COMMENTS

BY

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I. INTRODUCTION (1)

Mr. Chairman, Ladies and Gentlemen, I am honoured to be invited to speak before the Belgian Society of International Law and the distinguished participants of this conference. Please let me first clarify a minor point. I notice, Mr. Chairman, that you have mentioned and that the programme mentions the Max Planck Institute in Heidelberg after my name. In fact, I have been a Research Fellow at the Institute in Heidelberg for a number of years and still have a strong affiliation with it and my colleagues there. However, I am presently employed not by the Institute but by the Iran-United States Claims Tribunal in The Hague.

Now turning to the comments I would like to make in connection with the contributions by Professor Diederiks-Verschoor and Dr. Thiebaut — who have both offered a comprehensive overview of the relevant issues —

(1) This contribution was originally prepared for oral presentation. The format has been kept and the text has remained unaltered except for some clarifications and the footnotes which have been added subsequently for this publication. These comments are based upon the following publications by the author : « Information and Communication, Freedom of », in : R. Bernhardt (ed.), *Encyclopedia of Public International Law,* Vol. 9 (1986), pp. 162-172 ; « Telecommunication, International Regulation of », *ibid.*, pp. 367-371, (both with select bibliographies) ; « Das Satellitendirektfernsehen und die Vereinten Nationen », *ZaöRV* 44 (1984), pp. 257-289. They have benefitted, in particular, from the excellent analysis by Nicolas Mateesco MATTE, « Aerospace Law — Telecommunications Satellites » (1982). *See* also Manfred BÖHM, « Satelliten-Kommunikation : Technische und Wirtschaftliche Aspekte », in : Karl Kaiser/Stephan Frhr. von Welck (eds.), *Weltraum und internationale Politik* (1987), pp. 17 *et seq. ;* Rainer EBERLE/Christoph JACOBS, « Satelliten-Kommunikation : Medienpolitische und rechtliche Aspekte », *ibid.*, pp. 37 *et seq. ;* Dietrich RATZKE, « Die Bedeutung der Erforschung und Nutzung des Weltraums für die Medienstrukturen », *ibid.*, pp. 537 *et seq.* As to the significance of satellite technology for the « Third World » *see* Caesar VOÛTE, « Die Bedeutung und Nutzung des Weltraums für die Dritte Welt », *ibid.*, pp. 543 *et seq.* Regarding the use of telecommunications satellites for military purposes *see* Hubert FEIGL, « Militärisch nutzbare Satelliten : Ihre Bedeutung für Sicherheit und Rüstungskontrolle », *ibid.*, pp. 189 *et seq.* (at 202 *et seq*). On legal developments in international telecommunications in general *see* Ernst-Joachim Mestmäcker (ed.), *The Law and Economics of Transborder Telecommunications : A Symposium* (1987) ; R. VAN DEN HOVEN VAN GENDEREN/A.C.M. NUGTER/J.M. SMITS, « Recent Developments in Telecommunications Law », *Netherlands International Law Review* XVIII (1987), pp. 219-236 ; *Thesaurus Acroasium of the Institute of Public International Law and International Relations of Thesaloniki,* vol. XV (Session 1984) : Communications (Includes Telecommunications) (1987).

my initial problem, of course, is to select some aspects of more general interest without attempting to enter into a discussion of areas which subsequent panels will deal with. I would like to focus first on the international legal regime governing the use of telecommunications satellites and then address briefly one of the two main legal issues raised by Dr. Thiebaut, namely the issue of direct broadcasting satellites. The problems related to the geostationary orbit and the radio frequency spectrum as « limited natural resources » are probably more appropriately addressed in the following section of the conference.

II. SOME REMARKS ON THE INTERNATIONAL LEGAL REGIME GOVERNING THE USE OF TELECOMMUNICATIONS SATELLITES

With regard to the international legal framework governing the use of telecommunications satellites, Dr. Thiebaut has primarily referred to international space law as the « first major source », to the regulatory framework of the International Telecommunication Union (ITU) as the « second major source » of international law and finally, to the instruments establishing global and regional satellite telecommunication organizations (2). It is true that the rules and principles flowing from these « sources » are of central importance for the operation of telecommunications satellites. However, I would like to emphasize two other points which are of no lesser significance.

The first point is that although outer space law has its own charateristics and, because of its relatively rapid and innovative development, may appear to contribute more to the development of general international law than vice versa (3), it is not separated from, but rather has remained an

(2) For a survey *see* Simone COURTEIX, « Organisations internationales à vocation mondiale ou régionale dans le domaine des télécommunications par satellites », *Droit international,* Fascicule 141, 1985, pp. 1-25 ; Christian PATERMANN, « Weltraumpolitik regionaler und bereichsspezifischer Organisationen », in : K. Kaiser/Stephan Frhr. v. Welck (eds.) (note 1), pp. 463-477 ; MATTE (note 1), pp. 107 *et seq.*

(3) *See,* for example, Aldo Armando COCCA, « The Advances in International Law Through the Law of Outer Space », *Journal of Space Law* 9 (1981), pp. 13 *et seq.* For an extrapolation of the development of space law until the turn of the century *see* Karl-Heinz BÖCKSTIEGEL, « Perspektiven der Entwicklung des Weltraumrechts bis zum Jahre 2000 », in : Bodo Börner/Hermann Jahrreiss/Klaus Stern (eds.), *Einigkeit und Recht und Freiheit, Festschrift für Karl Carstens,* Vol. 1 (1984), pp. 307 *et seq.* For an interesting discussion of the relationship between treaty law and customary law in the development of international space law *see* Vladlen S. VERESCHCHTIN/Gennady M. DANILENKO, « Custom as a Source of International Law of Outer Space », *Journal of Space Law* 13 (1985), pp. 22 *et seq.*

integral part of international law (4). The references to the United Nations Charter and international law in the Outer Space Treaty and other space law instruments (5) may only reflect a compromise solution permitting different interpretations as to the precise relationship between international law and space law (6). However, in my view, it follows from the development of space law as a branch of public international law (7) that legal issues related to the use of telecommunications satellites cannot be decided by reference to these specialized instruments alone, but are governed also by the general framework of international law (8), including the rules on State responsibility (9), to the extent that they are not excluded by *lex specialis* rules. To give an example with regard to the terrestrial effects of telecommunications satellites : while the 1972 Space Liability Convention appears to grant relief only for physical damage caused by telecommunica-

(4) As to the inter-relationship between general international law and space law *see* Nicholas Mateesco MATTE (ed.), *Space Activities and Emerging International Law* (1984), pp. 128 *et seq.* and pp. 284 *et seq.* with a brief discussion of the various theories regarding the applicability of general international law to outer space.

(5) *See e.g.*, article I, paragraph 2 and article III of the Outer Space Treaty.

(6) *See* MATTE (note 3), p. 288 *et seq.* with reference to article III of the Outer Space Treaty.

(7) *See* Manfred LACHS, *The Law of Outer Space. Experience in Contemporary Law-Making*, Leyden (1972), pp. 2 *et seq.*

(8) *See* Nicholas Mateesco MATTE, *Aerospace Law. Telecommunications Satellites*, Montreal (1982), pp. 61 *et seq.*

(9) *See* generally I. BROWNLIE, *System of the Law of Nations : State Responsibility* (Part I) (1983) ; Richard B. LILLICH (ed.), *International Law of State Responsibility for Injuries to Aliens* (1983) ; P.M. DUPUY, « Le fait générateur en droit des gens », in : *Mélanges Perrin* (1984), pp. 91 *et seq.* ; Dietrich RAUSCHNING, « Verantwortlichkeit der Staaten für völkerrechtswidriges Verhalten », Albrecht RANDELZHOFER, « Probleme der völkerrechtlichen Gefährdungshaftung », both in : *Berichte der Deutschen Gesellschaft für Völkerrecht*, Vol. 24, (1984) ; *Kolloquium über Staatenverantwortlichkeit*, held on 8 February 1985 at the occasion of the 60th anniversary of the Max Planck Institute in Heidelberg with contributions by R. HOFMANN, J. WOLF, L. GÜNDLING, W. MENG and P. MALANCZUK in : *ZaöRV* 45 (1985), pp. 193 *et seq.* ; Karl ZEMANEK, « Responsibility of States : General Principles », in : R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. 10 (1987), pp. 362 *et seq.* ; Mohammed BEDJAOUI, « Responsibility of States : Fault and Strict Liability », *ibid.*, pp. 358 *et seq.* ; Rüdiger WOLFRUM, « Internationally Wrongful Acts », *ibid.*, pp. 271 *et seq.* with select bibliographies.

As to the International Law Commission's project to codify the rules on State responsibility *see* in addition : « Symposium on State Responsibility and Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law », with contributions by M.B. AKEHURST, M.C.W. PINTO, G. HANDL, J. COMBACAU and D. ALLAND, B. SIMMA, G. WHITE, L.F.E. GOLDIE, and S.P. JAGOTA, *Netherlands Yearbook of International Law* XVI (1985), pp. 3-300 and an Introduction by the editors, pp. xi-xvi ; Sterling SCOTT, « Codification of State Responsibility in International Law : A Review and Assessment », *ASILS International Law Journal* IX (1985), pp. 1 *et seq.* ; Bruno SIMMA, « Grundfragen der Staatenverantwortlichkeit in der Arbeit der ILC », *Archiv des Völkerrechts* 24 (1986), pp. 357 *et seq.* ; Daniel B. MAGRAW, « Transboundary Harm : The International Law Commission's Study of 'International Liability' », *AJIL* 80 (1986), pp. 305 *et seq.* ; Marina SPINEDI/Bruno SIMMA (eds.), *United Nations Codification of State Responsibility*, New York (1987) ; Karl ZEMANEK, « La responsabilité des Etats pour faits internationalement illicites, ainsi que pour faits internationalement licites », Jean SALMON, « Les circonstances excluant l'illicéité », both in : *Institut des Hautes Etudes Internationales, Cours et Travaux* 1987/1988 (pp. 1 *et seq.* and pp. 95 *et seq.*). For the most recent report concerning the responsibility of States for internationally wrongful acts by the new Special Rapporteur Gaetano ARANGIO-RUIZ *see* the « Preliminary Report on State Responsibility », *UN Doc. A/CN.4/416* of 18 May 1988 and Corr. 1 and 2, *A/CN.4/416/Add. 1 and Corr. 1 and 2.*

tions satellites (10), compensation claims with respect to illegal transmissions may nevertheless arise under general international law.

The second point I would like to make is that any discussion of the legal regime governing satellite telecommunications is incomplete without taking into due consideration the customary international law governing traditional telecommunications, that is non-satellite telecommunications, as it has developed since the 19th century. An examination of this development reveals that although the regulation of terrestrial communication occurred within the framework of general international law, it also witnessed the creation of special rules and principles (11).

Under general international law, particularly the principles of sovereignty and territorial jurisdiction, the regulation and control of national telecommunication systems is a domestic matter belonging to the *domaine réservé* of States (12), which is also recognized by the preamble of the International Telecommunication Convention. This applies both to fixed-type installations, such as telegraph, telephone and telex, as well as to radio and television broadcasting. With regard to transborder telecommunications, customary international law has developed a different set of rules and principles for fixed type installation services on the one hand and broadcasting services on the other.

It follows from the sovereign right of States to regulate and control their national telecommunication systems, but also *de facto* from the nature of fixed installation systems, that international transmissions necessitate the prior agreement as well as the co-operation of the States involved. Such agreements can be made on an individual basis, as under the ITU Convention ; they may also be made on a general basis, subject, however, to exceptions under « public interest » clauses which grant States broad discretion to interrupt undesired transmissions. This discretion, again, may be limited by specific rules of international law embodied in particularly in human rights instruments, which may oblige States to guarantee the free flow of informa-

(10) *See also* MATTE (note 7), p. 73 ; Stephen GOROVE, « International Direct Television Broadcasting by Satellite : 'Prior Consent' Revisited », *Colombia Journal of Transnational Law* 24 (1985), p. 10. For a detailed discussion of the general problems of liability under the Outer Space Treaty and under the Space Liability Convention *see* Carl Q. CHRISTOL, *The Modern International Law of Outer Space,* (1982), pp. 59 *et seq. See* also MALANCZUK, « Die völkerrechtliche Haftung für Weltraumfälle », in : *Technologischer Fortschritt als Rechtsproblem,* Ruprecht-Karls-Universität Heidelberg, Studium Generale, Wintersemester 1984/85, Heidelberg (1986), pp. 30 *et seq.* ; Joseph A. BURKE, « Convention on International Liability for Damage Caused by Space Objects : Definition and Determination of Damages After the Cosmos 954 Incident », *Fordham International Law Journal* 8 (1985), pp. 255 *et seq.*, with further references.

(11) *See* MALANCZUK, *Telecommunications,* (note 1), pp. 368 *et seq.* ; MATTE (note 1), pp. 62 *et seq.*, with further references.

(12) J.A. FROWEIN and B. SIMMA, « Das Problem des grenzüberschreitenden Informationsflusses and des 'domaine réservé' », *Berichte der Deutschen Gesellschaft für Völkerrecht,* Vol. 19 (1979).

tion (13), a subject, which I understand will be addressed in the round table discussion this afternoon.

Broadcasting services, on the other hand, do not require any special coordination or prior agreement between sending and receiving States except with regard to frequency (and, in the case of satellite telecommunications, also with regard to the closely related regulation of orbital positions). At least as far as terrestrial services are concerned, this area of telecommunications is governed by the principle of freedom of broadcasting which developed in customary international law after World War One on the basis of the experience with radio broadcasting. State practice shows that when States protested against foreign programmes they did not object to the broadcasting as such but rather to specific contents, because, as receiving States, they were usually also broadcasting to other countries themselves (14).

The development that States came to regard international broadcasting as permitted was a consequence of the physical fact that ether waves, whether intended for foreign reception or not, travel freely in the air (as well as in outer space) and, of course, do not stop at borders. Moreover, international conventions on the regulation of certain contents of radio communications, such as the South American Agreement on Radio Communications of 1935 which declared illegal « emissions likely to interfere with good international relations and to affect the national feelings of other peoples » (Article 7) (15) or the International Convention Concerning the Use of Broadcasting in the Course of Peace of 1936 (16), which aimed at preventing transmissions disturbing international understanding, incitement to war, false information and at promoting the dissemination of accurate news in times of crisis — which, by the way, remained ineffective — only make sense under the premise that, at least in principle, States regarded international broadcasting as permitted.

The principle of freedom of broadcasting, which originally developed with respect to radio transmissions, was later also applied to television broadcasting without great difficulty (17), probably because of the fact that, for technical reasons, the range of terrestrial television broadcasting

(13) *See* FROWEIN (note 12), pp. 15 *et seq.*; MALANCZUK, *Information and Communication* (note 1), pp. 166 *et seq.*

(14) MALANCZUK, *ibid.*, p. 163 *et seq.*

(15) M.O. HUDSON, *International Legislation*, Vol. 7, p. 47.

(16) *LNTS*, Vol. 186, p. 301.

(17) For a more sceptical view *see* Christoph ENGEL, « Das Völkerrecht des Telekommunikationsvorgangs », *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 49 (1985), pp. 90-120, stating that « (a)s to terrestrial television, state practice is somewhat unclear » (at p. 119 in *the summary*). At p. 100, with reference to Helmut ENGELHARD, *Satellitendirektfernsehen — neue Technologie für einen besseren Informationsfluss?* (1978), p. 145 f, ENGEL notes that the application of the principle of freedom of broadcasting to terrestrial television has been cast into doubt occasionally. *See* also his note 40 at p. 100.

remains limited without the admission and active support by the receiving State.

If freedom of broadcasting implies that every State is entitled to broadcast across frontiers without prior consent of the receiving State, there are, nevertheless, some limitations on this principle. The most difficult area concerns the limitations imposed by international law on the content of international broadcasting and the scope of admissible propaganda (18), which is controversial not only between East and West, but — with a different set of arguments — also in the context of the so-called New World Information and Communication Order advocated by the Third World in North-South relations (19). I expect that this area will also be discussed this afternoon.

It appears that there is general consensus on the second limitation on the principle of freedom of broadcasting, namely that « pirate » radio stations, operating on unlicensed frequencies from unlicensed locations, such as ships on the high seas, are illegal (20). Finally, there is no doubt that a third limitation requires States to respect the relevant international regulations on telecommunications when broadcasting to other States.

For our purposes, I believe that it is important to emphasize that the principle of freedom of broadcasting in customary international law developed only in conjunction with the recognition of the corresponding right of affected States to interfere with the reception of foreign broadcasts in their territory by radio jamming, provided the technical effects of such

(18) *See* Krateros IOANNOU, « Propaganda », in : R. Bernhardt (ed.), *Encyclopedia of Public International Law,* Vol. 9 (1986), pp. 310-314 with references. SIMMA (note 12), pp. 59-70 also discussing the relevance of the non-intervention principle.

(19) MALANCZUK, *Information and Communication* (note 1), pp. 169-182 with references. *See* also K. Venkata RAMAN, « Towards a New World Information and Communication Order : Problems of Access and Cultural Development », in : R. St. J. Macdonald/D.M. Johnston (eds.), *The Structure and Process of International Law,* The Hague (1983), pp. 1027 *et seq.* ; K. NORDENSTRENG, *The Mass Media Declaration of UNESCO* (1984) ; Gunnar GARBO, « A World of Difference — The International Distribution of Information : The Media and Developing Countries », Communication and Society 15, *Unesco Doc.* COM-85/WS-7, pp. 64 *et seq.* ; Thomas L. MCPHAIL/Brenda MCPHAIL, « The International Politics of Telecommunications : Resolving the North-South Dilemma », *International Journal* XLII (1987), pp. 289-319.

On the problems of developing telecommunications in the Third World *see* also « The Missing Link, Report of the Independent Commission for World Wide Telecommunications Development » (1985), Summary in *Telecommunication Journal* 52 (1985), pp. 67-71. *See* also « the Arusha Declaration on World Telecommunications Development adopted by the First World Telecommunications Development Conference held in Arusha from 27 to 30 May 1985 », in : *Telecommunication Journal* 52 (1985), pp. 441-443.

(20) This is justifiable to avoid harmful interferences in the use of the radio frequency spectrum by stations operating outside the international regulatory regime. Special rules dealing with pirate broadcasting have been incorporated in the 1965 European Agreement for the Prevention of Broadcasts Transmitted Outside National Territories and in Article 109 of the 1982 United Nations Convention on the Law of the Sea.

jamming remained restricted to their territory (21). This customary right to jamming is a lawful act of sovereignty and not, as sometimes described, an act of self-defence (22).

The customary principle of freedom of broadcasting and the corresponding right of receiving States to jam foreign broadcasts are manifestations of the principle of reciprocity in international law (23). This must be borne in mind when discussing new technological developments. Although human rights treaties guaranteeing freedom of information and communication, more likely, I would suggest, on the regional Western European level than on the global level, may exclude the customary right to jamming, I submit that no general prohibition of jamming can be deduced from Article 35 of the International Telecommunication Convention which stipulates that 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 States.

These considerations must be taken into account when dealing with the specific questions raised by satellite telecommunications. To some extent, indeed, there is a parallel between the dual system of terrestrial fixed installation telecommunications and terrestrial broadcasting on the one hand, and fixed telecommunication satellite services and direct broadcast satellite services on the other (24). While the legal principles developed in

(21) For a discussion of the legality of jamming *see* SIMMA (note 12), pp. 70-71 ; Gilbert GORNIG, « Der grenzüberschreitende Informationsfluss durch Rundfunkwellen/Zur Frage der Völkerrechtswidrigkeit von Jamming », *EuGRZ* 15 (1988), pp. 1 *et seq.* ; James G. SAVAGE/Mark W. ZACHER, « Free Flow Versus Prior Consent : The Jurisdictional Battle over International Telecommunications », *International Journal* XLII (1987), pp. 342 *et seq.* ; Christine M. SCHENONE, « Jamming the Stations : Is There an International Free Flow of Information ? », *California Western International Law Journal* 14 (1984), pp. 501 *et seq.* It is notable that the USSR has ceased to jam broadcasting from the West, including « Radio Free Europe » and « Radio Liberty » and that the Concluding Document of the Vienna Meeting of the Conference on Security and Cooperation in Europe, adopted by consensus on 15 January 1989, provides that the participating States will « ensure that radio services operating in accordance with the ITV Radio Regulations can be directly and normally received in their States... ».

(22) It may suffice to note here that self-defence as well as reprisals, in contrast to acts of retortion, are reactions to *illegal* action taken (or in the process of being taken) by the target state. International broadcasting which observes the limits imposed by international law is lawful *per se.* Moreover, under modern international law self-defence can be invoked only against an illegal use of armed force. As to the concepts of self-defence, reprisals, retortion, and countermeasures *see* MALANCZUK, « Countermeasures and Self-Defence as Circumstances Precluding Wrongfulness in the International Law Commission's Draft Articles on State Responsibility », in : Marina Spinedi/Bruno Simma (eds.), *United Nations Codification of State Responsibility*, New York (1987), pp. 197 *et seq.* ; MALANCZUK, « Zur Repressalie im Entwurf der International Law Commission zur Staatenverantwortlichkeit », *ZaöRV* 54 (1985), pp. 293 *et seq.* ; Jean SALMON, « Les circonstances excluant l'illicéité », in : Karl Zemanek/Jean Salmon, *Responsabilité internationale*, Institut des hautes études internationales de Paris, Cours et Travaux 1987/1988, pp. 95 *et seq. See* also Elisabeth ZOLLER, « Peacetime Unilateral Remedies. An Analysis of Countermeasures », New York (1984) and O.Y. ELAGAB, *The Legality of Non-forcible Counter-measures in International Law*, New York (1988).

(23) As to the principle in general *see* Bruno SIMMA, « Reciprocity », in : R. Bernhardt (ed.), *Encyclopedia of International Law*, Vol. 7 (1984), pp. 400 *et seq.* with bibliography.

(24) MATTE (note 1), p. 70.

customary international law with regard to fixed installation telecommunications can easily be applied to satellite fixed-type services, in particular, the application of the principle of freedom of broadcasting has remained highly controversial with respect to direct television broadcasting satellite services because of the feared psychological, cultural, political and economic impact of the medium and the limited availability — either technically or financially — of jamming devices by receiving States (25). This leads me to some concluding remarks on the direct broadcasting satellite issue and international law.

III. SOME REMARKS ON DIRECT BROADCASTING SATELLITES AND INTERNATIONAL LAW

It is necessary to distinguish between the technical and the political aspects of regulation of the use of direct broadcasting satellites in international law (26). Furthermore, it is necessary to differentiate between the global level and the regional level.

As far as the technical aspects are concerned, it has been possible to achieve a detailed and precise regulation of direct satellite broadcasting

(25) *See* SIMMA (note 12), pp. 72-77, 82 ; ENGEL *op. cit.*, takes the following view : « Ever since broadcasting was invented, states have not objected to the mere fact of electromagnetic waves entering their territory as terrestrial radio broadcasts. However, the 'victims' of foreign radio emissions have exercised the right to jam any incoming programme within their territory. As to terrestrial television, state practice is somewhat unclear. In any event, the rules of customary international law on terrestrial broadcasting are not considered applicable to DBS. Since jamming of DBS is not feasible, at least not at a reasonable price, a receiving state could not usefully avail itself of this right. », at p. 119 (summary), *see* also pp. 100-103. The problem is that it still seems unclear to which extent jamming of direct television broadcasting satellite transmission actually *is* feasible. For example, there is a reference in the essay by R. EBERLE and C. JACOBS (note 1), to M. BÖHM (note 1), pp. 33-34 for the following proposition : « Technische Abwehrmassnahmen gegen die Empfangbarkeit von Satellitenrundfunk ('jamming') sind — im Vergleich zu gezielten Störungen von terrestrisch verbreiten Rundfunk — aufwendig und nur selten lückenlos durchführbar » (at p. 38). BÖHM, Direktor of Standard Elektrik Lorenz AG, Stuttgart, however, at p. 32, explains that it is relatively simple to prevent the reception of such satellite broadcasts in states with a developed terrestrial television network.

(26) For the relevant literature *see* MALANCZUK, *Satellitendirektfernsehen* (note 1), pp. 257 *et seq.* with references ; furthermore *see* Stephen GOROVE, (note 10), pp. 1-11 ; Carl Q. CHRISTOL, « Prospects for an International Legal Regime for Direct Television Broadcasting », *International and Comparative Law Quarterly* 34 (1985), pp. 142-158 ; Joel R. PAUL, « Making Direct Broadcasting by Satellites Safe for Sovereignty », *Hastings International and Comparative Law Review* 9 (1986), pp. 329-375 ; Bernd-Ulrich HAGEN, « Satellitenfernsehen — Rechtsprobleme einer neuen Technologie », *European University Studies*, Series II, Law, Vol. 559 (1986) ; Michael I. STOCKMAN, « The Educational Value of Direct Broadcasting Satellites and the Heightened Need for International Agreement », *Loyola of Los Angeles International and Comparative Law Journal* 9 (1987), pp. 377-412 ; Walter RUDOLF, « Informationsfreiheit und Satellitenrundfunk im Völkerrecht », *Festschrift für Wolfgang Zeidler*, Vol. 2 (1987), pp. 1869-1883 ; B.A. HURWITZ, « The Labyrinth of International Telecommunications Law : Direct Broadcasting Satellites », *Netherlands International Law Review* XXXV (1988), pp. 145-180 ; Marika Natacha TAISCHOFF, *State Responsibility and the Direct Broadcasting Satellite*, 1987.

within the framework of the ITU on a global level. The World Administrative Radio Conference of 1977, within certain frequency bands, prepared the ground for a comprehensive technical regulation of satellite direct broadcasting for Regions 1 and 3 which was completed by the rules adopted at the 1983 Conference for Region 2 (the Americas) (27). For Europe, in particular, the basic idea was in principle to limit television broadcasting of States as far as possible to their own territory, except for the so-called technical « unavoidable spill-over » of the beam to foreign territory in order to ensure complete coverage of the national territory. As we all know, the technological development has led to an unexpected improvement of reception equipment with the result that, in Europe, the assumptions upon which the 1977 plan was based have been undermined to a considerable extent (28). You are certainly aware of the project to launch the hybrid ASTRA satellite in the near future (29), which will provide for coverage of most of Western Europe. This project, by the way, raised the issue of whether it required a coordination procedure (30) between EUTELSAT and the Grand Duchy of Luxemburg similar to the one mentioned by Professor Diederiks-Verschoor with regard to the relationship between ARABSAT and INTELSAT.

Dr. Thiebaut has cited the ITU provision stipulating that

> « in devising the characteristics of a space station in the broadcasting-satellite service, all technical means shall be used to reduce to the maximum extent practicable, the radiation over the territory of other countries unless an agreement has been previously reached with such countries » (31).

I would like to submit two propositions with respect to the interpretation of this provision for our discussion :

(27) For literature *see* MALANCZUK, *Satellitendirektfernsehen,* (note 1), p. 258 ; Ram S. JAKU/J.L. MAGDELENAT/H. ROUSELLE, « The ITU Regulatory Framework for Satellite Communications : An Analysis of Space WARC 1985 », *International Journal* XLII (1987), pp. 276-288 ; Alfons A.E. NOLL, *Réglementation internationale relative aux télécommunications par satellites,* in this Volume.

(28) For details *see* RATZKE (note 1), pp. 580-583.

(29) The first of two ASTRA satellites was launched in December 1988 and is operated by the Luxemburg based Société Européenne des Satellites (SES). It provides for the transmission of 16 television programmes which can be received directly with smaller antennae dishes and also be entered into cable networks. In the International Frequency Register, ASTRA is known as GDL-6. This medium-power satellite with 16 transponders of 45 W each is positioned at 19.2 ° E. in the geostationary orbit. It will use the 11.20 - 11.45 GHz band and individual reception within the 50 dBW zone requires a dish of 85 cm. *See* M. WOOLLEY, « European direct broadcasting plans », *Telecommunication Journal* 55 (1988), p. 443.

(30) Under article XVI of the EUTELSAT Convention. On EUTELSAT *see* Simone COURTEIX, « EUTELSAT : Europe's Satellite Telecommunications », *Michigan Yearbook of International Legal Studies* (1984), pp. 85-101 ; E. LEVEAU-VALLIER, « La coopération ESA/EUTELSAT suite à l'entrée en vigueur de la convention portant création de l'Organisation Européenne de Télécommunications par satellite le 3 juillet 1985, *Revue Franç. de Droit Aér.* 39 (1985), pp. 412-416.

(31) No. 6222 of the ITU Radio Regulations and Additional Regulations, Final Acts of the World Administrative Radio Conference, Geneva 1979, previously : regulation 428 A, introduced in 1971.

First, although a number of States have invoked this provision in support of the prior consent principle, it should be properly construed as a « technical » regulation only, the purpose of which is to ensure an efficient and equitable use of the orbit/frequency spectrum and not to decide the political issues involved in the dispute between the advocates of the free flow of information principle and the supporters of a more absolute concept of sovereignty. It would exceed the competence of the ITU to make such a political determination (32). This is confirmed, *inter alia,* by the reservations entered to the Final Protocol of 1977 by the United States, the United Kingdom and the Federal Republic of Germany (33).

Second, nevertheless, it is important to note that this provision is legally binding. It requires an agreement between the States involved under its terms. This legal effect is there whether one construes the provision as only « technical » or not. For practical purposes, however, due to the afore-mentioned advances in the technology of reception equipment, this issue has largely become moot. The question here may still be whether it makes sense to distinguish between intentional and non-intentional over-spill, that is to say whether or not foreign broadcasting is specifically designed for reception in the territory of another State. I believe that within the context of this provision such a distinction is not warranted (34).

With respect to the political aspects — without wishing to enter into the discussion on the legal significance of U.N. Assembly Resolutions in general — I agree with the view that Resolution 37/92 of December 1982 is not legally binding, at least as far as those States are concerned which voted against it or chose to abstain (35). This does not mean, on the other hand, that the views of the dissenting Western States invoking the freedom of broadcasting principle also with regard to direct television satellite broadcasting have been shown to reflect established international law. In spite of its non-binding character, the Resolution remains important as evidence that, in the opinion of a large majority of States, international direct television broadcasting should at least require the authorization of

(32) MALANCZUK, *Satellitendirektfernsehen* (note 1), pp. 262-263 with references. Yirka OMEOROGBE, « Functionalism in the UPU and the ITU », *Indian Journal of International Law* 27 (1987), pp. 50-62, also arrives at the conclusion that in spite of conflicts « the functional aspects of the two Unions (the Universal Postal Union and the ITU, PM) have prevailed. Both are purely technical in that their aims are to establish uniform standards and procedures in their respective spheres of activity, and universality is therefore essential to them. » For an interesting account on the relationship between the technical and political debates *see* Nandasiri JASENTULIYANA, « Space Telecommunications Issues and Policies : Role of the United Nations », in : *Proceedings of the 77th Annual Meeting of the American Society of International Law* (1983), pp. 347-353.

(33) *See* FROWEIN (note 12), p. 13.

(34) MALANCZUK, *Satellitendirektfernsehen* (note 1), p. 262 with references. *See* also the comments by David SMALL in the meeting of the American Society of International Law on « Space Telecommunications — Issues and Policies », *Proceedings of the 77th Annual Meeting* 1983, p. 366.

(35) *See* MALANCZUK, *Satellitendirektfernsehen* (note 1), pp. 283-285.

receiving States. While this Resolution for the first time abandoned the principle of consensus traditionally used in the development of space law in the United Nations Committee for the Peaceful Uses of the Outer Space (36), it is interesting to note that the Principles dealing with remote sensing, without recognizing the right of sensed states to require their prior consent, were adopted again by consensus in 1986 (37).

Whereas on the global level, the development of international law with respect to direct broadcasting satellites under political aspects is still in flux and controversial, in the, with regard to constitutional principle, homogenous regional context of Western Europe, more definite international standards apply under the European Convention of Human Rights (Article 10) (38) and, as we shall probably hear from Dr. Schwartz, under European Community law too. Hopefully, one day the regional presumption in favour of the free flow of information principle will develop into a truly universal standard of law which is able to reconcile the interests of receiving States in protecting their legitimate concerns in the diverse world of our so-called « global village ».

Thank you very much.

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(36) *See* E. GALLOWAY, « Consensus Decisionmaking by the UN Committee on the Peaceful Uses of Outer Space », *Journal of Space Law* 7 (1979), pp. 3 *et seq.*

(37) *See* Carl Q. CHRISTOL, « Remote Sensing and International Space Law », *Journal of Space Law* 16 (1986), pp. 21 *et seq.* ; MALANCZUK, « Satelliten-Fernerkundung der Erde : Politische und rechtliche Aspekte », in Karl Kaiser/Stephen Frhr. v. Welck (eds.), *Weltraum und internationale Politik,* München (1987), pp. 57 *et seq.* ; Marietta BENKÖ/Gerhard GRUBER, « The UN Committee on the Peaceful Uses of Outer Space : Adoption of Principles on Remote Sensing of the Earth from Outer Space and Other Recent Development », *Zeitschrift für Luft- und Weltraumrecht* 36 (1987), pp. 17 *et seq.* For an overview on the technical aspects and the evolution of the discussion in the United Nations *see* W. DE GRAAFF/G.C.M. REIJNEN, « Remote Sensing by Satellites », in : Marietta Benkö/Willem de Graaff/Gijsbertha C.M. Reijnen, *Space Law in the United Nations,* Dordrecht 1985, pp. 1 *et seq.* ; On the technology and economic aspects of remote sensing *see* also Heinz HÄBERLE, *Satelliten-Fernerkundung der Erde : Technische und wirtschaftliche Aspekte,* in K. Kaiser/St. Frhr. v. Welck (eds.) (note 1), pp. 47-56.

(38) *See* G. MALINVERNI, « Freedom of Information in the European Convention on Human Rights and in the International Covenant on Civil and Political Rights », *Human Rights Journal* 4 (1983), pp. 443 *et seq.* ; J.A. FROWEIN/W. PEUKERT, « Europäische Menschenrechtskonvention », *EMRK-Kommentar* (1985), pp. 223 *et seq.* ; J.A. FROWEIN, « Artikel 10 EMRK in der Praxis von Kommission und Gerichtshof », in : *AfP* 1986, pp. 197-200 ; Christoph ENGEL, « Der Zusammenhang von Sende- und Empfangsfreiheit unter der Europäischen Menschenrechtskonvention », *ZUM* (1988), pp. 511-526. On the « Projet de Convention du Conseil de l'Europe sur la télévision transfrontière » critically Christoph ENGEL, « Europäische Konvention über grenzüberschreitendes Fernsehen », *Zeitschrift für Rechtspolitik* 1988, pp. 240-247.

DISCUSSION

Question by Prof. A. Dietz

Mr. A. Dietz asks a question concerning prior consent to the specialists of *public* international law : could private interests, who hinder authorized broadcasting, be interpreted in the sense of prior consent ?

Answer by Dr. P. Malanczuk

This question raises under public international law the question of the subjects of public international law. Private persons as such would not be considered to be subjects of international law in this context. They are relevant in a different context namely in the context of responsibility of States for private individual action. However this requires the attribution of acts of the individual to the State, in terms which are not easily formulated and have been difficult to formulate in the International Law Commission. However that is the principle : it must be attributable to the State.

There is also an opposite side of the coin namely : which States are responsible versus each other for private activities in broadcasting. Here we have disagreement between East and West.

PART II

Prof. P. De Visscher

C'est un très grand problème de savoir si le droit qui dirige les activités des Etats en matière de satellites de télécommunication est le droit international général, le droit international spatial, ou le droit coutumier, et si dans le conflit souveraineté-solidarité, il n'y a peut-être pas une rectification fondamentale à faire dans nos pensées. Jusqu'à présent, le droit spatial a été fondé sur l'idée de souveraineté alors que nous sommes parfaitement conscients que les communications par satellites sont un des éléments du patrimoine commun de l'humanité. Nous avons là une forme de contradiction interne entre souveraineté et solidarité qui, peut-être, doit être dépassée. En ce qui concerne la mer, par exemple, on a parlé du droit du patrimoine commun de l'humanité et la Cour Internationale de Justice a dit : la terre domine la mer, ce qui est exact parce que vous avez là un facteur de proximité géographique immédiate. Peut-on dire que la terre domine l'espace ? Je ne le crois pas. Un droit nouveau de la solidarité dans l'égalité est en voie de se développer par des réglementations spéciales. Ce droit est à un stade temporaire et la prudence commande à dire que le droit international général domine le droit international spatial. Le développement de ce droit se fait par les faits, par les pratiques, par les coutumes, par les résolutions même non obligatoires des Nations Unies qui finalement deviennent obligatoires. C'est dans cette perspective très encourageante qu'on a pris conscience du fait que le droit de l'espace est un patrimoine commun de l'humanité.