space activities).

29. See Christopher M. Petras, "Space Force Alpha": *Military Use of the International Space Station and the Concept of "Peaceful Purposes"* 53 A.F. L. REV. 135, 149, 163 (2002).

30. Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space, Apr. 22, 1968, U.N. GAOR, 22nd Sess., Supp. No. 16, at 5, U.N. Doc. A/6716 (1968), 19 U.S.T. 7570 (based on Article V of the Outer Space Treaty).

31. Convention on International Liability for Damages Caused By Space Objects, Mar. 29, 1972, U.N. GAOR, 26th Sess., Supp. No. 29, at 25, U.N. Doc. A/8429 (1972), 24 U.S.T. 2389 (based on Article VII of the Outer Space Treaty).

32. Convention on the Registration of Objects Launched into Outer Space, Jan. 14, 1975, U.N. GAOR, 29th Sess., Supp. No. 31, at 16, U.N. Doc. A/9631 (1975), 28 U.S.T. 695 (based on Article VIII of the Outer Space Treaty, this convention enumerates the registration requirements imposed on the party states for all objects that are launched into space, including satellites, whether the objects be commercial or governmental).

33. Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, Dec. 18, 1979, U.N. GAOR, 34th Sess., Supp. No. 46, at 77, U.N. Doc. A/34/46 (1980), 18 I.L.M. 1434 (based on Article II of the Outer Space Treaty).

34. Compare Twibell, *supra* note 10, at 264 (recognizing that the main components of *corpus juris spatialis* come from the Outer Space Treaty, the Rescue Treaty, the Liability Convention, and the Registration convention, but omitting the Moon Treaty), with Petras, *supra* note 29, at 147 (recognizing the Moon Treaty and the 1963 Limited-Test-Ban Treaty as components that make up fundamental principles of international space law).

35. See Michael M. Bernard, *Transformation of Property Rights in the Space Age*, 7 AIR & SPACE LAW, 6, 11 (1993) (calling the Outer Space Treaty "the Mother Treaty on Space"); see also Heidi Keefe, *Making the Final Frontier Feasible: A Critical Look at the Current Body of Outer Space Law*, 11 SANTA CLARA COMPUTER & HIGH TECH. L.J. 345, 349 (1995) (calling the Outer Space Treaty "the cornerstone of all space law").

36. See, e.g., S. Chandrashekar, *Introduction, in PEACEFUL AND NON-PEACEFUL USES OF OUTER SPACE: PROBLEMS OF DEFINITION FOR PREVENTION OF AN ARMS RACE 1,*

States that are parties to the treaty agree not to “place in orbit around the Earth any objects carrying . . . weapons of mass destruction.”³⁷

The term “weapons of mass destruction” has not been defined by the United Nations, and no internationally accepted definition exists.³⁸ While all nations do appear to agree that nuclear, biological, and chemical weapons are weapons of mass destruction, the same agreement does not exist for other types of weapons.³⁹ At the more liberal end of the definitional spectrum, it is conceivable that some may define the term to include any weapon that can cause significant injury or loss of life to a large number of people.⁴⁰ But does the United Nations’ ability to regulate communications satellites hinge on an acceptance of the latter, more liberal definition? The surprising answer is that all nations are in substantial agreement, at least in respect to regulating potentially life-threatening communications, that the definitional spectrum is insignificant.⁴¹ Although the legality of communications satellites, *en toto*, is unquestioned,⁴² all nations

4–5 (Bhupendra Jasani ed. 1991) (addressing the Outer Space Treaty as it relates to peaceful purposes in out space, while considering only Article IV).

37. Outer Space Treaty, *supra* note 18.

38. See Chandrashekar, *supra* note 36, at 4–5; see also Ivan A. Vlasic, *The Legal Aspects of Peaceful and Non-Peaceful Uses of Outer Space*, in PEACEFUL AND NON-PEACEFUL USES OF OUTER SPACE: PROBLEMS OF DEFINITION FOR PREVENTION OF AN ARMS RACE 47 (Bhupendra Jasani ed. 1991).

39. Chandrashekar, *supra* note 36, at 5; see also 50 U.S.C. § 2302 (2000) (defining the United States’ understanding of “weapons of mass destruction” as including only nuclear, biological, and chemical weapons). *But see* Vlasic, *supra* note 38, at 42, 47 (expanding the definition of weapons of mass destruction to also cover any radiological weapons).

40. Vlasic, *supra* note 38, at 47 (noting that weapons of mass destruction may also include any future weapon with “destructive potential” that would be “catastrophic”).

41. See Stephen D. Bayer, Comment, *The Legal Aspects of TV Marti in Relation to the Law of Direct Broadcasting Satellites*, 41 EMORY L.J. 541, 549 (1992) (stating: “[N]o country, including the United States, opposes the elimination of propaganda which incites violence or war. . . .”); see also Elizabeth A. Downey, Note, *A Historical Survey of the International Regulation of Propaganda*, 5 MICH. Y.B. INT’L L. STUDIES 342 (1984) (noting that no country seriously objects to the international regulation and control of hostile propaganda).

42. See Richard A. Morgan, *Military Use of Commercial Communication Satellites: A New Look at the Outer Space Treaty and ‘Peaceful Purposes,’* 60 J. AIR L. & COM. 237, 240–41, 252–65 (1994) (listing examples of legal communication satellites); see also

have agreed to eliminate hostile propaganda and communications aimed at inciting violence.⁴³ Thus, by international regulation of hostile communications, the nations have constructively consented to the more liberal definition. Accordingly, although telecommunications satellites themselves are not weapons of mass destruction, nations have implicitly agreed that communications aimed at inciting violence is itself a weapon of mass destruction and thus falls under the regulatory authority of the United Nations and the 1967 Outer Space Treaty.

B. Various Other Sources of International Law are Contradictory but are Beginning to Compromise

Sadly, the international consensus on eliminating communications aimed at inciting violence does not extend to less dramatic effects of communications. Outside of the *corpus juris spatialis*, there is still a great body of law that deals with these lesser effects and that attempts to govern trans-border satellite communications.⁴⁴ Unfortunately, the collective body of law is contradictory and predictably causes disagreement among the various nations.⁴⁵ The body of law governing satellite communications is found in many sources. These sources include, in part, the United Nations Charter,⁴⁶ United Nations Resolution 110(II) (Resolution 110),⁴⁷ the Universal Declaration of Human Rights (Declaration of Human Rights),⁴⁸ United Nations Resolution 37/92 (Resolution 37/92),⁴⁹ and Radio

Vlasic, *supra* note 38, at 50.

43. See *supra* note 41 and accompanying text.

44. See, e.g., Jamie Frederic Metzl, Comment, *Rwandan Genocide and the International Law of Radio Jamming*, 91 AM. J. INT'L L. 628, 636-45 (1997) (discussing various international laws, policies, and standards applied to trans-border communication).

45. See Bayer, *supra* note 41, at 566; see also Stephen Gorove, *International Direct Television Broadcasting by Satellite: "Prior Consent" Revisited*, 24 COLUM. J. TRANSNAT'L L. 1, 2-5 (1985).

46. See U.N. CHARTER art. 2.

47. *Measures to Be Taken Against Propaganda and the Inciters of a New War*, GA Res. 110, at 14, U.N. Doc. A/Res/110 (1947).

48. GA Res. 217A, U.N. Doc. A/810, at 71 (1948).

49. *Principles on TV Broadcasting*, *supra* note 22, at 98.

Regulations promulgated by the ITU.⁵⁰

Despite all of these sources of international law, the disagreement is remarkably simple, and the world generally stands on one of two opposing sides. The sides can be characterized as one between the states supporting the “free flow of information” and the states supporting “national sovereignty.”⁵¹ The states that support the free flow of information, including the United States, base their position on the Declaration of Human Rights, the United Nations Charter, Customary Law, and the International Telecommunication Convention.⁵² The Universal Declaration of Human Rights is, perhaps, the best summary of the entire set of law. Under Article 19 of the Declaration of Human Rights, “[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”⁵³ These nations oppose virtually any interference with this right to impart information through any form of media.⁵⁴

In contrast, the national sovereignty nations base their position on customary law, the United Nations Charter, Resolution 110, and Resolution 37/92.⁵⁵ Under this view, Article II of the United Nations Charter grants strong deference to the interests of national sovereignty, including cultural, religious, social, and economic interests.⁵⁶ To protect these interests, these states advocate strict regulation of content and sanctions for non-conforming communications.⁵⁷ In contrast, the “free flow of information” states view this intervention as little more than

50. See Bayer, *supra* note 41, at 559.

51. See Metzl, *supra* note 44, at 644–46; see also Bayer, *supra* note 41, at 566.

52. See Bayer, *supra* note 41, at 548, 558; see also Freedom of Information: Interference with Radio Signals, GA Res. 424 (V), U.N. GAOR, 5th Sess., Supp. No. 20, at 4, U.N. Doc. A/1775 (1950).

53. Universal Declaration of Human Rights, GA Res. 217A, U.N. GAOR, 3rd Sess., Art. 19, at 71, U.N. Doc. A/810 (1948).

54. See Bayer, *supra* note 41, at 549.

55. See *id.* at 546–48, 554.

56. See U.N. CHARTER art. 2, paras. 4, 7.

57. See Gorove, *supra* note 45, at 5.

government sponsored censorship.⁵⁸

Fortunately, a middle ground has been suggested.⁵⁹ The extreme views purportedly held by the United States have been tempered by holdings within the United States' own court system.⁶⁰ The United States Constitution is considered to have unmatched legal protection for free speech.⁶¹ However, the United States Supreme Court has found that even the near-absolute power of free speech can be overcome where a compelling state interest exists.⁶² The Supreme Court was called to answer this question in 1919,⁶³ 1951,⁶⁴ 1952,⁶⁵ and 1969.⁶⁶ Since the United States can silence speech within its own borders when a compelling state interest is found, it can hardly advocate a more absolute bar to governmental intervention by other countries within their own borders.⁶⁷ A more comprehensive approach was taken by the European Court of Human Rights.⁶⁸ In *Sunday Times v. The United Kingdom*, the Court cited a standard for testing which restrictions on the freedom of expression are permissible.⁶⁹ The standard employs a three-part test.⁷⁰ Governments may restrict speech when the

58. See Joel R. Paul, *Images From Abroad: Making Direct Broadcasting by Satellites Safe for Sovereignty*, 9 HASTINGS INT'L & COMP. L. REV. 329, 358 (1985-1986).

59. See *Sunday Times v. United Kingdom*, 30 Eur. Ct. H.R. (ser. A) 245, 269 (1979) (outlining a three step inquiry into when it is permissible to restrict the free flow of ideas).

60. See Metz, *supra* note 44, at 644-45.

61. *Id.*

62. *Id.*

63. *Schenck v. United States*, 249 U.S. 47, 52 (1919) (permitting prohibition of speech intended to incite the listeners to violate criminal statutes).

64. *Dennis v. United States*, 341 U.S. 494, 516-17 (1951) (refusing to protect speech directed at overthrowing the government).

65. *Beauharnais v. Ill.*, 343 U.S. 250, 266 (1952) (holding that libel, insults, or fighting words are subject to governmental restriction).

66. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (allowing regulation of speech "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action").

67. See Metz, *supra* note 44, at 645.

68. See *Sunday Times*, 30 Eur. Ct. H.R. (ser. A) 269.

69. *Id.*

70. See ARTICLE 19, NOTE ON THE DRAFT DECLARATION ON THE RIGHT TO COMMUNICATE 3 (Jan. 2003), available at <http://www.article19.org/docimages/1502.doc>

restrictions: (1) are provided by law; (2) protect a legitimate interest recognized under international law; and (3) are necessary to protect that interest.⁷¹ This approach recognizes the validity of the laws cited to support the national sovereignty states and the interests these states wish to protect, while also limiting the governmental ability to act in cases where the restriction in free speech is the only method of protecting that interest. While ambiguity and contradiction seem to reign supreme among the vast reserves of international law that may cover trans-border communications and regulation, the tension between free speech and sovereignty may be subsiding now that at least the European court has initiated a compromise.

III. MODERN REGULATION AND REGULATORY PROPOSALS FAIL TO BALANCE THE EXPECTATIONS OF ALL INTERESTS

The launch of *Sputnik I* did more than manifest humankind's curiosity with space or demonstrate a nation's superior technological developments. *Sputnik* furthered the technological expansion and world interconnectivity that began in 1901 when Guglielmo Marconi transmitted the letter "s", in Morse code, across the Atlantic Ocean—marking the first transoceanic transmission of a radio signal.⁷² Further, it marked the bona fide beginning of humankind's ability to invisibly cross borders while metaphorically not leaving the house. And where radio began, television and data transmission soon followed.⁷³ Radio, television, and data transmission have undoubtedly proved to be powerful tools in the hands of people and governments.⁷⁴ As much to inspire and promote peace, the technology affords those who possess it the capacity to incite hatred, display rage, and wage war.⁷⁵

[hereinafter NOTE ON DRAFT DECLARATION].

71. *Id.*

72. *Marconi, Guglielmo*, 7 NEW ENCYCLOPÆDIA BRITANNICA: MICROPÆDIA 826 (15th ed. 1998).

73. See Lee A. Lievrouw, Communication, Microsoft Encarta Online Encyclopedia (2005), available at http://encarta.msn.com/text_761564117_8/Communication.html. (last visited Jan. 21, 2005).

74. See Metzl, *supra* note 44, at 628–29.

75. *Id.* at 628.

This section details the regulations that exists in modern times. The first part demonstrates the increasing need for regulation over international communications. Notwithstanding the many benefits of international communications, unregulated communications hinder national sovereignty and can and do have potentially devastating effects on cultures and economies. The current regulatory scheme is discussed in the second part. The regulations in place by the ITU and the United Nations comprise a set of contradictory treaties and charters. These garbled regulations are ambiguous, raising issues of whether there is an international agreement that permits regulation over the content of international broadcasts. More importantly, this ambiguity leads to the only type of recognized regulation—self-help by the sovereign nations. The final part of this section discusses some of the many proposals that have been put forth to encourage further regulation. Each proposal is unsatisfactory, and has been rejected, in part, because it fails to balance the freedom of expression with the need for expeditious action where an imminent threat of lawlessness or violence exists.

A. *Increasing Destruction to Social, Cultural, and Economic Norms Require Regulation over the Content of International Communications*

Governments, political factions, charitable organizations, and commercial providers now broadcast radio and television all over the globe. Many of the broadcasts provide services and remedies that may be universally hailed as societal benefits. However, the detrimental aspects of many communications are also being exposed. Damages may be cultural, religious, linguistic, political, economic, or social (to name just a few). What is clear is that unless international agencies or governments work together to regulate harmful content, trans-border communications will continue to disrupt international stability.

Until the 1990s, the vast majority of all satellites, including telecommunications satellites, were owned and operated by governments instead of operated as commercial ventures.⁷⁶

76. 1 HANK INTVEN ET AL., WORLD BANK, TELECOMMUNICATIONS REGULATION

Subsequent to that time, the trend has changed and even the government-sanctioned monopoly that provided advantage to the International Telecommunications Satellite Organization (INTELSAT) vanished, and the privatized INTELSAT, L.L.C. began operating as a commercial communications provider.⁷⁷ Regulation of the communications industry is often met with resistance.⁷⁸ In fact, the near universal view is that communications should be met with less regulation over time.⁷⁹

Most of the calls for regulation come from advocates of economic growth that support the expansion of the satellite market to promote competition.⁸⁰ These economic advocates suggest that regulation is needed to transform the telecommunications markets from monopolies into freely competing markets.⁸¹ Currently, the ITU supports another argument made by these economic theorists⁸²—regulation is needed purely to authorize and license new operators.⁸³ As competition increases, the licensing commission acts to remove the roadblocks that are normally prohibitive to entering the industry.⁸⁴ Further, the licensing commission should ensure that high cost areas, those with few resources and minimal use for the systems, as well as low-income nations are not left behind.⁸⁵ However, these arguments support only regulations that permit

HANDBOOK § 1.1.2 (Hank Intven & McCarthy Tétrault eds., 2000), available at <http://www.infodev.org/projects/314regulationhandbook/module1.pdf>.

77. U.S. GOV'T ACCOUNTABILITY OFFICE, TELECOMMUNICATIONS; INTELSAT PRIVATIZATION AND THE IMPLEMENTATION OF THE ORBITAL ACT 1 (2004), available at <http://www.gao.gov/cgi-bin/getrpt?GAO-04-891>.

78. See INTVEN ET AL., *supra* note 76, at 1-1.

79. *Id.* at 1-1, 1-21.

80. See *id.* at 1-1, 1-22. (Peculiarly, the majority of calls to reduce regulation for telecommunications satellite have also come from advocates arguing from an economic perspective. Along the lines of the economic theorists, other advocates for regulation focus on the need to standardize the industry to promote interchange.)

81. *Id.* at 1-22, 1-23.

82. See Leslie Taylor Associates, *The Satellite Regulatory Process of the FCC* ¶ 2, available at http://www.lta.com/res_regulatory/regproc.htm (last visited Jan. 21, 2005) (noting that the current role of the ITU is largely to regulate the telecom industry by allocating the use of the RF spectrum and granting licenses for space positioning).

83. INTVEN ET AL., *supra* note 76, at 1-23 to 1-24.

84. *Id.* at 1-1.

85. *Id.* at 1-1 to 1-2.

a satellite operator to get into space, and noticeably lack any suggestion for a regulatory scheme that monitors or exercises any control over the transmitted content once the operator has been granted a license.⁸⁶ Due to the lack of discussion on content control, these same advocates of regulation suggest that the role of regulation should diminish once the markets become competitive.⁸⁷

A purely economic view justifies the need for regulation because regulation is necessary to establish and ensure competition in a free market.⁸⁸ However, limiting the view to this purely economic perspective ignores the equally important social, political, and cultural consequences that were recognized by COPUOS and the United Nations.⁸⁹ Concerns over cultural erosion, moral degradation, political upheaval, and social change are essentially ignored by these economic theorists when they justifiably warrant some international attention and discussion.⁹⁰ To their credit, perhaps these economic theorists recognize that telecommunications satellites are valuable assets and view the scores of benefits as sufficient to overshadow any potential drawbacks. Moreover, the most significant benefits of trans-border communications are felt by the lesser developed countries—the same countries that the rest of the world has expressly consented to giving special consideration.⁹¹

A central rationale for allowing free interchange of ideas and

86. *Cf. id.* at 1-21 to 1-26 (offering numerous reasons why regulation is initially needed for increasing competition, but making no mention of controlling the content of communications).

87. *Id.* at 1-4.

88. *Id.* at 1-1.

89. *See Principles on TV Broadcasting, supra* note 22.

90. *Cf.* Mark Nogueira, Comment, *The Benefits of Low-Earth Orbiting Satellite Technology for the International Community: Can the Potential be Realized?*, 5 *IND. J. GLOBAL LEG. STUD.* 739, 746–56 (1998) (addressing additional concerns on the placement of satellites for telecommunications purposes, including concerns over national sovereignty).

91. *Declaration on International Cooperation in the Exploration and Use of Outer Space for the Benefit and in the Interest of All States, Taking into Particular Account the Needs of Developing Countries*, G.A. Res. 51/122, U.N. GAOR, 55th Sess., Supp. No. 20, at 2, U.N. Doc. A/RES/51/122 (1996) (noting that “particular attention should be given to the benefit for and the interests of developing countries” in the context of space use and exploration).

communications via satellite is the legitimate argument that these communications systems provide developing countries with the ability to obtain an “instant infrastructure.”⁹² These countries that are already behind a large portion of the world can essentially leapfrog the “growing pains” that the First World experienced, where alternative infrastructure or these same growing pains would make the development cost prohibitive.⁹³ No government could realistically choose between telecommunications capabilities and other needs of the country, especially where more pressing needs include the population’s suffering through starvation, disease, or poverty.⁹⁴

Beyond the economic justification, it is equally possible that political and cultural benefits are derived because of the telecommunications capabilities that are now available.⁹⁵ The rapid availability of information and communication facilitates “political globalization.”⁹⁶ Political globalization refers to the advancement of understanding between different cultures, where such understanding yields a more peaceful and stable international system.⁹⁷ Modern telecommunications technology can, at least in part, be credited with furthering the political globalization that has led to greater international convergence with respect to the value of human rights and the increase in the number of democratic governments worldwide.⁹⁸

Social benefits are also derived from contemporary uses of telecommunications.⁹⁹ Improved communications systems bring quicker response times for medical needs.¹⁰⁰ Information on global health problems and global health threats is more quickly spread through the aid of satellite and trans-border

92. See Nogueira, *supra* note 90, at 742–43.

93. See, e.g., *id.* at 742 (citing *Mandela Reminds Telecom Firms that Half the World Has No Phone*, FORT WORTH STAR-TELEGRAM, Oct. 4, 1995, at B1).

94. *Id.* at 743.

95. See *id.* at 744–45.

96. Alex Y. Seita, *Globalization and the Convergence of Values*, 30 CORNELL INT’L L.J. 429, 455–56 (1997).

97. *Id.* at 460.

98. *Id.* at 455–56.

99. Nogueira, *supra* note 90, at 743.

100. Douglas D. Bradham et al., *The Information Superhighway and Telemedicine: Applications, Status, and Issues*, 30 WAKE FOREST L. REV. 145, 147 (1995).

communications.¹⁰¹ A product of the widespread dissemination of information is an increased control over the spread of infectious diseases.¹⁰² Similarly, even for localized conditions, the availability of communication makes “telemedicine” possible.¹⁰³ Telemedicine increases the quality of local medical assistance by providing immediate access to specialized services or otherwise unavailable services.¹⁰⁴ Prevention and diagnostic accuracy can be improved.¹⁰⁵ An additional and significant social benefit of satellite data transmission is that of education.¹⁰⁶ Communities without the resources to increase literacy rates and education levels can now access virtual libraries and schools.¹⁰⁷ These are but a few of the countless other benefits now made possible by satellite communications.

The benefits of international communications through orbiting satellites are enormous,¹⁰⁸ and these substantial benefits may appropriately be seen as a justification for the continued use and advancement of satellite technology.¹⁰⁹ But should recognition of these same benefits inevitably dismiss any international regulation on the content of their programming? The answer lies in whether the world expresses any significant concern over the other potential consequences of satellite communications. It depends on how the nations of the world would respond to questions on sovereign rights of governments, globalization and cultural erosion, and the ability to use trans-border communications to incite others to “hate, prejudice, violence, war, [or] genocide.”¹¹⁰

101. Nogueira, *supra* note 90, at 746.

102. *Id.* at 745–46.

103. *See* Brandham et al., *supra* note 100, at 150.

104. *Id.* at 147.

105. *See id.*

106. Nogueira, *supra* note 90, at 743.

107. *See* Mary Beth Marklein, *Computers Allow a Virtual Shift in Higher Learning*, USA TODAY, Dec. 8, 1996, at 7D; *see also* Nogueira, *supra* note 90, at 744.

108. *See* Nogueira, *supra* note 90, at 742–46. (discussing the enormity of the benefits of satellites in low-earth orbits); *see also supra* notes 91–107 and accompanying text.

109. *See* Nogueira, *supra* note 90, at 742–46.

110. World Summit on the Information Society, Geneva, Switzerland, Dec. 2003, Draft Declaration on the Right to Communicate, p.3, ¶ 8 (Dec. 2003), *available at*

Introducing an alien influence to a nation's people, whether the influence has a cultural, economic, moral, or social effect, invariably alters the nation.¹¹¹ This is so because a nation is defined by its inhabitants and their corresponding values and cultures.¹¹² Few earnestly argue that a convergence of worldwide values and morals is universally beneficial, thus safeguards must be put in place to minimize the effects of these outside influences.¹¹³ As globalization continues, cultures, economies, and morals are more apt to collide.¹¹⁴ Political and religious motives are more likely to change those that least desire the changes.¹¹⁵ Sometimes the results are violent and even genocidal.¹¹⁶ Other times it is a mere cultural change—one that may be irreversible if not adequately protected when first threatened.¹¹⁷ Without regulation, these changes will continue unfettered, and injury to national sovereignty, national identity, political stability, and the like can only increase.

B. Only Self-Help Remedies are Available Because The Modern Regulation System is Ambiguous and Unenforceable

Unfortunately, the legal standards as they currently exist are still debated and ambiguous among the world nations.¹¹⁸ The three-prong test of the European Court of Human Rights has not received international consensus, and the international community lacks clear direction on the permissible regulatory

<http://www.iris.sgdg.org/actions/smsi/hr-wsis/list/2002/doc00001.doc> [hereinafter *Right to Communicate*].

111. Paul, *supra* note 58, at 341.

112. *See id.*

113. *See id.*

114. *See* Laurence G. C. Kaplan, *The European Community's "Television Without Frontiers" Directive: Stimulating Europe to Regulate Culture*, Comment, 8 EMORY INT'L L. REV. 255 (1994) ("[Communication] has a 'touch' or link with the essential: the identity of the people, of cultures, of nations, their history, and what they represent.") (citing Dominique Wolton, *L'Impatience de L'Europe et les Langueurs de la Commission*, LE DEBAT, Sept.-Oct. 1992, at 115).

115. *See* Kaplan, *supra* note 114, at 255–257, 318–320; *see also* Bayer, *supra* note 41, at 578.

116. *See infra* notes 179–204 and accompanying text.

117. *See* Kaplan, *supra* note 114, at 255–257.

118. *See* Bayer, *supra* note 41, at 566.

power of the United Nations and the ITU.¹¹⁹ As a result, there is no international regulation of the content of trans-border broadcasts, such that it has been noted that in regard to regulating trans-border communications, “[t]he status of regulatory instruments as evidence of international law is highly uncertain, and the fact that they are unenforceable further weakens them.”¹²⁰

Without the international regulation needed to unite the polarized views on regulation, governments have themselves taken-on the regulatory role.¹²¹ Unwanted data streams and radio or television signals are sometimes jammed.¹²² The costs to jam a signal may make it cost prohibitive for many developing nations. This places developing nations at a comparative disadvantage to their more-developed neighbors. Further, even where jamming can occur, the effects are not always limited to domestic areas.¹²³ The jamming signals can also carry across borders and cause economic damage by disrupting neighboring nations’ television and radio stations.¹²⁴ While ambiguity in international regulation is leading to unenforceability, self-help may remain an available alternative, but is an inequitable solution to the pressing problem of regulation.

C. Proposals for Regulation Reform Have Lacked Efficiency and Improperly Favored Either National Sovereignty or Freedom of Expression

In one corner of the fight on regulation sits freedom of expression, and its unequivocal desire for unrestricted speech. In the other sits national sovereignty and its appeal for the ability to protect itself from external influence. The sides in the debate never change and, predictably, past regulatory proposals

119. *See id.* at 578.

120. *Id.* at 566.

121. *See id.* at 565 (citing Walter E. Spiegel, Prior Consent and the United Nations Human Rights Instruments, 5 Mich. YBI Legal Stud. 379, 384 (1984) (“[W]ithout effective international regulation to prevent these intrusions of undesirable broadcasts, many states claim they have no other choice but to jam the satellite signals.”)).

122. Bayer, *supra* note 41, at 565.

123. *See infra* notes 222 & 232 and accompanying text.

124. *See infra* notes 222 & 232 and accompanying text.

that have favored one side over the other have been declared failures.

Considering the need for each nation to respond to what it perceives as serious threats to itself and its inhabitants, it is clear that the international community has been unable to reach consensus on any proposed international regulatory scheme.¹²⁵ This lack of consensus does not derive from a lack of participation and state-sponsored proposals. Numerous proposals have been brought before COPUOS to allow for international regulation of commercial, political, and cultural content of trans-border broadcasts.¹²⁶ As an example of the nature of these proposals, the Japanese proposed a specific ban to various types of propaganda.¹²⁷ In particular, the proposal asked for a ban on media and trans-border communications that served as provocation to criticize governmental policies, to slander, or to perform seditious acts.¹²⁸ This proposal never fell into the good graces of COPUOS, and thus never reached the United Nations General Assembly for a vote.¹²⁹

The former Soviet Union was as active in the arena as any other country, and submitted proposals in 1970, 1972, and 1974.¹³⁰ Similar to the Japanese proposal, the former Soviet Union also sought a specific ban on particular types of propaganda.¹³¹ Vague provisions in the 1970 proposal prohibiting the broadcasting of “amoral or provocative” material that tended to “interfere with the national life of States”¹³² met the same fate as the Japanese proposal, and the proposal was never acted upon by COPUOS or the General Assembly.¹³³ The

125. Paul, *supra* note 58, at 354.

126. Sharon L. Fjordbak, Comment, *The International Direct Broadcast Satellite Controversy*, 55 J. AIR L. & COM. 903, 914 (1990).

127. Paul, *supra* note 58, at 355.

128. *Id.*

129. *Id.*

130. Bayer, *supra* note 41, at 559–60.

131. *See id.*

132. Fjordbak, *supra* note 126, at 914 n.69 (quoting *Model Principles for the Use of Artificial Earth Satellites for Radio and Television Broadcasting, Report by COPUOS' Working Group on Direct Broadcast Satellites*, U.N. Doc. A/AC.195/WG.3/CRP.1, Art. V (1970)).

133. *See* Bayer, *supra* note 41, at 559–60.

1972 and 1974 proposals took a markedly different approach than prior regulation proposals—that of prior consent to control content.¹³⁴ Under such an approach, a broadcaster must notify the receiving state and obtain the government's consent prior to transmitting across the border.¹³⁵ If consent were not obtained, then sanctions would be levied and the broadcast interrupted.¹³⁶ Although these proposals were also quashed, proposals based on prior consent have not disappeared.¹³⁷

In addition to the Soviet proposals, two other regulatory schemes, based on the concept of prior consent, are noteworthy. Introduced at about the same time as the Soviet proposals were: ITU Radio Regulation Number Spa 2-428A (Radio Regulation 428A), as adopted by the World Administrative Radio Conference (WARC);¹³⁸ and the United Nations Educational, Scientific and Cultural Organization's (UNESCO) Declaration on the Use of Satellite Broadcasting.¹³⁹

Radio Regulation 428A was directed principally to establish technical guidelines that would reduce the spillover of domestic

134. The prior consent theory is similar to the solution adopted in the *Principles on TV Broadcasting* suggesting that trans-border communication should occur only after first making sure that there will be no resultant cultural, political, or social effects. See *Principles on TV Broadcasting*, *supra* note 22.

135. See Bayer, *supra* note 41, at 561.

136. See Paul, *supra* note 58, at 355–56.

137. See Bayer, *supra* note 41, at 562.

138. International Telecommunication Union, *Final Acts of the World Administrative Radio Conference for Space Telecommunications*, Radio Regs. No. Spa 2-428A (1971), reprinted in 23 U.S.T. 1527, 1527–28 (1972). Jointly, Sweden and Canada drafted a proposal that attempted to give legal significance to Regulation 428A, while also providing for more guidance on the prior consent requirement. In part, the proposal allowed for a government to withhold consent arbitrarily. This broad allowance for withholding consent has been criticized by advocates for the free flow of information as a violation of Article 19 of the Universal Declaration of Human Rights. The proposal was never accepted. See Abram Chayes & Paul Laskin, *A Report on the Panel on International Telecommunications Policy*, in *DIRECT BROADCASTING FROM SATELLITES: POLICIES AND PROBLEMS* 1, 30 (1975).

139. *United Nations Educational, Scientific and Cultural Organization's Declaration of Guiding Principles on the Use of Satellite Broadcasting for the Free Flow of Information, the Spread of Education and Greater Cultural Exchange*, Res. 4.11, 1 Unesco, Records of the General Conference, 17th Sess., at 67, U.N. Doc. A/AC.105/109 (1972) [hereinafter *UNESCO Declaration*].

broadcasts had into neighboring nations.¹⁴⁰ However, the regulation is also often seen as establishing a prior consent requirement, although the actual existence and impact of this claim is hotly disputed.¹⁴¹ Radio Regulation 428A does not prohibit all communications across borders; neither does it discuss the content of any transmission, but merely the technical specification for a transmission.¹⁴² The regulation, however, fails to define, in part, what penalty could apply to a broadcaster that fails to obtain consent.¹⁴³ Further, the regulation fails to define even what is meant by the term consent or what type of agreement would satisfy any requirement of prior consent.¹⁴⁴ Because of these deficiencies, Radio Regulation 428A has been interpreted as having the effect “not to incorporate the principle of prior consent [into the regulation,] but simply to try to establish some sort of technical framework”¹⁴⁵

The UNESCO Declaration is not binding, but was met with large scale, international acceptance.¹⁴⁶ The key provision relating to the obligation of prior consent is Article IX, which notes that “it is necessary 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.”¹⁴⁷ The inability to reach consensus in any international regulatory scheme focuses on the same arguments made during the Cold War between the Western States and the former Soviet bloc.¹⁴⁸ The debate always centers on the fervent belief in protecting free speech, as voiced by the Western

140. Bayer, *supra* note 41, at 562.

141. *See id.*; *see also* Paul, *supra* note 58, at 358 (noting that 428A arguably does not require prior consent, but if required then conditions may be attached).

142. Bayer, *supra* note 41, at 562.

143. *See* Fjordbak, *supra* note 126, at 920; *see also* Paul, *supra* note 58, at 359.

144. Bayer, *supra* note 41, at 562.

145. *Id.*

146. Fjordbak, *supra* note 126, at 921. Although met with general consensus, the interpretation and impact of the UNESCO declaration are far from universal. *See also* Bayer, *supra* note 41, at 563.

147. *UNESCO Declaration*, *supra* note 139, art. IX.

148. *See* Paul, *supra* note 58, at 357.

nations, and the fear over offensive and damaging programming, as previously championed by the former Soviet bloc.¹⁴⁹ Given this dichotomy, it is clear that the UNESCO declaration does not provide a sound regulatory scheme. Article IX promotes both sides of the argument. Within the same article, UNESCO promotes “prior agreements” only when the “principle of freedom of information” is not sufficiently compelling.¹⁵⁰ Article V even further weakens the prior consent requirement of Article IX by promoting the free flow of information, while not mentioning the prior consent counterbalance.¹⁵¹ Accordingly, UNESCO has assured itself that Western nations, or any broadcasting nation, will always find the freedom of information to be sufficiently compelling to override any need for prior consent from the receiving nation.¹⁵²

While the past proposals fail essentially for ambiguity, a more recent proposal fails for being both overly broad and inefficient. In December 2003, the World Summit on the Information Society (WSIS) was held in Geneva, Switzerland, and a draft Declaration on the Right to Communicate (Declaration on Communication) was presented.¹⁵³ The Declaration wisely eliminates the unilateral balancing test constructively approved by UNESCO.¹⁵⁴ Instead, the Declaration purports to focus on an individual’s near-inalienable right to free communication.¹⁵⁵ The Declaration does so by emphasizing that each individual should have the right to participate in all means of communication, and to express himself or herself and to

149. Bayer, *supra* note 41, at 560–61.

150. *UNESCO Declaration*, *supra* note 139, art. IX.

151. *See Id.* art. V (“The objective of satellite broadcasting for the free flow of information is to ensure the widest possible dissemination . . . of news of all countries . . .”) *quoted in* Bayer, *supra* note 41, at 560–61.

152. *See* Bayer, *supra* note 41, at 563 (noting the deficiencies in the UNESCO Declaration and the disagreement between interpretations taken by comparing the Western free-flow-of-information philosophy with the more restrictive, national sovereignty view).

153. *Right to Communicate*, *supra* note 110.

154. *Cf. id.* (emphasizing free expression and communication with an absolute right to protection from incitement to hate, violence, war, and genocide).

155. *See id.*

access information.¹⁵⁶ Far from individual rights, these purported rights are defined as limitations to the freedom of communication and expression.¹⁵⁷ Most indicative of the failures of the Declaration on Communication is Part III, which defines the “Protection Rights” within the right to communicate.¹⁵⁸ The majority of these “Protection Rights” are defined in the negative.¹⁵⁹ Instead of affirmative rights, they are the right to be protected from the freedom of expression of others, such as “forms of propaganda, in whatsoever country conducted, which [are] either designed or likely to provoke or encourage any threat to the peace, breach of peace, or act of aggression.”¹⁶⁰ While it is generally accepted that there is a right to be protected from propaganda that is designed to incite violence,¹⁶¹ the Declaration on Communication restricts a person’s right to communicate too broadly. For example, this clause would restrict a person’s right to criticize government officials or policies when they *might* lead to some violent reaction by others, despite no such intent by the one expressing the views.¹⁶² It is similarly broad in granting each individual a right to “promote, protect and preserve . . . cultural identity, national and international cultural property and heritage.”¹⁶³ The Declaration on Communication grants these rights as untempered absolutes. As mentioned previously, the International Courts consider the free expression of ideas to be almost sacrosanct—to be restricted only after meeting the rather high burden of showing a compelling international interest.¹⁶⁴

With these restrictions in place, the Declaration on

156. *Id.*

157. NOTE ON DRAFT DECLARATION, *supra* note 70, at 6–7; see also *Right to Communicate*, *supra* note 110, Part III (acknowledging that a person has a right to be protected from various forms of communications from others).

158. *Right to Communicate*, *supra* note 110, Part III.

159. See NOTE ON DRAFT DECLARATION, *supra* note 70, at 6 (noting several of the “Protection Rights” that are actually restrictions on the right to communicate).

160. See *Right to Communicate*, *supra* note 110, Part III, para. 7.

161. See Downey, *supra* note 41, at 341 (noting that “no country formally disputes the goal of eliminating propaganda which incites to war or violence”).

162. NOTE ON DRAFT DECLARATION, *supra* note 70, at 8.

163. *Right to Communicate*, *supra* note 110, Part II, para. 6.

164. See *supra* notes 60–71 and accompanying text.

Communication and its definitions of the right to communicate violate internationally accepted standards.¹⁶⁵ To address violations, the Declaration creates an international Ombudsman to address the concerns of individuals, and would grant the Ombudsman authority to address concerns that an individual has with governments or private parties.¹⁶⁶ Grievances are made and the Ombudsman is asked to intervene or submit a petition for the start of proceedings.¹⁶⁷ Such a proposal focuses entirely on individual rights and provides no protection for a state and its interest in preserving its culture, or protecting its patriots from other speech intended to provoke violence. Further, a “plethora of international mechanisms” are already in place to address the concerns presented by the Declaration.¹⁶⁸ The current mechanisms are slow, cumbersome, often ineffective, and the Ombudsman offers no hope of remedy.¹⁶⁹ Concerns over immediate violence are to be addressed the same as a concern over improper news reporting by a media outlet.¹⁷⁰ Where the threat is imminent, the Declaration on Communication offers only the hope of temporary relief, after drawn-out proceedings.¹⁷¹ The Ombudsman would clearly lack the capacity or authority to implement immediate measures and efficiently meet the demands that may occur where trans-border communications brings with it the predetermined threat of violence, death, or genocide.

The self-help remedies currently employed by unprotected nations are the last line of defense to national interests.¹⁷² Although proposed schemes seek to broaden the regulatory

165. NOTE ON DRAFT DECLARATION, *supra* note 70, at 6.

166. *Right to Communicate*, *supra* note 110, Part VI.

167. *Id.*

168. NOTE ON DRAFT DECLARATION, *supra* note 70, at 8.

169. *See id.*

170. *See generally Right to Communicate*, *supra* note 110 (giving no distinctive treatment to the protection against violence and the protection against cultural infringement).

171. *See id.* Part IV (“Any person . . . may ask the Ombudsman to intervene on his/her behalf, by submitting a petition for the start of proceedings.”).

172. *See Bayer*, *supra* note 41, at 565 (“[W]ithout effective international regulation to prevent these intrusions of undesirable broadcasts, many states claim they have no other choice but to jam the satellite signals.”).

power of the United Nations or the ITU, the schemes do nothing to change the currently unworkable state of international regulation. These past proposals are equally unworkable because they are inefficient, or because they unduly favor one side or the other in the fight over the sanctity of nation or expression.

IV. BY EXAMINING RESULTS FROM THE PAST WE SEE MORE CLEARLY THE PRESENT NEED FOR REGULATION

No nation, its people, or its history is left unaffected by the trans-border communications facilitated by satellites. As has been mentioned, there are enormous societal benefits that can be derived from the interaction with other cultures and nations.¹⁷³ Among the many benefits, trans-border satellite transmissions can promote cultural interchange that cultivate understanding, facilitate communications, and foster an environment of technological interchange to increase the opportunities previously unavailable to third-world nations.¹⁷⁴ Such goals are certainly noble, but to forget the injurious effects of the same power in Bosnia and Herzegovina¹⁷⁵ and Nazi Germany,¹⁷⁶ or even the seemingly minor cultural and linguistic damage in the Philippines¹⁷⁷ leaves noteworthy effects and uses of radio unexplored. At the present, international communications into Iraq is at an all-time high. The United States exports American morals, traditions, values, and capitalism to Iraq through programs such as "Sesame Street" and "Friends," which can now be viewed by many Iraqis as the sale of satellite dishes has increased exponentially.¹⁷⁸ Christian

173. See *supra* notes 91–107 and accompanying text.

174. *Id.*

175. See ARTICLE 19, FORGING WAR: THE MEDIA IN SERBIA, CROATIA, AND BOSNIA-HERZEGOVINA (1994) [hereinafter FORGING WAR]; Francoise J. Hampson, *Incitement and the Media: Responsibility of and for the Media in the Conflicts of the Former Yugoslavia*, in PAPERS IN THE THEORY AND PRACTICE OF HUMAN RIGHTS (1993).

176. See ROBERT EDWIN HERZSTEIN, THE WAR THAT HITLER WON: THE MOST INFAMOUS PROPAGANDA CAMPAIGN IN HISTORY (1978).

177. See Bernard Cloutier, *Philippines*, at <http://berclo.net/page94/94en-philippines.html> (last visited Jan. 22, 2005).

178. See Ryan Dilley, *Is Elmo Bush's Secret Weapon?*, BBC NEWS ONLINE, Sept. 3, 2003, at <http://news.bbc.co.uk/1/hi/magazine/3200699.stm>; Mohamed Hasni, *Iraqis Jostle*

organizations, from the United States and internationally, broadcast messages aimed at conversion.¹⁷⁹ The United States government broadcasts music over Radio Sawa, and has intentionally broadcast other messages as a form of psychological warfare.¹⁸⁰ Before we have to react to the consequences, perhaps now is the time to proactively approach the discussion on whether the potential or desired effects of trans-border communications now need to be regulated. In that context, the following two parts detail individual case studies and present specific proof that unregulated radio and television (and potentially data transmission) are a continuing danger. In some cases, the consequences have been deadly.

A. *Rwandan Genocide Facilitated by Radio-Télévision Libre des Milles Collines*

It took less than an hour in Kigali. In April 1994, the plane containing Juvenal Habyarimana and Cyprien Ntaryamira, then the respective presidents of Rwanda and Burundi, was shot down as it approached the Kigali airport in the Rwandan capital.¹⁸¹ Within an hour, the genocide began, and for more than three months the killing continued.¹⁸² It is estimated that in the period of just one hundred days, between five and eight hundred thousand people died, mostly Tutsis.¹⁸³ The butchery came at the hands of the Hutu—from gangs made up of youth and with the help of the Hutu Presidential Guards.¹⁸⁴

While one might have expected a chaotic and disorganized

to View Foreign TV, but at a Price, AGENCE FR-PRESSE (Apr. 22, 2003), 2003 WL 2785559.

179. Rachel Zoll, *Christian Missionaries Already Making Gains in Muslim Countries*, ASSOCIATED PRESS NEWSWIRES, Apr. 20, 2003.

180. Kevin Coughlin, *War—it's not just firing guns*, THE STAR LEDGER, April 11, 2003, available at <http://www.globalsecurity.org/org/news/2003/030411-iraq01.htm>.

181. Metzl, *supra* note 44, at 630.

182. *See id.*

183. *See* ALAIN DESTEXHE, RWANDA AND GENOCIDE IN THE TWENTIETH CENTURY 68 (Alison Marschner trans., 1995); Metzl, *supra* note 44, at 629–30. While most of the butchered Rwandans were from the minority Tutsi, a significant portion of the slaughter was effectuated against the moderate Hutu who had advocated for peace and compromise between the two factions. *See* Metzl, *supra* note 44, at 630.

184. Metzl, *supra* note 44, at 630.

manner to the mass killings, the Hutu effectively used what limited resources could be found near their third-world country to carry out an orderly and synchronized attack.¹⁸⁵ In the background, but at the very heart of this order, was Radio-Télévision Libre des Milles Collines (RTLMC).¹⁸⁶ As provocation for the creation of RTLMC, the Rwanda government initiated reforms that increased the number of moderate Hutu among the ranking positions in the Rwandan Government, including the Ministry of Information that directed the affairs of state-sponsored Radio Rwanda.¹⁸⁷ From its creation in 1993, RTLMC was an extension of civilian and government Hutu extremists,¹⁸⁸ and countered the less extremist views that were transmitted over the broadcasts sanctioned by the Rwandan Government on Radio Rwanda.¹⁸⁹

Between 1993 and April 1994, the popularity and effectiveness of RTLMC grew.¹⁹⁰ RTLMC consciously targeted a listening audience made up of the Interahamwe and other gangs of young Hutu, by presenting the radio shows in a talk-show format.¹⁹¹ The operative link between the Hutu savages and RTLMC became readily apparent.¹⁹² The broadcasts became effective tools for organizing the Hutu in searching out and attacking their opponents and less extreme governmental officials.¹⁹³ Non-coincidentally, attacks against opponents

185. *Id. Contra* Lindsey Hilsum, *The Radio Station Whose Call Sign is Mass Murder*, THE OBSERVER, May 15, 1994, at 19 (stating “[T]here is no evidence of systematic slaughter on the rebel side.”).

186. Metzl, *supra* note 44, at 630.

187. LINDA KIRSCHKE, ARTICLE 19, BROADCASTING GENOCIDE: CENSORSHIP, PROPAGANDA AND STATE SPONSORED GENOCIDE IN RWANDA 1990-1994, at 40–41 (1996).

188. *Id.* at 41–44. Many of the members of RTLMC had worked previously for Radio Rwanda or were influential governmental and civilian leaders. The President of the RTLMC board of directors was Félicien Kabuga, the financial advisor to President Habyarimana. Also heavily involved in operating RTLMC were: André Ntagerura, the Minister of Transport and Communications, and Jean-Bosco Baryagwiza, the leader of the Coalition pour la Défense de la République. *Id.*

189. GÉRARD PRUNIER, THE RWANDA CRISIS: HISTORY OF A GENOCIDE 188–90 (1995).

190. *See* KIRSCHKE, *supra* note 187, at 49–64.

191. *See id.* at 49–50.

192. Metzl, *supra* note 44, at 631.

193. *See* KIRSCHKE, *supra* note 187, at 51–61.

immediately followed RTLMC broadcasts that specifically criticized the official or opponent.¹⁹⁴ Further, roadblocks and neighborhood searches for the Rwandese Patriotic Front (RPF) were immediately carried out by the Hutu following an erroneous RTLMC broadcast announcing that the Tutsi from Uganda had invaded Rwanda, and requesting searches in specific neighborhoods.¹⁹⁵

That RTLMC was inciting the violence in Rwanda became even more apparent in the days that immediately followed the shooting down of President Habyarimana's plane.¹⁹⁶ More roadblocks and even more coordinated attacks followed.¹⁹⁷ RTLMC became an active participant in the genocide by reading off names of those considered enemies to the cause, and then had only to wait while the Interahamwe formed militias to hunt down and execute those on the lists.¹⁹⁸ The RTLMC broadcasts specifically identified vehicles, which were then targeted, and the passengers put to death.¹⁹⁹ These "systematic, widespread and flagrant violations of international humanitarian law"²⁰⁰ are but a few of the actions and results taken by RTLMC to incite violence and lawlessness in Rwanda.

The International community did nothing to stop the broadcasts and protect the people.²⁰¹ The genocide continued despite the United Nation's recognition that RTLMC was

194. *Id.* at 55–57. That those in Rwanda recognized the connection between RTLMC and the attacks is unquestioned. After one broadcast, the person named in the broadcast begged the RTLMC station to retract what he considered to be a "death warrant." *Id.* at 56.

195. *Id.* at 56–57.

196. See Metzl, *supra* note 44, at 630–31.

197. KIRSCHKE, *supra* note 187, at 71–79.

198. *Id.* at 79.

199. Metzl, *supra* note 44, at 631.

200. See S.C.Res 918, U.N. SCOR, 49th Sess., 3377th mtg., at 1, U.N. Doc. 3/RES/918 (1994).

201. See Metzl, *supra* note 44, at 632 ("[R]eports of the . . . RTLMC[C] radio broadcasts were transmitted throughout the world by CNN and the print news . . . [but] it was soon clear that the international community would offer little meaningful response."); see Maxine Marcus, *Humanitarian Intervention Without Borders: Belligerent Occupation or Colonization?*, 25 HOUS. J. INT'L L. 99, 105 (2002) ("The United States and France have publicly accepted responsibility for failing to prevent genocide [in Rwanda].").

“calling on militias to step up the killing of civilians,”²⁰² and the wide media coverage in the United States that led the United States to recommend taking some action.²⁰³ Neither the United Nations nor the United States took action, and the United Nations actually reduced their forces in Rwanda from almost twenty-five hundred to less than three hundred.²⁰⁴ Instead, the slaughter ended only after the Tutsi-led RPF captured Kigali and exiled the Hutu Government to Zaire.²⁰⁵

Even in hindsight, it cannot be clear what the death toll would have been had the Hutu extremists been unable to broadcast their calls for violence over RTLMC. However, even had regulation banning or jamming the broadcasts not been effective in stopping the violence, it has been argued that such action could have been an effective “tool for keeping tensions in check” as it is clear that “radio broadcasts did play a major role in promoting tensions and even coordinating attacks by militia” as they “struck a responsive vein in a society torn asunder by its colonial history and postcolonial experience.”²⁰⁶ Rwanda presents a clear lesson for the present—those with the power to communicate will not regulate themselves, especially when communication is fueled by hatred or terror.

B. Cuban Interference with US Economic Interests by Self-Help Jamming of TV and Radio Martí

Beginning in 1983, when the Radio Broadcasting to Cuba Act (RBC Act) was passed by the United States Congress, Cuba and the United States have struggled to find a compromise

202. Frank Smyth, *Rwanda's French Connection*, THE VILLAGE VOICE, May 1994, available at <http://www.franksmyth.com/clients/FrankSmyth/frankS.nsf/fb45d75161e3107885256b6c005611a4/88609107cf66cf4085256b7b0079068d> (quoting Abdul Kabia, the United Nations spokesman in Kigali).

203. See Metzl, *supra* note 44, at 632–33 (noting coverage of the Rwandan conflict by, inter alia, United Press International, The Washington Post, and The Christian Science Monitor).

204. Boutros Boutros-Ghali, INTRODUCTION TO UN DEP'T OF PUBLIC INFORMATION, THE UNITED NATIONS AND RWANDA 1993-1996, at 35–49, U.N. Sales No. E. 96.I.20 (1996).

205. *Rwanda*, 10 6 THE NEW ENCYCLOPEDIA BRITANNICA: MICROPÆDIA 267–68 (15th ed. 2003).

206. Metzl, *supra* note 44, at 649–650.

between the issues of national sovereignty and freedom of expression.²⁰⁷ On the northern end of the Straits of Florida, the United States Information Agency (USIA) stands, advocating the freedom of expression.²⁰⁸ On the southern end, the Cuban government protects its national sovereignty through radio jamming and deliberate broadcast interference.²⁰⁹ These diametric views are based, in part, on the same principles that each government follows within its borders.²¹⁰ Cuba adheres to disseminating only the information that coincides with the government's ideals, and actively polices and controls the media.²¹¹ Cuba essentially operates on a platform of censorship.²¹² In contrast, the United States government, under the First Amendment freedom of the press, allows the media to operate without undue interference from the government.²¹³

The RBC Act noted its principle objective as "provid[ing] for the open communication of information and ideas through the use of radio broadcasting to Cuba."²¹⁴ Through the RBC Act, the United States government authorized attempts to break-up the media monopoly held by the Cuban government.²¹⁵ Instead of providing programming that is ideologically consistent with Cuba's policies, the RBC Act authorized the USIA to develop alternative programming that the United States now beams directly into Cuba.²¹⁶ The USIA programming was named Radio Martí.²¹⁷

207. See Radio Broadcasting to Cuba Act (RBC Act), 22 U.S.C. § 1465 (2003).

208. See P. Kimberly Howland, Comment, *Radio Marti and the U.S.-Cuban Radio War*, 36 FED. COMM. L.J. 69 n.1 (1984). The United States Information Agency (USIA) is the agency authorized by the RBC Act "to provide for open communication of information and ideas through the use of radio broadcasting to Cuba." § 1465a.

209. Bayer, *supra* note 41, at 567-568.

210. See *id.* at 567.

211. *Id.* at 568.

212. *Id.*

213. *Id.*

214. 22 U.S.C. § 1465 (2000).

215. Howland, *supra* note 208, at 81.

216. See *Id.* at 81-82.

217. Jose O. Salinas, Note, *Radio Marti: Meeting the Need for Uncensored Information in Cuba*, 19 N.Y.U.J. INT'L L. & POL. 433 (1987). The name of Radio Martí comes from José Martí, a Cuban poet that was the champion of the Cuban struggle for

From the United States' perspective, Radio Martí is guided by altruistic goals. Radio Martí is filled with programming that "give[s] both international and domestic Cuban developments a perspective, balance and fullness now denied the Cuban people by its government."²¹⁸ It is intended as an objective and accurate information source that provides an independent standard by which Cubans can hold their government accountable.²¹⁹ After the RBC Act was passed in 1985, Cuba attacked the Radio Martí programming on two fronts.²²⁰ First, the Cuban government initiated anti-American radio programming.²²¹ The programming was not broadcast solely to the Cubans that would be listening to Radio Martí, but also to United States radio stations in the southern United States.²²² As the second defense, Cuba jammed the Radio Martí frequency.²²³ By jamming the signal, Cuba interfered not only with Radio Martí, but with numerous other radio signals, which caused lost revenue to radio broadcast stations throughout the southern United States.²²⁴

To further the goals of Radio Martí, President Reagan, in 1988, signed a bill creating TV Martí.²²⁵ Television in Cuba had increased since Radio Martí was created, and TV was seen as the next logical step to expanding the Radio Martí agenda.²²⁶ Programming began on March 27, 1990.²²⁷ Three hours of programming, including music, skits about the United States, and the situational comedy, "Kate and Allie," were planned for

independence in the late nineteenth century. *Id.* at 441, n. 37.

218. Bayer, *supra* note 41, at 569; see also Trevor R. Jefferies, *The Cuban Democracy Act of 1992: A Rotten Carrot and a Broken Stick?*, 16 HOUS. J. INT'L L. 75, 89 (1993) ("[The] broadcasts promote the anti-Castro movement within Cuba by spreading American ideals").

219. *Id.* at 568–69.

220. Salinas, *supra* note 217, at 448–50.

221. *Id.* at 447–48.

222. *See id.*

223. *See id.* at 450.

224. *Id.* at 448–49.

225. Bayer, *supra* note 41, at 571.

226. *Id.*

227. *TV Marti Takes Off – But Will It Fly?*, BROADCASTING 50, Apr. 2, 1990, available at LEXUS, ISSN: 0007-2028.

the initial broadcast.²²⁸ However, the Cuban government shut down the broadcast within minutes.²²⁹ By broadcasting on the same television channel, the Cuban government created enough interference to jam the TV Martí broadcasts.²³⁰

Fidel Castro maintains that the TV and Radio Martí broadcasts are violations of international law.²³¹ His position is based, in part, on his claims that the foreign broadcasts devastate economies and ideologies, and are detrimental to cultures and citizen morale.²³² However, arguably the more important lesson from TV and Radio Martí is that it shows the ineffectiveness of the self-help regulation that is currently in place due to the inability of the ITU to enforce any of the already uncertain international regulation.²³³ Without a reliable international response, the retaliatory, self-help radio jamming can cause significant economic damage, such as that caused by the radio interference to the nearby radio stations in the United States.²³⁴ Protection of a nation's sovereignty, as well as against any cultural, political, or social detriment, such as those claimed by Castro, merely lends additional support to the argument calling for the international community to step in.²³⁵

228. *Id.*

229. *See Id.*

230. *Id.*

231. Bayer, *supra* note 41, at 573.

232. *Id.* at 549. As the other basis for his legal claim, Castro cites the 1982 Plenipotentiary Conference Convention and the ITU Convention. *Id.* at 573. Based on Article 35 of the Convention, the International Frequency Registration Board (IFRB), an arm of the ITU, concluded that TV Martí is in contravention to the Radio Regulations. *President Pushes TV Martí; ITU Pushes Back*, BROADCASTING, Apr. 9, 1990, at 37. Article 35 of the Convention notes that “[a]ll stations must be established and operated in such a manner as not to cause harmful interference to the radio services or communications of other members . . . which carry on radio service, and which operate in accordance with the provisions of the Radio Regulations.” *TV Martí Takes Off – But Will It Fly?*, *supra* note 227, at 50.

233. *See* Bayer, *supra* note 41, at 566 (“The status of regulatory instruments as evidence of international law is highly uncertain, and the fact that they are unenforceable further weakens them.”).

234. *Cf. supra* note 224 and accompanying text (noting the significant financial damage to the radio stations in the southern United States as a result of Cuba jamming Radio Martí).

235. Beyond the normal debate about the cultural, political, moral, and social effects caused by trans-border telecommunications, the argument by Castro is even more

V. A SOLUTION CAN BE FOUND THAT BALANCES EXPRESSION
AND SOVEREIGNTY

A solution to the unworkable state of regulation is not unfathomable. While past regulatory schemes have focused on the essential differences between the factions competing for national sovereignty and freedom of expression, the solution lies in focusing on the few points of agreement between the two sides. By finding the common ground, and building a workable framework to balance the competing interests, the ITU can operate as the center point of international telecommunications and regulate transmission content without the burden of continuous monitoring.

As highlighted by the RTLMC sponsored genocide in Rwanda,²³⁶ and the self-help remedies used in Cuba,²³⁷ whatever international regulatory scheme exists is plainly not working. The ITU is recognized as the “international focal point for all matters relating to telecom in the global information economy and society of the twenty-first century.”²³⁸ To begin to work back to its central role, the ITU must work out a compromise between free expression and national sovereignty. As the conflicting views have not compromised in a hundred years, this is clearly not an easy task.

Fortunately, two steps aid the ITU in establishing the respect of both debating sides. Both sides have taken the first step in their agreement that there must be an immediate

hotly debated. Cubans are exposed to American culture with or without Radio and TV Martí. Inside Cuba, American television, books, and movies are already readily available, which tends to contradict Castro's claims that TV and Radio Martí would themselves be highly injurious. See Dave Brezing, *Art Exhibit Explores Cultural Connection Between Cuba and US*, HAVANA J., June 5, 2003, available at http://havanajournal.com/culture_comments/A525_0_3_0_M/; see also BEN DANGL & APRIL HOWARD, *Portrait: Talking with Cubans about the State of the Nation*, UPSIDE DOWN WORLD, March 5, 2004, at http://www.americas.org/index.php?cp=item&item_id=13995.

236. See *supra* discussion accompanying notes 181–206.

237. See *supra* discussion accompanying notes 207–235.

238. Pekka Tarjanne, *The Limits of National Sovereignty: Issues for the Governance of International Telecom*, in TELECOM REFORM PRINCIPLES, POLICIES AND REGULATORY PRACTICES 37, 39 (William H. Melody ed. 1997), available at <http://www.lirne.net/resources/tr/chapter04.pdf>

international presence that is capable of obstructing and eliminating propaganda that threatens immediate lawlessness or human slaughter.²³⁹ Although no internationally accepted definition for propaganda exists, the United Nations must be granted deference to step in where trans-border communication incites war, extreme violence, or genocide.²⁴⁰ To maintain its role in global telecommunications, the ITU, acting under the auspices of the Security Council, should fulfill such a role. Chapter VII of the United Nations Charter recognizes such a need.²⁴¹ The Security Council is granted power to maintain or restore peace and security when there is any “threat to the peace, breach of the peace, or act of aggression.”²⁴² The ITU is in the ideal situation to set-up procedures for decision making mechanisms to determine when propaganda breaches the peace and threatens international security.²⁴³ However, to function in its capacity, the ITU must have the necessary resources. At a minimum, radio and television signal jamming equipment must be available for global conflicts.

The second step remains to be taken by the international community, but the process is underway. Although it is not obvious, the contradictory sides of state sovereignty and freedom of expression are converging.²⁴⁴ Despite the lack of agreement, both sides have taken a step toward the other. The United States and Europe play the principle role in the desire for free expression, but both have backed away from the standard of an absolute free flow of ideas.²⁴⁵ The United States Courts and European Court of Human Rights both acknowledge that there is some compromise available.²⁴⁶ As a result, there is no reason for either the United States or Europe to hold out for a stricter

239. See Bayer, *supra* note 41 and accompanying text.

240. See *id.* at 549–50 (noting the different definitions given to the term “propaganda”).

241. See U.N. CHARTER art. 39.

242. *Id.*

243. Tarjanne, *supra* note 238, at 39 (noting that “regulation” is one of the three main functions of the ITU).

244. See Gorove, *supra* note 45, at 8–9.

245. See *supra* notes 59–71 and accompanying text.

246. See *id.*

standard abroad than at home.²⁴⁷ On the other side, it appears that customary law is moving toward the Western view of free expression.²⁴⁸ Trans-border communications, such as Voice of America, has been around for decades.²⁴⁹ Few nations have objected to such measures by the United States.²⁵⁰ The mere failure to react may demonstrate a new form of customary law that more willingly accepts the free flow of information.²⁵¹

Despite any real or imagined convergence, the difficulty still lies in “draw[ing] a distinction between permissible and impermissible forms of international propaganda.”²⁵² The European Court of Human Rights has led us a long way toward a solution.²⁵³ By allowing restrictions in free speech only when the restraint is necessary to preserve an internationally recognized interest, and not when other suitable methods of redress are available, the court’s three-prong test provides the beginnings of a workable method to protect the conflicting interests.²⁵⁴ Where an incitement to breach the peace or act out in war or genocide is not present, the ITU will carefully ensure that the interests of all sides are understood and measured. Undoubtedly, some will consider cultural, social, economic, religious, or moral damage to be just as immediate a threat as violence or the equivalent of war.²⁵⁵ However, there must be a line drawn, and the international community has drawn it where they currently agree—at violence and loss of human

247. See *supra* note 67 and accompanying text.

248. Gorove, *supra* note 45, at 8–9.

249. See M.R. Kropko, *Hungarian Says Rock Defeated Communism*, THE MIAMI HERALD, Nov. 9, 2003, at 1; cf. Metz, *supra* note 44, at 636–45 (discussing various international laws, policies, and standards applied to trans-border communication starting back as far as 1936).

250. Gorove, *supra* note 45, at 9.

251. *Id.*

252. Richard Falk, *On Regulating International Propaganda: A Plea for Moderate Aims*, 31 LAW & CONTEMP. PROBS. 622, 624 (1966).

253. See *supra* discussion accompanying notes 68–71.

254. See *id.*

255. Cf. Bayer, *supra* note 41, at 542 (“Developing countries . . . claim this direct access to their citizens of foreign television broadcasts devastates their economies, cultures, and ideologies.”).

life.²⁵⁶

Dispute resolution through the ITU must follow new procedures. The ITU is not new to evolution, and must continue to evolve if it is to meet the needs of all nations that seek international harmony.²⁵⁷ A quasi-judicial process can address the concerns of all involved, and then act only where the three-prong test indicates action is necessary. Clearly, the efficiency of the process is reduced when compared to immediate action under the Security Council, but far exceeds the efficiency of the current system, which has a total lack of coherent regulation. As a result of the proposed reforms to the ITU, it regains its role as the central figure in world telecom. The ITU must have the authority and capacity to step in where international telecommunications propaganda threatens the peace. Where social, moral, cultural, or other similar consequences are at stake and human life is not in imminent danger, the more judicious approach is to weigh the sides, consider the international interests at stake, and determine if regulation is the only means available to preserve the interest.

VI. CONCLUSION

The legal status of much of the international law and policy that governs trans-border, satellite telecommunications is uncertain. Worse yet, the international organizations commissioned to enforce the law, lack the effectiveness, resources, or initiative to enforce even what it sees as the law. A significant part of this ineffectiveness is due to the ambiguity in the law, but much is due also to the lack of clear directives establishing courses of action. The organizational structure is in place, but the system must evolve. Under the United Nations, the International Telecommunication Union must adapt to the technology that has been in use for the past forty years. The international community has stripped the ITU of much of the regulatory power. This power must be restored if the ITU is to regain its pace to become the international focal point for telecom in the twenty-first century. To succeed, the ITU must

256. *Accord supra* note 43 and accompanying text.

257. Tarjanne, *supra* note 238, at 37.

begin on the most universally accepted grounds, where the entire world is in agreement. The United Nations must supply the ITU with the technology and man power to form immediate response teams to directly confront trans-border transmissions that are directed at inciting violence and breaches of the peace. Further, the ITU must rethink the dispute resolution process. While much of the world is concerned with the danger trans-border communications poses to cultural, political, economic, social, idealistic, and moral values, the ITU must act—but not entirely at the expense of those supporting the free flow of information and the Declaration of Human Rights. Fortunately, international courts are beginning to establish guidelines for walking the fine line between the freedom of expression and the preservation of national sovereignty. The ITU must re-affirm these established international principles as it takes a reactionary stance to bring about a prompt, but careful dispute resolution process that is fully supported by the international community.

*Colby C. Nuttall**

* J.D. Candidate, 2005, University of Houston Law Center; B.S.M.E., 2002, Utah State University. This Comment received the 2004 Adams & Reese, L.L.P. Award for Outstanding Comment in International and Comparative Law. I wish to express my thanks to the current members of the Houston Journal of International Law for their tireless editorial support and basic good will. I express additional thanks to my family and friends for their support and encouragement. Finally, I reserve my deepest gratitude for Delyn—my best friend, wife, and eternal companion—whose support made law school a possibility and reality.