

International Law and the Intentional Harmful Interference with
Communication Satellites

by

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Abstract

During the Arab Spring effected governments in the Middle East Northern Africa sought to jam satellite transmissions from news agencies carrying news and information of the uprisings into their respective territories. The news agencies pushed back and in addition jumping satellites and changing signals, some of these agencies reported that such jamming was a violation of international law. As a result of these claims, the first part of this thesis explores the intentional harmful interfere with transnational radio and satellite broadcasting, those States most impacted by jamming, and the legal justifications that a State may assert in order to jam a radio or satellite transmission. The second portion of the thesis is devoted to exploring those areas of international law that support a State sending a satellite transmission to another State without first obtaining the receiving State's consent. This portion of the thesis explores Article 19 of the Universal Declaration of Human Rights, its status as a binding obligation upon all States, and the role it plays in providing legal support for foreign broadcasting conducted by the United States. The final section of this thesis looks at the application of Article 19 to the People's Republic of China and the Islamic Republic of Iran in an effort to demonstrate the potential negative impact that economic and political factors may have on its application.

Résumé

Pendant le Printemps Arabe, les gouvernements les plus touchés en Proche Orient et en Afrique du Nord essayaient de bloquer la diffusion satellitaire transmettant les actualités concernant la révolte et le soulèvement sur leurs territoires. Les agences de presse étrangères se sont manifestement déclarées rétives contre ce blocage illégal, considéré comme une violation à la loi internationale et par conséquent, elles se sont acharnées à débloquent cette situation et à tenter de procéder à la transmission satellitaire des informations et de médiatiser ce qui se passait à l'intérieur de ces pays. En observant cette protestation, cette thèse se propose d'y effectuer une recherche dont la première partie est consacrée à l'enquête sur : une interférence nuisible intentionnelle aux émissions satellitaires et radiophoniques; les états étant les plus touchés; et le soutien légal permettant aux états de bloquer la diffusion des émissions. La deuxième partie de cette thèse concerne les lois internationales autorisant un État à émettre une émission par la voie de satellite vers un autre pays sans que la permission de ce dernier soit requise. Cette partie de thèses visera à enquêter sur l'Article 19 de la Déclaration d'Homme Universel, en tant qu'une loi obligatoire étant compétente de jouer le rôle d'un appui soutenant la diffusion des émissions émises de l'extérieur des États-Unis. En fin la dernière partie se penchera sur l'application de l'Article 19 à la République Populaire de la Chine ainsi qu'à la République Islamique d'Iran afin de démontrer la réalité selon laquelle, d'autres facteurs devraient être pris en considération à savoir économiques et politiques, à l'application de l'Article 19 de la Déclaration d'Homme Universel.

Acronyms & Abbreviations

ASATs	Anti-Satellite Weapons
BBG	Broadcasting Board of Governors
CCTV	China Central Television
COPUOS	United Nations Committee on the Peaceful Uses of Outer Space
DBS	Direct Broadcast Satellite
DOS	United States Department of State
DTH	Direct to Home
EMP	Electromagnetic Pulse
FCC	United States Federal Communications Commission
GA	United Nations General Assembly
HRC	Human Rights Committee established by the ICCPR
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
IO	Information Operations
IRIB	Islamic Republic of Iran Broadcasting
ITU	International Telecommunication Union
NTD	New Tang Dynasty Television
NITV	National Iranian Television
OST	Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
RFA	Radio Free Asia
RRB	Radio Review Board
RT	Russian State Broadcasting, formerly “Russia Today”
RTL	Radio Télévision Libre des Mille Collines
UDHR	Universal Declaration of Human Rights
USAF	United States Air Force
USSR	Union of Soviet Socialist Republics
VCLT	Vienna Convention on the Law of Treaties
VOA	Voice of America
VOICE	Victims of Iranian Censorship Act
WRC	World Radiocommunication Conference

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Introduction

In December 2010 in Tunisia, Mohamed Bouazizi, a jobless graduate, set fire to himself in protest after police confiscated the fruit and vegetables he was selling from a street stall. Soon after, widespread protests emerged in Tunisia over unemployment among educated people. These protests led to calls for the resignation of then President Zine el Abidine Ben Ali. Days after the initial protests, President Ben Ali fired the country's communications minister, saying that the violence was manipulated by foreign media.¹ Citizen journalists in Tunisia had reported on the uprising by using social media and cellphones to upload images to the Internet that could be played on such Internet sites as YouTube. These images and videos were later rebroadcast throughout the Middle East via satellite by foreign media outlets such as by Al-Jazeera.² On 15 January 2011, Ben Ali left Tunisia and took refuge in Saudi Arabia.³

Similar protests erupted in Egypt on 25 January 2011. Two days later the Egyptian government shut down the Internet. One of the only ways of seeing what was happening in Egypt became through satellite broadcasts by foreign media outlets such as Al-Jazeera.⁴ Several days after the Internet shutdown, Egypt ordered Al-Jazeera to close its

¹ Julian Borger "Tunisian president vows to punish rioter after worst unrest in a decade" *The Guardian* (29 December 2010), online: The Guardian <
<http://www.guardian.co.uk/world/2010/dec/29/tunisian-president-vows-punish-rioters> >.

² "Recapping the Arab Revolution" *Al-Jazeera Listening Post* (11 July 2011), online: Al-Jazeera English
<http://www.aljazeera.com/programmes/listeningpost/2011/07/20117221365464383.html>
["Recapping the Arab Revolution"].

³ Angelique Chrisafis & Ian Black "Zine al-Abidine Ben Ali forced to flee Tunisia as protester claim victory" *The Guardian* (15 January 2011), online: The Guardian <
<http://www.guardian.co.uk/world/2011/jan/14/tunisian-president-flees-country-protests> >.

⁴ "Recapping the Arab Revolution", *supra* note 2.

studios in Egypt and removed Al-Jazeera broadcasting from its State-owned satellites.⁵ Despite this removal, Al-Jazeera continued broadcasting in Egypt by employing other regional satellite operators. Many of these satellites were owned and operated by Western satellite companies. The Egyptian government could not order the cessation of satellite broadcasts originating outside its sovereign territory. When Egyptian citizens were unable to receive even these satellite signals the Egyptian government was suspected of jamming the satellite signals.⁶ The Egyptian government also warned its citizens not to listen to foreign satellite broadcasts because they were spreading propaganda to “weaken Egypt and distort its image.” Foreign journalists were attacked in the streets; and as a result, these same journalists became more determined in their resolve to report on the events taking place in Egypt by using the Internet and communication satellites to broadcast into Egypt.⁷ On 11 February 2011, President Mubarak resigned.⁸

When protests erupted in Libya, President Muammar Gaddafi blamed the Arab media for the unrest and immediately ejected Al-Jazeera and all foreign media correspondents from the State. In an effort to stop all forms of transnational media from entering the State, Gaddafi also jammed satellite television transmissions coming into

⁵ Jack Shenker & Ian Black “Egypt protests: change is coming, say Mohammed Elbaradei” *The Guardian* (30 January 2011), online: The Guardian <<http://www.guardian.co.uk/world/2011/jan/30/egypt-protests-mohammed-elbaradei>>.

⁶ “Egypt blocks Al-Jazeera transmission, orders bureaus shut” *Committee to Protect Journalists* (30 January 2011) online: The Committee to Protect Journalists <<http://www.cpj.org/2011/01/egypt-blocks-al-jazeera-transmissions-orders-burea.php>>.

⁷ “Recapping the Arab Revolution”, *supra* note 2.

⁸ Chris McGreal & Jack Shenker “Hosni Mubarak resigns - and Egypt celebrates a new dawn” *The Guardian* (11 February 2011), online: The Guardian <<http://www.guardian.co.uk/world/2011/feb/11/hosni-mubarak-resigns-egypt-cairo>>.

Libya.⁹ Similar instances of satellite jamming of transnational news programs have been reported in Syria, Bahrain, and Iran. In 2012, the Broadcasting Board of Governors, a United States government organization responsible for foreign broadcasting conducted by the United States, noted that the degree of satellite jamming over the last several years was unprecedented;¹⁰ and has resulted in domestic populations being cut off from foreign news broadcasts. In March 2012, President Barack Obama cited Iran as a State that had censored the Internet and jammed foreign satellite signals. In attempting to address the Iranian public via YouTube in a four-minute message. He summarized the problem in Iran by stating the following:

Increasingly, the Iranian people are denied the basic freedom to access the information that they want. Instead, the Iranian government jams satellite signals to shut down television and radio broadcasts. It censors the Internet to control what the Iranian people can see and say. The regime monitors computers and cell phones for the sole purpose of protecting its own power...Because of the actions of the Iranian regime, an electric curtain has fallen around Iran.¹¹

The descent of an “electronic curtain” over Iran and the unprecedented and growing instances of satellite jamming are a direct response to the perceived power of the Internet and the foreign media that fueled the uprisings in the Middle East.¹² During

⁹ “Libya: A media black hole” *Al-Jazeera Listening Post* (26 February 2011), online: Al-Jazeera English <<http://www.aljazeera.com/programmes/listeningpost/2011/02/2011226111327860400.html>>

¹⁰ “BBG Condemns Satellite Jamming: Adds Damascus, Syria to List of Sources” *Broadcasting Board of Governors* (13 January 2012) online: The Broadcasting Board of Governors <<http://www.bbgstrategy.com/2012/01/bbg-condemns-satellite-jamming-adds-damascus-syria-to-list-of-sources/>> [“BBG Condemns Satellite Jamming”].

¹¹ “On Nowruz, President Obama Speaks to the Iranian People” *You Tube* (20 March 2012), online: You Tube White House <<http://www.youtube.com/watch?v=vBtkSa6RiPg&feature=relmfu>>.

¹² Karin Deutsch & Jennifer Dunham “Press Freedom in 2011: Breakthroughs and Pushback in the Middle East,” online: Freedom House <<http://www.freedomhouse.org/report/freedom->

the Arab Spring Al-Jazeera's coverage helped fuel the "movements" throughout Middle East. Transnational media undermined traditional State censorship and "brought the actions of thousands to millions" and what was once local news became national and then international. Al-Jazeera provided emotional analysis, relied on "tight crowd shots" and generously judged the size of protests. These actions resulted in thousands of people descending on the street to protest.¹³

The specific impact that the media and satellite television have on their viewers or their ability to bring about any form of social transformation is beyond the scope of this thesis. One thing can be said is that there is at least the perception that transnational media has a significant impact on its viewing population. Regimes in the Middle East no doubt feel threatened by media in which they have no control. This loss of control has precipitated unprecedented instances of Internet shutdowns and interference with satellite signals.

Western media and nations typically describe satellite jamming as illegal and contrary to international law.¹⁴ Despite these characterizations, the jamming of satellite signals, in many instances, represents a viable and legal method to prevent an unauthorized transnational broadcast. Analysis of these two perspectives is the central focus of this thesis. The first part of this thesis will provide a background of satellite communications and satellite jamming and the international regulations that have led numerous States to declare that satellite jamming violates international law. It will

press/freedom-press-2012>.

¹³ Jon B. Alterman, "The Revolution Will Not Be Televised" (15 March 2011) *Center for Strategic and International Studies*, online: Center for Strategic and International Studies <http://csis.org/files/publication/0311_MENC2.pdf>.

¹⁴ "BBG Condemns Satellite Jamming", *supra* note 10.

analyze those States that are most dependent on satellite technology and identify those who are most likely to engage in the harmful interference or jamming of satellite signals. This part of the thesis will demonstrate that the problem of satellite jamming is likely to continue in the future given the current structure of ownership and control of communications satellites. The second part of this thesis will explore the areas of international law that allow a State to either jam or interfere with a national or transnational radio or satellite broadcasts. This analysis will demonstrate that there are numerous instances in which international law permits a State to jam or interfere with an unauthorized transnational broadcast. Conversely, the next section of this thesis will explore the international law that allows a State to send a satellite transmission without first obtaining the receiving State's consent. The focus of this part is on the United States and the legal justifications for its foreign broadcasting activities. This thesis will demonstrate that the foundation for such broadcasting is based on a variety of factors to include the *opinio juris* of Article 19 of the Universal Declaration of Human Rights, the principle of freedom of broadcasting, peace broadcasting, and the movement that commenced during the latter half of the twentieth century to enforce and advance human rights. The final section of this thesis will look at the application of Article 19 to the Peoples Republic of China and Iran in an effort to demonstrate the negative impact that economic and foreign relations have on the realization and application of Article 19. This section of the thesis suggests a shift in the foreign broadcasting policies of the United States from Article 19 of the Universal Declaration of Human Rights to the principle of freedom of broadcasting to avoid the limitations and exceptions imbedded in Article 19 of the Declaration.

Chapter 1: Radio & Satellite Jamming

Satellite Jamming & Harmful Interference

This chapter will explore how a communication satellite functions, how a one is jammed, and how such jamming has come to be considered as contrary to international law. This discussion will be followed by a brief history of radio jamming and its application to satellite communications. Finally, in order to understand the issue of satellite jamming and interference with satellite transmissions it is also important to examine two points; first, the States and populations that are most dependent on satellite technology; and second, the States and companies who exercise control over the communications satellites. This examination will reveal those populations who are most likely to be impacted by a transnational satellite broadcast and those governments who are most likely to engage in jamming or harmful interference with satellite broadcasts. This analysis will demonstrate that satellite jamming is a phenomenon that is likely to continue given the current jurisdiction and control over communications satellites.

Satellites in the geostationary orbit provide the majority of telecommunications and direct broadcasting, including television programming.¹⁵ The geostationary-satellite orbit lies in the plane of the Earth's equator and remains fixed relative to the Earth such that satellites in this orbit will rotate with the Earth.¹⁶ This orbital position lies approximately 35,786 km/22,236 miles above the equator.¹⁷ It is desirable because it does not require numerous ground tracking stations to communicate with the communications satellite.

¹⁵ Francis Lyall & Paul B. Larsen, *Space Law A Treatise* (Burlington and Farnham: Ashgate Publishing, 2009) at 256.

¹⁶ *International Telecommunication Union Radio Regulations*, (Geneva: ITU, 2005) art. 1.189 (Geostationary Satellite) [*ITU Radio Regulations*].

¹⁷ Lyall, *supra* note 15 at 246.

Instead, a single ground station can remain in constant contact with a satellite located in this orbital position.¹⁸

In order to function, a satellite located in the geostationary orbit must receive a radio signal from the ground. This radio signal is often referred to as the *uplink*. The radio signals that travel to the ground from the satellite is the *downlink*.¹⁹ It is this downlink that makes satellite programming accessible in individual households throughout the world so long as the household is equipped with an appropriate dish aerial (antennae) and, where necessary, decoders to de-code a satellite downlink.²⁰ A satellite operates as a “mirror” by reflecting and re-directing radio signals to thousands of different locations on the surface of the Earth. This technology has resulted in a proliferation of satellite television channels that broadcast worldwide.

Thousands of stations and tens of thousands of programs are broadcast via satellite every day.²¹ Most are broadcast without incidence or interference; however, in some instances satellites have been intentionally interfered with or jammed. Jamming occurs when a station intentionally interferes with the uplink or downlink by broadcasting a radio signal at the same frequency and at a higher power. This second signal serves to drown out the intended transmission in the form of “harmful

¹⁸ *Ibid* at 257.

¹⁹ Laura Grego, *A History of Anti-Satellite Programs*, (Cambridge MA: Union of Concerned Scientists Association, 2012) 9, online: Union of Concerned Scientists <http://www.ucsusa.org/assets/documents/nwgs/space_weapons_section_11.pdf>.

²⁰ Lyall, *supra* note 15 at 257.

²¹ “Broadcasting Services: Direct-to-Home,” online: Eutelsat Communications <<http://www.eutelsat.com/home/index.html>>. (Eutelsat is just one of many satellite operators and alone broadcasts 4250 TV channels, over 300 HDTV channels and 1100 radio stations.)

interference.”²² Harmful interference is interference with a radio signal that seriously degrades, obstructs, or repeatedly interrupts a radio communication service that is operating in accordance with the international radio regulations.²³ The jamming signal must be located within the uplink or downlink area such that the jamming signal interferes with the signal being sent to the satellite thereby causing the jammed signal to be downlinked to the receiving units. In other words, the uplink is turned into garble and the downlink merely rebroadcasts this garble. If ground-based, the jammer has a significant advantage over the downlink coming from the satellite because the signal coming from the geostationary orbit is not strong when compared to the jamming signal that is typically sent over a much shorter distance.²⁴ It is significant that there are two locations from which a satellite may be jammed. One will obviously be in the territory of the jamming State to interfere with the downlink. The jamming station will seek to be in close proximity to the individual receiving units. The other location is at the source of the uplink and may be located in another part of the world.²⁵ Jamming in the context of communications satellites has been typically directed toward a single station or program that is being broadcast via satellite; however, the problem is usually more complicated because attempts at jamming often result in numerous stations and television programs being jammed in addition to the “target transmission.”²⁶

²² Grego, *supra* note 19 at 9.

²³ *ITU Radio Regulations*, *supra* note 16 at art. 1.169.

²⁴ Grego, *supra* note 19 at 9.

²⁵ Safa Haeri “Cuba blows whistle on Iranian jamming” *Asian Times Online* (22 August 2003), online: The Asia Times <http://www.atimes.com/atimes/Middle_East/EH22Ak03.html> (Cuba informed the United States that the Iranian embassy in Havana was jamming the uplink of Iranian television programs produced in the United States and destined for Iran).

²⁶ Paul Sonne & Farnaz Fassihi “In Skies Over Iran, a Battle for Control of Satellite TV” *Wall Street Journal* (27 December 2011), online: WSJ <

The jamming of a satellite's radio signal is only one way in which a country may intentionally interfere with a transnational broadcast. The terms deliberate or harmful interference are more encompassing and include all technical, legal, political, and economic forms of interference with a satellite signal.²⁷ In short, it is any method that is used to censor or prohibit a transnational broadcast via satellite. Harmful interference via satellite jamming is the most conspicuous form of deliberated interference and is potentially controllable through international regulation or treaty.²⁸ Other and arguably more severe forms of harmful interference include making the reception of foreign satellite signals a violation of national law.²⁹ Such actions have been taken by a number of States including Saudi Arabia³⁰ and Iran³¹ where the ownership of satellite dishes is technically illegal but at the same time private ownership of satellite receivers are to some extent tolerated by the governments.³² Restrictions on ownership have also been instituted in China where foreign programming is only allowed in certain areas of the

<http://online.wsj.com/Article/SB10001424052970203501304577088380199787036.html>>
[Sonne, "Battle for Control of Satellite TV"].

²⁷ James B. Savage, *The Politics of International Telecommunications Regulation*, (Boulder, San Francisco, & London: Westview Press, 1989) at 132.

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ United States Department of State, *Human Rights Report, Saudi Arabia 2010* (Washington, D.C.: Department of State 2011) online: The United States Department of State <<http://www.State.gov/j/drl/rls/hrrpt/2010/nea/154472.htm>>.

³¹ United States Department of State, *Human Rights Report, Iran 2010* (Washington, D.C.: Department of State 2011) online: The United States Department of State <http://www.State.gov/j/drl/rls/hrrpt/2010/nea/154461.htm> > [DOS, *Human Rights Report, Iran*].

³² See Islamic Republic of Iran Broadcasting (IRIB), *IRIB TV and Radio Channel Reception Guide*, IRIB Satellite Department (March 2011) online: IRIB <http://www2.trib.ir/tech/frequency/en/IRIB_Guide.pdf>(although technically illegal in Iran, the Islamic Republic of Iran Broadcasting website has an English-language pamphlet that not only describes government satellite programming but also provides useful tips on operating a satellite)..

State.³³ Equally severe forms of interference include the bombing of satellite news headquarters or local facilities, as was the case in Libya during the 2011 NATO attack.³⁴ Harmful interference with broadcasting may also include the harassment and arrest of foreign journalists who contribute to transnational media³⁵ and forms of self-censorship that are created by the perceived consequences that critical reporting of the government may entail.³⁶

³³ Mei Ning Yan, “China and the Prior Consent Requirement: A Decade of Invasion and Counter-Invasion by Transfrontier Satellite Television” (2002-2003) 25 *Hasting Comm. & Ent. L. J.* 265.

³⁴ Sonne, “Battle for Control of Satellite TV”, *supra* note 26.

³⁵ Josh Halliday “Al-Jazeera journalists arrested in Egypt” *The Guardian* (31 January 2011), online: The Guardian <<http://www.guardian.co.uk/media/2011/jan/31/al-jazeera-journalists-egypt>>.

³⁶ See generally Naomi Sakr, “News, Transparency and the Effectiveness of Reporting From Inside Arab Dictatorships” (2010) 72 *Int’l Comm. Gazette* 35 (In many parts of the Middle East and in particular Egypt, journalists have to obtain a license in order to report. The government is the issuing body for the licenses and can therefore silence journalists who criticize the government by rescinding a license. If a license is rescinded the journalist will be unable to continue working in journalism).

International Telecommunication Union

International regulations adopted through the International Telecommunication Union (ITU) prohibit jamming or the intentional harmful interference with an allocated satellite radio frequency. As will be discussed below, this is one of the prohibitions that States use to identify satellite jamming as contrary to international law. The ITU is the UN specialized agency for information and communication technologies. It currently has a membership of 193 countries.³⁷ ITU was founded in Paris in 1865 as the International Telegraph Union. It took its present name in 1934, and in 1947 became a specialized agency for the UN.³⁸ Part of the work of the ITU is to allocate global radio spectrums/frequencies to be used by satellites and their orbital slots. The ITU also develops the technical standards for the use of allocated frequencies.³⁹ In short, the ITU is the agency that makes sure global communications function properly by allocating different frequencies to different services and parties. These allocations and technical standards are embodied in the ITU constitution, convention, and radio regulations. These instruments impose international obligations on all State members.⁴⁰

When the ITU assigns or allocates a frequency it is recorded in the Master International Frequency Register (the Master Register).⁴¹ The State or private station

³⁷ “About ITU,” online: International Telecommunication Union <<http://www.itu.int/en/Pages/default.aspx>>

³⁸ “History,” online: International Telecommunication Union <<http://www.itu.int/en/Pages/default.aspx>>.

³⁹ “About ITU,” online: International Telecommunication Union <<http://www.itu.int/en/Pages/default.aspx>>.

⁴⁰ *Constitution of the International Telecommunication Union*, reprinted in *Collection of the basic texts of the International Telecommunication Union adopted by the Plenipotentiary Conference*, 2011 ed. (Geneva: ITU, 2011) art. 6 online: <<http://www.itu.int/net/about/basic-texts/index.aspx>> [ITU Constitution].

⁴¹ *ITU Radio Regulations*, *supra* note 16 at art. 8.1.

using the assigned frequency receives a right to “international recognition.”⁴²

International recognition means that if another station uses that frequency and interferes with the legally entitled holder of the frequency allocation, that interfering station must, upon receipt of advice thereof, immediately eliminate the use of that frequency because of its tendency to create interfere with the signal that has international recognition.⁴³

This prohibition of harmful interference is noted in the ITU’s radio regulation and also included in Article 45 of the ITU constitution which provides:

All stations, whatever their purpose, must be established and operated in such a manner as not to cause harmful interference to the radio services or communications of other Member States or of recognized operating agencies, or of other duly authorized operating agencies which carry on a radio service, and which operate in accordance with the provisions of the Radio Regulations.⁴⁴

Similarly, Article 15.1 of the radio regulations provide in part:

All stations are forbidden to carry out unnecessary transmissions, or the transmission of superfluous signals, or the transmission of false or misleading signals, or the transmission of signals without identification⁴⁵...Transmitting stations shall radiate only as much power as it necessary to ensure a satisfactory service.⁴⁶

Therefore, when a State or station jams a satellite signal, that entity is broadcasting a radio signal on a frequency that has not been allocated to them. They are operating contrary to the ITU Radio Regulations (including the Master Register) and interfering with another State or station’s right to broadcast. The jamming station is also violating Article 15 in that it is sending a superfluous signal. Under the ITU radio regulations and

⁴² *ITU Radio Regulations*, *supra* note 16 at art. 8.3.

⁴³ *Ibid* at art. 8.5.

⁴⁴ *ITU Constitution*, *supra* note 40 at art. 45.

⁴⁵ *ITU Radio Regulations*, *supra* note 16 at art. 15.1 § 1.

⁴⁶ *Ibid* at art.15.2 § 2.

constitution, the jamming entity is required to cease the broadcasting or the harmful interference. The continued broadcasting on an unassigned frequency violates the ITU radio regulations and constitution. This problem is compounded if the jamming station refuses to either acknowledge the jamming or stop broadcasting because there are no provisions for the ITU to take forcible corrective action against the jamming entity. In tackling this problem the ITU has historically been limited to relying upon “...the utmost goodwill and mutual assistance in the application of the provisions of Article 45 of the Constitution...”⁴⁷ The ITU has been slow to tackle this problem in part because it is political in nature.⁴⁸ The Radio Regulations Board (RRB) is a part of the ITU that is tasked with making recommendations in cases of unresolved harmful interference.⁴⁹ The RRB plays a significant role in facilitating negotiations between large and small States when there is harmful interference.⁵⁰ However the RRB:

[I]s noticeably less successful in resolving harmful interference disputes that are based on intentional interference (i.e. jamming) or on an intentional non-conformity with the Regulations, whether for political or commercial considerations.⁵¹

This inability to adequately address issues of intentional interference with radio transmission was formerly demonstrated between the U.S. and the Soviet Union⁵² and is now most noticeably present with Iran.⁵³

⁴⁷ *Ibid* at art. 15.22 § 14.

⁴⁸ Savage, *supra* note 27 at 133-132.

⁴⁹ “Radio Regulations Board” online: ITU < <http://www.itu.int/en/Pages/default.aspx>>.

⁵⁰ David M. Leive, *International Telecommunications and International Law: The Regulation of the Radio Spectrum* (Dobbs Ferry NY: Oceana Publications 1970) at 131.

⁵¹ *Ibid* at 132.

⁵² *Ibid*.

Recently, at the 2012 World Radiocommunication Conference (WRC), the ITU attempted to address the issue of radio jamming by amending certain portions of its regulations. The WRC is held every three to four years and has the power to change international radio regulations. These radio regulations constitute a treaty governing the use of radio-frequency spectrum and orbiting satellites.⁵⁴ The 2012 WRC included an ad-hoc group of the plenary, under Canadian chairmanship, that was created during the WRC's first week to consider possible amendments to Article 15 of radio regulations dealing with some basic principles of interferences. After six meetings it was agreed that a revision to the text of radio regulation 15.21 was warranted, which clearly reflected the substance of the issue under consideration.⁵⁵ Article 15.21 of the ITU radio regulation formerly provided:

If an administration has information of an infringement of the Convention or Radio Regulations, committed by a station owner over which it may exercise authority, it shall ascertain the facts, fix the responsibility and take the necessary action.⁵⁶

Two key questions were resolved by the discussions of the ad hoc group, which facilitated agreement on the final text of radio regulation 15.21. The first was that any transmission, which has the intent to cause interference to stations of other

⁵³ Peter B. de Seldding "ITU Implore Iran to Help Stop Jamming" *Space News* (26 March 2010), online: Space News <<http://www.spacenews.com/policy/100326-itu-implores-iran-help-stop-jamming.html>>.

⁵⁴ Ben Steward, "EBU applauds ITU move to tackle satellite jamming" *European Broadcasting Union* (20 February 2012), online: The European Broadcasting Union <http://www.ebu.ch/en/union/news/2012/tcm_6-74499.php>.

⁵⁵ 2012 World Radiocommunication Conference, *Report of the World Radiocommunication Conference WRC-12*, (23 January – 17th February) online: European Center of Postal and Telecommunications Administrations <[http://www.cept.org/ecc/groups/ecc/cpg/client/introduction/news/the-world-radiocommunication-conference,-geneva,-switzerland-\(23-january-17-february-2012\)>](http://www.cept.org/ecc/groups/ecc/cpg/client/introduction/news/the-world-radiocommunication-conference,-geneva,-switzerland-(23-january-17-february-2012)>) [WRC Report 2012].

⁵⁶ *ITU Radio Regulations*, *supra* note 16 at art. 15.21§13.

administrations, is an infringement of the constitution, convention and radio regulations. The second question requested confirmation that any station operating in the territory of an administration is under the authority of this administration, even if this station is not authorized. This was also confirmed, since the authority of an administration of the country having jurisdiction over any station applies throughout its territory.⁵⁷ In the final act the regulation was modified in to underscore violations of Article 45 of the constitution and radio regulations 15.1 as actions that require necessary action from the national administration.⁵⁸ The change, albeit not a significant one, was adopted by 165 member States.⁵⁹ The change is not significant because it adds little to the original language and does not contemplate action in response to a recalcitrant State administration. Perhaps the ITU felt that something symbolic had to be done in light of the numerous complaints that were lodged with the ITU about the radio jamming of international satellite television programs in Persian and Arabic languages, carried mainly on Eutelsat and Arabsat satellites. The radio jamming, which has increased since September 2011, involved the jamming of television and radio programs of the British Broadcasting Corporation (BBC), Radio France Internationale, Deutsche Welle (Germany), and Radio Farda, Radio Netherlands Worldwide (RNW), Voice of America (VOA), and the European Broadcasting Union.⁶⁰

⁵⁷ See generally *WRC Report 2012*, *supra* note 55.

⁵⁸ 2012 World Radiocommunication Conference, *Provisional Final Acts, World Radiocommunications 2012*, Geneva, (23 January – 17 February 2012) at art. 15.21.

⁵⁹ Steward, *supra* note 54.

⁶⁰ *Ibid.*

This amendment does not increase the ITU's authority to tackle this problem. The modification is merely a restatement of the former regulation that now identifies the types of infringements contemplated by the regulation. The regulation States that the "administration" shall take the necessary action. The administration is the State organization that is in control of radio broadcasting.⁶¹ However, if the "administration" is complicit in the jamming, the former regulation and the modified version will similarly be unable to prevent continued jamming. The problem with any amendment to the radio regulations is with the authority of the ITU is limited in respect to any action it can take against a jamming State. Any action that the ITU or the RRB takes is against the assignment of frequency and not the State administration responsible for the broadcasting.⁶² In other words, the only thing that can be taken away by the ITU is the right or the protection of "international recognition." However, if the State administration is not interested in assignments of frequencies, this is not a penalty or a deterrent. For example, Iran is often accused of jamming the same European satellites that it uses for its own State satellite broadcasting.⁶³ The right to international recognition of these frequencies does not necessarily rest with Iran but rather with the satellite operators and with their licensing States. The ITU cannot, as a penalty for jamming, prohibit other satellite operators from carrying Iranian broadcasting. Moreover, if a satellite operator unilaterally decides to stop carrying Iranian broadcasting, so as to pressure Iran not to engage in jamming, Iran will likely find

⁶¹ *ITU Radio Regulations*, *supra* note 16 at art.1.2.

⁶² Leive, *supra* note 50 at 150.

⁶³ Shirin Ebadi & Hadi Ghaemi, "Broadcasting Tehran's Repression" *The Wall Street Journal* (9 December 2011), online: WSJ <<http://online.wsj.com/Article/SB10001424052970204903804577079970310000322.html>>.

another satellite operator to satisfy its broadcasting requirements. The Middle East is one of the most dynamic regions when it comes to satellite television given the number of operators in the region.⁶⁴ Therefore, simply canceling the broadcast would unlikely prevent Iran from using another satellite operator to broadcast its satellite television programming. In order for such measure to work all the satellite operators in the region would have to agree to forego any potential profit from carrying Iranian broadcasting. Even if such measure were taken, it would be taken outside the ITU.

In addition to any enforcement problems that the ITU may have, the UN Charter also limits the ITU. The Charter currently has 193 members⁶⁵ and serves to:

To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace...⁶⁶

Towards this goal of international peace and security Article 103 of the Charter⁶⁷ subordinates all the radio regulations and significantly limits the action that any member State could take against a State suspected of jamming radio signals. To the extent that

⁶⁴ Peter B. de Selding "Satellite Business Booming in the Middle East and North Africa: Highly Competitive Region Has 13 Operators" (20 October 2008), online: Space.com <<http://www.space.com/5996-satellite-business-booming-middle-east-north-africa-highly-competitive-region-13-operators.html>> [Selding "Business Booming in Middle East"].

⁶⁵ United Nations Treaty Collection, *Status of the Charter of the United Nations and Statute of the International Court of Justice*, online: United Nations Treaty Collection <http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=I-1&chapter=1&lang=en>.

⁶⁶ *Charter of the United Nations*, art. 1.

⁶⁷ *Ibid* art. 103 (Article 103 provides the following: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail").

the amended radio regulation would authorize the use of force, threats, or sanctions against a jamming State, the ITU is limited by Article 2(4) of the Charter, which prohibits the use of force or the threat of force.⁶⁸ Reciprocal jamming or interference with a broadcasting State's radio signal also presents an issue under the Charter. Article 41 of the Charter vests the Security Council with the authority to "...decide what measures not involving the use of armed force are to be employed..." Article 41 specifically contemplates the interruption of radio communications services.⁶⁹ Thus, any decision to jam a recalcitrant State's broadcasting on its own sovereign territory would have to receive the support of the Security Council. The Security Council is composed of six temporary members and five permanent members. The permanent members include the U.S., France, the United Kingdom, Russia and China.⁷⁰ Any action by the Security Council requires the concurrence of the five permanent members.⁷¹ Therefore, because China and Russia⁷² have engaged in radio jamming in the past and China actively provides jamming equipment to third party States,⁷³ it is unlikely that either of these States would vote affirmatively to take action against another jamming State. As such, it is unlikely that the UN will authorize any affirmative action against a jamming State. For this reason alone radio jamming is likely to continue.

⁶⁸ *Ibid* art. 2(4).

⁶⁹ *Ibid* art. 41.

⁷⁰ *Ibid* art. 23.

⁷¹ *Ibid* art. 27.

⁷² Savage, *supra* note 27 at 135.

⁷³ "Ethiopia: EFJA Urges China to Stop Complicity in Jamming Satellite TV Transmissions" *All Africa* (22 June 2011), online: All Africa < <http://allafrica.com/stories/201106230066.html>>.

The ITU constitution and regulations also cloud the issue of whether jamming may in some instances be authorized. The preamble to the constitution provides in part:

While fully recognizing the sovereign right of each State to regulate its telecommunication and having regard to the growing importance of telecommunication for the preservation of peace and the economic and social development of all States...⁷⁴

This preamble suggests that a State should have the ability to prohibit certain programming from its territory. It certainly does not imply that a State can send whatever it wants via transnational satellite broadcast. Although the preamble does not function as a binding part of the treaty, it plays a prominent role in its interpretation.⁷⁵ Indeed the preamble could therefore be read in conjunction with and provide meaning to radio regulation 23.13 § 4 which provides:

In devising the characteristics of a space station in the broadcasting-satellite service, all technical means available shall be used to reduce, to the maximum, the radiation over the territory of other countries unless an agreement has been previously reached with such countries.⁷⁶

This regulation recognizes that it is not possible for a State to limit its satellite broadcast to its territory at all times. Therefore, broadcasting States are under an obligation to restrict the broadcasting that invades other countries, "...unless an agreement has been previously reached with such countries." If this regulation is read in conjunction with the preamble to the constitution, it suggests that this regulation is designed to protect the sovereign right of each State to regulate its telecommunications. Therefore, the regulation and the preamble suggest that a State would be authorized to take action, in the form of objection or radio jamming, if another broadcasting State completely

⁷⁴ *ITU Constitution*, *supra* note 40 at preamble.

⁷⁵ *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331, art. 31 § 2.

⁷⁶ *ITU Radio Regulations*, *supra* note 16 at art. 23.13 § 4.

disregards this regulation and sends a transmission without first obtaining proper consent. Thus, the combination of allocating specific frequencies to specific stations and States, and the adoption of radio regulation 23.13 § 4 had the effect of limiting transnational satellite broadcasting to that of a national activity.⁷⁷

On the other hand, some commentators have noted that regulation 23.13 § 4 is part of a technical regulation designed to prevent mutual interference of signals and therefore do not represent legal norms requiring the prior consent of a State receiving a satellite signal.⁷⁸ Moreover, this regulation also presents a number of ambiguities. The first issue is - what is consent? Is it the consent for a satellite to operate generally? Or does the consent concern the specific content of each and every program? For example, Iran obviously consents to the existence of satellites over its territory to facilitate the broadcasting of its own content, but Iran does obviously not consent to the content of some of the other broadcasts on the same satellite. It may prove to be too cumbersome for a State to express its consent to each and every program broadcasted via satellite. As stated above there are thousands of stations broadcast via satellite along with tens of thousands of programs.⁷⁹ The ability of a State to review and selectively object to certain programming is next to impossible. The Federal Communications Commission (FCC) in the U.S. in part demonstrates this reality. This agency is responsible for the enforcement of certain content rules in the U.S.; however, it does not monitor the thousands of programs that are broadcast on a daily basis in the U.S. Instead, the agency

⁷⁷ David I. Fisher, *Prior Consent to International Direct Satellite Broadcasting*, (Dordrecht, Boston and London: Martinus Nijhoff 1990) at 57.

⁷⁸ *Ibid* at 58.

⁷⁹ "Facts and Figures," online: Eutelsat Communications <<http://www.eutelsat.com/home/index.html>>.

relies upon viewer complaints to facilitate enforcement.⁸⁰ If there is no complaint about the broadcast then it is less likely that any action will be taken against the broadcaster. Under these circumstances it can be said that the U.S. has “acquiesced” to a broadcast that does not comport to its content regulations. It is the high number of satellite broadcasts that are accomplished on a daily basis that would complicate the enforcement of radio regulation 23.13 § 4.

The second issue is what is the remedy for a State that receives a broadcast without first providing its consent? In other words, if Iran receives a broadcast that it did not consent to, can Iran jam the broadcast under this regulation? Given the above discussion, it is unclear if Iran would be able to jam a signal that it has not consented to because to do so would violate regulations 15.1, 15.21 and Article 45 of the ITU constitution. Under these circumstances a receiving State would be forced to endure significant unauthorized broadcasting during the pendency of any dispute resolution.

At this point it is important to distinguish the intentional creation of harmful interference from unintentional interference with radio signals. The occurrence of such interference is well contemplated because radio frequencies compatible with communications satellite and orbital slots in the geostationary orbital position are limited. This finite number of frequencies makes it possible that other activities, such as industrial, scientific, or medical could produce radio signals that would interfere with radio frequencies assigned and registered in the master register.⁸¹ Article 44 of the ITU constitution recognizes the limited nature of the frequency spectrum by providing:

⁸⁰ Federal Communications Commission, *Guide: Obscenity, Indecency, and Profanity*, online: FCC <<http://www.fcc.gov/guides/obscenity-indecency-and-profanity>>.

⁸¹ *ITU Radio Regulations*, *supra* note 16 at art. 15.13 § 9.

...Member States shall bear in mind that radio frequencies and any associated orbits, including the geostationary-satellite orbit, are limited natural resources and that they must be used rationally, efficiently and economically, in conformity with the provisions of the Radio Regulations...⁸²

In order to mitigate and avoid unintentional harmful interference a number of measures have been adopted. For the allocation of frequencies the world has been divided into three regions to further limit unintentional interference.⁸³ Detailed administrative procedures have been developed when harmful interference occurs.⁸⁴ Finally, if the procedures are not successful, the concerned States may try to resolve their dispute, if they are parties the optional protocol on the compulsory settlement of disputes relating to the ITU constitution, convention, and to the administrative regulations.⁸⁵

⁸² *ITU Constitution*, *supra* note 40 at art. 44.

⁸³ *ITU Radio Regulations*, *supra* note 16 at art. 5.2.

⁸⁴ *ITU Radio Regulations*, *supra* note 16 at art. 15 § IV.

⁸⁵ ITU, *Optional Protocol on the Compulsory Settlement of Disputes Relating to the Constitution of the International Telecommunication Union, to the Convention of the International Telecommunication Union and to the Administrative Regulations*, (Geneva 1992), cited in *Collection of the basic texts of the International Telecommunication Union adopted by the Plenipotentiary Conference*, 2011 ed. (Geneva: ITU 2011) online: <<http://www.itu.int/net/about/basic-texts/index.aspx>>

History of Radio and Satellite Interference

Harmful interference with radio signals directed towards satellites or other ground communications mechanisms has been conducted with various degrees of success between States since 1934 when the Austrian government employed jamming against Nazi propaganda.⁸⁶ By the late 1930s radio jamming was widespread in Europe as nearly every State employed some type of jamming except for Britain.⁸⁷ The first attempt at resolving the issue of radio jamming was the League of Nations International Convention Concerning the Cause of Peace in Broadcasting.⁸⁸ However, this Convention did little to stop radio jamming and radio jamming continued throughout World War II and the Cold War where the Soviet Union routinely attempted to jam or block radio signals from Europe and the U.S.⁸⁹ During the cold war a significant part of the entire Soviet broadcasting apparatus was devoted to jamming radio signals from abroad, but nearly all-Soviet jamming ceased with the collapse of the Soviet Union.⁹⁰

The specific jamming and interference with satellite radio signals is not something that only emerged during the Arab Spring. There have been numerous instances of jamming and also non-technical measures to prevent the transnational broadcasting via satellite. In the 1990s, Med-TV, a Kurdish television station was uplinked from London to a Eutelsat satellite, which facilitated the reception of its signal by 70 States and had a claimed 16 million viewership worldwide. Turkey claimed that

⁸⁶ Savage, *supra* note 27 at 139.

⁸⁷ Julian Hale, *Radio Power: Propaganda and International Broadcasting*, (Philadelphia: Temple University Press, 1975) at 128.

⁸⁸ Savage, *supra* note 27 at 139.

⁸⁹ *Ibid* at 140.

⁹⁰ Steven Eke “BBC Russian radio hits the off switch after 65 years” *BBC News* (22 March 2011), online: BBC News < <http://www.bbc.co.uk/news/world-europe-12820788>>.

the broadcast “fomented terror” and routinely jammed it. The Turkish government also put pressure on the British government to have the station’s broadcasting rights suspended.⁹¹ Although jamming is contrary to the ITU, Turkish pressure on British officials is not prohibited by the ITU; and it was this pressure that resulted in the termination of the satellite broadcast. Similarly, Serbian satellite television was discontinued in Europe during the 1999 NATO bombing after the European satellite operator (Eutelsat) decided to discontinue its transmission. Before the station was pulled from the satellite NATO forces also reportedly jammed it.⁹² In May 1999, Yugoslavian president Milosevic was able to convince an Israeli satellite company to broadcast Yugoslav television. However, this transmission was discontinued when the U.S. placed pressure on Israel to discontinue the broadcast.⁹³ In the Middle East, Iran has an extensive history of jamming satellite signals even before the Arab Spring. In 2001 Iran jammed a foreign satellite broadcasts after similar broadcasts had helped fuel student protests.⁹⁴ In 2009, Iran jammed the BBC Persian service in the wake of its presidential elections; and Iran continues to engage in extensive jamming operations of the BBC broadcasts into its territory.⁹⁵ In Asia, China routinely jams radio signals that

⁹¹ Stephen Kinzer “Only Kurdish TV Station May Be Shut Down” *New York Times* (5 April 1999), online: The New York Times <<http://www.nytimes.com/1999/04/05/world/only-kurdish-tv-station-may-be-shut-down.html?pagewanted=print>>.

⁹² Statement from The Serbian Information Minister (27 May 1999) online: Voices Against the War in Kosovo <<http://www.bulgaria-italia.com/fry/rtssat.htm> >.

⁹³ Monroe E. Price, “Satellite Transponders and Free Expression” (2009-2010) 27 *Cardozo Arts & Ent. L.J.* 1 at 7-8.

⁹⁴ Michael Lewis “The Satellite Subversives” *The New York Times* (24 February 2002), online: The New York Times <<http://www.nytimes.com/2002/02/24/magazine/the-satellite-subversives.html> >

⁹⁵ Sonne, “Battle for Control of Satellite TV”, *supra* note 26.

are sent to its territory by the U.S. via Radio Free Asia (RFA).⁹⁶ The jamming of satellite transmissions represents a continuation of radio jamming that started early in the twentieth century and thus continues to this day.

⁹⁶ Broadcasting Board of Governors, *Broadcasting Board of Governors Annual Report 2011, Impact through Innovation and Integration*, (Washington, D.C.: BBG, 2011) at 13 [*BBG Annual Report 2011*].

States Dependent on Satellite Technology

Jamming and the harmful interference of communication satellites is not a worldwide phenomenon but is typically limited to those States whose populations are most dependent on communication satellites for uncensored news and information and to States that exercises a strong degree of control over the media. It is in these States where jamming can effectively censor information from the public. States located in the Middle East rely heavily on communications satellites for uncensored news and information because in many instances these broadcasts are not subject to the State-controlled media that is prevalent in the Middle East.⁹⁷ According the Freedom House, an organization that monitors press freedoms throughout the world, States in the Middle East and North Africa are some of the least free regions in the world when it comes to freedom of expression and freedom of the press. The organization rates the 20 States and territories with 392 million people as 2 per cent free.⁹⁸ In this region, uncensored news and information is likely to come from via satellite from States that enjoys a greater degree of freedom of the press.

This reliance on communications satellites in the Middle East was recently demonstrated in a study in Jordan. According to the study, the majority the population in Jordan relied on satellite media for local and regional news and information.⁹⁹ By comparison, a much smaller percent of the population routinely watched the State-run

⁹⁷ Naomi Sakr, *Satellite Realms, Transnational Television, Globalization & the Middles East*, (New York: I.B. Tauris, 2001) at 3.

⁹⁸ “Middle East and North Africa Press Freedom Report” online: Freedom House <<http://www.freedomhouse.org/regions/middle-east-and-north-africa>>.

⁹⁹ Fares Braizat & David Berger, “The Impact of Arab Satellite Channels on Public Opinion” in Emma C. Murphy & Mahjoob Zweiri, *The New Arab Media: Technology, Image and Perception* (Reading UK: Ithaca 2011) 123 at 127-128.

media. Satellite television was also more popular than other forms of media.¹⁰⁰ For example a very small portion of the population relied on the Internet for news and information and only a slightly larger percentage of population relied on the local newspaper.¹⁰¹ One of the most popular stations among viewer was Al-Jazeera, which is based in Qatar.¹⁰² Although Freedom House also designates Qatar as “Not Free,”¹⁰³ this station has been recognized for objective and uncensored reporting in the region.¹⁰⁴

In addition to seeking uncensored news and information, satellites television is popular for a number of other reasons in the Middle East and North Africa regions. These States have diminished literacy rates and television is a more attractive medium for information.¹⁰⁵ There is a predisposition for home-based entertainment, especially in rural areas and in hotter weather.¹⁰⁶ Finally, in many instances satellite television represents the only available medium to receive news and information because States in the Middle East and North Africa experience low levels of Internet connectivity and terrestrial broadcasting systems are virtually nonexistent.¹⁰⁷

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

¹⁰³ “Qatar Press Freedom Report” online: Freedom House < <http://www.freedomhouse.org/>>.

¹⁰⁴ Naomi Sakr, “Maverick or Model? Al-Jazeera’s Impact on Arab Satellite Television” In Jean K. Chalaby, *Transnational Television Worldwide Towards a New World Order* (New York: I.B. Tauris, 2005) 66 at 66-67.

¹⁰⁵ Naomi Sakr, *Satellite Realms, Transnational Television, Globalization & the Middles East*, (New York: I.B. Tauris, 2001) at 6.

¹⁰⁶ *Ibid* at 6.

¹⁰⁷ ITU, *World Telecommunication/ICT Development Report 2010 Monitoring the WSIS Targets A mid-term review*, (Geneva: ITU, 2010) at 163 [*Telecommunications Development Report 2010*].

For many of the same reasons, developing States are also heavily dependent on satellite broadcasts. If there is little or no terrestrial broadcasting satellite broadcasting may serve as one of the main sources of media.¹⁰⁸ Developing States typically also have higher rates of illiteracy and radio and television programs remain a principal source of news and information for illiterate segments of the population. Satellite broadcast is particularly important in States where few people use the Internet, or where local online content and content in local languages are limited.¹⁰⁹ For developing States, a communications satellite represents an attractive option compared to the construction of a terrestrial network because a single satellite can perform the same task as a complex terrestrial broadcasting system.¹¹⁰ For this reason satellite broadcasting has been a disincentive for the investment in a terrestrial broadcasting system. Although this phenomenon limits the available mediums for news and information¹¹¹, it also diminishes the control a State has over the media disseminated in its territory.

Instead of investing in terrestrial networks, different regions of the developing world have combined resources to deploy communications satellites to accommodate their needs.¹¹² These regional operators often operate in the absence of significant terrestrial communications systems and provide the capability for developing States to

¹⁰⁸ Selding “Business Booming in Middle East”, *supra* note 64.

¹⁰⁹ *Telecommunications Development Report 2010*, *supra* note 107 at 153.

¹¹⁰ *Ibid.*

¹¹¹ Olivia Marsaud “Tout l’Afrique connectée au web par satellite” *Radio France International* (22 March 2006), online: RFI < http://www.rfi.fr/actufr/Articles/075/Article_42639.asp>. (In Africa most of the continent receives its Internet through satellite communications because there is limited terrestrial capacity).

¹¹² *Telecommunications Development Report 2010*, *supra* note 107 at 165.

engage in significant satellite broadcasting.¹¹³ Moreover, the proliferation of satellites and satellite operators has opened up satellite broadcasting to more people. Broadcasters no longer have to pay the cost associated with the satellite development and launch; as a result communication satellites have over time become economical distribution systems for television and all forms of digital media.¹¹⁴ Given this success in the dissemination of information, many States have no plans to construct terrestrial broadcasting systems¹¹⁵; therefore, communications satellites will continue to play a significant role in the Middle East, North Africa, and in developing States.

¹¹³ *Telecommunications Development Report 2010*, *supra* note 107 at 166 (There are a number of pan-regional satellite operators in the Americas, Arab States, and Africa. Asia and the Pacific is one of the regions that do not have a pan-regional satellite operator. However, instead, there are a number of national satellite operator systems, some of which attract subscribers from neighboring countries. One country where direct broadcasting has boomed is India. Direct broadcasting has yet to make progress into y Chinese-speaking economies in the region such as China, Macao (China) or Singapore.

¹¹⁴ “Broadcast Services::Eutelsat Digital Platforms” Online: Eutelsat <<http://www.eutelsat.com/home/index.html>>.

¹¹⁵ *Telecommunications Development Report 2010*, *supra* note 107 at 170 (The time and expense involved in developing a terrestrial system are high. In India some 10,000 satellite-receiving units were provided free to the public).

Jurisdiction & Control of Communications Satellites

Satellite jamming is accomplished because the State that is receiving the satellite broadcast does not exercise jurisdiction and control over the satellite such that the receiving State could terminate the broadcast. It represents a State's last-ditch effort to censor information before it reaches its territory. If the receiving State controlled the satellite, no such jamming would be necessary. Therefore this section will explore the legal principles that define the jurisdiction and control of communications satellites. This section will demonstrate that these elements of jurisdiction and control, along with the dependency that some of these regions have on satellite technology; play a significant role in satellite jamming.

One of the primary instruments governing the use of communication satellite is the Outer Space Treaty (OST).¹¹⁶ The Outer Space Treaty provides the basic framework on international space law and applies to all State activities conducted in outer space. The treaty has been in force since 10 October 1967 and currently has 101 State parties.¹¹⁷ It provides that all activities in outer space must be conducted in accordance with the provisions of the OST, the UN Charter, and general principles of international law.¹¹⁸

This umbrella of governing law means that a State engaging in direct broadcasting via communications satellite must respect the rights and obligations described in not only in the OST but also the Charter and principles of international law.

¹¹⁶ Officially known as the *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies*, 27 January 1967, 610 U.N.T.S. 205 [*Outer Space Treaty*].

¹¹⁷ United Nations Office for Outer Space Affairs, *Status of International Agreements relating to Activities in Outer Space*, online: United Nations Office for Outer Space Affairs <<http://www.oosa.unvienna.org/oosa/en/SpaceLaw/treatystatus/index.html>>.

¹¹⁸ *Outer Space Treaty*, *supra* note 116 (art. III) at 208.

The obligations in the OST are also applicable to a State's nationals. Article VI of the OST provides that a State party to the OST bears international responsibility for the outer space activities of its nationals, both natural and juridical.¹¹⁹ Any State engaging in transnational broadcasting via communications satellite has to take account of its rights and obligations to other States under the UN Charter and general international law. In particular, a State is free to launch and operate a communications satellite so long as it does not adversely affect the rights of other States.¹²⁰ This principle is also reiterated in Article IX of the OST which provides that State parties "...shall conduct their activities in outer space...with due regard to the corresponding interests of all other States parties to the Treaty."¹²¹

These provisions of the OST can be interpreted to mean that States will bear international responsibility for satellite broadcasting activities conducted by the State or its nationals. After all, it is the State party to the OST who exercises control and jurisdiction over the space activities conducted from its territory; and it is the State that is obligated to adhere to the ITU frequency allocations. That States bear international responsibility and potential liability for space activities, to include satellite broadcasting, is also reflected in the promulgation of State licensing requirements for private commercial launching and other space related activities.¹²² These licensing

¹¹⁹ *Outer Space Treaty*, *supra* note 116 at 209.

¹²⁰ Nicolas M. Matte *et al.*, *Analysis of the Legal Regime for the Establishment of Guiding Principles to Govern the Use of Direct Broadcasting Satellites (With Special Emphasis on the Canada-Sweden Initiative within the COPUOS)*, (Montréal: McGill University Press, 1980) at 52 [Matte, *Principles Governing DBS*].

¹²¹ *Outer Space Treaty*, *supra* note 116 at 213.

¹²² See generally Lyall, *supra* note 15 at 273.

requirements further ensure that States will provide some approve of the space activities conducted from its territory.

Despite this possible interpretation of the OST, States have been unwilling to accept responsibility for transnational satellite broadcasting conducted from within its territory. According to the Council of Europe, the provisions of the OST should not be interpreted as implying State responsibility for the radio and television programs transmitted by satellite.¹²³ The Council relied on the concept of freedom of information in excusing States from liability for the content of a particular satellite broadcast. Such a sentiment was also supported in the meetings of the UN Committee for the Peaceful Uses of Outer Space:

According to the principle of freedom of information and of the free circulation of information, the State cannot be held responsible for the content of information, whether this be at the national or international level. It follows from that that interference and pressure from foreign States which relate to the contents of information imparted by mass media and jeopardizing the exercise of freedom of information are inadmissible.¹²⁴

Although a State will bear responsibility for the dissemination of illegal propaganda,¹²⁵ this subordination of the OST to the "principle of freedom of information" gives significant discretion and control to States and satellite operators in terms of the content they wish to disseminate. In many circumstances this discretion is transferred or delegated from the satellite operators to national or international broadcasters who lease

¹²³ Fisher, *supra* note 77 at 44.

¹²⁴ UNCOPUOS, 21st Year, 207th Mtg., UN Doc. A/AC.105/PV.207 (1980) 47. (Reiteration of the position of the Council of Europe by the representative from the Republic of Germany).

¹²⁵ Nicola Mateesco Matte, *Aerospace Law: Telecommunications Satellites*, (Toronto & Vancouver: Butterworth 1982) at 72 [Matte, *Aerospace Law*].

broadcasting services from satellite operators.¹²⁶ Therefore, although satellite operators exercise some control over the information that is disseminated, this control is limited by commercial contractual obligations with the broadcaster.

Although the subordination of the OST to the principle of freedom of information appears to vest the broadcaster (through the satellite operator) with near-complete discretion in broadcasting, this discretion can still be trumped by the State. The OST provides that a State party to the OST will retain control and jurisdiction over a communications satellite once it is launched into space if it is launched on its registry. Article VIII of the OST provides:

State Parties to the Treaty on whose registry an object launched into outer space is carried shall retain jurisdiction and control over such object, and over any personnel thereof, while in outer space or on a celestial body. Ownership of objects launched into outer space, including objects landed or constructed on a celestial body, and of their component parts, is not affected by their presence in outer space or on a celestial body or by their return to the Earth...¹²⁷

As such, a State retains jurisdiction and control over a communications satellite that is placed on its registry. This means that in addition to the satellite operator and broadcaster, it is the State that has the final say over what may be broadcast via the satellites launched upon its registry.

This "final say" over what may be broadcast via satellite is largely concentrated in three private companies, Intelsat (Luxembourg & Washington), SES (Luxembourg), and Eutelsat (France). Combined, these three companies own and operate the majority

¹²⁶ For example see "Company Facts," online: Intelsat Corporation <<http://www.intelsat.com/press/company-facts/>> (Companies such as Eutelsat and Intelsat are satellite operators that provide broadcasting services to a number of national and international broadcasters).

¹²⁷ *Outer Space Treaty*, *supra* note 116 at 209.

of communications satellites in the geostationary orbit.¹²⁸ Services offered by these operators include, *inter alia*, Direct to Home (DTH) television and cable distribution of television broadcasts. SES provides DTH television services to 80 million households.¹²⁹ It provides cable services via satellite to 150 million cable television homes in North America, Latin America, Europe and Asia-Pacific.¹³⁰ SES delivers nearly 6,000 television channels via satellite. Both Intelsat and SES are able to provide communications services to 99% of the world's populated regions including access in approximately 200 countries.¹³¹ Eutelsat's fleet of satellites covers Europe, the Middle East, Africa, and a large part of Asia and the Americas. At the end of 2011, Eutelsat was broadcasting 4000 television channels to more than 150 countries, an increase of 2000 channels over the last five years.¹³²

In the Middle East and North Africa, regional satellite operators provide communication services to over 20 million homes (i.e. over half of all households with a TV) receiving satellite signals in 2008.¹³³ This percentage of use makes the region an attractive market for satellite operators seeking to sell or lease satellite communications capacity; and as a result the world's largest satellite operators have managed to dominate

¹²⁸ Peter B. de Selding "The List Top Fixed Satellite Service Operators" *Space News* (6 July 2009), online: Space News < www.spacenews.com/resource-center/top.../TopSatelliteOperators.pdf>.

¹²⁹ "Direct to Home," online: SES Your Satellite Company <<http://www.ses.com/4334538/direct-to-home>>.

¹³⁰ "Cable Distribution," online: SES Your Satellite Company <<http://www.ses.com/4334566/cable-distribution>>.

¹³¹ "Company Facts," online: Intelsat Corporation <<http://www.intelsat.com/press/company-facts/>>.

¹³² "Facts and Figures," online: Eutelsat Communications <www.eutelsat.com/news/media_library/brochures/Facts_&_Figures.pdf>.

¹³³ *Telecommunications Development Report 2010*, *supra* note 107 at 166.

this regional market in terms of capacity to facilitate broadcasting. Eutelsat and Intelsat own the majority of satellite communications capacity in this region. Eutelsat is the biggest and has 14 satellites serving the region. Eutelsat alone is able to provide half of the region's bandwidth or capacity to broadcast via satellite.¹³⁴ The second largest operator is Intelsat with 11 satellites capable of transmitting to the Middle East.¹³⁵ Eutelsat and Intelsat's ability to sell capacity on their satellites has led to an increase in the number of satellite operators in the region. There are now 13 commercial-satellite fleet operators in the Middle East; and although Eutelsat and Intelsat own the majority of the satellites, it is one of the most diverse regions in the world for satellite communications services.¹³⁶

Regional satellite operators in the Middle East and North Africa may not exercise jurisdiction and control over as many satellites as Intelsat and Eutelsat, but these operators are able to reach millions. For example, one of the largest and oldest regional satellite operators is Arabsat, which was founded in 1976 by the 21 member-States of the Arab League. Arabsat is based in Saudi Arabia and carries over 400 television channels and 160 radio stations, reaching countries across the Middle East, Africa, Europe, and Central Asia. Arabsat reports that their audience is over 164 million viewers within the 21 Arab countries.¹³⁷ However, in terms of actual resources, it has only five operational satellites; and as a result Arabsat customers lease space on

¹³⁴ Selding "Business Booming in Middle East", *supra* note 64.

¹³⁵ *Ibid.*

¹³⁶ Selding "Business Booming in Middle East", *supra* note 64.

¹³⁷ "In Orbit Satellites," online: Arab Satellite Communications Organization <<http://www.arabsat.com/pages/InOrbitSatellites.aspx>>.

different satellite operators such as Intelsat and Eutelsat.¹³⁸ In an effort to increase capacity or to limit dependency on leased capacity, Arabsat announced in 2009 that it has contracted for two additional satellites.¹³⁹ The other main regional provider is Nilesat. Nilesat is an Egyptian satellite company established in 1996 to operate Egyptian satellites. This operator also falls short of the resources of Intelsat and Eutelsat in that it has three operational satellites. Nilesat therefore depends on capacity purchased or leased from Eutelsat.¹⁴⁰ Of the relationship between Nilesat and Eutelsat, Eutelsat's Chief Executive has stated, "We are the Hot Bird of the Arab Countries."¹⁴¹ This fact notwithstanding, Nilesat broadcasts over 600 channels and 100 digital radio channels. Nearly 76% of the channels are free to air while the remaining channels require a subscription. Nilesat also States that it had a viewing population of 11 million households in 2003 and that it increase to more than 40 million in 2009. Nilesat is viewed by 95% of the households in the Middle East and North African region.¹⁴² Other regional operators include Noorsat of Bahrain which also leases capacity from Eutelsat.¹⁴³ Therefore, although ultimate jurisdiction and control of communications

¹³⁸ "Partners," online: Arab Satellite Communications Organization < <http://www.arabsat.com/pages/Globecast.aspx>>.

¹³⁹ "In Orbit Satellites," online: Arab Satellite Communications Organization < <http://www.arabsat.com/pages/InOrbitSatellites.aspx>>.

¹⁴⁰ Peter B. de Selding "Eutelsat's Atlantic Bird 7 Begins Service" *Space News* (25 October 2011), online: Space News < http://www.spacenews.com/satellite_telecom/111025-atlanticbird7-begins-service.html>.

¹⁴¹ "Stiff Competition Awaits YahLive Satellite TV Venture" *Space News*, (21 September 2009), online: Space News <http://www.spacenews.com/satellite_telecom/stiff-competition-awaits-yahlive-satellite-venture.html>.

¹⁴² See Nilsat Company profile <http://nilesat.com.eg/AboutUs/CompanyProfile.aspx>

satellites is concentrated in Western companies, regional operators have the ability to transmit significant news and information via satellite.

The diversity of satellite operators in the region means that it is not necessarily the government of Tunisia, Egypt, or Libya who decide what is broadcast into their respective national territories. The discretion ultimately lies with the satellite operator and ultimately the broadcaster who may be a government entity or a for-profit business with headquarters on the other side of the world. This diversity of control over satellite communication and the excusal of liability for the content of a broadcast that increases the likelihood that satellite jamming will continue. This is simply because the State in the region may have little to no say over what is broadcast in their territories.

During the Arab Spring, Egypt was able to eject Al-Jazeera from NileSat. This would have eliminated the need for Egypt to jam Al-Jazeera's satellite signal; however, Western satellite operators were able to ensure that the signal was still transmitted. This then created the need for Egypt to jam the signal or resort to other non-technical methods to prevent the transmission. The same can be said of Iran. Iran routinely jams the BBC Persian broadcast on the Eutelsat satellite. However, if Iran exercised any control or jurisdiction over the satellite the jamming simply would not be necessary. Therefore, so long as a diverse number of companies and governments retain control and jurisdiction over the communications satellites; and State governments in the Middle East and North Africa engages in censorship, satellite jamming is likely to continue.¹⁴⁴

¹⁴³ "Noorsat Buys Additional Eutelsat Capacity for TV" *Space News* (5 October 2009), online: Space News < http://www.spacenews.com/satellite_telecom/noorsat-buys-additional-eutelsat-capacity-for.html>.

¹⁴⁴ Ben Dowell "BBC World Service to sign funding deal with US State department" *The Guardian* (20 March 2011), online: The Guardian < <http://www.guardian.co.uk/media/2011/mar/20/bbc-world-service-us-funding>>.

Indeed, for this conflict over the jamming of satellite signals to cease, the States involved would either have to gain more control over the use of satellites in their region or adopt more liberal policies with respect to the flow of news and information from foreign sources.

Chapter 2: International Law

Given the likelihood that satellite jamming will continue, the next part of this thesis is dedicated to exploring the legal justifications that a State may assert to justify the jamming or harmful interference of a transnational satellite broadcast into its territory. This chapter will commence with a discussion of State sovereignty, the UN Charter, and the principle of non-intervention. This discussion will be followed by an analysis of the 1936 Convention Concerning the Use of Broadcasting in the Cause of Peace and illegal propaganda. The chapter will conclude with a discussion of UN efforts to develop an international convention with respect to direct broadcasting by satellite. These discussions will demonstrate that there are a number of legal justifications that a State may assert in order to jam a satellite signal. Additionally, the international community's failure to establish a binding convention with respect to satellite broadcasting has resulted in this area of international law being driven by State practice.

Sovereignty & Non-Intervention

State sovereignty allows a State to regulate and control the telecommunications disseminated within its territory and may justify an action of a State to engage in satellite jamming over its sovereign territory. According to Oppenheim, sovereignty is “supreme authority;”¹⁴⁵ and in terms of international relations, it does not mean legal authority over all other States, but rather it is the “...highest underived power within the State with exclusive competence therein.”¹⁴⁶ The concept of sovereignty is part of the foundation upon which the UN Charter operates. Article 2(1) of the Charter provides

¹⁴⁵ Sir Robert Jennings & Sir Arthur Watts, eds., *Oppenheim's International Law*, 9th Ed. (Essex England: Longman Group, 1993) at 122.

¹⁴⁶ *Ibid* at 125.

that “The Organization is based on the principle of the sovereign equality of all its Members.”¹⁴⁷

Sovereignty excludes subjection to any other authority and in particular to any other State. It is a form of independence that enables a State to exercise supreme authority over all persons and things within its territory.¹⁴⁸ It is this supreme authority that enables a State to pass laws and regulate and control their affairs. The correlative to this supreme authority within a State is non-intervention in the affairs of other States and vice versa. In the *Lotus* case the Permanent Court of International Justice stated that “...the first and foremost restriction imposed by international law upon a State is that, failing the existence of a permissive rule to the contrary, it may not exercise its power in any form in the territory of another State.”¹⁴⁹ In the *Corfu Channel* case the International Court of Justice stated, “Between independent States, respect for territorial sovereignty is an essential foundation of international relations.”¹⁵⁰ These principles of independence and nonintervention are also recognized in the Charter, which provides:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.¹⁵¹

Friendly Relations Declaration

In addition to the Charter, the Friendly Relations Declaration is another international instrument that underscores State sovereignty and non-intervention. The Declaration

¹⁴⁷ *Charter of the United Nations*, art. 2(1).

¹⁴⁸ Jennings, *supra* note 145 at 125.

¹⁴⁹ *The Case of the S.S. Lotus (France v Turkey)* [1927], P.C.I.J. (Ser. A.) No. 10 at 18.

¹⁵⁰ *Corfu Channels Case (United Kingdom v Albania)*, [1949] I.C.J. Rep. 4 at 35.

¹⁵¹ *Charter of the United Nations*, art. 2(7).

was adopted by the General Assembly in Resolution 2625 (XXV) on 24 October 1970.¹⁵² The Declaration specifies rights and duties of States with a view toward maintaining international peace. The Declaration proclaimed that “All States enjoy sovereign equality” which includes the enjoyment of a State’s “...rights inherent in full sovereignty,...the right freely to choose and develop its political, social, economic and cultural systems, ...[and] the duty to respect the personality of other States.”¹⁵³ States equally have a duty to promote “...universal respect for and observation of human rights and fundamental freedoms for all.”¹⁵⁴ The General Assembly also stated in the preamble that it was convinced:

[T]hat the strict observance by States of the obligations not to intervene in the affairs of any other State is an essential condition to ensure that nations live together in peace with one another, since the practice of any form of intervention not only violates the spirit and letter of the Charter, but also leads to the creation of situations which threaten international peace and security.¹⁵⁵

In accordance with the preamble the declaration provided that “No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State.”¹⁵⁶

These concepts of sovereignty, independence, and non-intervention also apply to the airspace over a State. The Chicago Convention governs the principles and

¹⁵² Formally, *The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, GA Res. 2625(XXV), UN GAOR, 25th Sess., Supp. No. 18, UN Doc. A8082 (1970) 121.

¹⁵³ *Ibid* at 123-124.

¹⁵⁴ *Ibid* at 123.

¹⁵⁵ *Ibid* at 122.

¹⁵⁶ *Ibid* at 123.

arrangements of civil international aviation and currently has 191 parties.¹⁵⁷ Article I of the Chicago Convention provides, “The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory.”¹⁵⁸ In reference to this Article of the Chicago Convention, the International Court of Justice in the *Nicaragua Case* stated, “The Court has no doubt that these prescriptions of treaty-law merely respond to firmly established and longstanding tenets of customary international law.”¹⁵⁹ This national sovereignty over airspace has also been interpreted to include sovereignty with respect to radio waves over the territory of a State.¹⁶⁰ Such a finding is consistent with the preamble to the ITU Constitution, which fully recognizes “[T]he sovereign right of each country to regulate its telecommunications.”¹⁶¹

State application of sovereignty

In applying these principles to radio and satellite communications, it is important to note that every State regulates or controls the program contents of its broadcasting to some extent.¹⁶² The regulation of broadcasting content is even done by the U.S., who is a strong proponent of the principle of the free flow of information.¹⁶³ The U.S. has been regulating domestic and foreign radio broadcasting in the U.S. since its enactment of the

¹⁵⁷ International Civil Aviation Organization, *Current lists of parties to multilateral air law treaties*, online: International Civil Aviation Organization<http://www.icao.int/secretariat/legal/List%20of%20Parties/Chicago_EN.pdf>.

¹⁵⁸ Formally, *The Convention on International Civil Aviation*, 7 December 1944, 15 U.N.T.S. 295.

¹⁵⁹ *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v the United States)*, [1986] I.C.J. Rep. 14 at 111 [*Nicaragua Case*].

¹⁶⁰ Matte, *Principles Governing DBS*, *supra* note 120 at 37-38.

¹⁶¹ *ITU Constitution*, *supra* note 40 at preamble.

¹⁶² Matte, *Principles Governing DBS*, *supra* note 120 at 33.

¹⁶³ *Ibid.*

Radio Act of 1927.¹⁶⁴ This act required would-be broadcasters to obtain a license from the Secretary of Commerce.¹⁶⁵ The Communications Act of 1934 imposed similar licensing requirements and created the Federal Communications Commission (FCC) to issue licenses and enforce the provisions of the act.¹⁶⁶ Thus, there can be no radio broadcasting in the U.S. unless the FCC has issued a license. Although it has been stated that the licensing process is more a matter of form over substance, the FCC does set basic broadcast guidelines regarding content.¹⁶⁷ If a broadcaster violates these content requirements, the broadcaster could be subject to fines or have their license revoked. For example, in the first six months of 2006, the FCC imposed fines worth millions of dollars for broadcasting indecency.¹⁶⁸

These licensing requirements and fines for the broadcasting of certain material are evidence that the U.S. is exercising its sovereignty over its territory with respect to radio telecommunications. It is State sovereignty that permits a State to enact and enforce these rules and regulations over its territory. If a broadcaster, including a satellite operator or a local radio station, does not have license issued by the FCC then that broadcaster is not permitted to broadcast in the U.S. If a broadcaster violates the terms of the license the broadcaster may be fined or have its license revoked. Although, some frequency allocation is necessary in order to avoid unintentional harmful

¹⁶⁴ *Radio Act of 1927*, 47 U.S.C. §§ 81-83 (1927).

¹⁶⁵ *Ibid.*

¹⁶⁶ *United States Communications Act of 1934*, 47 U.S.C. §§ 307-309 (1934).

¹⁶⁷ Dwight L. Teeter & Bill Loving, *Law of Mass Communications Freedom and Control of Print and Broadcasting*, 13th ed. (New York: Foundation Press, 2011) at 775-776.

¹⁶⁸ Federal Communications Commission, *Indecency Complaints and NALs: 1993 – 2006*, online: FCC <<http://transition.fcc.gov/eb/oip/ComplStatChart.pdf>>.

interference amongst broadcasters, these regulations demonstrate a greater degree of sovereignty in that they regulate the content of the broadcast.

An intentional unlicensed-transnational satellite broadcast may therefore violate the laws of the U.S. and involve State responsibility under the Outer Space Treaty. The transmission of radio waves via satellite constitutes an “activity” in outer space; and as stated above, States bear “international responsibility” for activities in outer space conducted by governmental and non-governmental agencies.¹⁶⁹ Although certain members of COPUOS and the Council of Europe have stated their opinion that a State cannot be liable for the *content* of a satellite broadcast;¹⁷⁰ this assertion does not mean that a State cannot be liable for a satellite broadcast, content notwithstanding. Depending on the circumstances, such a broadcast may interfere with the receiving State’s sovereignty and be contrary to the principle of non-intervention. Therefore, depending on the nature of the broadcast, the receiving State may vest with the right to jam or interfere with the radio signal.

Countermeasures & Self Defense

In response to an unauthorized broadcast the receiving State may claim the right to engage in countermeasures¹⁷¹ or act in self-defense. A countermeasure, as described by the International Court of Justice, has several requirements. First, a countermeasure must be taken in response to a previous international wrongful act of another State and must be directed against that State. Secondly, the injured State must have called upon the State committing the wrongful act to discontinue its wrongful conduct or to make

¹⁶⁹ *Outer Space Treaty*, *supra* note 116 at 209.

¹⁷⁰ UNCOPUOS, 21st Year, 207th Mtg., UN Doc. A/AC.105/PV.207 (1980) 47.

¹⁷¹ *The Case Concerning the Gabcikovo-Nagymaros Project (Hungary v Slovakia)*, [1997] I.C.J. Rep. 7 at 55-57 [*Gabcikovo-Nagymaros Project*].

reparation for it. Third, it must be proportionate and its purpose must be to induce the wrongdoing State to comply with its obligations under international law; and the countermeasure must be reversible.¹⁷²

In addition to countermeasures, a State may also claim the right to act in self-defense. Article 51 of the UN Charter provides, *inter alia*, that nothing shall impair the inherent right of individual or collective self-defense if an “armed attack” occurs against a member State.¹⁷³ Although it is unlikely that a transnational satellite broadcast will meet the Charter’s requirement of an “armed attack,”¹⁷⁴ the general prohibition of the use of inter-State force and the exception to it, the right to self-defense, are both part of customary international law;¹⁷⁵ and Article 51 does not cover the whole area of the regulation of the use of force in international relations.¹⁷⁶ In other words, the right to engage in self-defense may not require an “armed attack.” Some commentators maintain that Article 51 does not extinguish the pre-existing right under customary international law to take reasonable anticipatory action in self-defense; their position is that there is no indication that the drafters of the UN Charter intended to limit the customary law of self-defense in this way.¹⁷⁷ The classic formulation of the right of

¹⁷² *Ibid.*

¹⁷³ *Charter of the United Nations*, art. 51.

¹⁷⁴ *The Case Concerning Oil Platforms (Iran v United States)*, [2003] I.C.J. Rep. 161 at 187; (Must distinguish “the most grave forms of use of force,” those constituting an armed attack, from less severe forms. The Court also notes that the mining of a single military vessel may be enough to constitute as armed attack); See also *Nicaragua Case*, *supra* note 161 at 101.

¹⁷⁵ *Nicaragua Case*, *supra* note 159 at 103.

¹⁷⁶ *Ibid* at 94.

¹⁷⁷ Myres S. McDougal, “The Soviet- Cuban Quarantine and Self-Defense” (1963) 57:3 Am. J. Int’l L. 597 at 604.

anticipatory self-defense arose from the Caroline incident, which established that the necessity of self-defense must be instant, overwhelming, leaving no choice of means, and no moment of deliberation.¹⁷⁸ The International Military Tribunal at Nuremberg later affirmed this formulation when it ruled that the German invasion of Norway in 1940 was not defensive because it was unnecessary to prevent an “imminent” Allied invasion.¹⁷⁹ The Caroline test requires that force must be necessary because the threat is imminent and thus pursuing peaceful alternatives is not an option. Such use of self-defense also requires that the response or self-defense be proportionate to the threat.¹⁸⁰ Evidence of this concern for threats is illustrated in the “preemption doctrine” that is designed to better address threats to State security before they fully materialize.¹⁸¹

The exercise of self-defense or a countermeasure against a communications satellite may come in a variety of forms. Measures against satellites, often referred to as Anti-Satellite Weapons (ASATs), are direct-ascent and co-orbital systems that employ various mechanisms to destroy an on-orbit spacecraft.¹⁸² ASATs can include ground-based attacks against terrestrial satellite components, radio jamming, laser attacks,

¹⁷⁸Y. Dinstein, *War Aggression and Self-Defense*, 4th ed. (Cambridge: Cambridge University Press, 2005) 184-185.

¹⁷⁹*Judgment of the Nuremberg International Military Tribunal 1946* (1947) 41 Am. J. Int'l L. 172.

¹⁸⁰ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion [1996] I.C.J. Rep. 226 at 242; See also McDougal, *supra* note 179 at 597-604.

¹⁸¹The White House, *The National Security Strategy of the United State of America* (September 2002), online: Military Education Research Library Network <<http://merln.ndu.edu/whitepapers/USnss2002.pdf>> ;but see UN SCOR, 36 Sess., UN Doc. Res S/RES/487 (1981) (Security Council resolution condemning Israeli attacks on Iraqi nuclear research facility).

¹⁸² United States Air Force, *Counterspace Operations: Air Force Doctrine Document 2-2.1* (2 August 2004) at 33, online: The Defense Technical Information Center http://www.dtic.mil/doctrine/jel/service_pubs/afdd2_2_1.pdf [*USAF Counterspace operations*].

Electromagnetic Pulse (EMP) weapons, kinetic weapons, and Information Operations (IO) capabilities capable of corrupting space-based and terrestrial-based computer systems utilized to control satellite functions.¹⁸³ Of these measures, it is important to note that many of them permanently disable or destroy the satellite target while causing significant damage to the atmosphere and space environment.¹⁸⁴ For example a kinetic (collision) attack could potentially create fields of space debris that could threaten the existence of existing satellites and future space missions.¹⁸⁵ An EMP requires a nuclear detonation in the upper atmosphere that can similarly have far reaching consequences on target and non-target satellites.¹⁸⁶ Radio jamming, on the other hand, may have a limited and reversible effect on the target satellite.

One of the commonalities of countermeasures and self-defense is that the measures taken under either theory must be proportional to the conduct of the State sending the unauthorized broadcast. Radio jamming arguably meets this requirement of proportionality. Jamming the downlink of a satellite signal will not have a long-term effect on the satellite and environmental considerations such as radiation and space debris are avoided. Additionally, the jamming can cease when the unauthorized broadcast ceases. This type of countermeasure also requires that the receiving State declare the countermeasures and employ the jamming to specifically counter it.

Radio jamming could also be employed under a theory of self-defense. This

¹⁸³ *Ibid* at 4.

¹⁸⁴ *Ibid*.

¹⁸⁵ William J. Broad & David E. Sanger “China Tests Anti-Satellite Weapon, Unnerving U.S.” *The New York Times* (18 January 2007), online: *The New York Times* <<http://www.nytimes.com/2007/01/18/world/asia/18cnd-china.html>>.

¹⁸⁶ See generally Michael M. May, “Safeguarding our Military Space Systems” (1986) 232 *Science* 336.

theory will also require an “armed attack” or the imminent threat of one. If the satellite transmission is not accompanied by a traditional armed attack or the imminent threat of one, the content of the unauthorized broadcast and its overall effect must be considered. Obviously an unauthorized “cooking show” would not support the use of radio jamming under a theory of self-defense. On the other hand, warmongering propaganda or incitement to commit genocide would likely support the use of radio jamming in self-defense. Employing radio jamming under a theory of self-defense will necessarily invoke a theory of pre-emption or anticipatory self-defense given the fact that a radio transmission cannot be jammed *after* it is received by the receiving or jamming State.

Outside of satellite jamming, it is unlikely that a State would be justified to exercise other ASATs against a communications satellite in the absence of an “armed attack” or the imminent threat of one. In many situations the damage to the sending satellite and the environment will be too great to justify such an action under the requirement of proportionality. Moreover, if a State possesses the capability to destroy or otherwise permanently disable a satellite, such a fact supports a finding that the same State possesses the technology to employ a more proportional response such as radio jamming.

Although countermeasure and self-defense provide legal support for a State that seeks to jam a transnational broadcasting into its territory, there is nothing that requires a State to take action. In other words, the receiving State may simply acquiescence to the receipt of an unauthorized broadcast.¹⁸⁷ As discussed above, there are thousands of stations and tens of thousands of programs broadcasted everyday via satellite. Given the sheer volume of transnational broadcasting and the variety of programming available,

¹⁸⁷ Matte, *Principles Governing DBS*, *supra* note 120 at 40.

acquiescence is perhaps the most widely exercised exception to State sovereignty.

Freedom of Broadcasting

In terms of *terrestrial* radio broadcasting, States have engaged in a practice, which led to the principle of “freedom of broadcasting.”¹⁸⁸ This principle developed around World War II where European States engaged in significant transnational-radio broadcasting. In some cases receiving States would prohibit the reception of a radio signal or attempt to jam it. The receiving States did not protest because they possessed their own transmission capabilities and did not want to foreclose their use.¹⁸⁹ Over time, this resulted into a uniform State practice of acquiescence to transnational broadcasting. This practice developed into a customary rule of international law – the principle of freedom of broadcasting.¹⁹⁰ Although this customary rule initially only applied to terrestrial broadcasting, a strong argument can be made that this customary rule should also apply to satellite broadcasting. This argument is largely support by the growth in the communications satellite industry and private and State access to satellite broadcasting.¹⁹¹

Terrestrial freedom of broadcasting is based on the theory that airspace is separable from radio waves; and unlike air space, no State has ever claimed sovereignty

¹⁸⁸ Matte, *Aerospace Law*, *supra* note 124 at 67.

¹⁸⁹ *Ibid* at 68.

¹⁹⁰ *Ibid*.

¹⁹¹ See generally Satellite Industry Association “State of the Satellite Industry Report 2011” (June 2011), online: Telecommunications Industry Association <http://www.google.ca/search?client=safari&rls=en&q=State+of+the+satellite+industry+report+2011&ie=UTF-8&oe=UTF-8&redir_esc=&ei=3AoDUMGOGqjL0QGtyLGmBw> (This report demonstrates that communications satellite make up the majority of satellites in orbit. It is also indicative of a private competitive satellite industry).

over radio waves.¹⁹² This principle is characterized by two components. First a State can engage in a transnational broadcast into another sovereign State without receiving permission for the broadcast. Second, the receiving State retains the right to jam the signal as a countermeasure so long as the jamming activity is limited to the receiving State's territory. Over time, exceptions to this principle of freedom of broadcasting developed to include illegal propaganda, pirate broadcasting, and interference with the ITU regulations and existing frequency allocations. These are the types of broadcasts that are prohibited under the principle.¹⁹³

In the past, this principle of freedom of information did not directly apply to direct broadcasting by communications satellites; and during the late 1970s and early 1980s its application to satellites was considered controversial.¹⁹⁴ Among the early concerns for satellite broadcasting were the dissemination of propaganda, the submersion of national culture by satellite broadcasts, and the sentiment that some governments did not wish their citizens to learn of international and domestic events from foreign sources.¹⁹⁵ The three initial international viewpoints are summarized as follows. The Soviet Union favored strict control and prior consent of the receiving State for satellite broadcasting. The U.S. wanted no international agreement at all regarding satellite broadcasting; and finally, Canada and Sweden proposed a declaration that required consent and participation. The receiving State would have to give its prior

¹⁹² Fisher, *supra* note 77 at 159.

¹⁹³ *Ibid* at 160.

¹⁹⁴ Matte, *Aerospace Law*, *supra* note 124 at 70.

¹⁹⁵ Abram Chayes & Paul Laskin, "Direct Broadcasting from Satellites: Policies and Problems" (1975) 7 Am. Soc. Int'l L. Rev. 7-9.

consent to a satellite broadcast and then would also be able to participate in activities involving coverage of its area.¹⁹⁶

Initially States were not willing to extend the principle of freedom of broadcasting to satellites. Part of the fear of applying this principle to satellites was that States would lose control over their ability to disseminate news and information and their national identity would be subordinate to States that had the capacity to broadcast. However, if *all* States had equal access to satellite communications and broadcasting these concerns would greatly diminish. Although it cannot be said that *all* States have equal access to satellite broadcasting, many of the barriers have been removed. Companies such as Eutelsat,¹⁹⁷ Intelsat,¹⁹⁸ and numerous other regional operators bear the cost of constructing and launching the satellite while allowing private individuals and States to lease bandwidths. In short, more States and individuals can join the conversation because satellite broadcasting is no longer confined to the wealthiest of States. The ubiquity of satellite broadcasting and the relaxed market entry into satellite broadcasting support a finding that it should no longer be distinguished from terrestrial broadcasting in terms of freedom of broadcast. Under this theory a State would be permitted to send an unauthorized satellite broadcasts so long as it did not constitute illegal propaganda, come from a pirate station, or interfere with ITU frequency allocations. In turn, the receiving State would be authorized to jam the satellite signal so long as the jamming efforts were restricted to its territory.

¹⁹⁶ *Ibid* at 12.

¹⁹⁷ “Eutelsat’s Satellites,” online: Eutelsat Communications < <http://www.eutelsat.com/home/index.html>>.

¹⁹⁸ “Company Facts,” online: Intelsat Corporation < <http://www.intelsat.com/>>.

Freedom of broadcasting, as it relates to satellites transmissions, finds further support in the concept of “peace broadcasting.” The term “...refers to any non-incendiary transmission broadcast from an intervening State directly into a target State as part of the intervening State’s attempt to prevent or stop a human rights crisis.”¹⁹⁹ Similar to the principle of freedom of broadcasting, under peace broadcasting a State can assert its sovereignty and jam a transnational broadcast. This action does not diminish the sending State’s right to send the broadcast as long as the transmission does not interfere with ITU frequency allocations existing in the State.²⁰⁰ Unlike freedom of broadcasting, which finds its roots in customary international law developed around World War II,²⁰¹ the purported legal support for this peace broadcasting is Article 19 of the Universal Declaration of Human Rights, which provides that “Everyone 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.”²⁰² Although the declaration was not intended to be a binding document, peace broadcasting is predicated on a finding that this right has transformed into customary international law.²⁰³

¹⁹⁹ Eric Blinderman, “International Law and Information Intervention” in Monroe E Price & Mark Thompson, ed. *Forging Peace Intervention, Human Rights and the Management of Media Space* (Edinburgh: Edinburgh University Press 2001) 104 at 114; Jamie F. Metzl, “Information Intervention: When Switching Channels Isn’t Enough” (1997) 76 *Foreign Affairs* 15.

²⁰⁰ *Ibid* at 114.

²⁰¹ Matte, *Aerospace Law*, *supra* note 124 at 68.

²⁰² *Universal Declaration of Human Rights*, GA Res. 217(III), 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) [*UDHR*].

²⁰³ Blinderman, *supra* note 199 at 114 (The status of Article 19 as a binding obligation will be further discussed in chapter 3 of the this thesis).

Propaganda

1936 Convention Concerning the Use of Broadcasting in the Cause of Peace

States have long recognized that radio broadcasting could be used as a tool for illegal propaganda. As a result of this concern, the League of Nations sponsored the 1936 International Convention Concerning the Use of Broadcasting in the Cause of Peace, signed at Geneva September 23rd 1936. This treaty entered into force on 2 April 1938 and is ratified by 28 countries.²⁰⁴ The first three Articles of the convention place limitations on transnational radio broadcasting. Although not written into the convention, a violation of these Articles will likely provide the aggrieved State party with a right to jam radio or satellite broadcasting pending the resolution of the disputed transnational radio transmission. Article 1 provides that:

The High Contracting Parties mutually undertake to prohibit and, if occasion arises, to stop without delay the broadcasting within their respective territories of any transmission which to the detriment of good international understanding is of such a character as to incite the population of any territory to acts incompatible with the internal order or the security of a territory of a High Contracting Party.²⁰⁵

Articles 2 provides that the parties undertake to ensure that transmissions from stations within their respective territories shall not constitute incitement either to war against another party or acts likely to lead thereto. Article 3 prohibits transmissions likely "...to harm good international understanding by Statements the incorrectness of which is or ought to be known to the persons responsible for the broadcast."²⁰⁶ The convention also requires that in times of crisis certain information should be verified before it is

²⁰⁴ United Nations, *International Convention concerning the Use of Broadcasting in the Cause of Peace*, online: United Nations Treaty Collection <<http://treaties.un.org/pages/LONViewDetails.aspx?SRC=LONONLINE&id=509&lang=en>>.

²⁰⁵ *International Convention Concerning the Use of Broadcasting in the Cause of Peace*, 23 September 1936, 1938 L.N.T.S. 303 at 309, No. 4319 [*Broadcasting in the Cause of Peace*].

²⁰⁶ *Ibid* .

broadcast.²⁰⁷ If there is a dispute regarding the application or interpretation of the convention, it will be resolved first by any mechanism in place between the parties, arbitration, or the Permanent Court of Justice.²⁰⁸

Although there were no active communications satellites at that time the convention, it does not limit itself to any certain medium of communication. The terms “broadcasting” and “transmission” are not defined in the convention and are therefore wide enough to encompass broadcasting by satellite. Moreover, because the convention constitutes “international law” it should be considered as governing international law under Article III of the Outer Space Treaty.²⁰⁹

Under this convention, the transnational broadcasting of news, information, or entertainment via satellite is in breach of the convention if the transmission is of a character to incite the population of any territory to acts incompatible with the internal order or security of a contracting party. The proscriptions included in Article I do not require that the transmission be false or inaccurate, but rather “...incompatible with the internal order or security.” This prohibition is broadly worded and seems to include accurate reports of news worthy events if disseminating information about these events has the requisite negative impact on the receiving State. Notably, false or incorrect information is considered in separate Articles of the convention and therefore underscores a finding that Article one’s prohibitions need not be incorrect or false.

The U.S., home to Intelsat, one of the largest satellite operators, never ratified or signed this treaty. France, Australia, the Netherlands, and the United Kingdom all

²⁰⁷ *Ibid.*

²⁰⁸ *Ibid* at 311.

²⁰⁹ Matte, *Principles Governing DBS*, *supra* note 120 at 67.

denounced or withdrew from the treaty in the mid-1980s, during a period when transnational broadcast via satellite was coming into fruition.²¹⁰ These States are not bound by the convention and are not restricted from broadcasting from within their respective territories transmissions which may incite acts incompatible with the “internal order and the security” of a party to the convention. These States are not encumbered with the convention’s requirement that all information broadcasted is verified. Such a requirement would result in more reliable information but could also significantly impact the speed with which all news is disseminated.

Adherence to this convention would have significantly slowed or prevented the dissemination of news and information during the Arab Spring. During the uprisings, Al-Jazeera disseminated information about the respective protests in the region and corresponding government crackdowns on protestors.²¹¹ Much of this news was gathered from citizen journalists recording information on cellular phones and uploading it to the Internet. These images were then re-broadcast by media organizations such as Al-Jazeera via satellite.²¹² Under the convention, these images and stories would have to be verified before dissemination; and given the political climate; such verification may have slowed or even prevented the dissemination of this news. Moreover, some of the video broadcasted by Al-Jazeera from Qatar via satellite-depicted protestors in being attacked by State officials.²¹³ The widespread dissemination of these images could fuel or prompt additional protests and certainly interfere with the “internal security” of the

²¹⁰ United Nations, *International Convention concerning the Use of Broadcasting in the Cause of Peace*, online: United Nations Treaty Collection <<http://treaties.un.org/pages/LONViewDetails.aspx?SRC=LONONLINE&id=509&lang=en>>.

²¹¹ “Recapping the Arab Revolution”, *supra* note 2

²¹² *Ibid.*

²¹³ Alterman, *supra* note 13.

receiving States. Therefore, had Qatar, the broadcasting headquarters of Al-Jazeera, been a party to this convention, these broadcasts would most likely have been prohibited by the convention if the receiving State was also a member of the convention. As a result, the receiving State may have been entitled to jam the radio signal because the broadcast would be in violation of the convention.

Although the convention is silent with respect to jamming transmissions, a broadcast sent in contravention of the convention would likely invoke the right to use countermeasures. The breach of an international obligation is a wrongful act; and international responsibility for an intentional act will inure for the refusal to satisfy a treaty obligation.²¹⁴ The State receiving the transmission would be in a position to jam incoming transmissions as a countermeasure to the breach of the convention. Although Article VII of the convention deals with disputes, it is unlikely that a State would be patient enough to wait until the dispute is resolved in order to end the perceived violations of the convention.

The right to engage in countermeasures was contemplated during the signing of the convention in the form of reservations to the convention. These reservations to the convention also sought to reaffirm a State's sovereign right to control the broadcasting within its territory during the pendency of any dispute resolution. The delegation of Belgium declared its opinion that:

...[T]he right of a country to jam by its own means improper transmissions emanating from another country, in so far as such a right exists in conformity with the general provisions of international law and with the Conventions in force is in no way affected by the Convention.²¹⁵

²¹⁴ *Gabcikovo-Nagymaros Project*, *supra* note 171 at 55.

²¹⁵ *Broadcasting in the Cause of Peace*, *supra* note 205 at 314.

Similarly, the Spanish Delegation reaffirmed its right to “...put a stop by all possible means to propaganda liable to adversely affect internal order in Spain and involving a breach of the convention.”²¹⁶ The Soviet Delegation asserted that during the pendency of any dispute resolution, the Soviet Union maintained the right to take “reciprocal measures” against a State carrying out an improper transmission against it. Similar to the Belgium declaration, the Soviet position considered that the convention did not restrict any existing right in international law to take reciprocal action.²¹⁷ These reservations demonstrate that these States considered jamming to be permissible under international law; and that such jamming could take place if there was a violation of the convention.

There are several problems with the convention and the presumed right to jam transmission sent in contravention of it. First, there are few States that have ratified it. Some of the larger States such as the U.S. have never signed it and other European States have denounced it. As such, a State party cannot assert this convention against a non-State party because non-State parties have not assumed an obligation under the convention. In order to jam the incoming signal, the receiving State would be entitled to rely on State sovereignty and non-intervention. Reliance on these principles significantly reduces the importance of this convention. Second, the prohibitions of Article I are so broad that they may run contrary to more recent developments in international human rights law. The convention restricts a person’s ability to seek and receive information, a right that is recognized under the Universal Declaration of Human

²¹⁶ *Ibid* at 315.

²¹⁷ *Ibid* at 317.

Rights.²¹⁸ To the extent that this right, if considered to have emerged as a peremptory norm of general international law, this convention would interfere with it.²¹⁹ Article 64 of the Vienna Convention on the Law of Treaties provides that “If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.”²²⁰ Although the free flow of information may not have been recognized as a peremptory norm when this convention came into force, if it is now recognized, portions of this convention would be void because its prohibition is not merely applicable to illegal propaganda or incitement broadcasts but instead includes *any* transmission that is of such a character as to incite the population of any territory to acts incompatible with internal order or security.²²¹ Such a limitation in the convention could be remedied through its dispute resolution provisions; however, given the rate at which satellite news travels it is unlikely that the findings of the arbitration panel or court would have any significant effect because any alleged improper transmission and the event surrounding it would be too far removed from the ruling.

Although the convention serves to limit the spread of propaganda, it also has the potential to significantly limit the flow of information. If all States had ratified this

²¹⁸ *UDHR*, *supra* note 202 at art. 19.

²¹⁹ The extent to which Article 19 of the UDHR has emerged as a customary norm will be further discussed in Chapter 3 of this thesis.

²²⁰ *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331 art. 64 [*VCLT*].

²²¹ Emma Graham-Harrison, “Qur'an burning protests: two US soldiers shot dead by Afghan colleague” *The Guardian* (23 February 2012), online: The Guardian <<http://www.guardian.co.uk/world/2012/feb/23/quran-burning-afghanistan-us-soldiers-dead>> (For example, because Afghanistan is a party to the convention, any other State party to the convention would be restricted from reporting on certain events in Afghanistan. The 2012 report of U.S. Soldiers burning the Koran in Afghanistan would be contrary to the aims of the convention because such a report is certainly likely to be incompatible with Afghanistan's internal order or security. It resulted in days of protest outside a U.S. Military base and several Afghani deaths).

convention, the convention would likely provide State parties significant discretion to object to and jam incoming information. However, given the fact that few States have ratified this convention, its greatest significance appears to be its role in supporting the customary rules of international law prohibiting illegal propaganda.

Illegal Propaganda

In addition to the 1936 Convention Concerning the Use of Broadcasting in the Cause of Peace, there are a number of international instruments that define and prohibit the dissemination of illegal propaganda. In many circumstances a State that believes it is receiving radio transmissions of illegal propaganda may object to such a broadcast. If the sending State refuses to terminate the broadcast, the receiving State would be authorized to jam the radio or satellite broadcast as a countermeasure, or depending on the circumstances under a theory of self-defense. Claims of illegal propaganda were explicitly and implicitly advanced in the Arab Spring where many authoritarian governments placed blame for their predicament on the lies or misstatements of the “foreign media.”²²² Similar claims of propaganda have been made by the Soviet Union against the U.S. During the Cold War the Soviet Union would jam broadcasts of the Voice of America and BBC; the Soviet representative to the UN described the broadcasts and jamming as follows

As to the jamming of BBC and "Voice of America" broadcasts, as the Polish representative had pointed out, those broadcasts were inimical propaganda which actually appealed for revolt against and war upon the USSR. If measures were taken to ensure the free transmission of such lies over the USSR, popular indignation would be aroused to such an extent that the result would be unpleasant for...[the United States]...and others who desired such broadcasts.²²³

Considering these claims, this section of the chapter will initially demonstrate that the transnational dissemination of illegal propaganda provides legal support for satellite

²²² Borger, *supra* note 1; See also “Recapping the Arab Revolution”, *supra* note 2; “Libya: A media black hole”, *supra* note 9.

²²³ UN GAOR, 4th Sess., 313th Mtg. UN Doc. A/C.1/SR.330 (1949) 296.

jamming. This section will also explore defamatory propaganda and the legal support it provides for State that decide to engage in satellite jamming.

Illegal propaganda has been described as one of the most dangerous sources of international friction and war and can be broken down into three distinct categories: warmongering, subversive, and defamatory.²²⁴ Warmongering and subversive propaganda are the most egregious forms of propaganda and are clearly contemplated in UN Resolutions. The former includes direct incitement to war or violence and the latter includes any attempt by an outside power to aid in the overthrow of the government of a friendly power by subversion.²²⁵

Recognizing the potential consequences of illegal propaganda, in its second session the UN General Assembly adopted a resolution entitled Measures to be taken against Propaganda and the Inciters of a New War. The resolution “Condemns all forms of propaganda, in whatsoever country conducted, which is either designed or likely to provoke or encourage any threat to the peace, breach of peace, or act of aggression.” The resolution also requests that each government “promote by all means of publicity and propaganda available to them, friendly relations among nations based on the purposes and principles of the Charter.”²²⁶ This same prohibition appears in the 1962 resolution entitled Declaration of Legal Principles Governing the Activities of States in the Exploration of Outer Space.²²⁷ This declaration was later incorporated into the

²²⁴ Arthur Larson, “The Present Status of Propaganda in International law” (1966) 31 Journal of Law and Contemporary Problems 439.

²²⁵ *Ibid.*

²²⁶ *Measures to be Taken Against Propaganda and the Inciters of a New War*, GA Res. 110(II), UN GAOR, 2d Sess., UN Doc. A428 (1947) 14.

preamble of the Outer Space Treaty and therefore made this prohibition applicable to space.²²⁸ Moreover, Article III of the OST's requirement that space activities, shall be carried out "in the interest of maintaining international peace and security and promoting international cooperation and understanding"²²⁹ has been interpreted to include by implication a prohibition of broadcasting propaganda via satellite.²³⁰

The 1950 UN resolution entitled *Condemnation of Propaganda against Peace* expanded the definition of propaganda to include restricting a population from information concerning news and information. The resolution prohibited the following:

Incitement to conflict or acts of aggression

Measures tending to isolate the peoples from any contact with the outside world, by preventing the Press, radio and other media of communication from reporting international events, and thus hindering mutual understanding between peoples.

Measures tending to silence or distort the activities of the United Nations in favour of peace or to prevent their peoples from knowing the views of other States Members.²³¹

In light of this resolution, efforts to prevent a population from learning about news and information are also considered propaganda. Therefore, if the sole purpose of jamming a satellite or radio transmission were to deny information or isolate a population, such jamming would be prohibited by this resolution. However, it is unlikely that a State

²²⁷ *Declaration of Legal Principles Governing the Activities of States in the Exploration and Uses of Outer Space*, GA Res. 1962(XVIII), UN GAOR, 18th Sess. UN Doc. A/5656 (1963) 15.

²²⁸ *Outer Space Treaty*, *supra* note 116 at 205

²²⁹ *Ibid.*

²³⁰ Matte, *Principles Governing DBS*, *supra* note 120 at 54.

²³¹ *Condemnation of Propaganda Against Peace*, GA Res. 381 (V), UN GAOR, 5th Sess., UN Doc. A/1490 (1951) 14.

would ever admit that the sole reason for jamming a radio signal is the isolate of its people. The proffered reason is more likely to reflect national security or public order.

Members of the UN Committee on the Peaceful Uses of Outer Space (COPUOS) have also expressed concern over the content of satellite broadcasts and content that would be tantamount to propaganda. The COPUOS was set up by the General Assembly in 1959 to review the scope of international cooperation in peaceful uses of outer space, to devise programs in this field to be undertaken under UN auspices, to encourage continued research and the dissemination of information on outer space matters, and to study legal problems arising from the exploration of outer space.²³² While considering the transnational use of satellites the Government of the Philippines expressed concern over the fear of unwanted political interference from direct broadcasting satellites.²³³ The Government of Japan also expressed a concern for political interference and described what it considered “undesirable” direct broadcasting as those with the following characteristics:

1. Broadcasts making war propaganda, which provokes the mentality of the people of receiver countries towards the initiation of war.
2. Broadcasts, which incite subversive activities against the political institutions of receiver countries.
3. Broadcasts, which slander receiver countries or their representative organs and injure the dignity and honor of receiver countries.
4. Broadcasts, which interfere in the internal affairs of receiver countries by criticizing their policies and incite the people not to follow their policies.

²³² *International Cooperation in the Peaceful Uses of Outer Space*, GA Res. 1472 (XIV), UN GAOR, 14th Sess., UN Doc. A/4351 (1959) at 5.

²³³ COPUOS, *Reports of the Working Group on Direct Broadcast Satellites: Comments Received from Governments, Specialized Agencies, and Other Competent International Bodies*, UN COPUOS, (1970), UN Doc. A/AC 105/79, 9.

5. Broadcasts, which violate basic human rights, are offensive to the race, belief, religion, etc., of the receiver countries' people.²³⁴

Although these characteristics are not legally binding, they further describe what States considered, if not propaganda, then at least undesirable broadcasting. The first two paragraphs are clearly a reference to the existing definitions of propaganda identified by the General Assembly and provide support a finding that a State is prohibited from broadcasting such material via satellite or terrestrial broadcast. The above resolutions also support a finding that a State that receives such a broadcast would be authorized to jam it as a countermeasure. The latter two paragraphs expand the definition of propaganda to include what could be described as political interference or critical journalist reporting. Under this broad language, a satellite operator would be restricted from broadcasting news stories critical of the government. For example, a satellite operator would be prohibited from broadcasting a report on government corruption because such reporting would certainly interfere with the “dignity and honor of receiving countries.” This specific concern for undesirable broadcasting is relevant because it is indicative of the illegality of defamatory propaganda.

²³⁴ COPUOS, *Reports of the Working Group on Direct Broadcast Satellites: Comments Received from Governments, Specialized Agencies, and Other Competent International Bodies*, UN COPUOS, (1970), UN Doc. A/AC 105/79, 7.

Defamatory Propaganda

In addition to warmongering and subversive propaganda, there is also general agreement on the principle of the illegality of the more inflammatory types of defamation. The law has been summed up as follows: “International law clearly forbids the higher officials of a State to indulge in uncomplimentary or insulting comments upon the personality of another State or its rulers.”²³⁵ This proposition of international law is primarily supported by the third primary source of international law listed in the Statute of the International Court of Justice, “[T]he general principles of law recognized by civilized nations.”²³⁶ The sources of this prohibition are found in ancient and more recent legislation.²³⁷ In fact, almost every State in the world has a civil or criminal law protecting individual and institutional reputation against defamation and these laws generally protect against false allegations injurious to reputation and derogatory Statements of fact.²³⁸ These defamatory Statements, most of which are transmitted via international news media, can have a significant impact on individual and State interests.²³⁹

²³⁵ Charles Hyde, *International Law, Chiefly as Interpreted and Applied by the United States*, 2nd ed. (Boston: Little, Brown, and Co. 1945) at 709 cited in Arthur Larson, “The Present Status of Propaganda in International law” (1966) 31 *Journal of Law and Contemporary Problems* 439 at 447.

²³⁶ *Statute of the International Court of Justice*, art. 38.

²³⁷ Larson, *supra* note 224 at 439.

²³⁸ Elad Peled, “Should States Have a Legal Right to Reputation? Applying the Rationales of the Defamation Law to the International Arena” (2010) 35 *Brook J. Int’l L.* 107 at 110.

²³⁹ *Ibid* at 109 (The following examples are listed: Bolivia had an astonishing rate of infant deaths (2007); Iran forced non-Muslims residing in Iran to wear identification patches (2006); Iraq killed Kuwaiti babies in hospital incubators (1990); Iraq harbored weapons of mass destruction (2003); Israel carried out a massacre in Jenin refugee camp (2002); U.S. military employed nerve gas during the Vietnam War U.S. Interrogators at Guantanamo Bay flushed a Koran down a toilet (2005); Uzbek police tortured a person to death (2004)).

Although these Statements may not have been intentionally false, one cannot dispute that they have had far-reaching consequences on the State making the Statement and the defamed State. One cause is that most news agencies are privately owned and run on a for-profit basis and media budgets are considerably less because given competition with the Internet.²⁴⁰ In addition to the hazards of a for-profit media, these same media outlets are shaped by the policies of their financiers. One commentator has pointed out that Rupert Murdoch, the principle owner of Fox News Channel, has dispensed with political neutrality and sought to influence global news to reflect his political prejudices.²⁴¹ Another, less obvious example, is Al-Jazeera's treatment of Bahrain during the Arab Spring. Al-Jazeera's biases were illustrated in the way they covered the uprisings in the neighboring State of Bahrain. The protests in Bahrain received considerably less attention than other protest in the region.²⁴² There are also reports that Al-Jazeera prohibited reporting on the militarization of the Syrian uprising because it did not "fit the narrative of a clean and peaceful uprising."²⁴³

In addition to the mistakes, biases and agendas advanced by the private sector in international media, States have used propaganda to further their own interests.²⁴⁴ Simple statistics about the economy or civil rights, provided by a government, are not

²⁴⁰ James Curran, *Media and Democracy*, (London & New York: Routledge 2011) at 23-25.

²⁴¹ *Ibid.*

²⁴² Ali Hashem "The Arab spring has shaken Arab TV's credibility" *The Guardian* (3 April 2012), online: The Guardian < <http://www.guardian.co.uk/commentisfree/2012/apr/03/arab-spring-arab-tv-credibility>>.

²⁴³ *Ibid.*

²⁴⁴ John B. Whitton, "The Problem of Curbing International Propaganda" (1966) 31 *Law & Contemporary Problems* 601-02.

necessarily only issued for enlightenment, education, or information. There is usually a specific goal attached to the release of this information. This goal could include seeking voter approval; or internationally, this information could serve to increase the prestige and influence of a specific government.²⁴⁵ The dissemination of this information can constitute illegal defamatory propaganda, the effects of which can be negative:

In the hands of an unscrupulous government, communications of this kind can be welded into a vicious weapon of distortion and defamation, capable of arousing a people against its government and one nation against another.²⁴⁶

In order to combat the “unscrupulous government” from disseminating such propaganda a number of measures can be employed. These measures include responding to the erroneous information with counter propaganda, diplomatic redress, and international agreement.²⁴⁷ A State could also object to the receipt of the perceived defamatory propaganda, and if the sending State does not cease the transmission, the receiving State could potentially jam the transmission as a countermeasure.

This justification for satellite jamming could potentially increase given the increase in State-sponsored satellite broadcasting, their policy agendas, and the perceived effects that satellite broadcasting can have on a population. However, due to the increase in satellite broadcasting capacity, States may simply choose to broadcast counterpropaganda. Satellite jamming may therefore be reserved for those States that lack the resources to engage in an effective counterpropaganda movement.

²⁴⁵ *Ibid.*

²⁴⁶ *Ibid.*

²⁴⁷ *Ibid* at 608.

States with a well-established satellite broadcasting apparatus do not necessarily have to engage in jamming because they have the ability to engage in counterpropaganda. Examples of such States include the U.S. and the various programs of its Broadcasting Board of Governors, Iran's Press Television, Qatar's Al-Jazeera, Russia's RT (RT), and China Central Television (CCTV). U.S. Secretary of State, Hillary Clinton, has voiced concern that the broadcasting by these States is not limited to the objective dissemination of news and information. While seeking an increase in U.S. funding for international broadcasting, Ms. Clinton, stated that the U.S. was losing an "information war" in State broadcasting.²⁴⁸

State broadcasting by these entities is not disinterested and can lead to the broadcasting of defamatory propaganda. All broadcasting by the U.S. has to be in accordance with the broad foreign policy interests of the U.S.²⁴⁹ This requirement has led one commentator to conclude that the only difference between the U.S. and other State broadcasters is that "...the United States government tends to tacitly control media through a set of laws and codes, while authoritarian regimes directly control media to advance their agenda."²⁵⁰ Government interest and control of U.S. foreign broadcasting is demonstrated in the U.S. foreign broadcasting in the Middle East, via its satellite news network Al-Hurra. Unlike its main competitors in the region, Al-Hurra does not offer viewers an opportunity to call in and interact with the show in real-time. Other Arab-based satellite stations, such as Al-Jazeera and Al-Arabiya, allow callers to express their

²⁴⁸ "Hillary Clinton On US Pro-War Pro-Corporate Propaganda Losing To Al-Jazeera, RT, CCTV" RT (9 December 2011), online: RT via YouTube <<http://www.youtube.com/watch?v=vv9JirX0yzg>>.

²⁴⁹ *United States International Broadcasting Act*, 22 U.S.C. § 6201 (1994).

²⁵⁰ El Mustapha Lahlali, *Contemporary Arab Broadcast Media*, (Edinburgh University Press, Edinburgh, 2011) at 105.

viewpoints in real-time. The reluctance of Al-Hurra to allow such real-time interaction with the public is likely designed to monitor and control Al-Hurra's dissemination of information.²⁵¹ Al-Hurra has also been accused of failing to critically cover American domestic issues; and ignoring or obfuscating some critical news events in the region.²⁵²

In Russia, during Vladimir Putin's first term of presidency, there was increasing concern that Russia was becoming "neo-imperial" in nature.²⁵³ Putin responded by re-energizing Russian propaganda and investing into Russia's image abroad.²⁵⁴ One of the products of this propaganda initiative included a transnational television station called RT. It went on the air in April 2005 and broadcasts in English and Arabic; and was designed to be a counter weight to CNN and BBC.²⁵⁵ In 2010, the Russian government was expected to spend \$1.4 billion on international propaganda.²⁵⁶ One commentator has noted that "They [the Russian government] have realized it is only by controlling what gets printed in the international media they can advance their hard policy agenda items."²⁵⁷

²⁵¹ *Ibid* at 107.

²⁵² *Ibid* at 99-100 (Al-Hurra failed to cover the assassination of Sheikh Ahmed Yassin, Hamas's spiritual leader. All other stations in the region covered the event while Al-Hurra chose to air an American cooking show in Arabic).

²⁵³ Valentina Feklyunina "Battle for Perceptions Projecting Russia in the West," (2008) 60 *Europe-Asia Studies* 605.

²⁵⁴ *Ibid*.

²⁵⁵ "Using Stalin to Boost Russia Abroad" *Spiegel online International* (20 November 2007) online: Spiegel <<http://www.spiegel.de/international/world/0,1518,518259,00.html>>.

²⁵⁶ *Ibid* (A figure that exceeds the amount the State spends on fighting unemployment).

²⁵⁷ Luke Harding "Russia Today launches first UK ad blitz" *The Guardian* (18 December 2009), online: The Guardian <<http://www.guardian.co.uk/world/2009/dec/18/russia-today-propaganda-ad-blitz>>.

In China, speaking before China's National Media Association in 2011, a government representative stated, "The first social responsibility and professional ethic of media staff should be understanding their role clearly and being a good mouthpiece." The representative continued, "Journalists who think of themselves as professionals, instead of as propaganda workers, were making a fundamental mistake about identity."²⁵⁸ The Chinese government is seeking to reshape much of the world's media away from an organization that would be critical of the government into one where the government's interests are of paramount concern. China is making a multi-billion dollar expansion of its own media to the world through satellite and Internet television channels.²⁵⁹ In 2008, Li Changchun, the party leader responsible for propaganda, summed up China's rationale: "In the modern age, whichever nation's communication methods are most advanced, whichever nation's communication capacity is strongest . . . has the most power to influence the world."²⁶⁰

Finally, Press TV is one of a number of stations run by the Islamic Republic of Iran Broadcasting (IRIB), Iran's State-owned media company. This State broadcaster is similarly engaged in a war to win public opinion and designed to combat the "... domineering empire of Western Media aiming for the cultural conversion of the

²⁵⁸ "China's Programming for U.S. Audiences: Is it News or Propaganda" *PBS News hour* (23 March 2012) online: PBS <http://www.pbs.org/newshour/bb/world/jan-june12/cctv_03-23.html>

²⁵⁹ Douglas Farah & Andy Mosher, "Winds From the East: How the People's Republic of China Seeks to Influence the Media in Africa, Latin America, and Southeast Asia" (2010) *A Report to the Center for International Media Assistance*, Center for International Media Assistance. 4.

²⁶⁰ John Pomfret, "From China's Mouth to Texans' Ears: Outreach Includes Small Station in Galveston," *Washington Post* (25 April 2010) online: Washington Post <<http://www.washingtonpost.com/wp-dyn/content/Article/2010/04/24/AR2010042402492.html>>.

Independent nations specifically focusing on the Islamic Republic of Iran...”²⁶¹ The IRIB recently lost its license to broadcast in the United Kingdom after being accused improperly holding its license and after the airing of a 2009 false confession, in which a journalist was forced to confess to helping to stage Iran's 2009 protests with other foreigners in collusion with the Western media. The confession was aired in the United Kingdom and Iran.²⁶² Iran has countered that the revocation was precipitated due to its coverage of the London riots and the cost of royal wedding.²⁶³

Given the relative purposes and positions of these State-broadcasting entities it certainly is within the realm of possibility that there will be an increase in the dissemination of defamatory propaganda. This is especially true given the express statements by Iran and the U.S., in that they are engaged in a “media war.” In response to instances of defamatory propaganda, international law would allow a State to object and if the objection is not respected the aggrieved State could engage in radio jamming as a countermeasure. For example, the United Kingdom could have objected to and subsequently jammed the radio transmission of the false confession where Iran accused the Western media of orchestrating the 2009 Iranian protests. However, the United Kingdom had the ability of revoking Iran’s broadcasting license to prevent this and similarly perceived defamatory broadcasts. Other States that are recipients of defamatory propaganda may not have the luxury of effectively revoking a license on a satellite broadcast. During the Arab Spring, it was demonstrated that the authoritarian

²⁶¹ “IRIB at a glance,” online: IRIB <<http://www.irib.ir/English/AboutUs/index.php>>.

²⁶² Paul Sonne & Farnaz Fassihi “Tehran's TV Channel Loses British License” (21 January 2012) *Wall Street Journal* Online: WSJ <<http://online.wsj.com/Article/SB10001424052970204616504577172763781772708.html>>.

²⁶³ *Ibid.*

governments in power did not have complete control over the satellite broadcasts disseminated into their respective territories. Thus, the only remaining option available to these governments was to object and jam the incoming radio signal. Although jamming a radio signal is cumbersome it can be more effective than trying to counter the defamatory propaganda with the truth or counter propaganda. This is because there simply is not as much interest in a “corrected” news story as there is in the initial publication.²⁶⁴ As articulated by Justice Brennan, “...it is the rare case where the denial overtakes the original charge. Denials, retractions, and corrections are not "hot" news, and rarely receive the prominence of the original story.”²⁶⁵

Moreover, when a State responds to defamatory propaganda, that State has to persuade the public of the falsity and correct the information; however, since the State will likely be perceived as biased, it is unlikely that the public will be persuaded. Thus, it is the initial uncorrected defamatory Statement that is likely to become believed.²⁶⁶ Therefore, because there is no way of knowing what is going to be broadcast at any particular moment, the normal employment of a countermeasure, objection and notice, may not be sufficient in the field of satellite communications. As such, the only effective intervention may be to block or jam the broadcast in its entirety.

Finally, it cannot be ignored that this legal justification for radio and satellite jamming is subject to abuse. As stated in the beginning of this chapter, during the Arab Spring, claims tantamount to illegal defamatory propaganda were advanced by many of the governments in jeopardy. This claim was used to jam satellite signals and eject

²⁶⁴ Peled, *supra* note 238 at 141.

²⁶⁵ *Rosenbloom v Metromedia*, 403 U.S. 29 at 46 (1971).

²⁶⁶ Peled, *supra* note 238 at 141.

foreign media. When such a claim is made, it is either the broadcasting State that is engaged in the dissemination of illegal propaganda or it is the receiving State that is engaged in propaganda by virtue of isolating its population from news and information. Unfortunately the question may not be solved by the truth but rather by the State or States who have honed their ability to broadcast and exercise control over the dissemination of transnational media.

United Nations Resolutions

The advent of satellite technology and the possibility of direct broadcasting opened up numerous possibilities in communications. The extent of these possibilities is similar to that offered by civil international aviation after World War II. Both of these technologies made the world a smaller place in that they can so easily transcend national borders. It is for this very reason that an international framework was needed in both fields. In the field of civil aviation, the Chicago Convention affirmed a State's sovereignty over its airspace and created certain binding rules with respect to civil aviation.²⁶⁷ This civil aviation convention paved the way for numerous bilateral air transport agreements between States.²⁶⁸ While the technical realm of satellite communications was the province of the ITU, other UN agencies such as COPUOS and the Economic and Social Council (UNESCO) sought to draft legal instruments governing direct broadcasting by satellite. However, as will be demonstrated below, the instruments ultimately adopted by the UN failed to establish binding international rules and do not prohibit a State from jamming transnational satellite signals in their territory. The attempt to develop binding rules for satellite broadcasting lasted for over a decade and produced a UNESCO Declaration in 1972 and General Assembly Declaration in 1982. Each will be discussed.

The UNESCO Declaration of 1972

In 1970, UNESCO's Space Communication Program had three essential aims: first, to promote expanded use of tele-education; second, the promotion of cultural exchange; and third, the promotion of the free flow of information between and within

²⁶⁷ Formally *The Convention on International Civil Aviation*, 7 December 1944, 15 UNTS 295.

²⁶⁸ See generally Paul Stephen Dempsey, *Public International Air Law*, (Montreal: McGill University, 2008).

nations.²⁶⁹ Given these aims, the UN had requested UNESCO's assistance in the elaboration of principles to regulate outer space activities.²⁷⁰ In 1972 there was a Meeting of Experts who adopted a draft declaration on the guiding principles of communications satellites. COPUOS did not have the opportunity to comment on the declaration; nevertheless, and contrary to COPUOS's wishes, the declaration was adopted by the UNESCO's General Assembly in 1972.²⁷¹

The UNESCO Declaration did not state that a State could engage in any form of satellite jamming but it supported the proposition that a State sending a satellite broadcast must obtain the receiving State's prior consent to receive the broadcast before such broadcast is sent. Article II of the Declaration provides that "Satellite broadcasting shall respect the sovereignty and equality of all States."²⁷² Article V of the Declaration provides that the objective of satellite broadcasting for the free flow of information is "...to ensure the widest possible dissemination, among people of the world, of news of all countries, developed and developing alike." In order to achieve this dissemination, a State receiving a broadcast must first consent to the broadcast as described in Article IX:

1. In order to further the objective set out in the preceding articles, it is necessary that States, taking into account the principle of freedom of

²⁶⁹ COPUOS, *Review of the Activities and Resources of the United Nations, of its Specialized Agencies and of Other Competent International Bodies Relating to the Peaceful Uses of Outer Space*, UN GAOR 1970, UN Doc. A/AC.105/177 at 56.

²⁷⁰ *International Cooperation in the Peaceful Uses of Outer Space*, GA Res. 1721 (XVI), UN GAOR, 16th Sess., UN Doc. A/5026 (1961) 7.

²⁷¹ Matte, *Principles Governing DBS*, *supra* note 120 at 80 (The full title of the declaration is *Declaration of guiding principles on the use of satellite broadcasting for the free flow of information, the spread of education and greater cultural exchange*).

²⁷² *Declaration of guiding principles on the use of satellite broadcasting for the free flow of information, the spread of education and greater cultural exchange 1972*, Reprinted in Nicolas M. Matte, *Aerospace Law From Scientific Exploration to Commercial Utilization*, (Toronto: Carswell 1977) at 300 [Matte, *UNESCO Declaration*].

information, reach or promote prior agreements concerning direct satellite broadcasting to the populations of countries other than the country of origin of the transmission.

2. With respect to commercial advertising, its transmission shall be subject to specific agreement between the originating and receiving countries.²⁷³

Although the declaration is not binding under international law,²⁷⁴ it was meant to serve as a guide for States engaging in satellite communications. The references to sovereignty and the requirement for “prior agreements” have become known as the “doctrine of prior agreement” to send a satellite broadcast.²⁷⁵ In other words, a State cannot engage in transnational satellite broadcasting into another State unless the sending State has received the receiving State’s prior consent.

In addition to the non-binding nature of the Declaration, the importance of the UNESCO declaration is further diminished because it failed to receive a majority of the votes. Of the 128 member States at the time, 110 were present and 84 voted. Out of those who voted, 55 were in favor, 7 against, and 22 abstained.²⁷⁶

²⁷³ *Ibid* at 299.

²⁷⁴ *Ibid* at 41.

²⁷⁵ Savage, *supra* note 27 at 148.

²⁷⁶ Matte, *Principles Governing DBS*, *supra* note 120 at 83.

Principles Governing the Use by States of Artificial Earth Satellites for International Direct Television Broadcasting

At the direction of the General Assembly, the legal subcommittee of COPUOS similarly worked to formulate principles relating to the direct broadcasting by satellite.²⁷⁷ Similar to the UNESCO declaration, the COPUOS draft principles required consultation and agreement between the broadcasting and receiving State prior to any foreign broadcast.²⁷⁸ This consultation and agreement was supported in a number of working papers related to the draft principles. For example, Canada, Sweden²⁷⁹, Belgium, Colombia, and Iraq all submitted working papers to the COPUS requiring either consent or a bilateral or multilateral treaty to be in place as a prerequisite to broadcasting.²⁸⁰ The U.S., on the other hand, opposed any requirement for an agreement before engaging in such a transnational broadcast and proposed the following language in lieu of requiring either a treaty or prior agreement:

The State which proposes to establish or authorize such a service should take into account and give due regard to the interests and concern of the foreign State in regard to the proposed service, as set forth in such consultations. Any such consultations should also be premised upon facilitating a free flow and a wider dissemination of information of all kinds and encouraging co-operation in the field of information and the exchange of information with other countries.²⁸¹

²⁷⁷ *Preparation of international instruments or United Nations arrangements on principles governing the use by States of artificial earth satellites for direct television broadcasting*, GA Res. 2916 (XXVIII), UN GAOR, 27 Sess., UN Doc. A/8801.

²⁷⁸ COPUOS, *Report of the Legal Sub-Committee on the Work of its Nineteenth Session*, UN COPUOS, 19th Sess., UN Doc. A/AC.105/271 Annex I (1980) 9.

²⁷⁹ *Ibid* at 12.

²⁸⁰ COPUOS, *Report of the Legal Sub-Committee on the Work of its Nineteenth Session*, UN COPUOS, 20th Sess., UN Doc. A/AC.105/288 Annex II (1981) 8-9.

²⁸¹ COPUOS, *Report of the Legal Sub-Committee on the Work of its Nineteenth Session*, UN COPUOS, 19th Sess., UN Doc. A/AC.105/271 Annex I (1980) 17.

The draft declaration made it to the General Assembly in the form of the 1982 Resolution entitled Principles Governing the Use by States of Artificial Earth Satellites for International Direct Television Broadcasting.²⁸² This resolution was a result of over a decade of discussions on the subject in COPUOS. With respect to sovereignty, the first principle of the resolution states direct broadcasting by satellite should be done in a manner compatible with the sovereign rights of each States and include the principle of non-intervention.²⁸³ In its paragraphs 13, 14 and 15 the resolution provides that:

13. A State which intends to establish or authorize the establishment of an international direct television broadcasting satellite service shall without delay notify the proposed receiving State or States of such intention and shall promptly enter into consultation with any of those States which so requests.

14. An international direct television broadcasting satellite service shall only be established after the conditions set forth in paragraph 13 above have been met and on the basis of agreements and/or arrangements in conformity with the relevant instruments of the International Telecommunication Union and in accordance with these principles.

15. With respect to the unavoidable over-spill of the radiation of the satellite signal, the relevant instruments of the International Telecommunication Union shall be exclusively applicable.²⁸⁴

The resolution was adopted on 10 December 1982. One hundred and seven countries voted for the resolution, 13 voted against and 13 abstained. The States that voted against the resolution include the U.S., the United Kingdom, Spain, Norway, Belgium, Denmark, East Germany, Japan, Sweden, the Netherlands, Luxembourg, Italy,

²⁸² *Principles Governing the Use by States of Artificial Earth Satellites for International Direct Television Broadcasting*, GA Res. 92 (XXXVII), UN GAOR, 37th Sess., Suppl. no. 51, UN Doc. A/37/51 (1982) 98 [*Direct Broadcasting Principles*].

²⁸³ *Ibid.*

²⁸⁴ *Ibid* at 99.

and Iceland.²⁸⁵ The proposal by the U.S. was rejected in favor of a provision requiring a prior agreement with a State receiving a transnational satellite broadcast.

The skewed vote in support of requiring a prior agreement for a satellite broadcast is not surprising given the degree of State control over media that existed before transnational broadcast via satellite. Before satellite communications States in Europe would trade different television programs of entertainment and news for national broadcast. This transfer or exchange allowed respective States to vet and censor foreign programs so as not to violate national programming regulations and expose viewers to “harmful programs” or “propaganda.” Writing while this exchange practice was ongoing, one author noted, “In today’s world, each government strictly controls the programs that may be telecast, and each regards it as essential that the integrity of these decisions be protected.”²⁸⁶ It was believed that any international exchange system had to take into consideration the importance of television to national sovereignty.²⁸⁷ The vote regarding satellite broadcast in part demonstrates a reluctance of States to cede control over what is broadcast in their national territories.

The vote also reflects the concern that a number of postcolonial developing States shared regarding the potential for cultural imperialism that could be exercised by the space-faring and satellite-operating States.²⁸⁸ Allowing unfettered foreign broadcasts

²⁸⁵ United Nations General Assembly, *Principles Governing the Use by States of Artificial Earth Satellites for International Direct Television Broadcasting*, online: United Nations Documents Voting Records < <http://unbisnet.un.org:8080/ipac20/ipac.jsp?&profile=voting&menu=search#focus>>.

²⁸⁶ Ernest Eugster, *Television Programming across National Boundaries: The EBU and OIRT Experience*, (Dedham MA: Artech House, 1983) at xix.

²⁸⁷ *Ibid.*

²⁸⁸ Ram S. Jakhu, “The Law of Space Applications” Classroom Lecture.

would interfere with a State's right to "self-determination." It would interfere with the right that allows a population or people to determine for themselves, free from outside influences, whether to create a State, and if so the nature, institutions, and identity of the State. These concepts of self-determination, sovereignty, and non-intervention gained strength in latter half of the last century. The decolonization process occurred much faster than colonial powers had anticipated; and these newly independent States strongly supported and adhered to concepts of State sovereignty and non-intervention.²⁸⁹ It is this strong support for these principles and the concern that the former colonial powers would exercise control of their media that led these new States to embrace the requirement for an agreement prior to receiving a satellite broadcast.

Since the vote on the 1982 UN General Assembly Resolution, the number of transnational satellite programs and broadcasts has increased from a mere handful transnational sporting events²⁹⁰ to tens of thousands of programs and thousands of stations being broadcast via satellite. This flood of satellite media has not changed a State's sovereign right to object to unwanted foreign broadcast via satellite.²⁹¹ The increased number of programs makes it exceedingly difficult for a State to control all satellite broadcasts that are transmitted into its territory. It is far easier for a State to acquiesce to these transmissions than to seek a prior agreement on each and every broadcast. Nevertheless, this difficulty in monitoring and acquiescence does not eliminate a State's right to object to a certain broadcast; and if the objection is not

²⁸⁹ Maxwell O. Chibundu, "The Parochial Foundation of Cosmopolitan Rights" in M.N.S. Sellers ed., *Parochialism, Cosmopolitanism, and the Foundations of International Law*, (Cambridge: Cambridge University Press 2011) 172 at 186-187.

²⁹⁰ "Facts and Figures," online: Eutelsat Communications <<http://www.eutelsat.com/home/index.html>>.

²⁹¹ Blinderman, *supra* note 199 at 116.

observed, a State can engage in measures to prevent the transmission from reaching its territory.

It is interesting to note that the States that voted against the resolution or abstained from voting control the majority of communications satellites. The States that voted for the resolution, with the exception of Russia, were not space-faring nations at the time of the adoption and did not enjoy the same access to communications satellites.²⁹² The States that voted for the resolution are the States who have been accused of satellite and radio jamming, i.e. Egypt, Iran, China, the former Soviet Union. Therefore, instead of codifying international law, the 1982 became a harbinger of future State practice. Those who voted for the resolution have found themselves at the mercy of those who engage in transnational satellite broadcasting. However, this resolution does not prohibit a State from jamming a satellite transmission and lends some degree of support to those States that jam unauthorized satellite broadcasts.

²⁹² Fisher, *supra* note 77 at 45.

Chapter 3: Human Rights

The first two chapters of this thesis were devoted to exploring international law with respect to satellite and radio jamming. These chapters have demonstrated that there are a number of legal justifications that support a State's decision to jam an unauthorized (unwanted) satellite broadcast within their territory. This chapter explores the opposite, namely the legal support for a State that sends an unauthorized transmission across a border without first obtaining the receiving State's consent or agreement and the prohibition of jamming such a transmission. As previously discussed the foundation for such a right rests in the principle of "freedom of broadcast" with respect to terrestrial broadcasting. With respect to satellite broadcasting the foundation for this right is often cited as Article 19 of the Universal Declaration of Human Rights (UDHR). This Article has been used to criminalize the jamming of satellite transmissions because doing so interferes with an individual's right "...to seek, receive and impart information and ideas through any media and regardless of frontiers."²⁹³ However, as will be demonstrated in this section of the thesis, it is unlikely that Article 19 of the UDHR represents a binding legal obligation upon States under either conventional or customary international law. Moreover Article 19 of the UDHR and other similar international legal instruments are often qualified by exceptions that can be interpreted to justify the jamming of foreign transnational broadcasts. Thus, this section will also demonstrate that although there is a consistency in terms of international obligations, it is the differing State applications of the exceptions that frustrate a finding that Article 19 of the UDHR represents a customary norm of international law.

²⁹³ UDHR, *supra* note 202 at art 19.

Article 19 of the UDHR as an International Obligation

In order to analyze the legal significance of Article 19 of the UDHR it is necessary to look at the sources of international law and obligations that bind States. The Statute of the International Court of Justice is generally regarded as a Statement of the sources of international law.²⁹⁴ Article 38.1 provides that when deciding disputes, the Court shall apply international conventions, international custom, general principles of law recognized by civilized nations, and finally judicial decisions and the teachings of the most highly qualified publicists of the various nations, as a subsidiary means for the determination of international law.²⁹⁵ In order to be a binding international obligation, Article 19 of the UDHR must satisfy the requirements set forth in Article 38.1.

The UDHR does not represent conventional international law and is not a legal instrument.²⁹⁶ Even when adopted it was not viewed as imposing legal obligations on States. Eleanor Roosevelt, Chairman of the UN Commission on Human Rights and U.S. Representative to the General Assembly, provided the following remarks shortly after the declaration was adopted:

In giving our approval to the declaration today, it is of primary importance that we keep clearly in mind the basic character of the document. It is not a treaty; it is not an international agreement. It is not and does not purport to be a Statement of law or of legal obligation. It is a declaration of basic principles of human rights and freedoms to be stamped with the approval of the General Assembly by formal vote of its members, and to serve as a common standard of achievement for all people of all nations.²⁹⁷

²⁹⁴ Ian Brownlie, *Principles of Public International Law*, 6th ed. (Oxford and New York: Oxford University Press, 2003) at 5.

²⁹⁵ *Statute of the International Court of Justice*, Article 38.1.

²⁹⁶ Brownlie, *supra* note 294 at 535.

²⁹⁷ Marjorie M. Whiteman, *Digest of International Law*, Vol 5 (Washington, D.C.: Dept. of State Publication # 7873, 1965) at 243.

John Foster Dulles, a member of the U.S. delegation also commented on the importance of continuing the work of the UDHR and embarking on a covenant that would transform the declaration into law. In comparing it to jurisprudence in the U.S., Dulles stated,

...It does not minimize the importance of our own Declaration of Independence to recognize that the Constitution and the Bill of Rights were required to establish a body of law necessary to achieve the practical results...²⁹⁸

Thus, if one were to go back in time and ask the U.S. officials, who were present during the drafting and adoption of the UDHR, if States were bound by international law to follow all Articles of the UDHR the answer would have been a resounding “no.” As Dulles contemplated, the UDHR was not a binding document. Instead, the binding documents were years away and would become known as the International Covenant on Civil and Political Rights (ICCPR)²⁹⁹ and the International Covenant on Economic, Social and Cultural Rights.³⁰⁰ Unlike the UDHR, the obligations contained in these covenants were intended to be binding upon State parties.³⁰¹

Despite the drafters’ intention to rely on future covenants and agreements, the significance of the UDHR should not be underestimated because some of UDHR’s provisions either constitute general principles of law or elementary considerations of

²⁹⁸ *Ibid.*

²⁹⁹ See generally *International Covenant on Civil and Political Right*, 19 December 1966, 999 U.N.T.S. 171 [ICCPR].

³⁰⁰ Hurst Hannum, “The Status of the Universal Declaration of Human Rights in National and International Law” (1995-1996) 25 GA J. Int’l. & Comp. L. 287 at 318.

³⁰¹ *ICCPR*, *supra* note 299 at art. 2.

humanity.³⁰² The UDHR also provides guidance, produced by the General Assembly, to the interpretation of UN Charter.³⁰³ In its first Article, the Charter lays out the purposes of the UN, one of which is promoting and encouraging respect for “human rights” and for fundamental freedoms for all;³⁰⁴ yet nowhere in the Charter are these rights defined. Under this interpretation, the UDHR has served to define the obligations assumed by the Parties to the Charter.³⁰⁵ Therefore, it has been argued that a failure by any member to respect the rights recognized in the UDHR is a violation of the Charter.³⁰⁶ On the other hand, such a finding is not consistent with the Statements made by its drafters during its adoption. Additionally, there is nothing to indicate that the Articles in the UDHR were intended to become rules of law, enforceable in a State court upon the ratification of the Charter.³⁰⁷

The conclusion that the UDHR is not a binding legal document, i.e. a binding covenant, is not dispositive in determining the obligatory nature of the document. In order to determine which rights or Articles of the UDHR are binding upon States, one must determine the extent to which the UDHR has transformed into customary law

³⁰² *Corfu Channels Case (United Kingdom v. Albania)* [1949] I.C.J. Rep. 4 at 22.

³⁰³ Brownlie, *supra* note 294 at 535.

³⁰⁴ *Charter of the United Nations*, art. (1)(3).

³⁰⁵ *The Situation in Namibia*, SC Res. 310, UN SCOR, 1972 (“Strongly condemns the recent repressive measures against the African Laborer in Namibia and calls upon the government of South Africa to end immediately these repressive measures and to abolish any labour system which may be *in conflict with the basic provisions of the Universal Declaration of Human Rights*” (emphasis added)).

³⁰⁶ A.L.I., Restatement of the Law 3rd Foreign Relations Law of the United States (St. Paul, MN: American Law Institute, 1989) “Obligation to Respect Human Rights” § 701, note 4 [Restatement 3rd].

³⁰⁷ *Sei Fujii v State*, [1952], 38 Cal.2d 718 at 722-725 (Sup. Ct. California, U.S.).

binding upon all States.³⁰⁸ The starting point for this discussion is to recognize that some parts of the UN Charter, the UDHR, international resolutions and declarations, and other practices of States have evolved into the customary international law of human rights.³⁰⁹

With respect to human rights, the creation of a customary norm is unique.³¹⁰ Normally the development of customary norms requires State practice or acts accompanied by evidence that the States recognize the practice as obligatory. The International Court of Justice has stated:

Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule or law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*.³¹¹

In the area of human rights more emphasis placed on resolutions and other international instruments because these instruments evidence obligations assumed by States.³¹² In the *Nicaragua case*, in order to find the *opinio juris* prohibiting the use of force and an act of aggression outside of the Charter, the Court considered, *inter alia*, the attitudes of the parties to the dispute and their ascension to a number of resolutions that prohibited aggression and the use of force.³¹³ Similarly, in the field of human rights the

³⁰⁸ *Statute of the International Court of Justice*, art. 38.

³⁰⁹ Restatement 3rd, *supra* note 306 at § 701.

³¹⁰ Hannum, *supra* note 300 at 319.

³¹¹ *The North Sea Continental Shelf Cases (Germany v. Denmark; Germany v. Netherlands)* [1969] I.C.J. Rep. 3 at 44.

³¹² *Nicaragua Case*, *supra* note 159 at 99-100; See also Restatement 3rd, *supra* note 306 at § 701, note 2.

Restatements place significant weight on the universal adherence to the UN Charter and virtually universal and frequently reiterated acceptance of the UDHR even if only in principle.³¹⁴ It also recognizes State participation in the preparation and adoption of national law and international agreements recognizing human rights principles generally, or a particular human right in determining the creation of customary law.³¹⁵ This evidences the obligation or the *opinio juris* that a State has assumed to act or refrain from acting in a particular manner.³¹⁶

With respect to the UDHR, there are numerous scholars who believe that the goals or principles advanced in the UDHR have, over time, transformed into binding legal obligations under customary law.³¹⁷ In 1965 Humphrey Waldock, a former Judge of the International Court of Justice, concluded that the UDHR had become, binding, customary international law.³¹⁸ Similarly, the non-governmental Assembly for Human Rights adopted the Montréal Statement, which concluded that the UDHR had become part of customary international law.³¹⁹ In 1968, the International Conference on Human

³¹³ *Ibid* (The agreements cited by the Court in order to establish an *opinio juris* to refrain from the use of force included the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations; the Sixth International Conference of American States condemning aggression; the Montevideo Convention on Rights and Duties of States; the declaration on principles governing the mutual relations of States participating in the Conference on Security and Co-operation in Europe (Helsinki, 1 August 1975).

³¹⁴ Restatement 3rd, *supra* note 306 at § 701, note 2.

³¹⁵ *Ibid*.

³¹⁶ Hannum, *supra* note 300 at 322.

³¹⁷ *Ibid* at 323-325.

³¹⁸ Richard B. Lillich, "The Growing Importance of Customary International Human Rights Law" (1995-1996) 25 Ga. J. Int'l. & Comp. L. 1.

³¹⁹ Assembly for Human Rights, *Montréal Statement of the Assembly for Human Rights* (New York: Assembly for Human Rights, 1968) at 2 ("The Universal Declaration of Human Rights

Rights adopted the Proclamation of Teheran stating that the UDHR constitutes an obligation for members of the international community.³²⁰ In addition to these instruments, there is a number of UN resolutions and declarations that speak of the duty of States to fully and faithfully observe the provisions of the Universal Declaration.³²¹

Despite these instruments and assertions, the binding character of the UDHR is a matter that continues to be debated.³²² One of the problems with concluding that the entire UDHR represents binding customary international law is the insufficient State practice of enforcing all the rights promulgated in the declaration.³²³ Nevertheless, the inclusion of a right in the UDHR serves as evidence that the specific right has obtained the status of a customary norm;³²⁴ and there are certain rights promulgated that have become customary in nature. For example, a State violates international law if, as a matter of State policy, it practices, encourages, or condones: genocide, slavery or slave trade, the murder or causing the disappearance of individuals, torture or other cruel,

constitutes an authoritative interpretation of the Charter on the highest order, and has over the years become part of customary international law.” Also, all participates in the assembly were present as individuals and not as representatives or governments or private organizations).

³²⁰ 1968 *Proclamation of Teheran* reprinted in Sandy Ghandhi, ed., *Blackstone’s International Human Rights Documents*, 7d ed. (Oxford: Oxford University Press, 2010) at 468 (Solemnly proclaims that It is imperative that the members of the international community fulfill their solemn obligations to promote and encourage respect for human rights...The Universal Declaration of Human Rights States a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all member of the human family and constitutes an obligation for the members of the international community (emphasis added).

³²¹ See generally *United Nations Declaration on the Elimination of All Forms of Racial Discrimination*, GA Res. 1904 (XVIII), UN GAOR, 18th Sess., Supp. No. 15 (1983) 35 (“Considering that the Universal Declaration of Human Rights proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set out in the Declaration, without distinction of any kind, in particular as to race, colour or national origin...”).

³²² Restatement 3rd, *supra* note 306 at § 701, note 6.

³²³ Hannum, *supra* note 300 at 340.

³²⁴ *Ibid* at 322.

inhuman, or degrading treatment or punishment, prolonged arbitrary detention, systematic racial discrimination, or a consistent pattern of gross violations of internationally recognized human rights.³²⁵

These rights have been described as “core rights”³²⁶ which are also reflected in the ICCPR as rights from which there can be no departure even in time of exigency.³²⁷ Absent from these core rights and the prohibition of any derogation is any reference to language similar in scope to that of Article 19 of the UDHR.³²⁸ The initial conclusion is that Article 19 of the UDHR does not constitute a core right from which there can be no derogation. This finding does not *ipso facto* mean that Article 19 has not achieved the status of a customary norm.

The required *opinio juris* can be found in numerous instruments of national and international law. Examples of this obligation include the United States Constitution and its First amendment guarantee that Congress shall make no law restricting freedom of speech or the press.³²⁹ Although indecent and obscene speech are not protected under this amendment,³³⁰ political speech can only be restricted in limited circumstances to meet a compelling State interest.³³¹ Similar to the U.S., the recognition of freedom of

³²⁵ Restatement 3rd, *supra* note 306 at § 702.

³²⁶ Christina M. Cerna, “Universality of Human Rights and Cultural Diversity: Implementation of Human Rights in Different Socio-Cultural Contexts” (1994) 16 Hum. Rts. Q. 740 at 744.

³²⁷ ICCPR, *supra* note 299 at art. 4.

³²⁸ UDHR, *supra* note 202 at art. 19.

³²⁹ U.S. Const. amend. I.

³³⁰ See generally *Miller v California*, 413 U.S. 15 (1973) (Material that is classified as obscenity receives not Constitutional protection).

³³¹ See generally *Buckley v Valeo*, 424 U.S. 1 (1976) (Political speech is a highly guarded form

expression under Islamic law as a birthright of every person is confirmed by the Qur'an; and these freedoms have been an acknowledged right from the inception of Islamic law.³³² Also similar to the interpretation of the U.S. Constitution, Islamic law limits this freedom of speech and expression in that it does not accommodate obscenity or "the spread of evil."³³³ One of the specific restraints on freedom of expression that differ significantly from the U.S. Constitution is the prohibition of blasphemy. Blasphemy has been defined broadly as 'All utterances expressive of contempt for Allah [God] himself, His names, attributes, laws, commands or prohibitions [and] All scoffing at Muhammad or any other prophets or apostles of Allah [God].'³³⁴

Other, early examples of national law that allow for freedom of speech include England's Bill of Rights which in 1689 granted 'freedom of speech in Parliament.'³³⁵ In France, the Declaration of the Rights of Man, a fundamental document of the French Revolution, provides for freedom of speech. Article 11 of the Declaration provides "The free communication of ideas and opinions is one of the most precious of the rights

of speech because of its expressive nature and importance to a functional republic. Restrictions on this type of speech must weather strict scrutiny analysis, meaning that the restriction must satisfy a compelling government interest and be narrowly tailored).

³³² Mashood A. Baderin, *International Human Rights and Islamic Law* (Oxford: Oxford University Press, 2003) at 127-128 (Qur'an 55:1-4 provides "[God] The most Gracious!;[He] Taught the Qur'an;[He] Created Man [and] *Taught him eloquent speech [expression]*" (emphasis added)).

³³³ *Ibid* at 127 (Sharī'ah limitation on freedom of expression are classified as moral and legal. Moral restraints include defamation, lying, derision, exposing the weaknesses of others, and acrimonious disputation. Legal restraints include *inter alia* evil or hurtful speech, seditious speech and blasphemy).

³³⁴ *Ibid* at 128.

³³⁵ *English Bill of Rights* (1689) online: Yale Law School, Lillian Goldman Law Library <http://avalon.law.yale.edu/17th_century/england.asp>.

of man. Every citizen may, accordingly, speak, write, and print with freedom, but shall be responsible for such abuses of this freedom as shall be defined by law.”³³⁶.

In addition to the above, there are a number of international conventions that constitute the main corpus of human rights that also support a finding of *opinio juris* with respect to Article 19 UDHR. Many of these instruments include references to an international right to communicate or other right similar to Article 19 of the UDHR. However, similar to Article 19, these instruments also qualify these rights in the same manner that Article 29 UDHR qualifies Article 19. Article 29 of the UDHR provides:

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.³³⁷

The limitation of “morality, public order, and the general welfare in a democratic society” appears to be a prerequisite for a State to assume the obligation of providing any form of freedom of expression.

Included among these conventions are, the African Charter on Human and Peoples’ Rights of 1981, the European Convention on Human Rights of 1950, the American Convention on Human Rights of 1969, and the ICCPR.³³⁸ Article 9 of the African Charter on Human and Peoples’ Rights provides, every individual shall have the right to receive information and the right to express and disseminate his opinion within the law.³³⁹

³³⁶ *Declaration of the Rights of Man*, Article 11 (1789) online: Yale Law School, Lillian Goldman Law Library < http://avalon.law.yale.edu/18th_century/rightsof.asp>.

³³⁷ *UDHR*, *supra* note 202 at art. 29(2).

³³⁸ Brownlie, *supra* note 294 at 36.

Article 10 of the European Convention on Human Rights provides in part, “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.” However, similar to the Article 29 of the UDHR this obligation is qualified by the following:

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.³⁴⁰

Article 13 of the American Convention on Human Rights provides similar rights but also limits the right with respect to the reputations of others and “...the protection of national security, public order, or public health or morals.”³⁴¹

As stated above, the ICCPR is the covenant that was designed to give effect to the rights defined in the UDHR. Similar to Article 19 of the UDHR, Article 19 of the ICCPR describes an obligation assumed by State parties and is nearly identical to the language in the UDHR. Section two of the Article provides, “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and

³³⁹ *African Charter on Human and Peoples' Rights* (1981) Article 9, reprinted in Ghandhi, *supra* note 322 at 409-419.

³⁴⁰ Formally the *European Convention for the Protection on Human Rights and Fundamental Freedoms* (1950) Article 10, reprinted in Ghandhi, *supra* note 322 at 268-277.

³⁴¹ *American Convention on Human Rights* (*Pact of San José, Costa Rica*)(1969), Article 13, reprinted in Ghandhi, *supra* note 322 at 375-390 (Section 3 further provides: “The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by means tending to impede the communication and circulation of ideas and opinions.”).

impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”³⁴² There are currently 167 State parties the ICCPR who have assumed an obligation similar to that expressed in Article 19 of the UDHR.³⁴³ That these States have voluntarily adhered to this requirement and the other international instruments is further evidence of the *opinio juris* required to generate a customary norm of international law. Therefore, in light of these numerous national and international instrument of law, a strong argument can be made that the majority of States have undertaken an obligation to provide an international right to communicate.

The other required element for the formation of a customary norm is State practice, or in other words, implementation-enforcement of the obligations assumed. With respect to the ICCPR, enforcement of all Articles is the responsibility of the State party. The ICCPR specifically provides that “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant....”³⁴⁴ Therefore, in order to determine the status of Article 19 as a customary norm of international law, the status of its internal enforcement must demonstrate a State practice that satisfies the obligations assumed by the State.

One of the barometers of State practice or enforcement of Article 19 of the ICCPR and therefore Article 19 of the UDHR is the 1966 (First) Optional Protocol to

³⁴² *ICCPR*, *supra* note 299 at art. 19.

³⁴³ United Nations Treaty Collection, *Status of the International Covenant on Civil and Political Rights*, online: United Nations Treaty Collection
<http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en>.

³⁴⁴ *ICCPR*, *supra* note 299 at art. 2.

the International Covenant (herein referred to as the Protocol).³⁴⁵ The Protocol currently has 114 State parties;³⁴⁶ and allows individuals who are denied rights under the ICCPR to communicate with the Human Rights Committee (hereinafter referred to as the Committee).³⁴⁷ Pursuant to Article 5 of the Protocol the Committee will share its views with the individual and the State as to whether a violation has occurred; and a notation will be made of the State's annual report.³⁴⁸

In responding to allegations of violations, the Committee has also provided guidance on the interpretation of and application of exceptions to Article 19.³⁴⁹ For example, in terms of restriction on Article 19 the Committee has asserted:

³⁴⁵ *Optional Protocol to the International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171 [*ICCPR Protocol*].

³⁴⁶ United Nations Treaty Collection, *Status of the Optional Protocol to the International Covenant on Civil and Political Rights*, online: United Nations Treaty Collection <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en>.

³⁴⁷ *ICCPR Protocol*, *supra* note 345 at 302 (Article 2 s provides “Subject to the provisions of Article 1, individuals who claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the Committee for consideration.”).

³⁴⁸ *Ibid* (Article 5 provides:

1. The Committee shall consider communications received under the present Protocol in the light of all written information made available to it by the individual and by the State Party concerned.
2. The Committee shall not consider any communication from an individual unless it has ascertained that:
 - (a) The same matter is not being examined under another procedure of international investigation or settlement;
 - (b) The individual has exhausted all available domestic remedies. This shall not be the rule where the application of the remedies is unreasonably prolonged.
3. The Committee shall hold closed meetings when examining communications under the present Protocol.
4. The Committee shall forward its views to the State Party concerned and to the individual).

³⁴⁹ See generally Human Rights Committee, *General comment No. 34 Article 19: Freedoms of opinion and expression*, UN HRC, 102 Sess., UN Doc. CCPR/C/GC/34 (2011) [*Comment 34 Article 19*].

[T]he restrictions must be “provided by law”... and they must conform to the strict tests of necessity and proportionality. Restrictions are not allowed on grounds not specified in paragraph 3 [respect of rights and reputations of others; national security, public order, or public health or morals], even if such grounds would justify restrictions to other rights protected in the Covenant. Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.³⁵⁰

Despite the Protocol’s encouragement to States to respect the obligations assumed under Article 19, there are still numerous complaints alleging a violations of the rights similar to those granted in Article 19.³⁵¹ A recent report from the UN Human Rights Council provides country-by-country summaries of 304 general and individual allegations of violations of the rights to freedom of opinion and expression. The complaints involved 84 States in a period of less than two years.³⁵² Although a complete survey of the report and of the global status of the right to freedom of opinion and expression is beyond the scope of this thesis, it should be noted that the report contains a number of serious allegations including the assassination of journalists and the jailing of individuals involved in the promotion of human rights. In many instances the justification for such an action was “national security.”³⁵³ A review of the report reveals significant deficiencies in State practice with respect to the obligations assumed under Article 19 of the ICCPR and other similar international agreements in the name of national security.

³⁵⁰ *Ibid* at 6.

³⁵¹ See generally Human Right Council, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, UN HRC, 14th Sess. UN Doc. A/HRC/14/23/Add.1 (2010) [*Freedom of Opinion and Expression Report*].

³⁵² *Ibid* at 6.

³⁵³ *Ibid* at 9, 16 (The report includes numerous allegation from Bahrain where individuals were detained for participation in a human rights conference).

The assertion of “national security” has long impacted the execution of Article 19 of the ICCPR. For example the Soviet Union signed the ICCPR in March 1968 and ratified it in October 1973.³⁵⁴ However, during this timeframe and up until the end of the cold war the Soviet Union actively jammed the U.S. foreign radio broadcasting. This jamming was not done in contravention of the covenant but was rather facilitated by claiming an exception to the convention, i.e. national security.³⁵⁵

In addition to the UN reports regarding freedom of information there are also non-governmental organizations that can serve to measure State practice in adhering to their obligations. Freedom House is an international human rights organization that monitors human rights enforcement and among other activities, seeks to facilitate the free flow of information and ideas.³⁵⁶ In its 2012 report on media freedom the organization lists those States it considers to have a “Free Press,” a “Partially Free Press,” and a Press that is “Not Free.” The results of the report indicate that out of 197 States, only 66 States were deemed to have a free press, 72 States had a partially free, and 59 States were deemed not free.³⁵⁷ In the wake of the Arab Spring the organization noted that authoritarian regimes around the world, fearing domestic unrest, censored news of the Arab uprisings. They employed techniques ranging from information

³⁵⁴ United Nations Treaty Collection, *Status of the International Covenant on Civil and Political Rights*, online: United Nations Treaty Collection <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en>.

³⁵⁵ Rochelle B. Price, “Jamming and the Law of International Communications” (1984) 5 Mich. YBI Legal Stud. 392.

³⁵⁶ “About us” online: Freedom House <<http://www.freedomhouse.org>>.

³⁵⁷ Freedom House, “Freedom of the Press 2012” (2012) 20, online: Freedom House <<http://www.freedomhouse.org/report/freedom-press/freedom-press-2012>> [2012 Freedom House Report].

blackouts in the State media, as in Zimbabwe and Ethiopia, to high-tech Internet filtering, as in China.³⁵⁸ Additionally, the report asserts that State control of domestic media remains the norm in many societies and is used to restrict content critical of the respective governments.³⁵⁹

The findings of the Freedom House Report and the recent events in the Middle East support one of two findings. The first is that States do not consider themselves obligated to adhere to their human rights obligations that they have assumed in both regional and international covenants; or two, it is their interpretation of the exceptions that allow for such a result. In light of the fact that it is unlikely that a State will stand up and admit to violating its human rights obligations it is more likely a claim of an exception that allows for such varied application of a seeming straightforward principle. Notably, the exceptions are broad and easily satisfied. A State could easily assert that a simple protest represents a threat to national security or public order and therefore, limit the dissemination of the information surrounding the event. However, given the Human Rights Committee's guidance on how restrictions must be provided for "in law" and narrowly tailored³⁶⁰, it is unlikely that these asserted exceptions would satisfy the Human Rights Committee's review.

The Freedom House 2012 report and the report by the Human Rights Council suggest that there are significant deficiencies in State practice when it comes to enforcing and observing the numerous obligations assumed by States that are similar in scope to Article 19 of the UDHR. Therefore, while there appears to be significant

³⁵⁸ *Ibid* at 2.

³⁵⁹ *Ibid*.

³⁶⁰ *Comment 34 Article 19, supra* note 349 at 6.

evidence of *opinio juris* it does not appear that there is the requisite State-practice to transform Article 19 of the UDHR into a customary norm of international law. One author recognized the degree of exceptions to Article 19 of the UDHR and concluded:

...[I]t is difficult to conclude that this provision is now part of customary international law, unless one accepts that the restrictions to freedom of expression which States believe are permissible can be so broad as to swallow the right itself.”³⁶¹

It is the manner in which States exercise the exceptions to these obligations that eliminates a finding that there is a consistent State practice assumed by States. However, that is not to say that all asserted exceptions to Article 19 are illegitimate.³⁶² It is instead the number of claimed exceptions that are veiled attempts to silence criticism of the ruling party that preclude a finding of the requisite State practice.

A finding that Article 19 has not achieved the status of a customary norm of international law eliminates a barrier that may have otherwise restricted States from jamming unauthorized satellite broadcasts into their territory. Indeed, such a finding provides further legal support for states that engage in satellite jamming. However, as will be discussed below, such a finding does not bar States from sending unauthorized transmissions under the principles of acquiescence, freedom of broadcasting, and peace broadcasting.

³⁶¹ Hannum, *supra* note 300 at 348.

³⁶² Baderin, *supra* note 332 at 129 (In demonstrating how Article 10 of the European Convention is consistent with Sharî'ah law, the author points to the doctrine of the margin of appreciation in order to accommodate blasphemy. In *Otto-Preminger-Institut v Austria* the European Court of Human rights allowed the seizure of a “blasphemous” film in order to ensure “religious peace”).

Enforcement of Article 19 as a Human Right

Foreign Broadcasting by the United States

The United States and some European States do not rely on a State's prior consent before sending a particular transmission via satellite. Instead, the U.S. foreign radio and satellite broadcasting is predicated on Article 19 of the UDHR. It is this policy, in part, that has helped lead to the normalization of certain unauthorized broadcasts and the characterization of jamming as an action that is contrary to international law. However, as will be demonstrated below, the scope and breadth of US foreign broadcasting cuts against a finding that Article 19 of the UDHR has developed into a customary norm.

In February 2012, Iran and Syria reportedly jammed a number of satellite transmissions to include *inter alia* the BBC and the Voice of America Persian.³⁶³ In response to these instances of jamming, Richard M. Lobo, the Director of the United States International Broadcasting Bureau, referenced Article 19 of the UDHR and stated that the intentional jamming of these satellite broadcasts, "...is a fundamental violation, not only of international regulations and norms, but of the right of people everywhere to receive and impart information."³⁶⁴ In making this Statement Mr. Lobo is clearly asserting that it is wrong for a State to interfere with Article 19 of the UHHR. The Statement is not surprising considering the U.S. foreign policy with respect to international broadcasting. The first paragraph of the United States International Broadcasting Act provides:

³⁶³ Broadcasting Board of Governors, Press Release, "New Pressure on Jammers of International Broadcasts" (20 February 2012) online: BBG < <http://www.bbg.gov/press-release/new-pressure-on-jammers-of-international-broadcasts/> >.

³⁶⁴ *Ibid.*

It is the policy of the United States to promote the right of freedom of opinion and expression, including the freedom "to seek, receive, and impart information and ideas through any media and regardless of frontiers," in accordance with Article 19 of the Universal Declaration of Human Rights.³⁶⁵

In order to "promote" Article 19 the U.S. has developed an extensive capacity to broadcast internationally. Starting in October 1999, U.S. foreign broadcasting has been carried out by the Broadcasting Board of Governors (BBG). The BBG is a federal agency charged with supervising all government-supported, non-military international broadcasting.³⁶⁶ Its mission is "...[T]o promote freedom and democracy and to enhance understanding through multi-media communication of accurate, objective, and balanced news, information, and other programming about America and the world to audiences overseas."³⁶⁷

In 2010, the BBG had an annual budget of \$758.9 million³⁶⁸ and broadcasted into 100 different States in more than 59 languages.³⁶⁹ The target audiences include

³⁶⁵ *United State International Broadcasting Act*, 22 U.S.C. § 6201 (1994) (Congressional findings and declaration of purpose continues:

(2) Open communication of information and ideas among the peoples of the world contributes to international peace and stability and the promotion of such communication is in the interests of the United States.

(3) It is in the interest of the United States to support broadcasting to other nations consistent with the requirements of this chapter.

(4) The continuation of existing United States international broadcasting, and the creation of a new broadcasting service to the people of the People's Republic of China and other countries of Asia which lack adequate sources of free information, would enhance the promotion of information and ideas, while advancing the goals of United States foreign policy).

³⁶⁶ *Ibid* at § 6203-6204.

³⁶⁷ "United States Broadcasting Board Of Governors Issues Statement Critical of Arab Broadcasting Charter" Broadcasting Board Of Governors (21 February 2008), online: Broadcasting Board Of Governors <<http://www.bbg.gov/press-release/united-states-broadcasting-board-of-governors-issues-statement-critical-of-arab-broadcasting-charter>>.

those who live in States where the Freedom House Map of Press Freedom considers the press either “not free” or “partially free” and covers vast areas of the globe.³⁷⁰ The criteria used to determine which State should receive broadcasting has also been expressed by the U.S. Congress with respect to Radio Free Europe and Radio Liberty:

It is the sense of Congress that Radio Free Europe and Radio Liberty should continue to broadcast to the peoples of Central Europe, Eurasia, and the Persian Gulf until such time as—

(1) [A] particular nation has clearly demonstrated the successful establishment and consolidation of democratic rule; and

(2) [I]ts domestic media which provide balanced, accurate, and comprehensive news and information, is firmly established and widely accessible to the national audience, thus making redundant broadcasts by Radio Free Europe or Radio Liberty.

At such time as a particular nation meets both of these conditions, RFE/RL should phase out broadcasting to that nation.³⁷¹

The BBG’s budget and resources suggest that there remain a number of States that have not achieved democratic rule or sufficient domestic media. Therefore, in order to accomplish its missions, the BBG employs a number of different media platforms such as radio, satellite television, and the Internet. The BBG’s broadcasting stations include the Voice of America, Radio Free Europe/Radio Liberty, the Middle East Broadcasting Networks (Alhurra TV and Radio Sawa), Radio Free Asia, and the Office of Cuba Broadcasting (Radio and TV Marti).³⁷²

³⁶⁸ U.S., Broadcasting Board of Governors, *U.S. International Broadcasting 2010 Annual Report*, (Washington D.C.: BBG, 2011) at 43 [BBG 2010 Annual Report].

³⁶⁹ *Ibid* at 6.

³⁷⁰ See generally *Ibid* (The annual report lists the maps of where the press is considered “not free” or “partially free.” These are the target audiences. If the press is designated as “free” the State is no longer a target audience).

³⁷¹ *United State International Broadcasting Act*, 22 U.S.C. § 6211 (1994)

The BBG has proclaimed that it is a leader in combating Internet censorship, jamming, and signal interference.³⁷³ In combating signal jamming and other forms of harmful interference the BBG works with State broadcasters from the United Kingdom, Germany, France, and the Netherlands.³⁷⁴ Through this policy of combating censorship and satellite jamming, the U.S. and Europe have changed the discourse regarding satellite and radio jamming.³⁷⁵ Recently, the Directors General of the five largest Western international broadcasters called on regulators to take action against who engage satellite interference.³⁷⁶ The BBG has also passed a resolution prohibiting “illegal jamming.”³⁷⁷ What would normally be considered a valid countermeasure to an unauthorized broadcast is increasingly being reported as contrary to international law and a violation of a right to information. At the same time, the unauthorized broadcast is no longer seen as a breach of a State’s sovereignty but rather the valid enforcement of a human right as per the declarations of the BBG and its affiliate stations. This finding is further supported by

³⁷² BBG 2010 Annual Report, *supra* note 368 at 2.

³⁷³ *Ibid* at 5.

³⁷⁴ U.S., Broadcasting Board of Governors, *U.S. International Broadcasting 2011 Annual Report*, (Washington D.C.: BBG, 2011) at 13 [*BBG 2011 Annual Report*].

³⁷⁵ Price, *Media and Sovereignty*, *infra* note 379, at 202 (“The United States and the West have generally claimed that their right to broadcast putatively objective radio programs abroad meant that an interference with these transmission was a breach of international law in terms of both specific radio conventions and the right to communicate”).

³⁷⁶ “VOA, BBC, Deutsche Welle, Others Call For Action Over Satellite Jamming” *Broadcasting Board of Governors* (8 December 2011), online: BBG < <http://www.bbgstrategy.com/2011/12/voa-bbc-deutsche-welle-others-call-for-action-over-satellite-jamming/>>.

³⁷⁷ “BBG Condemns Satellite Jamming: Adds Damascus, Syria To List of Sources” *Broadcasting Board of Governors* (13 January 2012), online BBG < <http://www.bbgstrategy.com/2012/01/bbg-condemns-satellite-jamming-adds-damascus-syria-to-list-of-sources/>> (... THEREFORE, be it resolved that the Broadcasting Board of Governors condemns purposeful interference of satellite communications, and calls upon assembled delegates at the World Radiocommunication Conference, as well as those in the satellite industry – including satellite operators and brokers – to repudiate *this illegal behavior* (emphasis added)).

recent actions taken by the ITU at the 2012 World Radiocommunication Conference where member States joined together to try to solve the problem of intentional harmful interference with radio transmissions.³⁷⁸ On the contrary, the members of the ITU at the Radio Conference did not gather to discuss the repeated violations of State sovereignty and the principle of non-intervention. Instead, the campaign against jamming, undertaken by the BBG and its Western affiliates, has successfully characterized jamming as a violation of international law.

Finally, although it is the policy of U.S. foreign broadcasting to promote Article 19 of the UDHR, the vast efforts of the BBG may undercut a finding that it has become part of customary law. The BBG only targets those States that have a rating of “not free” or only “partially free,” as determined by the Freedom House. The fact that there are 100 that fit into this category suggests a deficiency in terms of State practice to enforce the any obligation similar to that of Article 19 of the UDHR. This deficiency in State practice thus undercuts a finding that Article 19 has achieved customary status.

³⁷⁸ See generally *WRC Report 2012*, *supra* note 55.

Legal Support for U.S. Foreign Broadcasting

As described above, it is unlikely that Article 19 has achieved the status of a customary norm of international law. However, even if Article 19 did create such an obligation upon States, some commentators have pointed out that there is nothing in the text of the Article or in the UDHR that would provide any State the affirmative right to make information and ideas available to whomever it chooses on the basis that it believes the target State is depriving its citizens of that right.³⁷⁹ Moreover, as discussed above, enforcement of the identical obligation in the ICCPR is the responsibility of the State party to the convention.³⁸⁰ Nevertheless Article 19 of the UDHR has been incorporated into U.S. foreign policy and is routinely “promoted.”³⁸¹ As such, this section of the chapter will explore the obstacles and justifications that support the foreign broadcasting by the U.S. and in particular the continued broadcasting into States that seek to jam the transnational broadcast.

There are a number of legal theories that either prohibit or discourage the incorporation of human rights into foreign policy, as is the case with the U.S. and its broadcasting act. The realist theory discourages such incorporation because foreign policy ought to be about the national interest defined in terms of power; and human rights cannot be consistently applied in foreign policy because they will at time come into conflict with other concerns more important for the State.³⁸² The criticism of this theory is that “interests are not reducible to power” and a State could legitimately be

³⁷⁹ Monroe E. Price, *Media and Sovereignty: the global information revolution and its challenge to State power*, (Cambridge, MA MIT Press, 2002) at 203.

³⁸⁰ *ICCPR*, *supra* note 344, art 2.

³⁸¹ *United State International Broadcasting Act*, 22 U.S.C. § 6201 (1994)

³⁸² Jack Donnelly, *Universal Human Rights, In Theory and Practice*, 2nd ed. (Ithaca and London: Cornell University Press 2003) at 156.

concerned with human rights.³⁸³ In other words, it could easily be what a State values or part of the State's national identity.³⁸⁴ "This is particularly clear in the case of the United States where combinations of moral, historical, political, and national interest concerns have led to a relatively strong and assertive international human rights policy."³⁸⁵ Among these human rights, freedom of speech and the right to communicate, in particular, are held in high regard in the U.S. This fact is demonstrated by the strict domestic adherence to the First Amendment of the United States Constitution. For example, speech that is considered "political" in the U.S. is something that can only be curtailed to satisfy a compelling governmental need.³⁸⁶ The International Broadcasting Act further provides that "Open communication of information and ideas among the peoples of the world contributes to international peace and stability and the promotion of such communication is in the interests of the United States."³⁸⁷ Thus, this freedom is something that the U.S. values or takes an interest in and it is not inconsistent with the realist theory to tie Article 19 of the UDHR to foreign policy.

The second obstacle to including human rights in foreign policy is the relativist theory, which emphasizes self-determination and a commitment to international pluralism. This theory views the placement of human rights provisions in foreign policy

³⁸³ *Ibid* at 156.

³⁸⁴ *Ibid* at 157.

³⁸⁵ *Ibid* at 159.

³⁸⁶ *United States v Haggerty*, 496 U.S. 310, (1990) (The Supreme Court struck down a federal statute designed to allow the government to punish persons who burn United States flags. The Court held that the plain intent of the statute was to punish persons for political expression and that burning the flag inextricably carries with it a political message).

³⁸⁷ *United State International Broadcasting Act*, 22 U.S.C. § 6201(2) (1994).

as a form of moral imperialism. One of the main arguments in support of this approach is that there are no internationally accepted standards of morality to which a State could appeal if it wished to act in the name of moral principles.³⁸⁸ However, this argument ignores that there are authoritative international human rights norms.³⁸⁹ As described above, Article 19 of the UDHR is not the only pronouncement of that particular human right. Language bestowing similar rights is included in numerous international declarations and covenants.³⁹⁰ The methodology and criteria established by Freedom House could be used to determine the State of Article 19 in a particular country with respect to the press.³⁹¹ Moreover, there is significant guidance provided by the ICCPR's Human Rights Committee. The Committee routinely assesses alleged violations and State responses in an effort to define the contours of the ICCPR's Article 19.³⁹² These criteria could certainly be used to establish a baseline for human rights enforcement with respect to Article 19 of the UDHR. States should not be allowed to advance relativist argument in order to deny their population the right to receive information.

Finally, the statist theory prohibits tying human rights to foreign policy. This theory is structured around the principle of sovereignty and grants a State exclusive jurisdiction over its own territory and resources, including its population. It implies non-intervention in the internal affairs of other States.³⁹³ This approach implies that

³⁸⁸ Donnelly, *supra* note 382 at 158.

³⁸⁹ *Ibid* at 159.

³⁹⁰ Brownlie, *supra* note 294 at 36.

³⁹¹ "Methodology," online: Freedom House 2012 Report <<http://www.freedomhouse.org>>.

³⁹² *Comment 34 Article 19*, *supra* note 349.

³⁹³ Donnelly, *supra* note 382 at 157.

what a State does to its own nationals, even in the area of human rights, is not a concern of other States. The statist position is summarized as follows:

...international law is at its core a law of sovereignty, and virtually all States in every region regularly insist on the primacy of sovereignty, especially when their own sovereignty is at stake.³⁹⁴

Nevertheless, a State's ability to stave off the enforcement of human rights is not absolute; and the concept of sovereignty itself is "vulnerable to attack."³⁹⁵ Traditional notions of sovereignty have undergone a "transformation"³⁹⁶ in the last century. In the wake of two world wars, sovereign States gave up their sovereign right to go to war under the UN Charter. The concept of sovereignty was further chipped away at when States were forced to cooperate in such institutions as the UN, the World Bank, and the International Monetary fund and other specialized agencies of the UN. Finally, the international human rights movement has significantly compromised State sovereignty; it is a movement that has its roots in the atrocities committed during World War II. Before the war, what one State did in its sovereign territory did not concern any other State. The atrocities of World War II forced States to take a concern in what other States were doing.³⁹⁷ The number of humanitarian and human rights treaties that have since been ratified represents this erosion.³⁹⁸ How a State treats its citizens is, to some extent, a matter of international concern.

³⁹⁴ *Ibid* at 158.

³⁹⁵ Louis Henkin, "That 'S' Word: Sovereignty, And Globalization, and Human Rights, Et Cetera" (1999) 68:1 Fordham L. Rev. 1 at 2.

³⁹⁶ *Ibid* at 3.

³⁹⁷ *Ibid*.

³⁹⁸ Some of the examples include the 1948 Convention on the Prevention and Punishment of the Crime of Genocide; The 1989 UN Convention on the Rights of the Child; The 1984 Convention

Given the erosion of sovereignty in the last century one might assume that its importance is diminished and that it will allow for the enforcement of human rights. Such an assumption would be wrong because it is the “sovereign” State or group of States that is charged with the enforcement of human rights. Sovereignty must therefore be intact in order to enforce human rights. In other words, the legal reality of sovereignty continues to limit the enforcement of human rights.³⁹⁹ As discussed in Chapter II, the UN Charter significantly limits unilateral action taken outside of the UN. Moreover, what is lacking from the Charter is a precise method for remedying violations of human rights.⁴⁰⁰ Outside of the Optional Protocol to the ICCPR, one of the only avenues of recourse lies with the Commission on Human Rights set up by the Economic and Social Council in 1946. The Commission has received complaints for human rights violations and can invite States to reply, after being given an indication of the nature of the complaint. The Commission can also institute investigations into such complaints, but aside from publicity and these fact-finding missions, the Commission lacks the power to take any definitive action. Similarly, the General Assembly equally lacks power to specifically enforce a human rights violations; it is limited to applying sanctions and passing resolutions condemning perceived violations of human rights.⁴⁰¹

Despite the concept of sovereignty and the Charter’s limitations, some commentators have asserted that starting with the end of the Vietnam War until the present, the U.S. and Western Europe have increasingly exercised their sovereignty and

against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; The 1966 International Convention on the Elimination of All Forms of Racial Discrimination.

³⁹⁹ Donnelly, *supra* note 382 at 160.

⁴⁰⁰ Brownlie, *supra* note 294 at 532.

⁴⁰¹ *Ibid* at 532.

influence to enforce human rights.⁴⁰² The start of this enforcement is marked by the actions of the Court of Appeals for the United States in the case of *Filartiga v Pena-Irala*.⁴⁰³ In this case, a U.S. Court ruled that alleged torture by a Paraguayan official of a Paraguayan citizen in Paraguay could be adjudicated in and remedied in a U.S. Court in the name of human rights.⁴⁰⁴ The case was not brought under any international treaty but rather the Alien Tort Statute, which provides: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the *law of nations* (Emphasis added) or a treaty of the United States.”⁴⁰⁵ Finding that the action was not brought under any treaty the Court applied the law of nations:

In light of the universal condemnation of torture in numerous international agreements, and the renunciation of torture as an instrument of official policy by virtually all of the nations of the world (in principle if not in practice), we find that an act of torture committed by a State official against one held in detention violates established norms of the international law of human rights, and hence the law of nations.⁴⁰⁶

After this case was decided, Western powers started to assert their “right” under the doctrine of “universal jurisdiction” to make “third-world dictators” account for human rights violations that had occurred in their own countries.⁴⁰⁷ The UDHR and human rights in general were “presented as a set of categorical universalist rules that were to be enforced through coercive measures.”⁴⁰⁸

⁴⁰² Chibundu, *supra* note 289 at 173.

⁴⁰³ *Ibid.*

⁴⁰⁴ *Filartiga v Pena-Irala*, 630 F.2d 876 (2nd Cir. 1980).

⁴⁰⁵ *Alien Tort Statute*, 28 U.S.C. § 1350 (1948).

⁴⁰⁶ *Filartiga*, *supra* note 404, at 880.

⁴⁰⁷ Chibundu, *supra* note 289 at 173.

There are a number of factors that facilitated this enforcement of universal human rights. The collapse of the Soviet Union served to remove a source of power that had served to check the influence and action by the United States and Europe.⁴⁰⁹ This is especially true in the area of jamming radio signals. When the Soviet Union engaged in radio jamming, they were able to establish another side to the radio jamming argument in that it could be done as a valid countermeasure and was not per se illegal. The Soviet Union legitimized the practice of radio jamming for States that desired to engage in this practice.⁴¹⁰ When a super power violates a human right the violation becomes a matter of debate.⁴¹¹ Similarly, when the Soviets jammed radio signal, it was a matter of international debate. Therefore, the collapse of the Soviet Union removed radio jamming from a matter of international debate and made it vulnerable to the characterization of a violation of international law.

The enforcement of human rights was driven by the need to do something in response to human rights violations.⁴¹² As with the *Filartiga* decision, if the Court did not find that the law of nations applied the plaintiff would have been left without a remedy for the crime of torture.⁴¹³ This need to “do something” was also underscored

⁴⁰⁸ *Ibid.*

⁴⁰⁹ *Ibid* at 174.

⁴¹⁰ Price, *Media and Sovereignty*, *supra* note 381 at 202-203 (Soviet, Cubans, and many developing countries believed that State sovereignty precluded unauthorized broadcasting, particularly from the United States, and jamming was a countermeasure that could be employed).

⁴¹¹ See generally Mark Mazzetti & Scott Shane “Interrogation Debate Sharply Divided Bush White House” *The New York Times* (3 May 2009) online: New York Times <http://www.nytimes.com/2009/05/04/us/politics/04detain.html?_r=1&ref=ciainterrogations>.

⁴¹² Chibundu, *supra* note 289 at 192-193

⁴¹³ *Filartiga v Pena-Irala*, 577 F.Supp. 860 (E.D.NY. 1984) (The District Court dismissed the

by the international community's failure to act during the 1994 Rwandan genocide. The conditions under which the genocide occurred have provided increased support for certain types of information intervention and "peace broadcasting."⁴¹⁴

In Rwanda in 1994 the Hutu station Radio Télévision Libre des Milles Collines (RTLM) played an active role in carrying out mass killings as the broadcasts explicitly called for the killing of Rwandan Tutsis. These broadcasts played an integral role in the deaths of some 800,000 Tutsi in a period of 100 days.⁴¹⁵ The U.S. government was aware of the broadcasts but did not interfere or jam the broadcasts for three primary reasons. First, it would have been logistically difficult; second, the intervention was close in time to an incident in Somalia where eighteen service members were killed; and finally, it was the position of the U.S. that international law prohibited action.⁴¹⁶

The Genocide Convention was the applicable international law. Article I provides that contracting States assume the obligation of preventing and punishing the crime of genocide.⁴¹⁷ Article III defines the crimes that can be punished under the convention and includes "direct and public incitement to commit genocide."⁴¹⁸ In the event of incitement via radio transmission, parties to the convention would be obligated

claim for lack of subject matter jurisdiction).

⁴¹⁴ Blinderman, *supra* note 199 at 115.

⁴¹⁵ Carol Pauli, "Killing the Microphone: When Broadcast Freedom Should Yield to Genocide Prevention," (2010) 61 Ala. L. Rev. 665, 666-667; Samantha Powers, *A Problem from Hell, America and the Age of Genocide*, (New York: Harper Collins, 2003) 370-373.

⁴¹⁶ See generally Jamie F. Metzl, "Rwandan Genocide and the International Law of Radio Jamming" (1997) 91 Am. J. Int'l L. 635

⁴¹⁷ Formally *The Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 U.N.T.S. 278, art. 1 (Article 1 provides "The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.") [*Genocide Convention*].

⁴¹⁸ *Ibid* at art 3.

to prevent or jam the broadcasting. However, during the drafting of the Genocide Convention the U.S. opposed “incitement” to genocide because it was subsumed in the other Article and including such a provision would create a pretext for State sponsored censorship. As a result of this position, radio jamming remained contrary to U.S. foreign policy.⁴¹⁹ The jamming of transnational radio signals remained a contested issue between the U.S. and the Soviet Union up until the end of the Cold War when the Soviet Union ceased jamming operations.⁴²⁰ Despite this capitulation, the U.S. maintained strict adherence to freedom of speech and expression remained intact from the Cold War; thus, there remained a near prohibition on any sort of radio jamming during peace. It is this strict prohibition on any radio jamming that played a role in the United States’ failure to act during the Rwandan Genocide.⁴²¹ This failure resulted in an apology from former President Clinton to the Rwandan people in 2004; and to the sentiment that something more should have been done.⁴²²

It is against this backdrop that “peace broadcasting” has been advanced. Such broadcasting does not require action from the UN and has been described as “...any non-incendiary transmission broadcast from an intervening State directly into a target

⁴¹⁹ Metzl, *supra* note 418 at 639 (During the Cold War “Jamming in virtually all circumstances came to be opposed so as to deny the Soviet Union any legal justification for such activities.” In May 1950 the U.S. promoted UNESCO’s Sub-Commission on Freedom of Information and the Press “...to condemn the Soviet Union for “deliberately interfering with the reception by the people of the USSR of certain radio signals originating beyond the territory of the USSR.” The Sub-Commission declared that this type of interference constituted “a violation of the accepted principles of freedom of information,” and condemned “all measures of this nature.”).

⁴²⁰ *Ibid* at 636.

⁴²¹ *Ibid*.

⁴²² Rory Carroll “US chose to ignore Rwandan genocide” (31 March 2004) *The Guardian* online: The Guardian < <http://www.guardian.co.uk/world/2004/mar/31/usa.rwanda>>; see also Price, *Media and Sovereignty*, *supra* note 381 at 213-214.

State as part of the intervening State's attempt to prevent or stop a human rights crisis.”⁴²³ The legal support advanced for such broadcasting has been described as the “customary status” of Article 19 of the UDHR and the exceedingly common transnational broadcasts that are conducted without the consent of the receiving State.⁴²⁴ In further support of this peace broadcasting is the Statement by the Institute of International Law which provides:

Without prejudice to the [UN Charter][...] States, acting individually or collectively, are entitled to take diplomatic, economic, and other measures toward any other State which has violated the obligation [to ensure the observance of human rights], provided such measures are permitted under international law and do not involve the use of armed force in violation of the Charter.⁴²⁵

This Statement is indicative of the recent efforts to enforce human rights and the erosion of State sovereignty that is making such enforcement possible. It is the Rwandan Genocide, similar crises, and the desire to avoid them in the future that has fostered this concept of peace broadcasting. However, this theory of peace broadcasting is not absolute and does not obviate a receiving State's sovereign right to jam an unauthorized broadcast.⁴²⁶

Foreign broadcasting by the U.S. can be justified to some extent by peace broadcasting. The limitation to this justification is that not all U.S. foreign broadcasting is done to avert a humanitarian crisis. Indeed, the only criterion to receive U.S. foreign

⁴²³ Jamie F. Metzl, “Information Intervention: When Switching Channels Isn’t Enough” (1997) 76 Foreign Affairs 15.

⁴²⁴ Blinderman, *supra* note 199 at 116.

⁴²⁵ UN Doc. E/CN.4/1990/NGO/55 reprinted in Eric Blinderman, “International Law and Information Intervention” in Monroe E Price & Mark Thompson, ed. *Forging Peace Intervention, Human Rights and the Management of Media Space* (Edinburgh: Edinburgh University Press 2001) 104 at 116.

⁴²⁶ Blinderman, *supra* note 199 at 116.

broadcasting is a negative rating by Freedom House and not necessarily a human rights crisis.⁴²⁷

Ironically, it may not be the advancement of human rights that provides the most significant legal support for U.S. foreign broadcast, notwithstanding its claim to the contrary. Instead, the legal support for such broadcasting seems to be either acquiescence to the broadcast, or as discussed in chapter I, the concept of freedom of broadcast.⁴²⁸ Although this principle initially only applied terrestrial broadcasting, the ubiquity of, and access to communications satellites supports a finding that this principle should apply to satellite broadcasting. As discussed above, this concept allows a State to send information via satellite and allows the receiving State to jam the transmission over its territory.⁴²⁹

The distinct advantage of freedom of broadcast is that it does not come with the exceptions and limitations embedded in the human rights conventions and declarations. For example, if a State were truly in a State of “national emergency,” that State would be authorized to jam or block unauthorized signals as per the exceptions to most of the conventions and international declarations regarding the free flow of information.⁴³⁰ However, under the international conventions discussed above, this finding suggests that the sending State would similarly be obliged to respect the national emergency

⁴²⁷ BBG 2010 Annual Report, *supra* note X (The annual report lists the maps of where the press is considered “not free” or “partially free.” These are the target audiences. If the press is designated as “free” the State is no longer a target audience).

⁴²⁸ Fisher, *supra* note 77 at 160.

⁴²⁹ *Ibid*; See Also Matte, *Principles Governing DBS*, *supra* note 120 at 40.

⁴³⁰ As noted above, most of the declarations and conventions have some qualifying language, which will allow a State to restrict the free flow of information. If the exception is legitimately invoked and satisfies the respective conventional requirements it is the author’s opinion that other States should recognize this exception.

exception and cease broadcasting if the sending State is justifying its activity under a similar convention or declaration. Under the freedom of broadcast principle these exceptions are arguably not applicable so long as freedom of broadcasting serves as the underlying justification for the transnational broadcast. There are fewer restrictions limiting the dissemination of non-propaganda to a receiving State because the receiving State retains the right to jam the broadcast over its national territory.

Notably, freedom of broadcast, peace broadcasting, and acquiescence allow the receiving State to jamming the incoming unauthorized signal so long as it is limited to the territory of the receiving State. Therefore, although a State may be able to send an unauthorized broadcast in accordance with these principles the receiving State's right to jam prevails over the "free flow of information."⁴³¹ These theories provide legal support for the broadcasting conducted by the U.S; on the other hand, the claim that a receiving State is *per se*⁴³² engaging in illegal conduct when it jams an unauthorized signal is not supported by international law.

Chapter 4: Application of Article 19 of the UDHR and ICCPR

The United States is not the only country that engages in foreign satellite broadcasting. The growth in the satellite communications industry has increased the number of satellite operators and opportunities for States or private entities (individuals)

⁴³¹ Matte, *Principles Governing DBS*, *supra* note 120 at 52.

⁴³² As discussed above, the jamming may be contrary to the State's assumed obligations under the one of the conventions. Moreover, this conduct may be considered propaganda if its purpose is "...to isolate the peoples from any contact with the outside world, by preventing the Press, radio and other media of communication from reporting international events, and thus hindering mutual understanding between peoples" See generally *Condemnation of Propaganda Against Peace*, GA Res. 381 (V), 5th Sess., UN Doc. 1/1 (1951) 14.

to carry out a transnational satellite broadcast. How States interact with satellite broadcasting is not always driven by a strict application of international law. Rather economic and foreign policy interests significantly influence the application of international law in the field of transnational broadcasting. This chapter will explore the People's Republic of China and demonstrate that China has the ability to use its economic position to influence international broadcasting. Its economic power and the lure of the Chinese market are tools that the government has at its disposal to influence any application of Article 19 of the UDHR or the ICCPR.

The second part of this chapter will explore the Islamic Republic of Iran and the application of Article 19 of the UDHR and the ICCPR in the context of its international relations with Western States. As discussed above, the rights in these instruments have exceptions; and Iran's relationship with the West may allow Iran to invoke them. The second portion of this chapter will therefore attempt to apply these instruments to Iran and demonstrate that if properly invoked, these instruments may prohibit unauthorized satellite broadcasts in contravention of the invoked exceptions. Therefore, this section will argue that the U.S. and other Western States should base the legal justifications for their broadcasts on the principle of freedom of broadcastings. Although this principle allows Iran to continue jamming over its territory, it also allows other Western States to continue broadcasting into Iran.

The People's Republic of China

China is a State that has engaged in radio and satellite jamming in the past⁴³³ but is not a peripheral member of the State system. Recently, China overtook Japan as the world's second largest economy with an economy worth approximately \$5.8 trillion. At

⁴³³ *BBG 2011 Annual Report*, *supra* note 374 at 6.

this rate of growth some analysts predict China will be the world's top economy in a decade.⁴³⁴ With such a large economy, China presents a lucrative market for investors of all types. As a result of this wealth and the desire to profit from the Chinese market, China has enjoyed significant success in staving off foreign satellite broadcasting into its territory. China has been able to accomplish this despite the fact that it has one of the largest television audiences in the world and the fact that the first pan-Asian direct broadcasting satellite service, Satellite Television Asia Region (STAR) was launched in 1991.⁴³⁵

Part of China's success in avoiding foreign satellite broadcasting is that many of the efforts to enter into the Chinese market have been frustrated and international broadcasters voluntarily submit to Chinese broadcasting rules by exercising self-censorship.⁴³⁶ This self-censorship in many instances eliminates the need for China to jam or otherwise interfere with a satellite signal. For example, Rupert Murdoch paid \$525m - for a majority stake in Star TV, a satellite broadcaster based in Hong Kong that provided access to the Mainland China market. In September 1993, a few months after buying the business he publicly stated that new telecommunications:

...[H]ave proved an unambiguous threat to totalitarian regimes everywhere ... satellite broadcasting makes it possible for information-hungry residents of many closed societies to bypass State-controlled television channels⁴³⁷

⁴³⁴ "China overtakes Japan as world's second-biggest economy" *BBC* (14 February 2011), online: BBC News <<http://www.bbc.co.uk/news/business-12427321>>.

⁴³⁵ Yan, *supra* note 33 at 266.

⁴³⁶ *Ibid* at 266.

⁴³⁷ "Murdoch and China" *The Guardian* (24 August 2003), online: The Guardian <<http://www.guardian.co.uk/media/2003/aug/24/chinathemedia.rupertmurdoch>>.

Shortly after this Statement China issued a decree banning satellite dishes from China. Within the following six months the BBC was dropped from Star's China signal.⁴³⁸ The removal of the BBC was not done at the request of the Chinese government but rather is evidence of self-censorship designed to facilitate Murdoch's entry into the Chinese telecommunications market. In short, the Chinese did not have to jam or block the satellite signal because Murdoch did it for them. In 1997 Murdoch made another speech in which he stated China is a distinctive market with distinctive social and moral values that Western companies must learn to abide by.⁴³⁹

The degree to which private companies are willing to censor themselves or conform to Chinese law represents a significant hurdle to the enforcement of Article 19 regardless the medium. With respect to the Internet, Cisco Systems, Juniper Networks, Nortel of Canada, and Alcatel of France reportedly were involved in upgrading China's Internet infrastructure, filtering, and surveillance systems earlier this decade. According to some reports, Cisco Systems sold several thousand routers to China, which helped to facilitate the Chinese government's censorship of Internet content and monitoring of Internet users.⁴⁴⁰ Microsoft has also been accused of cooperating with China's censorship policies in the development of its Bing search engine.⁴⁴¹ Google initially

⁴³⁸ *Ibid*

⁴³⁹ George Monbiot "The most potent weapon wielded by the empires of Murdoch and China" *The Guardian* (22 April 2008), online: The Guardian <<http://www.guardian.co.uk/commentisfree/2008/apr/22/chinathemedia.rupertmurdoch>>.

⁴⁴⁰ Jonathan Mirsky, Editorial, "China's Tyranny Has the Best Hi-Tech Help Censoring the Internet" *International Herald Tribune* (January 16, 2006), online: New York Times <<http://www.nytimes.com/2006/01/15/opinion/15iht-edmirsky.html>>.

⁴⁴¹ Christine Chiao, "Microsoft Erases Anti-Blog," *AsiaMedia* (January 17, 2006), online: UCLA Asia Institute <<http://www.international.ucla.edu/asia/news/Article.asp?parentid=37346>>.

cooperated with Chinese censorship requirements in 2006, a move that is believed to have given credibility to the current system of censorship, but recently took steps to reduce the State censorship that is imposed upon it by the Chinese government.⁴⁴²

In addition to self-censorship and corporate compliance, China has also enacted numerous national broadcasting rules to give effect to its prior consent requirement. China's prior consent requirement ensures that the government approves the content that is broadcasted via satellite within its borders.⁴⁴³ The control exercised by China has been described as a single satellite in the sky, and a single network on the ground.⁴⁴⁴ It is this insistence on compliance with its national laws that have led some authors to conclude that neither technology nor the market mechanism alone can guarantee media freedom and the free flow of information.⁴⁴⁵

Another factor that jeopardizes enforcement of Article 19 with respect to China is the degree to which China has become a space-faring nation. China now has the capacity to launch communications satellites. On 7 October 2011, Eutelsat announced the successful launch of its W3C satellite by a Long March 3B rocket from the Xichang Satellite Launch Centre in China.⁴⁴⁶ This launch by China has created a significant business relationship between China and Eutelsat. Notably, the absence of similar relationship between Eutelsat and any State in the Middle East allows Eutelsat the

⁴⁴² "Google's about turn in China" BBC News (13 January 2010), online: BBC <<http://news.bbc.co.uk/2/hi/technology/8456622.stm>>.

⁴⁴³ Yan, *supra* note 33 at 266.

⁴⁴⁴ *Ibid* at 268.

⁴⁴⁵ *Ibid*.

⁴⁴⁶ Peter B. de Selding "Chinese Rocket Launches Eutelsat's W3C Satellite" *Space News* (7 October 2011), online: Space News <<http://www.spacenews.com/launch/111007-china-launches-western-sat.html>>.

unfettered discretion of broadcasting without first obtaining the receiving State's consent; and the unfettered discretion of attempting to overcome efforts to jam its signals. However, the existence of such a relationship with China may result in Eutelsat engaging in forms of self-censorship so as to not damage this emerging business relationship.

The relationship between China and Eutelsat has already raised suspicions that Eutelsat has bowed to China's request to censor New Tang Dynasty Television. New Tang Dynasty Television (NTD) was founded by Chinese Americans and is broadcast from New York to parts of Mainland China via satellite. NTD's mission is to provide "...a truthful, uncensored Chinese-language alternative to China's State-run media."⁴⁴⁷ Its stated mission is to "bring truthful and uncensored information into and out of China; promote traditional Chinese culture; and facilitated mutual understanding between East and West."⁴⁴⁸ The television station began broadcasting in 2001 with the "...goal of reporting on what other Chinese TV networks would not."⁴⁴⁹

The content disseminated by NTD is not controlled or censored by the Chinese government and as a result, the government has attempted to restrict its broadcast in Mainland China. The Chinese Information Ministry has said that the broadcasting of NTD's programs "is not authorized in our country" and that "their content violates the laws of the People's Republic of China."⁴⁵⁰ Eutelsat had been carrying the signal into

⁴⁴⁷ "About us" online: NTD Television <http://english.ntdtv.com/ntdtv_en/aboutus.html>.

⁴⁴⁸ *Ibid.*

⁴⁴⁹ *Ibid.*

⁴⁵⁰ "Reporters Without Borders Condemns Eutelsat for Blocking NTDTV" *The Epoch Times* (15 May 2005), Online: The Epoch Times <<http://www.theepochtimes.com/news/5-3-15/27085.html>>

parts of Mainland China but in 2005 announced that it would not renew NTD's contract. In canceling the contract critics claimed that Eutelsat was bowing to pressure from China to remove offensive broadcasting.⁴⁵¹ Eutelsat successfully maintained that the decision to terminate the contract was made on financial grounds.⁴⁵²

Despite Eutelsat's successful claim, it eventually yielded international pressure and resumed broadcasts of NTD into Mainland China. These transmissions into China continued until on 16 June 2008 when they were again interrupted. Eutelsat claimed that it was a technical malfunction⁴⁵³ while critics maintained that the interruption, just a few weeks before the 2008 Olympic Games, was a "favor provided by Eutelsat with the aim of obtaining new deals."⁴⁵⁴ Reporters without Borders cites a recorded conversation on 23 June 2008 between an interlocutor the Eutelsat employee thought was a Chinese Propaganda Department official; the Eutelsat representative in Beijing said:

It was our company's CEO in France who decided to stop NTDTV's signal. (...) We could have turned off any of the transponders. (...) It was because we got repeated complaints and reminder from the Chinese government. (...) Two years ago, the State Administration of Radio, Film and Television kept saying the same thing over and over: 'Stop that TV station before we begin to talk.'⁴⁵⁵

⁴⁵¹ *Ibid.*

⁴⁵² "Court rejects Chinese TV station's case against Eutelsat" *Radio Netherlands Worldwide* (22 March 2005), online: Radio Netherlands Worldwide <<http://blogs.rnw.nl/medianetwork/court-rejects-chinese-tv-stations-case-against-eutelsat>>.

⁴⁵³ Eutelsat Communications, Press Release, "Eutelsat Reaffirms to European institutions the Irreversible and Purely Technical Nature of the Incident Resulting in the Interruption of Consumer Broadcasting Services Through it W5 Satellite" (15 January 2009), online: Eutelsat Communications <<http://www.eutelsat.com/news/compress/en/2009/html/PR0309/PR0309.html>>.

⁴⁵⁴ "European Satellite Operator Eutelsat Suppresses Independent Chinese Language TV Station NTDTV to Satisfy Beijing" *Reporters without Borders* (7 October 2008), online: Reporters Without Borders <<http://en.rsf.org/china-european-satellite-operator-10-07-2008,27818.html>>.

In response Eutelsat issued a press release where it insisted that the suspension of NTD was purely the result of a technical failure and that NTD had been provided with alternative operators to transmit its signal.⁴⁵⁶

Regardless of the veracity of NTD's claims in 2005 and 2008, these claims demonstrate how economic relationship between States and satellite operators could potentially affect the dissemination of information via satellite. The fact that China can offer launch services to satellite operator creates a significant financial relationship between China and its satellite operator customers. It is significantly less expensive to use a Chinese rocket versus comparable, European, Russian, or U.S. rocket. Depending on the size of the satellite, the cost of using a Chinese rocket can be 40% less than the \$100 million for the most expensive launches on European rockets.⁴⁵⁷ This represents a significant benefit to any satellite operator who wants to save on launch costs. However, this significant reduction in cost will likely come with either implicit or explicit requirements as to what can be broadcast via satellite into Mainland China. If a satellite operator broadcasts information that the Chinese government finds objectionable, China is free to refuse to launch any additional satellites for that operator. In this sense, broadcasting material objectionable to China could result in a 40% increase in the cost of the next launch.

⁴⁵⁵ *Ibid.*

⁴⁵⁶ Eutelsat Communications, Press Release, "Eutelsat Reaffirms to European institutions the Irreversible and Purely Technical Nature of the Incident Resulting in the Interruption of Consumer Broadcasting Services Through it W5 Satellite" (15 January 2009), online: Eutelsat Communications <<http://www.eutelsat.com/news/compress/en/2009/html/PR0309/PR0309.html>>.

⁴⁵⁷ Andy Pasztor "China to Launch Satellite for France's Eutelsat" *Wall Street Journal* (25 February 2009), online: WSJ <http://online.wsj.com/Article/SB123550142763361701.html>

The financial incentives to conform to China's censorship policies are so lucrative that China could avoid satellite jamming altogether. The interference with the satellite signal comes at a much earlier stage in which China is able to prevent the signal from being broadcast in the first place. In addition to the savings from using a Chinese rocket, Eutelsat or any other satellite operator who utilizes a Chinese launch vehicle will be in a better position to penetrate the Chinese market and reap the profits from serving the world's largest television viewing audience. These factors represent significant incentives to maintain a favorable working commercial relationship with China even at the expense of the free flow of information or the enforcement of Article 19 of the UDHR or ICCPR.

The Islamic Republic of Iran

The Iranian relationship with satellite communications started in 1991 when small satellite dishes started appearing in its capital. Around the same time the Interior Minister asserted that satellite television was a cultural invasion by the enemy and that satellite programs were “beamed in by Western countries to weaken people’s religious beliefs.”⁴⁵⁸ On 12 February 1995, a law was passed that prohibited the import, distribution, and use of satellite equipment. This law empowered the Minister of the Interior to use force to confiscate satellite equipment.⁴⁵⁹

Despite this prohibition, the government tolerates private satellite ownership to some extent. In December 2011, it was reported that some 45 to 60 per cent of Iranians regularly watched satellite television; a percentage that is thought to exceed that of Iranians who use the Internet.⁴⁶⁰ In light of this satellite use, when the reformist government came to power in 2000, it supported annulling the law; however, this effort coincided with unrest and protests instigated from abroad via satellite television and the law remained unchanged.⁴⁶¹ The tolerance for satellite ownership does not mean that the law has not been enforced. In August 2011, enforcement took the form of government agents, both police and special operations forces in plain clothes, raiding homes and climbing on tops of buildings and removing the small dishes used to receive the satellite signal.⁴⁶²

⁴⁵⁸ Fardin Alikhah, “The politics of satellite television in Iran” in Mehdi Semati ed., *Media Culture and Society in Iran Living with globalization and the Islamic State* (London & New York: Routledge 2008) 94 at 96 [Alikhah, “Satellite television in Iran”].

⁴⁵⁹ *Ibid* at 96.

⁴⁶⁰ Sonne, “Battle for Control of Satellite TV”, *supra* note 26.

⁴⁶¹ Alikhah, *supra* note 458 at 96.

In addition to confiscating satellite equipment, Iran routinely jams communications satellites. For example in 2000 a broadcasting signal from inside Iran disabled an entire Eutelsat satellite, Hot Bird 5, which was then broadcasting National Iranian Television (NITV), a satellite broadcast produced in Los Angeles, California.⁴⁶³ In 2003, Cuba informed the U.S. that the Iranian Embassy was jamming Telestar-12, a communications satellite that carries programs by the American government as well as by Iranian radio and television stations based in the U.S. to mainland Iran.⁴⁶⁴ In 2009 and 2010, Iran reportedly jammed Eutelsat's Hot Bird 8 satellite, one of Europe's largest and most powerful satellites. This jamming disrupted the Farsi services of the BBC, the Voice of America, and Deutsche Welle.⁴⁶⁵ In 2011, there were reports that Iran had jammed the BBC, the BBG, Audiovisuel extérieur de la France, France 24 TV, and Deutsche Welle.⁴⁶⁶ A typical period of jamming, starts early in the evening and continues into the early morning in specific areas in the city.⁴⁶⁷

⁴⁶² "Tehran Police Illegally Enter Homes and Destroy Satellite Dishes" *International Campaign for Human Rights in Iran* (23 August 2011), online: International Campaign for Human Rights in Iran <<http://www.iranhumanrights.org/2011/08/dish-police/>>.

⁴⁶³ See generally Lewis, *supra* note 94; See also Nazila Fathi "TV Stations Based in U.S. Rally Protesters in Iran" *New York Times* (22 June 2003), online: New York Times <<http://www.nytimes.com/2003/06/22/world/tv-stations-based-in-us-rally-protesters-in-iran.html>>.

⁴⁶⁴ Safa Haeri "Cuba blows whistle on Iranian jamming" *Asian Times Online* (22 August 2003), online: The Asia Times <http://www.atimes.com/atimes/Middle_East/EH22Ak03.html>.

⁴⁶⁵ Christophe Seidler, "Iran Jams Satellite Signals Carrying Foreign Media" *Der Spiegel* (31 March 2010), online: Der Spiegel <<http://www.spiegel.de/international/world/silencing-unwanted-coverage-iran-jams-satellite-signals-carrying-foreign-media-a-686670.html>>.

⁴⁶⁶ BBG, Press Release, "New Pressure on Jammers of International Broadcasts" (20 February 2012), online: BBG <<http://www.bbg.gov/press-release/new-pressure-on-jammers-of-international-broadcasts/>>.

⁴⁶⁷ Alikhah, *supra* note 458 at 97.

Although the Iranian government could have asserted that these jamming measures are countermeasures designed to meet an unauthorized broadcast, Iranian leadership initially denied any knowledge of satellite jamming. This changed with in 2010 when the head of Iran's State media admitted using such tactics.⁴⁶⁸ The initial denial that the government engages in jamming is likely a result of the Iranian government's precarious position in that the government uses the same satellites that it jams. In other words, while the Iranian government will typically jam Eutelsat satellites, the government uses these same satellites to transmit Iranian State television. Besides Eutelsat, the Iranian government is a customer of Intelsat, Telesat, and AsiaSat.⁴⁶⁹

These repeated efforts to jam Western media have resulted in some international action by the ITU at its most recent World Radiocommunication Conference.⁴⁷⁰ The United States Congress has also acted against Iran. Most recently, it is considering imposing sanctions on European satellite companies that provide service to the Iranian government, targeting Iran's jamming of satellite communications.⁴⁷¹ Again, such a move was likely anticipated by the Iranian government and could be the reason Iran delayed in acknowledging that it engages in such conduct. In addition to these proposed sanctions, in 2009, the U.S. Congress passed the Victims of Iranian Censorship or "VOICE Act." The act authorized \$30 million to the BBG to expend on U.S. foreign broadcasting into Iran. The funds were designed to develop additional transmission

⁴⁶⁸ Sonne, "Battle for Control of Satellite TV", *supra* note 26.

⁴⁶⁹ *Ibid.*

⁴⁷⁰ See generally *WRC Report 2012*, *supra* note 55.

⁴⁷¹ Roberta Rampton "U.S. Senate to vote on tough new Iran sanctions" *Chicago Tribune* (17 May 2012) online: Chicago Tribune <http://Articles.chicagotribune.com/2012-05-17/news/sns-rt-usa-iransanctions11e8gh5w7-20120517_1_iran-and-world-powers-sanctions-bill-round-of-economic-sanctions >

capability to counter Iranian government efforts to jam radio, satellite, and Internet-based transmissions.⁴⁷²

Iran's jamming efforts appear to specifically target certain Western satellite broadcasts, specifically, the VOA and the BBC being the two most frequently targeted for jamming.⁴⁷³ However, in addition to these satellite broadcasts, there are a number of other satellite broadcasting entities that seek to broadcast via satellite to Iran. In late 2007, there were 37 Persian satellite television networks available for reception in Iran.⁴⁷⁴ Some networks support the re-establishment of the monarchy while others support communism, or a republican system of government. In many instances these networks are "sharply critical" of the Islamic Republic and Islam.⁴⁷⁵ Opposition groups do the majority of the broadcasting into Iran via satellite. Of these opposition networks, seventy percent originate in the U.S.; the remaining networks originate in England.⁴⁷⁶ As such, nearly all the *political* satellite networks that were available in Iran were opposed to the current Iranian administration and nearly all of these networks had production facilities in the U.S. or England.

⁴⁷² *Victims of Iranian Censorship Act*, Pub. L. 111-84, 123 Stat. 2190 (codified as amended at 22 U.S.C. § 6204 (2009)); See also Ben Dowell "BBC World Service to sign funding deal with US State department" *The Guardian* (20 March 2011) online: The Guardian <<http://www.guardian.co.uk/media/2011/mar/20/bbc-world-service-us-funding>> ; But see, Ben Dowell "American anger at BBC World Service Trust's bid for US funding" *The Guardian* (22 March 2011) online: The Guardian <<http://www.guardian.co.uk/media/2011/mar/22/bbc-world-service-trust-us-funding?INTCMP=ILCNETTXT3487>>.

⁴⁷³ Sonne, "Battle for Control of Satellite TV", *supra* note 26.

⁴⁷⁴ Alikhah, *supra* note 458 at 99.

⁴⁷⁵ *Ibid* at 97.

⁴⁷⁶ *Ibid* at 100-101.

Initially, it may appear that Iran is not engaging in a State practice that is consistent with Article 19 of the UDHR because the jamming of these broadcasts appears to be inconsistent with an individual's right "...to seek, receive and impart information and ideas through any media and regardless of frontiers."⁴⁷⁷ However, before making such a conclusion, one must also consider the exceptions to Article 19 of the UDHR and ICCPR. Article 29 provides in part "everyone shall be subject only to such limitations as are *determined by law solely* for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of *morality, public order and the general welfare in a democratic society* (emphasis added)."⁴⁷⁸ Moreover, because Iran is also a party to the ICCPR it is also relevant to note the limitations to its Article 19 include "national security."⁴⁷⁹

Both the UDHR and the ICCPR require that the exceptions to their respective Article 19s be written "in law." Therefore, it is necessary to review the extent to which Iran has enacted a law that would restrict the enforcement of Article 19 of either the ICCPR or the UDHR. Unlike any Western State, the Islamic Republic of Iran is based on a belief in "...the One God (as stated in the phrase 'There is no god except Allah'), His exclusive sovereignty and right to legislate and the necessity of submission to his will commands..."⁴⁸⁰ This foundation in Iran's Constitution contemplates that there

⁴⁷⁷ UDHR, *supra* note 202 at art. 19.

⁴⁷⁸ *Ibid* at art. 29.

⁴⁷⁹ ICCPR, *supra* note 344 at art. 19.

⁴⁸⁰ *Constitution of Iran (1979)*, art. 2, reprinted in Henry J. Steiner, Philip Alston, & Ryan Goodman, *International Human Rights In Context*, 3rd ed. (Oxford: Oxford University Press 2008) 583 at 584.

could be more restrictions on freedom of expression.⁴⁸¹ With respect to freedom of the press, Article 24 of the Iranian Constitution provides “Publications and the press have freedom of express *except when it is detrimental to the fundamental principles of Islam or the rights of the public*. The details of this exception will be specified by law (emphasis added).”⁴⁸² The Islamic Penal Code of Iran has codified numerous offenses; and although a complete review is beyond the scope of this thesis, several sections are relevant for considering restrictions on speech and the press. Specifically, the following acts are penalized: insulting the Islamic sanctities, insulting the founder of Islamic Republic of Iran, swearing profane language, and the publication of “satiristis” material.⁴⁸³ In addition the penal code criminalizes the vaguely worded “acting against national security.” This provision of the penal code is frequently invoked to silence journalists, activists, and to justify what would otherwise be considered violations of a variety of human rights.⁴⁸⁴

⁴⁸¹ Baderin, *supra* note 332 at 127 (Shari’ah limitation on freedom of expression are classified as moral and legal. Moral restraints include defamation, lying, derision, exposing the weaknesses of others, and acrimonious disputation. Legal restraints include *inter alia* evil or hurtful speech, seditious speech and blasphemy).

⁴⁸² Steiner, *supra* note 480 at 58.

⁴⁸³ *Islamic Penal Code [Islamic Republic of Iran]*, UNHCR (28 November 1991), online: United Nations High Commissioner for Refugees <<http://www.unhcr.org/refworld/docid/4d384ae32.html>> (Unofficial translation of selected Articles, The Islamic Penal Code was approved by the Islamic Consultancy Parliament on 30 July 1991 and ratified by the High Expediency Council on 28 November 1991).

⁴⁸⁴ Nazila Fathi “Journalist Sentenced to Death in Iran, Accused of Terrorism” *New York Times* (21 February 2008), online: The New York Times <http://www.nytimes.com/2008/02/21/world/asia/21iran.html?_r=1&fta=y>; See also United States Department of State, DOS, *Human Rights Report, Iran*, *supra* note 31 (The human rights report from the Department of State details a variety of human rights abuses that are support by reference to “national security”).

The crime of acting against national security is vague and has been abused by the government of Iran;⁴⁸⁵ and such law clearly does not meet the standards articulated by the Human Rights Committee, that any restriction on Article 19 of the ICCPR must be “narrowly tailored.”⁴⁸⁶ However, a similar more narrowly tailored law would likely support Iran’s effort to jam satellite transmissions from the West based largely on the political and contentious relationship between Iran and the West. While a complete history of the relationship between these States is beyond the scope of this chapter, there are certain key events in the relationship between Iran and the West that have shaped the current relationship. The first event is the 1953 coup that was supported by the U.S. and the United Kingdom.⁴⁸⁷ It has been stated that the Iranian media religiously observes “...the anniversary of the coup as a day of perfidy that ranks with Pearl Harbor.”⁴⁸⁸ Iranian understanding of the coup is that “...a secular and moderate democratic leader was overthrown because he had the integrity and courage to stand up to imperialism.” It is this view that continues to this day in Iran.⁴⁸⁹

⁴⁸⁵ See generally DOS, *Human Rights Report Iran*, *supra* note 31.

⁴⁸⁶ See generally *Comment 34 Article 19*, *supra* note 349.

⁴⁸⁷ Ali M. Ansari, *Confronting Iran, the Failure of American Foreign Policy and the Next Great Crisis in the Middle East* (Basic Books, Cambridge 2006) 27.

⁴⁸⁸ *Ibid* at 37.

⁴⁸⁹ *Ibid* at 28; see also United States Department of State, “Press Briefing on American-Iranian Relations” (17 March 2000) online: Federation of American Scientists <<http://www.fas.org/news/iran/2000/000317.htm>> (In an official speech Secretary Albright acknowledged that the United States played a significant role in orchestrating the overthrow of Iran’s popular prime minister. She also lamented the United States support for the Shah, who while developing the country “brutally repressed political dissent”).

In addition to the coup, there are a number of other factors that have shaped this relationship to include Iranian hostage crisis,⁴⁹⁰ the U.S. support for Iraq during the Iraq-Iran War,⁴⁹¹ the U.S. firing upon a civilian Iranian airline;⁴⁹² and President George W. Bush's identification of Iran as a member of an "axis of evil."⁴⁹³ Moreover, the invasions into Afghanistan and Iraq⁴⁹⁴ have had the effect of surrounding Iran with United States military forces.⁴⁹⁵ There are also allegations that the U.S. and Israel have attacked the computer systems in Iran for use in Iran's main nuclear enrichment facilities.⁴⁹⁶ Combined with this cyber-attack is the increasing rhetoric that Israel, a strong ally of the U.S., will attack Iran in 2012.⁴⁹⁷

⁴⁹⁰ The American Experience "The Iranian Hostage Crisis" online: PBS <<http://www.pbs.org/wgbh/americanexperience/features/general-Article/carter-hostage-crisis/>>.

⁴⁹¹ "1988: US warship shoots down Iranian airliner" *BBC On this Day* (3 July 1988), online BBC News <http://news.bbc.co.uk/onthisday/hi/dates/stories/july/3/newsid_4678000/4678707.stm> (Most of those on board the Iranian Airbus were Iranians on their way to Mecca. The victims also included 66 children and 38 foreign nationals); See also Noam Chomsky in David Barsamian's "Targeting Iran" (Open Media Sources City Light Books San Francisco 2005) page 32-33.

⁴⁹² Donette Murray, *US Foreign Policy and Iran, American-Iranian relations since the Islamic revolution*, (New York: Routledge, 2010) at 60.

⁴⁹³ George W. Bush, *State of the Union Address*, (29 January 2002), online: Miller Center University of Virginia <<http://millercenter.org/president/speeches/detail/4540>>.

⁴⁹⁴ "US launches missiles against Saddam" *BBC* (20 March 2003), online: BBC News <http://news.bbc.co.uk/onthisday/hi/dates/stories/march/20/newsid_3495000/3495453.stm>.

⁴⁹⁵ Chomsky, *supra* note 491 at 35.

⁴⁹⁶ David Sanger "Obama Order Sped Up Wave of Cyber-attacks Against Iran" *New York Times* (1 June 2012), online: The New York Times <http://www.nytimes.com/2012/06/01/world/middleeast/obama-ordered-wave-of-cyberattacks-against-iran.html?_r=1&pagewanted=all>.

⁴⁹⁷ Ira Chernus "New York Times Hypes Israeli Attack on Iran" *Huffington Post* (29 January 2012), online: The Huffington Post <http://www.huffingtonpost.com/ira-chernus/israel-iran-attack_b_1240510.html>.

The current relationship is contentious and volatile; and while the Iranian law that criminalizes acts against national security is vague, it seems that this law could be redrafted to limit or authorize the jamming of satellite transmissions originating from the West out of a legitimate concern for national security. In addition to the factors cited above, the U.S. views the Islamic Revolution of 1979 as an illegal act;⁴⁹⁸ and it therefore follows that the U.S. similarly views the ruling party as illegitimate. Iran is currently surrounded by U.S. troops in Afghanistan and until recently Iraq.⁴⁹⁹ Israeli Prime Minister Benjamin Netanyahu has publicly acknowledged the fact that Israel is at least contemplating an attack.⁵⁰⁰ Therefore, in this climate, Iran could, consistent with the UDHR and its obligations under the ICCPR jam unauthorized transmission from Western sources if it enacts a narrowly tailor law designed to prohibit such transmissions. Such a narrowly tailored law could not restrict the right of the Iranian people to receive news and information in general, but it could exclude State news from sources deemed hostile to Iran.

If Iran vests with the right to invoke either of the exceptions to Article 19 of the ICCPR or the UDHR and jam satellite signals from sources that it deems hostile, it seems that the Western satellite broadcasters who have proclaimed that they are operating under Article 19 of the UDHR would also be required to cease broadcasting

⁴⁹⁸ United States Department of State, *Travel Advisory*, online U.S. Department of State <http://travel.State.gov/travel/cis_pa_tw/cis/cis_4520.html>.

⁴⁹⁹ “Last US troops withdraw from Iraq” *BBC* (18 December 2011), online: BBC News <<http://www.bbc.co.uk/news/world-middle-east-16234723>>.

⁵⁰⁰ Joshua Hersh “Benjamin Netanyahu On Iran: ‘Non Of Us Can Afford To Wait Much Longer’” *Huffington Post* (5 March 2012), online: Huffington Post <http://www.huffingtonpost.com/2012/03/05/benjamin-netanyahu-aipac-2012_n_1322839.html>.

out of respect for the exceptions to declaration and the convention. The continued broadcasting would, ironically, be contrary to both the UDHR and the ICCPR.

In order to continue broadcasting, a more viable theory is the freedom of broadcast principle. Although this theory does not obviate a receiving State's (Iran's) right to jam an unauthorized broadcast from its territory, the only restriction placed upon the sending State is that the broadcast does not amount to illegal propaganda or interfere with ITU frequency allocations. Therefore, even if Iran could legitimately invoke an exception to receiving satellite broadcasts from the West, the Western broadcaster would not be precluded from continued broadcasting so long as it adopted and pursued a different justification for foreign broadcasting and accepted the principle that jamming is consistent with international law so long as it is confined to the territory of the jamming State. It is unlikely that the pursuit of this policy would change Western satellite broadcasting or diminish the efforts to jam them; however, such a policy is more consistent with State practice and equally respects the right of a State to send an unauthorized transmission as well as a State's right to jam it.

Conclusion

The jamming of unauthorized satellite signals is not a new phenomenon and has been occurring since the dawn of radio. The specific jamming of satellite signals is likely to continue given the disparity in ownership and control of satellites between satellite operators and the governments in the Middle East, North Africa, and developing States. Despite the characterization of satellite jamming, as a violation of international law, there are a number of principles of international law that support a receiving State's right to jam an unauthorized transnational satellite broadcast. Most notably are the principles of sovereignty, non-intervention, the prohibition of illegal propaganda, countermeasures, and self-defense. The principle of freedom of broadcasting initially applied to terrestrial broadcasting and allowed States to send and jam transnational radio broadcasting. Although this did not initially apply to satellite broadcasting, the growth and ubiquity of satellite communications may be transforming this principle into a customary norm of international law as applied to satellite broadcasting.

The broadcasting policies of the U.S. have incorporated Article 19 of the UDHR. It remains unclear whether this Article has achieved the status of a customary norm of international law. Regardless of Article 19's status, there appears to be some legal support for U.S. foreign broadcasting in the form of the *opinio juris* of Article 19, a Western movement to enforce human rights, State acquiescence, peace broadcasting, and the emerging principle of freedom of broadcasting as applied to satellite broadcasting.

Finally, the application of Article 19 of the UDHR and ICCPR is complicated by a number of factors. In China, efforts to disseminate information are complicated by the lure of the lucrative Chinese television market, self-censorship, and China's ability to

launch communications satellite for satellite operators. In Iran, the application of Article 19 is complicated by the exceptions to Article 19. These exceptions and Iran's contentious relationship with the West support a finding that Iran could legitimately invoke the exceptions to Article 19 and jam unauthorized broadcasting into its territory. As such, the legal justifications for U.S. foreign broadcasting should change from Article 19 to that of the principle of freedom of broadcasting. Although this change would similarly allow Iran to continue jamming Western satellite signals, it would eliminate any obligation on the U.S. to cease broadcasting in observance of the exceptions to Article 19 of the UDHR and similar conventions.

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