

## **International Satellite Communications and the Law**

**by Stephen E. Doyle \***

In today's world wealth begets wealth, competence earns enrichment, diligent labor produces reward, and grace is well praised. An essential corollary of such a system is that the impoverished, unskilled, indolent and awkward most often comprise by default the lowest levels of society. A fundamental question in man's relationship with man is whether or not there exists a duty upon the endowed, the talented, the swift and assured, to maintain the poor, the uneducated, the slow and incompetent.

Is there a natural duty imposed upon the *have's* to support and sustain the *have-not's*? The extent to which the reader's reply to this question is affirmative or negative, and offered as a morally, socially, economically or politically arguable conclusion, dictates the degree to which he will respond to the current commentary and opinion with regard to the emergence of a method of international control for satellite communications.

It is essential to acknowledge initially that no discussion of law is divorceable from consideration of the elemental components of law. Law, as ideas expressed, must be a synthesis of the best available moral, social, economic, political and scientific conclusions of relevance, otherwise it is not good law and can not endure. Law which does endure serves the function of ordering our societies and contributes to the maintenance of peace in our community.

The community of man today encompasses a wide range of conditions and many types of societies. In our world community the ebullient and wealthy are often close neighbors to the despondent and hungry. It is not surprising to find, ironically existing in such a community, despicable squalor and depravation in proximity to multi-million dollar machines designed to analyse and report current economic trends. Research in the physical sciences produces new marvels daily — but to what end? Beneficial application of technological achievement for the common good requires the continual maintenance of an ordered society; otherwise the technology becomes science for war.

Among the most challenging, most exciting and most demanding current programs of scientific research, in those societies with the

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prerequisite technological competence, investigation of the nature and potential utilization of outer space and man-made systems located there is undeniably dominant. Immeasurable quantities of natural and human resources are being consumed in the development of man's capacity to traverse and exploit the regions beyond the earth. The most immediately promising program emerging from the space effort is the developing program for a global satellite communications system. Planners claim that this program will ultimately provide a world-wide network of instantaneous audio, visual and data transmission facilities.

During late 1963 and throughout the spring of 1964, the United States of America pursued a series of difficult and delicate negotiations with a number of nations.<sup>1</sup> The negotiations were in preparation for an international Conference convened July 21, 1964, in Washington, D.C.<sup>2</sup> At that Conference two agreements were finalized; the first, an agreement among governments,<sup>3</sup> provides for establishment of an international consortium to organize, establish, operate and maintain an international satellite communications system; the second agreement, a pact among communication ministries and private companies,<sup>4</sup> establishes the scheme of financial commitments of participants, and provides details of system management responsibilities and contract procurement.

Thus, in addition to substantial technological advancement toward the achievement of satellite communications during 1964,<sup>5</sup> a new form

<sup>1</sup> See U.S. Department of State Press Release 328, July 17, 1964; 51 U.S. Dept. of State Bull. 167 (August 3, 1964); also Haley, *Report by the Chairman of Working Group VII*, International Institute of Space Law of the International Astronautical Federation, presented at the VIIth Colloquium on the Law of Outer Space, Warsaw, September 1964, to be published in the proceedings.

<sup>2</sup> Plenipotentiary Conference to Establish Interim Arrangements for a Global Communications Satellite System, Washington, D.C., July 21-24, 1964. The Final List of Participants included delegates from Australia, Austria, Belgium, Canada, Denmark, France, Germany, Ireland, Italy, Japan, Netherlands, Norway, Spain, Sweden, Switzerland, United Kingdom and United States. See Conference Doc. 11, July 23, 1964.

<sup>3</sup> *Agreement Establishing Interim Arrangements for a Global Commercial Communications Satellite System*, opened for signature at Washington, D.C., August 20, 1964. Conference Doc. 14, July 24, 1964. Text published at 30 J. Air L. & Comm. 264 (1964); 51 U.S. Dept. of State Bull. 282 (August 24, 1964).

<sup>4</sup> *Special Agreement*, opened for signature at Washington, D.C., August 20, 1964. Conference Doc. 15, July 24, 1964. Text published at 30 J. Air L. & Comm. 270 (1964); 51 U.S. Dept. of State Bull. 286 (1964).

<sup>5</sup> See, e.g. NASA Press Releases No. 64-195, August 9, 1964 and No. 64-204, August 14, 1964, and discussion of their significance in Haley Report, *op. cit. supra*, note 1.

of international cooperative program for space was developed. The appropriateness and legality of that program has already been challenged.

"True, it is hard to tell from the text of these agreements what is in question; a new international organization, a joint-stock company with the participation of foreign capital or an unusual hybrid of the two."<sup>6</sup> "within the problem of nation-to-nation cooperation, there is the subordinate question which is peculiar to the United States, the "private-public agency" debate as to whether the agencies which express a nation's activity in space may be privately owned..."

I hope subsequent papers will look realistically at that problem and ask whether the communications satellite system does not, by the very nature of its expression of a particular American ideological position, in the attempt to mix the private and public sectors of this activity, unduly raise certain questions in the international forum which ought not to be there. Had there been a more realistic appraisal of the international significance of mechanisms of this kind, which are going to be utilized by many states, perhaps the notion of emphasizing the private corporate side might have taken a subordinate place in American thinking." (pp. 53-54)

Consideration of Cohen's suggestion is found at length in a special study done at the Rand Corporation in California: Schwartz & Goldsen, *Foreign Participation in Communications Satellite Systems: Implications of the Communications Satellite Act of 1962*, Memo. RM 3484-RC, February 1963.

The dominant participant during the long negotiations, and at the July 1964 Conference, was the United States' Communications Satellite Corporation (Comsat). In order to appreciate the nature of the international consortium created at the July Conference, it is useful to have some knowledge of the general nature and history of Comsat.

The United States' *Communications Satellite Act of 1962* became law on August 31 of that year.<sup>7</sup> It is an Act "to provide for the establishment, ownership, operation and regulation of a commercial communications satellite system, and for other purposes."<sup>8</sup> In an accompanying Report,<sup>9</sup> the late Senator Robert S. Kerr, then Chairman of the U.S. Senate Committee on Aeronautical and Space Sciences, declared that among the stated policies of the United States, as set forth in the Act :

<sup>6</sup> Cheprov, *Global or American Space Communications System?*, International Affairs, no. 12 (December 1964 Moscow) p. 69. See also comments and discussion at the *Conference on the Law of Space and of Satellite Communications*, May 1963, Chicago, where Maxwell Cohen noted that

<sup>7</sup> Public Law 87-624; 76 Stat. 419 (August 31, 1962). The Act is discussed in detail in Haley, *Space Law and Government* ch. 7 (New York, 1963) and the text of the act is included as an appendix at pp. 485-93.

<sup>8</sup> See the preamble of the Act, *op. cit. supra*, note 7.

<sup>9</sup> Kerr, *Communications Satellite Act of 1962*, S. Rep. No. 1819, 87th Cong., 2d Sess. (April 2, 1962).

"...it is the purpose of the United States to establish, in conjunction and in cooperation with other countries, as expeditiously as practicable, a commercial communications satellite system, *as part of an improved global communications network*, which will be responsible to public needs and national objectives, which will serve the communication needs of the United States and of other countries, and which will contribute to world peace and understanding." [emphasis added]<sup>10</sup>

From the outset of the planning for spearheading development of an international communications system employing satellites, it was the natural expectation of many that U.S. participation in such a system would be in the form of a private corporation.<sup>11</sup> This expectation was consistent with the well-established practices of free enterprise and open competition which have long characterized the American economic system.

The U.S. Congress sought to insure that any services offered by the proposed Corporation, would be made available equally to underdeveloped and developed areas;<sup>12</sup> in addition, it was desired to assure that the electro-magnetic frequency spectrum would be efficiently and economically used, and that any technological advances could be applied to improve quality and reduce costs of service in the new system. The *Satellite Communications Act* of 1962 expressly provides that maximum competition in provision of services and equipment to the system, as well as non-discriminatory access to the system shall be maintained.<sup>13</sup>

In order to accomplish all these objectives, it was concluded that a private corporation should be created, and that adequate governmental controls should be provided to insure that the new corporation (Comsat) would do all things necessary for the achievement of the goals stated in the Act.<sup>14</sup>

While it is clear from the Act, and from Senator Kerr's Report, that the Comsat group is not necessarily considered *the* global network, but only "as part of an improved global communications network,"<sup>15</sup> it is equally clear that in the Comsat group, the U.S. Corporation is to have the dominant voice. Under provisions of the July agreements, Comsat is represented by sixty-one (61) percent of the total vote on the Committee established to control the con-

<sup>10</sup> *Ibid.*, p. 3.

<sup>11</sup> See as examples, sources cited at note 6, *supra*.

<sup>12</sup> Public Law 87-624; 76 Stat. 419 (August 31, 1962), s. 102 (c).

<sup>13</sup> *Ibid.* See discussion in Haley Report, *op. cit. supra*, note 1 and contrary views in Cheprov, *Global or American Space Communications System?*, *op. cit. supra*, note 6.

<sup>14</sup> See extended discussion in Schwartz and Goldsen, *op. cit. supra*, note 6; and Senator Kerr's Report, *op. cit. supra*, note 9.

<sup>15</sup> See text accompanying note 10, *supra*.

sortium. Each participating nation is given a share in the voice of control commensurate with its anticipated financial contribution to the cost of establishing and maintaining the system. The contributions are in turn dependent upon the anticipated extent of utilization of the systems traffic by each nation.<sup>16</sup>

A significant aspect of the July agreements is their transient nature. Throughout the texts of both agreements one can find frequent reference to "interim" arrangements. Article IX of the inter-governmental agreement specifically requires that the consortium Committee shall render a report to each party to the agreement, in which report the Committee is to recommend definitive arrangements for an international global system to supersede the interim arrangements contained in the existing agreements. The report is to be rendered within one year after the initial system becomes operational, but in no case later than January 1, 1969.<sup>17</sup> An international conference is to be convened by the Government of the United States of America within three months following the submission of the report. "The Parties to this Agreement shall seek to insure that the definitive arrangements will be established at the earliest practicable date, with a view to their entry into force by 1st January 1970."<sup>18</sup>

Having provided for the establishment of the Communications Satellite Corporation, and having achieved a position of control in an international organization created to implement a satellite communication system as part of a global communication network, the American people have assumed the initiative with regard to the vital field of world communications. Can a system tantamount to unilateral control of a substantial portion of future world communication systems be tolerated?

In a carefully concocted but conspicuously undocumented attack on Comsat and the consortium, I. Cheprov, a prominent Russian commentator on matters of international law, claims that the negotiations leading to the July agreements, and the agreements themselves, constitute "a vital and alarming fact : encroachment by U.S. monopoly capital on the interests of mankind in the exploration and use of outer space, specifically by setting up a global communications satellite system."<sup>19</sup> Cheprov asserts that :

"The U.S. monopolies and their servants used trickery with two agreements — intergovernmental and special — and several other artful steps

<sup>16</sup> See *Special Agreement*, Arts. 3, 4 and 5. Sources *supra*, note 4.

<sup>17</sup> See *Agreement Establishing Interim Arrangements for a Global Commercial Communications Satellite System*, Art. IX. Sources *supra*, note 3.

<sup>18</sup> *Ibid.*

<sup>19</sup> Cheprov, *Global or American Space Communications System ?*, International Affairs, No. 12 (December 1964 Moscow) p. 69.

recently undertaken, for the purpose of disguising the schemes of American Big Business and presenting them as idyllic cooperation of nations in the exploration and use of outer space for the good of mankind."<sup>20</sup>

In addition, Cheprov claims, "Comsat has a decisive voice in the space communications system; Comsat is dominated by A.T.&T., and A.T.&T., in turn, is dominated by the biggets U.S. monopolists."<sup>21</sup>

In summary, these allegations are:

- (1) U.S. monopoly capital is encroaching on the interests of mankind by setting up an international satellite communications system.
- (2) U.S. monopolies and their servants [government] used trickery in negotiating the July agreements.
- (3) U.S. monopolists control the newly formed consortium.

It is perhaps no mere oversight on the part of the author of these allegations that no substantiating facts are offered to support his contentions. These charges are not charges of illegal activity, they are made merely to obviate the possibility that the American people could be acting in this regard in the best interest of mankind. The charges laid do give rise to several questions:

- (1) How is the establishment of a communications service by nineteen<sup>22</sup> nations acting jointly in their common interest through an organization open for participation to any nation desiring to participate,<sup>23</sup> an encroachment upon the rights of mankind?
- (2) What was the nature of the alleged trickery involved in negotiations related to the July agreements?
- (3) How do U.S. monopolists control the consortium?<sup>24</sup>

Since neither the allegations nor the questioning replies can give rise to serious legal discussion, it is not intended to join the issues on their merits here. It will suffice to point out here that although there are impliedly included in these claims serious questions of law, Chep-

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<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*, at p. 72.

<sup>22</sup> On January 15, 1965, participants (with dates of signature) included: Australia, August 20, 1964; Belgium, September 29, 1964; Canada, August 20, 1964; Denmark, August 20, 1964; France, August 20, 1964; Germany, September 21, 1964; Ireland, October 5, 1964; Israel, November 30, 1964; Italy, August 20, 1964; Japan, August 20, 1964; Netherlands, August 20, 1964; Norway, August 31, 1964; Portugal, October 29, 1964; Spain, August 20, 1964; Sweden, September 28, 1964; Switzerland, September 16, 1964; United Kingdom, August 20, 1964; United States, August 20, 1964; Vatican City, August 20, 1964.

<sup>23</sup> Subject to prerequisite membership in the International Telecommunications Union.

<sup>24</sup> This arguement was discussed well in advance by Schwartz and Goldsen, *op. cit., supra*, note 6.

rov has carefully avoided statements to the effect that any law has been violated. However, he does not stop after these claims.

Cheprov argues further that the U.S. Federal Communications Commission, as the lackey of the monopolists in the United States, is the tool employed by Big Business for manipulating Comsat. This claim unrealistically flies in the face of thirty or more years experience in hotly and openly contested American governmental regulation of the American communications industry. The Federal Communications Commission, and its predecessor the Federal Radio Commission, have maintained a continual regulatory hand over the activities of American carriers since the 1920's. To equate industry regulation by an administrative agency with industry control by monopolists, is to argue for integration of two elements in the American regulatory system which are inimicable by their fundamental nature.

Allowing the argument that Big Business, acting through government, could control Comsat is to ignore the fact of the existence of the Comsat Board of Directors. This fifteen-member board is comprised of (a) three Directors appointed for three year terms by the President of the United States; (b) six Directors elected annually by the one hundred and thirty thousand (130,000) public shareholders of the Corporation, who own one half of the Corporation's outstanding stock; and (c) six Directors elected annually by approximately one hundred and sixty communications business enterprises, which own the second half of the outstanding stock. Assuming that Comsat's Board of Directors has some influence in the operation and control of the Corporation, it is arguable that at least these fifteen Americans will have influence on the nature of the emerging system.

Comsat is not the sole participant in the consortium.<sup>25</sup> The additional nations participating in the consortium Committee represent, along with the United States of America, more than eighty (80) percent of the world's international communications traffic.<sup>26</sup> The participation of all members of the Committee in each phase of the planning, procurement and operation of the system has been assured under the terms of the agreements. Since the participation of East European nations has been lacking to date, it is not unreasonable to expect that a second international system for satellite communications may emerge from that area. This is a possibility which has already been considered and discussed by stockholders and officers of the American Corporation.<sup>27</sup> If such a system does emerge, and if it is

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<sup>25</sup> See note 22, *supra*.

<sup>26</sup> *Report on the First Annual Meeting of Shareholders and Recent Developments*, Communications Satellite Corporation 4 (Washington, December 1964).

<sup>27</sup> *Ibid* at p. 12.

an economically competitive system, all nations will benefit from the maintenance of costs at a low and competitive level. In the absence of a competitive system, the Committee of the consortium will be required to make necessary provisions to assure that rates are kept at a reasonable minimum, so that all nations can be guaranteed access to the system.

The problem of rates may be temporarily avoidable until an actual operational system is established. Eventually, rate-making will emerge as a major problem for the consortium and its committee. With regard to international rates, it seems obvious that some external body or agency, capable of some measure of objectivity, and possessed of necessary expertise should participate. The ITU seems a likely prime candidate for an influential post in matters of determining just and equitable rates for international service.

One of the most essential regulatory aspects of the operation of the consortium is the existence of the International Telecommunication Union (ITU). This international organization, a specialized agency of the United Nations, is the primary international communications regulatory body. It, too, is concerned with the efficient and economical use of the electro-magnetic spectrum, and plays an important role in the determination of radio frequency utilization by the nations of the world.<sup>28</sup>

Despite the fact that the ITU has a history of one hundred years as an international regulatory body, that Union, and the much more recently created United Nations Committee on Peaceful Uses of Outer Space (UNCOPUOS), have become equally important focal points of international interest due to the developments in space since October 4, 1957. With regard to the role and significance of the ITU and UNCOPUOS in connection with the development of Comsat and the international consortium, I. Cheprov has again spoken out in dissatisfaction. According to Cheprov it is no mere accident:

"...that the agreements make no mention of the General Assembly Declaration of Basic Principles Governing the Activities of States in the Exploration and Use of Outer Space. What these agreements envisage is incompatible with the provisions of this important international document which demands that the exploration and use of outer space be effected on the basis of equality of states."<sup>29</sup>

These points should be clarified in so far as no resolution of the General Assembly regarding activities in outer space *demands* anything; further, Assembly Resolution 1962 (XVIII) of December 1963, does

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<sup>28</sup> A comprehensive and detailed study of the ITU, its purposes, structure, role and functions, is set out in Ilaley, *Space Law and Government* ch. 7 (New York, 1963).

<sup>29</sup> Cheprov, *op. cit. supra*, note 19 at 74.

not mention international communications anywhere in its text, although the well-known Resolution 1721 (XVI) of December 1961 treats satellite communications at length; and finally, no provision of the agreements can be found which is inconsistent with any provision of the Assembly Resolution 1962 (XVIII) referred to by Cheprov. The Preamble to the *Agreement Establishing Interim Arrangements for a Global Commercial Communications Satellite System* reads:

The Governments signatory to this Agreement,

Recalling the principle set forth in Resolution No. 1721 (XVI) of the General Assembly of the United Nations that communications by means of satellites should be available to the nations of the world as soon as practicable on a global and non-discriminatory basis;

Desiring to establish a single global commercial communications satellite system as part of an improved global communications network which will provide expanded telecommunications services to all areas of the world and which will contribute to world peace and understanding;

Determined, to this end, to provide, through the most advanced technology available, for the benefit of all nations of the world, the most efficient and economical service possible consistent with the best and most equitable use of the radio spectrum;

Believing that satellite communications should be organized in such a way as to permit all States to have access to the global system and those States so wishing to invest in the system with consequent participation in the design, development, construction (including the provision of equipment), establishment, maintenance, operation and ownership of the system;

Believing that it is desirable to conclude interim arrangements providing for the establishment of a single global commercial communications satellite system at the earliest practicable date, pending the working out of definitive arrangements for the organization of such a system;

Agree as follows:

It is certainly true that this preamble has failed to mention General Assembly Resolution 1962 (XVIII), just as it failed to mention countless other Assembly Resolutions which, like Resolution 1962 (XVIII), contain no reference to principles applicable to satellite communications. But the agreement does contain reference to, and in fact borrows language from, the most recent Assembly Resolution containing declared principles applicable to space communications. Such provocative doubletalk with regard to U.N. General Assembly Resolutions is not likely to encourage international understanding.

In concluding his remarks, Cheprov observes that:

"The much-promising declaration of U.S. statesmen on international cooperation in space communication will remain so many words as long as the monopolies run the show. The first provision for a change for the better is to transfer the entire range of questions pertaining to space communication to the corresponding organizations. There is no need to create such organizations, for they have existed for a long time: first and

foremost the U.N. Committee on the Peaceful Uses of Outer Space and the International Telecommunication Union.

The United Nations is undoubtedly capable of making a prime contribution to truly international co-operation in space communication. Attempts to ignore it can only impair the prestige of the Organisation.<sup>30</sup>

What is meant by "the entire range of questions pertaining to space communication," is not explained. Whether UNCOPUOS is now or ever was intended to deal with matters of construction, operation, maintenance, or other functions within "the entire range of questions pertaining to space communication," is open to serious debate. The questions of regulation and international coordination of communications belong to, and are assigned to the ITU; but it has never been the actual or intended function of the ITU to act as an operator of communication systems, except for its internal needs. Exactly what kind of question should be transferred to these "corresponding organizations" beyond those already assigned, is another unanswered puzzle.

Within the more than one hundred and twenty-five nations of our world community there are many competent and sincere commentators capable of producing well-reasoned arguments of constructive criticism of existing and emerging systems of international control for space communications. In due time many of these views will appear to stimulate meaningful discussion and achievement of sound and workable agreements for the maximum utilization of the gifts of technology. It is to be expected, and indeed to be hoped, that the existing regime of international control of world communications will be modified to assure the widest possible participation of nations.

A serious question for consideration today is whether or not a nation, any nation, has a *right* to share advantages which are obtained from technology. If such a right exists it must be explained so as to be clearly understood by those who will make the decisions in the future. As the world is already well advised that there is a substantial gap between "recognition" and "attainment" of rights, it should be clearly understood that such thinking must be begun now.

The thinking will not automatically produce the solution to the many problems which will arise. Thinking alone is but a fertile seed; that seed must be planted, nurtured, protected and supported in the openly hostile world of unstable lands, barren and battle-cleared fields, and unhospitable climates in which attacks are often made for the sake of attacking.

The next major milestone for implementing decisions with regard to the permanent organization of international satellite communica-

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<sup>30</sup> *Ibid.*

tions will be reached in 1969. During the interim diplomats and lawyers will accomplish much more understanding and agreement, if they clarify in their discussions the nature of the topics discussed. The present *Agreement Establishing Interim Arrangements for a Global Commercial Communications Satellite System*, as a duly drawn and executed international agreement, is a part of international law. Discussions of its efficacy, political desirability, economic soundness, or social significance are all in order. What must be avoided, in order to prevent confusion and useless bickering, is the treatment of political aspects of the problem as "legal", or the voicing of economic criticism of organizational structures as challenges of legal validity. The component elements of the law must be discussed, in their individual perspective as elements and in their interrelation in their final synthesis into an idea expressed as law.

The achievement of a sound and lasting international agreement for the organization, management and control of international satellite communications necessarily presumes extended discussion. When a consensus can be reached, will be determined by the point in time when discourse is begun, the seriousness and sincerity with which it is pursued, and the reasonableness of the discussants in their demands. Oblique and vindictive statements lead to disruption of communication and discontent. Parties must communicate with rapport if agreement is ever to be reached.

In all discussions of law and facts, close thought and precise expression are absolutely essential. No better guide is available to the lawyer or to the statesman, than the exhortation to speak concisely with meaning, in precise language and clear style, and to have given the listener the benefit of an objective look at what is said.