

## A Charter of Contradictions

By Monroe E. Price

**March, 2008.** Seen in its best light, the Arab Satellite Charter adopted by the Arab League last month reflects the increasing recognition of the need for regional cooperation in the information field; the importance of clarifying which state has the power over what signals; and the demand for ethical legal principles that would govern transregional communication in the satellite realm. The final document, however, was something of a jumble, a potent mix of over-regulation and unclear direction (Qatar and Lebanon abstained in the vote among Ministers of Information to approve the document). In the Charter, the vocabulary of modernization collides with the rhetoric of tradition; the realities of political change conflict with the desire to preserve the status quo. Human rights discourse is interpreted and reshaped to fit the Middle East environment. The language of authority reflects difficulties with satellite regulation questions elsewhere. Not surprisingly, a charter of contradictions emerges from a society in which such contradictions abound.

The document has an Orwellian rhythm of expansive openness coupled with zones of prohibition: it calls for the main actors in the region to “abide by freedom of expression as a cornerstone of Arab media, provided that such freedom is practiced with full conscious and responsibility, in respect to protecting the supreme interests of the Arab countries, the Arab world, the freedoms and rights of others and commitment to media professionalism and ethics.”

Is the Charter, as its critics charge, censorial, overbroad and harshly restrictive? The document is encyclopedic in its listing of areas of potential program control. Here are some examples that would keep broadcasters (and their investors) up at night: under the Charter, crime should not be depicted in a tempting way, nor criminals rendered

heroic; leaders should not be insulted; sovereignty should not be undermined; Arab identity must be nourished against modernization; religions and religious officials should not be offended; gender and race and color must be treated gingerly; incitement to terror and violence is prohibited (though there is an exception for encouraging resistance to “occupiers”).

As an ethical matter, each ground for regulation or ethical limits is, of course, an area where broadcasters and the public should be in discourse. But when all of these are wrapped into issues of licensing and access to satellites, the measures prescribed can be toxic. The document is utopian in terms of its desire for harmony but dystopian in its potential for noxious interference in day-to-day programming decisions.

Quick and broad negative reaction to the Charter was mixed with some approving voices. Of course, groups from the West—the international non-government organizations concerned with the prerogatives of the press and the rights of individuals—chimed in immediately. There were strong remonstrances from organizations such as Article 19, concerned with the freedom to receive and impart information, and Reporters Sans Frontieres, concerned with the rights of journalists and the press.

But that was hardly all. Abd-al-Bari Atwan, editor-in-chief of *al-Quds al-Arabi* in London, represented one current of thinking about the Charter. In a panel discussion organized by Al Jazeera the day the Charter was issued, Atwan argued that it was drafted because “the repressive, dictatorial Arab governments have begun to realize that Arab public opinion is moving strongly” and Arab information ministers have hastened to “bury this awakening in Arab public opinion” by enacting legislation to “gag and criminalize Arab media.” The priority of the ministers of information, he suggested, was to protect the regimes that made those decisions. The objective of the Charter, he argued, was not to uphold Arab values and ethics, but “to preserve those repressive measures by governments that engage in torture and corruption, squander public funds, and violate human rights.”<sup>1</sup>

During the live discussion, Al Jazeera, whose editorial position critical of many Arab governments has made it one of the supposed targets of the Charter, presented a video report from Nabil al-Rihani, in which Rihani, somewhat supportively of the document, pointed out that the regulation of Arab satellite channels was motivated by

threats to the more mature channels “generated by a large number of profit-seeking channels that aim to attract viewers by nudity, charlatanry, and sectarianism.”<sup>ii</sup>

Competition yielded a race to the bottom, he argued, where civility would be sacrificed and sensationalism and lack of objectivity would prevail.

Some claim that the Charter is so cumbersome as to be ineffective and would not additionally influence state action. Others argue that the Charter is not a subject for worry: that the standards are designed as a “code of honor,” a matter for self-regulation rather than state enforcement. That reading is debatable; more likely an actual encasing of standards in licenses is foreseen. Already there are accounts that the Charter served to justify additional restrictions by Egypt in contracts for the use of Nilesat; such restrictions might also be imposed on the use of production facilities in Media Cities in Egypt and elsewhere.

There is no question that the Charter gives additional political cover to governments that wish to impose more restrictions, and the Charter seems to bring in a new order of pervasive licensing and authorization—or at least legitimate more extensive supervision. Certainly, transmission and retransmission services may or should be licensed under the Charter. But as the document is currently written, even program provisions seem susceptible to regulation.

Many people have commented on the restrictions outlined above. Let me turn to what might become an overlooked aspect of the Charter that sheds light on the complexity of power and jurisdiction in this legal area. The Charter seems to adopt an important principle from the Council of Europe’s Convention on Transfrontier Television<sup>iii</sup> (also embodied in the EU’s “Audiovisual Without Frontiers” Directive), a document designed to settle rules on satellite broadcasting within an extended Europe.

European leaders recognized that if satellite signals were subject to the laws of each member state, it would be too costly or impossible to use the new broadcasting technologies effectively, paralyzing the growth of the industry. Therefore, under the European Convention, the legality of a satellite service’s program is measured by its status in the “country of origin”—the country where the satellite broadcast channel is officed or established (assuming that country is a member state). If a satellite channel (say Arte) is established in or linked to Germany, and it is thought to be lawful in

Germany, its retransmission cannot be restricted in France or any other member-state. The receiving state cannot forbid cable systems from retransmitting the signal, and access to satellite dishes cannot be impeded.

There are many important questions that the “country of origin” principle raises. But what’s significant in the European context is that there is just *one* country of origin—that is the indispensable, vital business and cultural aspect of this jurisdictional settlement.

In the Arab Satellite Charter there is, at best, an ambiguity. The Arab Charter seems in one clause (Article 5 (3)) firmly to adopt the “country of origin” principle. If it held to this principle, the consequences could be interesting. Al Manar, established in Lebanon, would be governed by the laws of Lebanon. Al Jazeera, established in Qatar, would be governed by the rules of Qatar. If the mainstream definitions of “country of origin”—where the channel was officed or established—were followed (they are a bit more complicated than I have space to argue them here), then Egypt would not have power to regulate Al Jazeera’s retransmission or receipt (though as proprietor of Nilesat, it may have power to exclude it). In Europe, member states, in some instances, can complain to the member state of origin—for example, where there are thought to be moral hazards to children—but the circumstances are few and the conditions fairly onerous.

Arrangements on this question under the Charter are not clear. At the same time that it trumpets the country of origin principle, the Charter, in Article 5 (2), emphasizes a law of national sovereignty providing to each country member in the League of Arab States the right to enact related detailed laws and regulations upon its own discretion. And elsewhere it seems to say that any state that has a major connection to a satellite broadcaster can be its country of origin. If this interpretation bears out, then the real value of the country of origin test is lost and many states can get into the fight over the standards to be used with respect to any signal.

The country of origin rule was essential for building a “common market” in Europe. Much the same point could be made to develop a common market of information and broadcasting in the Arab world. Moving toward the traditional “country of origin” rule in the Arab World would be monumental as a step toward legal

simplification and would reduce burdens on the flow of information. It would reinforce something which is already going on: a competition among Arab states to house satellite services and provide an environment in which such services could flourish. States such as Jordan, Lebanon and the United Arab Emirates would compete to establish a legal framework that, within reason, would be hospitable to satellite services.

Unfortunately, that goal, though pointed to in the Charter, may not be realized. It's hard to tell from the somewhat skeletal structure of the Charter—a statement of principles to be sure—how committed the drafters were to the rule. Nor can it be predicted how such a rule would play itself out.

Let me close with a final point. Advocates of the Charter argue that its principles, approach, and philosophy of the state mirrors developments in satellite regulation that have already occurred elsewhere in the world, even in the freedom-professing West.

We can start from a truism. Over the last two or three decades, as the world has moved from almost exclusive reliance on a highly regulated licensed terrestrial broadcasting system to one where, as a result of the shift to satellites, cable and the Internet, the opportunities (or possibly appetites) for regulation have decreased. For a while, it seemed that this shift implied (or required) a reduced level of state control and management. But dangers and perceptions of dangers (moral, physical and political) endure, and the penchant to establish limits, impose punishments and standards and choke off communication is as alive as ever. Regulation is resurgent.

A bit of history is helpful, when it comes to thinking how states have felt about the power of satellites and their relationship to national sovereignty. In the beginning, with the founding of Intelsat, control occurred through exclusive governmental or intergovernmental ownership of all satellites, making it simple for states to decide who had access to the satellite's transponders. Even today, with all the privatization, remnants of this policy remain in Eutelsat, and more markedly in Nilesat or Arabsat. As satellites became privatized, another issue became salient: namely whether any government (and on what basis) should regulate or control what signals could be carried and where those signals could be delivered.<sup>iv</sup>

The international debate about these questions has gone through several phases. There was the extensive debate (that ended in tatters) in the late 1970s at the UN to

design a system of international standards. At that early point, some states proposed a *consent regime*, in which states agreed that no signal would be directed at the territory of a state that did not agree to receive it. Together or in addition, there was also a proposed *standards regime* whereby Treaty states would assure that no signals would be carried that violated agreed international norms. Neither approach was adopted as binding law.

With the rapid growth of satellite capacity and increasing privatization and competition in the 1970s, regulation, by and large, took a back seat. But in the post 9/11 world, there are renewed attempts at regulation and control. The considerations that informed the first stage—the UN debate—are present again, but the geopolitical considerations mean that many of the key players occupy different positions. During the NATO bombing campaign of 1999, the United States and its allies persuaded Eutelsat to shift a Serbian channel off its transponders. France has restricted Al Manar's access to Eutelsat and the United States has followed suit, invoking anti-terrorism laws. And in the recent debate to modernize the Television without Frontiers Directive (making it an "Audiovisual Without Frontiers" counterpart), many European states sought (more or less unsuccessfully) to gain more sovereignty than the country of origin principle allowed.

In Europe and the United States, there is both more leeway for programming and more calls for regulation, especially in the interests of children and in reaction to perceived national security threats. But—at least at the moment—none of these efforts have the deadening capacity to restrict or punish satellite services that could occur under the Charter. There are abuses, to be sure, and there are exceptions. But nowhere in Europe or the United States is there so pervasive a declaration of principles of restriction; nor is there such a continued threat of multiple powers, multiple authorities that can have the right to set rules; nor is there anywhere near the threat to limit criticism and insult the authorities. Vague words and potentials for the exercise of authority are the feasting place of authoritarian governments.

There might be reasons to have an Arab Broadcasting Charter. There may be issues of power to be clarified. And the pressures of commercialization, modernization and threats to security may well necessitate novel approaches to regulation. Perhaps a charter, subject to additional debate and refinement, can serve generally desirable purposes. But more work will have to be done to achieve a workable regional system of

harmonization consistent with an effective flow of information and entertainment in a way that meets agreed international standards.

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<sup>i</sup> BBC Monitoring World Media, "Al-Jazeera pundits discuss proposed Arab satellite TV regulations," February 20, 2008 [Source: Al Jazeera TV, February 12, 2008]

<sup>ii</sup> Ibid.

<sup>iii</sup> <http://conventions.coe.int/Treaty/EN/Treaties/Html/132.htm>

<sup>iv</sup> Privatization and competition of the satellites removed one of the more automatic modes of control. See Kenneth Katkin, Communication Breakdown?: The Future of Global Connectivity After the Privatization of INTELSAT, 38 Vand. J. Transnat'l L. 1323 (2005)