



COMMENT

on

Draft Journalist Protection Law of Iraq

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I. INTRODUCTION

1. In this Comment, ARTICLE 19 analyses the draft “Journalist Protection Law” [*sic*] (hereinafter the “Draft Law”) that is currently before the Iraqi legislature and is being discussed by stakeholders within Iraq.¹ Over the past two years, legislation on the protection of journalists has been the subject of vigorous discussions in Iraq, encompassing key Iraqi journalists’ organisations (notably the Iraqi Journalists’ Syndicate), international intergovernmental organisations (notably UNESCO) and NGOs (notably ARTICLE 19). ARTICLE 19 first commented on an earlier version of proposed legislation on the protection of journalists (“earlier version of the Draft Law”) in August 2009 in its *Comment on the Draft Journalists Protection Law of Iraq*.² In that Comment, ARTICLE 19 made a number of critical observations and a series of recommendations. That Comment identified “two cross-cutting problems” that characterised an earlier version of the Draft Law:

first, the Draft Law’s apparent prioritisation of journalists as holders of human rights by affording them a higher level of protection than that which is accorded to other members of Iraqi society (see provisions on “violations” against journalists and compensatory measures); *second*, the significant direct and indirect restrictions upon the exercise of the right to freedom of expression imposed by various provisions (such as those on the protection of sources and the de facto licensing of journalists) which appear to contradict the Draft Law’s essential purpose of protecting journalists.

2. In ARTICLE 19’s opinion:

the brevity and narrow focus of the [earlier version of the] Draft Law on the protecting of journalists obscures the fact that what many, indeed most, of the substantive provisions achieve is the exact opposite – significant restrictions of journalistic freedom of expression and other human rights in Iraq at a time when their reinforcement is most needed. In ARTICLE 19’s view, such restrictions on journalistic freedom of expression and other human rights are in clear violation of Iraq’s international legal obligations.

3. These criticisms remain as pertinent today in relation to the current version of the Draft Law as they were in August 2009 in relation to the earlier version. We are extremely disappointed that the current version of the Draft Law does not address these fundamental flaws of the earlier version of the Draft Law that were identified in August 2009: the drafters of the Draft Law have apparently completely overlooked such international-law based criticism of the earlier version of the Draft Law. At the same time, ARTICLE 19 is aware that the current discussions in Iraq lend themselves to a more rigorous consideration of the Draft Law from an international human rights perspective. We very much hope that our criticisms of the Draft Law and our recommendations for its reform are taken on board by the Iraqi legislature and are supported by stakeholders, including journalists’ organisations.

¹ See Annex II. The English translation of the Draft Law was obtained from Iraq Office of UNESCO in April 2011. In recent years ARTICLE 19 has produced numerous reports on the state of media freedom in Iraq. See most notably *Free Speech in Iraq: Recent Developments* (London, August 2007). ARTICLE 19 has also analysed an earlier version of the Draft Law in August 2009. See *Comment on Draft Journalists Protection Law of Iraq*, August 2009 <http://www.article19.org/pdfs/analysis/iraq-comment-on-draft-journalists-protection-law.pdf>

² See *Comment on Draft Journalists Protection Law of Iraq*, August 2009 <http://www.article19.org/pdfs/analysis/iraq-comment-on-draft-journalists-protection-law.pdf>

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4. At the outset of this Comment, ARTICLE 19 emphasises a number of general points. In ARTICLE 19's opinion the Draft Law is: counterproductive to its apparent objective of protecting journalists in Iraq; stands contrary to various provisions of international human rights law on freedom of expression, as well as other rights such as freedom of association by among other things establishing a *de facto* system of licensing; creates the reality and entrenches the perception of a hierarchy or two-tier system in Iraqi law with journalists apparently benefitting from a "higher" standard of protection than other individuals; is unfair because its application depends on whether type of attack is deemed a "terrorist act" and whether the victim is a journalist and a member of the Iraqi Journalists Syndicate; and refers to access to information for journalists, but does not properly protect the right to information as a human right for everyone in Iraqi domestic legislation. All these features and others which are indicated below stand to have profoundly negative consequences for Iraqi journalists and media and, more generally, the embedding of a system of governance that respects democracy, the rule of law and human rights in Iraq.

II. THE CONTEXT OF THE DRAFT LAW

1. International Legal Context

5. This Comment is informed by relevant provisions of international human rights law, in particular those on the right to freedom of expression and the right to information as protected by Article 19 of the International Covenant on Civil and Political Rights (hereinafter "ICCPR"), which Iraq ratified on 25 January 1971.³
6. It is recalled that Article 19 of the ICCPR states:
 1. Everyone shall have the right to hold opinions without interference.
 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.
7. Other relevant rights include the rights to life (Article 6 of the ICCPR), the right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment (Article 7 of the ICCPR), the right to liberty and security (Article 9 of the ICCPR), the right to a fair trial (Article 14 of the ICCPR), the right to freedom of association (Article 22 of the ICCPR), the right to non-discrimination (Articles 2 and 26 of the ICCPR).⁴
8. As a result of ratifying the ICCPR, the state of Iraq is not only bound as a matter of international law by the provisions of the ICCPR, but is obliged to give effect to that

³ See UN Treaty Collection http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en

⁴ For the full text of the ICCPR see <http://www2.ohchr.org/english/law/ccpr.htm>

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treaty through national legislation.⁵ This obligation applies to all the organs of government, including the judiciary.

9. Given the particular subject of the Draft Law, it is important to recall that there are a few, specific provisions of international humanitarian law on the protection of journalists in armed conflict. Most notably, Article 79 of Additional Protocol I of the Geneva Conventions concerns the protection of journalists engaged in dangerous professional missions in areas of armed conflict.⁶ Iraq ratified Additional Protocol I on 10 April 2010 and is therefore obliged to give domestic legal effect to it. In addition, Security Council Resolution 1738 of 23 December 2006 on the protection of journalists in armed conflict emphasises that “journalists, media professionals and associated personnel engaged in dangerous missions in areas of armed conflict shall be considered as civilians and shall be respected and protected as such ...” and “[a]ffirms that it will address the issue of protection of journalists in armed conflict strictly under the agenda item ‘protection of civilians in armed conflict.’”⁷
10. Whilst international humanitarian law applies only in situations of armed conflict, whether international or non-international, the obligations flowing from international human rights law apply *at all times*. Whether Iraq today meets the threshold of armed conflict for the purposes of international humanitarian law is unclear. It is important to stress that the legal protection accorded to journalists is the same as other individuals or civilians (in situations of armed conflict) under international human rights and humanitarian law. Journalists are not accorded a special, higher degree of protection than other individuals under these international legal regimes – as purportedly established by the Draft Law for Iraqi journalists.
11. The legal context of Iraq is also informed by the Arab Charter on Human Rights, which was adopted by the Arab League on 22 May 2004.⁸ Although this Charter has been criticised for its significant deficiencies as a human rights instrument,⁹ even it contains an express guarantees of the right to freedom of expression and the right to information.¹⁰

2. Factual Context

⁵ Articles 2(1)(b), 14(1) and 16, Vienna Convention on the Law of Treaties 1969.

⁶ Article 79 of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 states: “1. Journalists engaged in dangerous professional missions in areas of armed conflict shall be considered as civilians within the meaning of Article 50, paragraph 1. 2. They shall be protected as such under the Conventions and this Protocol, provided that they take no action adversely affecting their status as civilians, and without prejudice to the right of war correspondents accredited to the armed forces to the status provided for in Article 4 A (4) of the Third Convention. 3. They may obtain an identity card similar to the model in Annex II of this Protocol. This card, which shall be issued by the government of the State of which the journalist is a national or in whose territory he resides or in which the news medium employing him is located, shall attest to his status as a journalist.”

⁷ A/RES/1738 (2006), 23 December 2006. For commentary on the issue, see Alexandre Balguy-Gallois, “The Protection of Journalists and News Media Personnel in Armed Conflict” *International Review of the Red Cross* Vol 86 No 853 [2004] 37-67.

⁸ Arab Charter on Human Rights reprinted in 12 Int'l Hum. Rts. Rep. 893 (2005), entered into force 15 March 2008.

⁹ These deficiencies include the approach to the death penalty for children and problematic provisions on the rights of women and non-citizens. See the comments of the UN High Commissioner of Human Rights, Louise Arbour, upon entry into force of the Arab Charter on Human Rights, 30 January 2008.

¹⁰ Article 32, Arab Charter of Human Rights.

12. The “protection” of journalists has been a pressing issue in Iraq over the past few years. Reports of various organisations – including the Committee to Protect Journalists,¹¹ International Federation of Journalists¹² and Reporters Without Borders¹³ – demonstrate how journalists in Iraq require “protection” in relation to three forms of “attack”: *first*, targeted killings, physical attacks and harassment; *second*, arbitrary arrest and detention on the basis of criminal defamation allegations or charges; *third*, damage to and confiscation of journalists’ property and tools, including their notes, recording equipment and cameras. Estimates of the number of journalists who have been killed range from 149 journalists killed since 1992¹⁴ to 250 since the US-led invasion in 2003.¹⁵ Despite the drop in deadly attacks against journalists in Iraq recently, the striking lack of accountability for such killings and other attacks has led to a situation of impunity in respect of crimes committed against journalists. The combined effect of the various forms of attacks on journalists and the associated impunity has undoubtedly been a “chilling effect” on journalists’ exercise of freedom of expression in Iraq and, consequently, a restraint on the role of the press as a “watchdog” on the state.
13. Against this factual backdrop, it is perhaps not surprising that there are significant efforts within Iraq today to shore up the protection for journalists. However, the issue is whether legislation of the kind that is currently being proposed in the form of the Draft Law is what is actually needed in response, or whether there are other more appropriate and effective measures to improve the safety of journalists and improvement of their working conditions. Such measures may include: the implementation of the state’s international legal obligations; enhanced resources and training for law enforcement officers, prosecutors and the judiciary; right to information legislation; and legal reform of criminal defamation laws. In ARTICLE 19’s opinion such measures are better methods of protecting journalists than that which is currently presented by the Draft Law. Furthermore, the protection of journalists necessarily requires the full protection of journalists’ human rights as human rights for all, in particular their freedom of expression, upon which the exercise of their profession and a healthy democracy depends.

III. ANALYSIS OF THE DRAFT LAW

14. In this section ARTICLE 19 sets out the flaws of the Draft Law from an international human rights perspective, with a specific focus on freedom of expression and the right to information, and highlights recommendations for amending the Draft Law.

1. Rationale

15. According to its title, the broad objective of the Draft Law is to provide journalists in particular with “protection”. ARTICLE 19 notes that the “protection of journalists” is an extremely unusual subject for national legislation. As indicated above, journalists do not need singling out for specific protection under international human rights law: they receive all the protections and guarantees afforded to other individuals under international

¹¹ See Committee to Protect Journalists Survey on Iraq <http://cpj.org/killed/mideast/iraq/>

¹² See International Federation of Journalists on Iraq <http://mena.ifj.org/en/tags/107/contents>

¹³ See Reporters Without Borders on Iraq <http://en.rsf.org/iraq.html>

¹⁴ Committee to Protect Journalists on Iraq <http://cpj.org/killed/mideast/iraq/>

¹⁵ See International Federation of Journalists, “IFJ Warns of Iraq Terrorism As Journalist Dies in Mass Killing” 31 March 2011 <http://www.ifj.org/en/articles/ifj-warns-of-iraq-terrorism-as-journalist-dies-in-mass-killing>

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human rights treaties and other instruments. As already noted, while international humanitarian law contains specific provisions on the protection of journalists, these provisions apply in situations of armed conflict and do not accord them a higher level of protection than ordinary civilians in any event.

16. The final (unnumbered) provision of the Draft Law states that its more specific “rationale” is

[t]o provide necessary protection to journalists and secure the rights of journalists and their dependents in case of martyrdom due to a terrorist act or injury.

17. There are a number of problems with this stated goal. *First*, it assumes that the provisions contained in the Draft Law will provide the “necessary protection to journalists” and will “secure” the rights of them and their dependents. This Comment demonstrates that the provisions of the Draft Law serve to undermine rather than enhance the protection of journalists.

18. *Second*, the stated rationale assumes that it is possible to easily identify what is “martyrdom” and even what is a “terrorist act”, when such terms are actually challenging to define. It is assumed that “martyrdom” refers to the killing of a journalist as a result of a terrorist attack. However, the word martyrdom assumes that any journalist who has been killed as a result of a terrorist attack is a “martyr”, with all the religious and/or nationalistic ideas that that term connotes. In ARTICLE 19’s view, any references to the term should be completely deleted from the Draft Law.

19. The definition of terrorism has proven difficult and controversial in international law. The UN Security Council has defined “terrorist acts” as

criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.¹⁶

20. Although this is a definition set down by the Security Council in a resolution and is therefore part of international law, the drafters of the Draft Law may well have worked on the basis or the assumption of a different definition of what is a terrorist act.

21. Even if the concept of terrorist act were clear, it is problematic from a moral perspective to justify special protection to journalists apart from the rest of society as the Draft Law implies. The rationale of the Draft Law sets up a divide between how the state responds to attacks on journalists which may result in their death (presumably what is meant by “martyrdom”) and attacks on other members of society.

22. *Third* and relatedly, the rationale also suggests that violent attacks on journalists that are carried out by Iraq’s state authorities (such as the police) or agents (such as armed groups who are funded by state authorities) – rather than individuals who might be more easily labelled “terrorists” – are not subject to its provisions.

¹⁶ UN Security Council Resolution 1566 adopted unanimously 8 October 2004.

23. Thus, if adopted, the Draft Law would be profoundly unfair in its application because its application depends on *the type of attack* and on *whom*: if the type of attack is deemed a “terrorist act” then the action is covered by the scope of the Draft Law, while if the act is committed by an authority or agent of the Iraqi state itself, then the action is most likely not covered; if the victim is a journalist and member of the Iraqi Journalists Syndicate he/she is covered, otherwise not. The Draft Law would be extremely difficult to apply in practice because of the evidential challenges of demonstrating that the attack in which a journalist or journalists were killed or injured was actually a “terrorist act”.
24. For these reasons, the rationale for the Draft Law should be totally revised and amended. In ARTICLE 19’s opinion, the “protection of journalists” may be a subject for legislation *but only* where such legislation would strengthen Iraq’s implementation of its international legal obligations, particularly on the right to freedom of expression and the right to information.

Recommendation: The Draft Law should be amended to provide that its “rationale” is to strengthen Iraq’s implementation of its international legal obligations, particularly on the right to freedom of expression and the right to information as protected by Article 19 of the ICCPR.

2. Preamble

25. In ARTICLE 19’s view, the Draft Law should begin by recalling and consolidating the weak protection of the right of freedom of expression in the Article 36 of the Iraqi Constitution.¹⁷

Recommendation: The Preamble of the Draft Law should provide that the purpose of the Draft Law is to implement Iraq’s international legal obligations on the right to freedom of expression and the right to information as protected by Article 19 of the ICCPR.

3. Definition of “Journalist” and the Role of the Iraqi Journalists Syndicate

26. According to Article 1(I), the Draft Law “shall be applied to Iraqi journalists”. Article 2 of the Draft Law also states:

This Law aims at providing protection for Iraqi journalists in the Republic of Iraq and securing their rights.

27. Article 1(II) states:

For the purposes of this Law, a journalist shall be each member of the Journalists Syndicate.

28. Thus, membership of a particular journalists’ association, the Iraqi Journalists Syndicate, is the crucial and defining characteristic of who may be considered a journalist for the purposes of the Draft Law. This provision demonstrates more clearly than any other the central role of the Iraqi Journalists Syndicate to the Draft Law.

¹⁷ As approved by referendum on 15 October 2005. For a critique of constitutional provisions on the right to freedom of expression and freedom of the press see *Free Speech in Iraq: Recent Developments* (London, August 2007), chapter one.

29. There are two very significant legal problems with this approach. *First*, requiring any journalist to be a member of a particular association or union, such as the Iraqi Journalists Syndicate, is effectively setting up a licensing scheme for journalists and “closed shop” in violation of the individual’s rights to freedom of expression as well as freedom of association, as protected by the ICCPR and other human rights instruments.
30. More specifically, Article 1 effectively establishes a form of licensing scheme for journalists in breach of the right to freedom of expression. The right to work as a journalist belongs to everyone, irrespective of qualifications. This provision simultaneously puts a significant degree of political power in the hands of the Iraqi Journalists Syndicate and potentially restricts the independence of all journalists wishing to operate in Iraq. In responding to arguments put forward by Costa Rica and its supporters that a requirement for journalists to become members of a *colegio* (association) was legitimate, the Inter-American Court has found that licensing through restrictions placed upon access to journalism, harmed rather than enhanced public order, was counterproductive to the public’s right to be informed and failed to meet the necessity test for restrictions *on freedom of expression*. The Inter-American Court concluded that a scheme establishing compulsory membership in an association prescribed by law for the practice of journalism is a violation of freedom of expression.¹⁸ Regional and international intergovernmental organisations’ representatives on freedom of expression have supported this position.¹⁹
31. From a *freedom of association* perspective, a person has choice whether she/he will belong to a union or not, and that in the former case, that she/he is able to choose the union.²⁰ The choice whether to join a union and, if so, which union to join is totally taken away from journalists by Article 1(II). The Draft Law needs to be revised in order to uphold the right of journalists *not* to join any union including the Iraqi Journalists Syndicate.²¹
32. *Second*, the Draft Law does not actually define the professional characteristics of who is a journalist. In order to properly secure the rights of journalists, the Draft Law should properly define who is a journalist. Its scope should also cover other media workers, who often face the same types of attack as journalists themselves.

Recommendation: Articles 1 and 2 of the Draft Law should be amended to provide that its protections apply to all journalists and media workers operating in Iraq. It

¹⁸ *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion, OC-5/85 of 13 November 1985, Series A No 5 (Inter-American Court of Human Rights).

¹⁹ See the 2004 declaration of the three special mandates – the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of Media and the OAS Special Rapporteur on Freedom of Expression – which stated: “Individual journalists should not be required to be licensed or to register”; Special Mandates Joint Declaration of 18 December 2003.

²⁰ The European Court of Human Rights has held that that the “negative aspect” of freedom of association (i.e. the right not to join or withdraw from a trade union) is a necessary complement to a correlative of and inseparable from its positive aspect (i.e. the right to join a trade union). The Court has held that, although compulsion to join a particular trade union, may not always be contrary to this right, a form of such compulsion which strikes at heart of freedom of association may constitute an interference with the freedom. See *Sigurjonsson v Iceland* Application No 16130/90 Judgement of 30 June 1993 (European Court of Human Rights).

²¹ *Young, James and Webster v UK*, Applications Nos 7601/76, 7806/77 Judgment of 13 August 1981 (European Court of Human Rights).

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should provide that a journalist is defined as any natural person who is regularly and professionally engaged in the collection and dissemination of information for the public via any means of mass communication.²² The Draft Law should also provide that a media worker is defined as any person who has professional relations with journalists, such as researchers, editors, publishers or producers.

33. A reading of Article 1 of the Draft Law in isolation may lead to the assumption that foreign journalists operating within Iraq are excluded from its scope. However, Article 15 states:

Local and foreign media bodies operating in the Republic of Iraq shall commit to conclude employment contracts with journalists working therein according to a form to be prepared by the Journalists Syndicate, and a copy of the contract shall be deposited thereat.

34. This provision means that all media organisations working in Iraq – whether Iraqi or foreign – are obliged to sign business contracts with journalists working for them on the basis of a form prepared by the Iraqi Journalists Syndicate. Given that all media organisations and journalists are compelled to agree sign such contracts, it seems that the signature of such a contract is a condition for both the operation of media enterprises but also the profession of a journalist. Thus, the provision establishes a *de facto* registration scheme, albeit with the involvement of a journalists' association. International human rights bodies have expressed their concern that registration requirements on the print media are “unnecessary and may be abused and should be avoided.²³ Depending on the degree of personal details of journalists contained in these contracts and whether journalists are told that they will be submitted to the Syndicate, the provision might also infringe upon the privacy rights of the journalists.

35. The important role of the Iraqi Journalists Syndicate in disputes involving journalists' employment contracts is also indicated in Article 16 which states:

- I. The Journalists Syndicate shall be informed in order to settle disputes, if any, before the expiration of the journalist employment contract.
- II. If settling the dispute between the journalist and his/her employer is impracticable, provisions of Labor Act No. 71 of 1987 shall be applied.

Recommendation: Articles 15 and 16 of the Draft Law should be omitted.

4. Protection of Journalists

36. Several provisions of the Draft Law together provide for a “system of protection for journalists” in particular against physical attacks. Article 9 of the Draft Law states:

Any person who assaults a journalist while on or because of duty shall be sentenced to the same sentence set for those who assault an officer while on or because of duty.

37. There are several fundamental weaknesses with this provision. *First*, the meaning and scope of “officer” is unclear and therefore difficult to implement. Is it intended to cover a law-enforcement official such as a police officer, or is it supposed to cover government or public employee more generally? *Second*, any “assault” of a journalist “while on or

²² See the definition of journalist in Council of Europe Recommendation No. R(2000) 7 adopted on 8 March 2000.

²³ See above the Joint Declaration of the Special Mandates, adopted 18 December 2003.

because of duty” is placed on the same legal footing as an assault against an “officer while on or because of duty”: sentences for assaults against journalists are supposed to be the same as those for assaults against “officers”. This is problematic partly because it clearly implicitly allocates a higher degree of protection to journalists and “officers” as compared with other individuals by punishing violations against these individuals more severely. Yet there is no justification within international human rights law for such a provision which privileges the rights of journalists (and “officers”) while on or because of their duties by allowing for assaults against them to be punished more severely than assaults against other persons. All human beings have the same human rights, including the rights to life and to be free from torture, cruel, inhuman or degrading treatment, which should be protected by the state through *inter alia* the establishment of independent and impartial investigations into violations of these rights. Therefore, this provision as it stands arguably falls foul of Iraq’s obligations under Article 26 ICCPR on equality before and equal protection of the law.²⁴ *Third*, by requiring that assaults on journalists are to be punished *en par* with assaults on “officers”, the Draft Law potentially compromises the independence of journalists and consequently their “vital role of watchdog” on the state itself.²⁵

Recommendation: Article 9 should be amended to provide that state authorities, including state police, shall be obliged to ensure independent and impartial investigations into any crimes committed against journalists (such as physical attacks upon, threats made to and disappearances of journalists) and other individuals in Iraq. Such a provision should already be part of Iraqi law.

38. Article 3 of the Draft Law states:

Departments of the State, public sector and the other bodies journalists practice their profession before shall commit to providing facilitations necessary to the journalists duties so as to secure the dignity of journalism.

39. Whilst this provision sets out the state’s intention to establish “facilitations necessary to the journalists duties so as to secure the dignity of journalism”, there is no indication as to what those “facilitations” involve in practice. The term should be interpreted to mean such state assistance or capacities that would include a fully-fledged and effective system of law and order in Iraq. However, in order to be effective such a system of law and order would necessarily protect not only journalists as this provision suggests, but all members of society. Indeed, the state has a positive duty under international law to establish an independent, impartial and effective investigation into physical attacks on *anyone* within its jurisdiction of the state.²⁶ Another potential problem with the concept of “facilitations necessary ... so as to secure the dignity of journalism” is that it may be used to restrict journalists’ rights to practice their profession whilst purporting to “protect” them. More

²⁴ Article 26 ICCPR states: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” Article 1 of the Universal Declaration on Human Rights states: “All human beings are equal in dignity and rights”.

²⁵ *Sunday Times v United Kingdom* (1979) 2 EHRR 229 at para 50(b) (European Court of Human Rights).

²⁶ See UN Human Rights Committee, General Comment No 6 on the right to life (article 6), 30 April 1982 para 4; UN Human Rights Committee, General Comment No 7 on the torture or cruel, inhuman or degrading treatment or punishment (article 7), 30 May 1982 para 1; UN Human Rights Committee, General Comment No 31 (nature of the general legal obligation imposed on states parties to the covenant), 26 May 2004 paras 8, 15 and 18 in particular.

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specifically, the notion of the “dignity of journalism” may be abused to withhold or curtail legal protection of journalists rather than to enhance it. For example, it is conceivable that under this provision the police may refuse to protect a journalist who has been repeatedly threatened on the grounds that that journalist has undermined the “dignity of journalism” by criticising the policies or bodies of the state.

Recommendation: Article 3 should be amended to provide that the state should ensure that the criminal justice system (including the police, prosecutors, defence lawyers and the courts) is adequately resourced to be able to conduct independent and impartial investigations into crimes committed against journalists and other individuals in Iraq. Such a provision should already be part of Iraqi law.

40. Article 11 of the Draft Law states:

If a judicial officer is informed about a witnessed crime committed against a journalist or that crime come to his/her knowledge, s/he shall inform the security authorities, magistrate and prosecutor about the crime; go immediately to the crime scene; and take action pursuant to the law.

41. Article 12 goes on to state:

If the magistrate is informed about a witnessed crime committed against a journalist, s/he shall immediately go to the crime scene and take action pursuant to the law.

42. These two provisions are problematic in several ways. *First*, the roles of judicial officers, security authorities, magistrates and prosecutors lack clarity and appear confused across both Articles 11 and 12. Article 11 places “judicial officers” at the heart of the protection of journalists: they are the bodies who are responsible for *informing* “security authorities” as well as magistrates and state prosecutors, *going* to straight to the scene and *taking action* according to the law. Article 12 then requires magistrates who have been informed about a “witnessed crime” to go to the crime scene and take action. This means that both magistrates and judicial officers are required to attend the scene of any crime committed against a journalist or any individual. Yet it should be the role of the state’s law enforcement officials, in other words the police not authorities exercising any judicial authority, to conduct independent, impartial and effective investigations into attacks or threats on journalists or on anyone else.

43. *Second*, both Articles 11 and 12 provide for action “pursuant to the law” in the case of any “*witnessed* crime committed against a journalist” (emphasis added). This may be interpreted to mean that any allegation of a crime against a journalist that does not have any witnesses other than the journalist or any witnesses at all (such as a disappearance of a journalist) is not investigated.

44. *Third*, neither Articles 11 nor 12 nor any other provision of the Draft Law indicate the institutional mechanism by which perpetrators of attacks on journalists should be held accountable. Under international law, criminal accountability should solely be the responsibility of a jurisdictionally competent, independent and impartial judicial system which is able to conduct fair and public hearings to determine promptly the guilt or innocence of the accused, and in the case of the former, the sentences according to law.²⁷

²⁷ Article 14 ICCPR. See also Basic Principles on the Independence of the Judiciary (1990), adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders (1985) both adopted at the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders,

Recommendation: Articles 11 and 12 should be amended to provide that the state's law enforcement officials shall conduct independent and impartial investigations into any crimes committed against journalists or any other individuals in Iraq. They should also provide that anyone accused of a crime against a journalist or any other person shall be entitled to a fair and public hearing by a competent, independent and impartial court or tribunal established by law. Any judgment rendered shall be delivered its decision promptly and according to law. Such a provision should already be part of Iraqi law.

5. Injured Journalists and the Children of Killed Journalists

45. Closely connected to the system for the protection of journalists established through the provisions described above, there are various provisions which together form a system for compensating victims of physical attacks who happen to be journalists.

46. Article 14 states:

The State shall provide free treatment to any journalists injured due to a terrorist act while on or because of duty.

47. There are a number of problems with this provision. *First*, it suggests that the state is only willing to provide treatment (presumably this includes medical care) for journalists injured because of a terrorist act or in the exercise of their profession. However, in many cases it may be difficult to identify whether a journalist has been injured due to a terrorist act while on duty because of the problems in identifying what is a terrorist act in the first place or because of possible problems in identifying whether a journalist was on duty or was an ordinary civilian in the particular circumstances. *Second*, the provision implies that the state bears no responsibility for journalists who are injured due to an act unrelated to terrorism, but rather due to the actions of the state's own agents such as the police and security forces. *Third*, the provision implies that the State does not have to provide free treatment to any other individual injured due to a terrorist act. Thus, this provision establishes a multi-tiered system of medical treatment in Iraqi society when the right to health should be respected, protected and fulfilled on a non-discriminatory basis under international law.²⁸ From a policy perspective, there is no reason why the journalists should be privileged in terms of access to medical care and treatment over and above individuals who are not journalists but have also been injured in terrorist attacks whilst performing their chosen professions.

Recommendation: Article 14 should be omitted.

48. Article 13 of the Draft Law states:

- I. Children of martyr journalists, other than employees, who die while on or because of duty due to a terrorist act, shall be granted a pension of 500,000 five hundred thousand Iraqi Dinar.
- II. Each journalist, other than employees, who gets injured due to a terrorist act while on or because of duty and becomes disable by 50% or more shall be granted a pension of 250,000 five hundred thousand Iraqi Dinar.

Havana, 1990; UN Doc A/CONF.144/28/Rev.I (1990) 118, 189.

²⁸ See Article 12 of the International Covenant on Economic, Social and Cultural Rights protects the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

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- III. The provisions of the aforementioned two Paragraphs shall be applied to martyrdom and injury cases happening after 22/3/2003.

49. This provision reads rather confusingly in the English translation. The pensions in Article 13(I) and (II) are indicated both by number digits and words. While they correspond in (I) they do not in (II). There is clearly a mistake in the Arabic or English version which ought to be corrected. The purpose and implications of the phrase “other than employees” in Article 13(II) is also unclear.

50. Article 13(I) suggests that the state is willing to look after the “children” of journalists killed as a result of a terrorist act by granting such children a pension of 500,000 Iraqi Dinar, which equates to about €290. Although this appears a laudable goal, there is no reason why the children of journalists killed in terrorist acts after 22/03/2003 should receive special benefits over and above those of individuals who have also been killed in terrorist acts whilst performing their chosen professions since that date.

51. Article 13(II) suggests that the state would be willing to provide for disabled journalists, only if their disability was caused by a terrorist act while on or because of duty and constitutes more than 50%. Such journalists are granted a pension of 250,000 or 500,000 Iraqi Dinar (it is unclear which). This provision may be considered unfair in a number of ways. It discriminates against all those who are not journalists according to this Draft Law but who have become disabled due to a terrorist act while on or because of their profession (e.g. medical workers), as well as journalists who are considered to have suffered a disability of less than 50% due to a terrorist act. It would also be very difficult to prove whether the threshold of 50% had been reached in the cases of many journalists disabled due to a terrorist act while on or because of their work. For many victims of terrorist attacks, certain physical and psychological injuries only become apparent some time afterwards. Because of the 22/3/2003 cut-off date, the provision is problematic from the perspective of journalists who have been disabled by terrorist acts while undertaking their work before that date. Furthermore, journalists who have been disabled for all or much of their lives or have become disabled for reasons unrelated to their work will also be excluded.²⁹

Recommendation: Article 13 should be omitted.

6. Journalists and Criminal Justice

52. ARTICLE has serious concerns about the plethora of ways in which the Draft Law affects journalists’ right to freedom of expression and other human rights, including freedom of association. Article 10 states:

- I. The Journalists Syndicate shall be informed about any complaint filed against any journalist on committing a crime related to practicing his/her profession.
- II. A journalist may be questioned and interrogated for a crime attributed to him/her and related to practicing his/her profession only after informing the Journalists Syndicate.
- III. Chairman of the Journalists Syndicate, or his/her delegatee, may attend the interrogation, preliminary questioning or trial.

²⁹ See further provisions of Convention on the Rights of Persons with Disabilities, entered into force 3 May 2008. Iraq is not yet a signatory to the Convention. However, a fundamental obligation of State Parties under the Convention is “to ensure and promote the full realization of all human rights and fundamental freedoms for *all persons with disabilities without discrimination of any kind on the basis of disability*” (emphasis added) (Article 4(1)). As of 26 August 2009, there were 142 signatories and 65 States Parties to the Convention.

53. At first blush this provision appears based upon the principle that a journalist should not be punished simply for going about his or her chosen profession as a journalist in the usual manner. Yet this provision is more about framing certain criteria for the circumstances under which a journalist may actually be arrested, detained questioned, and ultimately put on trial: the Iraqi Journalists Syndicate should be notified of any complaint of a crime allegedly committed by a journalist relating to the practice of his/her profession; the Syndicate should be informed that the journalist may be questioned and interrogated; and the Chairman of the Syndicate or his/her representative may attend the interrogation, preliminary questioning or trial.
54. While notification or the presence of representatives of the Iraqi Journalists Syndicate at key moments in the criminal process may help to serve the goal of protecting journalists facing criminal charges from arbitrary, unfair or harsh treatment by state authorities, the establishment of such functions for the Syndicate will not provide a watertight guarantee against such abuses. Furthermore, the use of the word “interrogated” in Article 10(II) as distinct from “questioned”, which is also mentioned in that provision, is problematic. It suggests that the state authorities may have the authority to interrogate – including by using aggressive questioning techniques encompassing torture, degrading and inhuman treatment – a journalist for a crime related to practicing his/her profession. Such practices would be in flagrant violation of international law under the ICCPR, as well as the Convention Against Torture.³⁰
55. The procedural criteria in Article 10 do not in any way satisfy the substantive requirements for legitimate detention under international human rights law. *First*, no one may be detained otherwise than in accordance with national law;³¹ and *second*, the implementation of national law shall not be arbitrary.³² Moreover, there is no suggestion that an objective threshold for the circumstances in which an individual journalist may be arrested, such as “reasonable suspicion”, for the purpose of questioning. Depending on the scope of Iraqi criminal law on the law enforcement powers to arrest and detain individuals in Iraq more generally, this provision may actually serve to undermine the protection of journalists in relation to other individuals in Iraq, rather than enhancing it.

Recommendation: Article 10 should provide that no journalist or other individual should be subject to arbitrary arrest or detention. It should also provide that no journalist or other individual shall be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established by law.

7. The Right to Information and Journalists

³⁰ Although Iraq is not a party to the Convention Against Torture, it has been ratified by 147 states and some of its provisions have the status of customary international law.

³¹ Article 9(1) ICCPR.

³² The Human Rights Committee has emphasised that “‘arbitrariness’ is not equated with ‘against the law’, but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability”. See *Van Alphen v Netherlands*, Communication 305/88 Views of the Human Rights Committee adopted 23 July 1990, para 5.8. For the Committee, detention can only be considered arbitrary “if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context”. *A v Australia*, Communication 560/93, Views of the Human Rights Committee, adopted 3 April 1997, para 9.2. See also Article 5(1)(a)-(f) European Convention on Human Rights.

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56. The Draft Law also deals with journalists' rights of access to information. Article 4 of the Draft Law states:

Journalists may have access to information, news, data and statistics from their sources as permitted by the law, and maintain the confidentiality of their sources of information.

57. Article 6 is also relevant.

A journalist may have access to formal reports, information and statements, and the related body shall enable him/her to have such access and capitalize on them unless disclosing the same harms the public interest and violates the provisions of the law.

58. It is important to note that these provisions do not establish a right of access to information for journalists or a general right of access to information for everyone. Indeed, Article 4 simply affirms access to information held by journalistic sources and does not provide any more or any less protection for the right of access to information for journalists than is already provided for under domestic law. Article 6 also allows journalists special access to certain types of publicly held information unless it is against the public interest and contrary to the law. There is no justification, however, for any difference in treatment of journalists and members of the public as bearers of the right to information.

59. At the same time, it is widely accepted by media freedom organisations across the world that one of the best ways to enhance the role of the media and enable journalists to perform their profession is to enact and implement an effective right to information law. Therefore, if the Iraqi legislature were really serious about protecting the rights of journalists, it would enact a proper right to information law as soon as possible.³³ At minimum, such legislation would guarantee that *all requests* for information – regardless of whether they are made by journalists or members of the public – to public bodies would be met unless the public body can show that the information falls within the scope of a limited range of exceptions as permitted under a strict three part test: (1) the information must relate to a legitimate aim listed in the law; (2) disclosure must threaten to cause substantial harm to that aim; and (3) the harm to the aim must be greater than the public interest in having the information.³⁴

60. ARTICLE 19 has long recommended the adoption of legislation in Iraq that properly guarantees and implements the right to information in Iraq for several other interrelated reasons. *First*, the right to information is a fundamental human right that is crucial to the functioning of a democracy and key to the protection of other rights. The right is especially important in the context of Iraq – a post-conflict state struggling to establish the rule of law and democracy in the face of continued and considerable sectarian violence and where human rights conditions remain extremely poor. Clearly, the consolidation of the democracy, the rule of law and human rights in Iraq should be the priority of the Iraqi government, and also the international community. *Second* and more specifically, a properly protected right to information would counter corruption and enhance the flow of

³³ ARTICLE 19 has been advocated for the adoption of a right to information law in Iraq and has produced legal analyses of proposed drafts of such legislation. For example, ARTICLE 19 analysed the draft "Information Access Right Draft Law" developed by *Temkin* a group of experts, journalists and academics in Iraq in late 2009. See ARTICLE 19, Memorandum on the Access to Information Draft Law of Iraq, January 2010 <http://www.article19.org/pdfs/analysis/iraq-analysis-of-draft-access-to-information-law.pdf>

³⁴ See ARTICLE 19, *Principles on Freedom of Information Legislation* (June 1999).

information in the country and help to promote good governance, openness and transparency within Iraq's public administration. It would also increase a sense of trust amongst the people about the governmental and public authorities, whether at the national or local levels. *Third*, such legal protection would allow Iraq to join the community of nearly 90 states who have adopted legislation or national regulation on the right to access information to date.³⁵ This collection of states includes countries as diverse as Sweden³⁶, Jordan (the first Arab country to adopt right to information legislation)³⁷ and Indonesia.³⁸ *Fourth*, legislation on the right to information would also address the gap between Iraq's domestic legal protection and practice, on the one hand, and international legal obligations, under the ICCPR as well as in anti-corruption conventions signed and/or ratified by Iraq.

Recommendation: Articles 4 and 6 should be amended to provide that everyone (both journalists and non-journalists) have the right to information. It should further state that a body may not refuse to indicate whether or not it holds a record, or refuse to communicate information, unless the harm to the protected interest outweighs the public interest in disclosure. The state should also adopt a comprehensive right to information law.

8. Confidentiality of Sources

61. Article 4 is protects the confidentiality of sources of information in a very general way. In so doing, it falls below international,³⁹ regional⁴⁰ and national⁴¹ standards on the issue of the protection of sources.⁴² Following established principles on the protection of journalistic sources, the provision should state that a journalist has the right not to reveal the sources of information, unless it is necessary to prevent a major or serious crime (such as murder, manslaughter, severe bodily injury) or for the defence of a person accused of having committed a major crime.⁴³ In addition, all other alternative measures must be

³⁵ See Privacy International, *National Freedom of Information Laws, Regulations and Bills 2010* <http://www.privacyinternational.org/foi/foi-laws.jpg>

³⁶ The principle of public access to information has been established in Sweden since the 1766 Freedom of Press Act.

³⁷ See Law 47 of 2007 on Access to Information of Jordan.

³⁸ See The Openness of Public Information Act of Indonesia of 3 April 2008.

³⁹ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr Abid Hussein, submitted pursuant to Commission resolution 1997/27.

⁴⁰ Declaration of Principles of Freedom of Expression, Adopted 27 June 1981, OAU Doc CAB/LEG/67/3 rev.5; entered into force 21 October 1986; Concluding Document of the Vienna Meeting 1986 of Representatives of the Participating States of the Conference on Security and Cooperation in Europe; Inter-American Declaration of Principles of Freedom of Expression, October 2000.

⁴¹ At the national level, over 100 countries around the world have given journalists specific legal rights to protect their sources. See the comprehensive international survey of source protection, David Banisar, *Silencing Sources: An International Survey of Protections and Threats to Journalist's Sources* (Privacy International, 2007).

⁴² The leading case in the system of the European Convention of Human Rights is that of *Goodwin v United Kingdom* (1996) 22 EHRR 123. The European Court of Human Rights stated in that case: "[h]aving regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest" at para 39.

⁴³ See Explanatory Memorandum to Recommendation No R (2000) 7 of the Committee of Ministers to member states on the rights of journalists not to disclose their sources of information at paras 40-41.

exhausted and there must be a fair and public hearing of the journalist concerned before an order for disclosure may be issued.⁴⁴

Recommendation: Article 4 should be amended to provide that journalists should not be required to disclose the identity of their confidential sources, unpublished materials, notes, documents or other materials that may reveal information about their sources or journalistic processes. It should provide that any request to obtain information should be strictly limited to the most serious of cases and only be approved by an independent judge in a fair and public hearing and subject to appeal to an impartial body.⁴⁵

9. Journalistic Equipment

62. Article 7 of the Draft Law states:

Tools of journalism may not be meddled with except within the limits of the law.

63. The “tools of journalism” and “meddled” are unclear terms and this, rather awkwardly worded provision should be interpreted to protect against the seizure of, interference with or damage to journalistic equipment. It is noted that the seizure of journalistic equipment is a more direct intrusion into journalistic activity than an order to reveal sources and may be considered a more extreme measure to achieve similar ends.⁴⁶ However, the apparent breadth and lack of clarity of the provision casts doubt as to whether it could really be relied upon to provide protection for journalists complaining about the seizure, interference or damage to their equipment. Indeed, the provision affords the possibility for state authorities to rely on other provisions of domestic law to confiscate a journalist’s material or equipment on the pretext that it is, for example, necessary to prevent or investigate a crime. In order to comply with international law on freedom of expression, Article 7 ought to be drafted with greater precision.

64. Searches and seizures of journalistic material are one of the most obvious interferences with the right to freedom of expression and consequently must meet the conditions of the three-part test contained in Article 19(3). *First*, the interference must be provided for by law. This requirement will be fulfilled only where the law is accessible and “formulated with sufficient precision to enable the citizen to regulate his conduct.”⁴⁷ *Second*, the interference must pursue a legitimate aim. The list of aims in Article 19(3) of the ICCPR is exclusive in the sense that no other aims are considered to be legitimate as grounds for restricting freedom of expression. *Third*, the restriction must also be necessary to secure one of those aims in the sense that there must be a “pressing social need” for the restriction. Furthermore, the reasons given by the State to justify the restriction must be “relevant and sufficient” and the restriction must be proportionate to the aim pursued.⁴⁸

⁴⁴ See above at paras 40, 41 and 48.

⁴⁵ See further the criteria for disclosure indicated in the “Proposed Guidelines on Protection of Journalists’ Sources” in David Banisar, *Silencing Sources: An International Survey of Protections and Threats to Journalist’s Sources* (Privacy International, 2007) at 96.

⁴⁶ The European Court of Human Rights has considered that such a search when conducted with a view to uncover a journalist’s source is even more a “drastic measure than an order to divulge the source’s identity” and therefore may undermine the protection of sources to an even greater extent than such an order. *Roemen and Schmit v Luxembourg*, Application No 51772/99, Judgment of 25 February 2003 para 57.

⁴⁷ *Sunday Times v United Kingdom* (1979) 2 EHRR 229 at para 49 (European Court of Human Rights).

⁴⁸ *Lingens v Austria*, Application No 9815/82, Judgment of 8 July 1986, paras 39-40 (European Court of Human Rights).

The three-part test imposes a justifiably severe burden on the state to demonstrate that confiscation of journalistic material was appropriate in the circumstances. According to regional human rights jurisprudence, measures such as confiscation or seizure of journalistic material must demonstrate that the balance between the interests at stake, namely the protection of sources on the one hand and the prevention and punishment of crime on the other has been preserved. State authorities must show that the reasons to justify the particular interference with the journalist's freedom of expression are both relevant and sufficient in demonstrating that the measure was proportionate.⁴⁹

65. It should also be considered that any provision prohibiting the search, seizure, interference and damage to journalistic tools or equipment has potential implications for the right to respect for private life and the protection of property.⁵⁰

Recommendation: Article 7 should provide that any searches of a journalist's home or office should not be used to circumvent rules on the protection of sources (indicated above) and shall be presumed to be invalid. It should indicate that the state has the burden of demonstrating that any search or seizure was provided for by law, pursued a legitimate aim, and was necessary and proportionate in the circumstances. It should also provide that any materials obtained in violation of rules on the protection of sources should not be admissible as evidence in any proceedings.⁵¹

10. Restrictions on Journalists' Freedom of Expression

66. Article 5 of the Draft Law is a clear attempt to reinforce the independence of journalists. That provision states:

- I. A journalist may refrain from writing or preparing press materials incompatible with his/her beliefs, points of view and professional consciences.
- II. A journalist may comment as s/he deems appropriate to clarify his/her point of view regardless of the difference of opinion and intellectual interpretations without prejudice to the law.

67. Article 8 of the Draft Law states:

A journalist may not be held accountable for his/her opinions or the information s/he publishes and this may not be a reason for endangering him/her unless his/her act has violated the law.

68. The problems of both these provisions lie in their reliance on existing provisions of Iraqi law that challenge freedom of expression in various ways. The 2005 Iraqi Constitution contains weak protection for freedom of expression and no reference to the right to information. The constitution guarantees freedom of expression and freedom of press and media (Article 36), but renders the respect for the right of freedom of expression conditional upon respect for public order and morality. Article 44 of the Constitution

Rights).

⁴⁹ *Roemen and Schmit v Luxembourg*, Application No 51772/99, Judgment of 25 February 2003 (European Court of Human Rights).

⁵⁰ On privacy see Article 17 ICCPR and Article 8 of the European Convention on Human Rights; on the right to property see Article 1 of the First Protocol of the European Convention on Human Rights.

⁵¹ See further the criteria for disclosure indicated in the "Proposed Guidelines on Protection of Journalists' Sources" in David Banisar, *Silencing Sources: An International Survey of Protections and Threats to Journalist's Sources* (Privacy International, 2007) at 96 and 97.

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allows restrictions on the right of freedom of expression to be imposed “by law or on the basis of it, and insofar as that limitation or restriction does not violate the essence of the right or freedom”. Under the 2005 Constitution, all existing laws, including those developed under Saddam Hussein, are considered to continue in effect unless specifically annulled or amended by the Council of Representatives. As a result, a large number of laws are available to silence legitimate criticism of public officials or government practices. Most notably, the 1969 Penal Code, criminalizes defamation and libel, makes it a crime engage in a range of expression such as shouting or singing in a manner that provokes dissent or obtaining materials that incite constitutional change or that promote “banned ideologies” with the aim of publishing them. It also includes numerous restrictions on what may be published in the name of protecting “state secrets”. Various provisions in the Penal Code also prohibit the publication of false facts or allegations. The legacy of the former regime are also found in the 1968 Publications Law which, among other things, provides for up to seven years jail for publicly insulting the government, the national assembly or public authorities, or inciting violence and civil disorder.⁵²

69. So that existing provisions of Iraqi law are not relied upon through this Draft Law to constrain freedom of expression, Article 8 should affirm Iraq’s international legal obligations by emphasising that any restriction on the freedom of expression of journalists or any other individual needs to meet all the criteria contained in Article 19(3) ICCPR.

Recommendation: Article 8 should be amended to provide that journalists and other individuals have a right to freedom of expression and any restrictions on this right must be provided for by law, pursue a legitimate aim, and be necessary and proportionate.

IV. CONCLUSIONS

70. **ARTICLE 19 urges the Iraqi legislature to reject the Draft Law as it is currently presented and, at minimum, to follow the recommendations indicated in this Comment.**
71. **ARTICLE 19 also urges the Iraqi state authorities to implement their existing international human rights obligations, ensure that there are enhanced training and resources available for law enforcement officers, prosecutors and the judiciary on the protection of journalists, enact legislation on the right to information legislation and repeal all criminal defamation laws.**
72. **If the Iraqi state authorities remain adamant and intent on adopting a law on the protection of journalists, ARTICLE 19 urges them to adopt the model Draft Law on the Protection and Regulation of Journalists and Media Workers that was drafted by ARTICLE 19 in August 2010.⁵³ This comprehensively and coherently protects the rights of journalists and media workers according to international law.**

⁵² See International Federation of Journalists, *Breaking the Chains*, Middle East and Arab World Press Freedom Review May 2009 – April 2010 <http://mena.ifj.org/assets/docs/208/084/4d4e5d0-92be754.pdf>

⁵³ See Annex I. This Draft Law was drafted by ARTICLE 19 as part of a project co-partnered with the International Federation of Journalists and funded by the European Commission.

V. SUMMARY OF RECOMMENDATIONS (IN ORDER OF THE PROVISIONS OF THE DRAFT LAW)

- **The Preamble of the Draft Law should provide that the purpose of the Draft Law is to implement Iraq’s international legal obligations on the right to freedom of expression and the right to information as protected by Article 19 of the ICCPR.**
- **Articles 1 and 2 of the Draft Law should be amended to provide that its protections apply to all journalists and media workers operating in Iraq. It should provide that a journalist is defined as any natural person who is regularly and professionally engaged in the collection and dissemination of information for the public via any means of mass communication. The Draft Law should also provide that a media worker is defined as any person who has professional relations with journalists, such as researchers, editors, publishers or producers.**
- **Article 3 should be amended to provide that the state should ensure that the criminal justice system (including the police, prosecutors, defence lawyers and the courts) is adequately resourced to be able to conduct independent and impartial investigations into crimes committed against journalists and other individuals in Iraq. Such a provision should already be part of Iraqi law.**
- **Articles 4 and 6 should be amended to provide that everyone (both journalists and non-journalists) have the right to information. It should further state that a body may not refuse to indicate whether or not it holds a record, or refuse to communicate information, unless the harm to the protected interest outweighs the public interest in disclosure. The state should also adopt a comprehensive right to information law.**
- **Article 4 should also be amended to provide that journalists should not be required to disclose the identity of their confidential sources, unpublished materials, notes, documents or other materials that may reveal information about their sources or journalistic processes. It should provide that any request to obtain information should be strictly limited to the most serious of cases and only be approved by an independent judge in a fair and public hearing and subject to appeal to an impartial body.**
- **Article 7 should provide that any searches of a journalist’s home or office should not be used to circumvent rules on the protection of sources (indicated above) and shall be presumed to be invalid. It should indicate that the state has the burden of demonstrating that any search or seizure was provided for by law, pursued a legitimate aim, and was necessary and proportionate in the circumstances. It should also provide that any materials obtained in violation of rules on the protection of sources should not be admissible as evidence in any proceedings.**
- **Article 8 should be amended to provide that journalists and other individuals have a right to freedom of expression and any restrictions on this right must be provided for by law, pursue a legitimate aim, and be necessary and proportionate.**

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- **Article 9 should be amended to provide that state authorities, including state police, shall be obliged to ensure independent and impartial investigations into any crimes committed against journalists (such as physical attacks upon, threats made to and disappearances of journalists) and other individuals in Iraq. Such a provision should already be part of Iraqi law.**
- **Article 10 should provide that no journalist or other individual should be subject to arbitrary arrest or detention. It should also provide that no journalist or other individual shall be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established by law.**
- **Articles 11 and 12 should be amended to provide that the state's law enforcement officials shall conduct independent and impartial investigations into any crimes committed against journalists or any other individuals in Iraq. They should also provide that anyone accused of a crime against a journalist or any other person shall be entitled to a fair and public hearing by a competent, independent and impartial court or tribunal established by law. Any judgment rendered shall be delivered its decision promptly and according to law. Such a provision should already be part of Iraqi law.**
- **Article 13 should be omitted.**
- **Article 14 should be omitted.**
- **Articles 15 and 16 should be omitted.**

ANNEX I: DRAFT LAW ON THE PROTECTION AND REGULATION OF JOURNALISTS AND MEDIA WORKERS

Drafted by ARTICLE 19, August 2010

INTRODUCTORY NOTE

This draft law on the protection of journalists (“the Draft Law”) has been prepared by ARTICLE 19 on the basis of discussions with the Iraqi Journalists Syndicate, Iraq, and the International Federation of Journalists, Brussels. These discussions have been aimed at making proposals for legal reform to support the freedoms of journalists and media organisations in Iraq, which have faced a range of considerable challenges in recent times. The Draft Law has been drafted with the intention of providing the Iraqi legislature with a proposal for a law which meets Iraq’s international legal obligations on freedom of expression.

In August 2009, ARTICLE 19 has set out its concerns about a previous version of the draft Journalists Protection Law from 2009 (“2009 Draft Law”). In our analysis, we welcomed the apparent intention of the 2009 Draft Law to shore up the protection of journalists in Iraq. However, we questioned whether the provisions of the 2009 Draft Law actually fulfilled its apparent intention of strengthening the legal protection of journalists and highlighted how the proposal failed to meet the standards and principles of international law on freedom of expression as protected by Article 19 of the International Covenant on Civil and Political Rights, which Iraq ratified on 25 January 1971. Indeed, in our view, “the brevity and narrow focus” of the 2009 Draft Law “obscure[d] the fact that what many, indeed most, of the substantive provisions achieve is the exact opposite – significant restrictions of journalistic freedom of expression and other human rights in Iraq at a time when their reinforcement is most needed”. ARTICLE submitted two overarching criticisms of this draft law: *first*, its prioritisation of journalists as holders of human rights by affording them a higher level of protection than that which was accorded to other members of Iraqi society; *second*, the significant direct and indirect restrictions upon the exercise of the right to freedom of expression imposed by various provisions.

Our criticisms of the 2009 proposal remain and we build on them in proposing the present Draft Law. We are also aware, however, that significant support exists amongst Iraqi journalists and media organisations for the adoption of a law specifically protecting journalists in Iraq.

In proposing this Draft Law, ARTICLE 19 proceeds on the basis of three premises.

- *First*, the Draft Law is premised on a deep concern within Iraq and within the international community at large about attacks on journalists’ human rights, including freedom of expression through the killing, harassment, intimidation, illegal arrest and detention against journalists, media professionals and associated personnel because of their professional activities.
- *Second*, the protection of journalists necessarily requires the full and effective protection of *journalists’ human rights as human rights* which are afforded to all human beings, including the right to freedom of expression and the right to information. It is ARTICLE 19’s position therefore that journalists have *the same* rights as everyone else – no more, no less – under international human rights law. These human rights have been recognised in general international human rights treaties, such as in the International Covenant on Civil and Political Rights. However, we recognise that international law also elaborates on such human rights as they apply to journalists specifically through such instruments as UN Security Council Resolution 1738 of 23 December 2006 on the protection of journalists in armed conflict. We also recognise jurisprudence at the international, regional and national levels which focuses on the rights of journalists.

The Draft Law does not purport to set out each one of the human rights belonging to journalists. Instead, the Draft Law draws on ARTICLE 19’s discussions with Iraqi journalists’ representatives by spotlighting key human rights issues which are particularly relevant to the situation of journalists in Iraq. In doing so, it is hoped that this proposed Draft Law will address areas where the protection of journalists is in fact most lacking, in particular the following:

- Killings, physical attacks and the lack of accountability for violations: There has been a striking lack of accountability for killings, physical attacks and attacks against journalists in Iraq over recent years. In particular, there has been complete impunity in relation to the killings of the 142 journalists who have

been killed in Iraq since 1992.

- Prosecution of journalists: Iraqi journalists have been arrested and detained arbitrarily often on the basis of alleged criminal defamation charges, which has had a severe chilling effect on the exercise of media freedom in Iraq.
- Other forms of attacks: Iraqi journalists are particularly concerned about attacks on and confiscation of their property, including their notes, equipment such as recording equipment and cameras. Iraqi journalists are increasingly encountering problems in accessing buildings, including Parliament, leading to a lack of transparency and access to information about Parliamentary proceedings.

As well as presenting a framework for the protection of journalists and media workers which addresses these concerns, the Draft Law presents a framework for the regulation of journalists and media workers in both the print media and broadcast media.

ARTICLE 19, August 2010

**DRAFT LAW ON THE PROTECTION AND
THE REGULATION OF JOURNALISTS AND MEDIA WORKERS**

AUGUST 2010 VERSION

Recalling

- *the International Covenant on Civil and Political Rights, Additional Protocols I and II to the Geneva Conventions, the Rome Statute of the International Criminal Court, Security Council 1738 of 23 December 2006 and other relevant instruments of international human rights and humanitarian law;*
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- *UNESCO Resolution 29 on the “Condemnation of Violence Against Journalists” and the Medellin Declaration Securing the Safety of Journalists and Combating Impunity adopted by UNESCO on 3-4 May 2007;*
- *UNESCO Media Development Indicators endorsed by the Intergovernmental Council of the International Programme for the Development of Communication (IPDC) at its 26th session (26-28 March 2008);*
- *the Istanbul Protocol, the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;*
- *and other relevant international legal standards and instruments*

the following law is enacted.

**Chapter I
General Provisions**

**Article 1
Definition of terms**

For the purpose of the present law

- a) A “journalist” is defined as any natural person who is regularly or professionally engaged in the collection and dissemination of information for the public via any means of mass communication.
- b) The “media” is defined as any print or electronic means of communication including the Internet.
- c) “Media workers” encompass persons who have professional relations with journalists as researchers, editors, publishers or producers.

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Article 2

Purpose

The present law pursues to enhance the existing legal protection of the fundamental human rights in Iraq, to elaborate on the content of the right to freedom of expression and to set forth a framework for the regulation of media workers in Iraq. Any restriction on the right to freedom of expression must be provided by law, pursue a legitimate aim, and be necessary to secure this aim.

Article 3

Interpretation of the law

This law shall be interpreted in accordance with the Constitution of Iraq, the international legal obligations of Iraq, including those under the International Covenant on Civil and Political Rights and other international legal instruments to which Iraq is party.

Chapter II

The Legal Framework for Protection of Journalists and Media Workers

Article 4

The human rights of journalists and media workers

1. In accordance with the Constitution of Iraq and international treaties to which Iraq is party, the human rights of every journalist are protected.
2. These human rights include, among other rights:
 - a) The right not to be arbitrarily deprived of one's life;
 - b) The right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment;
 - c) The right not to be subjected to arbitrary arrest or detention, including for freely exercising one's profession;
 - d) The right to liberty of movement and freedom to choose one's residence;
 - e) The right not to be subjected to arbitrary or unlawful interference with one's privacy, family, home or correspondence, or to unlawful attacks against one's honour or reputation;
 - f) The right to assemble and attend meetings and conferences in carrying out one's professional work;
 - g) The right not to be required to perform forced or compulsory labour;
 - h) The rights to freedom of opinion and freedom of expression, and the right to information;
 - i) The right to freedom of association, including the right to form and join trade unions for the protection of one's interests;
 - j) The right to own property alone as well as in association with others and the right to the peaceful enjoyment of one's possessions;
 - k) The right to equal treatment before the law and the right equal protection of the law, irrespective of such as race, colour, sex, language, religious, political or other opinion, national or social origin, property, birth or other status.

Article 5

General State Obligations

1. The State should adopt all appropriate measures, including legislative, judicial and administrative measures, as may be necessary to give effect to the rights recognised in this law.
2. The State should punish any violation of the human rights of journalists.
3. The State should ensure that:
 - a) Any journalist or media worker whose rights or freedoms are violated shall have an effective remedy including due compensation for damages resulting from the violation;
 - b) Any journalist or media worker has a right to an effective remedy notwithstanding that the violation may have been committed in an official capacity;
 - c) Any journalist or media worker claiming a remedy shall have his/right determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and with the possibility of judicial review;
 - d) The competent authorities shall enforce such remedies when granted.

Article 6

State Obligations to Prevent Attacks

1. The State shall take measures to prevent crimes against journalists and media workers including attacks or ill-treatment, such as murders, kidnappings, disappearances, intimidations and threats, as well as material destruction of communications facilities. No exceptions, including war or security situation, may be invoked as justification for failure to prevent attacks.

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2. The State shall take preventive operational measures to protect individual journalists and media workers whose lives are at risk from the attacks and ill-treatment. These measures should not impose a disproportionate burden on the authorities.
3. The State shall promote the awareness and train key state actors, including the armed and police forces, to respect and promote the safety of journalists in situations of risk and to ensure that journalists are able to work in full security and independence.

Article 7

State Obligations to Investigate Attacks

1. Law enforcement authorities shall be obliged to conduct investigations into any reports or complaints of attacks or ill-treatment committed against journalists and media workers, including attacks such as murders, kidnappings, disappearances, intimidations and threats, as well as material destruction of communications facilities.
2. Even in the absence of an express complaint, an investigation should be undertaken if there are other indications that attacks or ill-treatment against a journalist or media worker might have occurred.
3. Effective investigations shall:
 - a) be capable of leading to the identification and punishment of those responsible
 - b) be carried out promptly;
 - c) be carried out effectively by authorities that are independent, competent and impartial;
 - d) meet the highest professional standards;
 - e) be concluded within a reasonable time;
 - f) provide effective access for the victim or the next-to-kin in the process in order to safeguard his or her legitimate interests;
 - g) produce findings that must be made public;
 - h) provide payment of compensation where appropriate.
4. Investigatory bodies should:
 - a) have access to or the ability to commission examinations or studies by impartial experts;
 - b) be empowered to summons witnesses.
5. State authorities shall ensure that the criminal justice system, including the police, prosecution, the courts and legal representation, is adequately resourced to be able to effectively conduct investigations into attacks or ill-treatment committed against journalists and media workers.
6. There should be no statute of limitations for crimes against persons when these are perpetrated to prevent the exercise of freedom of expression and the right to information or when their purpose is the obstruction of justice.

Article 8

Protection of Journalistic Sources

1. All journalists have the right to protect the confidentiality of their sources. They should be free to seek access and maintain contacts with, public and private sources of information. This right also applies to media workers who acquire knowledge of information identifying a source through the collection, editorial processing or dissemination of this information.
2. The State shall respect the need for such professional confidentiality of journalists.
3. A journalist should be required to disclose the identity of a source only if:
 - a) there is an overriding requirement in the public interest and disclosure is necessary to protect life, to prevent a major crime or for the defence of a person accused of a having committed a major crime;
 - b) the interest in disclosure outweighs the harm of ordering the disclosure to freedom of expression;
 - c) disclosure is requested by an individual or body with a direct and legitimate interest, and who has demonstrably exhausted all reasonable alternative measures to protect that interest;
 - d) disclosure is ordered by a court of law (unless it is the case of a defamation case, in which case the court should never order disclosure);
 - e) the disclosure is limited as far as possible.

Article 9

Search and Seizure of Journalistic Material

1. Journalist material should be protected from search and seizure by state authorities, except in exceptional circumstances.
2. Search warrants may only be by a judge who must balance the importance of the search against the importance of preventing harm to the free exercise of the profession of journalism and the free flow of information.
3. No warrants for the seizure of material may be issued if the same goal can be achieved in a way that is less

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detrimental to the right to freedom of expression.

Chapter III

The Legal Framework for Regulation of Journalists and Media Workers

Article 10

Entry Requirements on the Practice of Professions in the Media

1. There should be no restrictions on who may practice journalism.
2. Any requirement upon journalists and media workers to obtain official permission before commencing their work is a violation of the right to freedom of expression.
3. Requirements on journalists and media workers to possess certain characteristics or qualifications (such as having a clean criminal record or particular academic credentials or membership of a particular association) are prohibited.

Article 11

Independent Representative Organisations

There should be no restrictions on the establishment of independent organisations representing journalists and/or media workers (such as associations and unions), except in accordance with the right to freedom of association as protected by the Constitution of Iraq and international legal instruments to which Iraq is party.

Article 12

Accreditation Schemes

1. Accreditation schemes for journalists and media workers are appropriate only where necessary to provide them with privileged access to certain places and/or events.
2. Accreditation schemes should at minimum:
 - a) be administered and overseen by a body which is independent from the government and follows a fair and transparent procedure;
 - b) be based on specific, non-discriminatory and reasonable criteria which are published in advanced;
 - c) only be applied to the extent justifiable by genuine space constraints;
 - d) not permit accreditation to be withdrawn based on the work of the journalist or the media outlet concerned.

Article 13

Prohibition of Censorship in Mass Media

1. Editorial independence of mass media is acknowledged and guaranteed by the law. The censorship is prohibited.
2. Any interference in the editorial activity of mass media is prohibited, unless it is provided by the law, is pursuing legitimate interest and is proportionate to the means pursued.

Chapter Four Final Provisions

Article 20

Overriding legislation

This law repeals Publication Law number 206 of 1968.

Article 21

Entry Into Force

This law comes into force from the date of its publication in the official newspaper.

ANNEX II: DRAFT JOURNALIST PROTECTION LAW NO. () OF 2009

On behalf of the people

The Presidency

Based on what was approved by the Council of Representatives and endorsed by the Presidency, and pursuant to the provisions of Paragraph I of Article 61 and Paragraph III of Article 73 of the Constitution,

The following Law shall be decreed:

Journalist Protection Law No. () of 2009

Article 1:

- I. The provisions of this Law shall be applied to the Iraqi journalists.
- II. For the purpose of this Law, a journalist shall be each member of the Journalists Syndicate.

Article 2:

This Law aims at providing protection for Iraqi journalists in the Republic of Iraq and securing their rights.

Article 3:

Departments of the State, public sector and the other bodies journalists practice their profession before shall commit to providing facilitations necessary to the journalists duties so as to secure the dignity of journalism.

Article 4:

Journalists may have access to information, news, data and statistics from their sources as permitted by the law, and maintain the confidentiality of their sources of information.

Article 5:

- I. A journalist may refrain from writing or preparing press materials incompatible with his/her beliefs, points of view and professional consciences.
- II. A journalist may comment as s/he deems appropriate to clarify his/her point of view regardless of the difference of opinion and intellectual interpretations without prejudice to the law.

Article 6:

A journalist may have access to formal reports, information and statements, and the related body shall enable him/her to have such access and capitalize on them unless disclosing the same harms the public interest and violates the provisions of law.

Article 7:

Tools of journalism may not be meddled with except within the limits of law.

Article 8:

A journalist may not be held accountable for his/her opinions or the information s/he publishes and this may not be a reason for endangering him/her unless his/her act has violated the law.

Article 9:

Any person who assaults a journalist while on or because of duty shall be sentenced to the same sentence set for those who assault an officer while on or because of duty.

Article 10:

- I. The Journalists Syndicate shall be informed about any complaint filed against any journalist on committing a crime related to practicing his/her profession.
- II. A journalist may be questioned and interrogated for a crime attributed to him/her and related to practicing his/her profession only after informing the Journalists Syndicate.
- III. Chairman of the Journalists Syndicate, or his/her delegatee, may attend the interrogation, preliminary questioning or trial.

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Article 11:

If a judicial officer is informed about a witnessed crime committed against a journalist or that crime come to his/her knowledge, s/he shall inform the security authorities, magistrate and prosecutor about the crime; go immediately to the crime scene; and take action pursuant to law.

Article 12:

If the magistrate is informed about a witnessed crime committed against a journalist, s/he shall immediately go to the crime scene and take action pursuant to law.

Article 13:

- I. Children of martyr journalists, other than employees, who die while on or because of duty due to a terrorist act, shall be granted a pension of 500,000 five hundred thousand Iraqi Dinar.
- II. Each journalist, other than employees, who gets injured due to a terrorist act while on or because of duty and becomes disable by 50% or more shall be granted a pension of 250,000 five hundred thousand Iraqi Dinar.
- III. The provisions of the aforementioned two Paragraphs shall be applied to martyrdom and injury cases happening after 22/3/2003.

Article 14:

The State shall provide free treatment to any journalists injured due to a terrorist act while on or because of duty.

Article 15:

Local and foreign media bodies operating in the Republic of Iraq shall commit to conclude employment contracts with journalists working therein according to a form to be prepared by the Journalists Syndicate, and a copy of the contract shall be deposited thereat.

Article 16:

- I. The Journalists Syndicate shall be informed in order to settle disputes, if any, before the expiration of the journalist employment contract.
- II. If settling the dispute between the journalist and his/her employer is impracticable, provisions of Labor Act No. 71 of 1987 shall be applied.

Article 17:

This Law shall take effect as of the date of publishing in the Official Gazette.

Rationale

To provide necessary protection to journalists and secure the rights of journalists and their dependents in case of martyrdom due to a terrorist act or injury.

This Law has been enacted.

FURTHER INFORMATION:

- For more information please contact: Dr Sejal Parmar, Senior Legal Officer, sejal@article19.org, +44 20 7324 2500
- ARTICLE 19 is an independent human rights organisation that works around the world to protect and promote the right to freedom of expression. It takes its name from Article 19 of the Universal Declaration of Human Rights, which guarantees free speech.