CONTROLLING "PIRATE" BROADCASTING

This Comment discusses the problem of "pirate" broadcasting and what measures have been taken to suppress this form of unauthorized broadcasting. First considered is the concept of extraterritorial jurisdiction and how it relates to "pirate" broadcasting. The Comment then examines specific occurrences of "pirate" broadcasting, including legislative action taken and theories of control used to justify the actions. Finally, the author analyzes recent United Nations action embodied in the Informal Composite Negotiating Text, possible factors behind its enactment, and its legal ramifications. He concludes that the action taken by the United Nations is valuable, although it may be somewhat outdated.

INTRODUCTION

Extraterritorial jurisdiction or the right of control over persons or things located outside territorial boundaries is a growing problem of international law. As nations become more interdependent and less isolated, the problem takes on new aspects. One relatively new aspect of this problem is radio and television broadcasting from ships or fixed structures located on the high seas, usually just outside territorial waters. These transmissions are directed toward audiences in nearby coastal States. The so-called "pirate" broadcasting stations are moored or installed outside territorial waters to escape regulation by coastal States.

Although unauthorized broadcasting does not technically constitute piracy, governments have been anxious to suppress the stations for a number of reasons. First, the stations operate on frequencies which have been allocated to other stations or are so close to assigned frequencies that electrical interference is likely. Thus, "pirate" stations may acquire listeners by using frequencies assigned to other

3. See Convention on the High Seas, supra note 1, art. 15.
stations, thereby diminishing the other stations' listening audience. Second, by causing interference the transmissions may adversely affect sea and air communications. Third, unregulated broadcasting poses a threat to national monopolies and public control over this type of communication. For example, most European countries prohibit commercial exploitation of broadcasting, and some prohibit advertising. However, “pirate” stations are not bound by these prohibitions. Fourth, the broadcasts may contravene national law, such as obscenity laws and laws prohibiting certain types of political broadcasts. Thus, the broadcasts' contents might endanger national security and the public good. Finally, the stations may broadcast material without making royalty payments to copyright and performing rights holders and without paying the proper revenue and other taxes.

“Pirate” broadcasting has been a serious problem in the past and may be one of even greater proportion in the future. Because of advanced technology and the recent emergence of airborne transmissions, the possibility of extensive “pirate” broadcasting poses a serious economic and political threat to many nations. Several countries have already enacted legislation prohibiting unauthorized broadcasts. In July, 1977, the United Nations also took action by adopting a resolution providing sanctions against “pirate” broadcasting.

PROBLEMS CONCERNING EXTRATERRITORIAL JURISDICTION

“Pirate” broadcasting has caused problems concerning extraterritorial jurisdiction because “pirate” stations do not broadcast under the authority of or in accordance with the legislation of the coastal States. Instead, the stations broadcast on frequencies not assigned to them and operate in international waters either without a flag or merely with a flag of convenience. With an increased number of transmitting stations on the high seas, the question of State control over these stations becomes extremely important. The notion that the waters of the sea are free to all has received general acceptance by the international community. Therefore, attempts to extend national jurisdiction...
sovereignty to regulate unauthorized broadcasting are quite complicated and the jurisdictional difficulties are formidable.

Throughout the history of "pirate" broadcasting, States have tried to justify their action—or inaction—against the stations by relying on Article 2 of the Convention on the High Seas. The controversy over the correct interpretation of this article has led to a number of different views. One extreme view suggests that the term "inter alia," accompanied by words allowing other freedoms "recognized by general principles of international law," means that all peaceful uses of the seas are permissible. Accordingly, the four listed freedoms are not exclusive; however, States may not engage in acts which adversely affect the use of the high seas by other States. A narrower view would restrict uses of the high seas to those expressly recognized. A more moderate view applies a test of "reasonableness" to additional uses of the high seas.

The general rules of international law concerning extraterritorial jurisdiction are briefly stated as follows: (1) a State has jurisdiction to make laws governing the acts of its nationals wherever they may be; (2) a State has some jurisdiction to apply its laws to acts committed by foreigners on the high seas; (3) a State does not always have a

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10. The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised under the conditions laid down by these articles and by the other rules of international law. It comprises, inter alia, both for coastal and non-coastal States:
   (1) Freedom of navigation;
   (2) Freedom of fishing;
   (3) Freedom to lay submarine cables and pipelines;
   (4) Freedom to fly over the high seas.
   These freedoms, and others which are recognized by the general principles of international law, shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas.

Convention on the High Seas, supra note 1, art. 2.

11. D. SMITH, supra note 2, at 41; van Panhuys & van Emde Boas, supra note 2, at 338.

12. D. SMITH, supra note 2, at 41.

13. Id., at 43; van Panhuys & van Emde Boas, supra note 2, at 338.

14. D. SMITH, supra note 2, at 42.


16. "On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship taken by piracy and under the control of pirates, and arrest the persons and seize the property on board." Convention on the High Seas, supra note 1, art. 19.
right to enforce its laws extraterritorially, but may exercise its jurisdic-
tion once a person enters its territory; and (4) a State with
national, flag, or territorial jurisdiction over a person, ship, or instal-
lation can transfer its rights in favor of another State, thus extending
the latter's customary rights under (2) and (3) above. For example,
if a ship of United States registration within French territory vio-
lated French law, France would have jurisdiction. However, France
can transfer its rights to the United States.

Questions arise as to whether any State may exercise domestic
jurisdiction in the international area and the extent of a State's jurisdic-
tion over aliens or citizens for acts committed outside that
State's territory. A coastal State's jurisdiction over the contiguous
zone and continental shelf does not govern broadcasts from "pirate" stations. Finally, ships on the high seas historically have been
subject to the exclusive jurisdiction of the flag State. If the flag State
was unwilling or unable to exercise control over the ship, the coastal
State was without a remedy. Today, however, international agree-
ments and some case law allow remedies in certain situations. The
following discussion of the history of "pirate" broadcasting illus-
trates the problems of extraterritorial jurisdiction.

HISTORICAL BACKGROUND

"Pirate" Broadcasting's Initial Appearance

Throughout the history of "pirate" broadcasting, much legislation
has been enacted. However, a general consensus within the interna-
tional community regulating the broadcasters or imposing sanctions
against them did not result.

"Pirate" broadcasting did not become an acute problem until the
late 1950's and 1960's, when nearly a dozen stations began transmit-
ing in the Baltic, Irish and North Seas. Denmark, Sweden, Nor-
way, Finland, Holland, Belgium, France and especially England were
targets for the unauthorized broadcasts. Perhaps one explanation for
the prevalence of "pirate" stations off the coasts of these West Euro-
pean countries is that broadcasting in these countries is heavily

17. M. Sibthorp, supra note 6, at 155.
18. Convention on the Territorial Sea and the Contiguous Zone, done at Ge-
20. E.g., Convention on the High Seas, supra note 1, art. 6.
21. E.g., Naim Molvan v. Attorney-Gen. for Palestine, 15 Ann. Dig. 115 (P.C.
1948).
22. D. Smith, supra note 2, at 72.
23. Id.
24. See Hunnings, supra note 4, at 410-12.
regulated by public authorities. In all the affected countries, radio communication is a State monopoly free of advertising. 25 Television broadcasting is also a State monopoly in these countries, although some nations permit advertising and commercial television. 26

Most “pirate” broadcasts involved only radio communications; however, one “pirate” television station also began transmitting. Radio Noordzee and TV Noordzee, operating from an artificial structure erected on the seabed in the North Sea adjacent to the Dutch coast but outside the Dutch territorial sea, began broadcasting to Holland in the summer of 1964. Dutch nationals built the structure, and the Reclame Exploitatie Maatschappij (R.E.M.), a private Dutch Company, was responsible for the broadcasts.

While the Dutch were plagued by the R.E.M. dilemma, the British were inundated by “pirate” broadcasts. In early 1961, one “pirate” station, Radio Veronica, began broadcasting to Eastern England. 27 In 1964, the problem became particularly serious when numerous unauthorized stations began broadcasting from ships and abandoned forts off the British coast. 28 Initially, the affected countries were slow to take action against the “pirate” stations, but during the 1960’s, there was much discussion and subsequent legislation concerning “pirate” broadcasting.

Early Attempts to Suppress “Pirate” Broadcasting

The first effort to address the problem of “pirate” broadcasting was the 1938 Radio Regulations of the International Telecommunication Union (I.T.U.). 29 In 1949, by an agreement between the United Nations and the I.T.U., the I.T.U. became a specialized agency of the United Nations. 30 In 1959, the Administrative Radio Conference (Geneva) replaced the word “broadcasting” in the existing Radio Regulations with the words “the operation of a broadcasting service.” 31 This action was apparently an attempt to distinguish “pirate”

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25. Id. at 415-16.
26. Id. at 416.
27. Id. at 411-12.
28. M. SMITHTHORP, supra note 6, at 207; HUNNINGS, supra note 4, at 421.
29. The I.T.U. has nearly 125 members.
broadcasting from mere unauthorized radio communications and to prohibit only the former. "Broadcasting service" refers to communications intended for mass audiences and therefore does not prohibit other unauthorized communications. Furthermore, because the term "mobile station" used in the earlier regulations was inapplicable if the "pirate" station transmitted from a stationary ship or from an artificial island\(^{32}\) or installation,\(^{33}\) the 1959 Conference adopted the following provision: "The establishment and use of broadcasting stations (sound broadcasting and television broadcasting stations) on board ships, aircraft or any other floating or airborne objects outside national territories is prohibited."\(^{34}\)

The difficulty concerning control of "pirate" broadcasting, however, has not been lack of prohibitions but rather lack of legitimate sanctions. The I.T.U., as an international agency, cannot act directly to regulate frequency assignments and other matters which are basically State concerns.\(^{35}\) For example, the Radio Regulations provide for the inspection of radio stations on board ships by the proper authorities of the ships' ports.\(^{36}\) In addition, the governments to which the ships are subject are to be notified if violations are found\(^ {37}\) so that they may assess the situation and take the necessary action.\(^ {38}\) However, none of these procedures can be implemented until the ships enter the territorial waters of a country other than their own. Inspection and subsequent notification seldom occur because most unauthorized broadcasting ships do not come to shore.

The Radio Regulations which provide for States' sanctions are ineffective for several reasons.\(^ {39}\) The primary difficulty is that unauthorized broadcasting ships do not carry the flags of responsible countries willing to punish their conduct, and no sanctions are provided if a State does not fulfill its obligations. Furthermore, not all States have ratified the various international telecommunication

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32. "Literally speaking, an artificial island is a man-made alluvion formed by placing soil and/or rocks in the sea which partakes thus of the 'nature of territory.' It is a non-naturally formed structure, permanently attached to the sea-bed and surrounded by water, which is above water at high tide." N. PAPADAKIS, THE INTERNATIONAL LEGAL REGIME OF ARTIFICIAL ISLANDS 6 (1977).

33. "The term 'installations' . . . refers collectively to man-made structures constructed from such other materials as concrete and steel, for example drilling platforms. These structures, therefore, do not partake of the 'nature of territory' and do not possess the same degree of permanence as the artificial islands." Id. For purposes of this Comment, however, the terms artificial islands and installations will be used interchangeably.

34. Radio Regulations, supra note 31, No. 422 (parenthetical original).

35. D. SMITH, supra note 2, at 77.


37. Id., No. 842.

38. Id., No. 721.

39. D. SMITH, supra note 2, at 75.
conventions. Those States which have not ratified the conventions are not obliged to abide by them, and even those States which have are not likely to suffer serious consequences if they breach their obligations.

IMPLEMENTATION OF NATIONAL AND REGIONAL LEGISLATION

Nordic Legislation

In April, 1961, the Nordic Administrative Radio Conference met in Oslo to discuss “pirate” broadcasting. The Conference members agreed to allow the national radio authorities to handle the problem. The national radio authorities stressed the immediate need for national legislation. During the summer of 1962, all four Nordic countries enacted national legislation. The Nordic statutes distinguish between acts committed within the legislating States' territories and those committed extraterritorially. Also, the statutes of each country equate the territories and citizenship of other Nordic countries with the territory and citizenship of the legislating country itself.

Shortly after the enactment of the Nordic legislation, several stations ceased transmission. However, not all broadcasters complied. One station, the Lucky Star, only ceased transmissions temporarily. The Danish police seized the ship. The ship's crew, the general organizer, and the representative of the company owning the ship, who were all Danish citizens, were fined for violating Danish law. Similarly, Swedish legislative efforts resulted in the prosecution of Radio Syd's director (a Swedish citizen), the radio announcers, and several people who supplied the ship. Because the prosecution and fines did not deter the station from continuing its broadcasting, the Swedish Government imprisoned the director. This action brought the broadcasts to a halt.

Belgian Legislation

Although it deals in greater detail with the position of foreigners than does the Nordic legislation, the Belgian legislation is directed

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40. Van Panhuys & van Emde Boas, supra note 2, at 306.
41. Runnings, supra note 4, at 418.
43. Hunnings, supra note 4, at 420 n.77.
44. Id. n.79.
45. Id. n.80.
46. Id. n.81.
specifically at mobile “pirate” stations. The Belgian Act is more restrictive because foreigners may be prosecuted only if they act in Belgium or aboard a Belgian ship or aircraft, or if they act jointly with Belgian nationals. In either situation, foreigners would be prosecuted only if apprehended within Belgian territory.

The Dutch Approach: The North Sea Installations Act

The Dutch took no legislative or administrative action in the 1960’s against “pirate” ships broadcasting outside Dutch territorial waters. Instead, they devoted their efforts to the elimination of unauthorized radio and television broadcasts transmitting from fixed installations. Their efforts were in response to the activities of the R.E.M. station previously mentioned. In formulating regulations to eliminate “pirate” broadcasting, the Dutch refused to equate the legal position of artificial structures standing on the seabed with that of ships. The Dutch Government based its refusal to equate artificial structures with ships on the factual difference between the two. Ships are movable so that their nationality cannot depend on their location while installations are stationary. Also, seldom, if ever, would any sort of registration exist. According to the Convention on the High Seas, ships have the nationality of the State whose flag they fly and are subject to that State’s jurisdiction. Applying this principle to installations, the State of registration would have jurisdiction.

The Dutch Government also refused to equate fixed installations with islands. Equating the two implied that sovereignty acquired over the installations would extend to the subjacent waters and to the airspace above the “island” or to a maritime belt around it. Most countries have rejected this proposition because of two provisions in the Geneva Conventions of 1958. Article 10 of the Convention on the Territorial Sea states that “[a]n island is a naturally-formed area of land, surrounded by water, which is above water at

47. Belgian Act of May 14, 1930, art. 2, as amended on Dec. 18, 1962. See also Hunnings, supra note 4, at 420; van Panhuys and van Emde Boas, supra note 2, at 323.
48. Van Panhuys & van Emde Boas, supra note 2, at 324.
51. Convention on the High Seas, supra note 1, art. 5.
52. Van Panhuys & van Emde Boas, supra note 2, at 320.
53. See Convention on the Territorial Sea and the Contiguous Zone, supra note 18, arts. 1 & 2.
high tide."\(^{54}\) "Naturally-formed" disqualifies the fixed installations from which "pirate" stations transmit because the installations are artificially constructed. Neither size nor capacity for use has any relevance to the conception of an island.\(^{55}\) Article 5 of the Convention on the Continental Shelf can also be used to support the Dutch Government's refusal because this article rejects the designation of certain artificial installations as islands.\(^{56}\) However, the article deals only with installations used in the exploration and exploitation of natural resources.

The Dutch also considered granting sovereignty over the installations to the country whose nationals operated, erected, or owned the structure. However, this alternative was not considered viable because it would cause uncertainties if operation and ownership of the structures were inconsistent or changed constantly. Another problem arises concerning who would make the various determinations. Furthermore, it would be possible to avoid restrictions by creating a company under the laws of a State chosen for the sake of convenience.\(^{57}\) In other words, a problem like that of "flags of convenience" would arise if the builders, personnel, and owners were intentionally selected to circumvent the laws of the target State.\(^{58}\)

A major factor adding to the Dutch Government's predicament was the public opinion opposing the Dutch broadcasting associations' monopoly which enabled these unauthorized broadcasters to gain wide popular support.\(^{59}\) Faced with this dilemma, the Dutch Government enacted the North Sea Installations Act on December 3, 1964.\(^{60}\) As a result of the Act, Dutch police landed on the R.E.M. installation ten days after passage of the Act, sealed its transmitters, issued warrants against the broadcasters and impounded the broadcasting installations.\(^{61}\) No country protested the Dutch Government's actions. This result was especially significant because for the first

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54. \textit{Id.}, art. 10(1).
56. "Such installations and devices . . . do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea of the coastal State." \textit{Convention on the Continental Shelf}, supra note 19, art. 5(4).
57. D. Smith, supra note 2, at 63.
58. Id.
59. See N. Papadakis, supra note 32, at 72; van Panhuys & van Emde Boas, supra note 2, at 308-09.
61. D. Smith, supra note 2, at 83.
time a State took unilateral action against a "pirate" station. The fact that no protests were made possibly signified general approval of the Dutch action and was perhaps the first step in establishing customary international law concerning "pirate" stations.

The North Sea Installations Act deals with fixed installations and is not primarily concerned with the problem of "pirate" broadcasting. The primary purpose of the Act is to create some legal order for installations standing in the seabed on that part of the continental shelf under Dutch jurisdiction. The Act applies to every installation on the continental shelf off the Dutch coast. By enacting what many referred to as the "anti-R.E.M. Act," the Dutch assumed that the establishment and use of these seabed installations were neither prohibited nor regulated by international law. The Government claimed that the law was not designed to assert sovereign rights of jurisdiction over fixed installations.

Legal Theories Used to Justify Unilateral Action by the Dutch

The Dutch based their claim to jurisdiction on three considerations: (1) the legal vacuum theory; (2) the protection of legal interests; and (3) the notion of contiguity. Also, although the Dutch did not explicitly rely on it, a theory known as the objective territorial principle had already received wide acceptance and was significant because of its similarity to the theories advanced by the Dutch. It no doubt lent support to the Dutch position.

The Objective Territorial Principle

The objective territorial principle permits States to claim territorial jurisdiction over acts committed in another State but which produce an effect within the territory of the State claiming jurisdiction. The United States was especially responsible for developing this principle in antitrust cases where activity occurring outside the United States had a direct effect within its territory. In United States v. Aluminum Co. of America the Court of Appeals for the Second Circuit stated: "[A]ny state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state apprehends . . . ."

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62. Van Panhuys & van Emde Boas, supra note 2, at 327.
63. Id. at 330 n.113.
64. Id. at 331 n.123. See also D. Smith, supra note 2, at 83.
65. Van Panhuys & van Emde Boas, supra note 2, at 331-32.
66. D. Smith, supra note 2, at 47-51; Hunnings, supra note 4, at 431-32.
67. D. Smith, supra note 2, at 47.
68. 148 F.2d 416, 443 (2d Cir. 1945).
The case of the *S.S. Lotus* (France v. Turkey), although later repudiated by the Brussels Convention of 1952 and the 1958 Geneva Convention, is another example of the objective territorial principle. The *Lotus*, a French ship, collided with a Turkish ship on the high seas, causing the sinking of the Turkish ship and the death of eight people. When the *Lotus* docked in Turkish territory, Turkey instituted proceedings against the ship's French officer, claiming that his negligence had produced effects on the Turkish ship and on Turkish citizens and thus on Turkish territory. The Permanent Court of International Justice resolved the dispute in favor of Turkey, holding that the Turkish action was consistent with international law. The Court stated that the act had produced an effect on Turkish territory and that there was no rule of international law prohibiting a State from asserting jurisdiction over a foreigner who committed acts outside the State's territory. It has been stated that the Court's reasoning concerning foreign vessels in the *Lotus* case is "equally relevant to the case of artificial islands erected on the high seas by foreigners."

In repudiating the *Lotus* case, the 1958 Geneva Convention stated:

> In the event of a collision or of any other incident of navigation concerning a ship on the high seas ... no penal or disciplinary proceeding may be instituted against such persons except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national.

Therefore, the objective territorial principle may be permissible in situations which do not involve incidents of navigation. One test to determine when to apply the principle is whether the act was meant to produce an effect within another territory. "Pirate" broadcasting will generally qualify under this test because most unauthorized transmissions are intentionally directed at a definite target State. Another test applies the principle depending upon the seriousness of the act. For example, France and Germany adhere to this modified principle, maintaining that a State may prosecute for acts committed abroad only when these acts are directed against the security or financial credit of the State. This approach assumes that States

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71. *Convention on the High Seas*, supra note 1, art. 11(1).
72. *Smith*, supra note 2, at 49.
73. *Id.* at 47.
74. Hunnings, supra note 4, at 432.
"would not claim to define acts directed against their security in an arbitrary way so as to include, for example, criticism of their governments published in a foreign press." 75

The Legal Vacuum Theory

The legal vacuum theory states that if an occurrence is not covered by existing international law, the affected State is free to formulate rules to meet the problems created. 76 The theory, first advanced by Professor J.P.A. Francois, 77 suggests that international law does not strive to provide areas of the world which are completely free of national jurisdiction. Therefore, no wrongful acts or failures to act should go unpunished because of lack of jurisdiction. In essence, the theory contradicts the idea that the Convention on the High Seas is law governing acts on the high seas. The theory recognizes the concept of international law forbidding subjection of the high seas to national sovereignty but takes exception under special circumstances.

One of these exceptions is international recognition of the nearest coastal State's jurisdiction to explore and exploit the continental shelf. 78 Another exception is the subjection of ships and persons and things on board to the authority of the State whose flag the ship is flying. Furthermore, several conventions have given the Contracting States special jurisdiction over each others' vessels on the high seas for specific purposes. 79 The conventions, however, were different from the Dutch action because they were multilateral or bilateral whereas the Dutch action was unilateral. This difference is significant because through a multilateral or bilateral agreement States merely transfer their rights of jurisdiction. Contrary to this approach, the Dutch asserted rights of jurisdiction without the approval or agreement of other States.

Proponents of the legal vacuum theory maintain that the actions occurring on installations built by private individuals should also be subject to the jurisdiction of a particular State. 80 They claim that the complete absence of authority would encourage illegal acts. Illegal outbreaks in fact took place on "pirate" stations off the English coast. On June 20, 1965, for example, eleven people forcibly seized Radio City, and on the following day the leader of the ousted group

77. See van Panhuys & van Emde Boas, supra note 2, at 315.
78. Convention on the Continental Shelf, supra note 19, art. 5(2) & (4).
79. See Hunnings, supra note 4, at 426-27.
80. Van Panhuys & van Emde Boas, supra note 2, at 332.
killed the head of the rival faction. The legal vacuum supporters relied upon these incidents to justify their theory, although such incidents were not those which the Dutch actually sought to prevent or punish.

Legal advisers of the R.E.M. station attacked the legal vacuum theory, contending that according to principles of international law there is no legal vacuum. They noted that in the absence of territorial jurisdiction upon the high seas, States may apply their law and jurisdiction to their own nationals on installations owned by them on the high seas. In 1955 the United States also expressed opposition to the theory when its delegation at the United Nations stated: "[T]he high seas are an area under a definite and established legal status which requires freedom of navigation and use for all. They are not an area in which a legal vacuum exists free to be filled by individual states, strong or weak."

**The Protection of Legal Interests Theory**

Another doctrine advanced by the Netherlands Government was the protection of legal interests theory. According to this theory, under international law a State may exercise jurisdiction on the high seas to protect its legal interests. Proponents suggest that just as the basis for the Convention on the Continental Shelf was a desire to protect domestic economic interests, control of fixed installations on the high seas is necessary to protect national interests. The legal interests need not be those of the State itself but might be those of the State's citizens or of the international community. Therefore, the Dutch justified the North Sea Installations Act as an attempt to subject fixed installations on the high seas near the Dutch coast to domestic legal provisions to protect Dutch legal interests. An argument could be made to support the Government's position because the R.E.M. represented an economic threat to the State broadcasting monopoly as well as a potential threat to the security of the country.

81. B. Paulu, supra note 4, at 23.
83. 4 M. Whiteman, Digest of International Law 54-55 (1965).
84. Van Panhuys & van Emde Boas, supra note 2, at 333-34.
85. D. Smith, supra note 2, at 62.
86. Van Panhuys & van Emde Boas, supra note 2, at 333.
Thus, the Dutch might attempt to justify their action as a preventive measure. Furthermore, problems such as frequency interference and tax evasion also implicate Dutch legal interests.

**The Notion of Contiguity**

The notion of contiguity is a subsidiary theory which was used by the Dutch in conjunction with the legal vacuum and legal interest theories. The notion of contiguity holds that once it is determined that some State may exercise jurisdiction to fill an existing legal vacuum and to protect certain legal interests, the nearest coastal State should have that jurisdiction. The Dutch Government claimed that this notion gave them the right to take measures to protect Holland's legal order up to an unspecified distance contiguous to its coast. This theory followed recently promulgated principles in the Convention on the Territorial Sea and the Contiguous Zone, the Convention on the Continental Shelf, the Convention on Fishing and Conservation of the Living Resources of the High Seas, and the Convention on the High Seas. These conventions recognized the extraterritorial rights of the coastal State.

The notion of contiguity, however, has certain weaknesses. One weakness is that it conflicts with various provisions of the Geneva Conventions. Article 2 of the Convention on the Continental Shelf grants the coastal State sovereign rights over the continental shelf for the purpose of exploration and exploitation of natural resources. No mention is made of fixed installations or unauthorized broadcasting. Article 3 specifically states that the coastal State's limited rights over the continental shelf "do not affect the legal status of the superjacent waters as high seas, or that of the airspace above those waters." By excluding claims to sovereignty over the airspace above the waters, the Convention prohibits its application to broadcasting because airspace is the medium which broadcasting uses.

Also, the Convention on the High Seas allows coastal States the right of hot pursuit of foreign ships on the high seas when good

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87. *Id.* at 334.
88. *N. Papadakis,* *supra* note 32, at 130.
89. *See* Convention on the Territorial Sea and the Contiguous Zone, *supra* note 18, art. 24(1).
93. *Constitution on* the Continental Shelf, *supra* note 19, art. 2(1).
94. *Id.*, art. 3.
95. *D. Smith,* *supra* note 2, at 62.
reason exists to believe that the ship has violated the laws of that State.\textsuperscript{96} Attempts to draw support from this provision for the actions taken against "pirate" stations are fallacious for several reasons. The Convention requires that pursuit be undertaken while the ship is within the internal waters or territorial sea of the coastal State.\textsuperscript{97} The Convention also assumes that the violation occurred while the foreign ship was within the coastal State's territory. Coastal States affected by "pirate" broadcasting could not meet these requirements. Finally, various conventions\textsuperscript{98} provide for coastal State control over certain activities only, and would, therefore, require an inclusion of unauthorized broadcasting from artificial installations among the regulated activities.

The R.E.M. advisers criticized the notion of contiguity. They based their attack on the \textit{Island of Palmas Case} (United States v. Netherlands),\textsuperscript{99} in which the court said the notion "of contiguity, understood as a basis of territorial sovereignty, has no foundation in international law." The court stated that the concept of contiguity is wholly lacking in precision and would lead to arbitrary results. Eminent publicists in international law have also expressed opposition to the notion of contiguity:

\begin{itemize}
\item The mere contiguity of an artificial island to a given coast, permanently above water or an elevation of the sea-bed, does not confer, under the rules of positive international law, any title of sovereignty to the coastal State if it is situated or erected outside its territorial waters. The same rule applies to the property existing on the island if it is owned by foreign nationals or companies.\textsuperscript{100}
\end{itemize}

The Dutch Government maintained, however, that until an international agreement could be reached, the nearest coastal State could exercise jurisdiction over fixed structures on that State's continental shelf to prevent legal vacuums. The Dutch were by no means claim-

\textsuperscript{96} Convention on the High Seas, supra note 1, art. 23(1).
\textsuperscript{97} Id.
ing territorial sovereignty over the structures. Instead, the Dutch were claiming only the right to take certain unilateral action to protect the legal interests of the Netherlands as the closest coastal State. The Dutch Government considered the notion of contiguity as secondary to the legal vacuum theory and the protection of legal interests theory.

**Agreement of the Council of Europe**

Like the Dutch, the British acted cautiously concerning "pirate" radio ships. Both the British and the Dutch Governments based their inaction against "pirate" radio ships on the fact that as early as November, 1961, the executive office of the Legal Committee on Broadcasting and Television of the Council of Europe had considered the problem. Both Britain and Holland desired to delay national legislation until an agreement was reached by the Council. Realizing the necessity of effective regional legislation, the Council of Europe sought agreement on certain essential clauses from which individual countries could draft their own legislation. Finally, on January 20, 1965, the Council of Europe opened for signature the European Agreement for the Prevention of Broadcasts Transmitted from Stations Outside National Territories.

The Agreement is in many respects similar to the Nordic Acts. However, the Agreement approaches the question of aliens more cautiously, reserving to the Contracting States the right to enact their own legislation on that matter. The document applies specifically to broadcasting stations operating from "ships, aircraft, or any other floating or airborne objects" outside national territories, although it states that nothing in the Agreement prevents a Contracting Party from applying the provisions to broadcasting stations on fixed installations. Coverage extends to nationals within the territory of the State concerned, on its ships or aircraft, or outside national territories on any ships, aircraft, or other floating or airborne objects. The Agreement includes non-nationals only when the act is committed in the State's territory, on its ships or aircraft, or on any floating or airborne object under its jurisdiction. The Agreement

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104. D. Smith, *supra* note 2, at 87 n.78.
does not in itself permit State action against aliens outside its jurisdiction or against the station if it is outside the State's jurisdiction. The Agreement states, however, that nothing in it prevents a Contracting State from applying the provisions concerned to persons other than those specified. Thus, the Agreement does not condemn the Dutch action.

The traditional principle of personal jurisdiction has been adopted with respect to nationals, while the principle of territorial or quasi-territorial jurisdiction has been adopted with respect to non-nationals. According to Article 2, "[e]ach Contracting Party undertakes to take appropriate steps to make punishable as offences, in accordance with its domestic law, the establishment or operation of broadcasting stations referred to in Article 1, as well as acts of collaboration knowingly performed." The following are included as acts of collaboration: provision, maintenance or repair of equipment; provision of supplies; provision of transportation for or the transportation of persons, equipment or supplies; the order or production of any material, including advertisements, to be broadcast; and the provision of services concerning advertisements.

The collaboration provision is especially significant because it represents the first attempt to regulate those who buy commercial time from "pirate" radio stations, although a few advertisers had previously been prosecuted for somewhat different reasons. By prohibiting purchase of advertising time by nationals, the Agreement affects the major source of revenue. The stations are thereby forced to recruit foreign sponsors who have products with wide distribution. This task is difficult because national advertising agencies may not be used to locate sponsors.

The Agreement was signed by Belgium, Denmark, France, Greece, Italy, Luxembourg, the Netherlands, Norway, Sweden and the

111. N. PAPADAKIS, supra note 32, at 136.
113. Id., art. 2(2)(a) to (e), reprinted in 14 INT'L & COMP. L.Q. 434, 434 (1965).
114. State v. Dessing (Frederiksberg Birkeret 1961) unrep., as cited in Hunnings, supra note 4, at 424 n.109 (Danish dentist who advertised on a "pirate" station was held to have acted unprofessionally, notwithstanding his contention that the advertisement was issued outside the State's jurisdiction).
115. D. SMITH, supra note 2, at 79.
United Kingdom. The Dutch were the last to sign, perhaps because of their reluctance to accept so strict a provision as Article 3.\textsuperscript{117} This provision would seem to compel Dutch authorities to take action against foreign stations which do not harm Dutch interests as well as against Dutch ships broadcasting religious services.\textsuperscript{118} Also, because the Agreement makes no distinction regarding program content, a State would have to take similar action against all unauthorized broadcasting regardless of whether the program content was religious, politically subversive, or similar to that of domestic stations. Although the Agreement did not establish an innovative jurisdictional policy, it was extremely successful in eliminating most of the “pirate” broadcasting stations on the North Sea.\textsuperscript{119} Its success has been attributed primarily to the provisions eliminating the stations’ closest and most convenient sources of supplies and equipment and, most important, their sources of revenue.\textsuperscript{120}

\textit{The Marine &c., Broadcasting (Offences) Act}

In accordance with the provisions of the Council of Europe Agreement was the Marine &c., Broadcasting (Offences) Act, which the United Kingdom passed in 1967.\textsuperscript{121} The Act’s scope is somewhat broader than the Agreement, extending coverage to broadcasts from marine structures and other objects in the water. However, the Act basically complies with the requirements in the Agreement. The prohibition extends to ships or aircraft registered in the United Kingdom and broadcasting from any location. The legislation also applies to ships or aircraft not registered in the United Kingdom if “in or over the United Kingdom or external waters.”\textsuperscript{122} Thus, the Act applies to non-nationals if they act in the United Kingdom or its external waters or on a ship or aircraft registered in the United Kingdom. According to Article 9(1), “external waters” means those which are within the seaward limits of the territorial sea.\textsuperscript{123} The Act prohibits operation of “pirate” stations and activities that support or further the operation of these stations.\textsuperscript{124} The activities enumerated are essentially the same as those specified in the Agreement.

There is a significant distinction between the Act and the Agreement in the definition of the term \textit{broadcasting}. The Act defines broadcasting as a wireless telegraphic transmission of sounds or

\textsuperscript{117} \textit{Id.}, art. 3, \textit{reprinted in} 14 \textit{INT’L & COMP. L.Q.} 434, 434 (1965).
\textsuperscript{118} Van Panhuys & van Emde Boas, \textit{supra} note 2, at 325.
\textsuperscript{119} M. Sibthorpe, \textit{supra} note 6, at 156.
\textsuperscript{120} \textit{Id.} at 207-08.
\textsuperscript{121} Marine &c., \textit{Broadcasting (Offences) Act}, 1967, c. 41.
\textsuperscript{122} \textit{Id.}, art. 1(1).
\textsuperscript{123} \textit{Id.}, art. 9(1).
\textsuperscript{124} \textit{Id.}, art. 4(3)(a) to (f).
visual images intended for general reception, regardless of whether the transmission is actually received. The Agreement requires only that the broadcast be "capable of being received." Under the British Act it is unnecessary to prove capability of reception. The intent of the person transmitting the broadcast will suffice even if the broadcast does not reach the United Kingdom. Like the Agreement, the Act's effectiveness lies in the fact that it eliminates the stations' primary sources of supplies and revenue.

Shortly after the Marine &c., Broadcasting (Offences) Act became effective, the Inter-Governmental Maritime Consultative Organization (IMCO) adopted a resolution against offshore broadcasting stations. The resolution is in the form of a declaration urging States to take necessary steps by national legislation to prevent the supply of food, fuel and advertising materials, and services necessary to operate "pirate" stations. The resolution also requests that Member States deny registration to ships used for unauthorized broadcasting. The I.T.U. adopted a view similar to that of IMCO. This view requests that States take legislative action to eliminate the sources of supplies, revenue and food. Neither the IMCO nor the I.T.U. resolutions mentioned extraterritorial jurisdiction over non-nationals and their property.

An Overview

The problems arising from "pirate" broadcasting are analogous to the predicament States faced in the first half of this century concerning air law. Initially, countries enacted national legislation and regulations governing the airspace and the right of passage. However, because States often had conflicting regulations and no international agreement existed, many disputes arose. National legislation was unsuccessful because of the international nature of air law. As a result, the Paris Convention of 1919, the Habana Convention of 1928, and the Chicago Convention of 1944 were organized. These

125. Id., art. 9(1)(7).
127. M. SIEBTHORP, supra note 6, at 208.
129. Memorandum by the International Frequency Registration Board of the I.T.U. on Broadcasting Stations Operated on Board Ships, Aircraft or Other Floating or Airborne Objects Outside National Territories, in IMCO Doc. MSC XII/23/Add. 2, at 10 (Dec. 21, 1965).
130. 9 M. Whitman, Digest of International Law 345 (1968).
conventions established international agreement on the subject of public international air law.\textsuperscript{131} Because of the international nature of "pirate" broadcasting, international recognition of and agreement concerning this problem is also needed.

The various multilateral and unilateral actions taken by the European community were partially successful in eliminating "pirate" broadcasting. However, these legislative efforts had an inherent weakness—they were not measures recognized by the international community. Although no State expressly objected to the actions, there was no international agreement concerning unauthorized broadcasting, nor was there general acceptance of the measures taken.

The legislation enacted to suppress "pirate" broadcasting was not effective necessarily because of its strength. Instead, the various measures were effective because other States failed to express opposition. Had other States reacted adversely, it is probable that the States enacting the measures would have submitted. Thus, because legislation against "pirate" stations might be opposed in the future, an international agreement is needed. International agreements are effective because they provide the authority under which States may act. Of course, States may disregard this authority and fail to take action. However, if a State desires to act, that State may do so knowing that it has the approval of the international community. International agreements are valuable for this reason if for no other.

\textbf{UNITED NATIONS ACTION}

The most recent and certainly the most significant legislation concerning "pirate" broadcasting came out of the Third United Nations Conference on the Law of the Sea. The Informal Composite Negotiating Text (ICNT), concluded in July, 1977, deals solely with law of the sea concerns.\textsuperscript{132} The ICNT is the first document of its kind to be formulated by a large international organization, and it is the most composite legislation regarding "pirate" broadcasting. Article 109 states:

1. All States shall co-operate in the suppression of unauthorized broadcasting from the high seas.
2. Any person engaged in unauthorized broadcasting from the high seas may be prosecuted before the court of the flag State of the vessel, the place of registry of the installation, the State of which the person is a national, any place where the transmissions can be received or any State where authorized radio communications is suffering interference.

\textsuperscript{131} \textit{Id.}
3. On the high seas, a State having jurisdiction in accordance with paragraph 2 may, in conformity with article 110, arrest any person or ship engaged in unauthorized broadcasting and seize the broadcasting apparatus.

4. For the purposes of the present Convention, “unauthorized broadcasting” means the transmission of sound radio or television broadcasts from a ship or installation on the high seas intended for reception by the general public contrary to international regulations, but excluding the transmission of distress calls.\footnote{133. \textit{Id.}, art. 109.}

In the second and third paragraphs, the international community has for the first time taken exception to the traditional principle of territorial or quasi-territorial jurisdiction over non-nationals. The ICNT authorizes States to arrest and prosecute offenders on the high seas regardless of the offenders’ nationality. The North Sea Installations Act is the only legislation which recognizes extraterritorial jurisdiction over aliens, but it does so on a different precept, namely, jurisdiction over fixed installations on Holland’s continental shelf. Of course, the North Seas Installations Act was a national act, not an international act.

Unlike previous action, the ICNT ignores acts of collaboration, such as supplying the “pirate” station with food, fuel or equipment or buying commercial time from the station. However, omission of such a provision is explainable by virtue of the comprehensiveness of the jurisdictional provision. By providing for extraterritorial jurisdiction, even over non-nationals, the ICNT obviates the need for indirect measures to restrain unauthorized broadcasting. Assuming that the ICNT receives wide acceptance, a State may take direct action against a broadcasting station without resorting to actions against the sources of supplies and revenue.

The significance of Article 109’s definition of unauthorized broadcasting stated in paragraph four above is twofold. First, it includes transmissions from mobile stations as well as from fixed structures, but not transmissions from airborne objects. The drafters of the article may have anticipated this form of transmission but excluded it because the ICNT deals specifically with law of the sea, and, therefore, unauthorized broadcasting from airborne objects is not within its scope. Second, the definition is similar to that of the Marine &c., Broadcasting (Offences) Act in that the transmission need only be “intended for reception by the general public,” even if it never reaches the intended audience. Thus, a “pirate” broadcaster

\footnote{133. \textit{Id.}, art. 109.}
may be arrested and prosecuted without the prerequisite that the transmission be received or the State be harmed, so long as intent to have the broadcast received exists.

Article 109 also clarifies the ambiguity regarding Article 2 of the Convention on the High Seas mentioned during the discussion of extraterritorial jurisdiction problems. The ICNT impliedly rejects a broad interpretation of Article 2. By providing sanctions against “pirate” broadcasting regardless of adverse affects on another State’s use of the high seas, the ICNT eliminates the need to show adverse effect. In fact, the claim that “pirate” broadcasting actually affects another State’s use of the high seas is inaccurate. Reading the ICNT in conjunction with Article 2, a proper interpretation indicates that the international community has recognized the four enumerated freedoms as well as any others recognized by the general principles of international law. Article 109 implicitly rejects “pirate” broadcasting as a recognized freedom. Thus, the ICNT adheres to the narrow interpretation of Article 2.

Several possible factors may have contributed to the enactment of Article 109. The European Agreement and the British Act almost totally eliminated “pirate” broadcasting. Therefore, there appeared to be no immediate threat to States. Yet, what accounts for the United Nations’ recent concern nearly fifteen years after the peak of the problem? One explanation may be that the provisions were politically inspired. Having already expressed opposition to Western broadcasters transmitting into Eastern Europe and the Soviet Union, it is apparent that the leaders of the Communist Bloc States favor stricter controls on telecommunications. Perhaps the Communist leaders view “pirate” broadcasting as another threat to government-controlled media. Likewise, other States realize the possibility of unauthorized stations transmitting politically inflammatory or subversive broadcasts. This possibility has been realized in Thailand. The Thai Government is currently plagued by radio broadcasts from southern China. The broadcasts include popular music interspersed with Communist propaganda. This situation is somewhat different from “pirate” broadcasting because the broadcasts directed toward Thailand are transmitted from another country. Nevertheless, it exemplifies the threat posed by unauthorized broadcasting and the importance in preventing this sort of activity. “Pirate” broadcasting is yet another means of access to foreign audiences for the purpose of communicating a particular political ideology. Perhaps the only countries opposed to stricter controls are those such as Panama and

134. See text accompanying notes 10-14 supra.
Liberia, which have been quite irresponsible in the past regarding ship registrations and gain much income from registrations.

Also, although "pirate" stations have in the past been prevalent only in northern Europe, nothing precludes the proliferation of this means of communication in other areas of the world. The likelihood of stations establishing themselves off the coasts of other States is great where a high possibility of commercial reward is present. Certainly, reward might be at least temporarily feasible in States where the domestic legal controls are ambiguous or nonexistent. If the profit margin is great enough to justify the initial investment, stations might begin broadcasting even where the probability of government action against the stations is great. In fact, in the late 1960's there were rumors of a "pirate" station beginning operations off the Southern California coast. The station, "Radio Free America," intended to cover an area from Santa Barbara to San Diego and broadcast an uncensored commercial program. Had transmission actually begun, the station might have made a sizable profit before the Government could enact legislation against "pirate" broadcasting. Thus, it is possible that Article 109 of the ICNT is both an economically and politically inspired attempt to avoid the future proliferation of "pirate" broadcasting.

The effectiveness of Article 109 cannot presently be determined. Although the provision may be comprehensive, it will be ineffective if States fail to enforce it in the future. The true test of approval will not come until the document is actually used. The Charter of the United Nations provides sanctions against States that fail to abide by the established rules of international law, but these sanctions are rather limited and are not a sufficient deterrent. In fact, the United Nations for the first time implemented the provided sanctions against a Member State on November 4, 1977, by directing all States

136. D. Smith, supra note 2, at 38.
137. Id.
138. 73 Broadcasting No. 2, at 10 (July 10, 1967).
139. Article 41 of the U.N. Charter gives the Security Council the authority to determine what measures not involving the use of armed forces are to be employed to give effect to its decisions. The Security Council may call upon the members of the U.N. to apply such measures. These actions include complete or partial interruption of economic relations and means of communication, and the severance of diplomatic relations. Should the Security Council consider these measures to be inadequate, it may take other limited action necessary to maintain or restore international peace and security. These other actions include demonstrations, blockades, and other operations by air, sea, or land forces. U.N. Charter art. 41, paras. 1 & 2.
to “cease forthwith” from providing arms and related material to South Africa.  

The imposition of sanctions against South Africa is significant for a number of reasons. First, the fact that the arms embargo represents the first time the United Nations has imposed sanctions against a Member State illustrates both the discord within the Security Council and the general reluctance of the United Nations to use the provided sanctions. Second, because the Charter prohibits interference in the internal affairs of Member States, the United Nations had to use “the acquisition of arms and related material” as the reason for the embargo. By prohibiting interference in a Member State’s internal affairs, the Charter severely limits the United Nation’s effectiveness in applying sanctions. Finally, enforcement of sanctions may be as difficult as their enactment. For example, Secretary General Kurt Waldheim is to report on the effectiveness of the embargo against South Africa. If widespread violations occur, a watchdog committee might be established. Formation of a watchdog committee will certainly be a difficult task, and its success in eliminating violations is doubtful. Thus, the effectiveness of the United Nations’ power to impose sanctions is not altogether certain.

CONCLUSION

The major problem confronting States dealing with “pirate” broadcasting has been the limitation upon these States’ jurisdiction. National laws cannot exceed the jurisdictional limits of the States which enact them. Therefore, unless States rely solely on indirect measures, they must either extend their jurisdictional limits in certain situations or depend on international agreements to control occurrences outside their territories.

Because the international community has not always been able to keep pace with rapidly developing technology, often States have been compelled to take unilateral action until an international agreement could be effected.

The States affected by “pirate” broadcasting found it necessary to implement national and regional legislation in the absence of international agreement. However, at last the international community established a provision which prohibits “pirate” broadcasting and provides sanctions against it. It will no longer be necessary for States confronted with “pirate” broadcasting to either enact national legis-

140. L.A. Times, Nov. 4, 1977, § 1, at 6, col. 4.
141. Id.
142. Id.
lation or develop alternate control measures without the approval of the international community.

Also, in light of the other provisions within the ICNT, it is questionable whether Article 109 is actually necessary. The ICNT proposes a territorial sea of up to twelve nautical miles\textsuperscript{143} and also provides for an exclusive economic zone of up to 200 miles (as measured from the baselines used to determine the breadth of the territorial sea).\textsuperscript{144} If these proposals receive wide acceptance, States will have sovereignty over as much as 200 miles of sea adjacent to their coasts. Therefore, they may suppress "pirate" transmissions which are broadcast within the 200 mile zone, and the likelihood of broadcasts from beyond the 200 mile zone is small.

Nevertheless, the problem of "pirate" broadcasting is not completely solved. Because Article 109 of the ICNT is so late in arriving, the provision is almost outdated. Although the ICNT prohibits broadcasts from ships and installations on the high seas, the possibility of transmitting from airborne objects is still available. Although sound and visual communication from airborne objects such as planes and satellites is a very expensive form of transmission, the technical capability exists. "Pirate" broadcasting might assume this form of transmitting in the future, thereby creating more problems concerning unauthorized broadcasting. What then, another fifteen years without international action?

MITCHELL J. HANNA

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\textsuperscript{144} Id., art. 57.
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