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Y. M. Kolossov

PROSPECTS FOR AN INTERNATIONAL TREATY ON TELECOMMUNICATIONS

Y.M. KOLOSSOV*

INTRODUCTION

What is the future plan for modern telecommunications technology? This question is currently being addressed by one of the United Nations specialized agencies, the International Telecommunications Union ("ITU"). One of the purposes of the ITU, according to the International Telecommunications Convention ("ITU Convention"),[1] is "to promote the development of technical facilities and their most efficient operation with a view to improving the efficiency of telecommunications services, increasing their usefulness and making them, as far as possible, generally available to the public."[2] Pursuant to this purpose, the ITU should act aggressively and adopt universal guidelines for promoting international cooperation in the new era of telecommunications technology.

I. A CALL FOR A UNIVERSAL AGREEMENT

As one scholar stated, "[w]e have at present an array of national, regional and limited international [but no universal] legislations, regulations and rules as well as ongoing moves at a regional level aimed at functional and multilateral contacts, exchanges and negotiations on the subject of harmonizing the international environment for transborder data flows."[3] Modern telecommunications technology highlights the need for international harmonization of telecommunications regulations by the end of the twentieth century. Specifically, the world needs a universal agreement covering all aspects of telecommunications.[4]

The last decade has witnessed many new developments in telecommunications.

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* LL.D. Professor of International Law, holder of the Chair of International Law at the Moscow State Institute of International Relations, USSR.

1. International Telecommunications Convention, Nov. 6, 1982, in G. WALLENSTEIN, INTERNATIONAL TELECOMMUNICATIONS AGREEMENTS, Binder *, pt. 3 (1985) [hereinafter *ITU Convention*]. The Convention was adopted on November 6, 1982 in Nairobi, Kenya. While some specialized agencies of the United Nations have wide international responsibilities over many telecommunications aspects within their expertise, the ITU deals exclusively with technical problems. Thus, the ITU Convention does not address issues relating to the political, social, economic and legal aspects of telecommunications regulation.

2. *Id.* art. 4, para. I(6).

3. NEW COMMUNICATION TECHNOLOGY AND INTERNATIONAL LAW 143 (W. Kleinwächter, ed. 1988).

4. Such an agreement could be structured similar to the United Nations Convention on the Law of the Sea.

At the international seminar of experts, held in Dresden, East Germany on September 20-21, 1987,[5] the following new technologies were discussed: (1) satellite and cable-based integrated services digital networks ("ISDN"); (2) direct broadcasting via satellites ("DBS"); (3) transborder data flows ("TDF"); (4) data processing equipment; and (5) consumer electronics, among others.[6] There is no doubt that more new technology will be introduced in the near future. Therefore, "[i]n order to achieve the optimal environment for, and the maximum benefit from, the new technology, a step-by-step evolution towards universal agreements . . . is necessary and indeed an urgent matter."[7]

The ITU Convention currently defines telecommunications as "any transmission, emission, or reception of signs, signals, writing, images, and sounds of intelligence of any nature by wire, radio, visual or other electromagnetic systems."[8] A comprehensive universal convention, however, would require a new definition of telecommunications. Specific features of modern telecommunications should be incorporated in the definition. For example, a new definition should address the global nature of telecommunications, the ongoing convergence of various telecommunications technology, the rapid approach of the age of an information-based society, economic aspects of telecommunications, and the role of journalists. Although the ITU may not have the expertise to develop the new complex definition of modern telecommunications, the United Nations General Assembly, through the Committee on Information, could undertake such an effort. The creation of a universal international treaty on a wide range of telecommunications issues would go far beyond drafting definitions and ultimately would require the expertise of more than one of the specialized agencies of the United Nations.

Besides technology, another development which supports drafting a universal agreement is "the convergence of mass electronic or broadcasting technologies with the other kinds of telecommunications: satellites, broad-band cable television; and optical fiber, all enabl[ing] electronic information to be disseminated at the speed of light," which raises "legal questions because of transborder communications, privacy and intellectual property."[9] Satellite delivered programs which cross many national borders require international regulatory bodies to address these international issues. Handling these issues demands a high level of international cooperation which can only be recognized through a universal agreement covering telecommunications.[10]

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5. This seminar was sponsored by the UNESCO Participation Programme. The second Medium-Term Plan of UNESCO (1984-1989) included a special program, "Studies on Communication," aimed at "furthering knowledge and improving understanding of the communication process, particularly at the international level, taking into account the rapid development of technologies." UNESCO Res. 4XC/2.03, 6.1(a).

6. New Communication Technology and International Law, *supra* note 3, at 7, 18-19.

7. *Id.* at 143.

8. *ITU Convention,* Annex II, *supra* note 1, at para. 2015.

9. S. White, Speakers' Papers from the First World Electronic Media Symposium (Oct. 6-9, 1989) (held in Geneva) (available at the ITU in Geneva).

10. *Id.* at 4.

Professor Dr. Ernst J. Mestmäcker has advanced another important argument in favor of a universal treaty: "With the technological convergence of the information to be transmitted and the network used for the transmission, it is no longer possible to assign responsibilities or base regulations on clearly defined roles of the participants or on the character of the medium."[11] Thus, the difficulty in isolating and identifying transmitted information from its source supports the need to develop a uniform scheme to regulate international telecommunications.

II. GUIDELINES FOR FORMULATING A UNIVERSAL AGREEMENT

Where can guidelines for this new telecommunications treaty be found? Two documents serve as good examples. The Committee of Ministers of the Council of Europe adopted the European Convention on Transfrontier Television[12] ("Convention") on March 15, 1989. The Convention was adopted to conform the activities of the State-members of the Council of Europe in the field of information and communication with fundamental technical and practical changes in that sphere. In other words, the purpose of the Convention is "to achieve a greater unity" between the members of the Council of Europe, and "to present an increasing range of choice of programme services for the public."[13] These goals are consistent with, and provide justification for, creating a universal treaty on telecommunications. The Convention is the first multilateral treaty of this type. Hence, it could serve as a prototype for a universal convention on transborder telecommunications.

Since the purpose of the European Convention is to facilitate the transfrontier transmission and retransmission of television program services among Council of Europe members, the purpose of a world treaty on telecommunications would need to be much broader in scope. Article 4 of the Convention serves as a basis for defining the purpose of an international telecommunications treaty: "The Parties shall ensure freedom of expression and information . . . and they shall guarantee freedom of reception and shall not restrict the retransmission on their territories of programme services which *comply with the terms of this Convention.*"[14] The last part of the provision indicates that freedom of retransmission should not be absolute. Then what should the limitations be? Other provisions of the Convention provide a useful model.

The Convention requires that the authorization issued to a broadcaster by the competent authority of each contracting party shall clearly and adequately specify

11. *Id.* at 9.

12. European Convention on Transfrontier Television, Council of Eur., Doc. No. 132 (Strasbourg, 1989) [hereinafter *Convention on Transfrontier Television*]. On May 5, 1989, the Convention was opened up for signature by State-members of the Council of Europe, State signatories to the European Cultural Convention, as well as State-members of the European Community.

13. *Id.* Preamble, at 2.

14. *Id.* art. 4, at 3 (emphasis added).

broadcasting responsibilities.[15] These responsibilities include the following obligations: (1) to respect the dignity of the human being and the fundamental rights of others; (2) to refrain from providing indecent program service, specifically, pornography, violence, and racial hatred; (3) to refrain from providing program services which are likely to impair development of children at program times when children are likely to watch; and (4) to fairly present facts and events in the news.[16] Also, the Convention requires that the public have access to major events of high public interest.[17] Finally, certain limitations are imposed on advertising.[18]

The second document providing guidance for a universal treaty is the United Nations General Assembly Resolution 37/92 of December 10, 1982 ("Resolution 37/92").[19] This resolution contains Principles Governing the Use by States of Artificial Earth Satellites for International Direct Television Broadcasting.[20] The following are the most relevant provisions of the Principles on direct broadcasting via satellites ("DBS"):

- activities in the field of DBS should be carried out in a manner compatible with the principle of non-intervention into the sovereign rights of States, with the development of mutual understanding and friendly relation and cooperation among all States;
- all States and peoples are entitled to and should enjoy the benefits from such activities;
- access to the technology in this field should be available to all States without discrimination on terms mutually agreed by all concerned;
- activities in the field of international DBS should be based upon and encourage international cooperation;
- States should cooperate on a bilateral and multilateral basis for protection of copyright and neighboring rights by means of appropriate agreements between the interested States or the competent legal entities acting under their jurisdiction.[21]

Resolution 37/92 also recognizes the right of every State to authorize international direct television broadcasting by persons and entities under its jurisdiction and to bear international responsibility for activities in this field conducted under their jurisdiction.[22] Such activities should be compatible with

15. *Id.* art. 6, at 4.

16. *Id.* art. 7, at 4.

17. *Id.* art. 9, at 5. In Japan this goal has been achieved through the existence of the dual system of public broadcasting and commercial broadcasting. *See* J. Kurokawa, *Development of Electronic Media and the Role of the Public Broadcasting System*, First World Electronic Media Symposium 27-29 (Oct. 6-9, 1989) (available at the ITU in Geneva).

18. *Convention on Transfrontier Television, supra* note 12, arts. 11-16, at 5-7.

19. Principles Governing the Use by States of Artificial Earth Satellites for International Direct Television Broadcasting, G.A. Res. 37/92, 1982 U.N.Y.B. 173, U.N. Doc. A/37/646 (1982).

20. G.A. Res. 37/92, 1982 U.N.Y.B. at 174.

21. *Id.*

22. *Id.* Annex, Principles C & F, at 174.

the right of everyone to seek, receive, and impart information and ideas.[23] These principles provide important guidelines for a new world treaty on telecommunications.

In addition to the Convention and Resolution 37/92, there is another possible source of reference for a universal telecommunications treaty. The non-aligned countries are working towards the establishment of a new international order in the area of information.[24] Relevant recommendations which address the interests of developing countries are contained in the Final Report of the International Commission for the Study of Communication Problems published by UNESCO in 1979 ("Commission").[25] The Commission addresses the need for a universal treaty on telecommunications, and many of the ideas in the Final Report would be useful for those who undertake the initiative to draft the treaty.

CONCLUSION

A universal treaty is urgently needed. States, international organizations, and international lawyers are lagging behind the technological progress. In 1974, this author suggested the need for a universal convention on the use of mass media in light of technological advancements.[26] More than fifteen years have passed since then, and the task is still incomplete. With three international instruments available as models, there is no excuse for the world community to wait any longer to accomplish this task.

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23. *Id.* Principle A.

24. The decision was made in 1976 at the Fifth Conference of Heads of State and Government of the Non-Aligned Countries in Colombo.

25. The Commission was established as a result of Resolution 100 adopted by the General Conference of UNESCO in 1976 at its eighteenth session. The Commission started its work in 1977 and finalized the Report in 1979. The President of the Commission was Mr. Seàn MacBride.

26. Y.M. KOLOSSOV, MASS INFORMATION AND INTERNATIONAL LAW 133-50 (Moscow, 1974) (in Russian), *translated into German in Theories und Praxis des sozialistischen Journalismus*, 5 WISSENSHAFTLICHE HEFTE DER KEKTION JOURNALISTIK AM DER KARL-MARX UNIVERSITÄT 105-11 (Leipzig, 1976).