



FREEDOM OF EXPRESSION ESSENTIAL TO IRAQ'S FUTURE

IRAQ MEDIA LAW ANALYSIS

by
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I. Introduction¹

A free, independent and pluralistic media is vital to the rebuilding of Iraq as a democratic society. A Gallup Poll published in November 2003 found that, virtually without exception, residents of Baghdad regarded the right to freedom of expression as the most important right to be guaranteed in Iraq's new constitution.² The "Agreement on Political Process" concluded by the Iraqi Governing Council and the Coalition Provisional Authority (CPA) in November 2003 guarantees that the "Fundamental Law" to be drawn up by February 2004 will include a Bill of Rights, which will, among other things, protect the right to freedom of expression.³

It is universally recognised that the right to freedom of expression is a crucial underpinning of a democratic society. As such, implementation in practice of respect for this key right should be high on the agenda of the authorities in Iraq. Such implementation should include ensuring strong constitutional guarantees for the right to freedom of expression. However, this is not, of itself, enough.

¹ ARTICLE 19 would like to thank the Foreign Ministry of The Netherlands, which has funded the translation and legal work on this report through its support for Index on Censorship project work in Iraq.

² Gallup Survey in Iraq, Government "A", 11 November 2003: <http://www.cpa-iraq.org/audio/20031118_Gallup-basic-freedoms.pdf>.

³ The Fundamental Law will function as Iraq's interim constitution until a new and final Constitution is adopted. "Agreement on Political Process", 15 November 2003: <http://www.cpa-iraq.org/audio/20031115_Nov-15-GC-CPA-Final_Agreement-post.htm>.

The present review of the existing legal framework exposes the legacy of harsh laws imposed by the Ba'ath Party regime that seriously impinge on the right to freedom of expression, contradicting both international guarantees and, presumably, any future constitutional guarantee.⁴ Furthermore, the CPA has itself issued Orders and Regulations that restrict rather than promote freedom of expression. As a result, in order to ensure full respect for freedom of expression, and in order for it to become a reality for all Iraqis, the entire legal framework in Iraq as it affects freedom of expression must be overhauled. A number of laws need to be repealed or amended to bring them into line with international standards. Finally, a significant change in the political culture and traditions is needed. In particular, Iraqi politicians and other public figures need to be sensitised to the implications of independent and critical reporting, which will expose them to intense scrutiny and sometimes harsh criticism.

Despite these urgent needs, international law restricts the extent to which the Coalition Provisional Authority and the Iraqi Governing Council, as bodies appointed by the occupying powers, can introduce reforms to the Iraqi legal system. Under international humanitarian law, occupying powers are required generally to respect the existing legal framework, subject to changes needed to protect security, to maintain orderly government or to remove obstacles to the application of international humanitarian norms. The occupying powers are an interim administration; only a properly established new Iraqi government or a United Nations transitional authority would have authority under international law to bring about significant permanent changes to Iraqi law.

This Memorandum analyses the extent to which changes are needed to Iraqi law⁵ in order to bring it into line with international standards on freedom of expression and information, and the extent to which international law allows the occupying powers to introduce the necessary changes. The following section provides a summary of our recommendations, and this is followed by an outline of international standards relating to freedom of expression. The fourth section assesses the extent to which international law permits the occupying powers to introduce changes to the Iraq legal system, detailing what transitional changes can be enacted by occupying powers and what changes could be introduced only by a duly established Iraqi government or UN transitional authority. The fifth and last section contains a detailed analysis of the existing legal framework, assessed for compliance with international standards of respect for freedom of expression, along with recommendations for reform. It is intended as starting point for law reform in Iraq.⁶

⁴ Under the provisional arrangements set up in Iraq, all laws that were in effect as of 16 April 2003 will remain in effect, unless amended or repealed by the Coalition Provisional Authority: Coalition Provisional Authority Regulation Number 1, CPA/REG/16 May 2003/01, Section 2.

⁵ Translations of the relevant laws have been provided by Index on Censorship: <<http://www.indexonline.org/>>.

⁶ This document is a detailed legal analysis of the existing legal framework in Iraq and, as such, is to be distinguished from the wider policy proposals suggested in the Internews "Framework for Change: Transforming Iraq's Media Landscape", published 24 June 2003.

II. Summary of Recommendations

Rights and duties of the occupying powers

International law regards the phase of belligerent occupation of a foreign territory as a transitional one. The occupying power does not assume the rights of a sovereign State upon the occupation of territory; it merely acts as a ‘caretaker government’ pending the (re)establishment of the sovereign government. As a matter of principle, therefore, it is under an obligation to respect the laws in force.

At the same time, international law requires the US and the UK, as the occupying powers in Iraq, to ensure respect for human rights, including the right to freedom of expression. Both States have ratified international treaties requiring them to ensure the enjoyment of human rights to all within their jurisdiction, while Iraq itself has also signed human rights treaties. Cumulatively, these international treaty obligations amount to a requirement to suspend or repeal legal measures that violate rights as well a requirement to take active steps to ensure that all persons in Iraq are guaranteed the enjoyment of their rights.

The recommendations in this Memorandum have therefore been based on the following basic principles:

1. The occupying powers are under an obligation to suspend or repeal all laws whose application would contravene international human rights standards.
2. The occupying powers may introduce temporary measures to maintain public order and security in Iraq, and should introduce measures to ensure orderly government and to implement human rights, including where this is necessary because the suspension or repeal of existing rules breaching human rights norms leaves a legal vacuum.
3. Permanent changes to Iraqi law may only be enacted by a future sovereign Iraqi government.

Criminal content restrictions

Viewed as a whole, Iraqi criminal law – including the 1969 Penal Code of Iraq (the Penal Code), the 1968 Law of Publications and different CPA orders – contains a large number of draconian restrictions on what may be published or broadcast. We recommend the following:

Insult and defamation

- All criminal defamation and insult provisions should be repealed immediately.
- The existing civil defamation law, a copy of which we have not been able to obtain, should be carefully reviewed for compliance with international standards and suspended or repealed, as necessary.
- An interim defamation law should, as necessary, be adopted reflecting, among other things, the following principles:
 - a. public bodies should not be able to sue for defamation;

- b. public figures, including officials, civil servants, foreign dignitaries and international organisations, should be required to tolerate greater criticism than ordinary citizens;
- c. religious figures and bodies should not benefit from greater protection for defamation than others; and
- d. appropriate defences should be available in defamation actions, including a defence of ‘reasonable publication’.

False news

- All prohibitions on the publication of ‘false news’ should be repealed immediately.

Public order and national security

- All existing national security and public order offences should either be repealed or suspended.
- If replacement measures are deemed necessary, these should be in the form of interim measures, employing clear and unambiguous language which restricts only expression that intentionally incites violence or serious illegal disorder, and where the risk of such consequences is serious and imminent.

Freedom of assembly

- CPA Order No. 19 should be reviewed to limit the restrictions placed on freedom of assembly to those that are strictly necessary, bearing in mind the present circumstances.
- The scope of the Order should be clarified, in particular as to the types of gatherings to which it applies.
- CPA Order No. 19 should be amended to clarify whether or not the authorities may refuse to authorise a demonstration. If so, the Order should set out the grounds on which such refusal may be based should be set out clearly and narrowly.
- CPA Order No. 19 should place clear and reasonable conditions on when the maximum number of participants in a roadway gathering may be limited and on when authorisation for a peak hours roadway gathering may be refused.

Other offences

- Articles 305, 403, 404 and 438 of the Penal Code, placing various illegitimate restrictions on the right to freedom of expression, should be suspended immediately. Over the longer term, a future sovereign Iraqi government may wish to revisit them to assess whether or not to simply repeal them all or to amend them so as to bring them into line with international and constitutional guarantees of freedom of expression.

Print regulation

The Law of Publications imposes a strict regulatory regime on the print media that is incompatible with the right to freedom of expression. We recommend that:

- The Law on Publications should be repealed in its entirety.
- Any future Iraqi government should resist the idea of requiring the print media to register. However, if a registration system is introduced, it should be administered by

an independent body and should be purely administrative in nature, in accordance with the standards articulated above.

- Importation of foreign publications should be subject to restriction only where such publications breach legitimate laws of general application.

Broadcast and film regulation

The regimes currently in force for broadcasting and film regulation, including the CPA Order on telecommunications regulation, fail to meet international standards on freedom of expression and broadcast regulation. We recommend the following:

- The Law on Telecommunications should be suspended and the Law on Censorship should be repealed immediately.
- The CPA should significantly amend Order No. 11 to provide for an independent interim regulatory body and an open, clear licensing system for the telecommunications sector designed, among other things, to promote freedom of expression and a pluralistic broadcast sector.
- Efforts should be made to ensure the inclusion of a requirement of an independent regulatory body in the new constitution.
- A future sovereign Iraqi government should make it a priority to put in place a comprehensive broadcasting regime, in line with international standards.
- No prior censorship regime should be applied to films. A future sovereign Iraqi government may wish to institute some sort of classification scheme to protect minors.

State media

In order for Iraq to be transformed into a democratic society, the state media need to be thoroughly transformed and/or privatised, while the Ministry of Culture and Information must be stripped of all its regulatory functions in the media and communications field. We recommend the following:

- The Law on the Ministry of Culture and Information should be repealed immediately. The rules governing the new Ministry of Culture should ensure that it operates as a modern government cultural department, with no control over the public media and with no regulatory powers in the media and communications field.
- The State broadcaster should be transformed into a public service broadcaster, incorporating the following minimum standards:
 1. the independence of both the broadcaster itself and its governing bodies must be guaranteed specifically and explicitly in the legislation which establishes the body and, if possible, also in both the Fundamental Law being drawn up at present and in the eventual new constitution;
 2. there must be a clear legislative statement of goals, powers and responsibilities;
 3. the rules relating to appointment of members of governing bodies must be laid down in law, and be open, transparent and inclusive;
 4. the broadcaster must be formally accountable to the public through a multi-party body;
 5. funding arrangements must secure a stable financial basis and guard against undue political interference.

The establishment of a national public service broadcaster will take time. As the Iraqi Media Network (IMN) is the body most likely to take on the role of national public service broadcaster in the short term, three measures must be taken immediately:

1. IMN must be governed by a clear public service mandate;
 2. IMN must be governed by an independent governing body that is broadly representative of Iraqi society; and
 3. the automatic regular appearances on IMN by CPA officials must cease immediately.
- All other State media enterprises, including film and broadcasting and any print media still functioning, should be privatised.

Freedom of information

Under the Ba'ath party regime, the internationally recognised right to access information held by public bodies was not protected and the concept of the 'public's right to know' was unheard of. Official information was closely guarded and a number of criminal law provisions were enacted to penalise the disclosure of official information. These provisions remain in force. We recommend that:

- The restrictions on publishing or disclosing material that would harm national security or defence should be subject to a public interest override, allowing for the publication of material which it is in the public interest to disclose. Articles 178(2) and 327 of the Penal Code should either be repealed or be amended as necessary.
- Article 437 of the Penal Code should be repealed and, if necessary, replaced with appropriate civil law provisions protecting disclosures in a wider range of circumstances.
- Articles 182 and 228 of the Penal Code should be repealed.
- An interim access to information regime should be enacted by the CPA and the Iraqi Governing Council immediately, and the right to access to information should be written into the Fundamental Law being drawn up at present.
- In the longer term, a sovereign Iraqi government should protect the right to freedom of information in the new constitution and adopt a fully-fledged freedom of information law, in accordance with the following principles:
 1. Freedom of information legislation should be guided by the principle of maximum disclosure.
 2. Public bodies should be under an obligation to publish key information of their own motion.
 3. Public bodies must actively promote open government.
 4. Exceptions should be clearly and narrowly drawn and subject to strict "harm" and "public interest" tests.
 5. Requests for information should be processed rapidly and fairly, and any refusal to disclose should be subject to an appeal to an independent body.
 6. Individuals should not be deterred from making requests for information by excessive costs.
 7. Meetings of public bodies should be open to the public.
 8. Laws which are inconsistent with the principle of maximum disclosure should be amended or repealed.

9. Whistleblowers – individuals who release information on wrongdoing – should be protected from any legal, administrative or employment-related sanctions.

Syndicate of Journalists

The Iraqi Journalists Syndicate was constituted through a 1969 Law and was run, initially, through the Ministry of Culture and Information. This is not a viable option for a democratic Iraq and we recommend that:

- The Law of the Syndicate of Journalists should be repealed immediately and it should be made clear that Iraqi journalists are free to form new, independent association(s).

III. International Standards

III.1 The Importance of Freedom of Expression

Article 19 of the *Universal Declaration on Human Rights* (UDHR) guarantees the right to freedom of expression in the following terms:

Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.⁷

The UDHR, as a UN General Assembly resolution, is not directly binding on States. However, parts of it, including Article 19, are widely regarded as having acquired legal force as customary international law since its adoption in 1948.⁸

The *International Covenant on Civil and Political Rights* (ICCPR),⁹ a treaty ratified by over 145 States, including Iraq,¹⁰ imposes formal legal obligations on State Parties to respect its provisions and elaborates on many of the rights included in the UDHR. Article 19 of the ICCPR guarantees the right to freedom of expression in terms very similar to those found at Article 19 of the UDHR:

1. Everyone shall have the right to freedom of opinion.
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.

Freedom of expression is also protected in all regional human rights instruments, at Article 10 of the *European Convention on Human Rights*,¹¹ Article 13 of the *American Convention on Human Rights*¹² and Article 9 of the *African Charter on Human and Peoples' Rights*.¹³ The right to freedom of expression enjoys a prominent status in each of these regional conventions and, although not directly binding on Iraq, judgments and decisions issued by courts under these regional mechanisms offer an authoritative interpretation of freedom of expression principles in various different contexts. The European Court of Human Rights, in particular, has issued final judgments in more than 150 cases involving freedom of expression issues, ranging from defamation to national security issues.¹⁴

⁷ UN General Assembly Resolution 217A(III), adopted 10 December 1948.

⁸ See, for example, *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2nd Circuit).

⁹ UN General Assembly Resolution 2200A(XXI), adopted 16 December 1966, in force 23 March 1976.

¹⁰ Iraq ratified the ICCPR on 25 January 1971.

¹¹ Adopted 4 November 1950, in force 3 September 1953.

¹² Adopted 22 November 1969, in force 18 July 1978.

¹³ Adopted 26 June 1981, in force 21 October 1986.

¹⁴ As elaborated below, judgments of the ECHR are directly binding on the UK, one of the occupying powers, who is legally bound to implement the rights stated in the European Convention to everyone within its jurisdiction. For the duration of military occupation, this includes that part of Iraq under the UK.

Freedom of expression is a key human right, in particular because of its fundamental role in underpinning democracy. At its very first session, in 1946, the UN General Assembly adopted Resolution 59(I) which states: “Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated.”¹⁵ As the UN Human Rights Committee has said:

The right to freedom of expression is of paramount importance in any democratic society.¹⁶

The European Court of Human Rights has also elaborated on the importance of freedom of expression:

Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man ... it is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no ‘democratic society’.¹⁷

III.2 Freedom of Expression and the Media

The guarantee of freedom of expression applies with particular force to the media, including the broadcast media and public service broadcasters. The European Court of Human Rights has consistently emphasised the “pre-eminent role of the press in a State governed by the rule of law.”¹⁸ It has further stated:

Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.¹⁹

And, as the UN Human Rights Committee has stressed, a free media is essential in the political process:

[T]he free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.²⁰

¹⁵ 14 December 1946.

¹⁶ *Tae-Hoon Park v. Republic of Korea*, 20 October 1998, Communication No. 628/1995, para. 10.3.

¹⁷ *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72, para. 49. Statements of this nature abound in the jurisprudence of courts and other judicial bodies around the world.

¹⁸ *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 63.

¹⁹ *Castells v. Spain*, 24 April 1992, Application No. 11798/85, para. 43.

²⁰ UN Human Rights Committee General Comment 25, issued 12 July 1996.

The Inter-American Court of Human Rights has stated: “It is the mass media that make the exercise of freedom of expression a reality.”²¹ The media as a whole merit special protection, in part because of their role in making public “information and ideas on matters of public interest. Not only does [the press] have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of ‘public watchdog’.”²²

The European Court of Human Rights has also stated that it is incumbent on the media to impart information and ideas in all areas of public interest:

Whilst the press must not overstep the bounds set [for the protection of the interests set forth in Article 10(2)] ... it is nevertheless incumbent upon it to impart information and ideas of public interest. Not only does it have the task of imparting such information and ideas; the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of “public watchdog”.²³

It may be noted that the obligation to respect freedom of expression lies with States, not with the media *per se*. However, these obligations do apply to publicly-funded broadcasters. Because of their link to the State, these broadcasters are directly bound by international guarantees of human rights. In addition, publicly-funded broadcasters are in a special position to satisfy the public’s right to know and to guarantee pluralism and access, and it is therefore particularly important that they promote these rights.

III.3 Restrictions on Freedom of Expression

The right to freedom of expression is not absolute. Both international law and most national constitutions recognise that freedom of expression may be restricted. However, any limitations must remain within strictly defined parameters. Article 19(3) of the ICCPR lays down the conditions which any restriction on freedom of expression must meet:

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.

A similar formulation can be found in the European, American and African regional human rights treaties. These have been interpreted as requiring restrictions to meet a strict three-part test.²⁴ International jurisprudence makes it clear that this test presents a high

²¹ *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, para. 34.

²² *Thorgeirson v. Iceland*, note 18, para. 63.

²³ See *Castells v. Spain*, note 19, para. 43; *The Observer and Guardian v. UK*, 26 November 1991, Application No. 13585/88, para. 59; and *The Sunday Times v. UK (II)*, 26 November 1991, Application No. 13166/87, para. 65.

²⁴ See, *Mukong v. Cameroon*, 21 July 1994, Communication No. 458/1991, para. 9.7 (UN Human Rights Committee).

standard which any interference must overcome. The European Court of Human Rights has stated:

Freedom of expression ... is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.²⁵

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.”²⁶ 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 be necessary to secure one of those aims. The word “necessary” means that there must be a “pressing social need” for the restriction. 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.²⁷

III.4 Pluralism

Article 2 of the ICCPR places an obligation on States to “adopt such legislative or other measures as may be necessary to give effect to the rights recognised by the Covenant.” This means that States are required not only to refrain from interfering with rights but also to take positive steps to ensure that rights, including freedom of expression, are respected. In effect, governments are under an obligation to create an environment in which a diverse, independent media can flourish, thereby satisfying the public’s right to know.

An important aspect of States’ positive obligations to promote freedom of expression and of the media is the need to promote pluralism within, and ensure equal access of all to, the media. As the European Court of Human Rights stated: “[Imparting] information and ideas of general interest ... cannot be successfully accomplished unless it is grounded in the principle of pluralism.”²⁸ The Inter-American Court has held that freedom of expression requires that “the communication media are potentially open to all without discrimination or, more precisely, that there be no individuals or groups that are excluded from access to such media.”²⁹

The UN Human Rights Committee has stressed the importance of a pluralistic media in nation-building processes, holding that attempts to straight-jacket the media to advance ‘national unity’ violate freedom of expression:

²⁵ See, for example, *Thorgeirson v. Iceland*, note 18, para. 63.

²⁶ *The Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, para. 49 (European Court of Human Rights).

²⁷ *Lingens v. Austria*, 8 July 1986, Application No. 9815/82, paras. 39-40 (European Court of Human Rights).

²⁸ *Informationsverein Lentia and Others v. Austria*, 24 November 1993, Application Nos. 13914/88 and 15041/89, para. 38.

²⁹ *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note 21, para. 34.

The legitimate objective of safeguarding and indeed strengthening national unity under difficult political circumstances cannot be achieved by attempting to muzzle advocacy of multi-party democratic tenets and human rights.³⁰

The obligation to promote pluralism also implies that there should be no legal restrictions on who may practise journalism³¹ and that licensing or registration systems for individual journalists are incompatible with the right to freedom of expression. In a Joint Declaration issued in December 2003, the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression state:

Individual journalists should not be required to be licensed or to register.

...

Accreditation schemes for journalists are appropriate only where necessary to provide them with privileged access to certain places and/or events; such schemes should be overseen by an independent body and accreditation decisions should be taken pursuant to a fair and transparent process, based on clear and non discriminatory criteria published in advance.³²

III.5 Public Service Broadcasting

The advancement of pluralism in the media is also an important rationale for public service broadcasting. A number of international instruments stress the importance of public service broadcasters and their contribution to promoting diversity and pluralism.³³ ARTICLE 19 has adopted a set of principles on broadcast regulation, *Access to the Airwaves: Principles on Freedom of Expression and Broadcasting*, which set out standards in this area based on international and comparative law.³⁴ In addition, the Committee of Ministers of the Council of Europe has adopted a Recommendation on the Guarantee of the Independence of Public Service Broadcasting.³⁵

A key aspect of the international standards relating to public broadcasting is that State broadcasters should be transformed into independent public service broadcasters with a mandate to serve the public interest.³⁶ The Council of Europe Recommendation stresses

³⁰ *Mukong v. Cameroon*, 21 July 1994, Communication No. 458/1991, para. 9.7.

³¹ See *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note 21.

³² Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 18 December 2003, online at: <http://www.unhcr.ch/hurricane/hurricane.nsf/view01/93442AABD81C5C84C1256E000056B89C?opendocument>.

³³ See, for example, the Declaration of Alma Ata, 9 October 1992 (endorsed by the General Conference of UNESCO at its 28th session in 1995) and the Protocol on the system of public broadcasting in the Member States, Annexed to the Treaty of Amsterdam, Official Journal C 340, 10 November 1997.

³⁴ (London: March 2002).

³⁵ Recommendation No. R (96) 10 on the Guarantee of the Independence of Public Service Broadcasting, adopted 11 September 1996.

³⁶ See *Access to the Airwaves*, note 34, Principle 34. See also the Declaration of Sofia, adopted under the auspices of UNESCO by the European Seminar on Promoting Independent and Pluralistic Media (with special focus on Central and Eastern Europe), 13 September 1997, which states: "State-owned broadcasting and news agencies should be, as a matter of priority, reformed and granted status of journalistic and

the need for public broadcasters to be fully independent of government and commercial interests, stating that the “legal framework governing public service broadcasting organisations should clearly stipulate their editorial independence and institutional autonomy” in all key areas, including “the editing and presentation of news and current affairs programmes.”³⁷ Members of the supervisory bodies of publicly-funded broadcasters should be appointed in an open and pluralistic manner and the rules governing the supervisory bodies should be defined so as to ensure they are not at risk of political or other interference.³⁸

Furthermore, the public service remit of these broadcasters must be clearly set out in law, and include the following requirements:

1. to provide quality, independent programming that contributes to a plurality of opinions and an informed public;
2. to provide comprehensive news and current affairs programming, which is impartial, accurate and balanced;
3. to provide a wide range of broadcast material that strikes a balance between programming of wide appeal and specialised programmes that serve the needs of different audiences;
4. to be universally accessible and serve all the people and regions of the country, including minority groups;
5. to provide educational programmes and programmes directed towards children; and
6. to promote local programme production, including through minimum quotas for original productions and material produced by independent producers.³⁹

Finally, the funding of public service broadcasters must be “based on the principle that member states undertake to maintain and, where necessary, establish an appropriate, secure and transparent funding framework which guarantees public service broadcasting organisations the means necessary to accomplish their missions.”⁴⁰ Importantly, the Council of Europe Recommendation stresses that “the decision-making power of authorities external to the public service broadcasting organisation in question regarding its funding should not be used to exert, directly or indirectly, any influence over the editorial independence and institutional autonomy of the organisation.”⁴¹

III.6 Independence of Media Bodies

In order to protect the right to freedom of expression, it is imperative that the media is permitted to operate independently from government control. This ensures the media’s role as public watchdog and that the public has access to a wide range of opinions, especially on matters of public interest.

editorial independence as open public service institutions.”

³⁷ Recommendation No. R (96) 10, note 35, Guideline I.

³⁸ *Ibid.*, Guideline III.

³⁹ ARTICLE 19 Principles, note 34, Principle 37.

⁴⁰ Recommendation No. R (96) 10, note 35, Principle V.

⁴¹ *Ibid.*

Under international law, it is well established that bodies with regulatory or administrative powers over both public and private broadcasters should be independent and be protected against political interference. In the Joint Declaration noted above, the UN, OSCE and OAS special mandates protecting freedom of expression state:

All public authorities which exercise formal regulatory powers over the media should be protected against interference, particularly of a political or economic nature, including by an appointments process for members which is transparent, allows for public input and is not controlled by any particular political party.⁴²

Regional bodies, including the Council of Europe and the African Commission on Human and Peoples' Rights, have also made it clear that the independence of regulatory authorities is fundamentally important. The latter recently adopted a Declaration of Principles on Freedom of Expression in Africa, which states

Any public authority that exercises powers in the areas of broadcast or telecommunications regulation should be independent and adequately protected against interference, particularly of a political or economic nature.⁴³

The Committee of Ministers of the Council of Europe has adopted a Recommendation on the Independence and Functions of Regulatory Authorities for the Broadcasting Sector, which states in a pre-ambular paragraph:

[T]o guarantee the existence of a wide range of independent and autonomous media in the broadcasting sector...specially appointed independent regulatory authorities for the broadcasting sector, with expert knowledge in the area, have an important role to play within the framework of the law.⁴⁴

The Recommendation goes on to note that Member States should set up independent regulatory authorities. Its guidelines provide that Member States should devise a legislative framework to ensure the unimpeded functioning of regulatory authorities and which clearly affirms and protects their independence.⁴⁵ The Recommendation further provides that this framework should guarantee that members of regulatory bodies are appointed in a democratic and transparent manner.⁴⁶

⁴² Note 32.

⁴³ Adopted by the African Commission on Human and Peoples' Rights at its 32nd Session, 17-23 October 2002.

⁴⁴ Recommendation No. R(2000) 23, adopted 20 December 2000.

⁴⁵ *Ibid.*, Guideline 1.

⁴⁶ *Ibid.*, Guideline 5.

Rights and Duties of Occupying Powers

International law regards the phase of occupation as a transitional one. The occupying power does not assume the rights of a sovereign State upon the occupation of territory; it merely acts as a 'caretaker government' pending the (re)establishment of the sovereign government.⁴⁷ As a matter of principle, therefore, it is under an obligation to respect the laws in force.

This principle is long-established in international humanitarian law and has been codified in the 1907 Hague Regulations and the 1949 Geneva Convention IV, both of which have been ratified by the United States as well as by the United Kingdom.⁴⁸ Both these instruments provide that, as a general rule, the laws of the occupied territory shall remain in force, subject to some limited, narrowly drawn exceptions.⁴⁹

Principally, Article 64 Geneva Convention IV states that the occupying powers may repeal or suspend existing legal provisions only to the extent that they constitute a threat to their security or an obstacle to the application of the Convention. Article 27 of Geneva Convention IV elaborates on the last of these two exceptions, setting out the core of humanitarian law relating to the protection of civilians in times of occupation. It provides, in part:

Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.

This has been interpreted broadly to include respect for the human rights of civilians in occupied territories in the widest sense. The authoritative Commentary to the Geneva conventions published by the International Committee of the Red Cross states:

⁴⁷ This principle is a logical consequence of the ban in the UN Charter on acquiring foreign territory by force.

⁴⁸ Regulations respecting the laws and customs of war on land, annexed to the Hague Convention Respecting the Laws and Customs of War on Land, 18 October 1907, entry into force 26 January 1910 (Hague Regulations); Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, entry into force 21 October 1950 (Geneva Convention IV). Geneva Convention IV was ratified by the UK on 23 September 1957 and by the US on 2 August 1955. The Hague Regulations were ratified by the UK and by the US on 27 November 1909. The US and the UK are the two occupying powers recognised under UN Security Council Resolution 1483(2003), 22 May 2003.

⁴⁹ Hague Regulations, Article 43; Geneva Convention IV, Article 64. Although the text of Article 64 Geneva Convention IV is limited to the penal law, it is widely recognised that the prohibition of interference applies to the entire legal framework. One reason Geneva Convention IV makes express reference only to respect for penal law is that during the Second World War, occupying powers interfered in a particularly scandalous way with the criminal laws of occupied territories. See, amongst others, *Commentary on the Geneva Conventions of 12 August 1949. Volume IV*, ICRC, Geneva, 1958, p. 335, online at <http://www.icrc.org/ihl>; *The Handbook of Humanitarian Law in Armed Conflicts*, D.Fleck, Ed., (OUP, Oxford: 1995), pp. 254-255.

[I]t covers all the rights of the individual, that is, the rights and qualities which are inseparable from the human being by the very fact of his existence and his mental and physical powers; it includes, in particular, the right to physical, moral and intellectual integrity -- an essential attribute of the human person.⁵⁰

It may be noted that key human rights instruments such as the UDHR are based on the 'inherent dignity' of all human beings.⁵¹ Indeed, the very first provision of the UDHR provides, in part: "All human beings are born free and equal in dignity and rights."⁵² As such, Article 27 should be interpreted in light of the basic human rights norms as elaborated in the UDHR, ICCPR and other human rights conventions.⁵³ Given its central position in international human rights law, there can be little doubt that the right to freedom of expression is included among the rights protected under Article 27. It follows that any laws currently in force in Iraq that violate or hinder the implementation of the right to freedom of expression should be repealed or at least suspended.

This is also consistent with the occupying powers' direct obligations under the ICCPR, which must be taken into account as they effectively run in parallel to the humanitarian obligations described above. Article 2 of the ICCPR places each State Party under an obligation to secure the rights guaranteed therein to all persons "subject to its jurisdiction". The United Kingdom is also bound by the ECHR, Article 1 of which provides for a similar obligation, namely to "secure to everyone within their jurisdiction the rights and freedoms" it guarantees. Interpreting this obligation, the European Court of Human Rights has said:

[I]n conformity with the relevant principles of international law governing State responsibility, ... the responsibility of a Contracting Party [can] also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration...⁵⁴

In that case, concerning Turkey's military occupation of northern Cyprus, the Court held that Turkey could not 'hide' behind a local administration (the TRNC) over whose actions Turkey argued it had little control:

It is not necessary to determine whether, as the applicant and the Government of Cyprus have suggested, Turkey actually exercises detailed control over the policies and actions of the authorities of the 'TRNC'. It is obvious from the large number of troops engaged in active duties in northern Cyprus ... that her army exercises effective overall control over that part of the island. Such control, according to the relevant test and in the circumstances of the case, entails her responsibility for the policies and actions of the 'TRNC'... Those affected by such policies or actions therefore come within the 'jurisdiction' of Turkey for the purposes of Article 1 of the Convention.⁵⁵

⁵⁰ *Commentary on the Geneva Conventions of 12 August 1949. Volume IV*, note 49, pp. 200-201.

⁵¹ Note 7, Preamble. See also the ICCPR, note 9, Preamble.

⁵² *Ibid.*, Article 1.

⁵³ *The Handbook of Humanitarian Law in Armed Conflicts*, note 49, p. 247.

⁵⁴ *Loizidou v. Turkey*, Application No. 15318/89, 18 December 1996, para. 52.

⁵⁵ *Ibid.* para. 56.

It follows that, although the occupying powers have recognised the Governing Council as “the principal body of the Iraqi interim administration”,⁵⁶ they remain responsible for the implementation of human rights guarantees as long as they exercise effective control over the country. Based on the example of Turkey above, this is likely to be for as long as they maintain a significant military presence in the country.

It also bears mention here that Iraq has itself ratified the ICCPR, and so any Iraqi authorities are also directly bound by the Article 2 obligation to ensure respect for the rights guaranteed therein to everyone on its territory and under its jurisdiction.

Taken together, the occupying powers’ authorities under Article 64 of Geneva Convention IV and their obligations under Article 27 of Geneva Convention IV, along with their obligations under Article 2 of the ICCPR and Article 1 of the ECHR, in conjunction, respectively, with Articles 19 and 10 of those treaties, provide ample authority for the proposition that they must act to suspend or repeal those laws that restrict the right to freedom of expression beyond the extent permitted by international law. In light of the Security Council’s stipulation that “the sovereignty of Iraq resides in the State of Iraq, reaffirming the right of the Iraqi people freely to determine their own political future,”⁵⁷ we recommend some caution in repealing laws. Although we clearly welcome international efforts to work towards a restoration of democracy and respect for human rights, we recommend that only those laws that pursue illegitimate aims should be repealed; laws that pursue a legitimate aim but that fail other parts of the test for restrictions on freedom of expression described above – for example because they are overly broad or vague – should be suspended with a view to their permanent amendment by a future sovereign Iraqi government.

These same obligations require the occupying powers, in some cases, to introduce interim measures addressing potential legal vacuums that arise as a result of the suspension of certain laws. Article 64 of Geneva Convention IV states that legal provisions may be introduced as necessary, amongst others, to maintain the orderly government of the territory and/or to enable the implementation of the occupying powers’ obligations under humanitarian law.⁵⁸ The occupying powers’ dual humanitarian obligations to ensure the Article 27 Geneva Convention IV rights to persons under their occupation and to maintain the orderly government of the territory, for example, would also warrant the imposition of appropriate civil defamation laws. The ICCPR guarantee of freedom of expression which, as noted above, includes an obligation to promote pluralism, mandates the temporary establishment of independent broadcasting authorities and the transformation or privatisation of existing State media outlets. We recommend restraint, however, in relation to other interim measures that regulate or restrict the right to freedom of expression. Although their introduction may be necessary, for example to maintain security or public order, such measures should be kept to the absolute minimum

⁵⁶ CPA Regulation No. 6, CPA/REG/13 July 2003/06, Section 1.

⁵⁷ UN Security Council Resolution 1511(2003), 16 October 2003, preamble.

⁵⁸ Geneva Convention IV, Article 64.

both to ensure compliance with international guarantees for the right to freedom and to avoid setting unfortunate precedents for a new, sovereign Iraqi government.

In addition, it should be noted that the occupying powers have been called upon by the UN Security Council to “[work] towards the restoration of conditions of security and stability and [to create] conditions in which the Iraqi people can freely determine their own political future”.⁵⁹ As part of that process, the occupying powers must prioritise preparatory work for the drafting of an interim constitutional framework. We note that in a subsequent Resolution, the Security Council welcomes the ongoing work to prepare for a constitutional conference, urging the Governing Council to complete the process quickly.⁶⁰ Given the current lack of an adequate framework for the protection of human rights, and the vacuum that exists in terms of providing for an administrative framework to govern the country until such time as the Iraqi people are free to adopt a new, permanent constitution, the enactment of an interim basic law, or constitution, is necessary.

While international law mandates the introduction of limited interim legislative measures, the extent to which occupying powers can introduce permanent new legislation to bring the domestic legal framework in line with the right to freedom of expression is a separate matter.

Pursuant to international humanitarian law, both the Coalition Provisional Authority (CPA) and the Governing Council of Iraq are to be regarded as interim bodies;⁶¹ neither possesses the necessary qualities to enact permanent new legislation. CPA Regulation No. 1 states that the CPA will “exercise powers of government temporarily [and] is vested with all executive, legislative and judicial control necessary to achieve its objectives” [emphasis added].⁶² Similarly, the UN Security Council has stressed “the temporary exercise by the [CPA] of [its] specific responsibilities, authorities, and obligations under applicable international law” [emphasis added].⁶³ CPA Regulation No. 6 recognises the Governing Council of Iraq as “the principal body of the Iraqi interim administration, pending the establishment of an internationally recognized, representative government by the people of Iraq;”⁶⁴ and the Governing Council’s establishment was welcomed by the UN Security Council as “an important step towards the formation ... of [a] ... representative government that will exercise the sovereignty of Iraq,”⁶⁵ emphasising its interim nature. We therefore doubt whether these bodies have the authority to enact permanent legislation, or a permanent new constitution.

In line with these considerations, the recommendations in this Memorandum have therefore been based on the following basic principles:

⁵⁹ UN Security Council Resolution 1483(2003), 22 May 2003, paragraph 4.

⁶⁰ UN Security Council Resolution 1511(2003), note 57, preamble and paragraph 7.

⁶¹ Article 6, Geneva Convention IV.

⁶² CPA Regulation No. 1, CPA REG/16 May 2003/01, Section 1.

⁶³ UN Security Council Resolution 1511(2003), note 57, paragraph 1.

⁶⁴ Note 56, Section 1.

⁶⁵ UN Security Council Resolution 1500(2003), 14 August 2003, paragraph 1.

1. The occupying powers are under an obligation to suspend or repeal all laws whose application would contravene international human rights standards.
2. The occupying powers may introduce temporary measures to maintain public order and security in Iraq, and should introduce measures to ensure orderly government and to implement human rights, including where this is necessary because the suspension or repeal of existing rules breaching human rights norms leaves a legal vacuum.
3. Permanent changes to Iraqi law may only be enacted by a future sovereign Iraqi government.

IV. Overview of Iraqi Laws Affecting the Media

A large number of repressive laws in Iraq restrict freedom of expression and significantly impede both the ability of the media to engage in independent and critical reporting, and the ability of individual citizens to express their concerns regarding the current situation in Iraq. Many of these laws were drafted by the Ba'ath party regime and were actively used to repress independent voices. With the exception of the most egregious, which have already been suspended by the Coalition Provisional Authority (CPA), most of the Ba'ath party laws remain in force today and these pose a serious obstacle to the implementation of the right to freedom of expression and the development of a free, independent and pluralistic media. In addition, some of the measures introduced by the CPA itself fail to pass muster under international law.

We have serious reservations concerning the legitimacy of virtually all of the Ba'ath party regime's laws affecting freedom of expression. This Memorandum focuses on the most egregious of these, mainly found in the criminal law. In addition, we recommend thorough reform of the legal framework for broadcasting and media regulation generally, and the de-linking of the Journalists Syndicate of Iraq from any political powers. We also recommend the introduction of an interim freedom of information regime, as well as the introduction by a future sovereign Iraqi government of a permanent freedom of information regime, grounded in the new, permanent constitution. The following sections summarise the various laws and analyse them against international standards on freedom of expression. Recommendations for repeal or suspension and suggestions for improvement are provided throughout. The recommendations distinguish between calls for immediate repeal of the existing laws and the introduction of interim measures (by the CPA and Governing Council), on the one hand, and suggestions for thorough review, repeal as necessary and the future introduction of new legislation (by a future sovereign Iraqi government).

V.1 Criminal Content Restrictions

Viewed as a whole, Iraqi criminal law – including the 1969 Penal Code of Iraq (the Penal Code),⁶⁶ the 1968 Law of Publications⁶⁷ and different CPA orders – contains a large number of draconian restrictions on what may be published or broadcast. The CPA has suspended two provisions in the Penal Code criminalizing the instigation of constitutional change and insulting the President, and three provisions posing restrictions on public gatherings;⁶⁸ all other provisions placing restrictions on freedom of expression remain in force.⁶⁹ In our view, all of the provisions noted below breach the right to freedom of expression as protected under international law, in many cases flagrantly so.

⁶⁶ Penal Code, with Amendments, Third Edition, No. (111) 1969.

⁶⁷ Law of Publications, No. (206) 1968.

⁶⁸ CPA Order No. 7, CPA/ORD/9 June 2003/07, Section 2(1), suspending Articles 200(2) and 225 of the Penal Code and CPA Order No. 19, CPA/ORD/09 July 2003/19, Section 2, suspending Articles 220-222 of the Penal Code.

⁶⁹ The authority of the CPA is required for prosecution of some offences. These include Articles 156-189 (offences against the external security of the State), Articles 190-195, 198-199, 2001-219 (offences related to internal security), Articles 223-224, 226-228 (offences against public authorities) and Article 229

V.1.1 Insult and Defamation

- Article 202 of the Penal Code makes it a crime, punishable by up to ten years' imprisonment, to insult "the Arab community or the Iraqi people or any section of the population or the national flag or the state emblem".
- Article 227 of the Penal Code makes it a crime, punishable by up to two years' imprisonment, to publicly insult a foreign country, flag or national emblem, or an international organization with an office in Iraq.
- Article 229 of the Penal Code makes it a crime, punishable by up to two years' imprisonment, to insult a public servant or body in the course of their work.
- Articles 372(1) and (5) of the Penal Code make it a crime, punishable by up to three years' imprisonment, to attack the creed of a religious minority or to insult a symbol or a person who constitutes an object of sanctification, worship or reverence to a religious minority.
- Article 433 of the Penal Code makes calumny (accusing someone of having committed a crime or bringing them into serious disrepute) a crime, punishable by detention and a fine.
- Article 434 of the Penal Code makes it a crime, punishable by up to one year's imprisonment, to direct abuse at others that has the effect of compromising their honour or status, or that offends them. Publication of such 'abuse' in the media is considered an aggravating circumstance.
- Article 435 of the Penal Code makes it a crime, punishable by up to six months' imprisonment, to insult a person in a personal meeting, during the course of a telephone conversation or in a private letter.

ARTICLE 19 has a number of specific criticisms of these provisions. We strongly believe that the use of criminal defamation laws to protect reputations or privacy is illegitimate. The key problem with these laws is that a breach may lead to a custodial sentence or another form of harsh sanction, such as a suspension of the right to practise journalism. Even where these are rarely applied, the problem remains, since the severe nature of these sanctions means that their very existence casts a long shadow. Suspended sentences, common in some countries, also exert a significant chilling effect as subsequent breach within the prescribed period means that the sentence will be imposed. It is now well-established that unduly harsh penalties, of themselves, represent a breach of the right to freedom of expression, even if circumstances do justify some sanction.⁷⁰

For these reasons, a Joint Declaration by the three special mandates for protecting freedom of expression – at the United Nations, the Organisation for Security and Cooperation in Europe and the Organisation of American States – in December 2002 states:

(offence of insulting a public figure). See CPA Order No. 7, note 68, Section 2.

⁷⁰ E.g. *Tolstoy v. the United Kingdom*, 13 July 1995, Application No. 18139/91 (European Court of Human Rights).

Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.⁷¹

As demonstrated in practice in many jurisdictions, reputation and privacy can adequately be protected through civil law. Use of the criminal law to protect reputation and privacy therefore fails the test under Article 19(3) ICCPR that restrictions on freedom of expression be “necessary”. We recommend that all criminal defamation provisions outlined above be repealed immediately.

We have not been able to obtain an English translation of Iraq’s 1951 Civil Code and cannot comment on the defamation provisions, if any, that it may contain. If the repeal of criminal defamation laws creates a legal vacuum, we recommend that interim measures be enacted to address this, limited to protecting the reputation of individuals and entities with the right to sue and be sued, ensuring that public officials are open to greater scrutiny than others (see below) and providing adequate defences, such as reasonable publication.⁷² If the Civil Code does contain a civil defamation regime, this would have to be carefully reviewed for compliance with international standards in this area before it could be considered acceptable as a fall-back from the criminal defamation regime currently in place.

Second, we note that a number of these provisions protect public bodies or national emblems or symbols. This is contrary to the rule, now well-established, that public bodies should not be able to sue for defamation. Courts in the UK, for example, have held that public bodies do not have the right to bring an action for defamation. The House of Lords stated, in relation to a county council, that as an elected body it “should be open to uninhibited public criticism. The threat of a civil action for defamation must inevitably have an inhibiting effect on freedom of speech.”⁷³ Courts in South Africa, Zimbabwe and India have also held that public bodies cannot bring defamation actions.⁷⁴

The rationale for restricting the ability of public bodies to sue is threefold. First, criticism of government is vital to the success of a democracy and defamation suits inhibit free debate about vital matters of public concern. Second, defamation laws are designed to protect reputations. Any reputation public bodies might have would belong to the public as a whole, which on balance benefits from uninhibited criticism. This reasoning is also

⁷¹ Joint Declaration, 11 December 2002: <<http://www.unhchr.ch/html/menu2/i2civfre.htm>>. A number of countries, including Sri Lanka, Ghana, Argentina, Peru, Costa Rica, Paraguay and Ukraine have in the last few years abolished criminal defamation laws – either fully or in important respects.

⁷² For other standards relating to defamation, see ARTICLE 19, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation* (ARTICLE 19, London: 2000). Principle 2, for example, provides that defamation laws should be restricted to protecting the reputations of individuals or entities against actions or statements that have caused the esteem in which they are held by the community to be lowered, that have exposed them to public ridicule or hatred or that have caused them to be shunned and avoided.

⁷³ *Derbyshire County Council v. Times Newspapers Ltd.* [1993] 1 All ER 1011, p. 1017.

⁷⁴ *Die Spoorbond v. South African Railways* [1946] SA 999 (AD); *Posts and Telecommunications Corporation v. Modus Publications (Private) Ltd.*, (1997), Judgment No S.C. 199/97; and *Rajagopal & Anor v. State of Tamil Nadu* [1994] 6 SCC 632 (SC).

dominant in the case of national symbols or emblems, which simply cannot be said to have a reputation in any meaningful sense. Furthermore, the staff of public, and particularly elected bodies regularly changes membership so, as the House of Lords has noted, “it is difficult to say the local authority as such has any reputation of its own.”⁷⁵ Finally, the government has ample ability to defend itself from harsh criticism by other means, for example by responding directly to any allegations. Allowing public bodies to sue is, therefore, an inappropriate use of taxpayers’ money, one which may well be open to abuse by governments intolerant of criticism.

Additionally, defamation laws should not provide for greater protection for public figures or public servants, such as is provided for in Article 229 of the Penal Code. Indeed, the opposite is true, as the European Court of Human Rights has emphasised:

The limits of permissible criticism are wider with regard to the Government than in relation to a private citizen, or even a politician.⁷⁶

And:

Civil servants acting in an official capacity are, like politicians, subject to wider limits of acceptable criticism than private individuals.⁷⁷

These were predated by a ruling of the US Supreme Court, which stated:

Cases which impose liability for erroneous reports of the political conduct of officials reflect the obsolete doctrine that the governed must not criticize their governors ... The interest of the public here outweighs the interest of appellant or any other individual.⁷⁸

The special protection provided to foreign dignitaries and international organisations is also out of line with the international guarantee of freedom of expression. The European Court of Human Rights stated in a recent case:

[To] withdraw [Heads of State] from criticism only because of their function or stature, without taking into account the public interest in criticism ... amounts to conferring an exorbitant privilege on foreign heads of State which cannot be reconciled with the political practice and designs of today. Whatever the obvious interest, for any State, to maintain friendly relations with the leaders of other States, this privilege exceeds what is necessary to achieve such a goal.⁷⁹

Finally, we note that Article 372 criminalises attacking the creed of religious minorities or insulting a person or symbol that constitutes an object of reverence to religious minorities. ARTICLE 19 has long objected to laws of this type, generally classified as ‘blasphemous libel’, which cannot be considered “necessary in a democratic society”. They are often applied in a discriminatory fashion and are open to abuse on political

⁷⁵ *Derbyshire County Council v. Times Newspapers Ltd*, note 73, p. 1020

⁷⁶ See, for example, *Incal v. Turkey*, 9 June 1998, Application No. 22678/93, para 54.

⁷⁷ *Thoma v. Luxembourg*, 29 March 2001, Application No. 38432/97 (European Court of Human Rights), para. 47.

⁷⁸ *New York Times Co. v. Sullivan* 376 US 254 (1964), p. 272.

⁷⁹ *Colombani and others v. France*, 25 June 2002, Application No. 51279/99, para. 68.

grounds. Moreover, they can have a serious inhibiting effect on any discussions regarding religion and restrictions of this sort, over and above general rules regarding incitement to violence, hatred or discrimination, are unnecessary. In any event, the harsh criminal penalties imposed by the Iraqi Penal Code cannot be considered to be “proportionate”.⁸⁰

Recommendations:

- All criminal defamation and insult provisions should be repealed immediately.
- The existing civil defamation law, should one exist, should be carefully reviewed for compliance with international standards and suspended or repealed, as necessary.
- An interim defamation law should, as necessary, be adopted reflecting, among other things, the following principles:
 - e. public bodies should not be able to sue for defamation;
 - f. public figures, including officials, civil servants, foreign dignitaries and international organisations, should be required to tolerate greater criticism than ordinary citizens;
 - g. religious figures and bodies should not benefit from greater protection for defamation than others; and
 - h. appropriate defences should be available in defamation actions, including a defence of ‘reasonable publication’.

V.1.2 Publication of False News

- Article 210 of the Penal Code makes it a crime, punishable with detention, to broadcast or to intend to broadcast false and ill-intentioned news, statements or rumours or to disseminate inciting propaganda if this disturbs public security, intimidates people or inflicts harm on public interest.
- Article 211 of the Penal Code makes it a crime, punishable with detention, to publish by any means false information if this disturbs the public peace.
- Article 179 of the Penal Code makes it a crime, punishable with detention, in times of war to broadcast false or biased information, statements or rumours that may lower the morale of the population.
- Article 180 of the Penal Code makes it a crime, punishable with detention, to broadcast abroad false or biased information concerning the internal situation in Iraq that would undermine financial confidence or tar Iraq’s international standing.

These prohibitions all constitute so-called ‘false news’ provisions, restrictions on the publication of anything that contains factual errors or mistakes. The various negative consequences that must flow from the publication before liability may ensue pursuant to the various provisions offer little in terms of protection or mitigation of the harsh nature of these rules, in part because all are phrased in very vague terms, such as ‘inflicts harm on public interest’, ‘lower the morale of the population’ or ‘intimidates people’.

Under international law, it is well established that criminal prohibitions on spreading rumours or false news are unjustifiable as a restriction on freedom of expression. They

⁸⁰ See the statements made by the European Court of Human Rights in its judgment in *Otto-Preminger-Institut v. Austria*, 20 September 1994, Application No. 13470/87, at para. 49.

fail to take into account the daily pressure that journalists are under to report news in a timely fashion and the public interest in receiving such timely information. This has been recognised by international human rights courts:

[N]ews is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest.⁸¹

Even the very best journalists make mistakes and criminalising such mistakes exerts an unacceptable chilling effect on freedom of expression and serves very little purpose. False news provisions are also frequently abused to stifle critical reporting. For these reasons, false news provisions have been ruled by constitutional courts around the world to be incompatible with the right to freedom of expression. In May 2000, for example, a prohibition on false news was struck down by the Supreme Court of Zimbabwe in a case involving two journalists who had published a story alleging there had been a coup attempt in the Zimbabwean army. They were charged with disseminating false news likely to cause fear, alarm or despondency. However, the Supreme Court unanimously and unambiguously struck this provision down as a breach of the guarantee of freedom of expression.⁸² Other courts have also held that the offence of ‘spreading false news’ is incompatible with the right to freedom of expression.⁸³

Recommendation:

- All prohibitions on the publication of ‘false news’ should be repealed immediately.

V.1.3 Public Order and National Security

- Article 201 of the Penal Code makes it a crime, punishable by up to life imprisonment, to promote Zionist or Masonic ideologies, including by joining related institutions, or by promoting these ideologies morally or in any other way.
- Article 208 of the Penal Code makes it a crime, punishable by up to seven years’ imprisonment, to obtain materials that incite constitutional change or that promote banned ideologies with the aim of publishing them.
- Article 214 of the Penal Code makes it a crime, punishable by up to one year’s imprisonment, to shout or sing in a manner that provokes dissent.
- Article 215 of the Penal Code makes it a crime to possess, with the aim of publication, trade or distribution, materials that disturb public security or tarnish the country’s reputation.

The Coalition Provisional Authority has actually extended the range of prohibited material by adopting CPA Order No. 14, entitled “Prohibited Media Activity”,⁸⁴ which prohibits the publication of any material that incites violence, civil disorder, rioting or damage to property or making statements on behalf of the Iraqi Ba’ath Party, amongst other things.

⁸¹ *The Observer and Guardian v. the United Kingdom*, note 23, para. 60.

⁸² *Chavunduka and Choto v. Minister of Home Affairs & Attorney General*, 22 May 2000, Judgement No. S.C. 36/2000.

⁸³ See, for example, *R v. Zundel*, [1992] 2 SCR 731 (Supreme Court of Canada).

⁸⁴ CPA/ORD/10 June 2003/14.

Over the years, the interface between security, on the one hand, and freedom of expression and information, on the other, has been the subject of intense scrutiny, both by courts and by international bodies and decision makers. The most authoritative and all-encompassing statement of principles relating to national security restrictions is provided by the *Johannesburg Principles on National Security, Freedom of Expression and Access to Information*.⁸⁵ The *Johannesburg Principles* were elaborated by a group of recognised experts in this field and are based on international law, standards for the protection of human rights, evolving State practice, and the general principles of law recognised by the community of nations. They outline, among other things, the prevailing standards for withholding information in the name of national security.⁸⁶

The *Johannesburg Principles* recognise that the right to seek, receive and impart information may, at times, be restricted on specific grounds, including the protection of national security. However, national security cannot be a catchall for limiting freedom of expression. Principle 2 of the *Johannesburg Principles* states:

Principle 2: Legitimate National Security Interest

(a) A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government.

(b) In particular, a restriction sought to be justified on the ground of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest.

The *Johannesburg Principles* also set out quite clearly the standard to be applied in assessing whether a particular restriction on freedom of expression on the grounds of national security can be justified:

Subject to Principles 15 and 16 [which further limit the scope of restrictions], expression may be punished as a threat to national security only if a government can demonstrate that:

- (a) the expression is intended to incite imminent violence;
- (b) it is likely to incite such violence; and
- (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

⁸⁵ Adopted October 1995. Available at: < <http://www.article19.org/docimages/511.htm>>.

⁸⁶ The *Johannesburg Principles* have been endorsed by the UN Special Rapporteur on Freedom of Expression. See UN Doc E/CN.4/1996/39, 1996, para. 154. They are frequently referred to by the UN Commission on Human Rights. See, for example, UN Doc. E/CN.4/1996/53, 1996, Preamble. They have also been referred to by superior courts of record around the world. See, for example, *Athukoral v. AG*, 5 May 1997, SD Nos. 1-15/97 (Supreme Court of Sri Lanka) and *Secretary of State for the Home Department v. Rehman* [2001] UKHL 47 (United Kingdom House of Lords).

It follows that laws restricting freedom of expression to protect public order and national security are legitimate only if carefully tailored to prevent abuse. Such restrictions should be unambiguously worded and narrow in scope. They should be engaged only in the context of a clear and close nexus between the expression in question and the national security or public order risk, and they should not restrict frank and open public debate.

Blanket bans on certain views from being reported in the media, simply because they are believed to be sympathetic to or to endorse terrorism, for example, are illegitimate. The media has the right, perhaps even an obligation, to report on all matters of public interest, including on activities that are themselves crimes, where these are present in society. They cannot be penalised simply for presenting these views. As the European Court of Human Rights has held:

Particular caution is required when called for when consideration is being given to the publication of views of representatives of organisations which resort to violence against the State, lest the media become a vehicle for the dissemination of hate speech and the promotion of violence. ... [W]here views cannot be categorised in such a way, [States] cannot, with reference to the protection of territorial integrity or national security or the prevention of crime or disorder, restrict the right of the public to be informed by bringing the weight of the criminal law to bear on the media.⁸⁷

The US Supreme Court has set an even stricter standard, allowing for potentially inflammatory speech to be restricted only when “advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action ... the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.”⁸⁸

In another case, the European Court of Human Rights held that the conviction of a broadcaster for carrying racist statements – the authors of those statements had already been convicted of hate speech – was not legitimate. As long as the broadcaster did not specifically endorse the views presented, they should not be held liable for them. In that case, the programme carried an introduction which stressed that its purpose was to expose the problem of racism, but the views expressed were not counterbalanced, and the presenter did not specifically distance himself from them. The European Court found a breach of the right to freedom of expression notwithstanding this.⁸⁹

The various provisions in the Iraqi Penal Code that impose national security-related restrictions, as well as CPA Order No. 14, fail to meet these standards. The threat of the use of CPA Order No. 14 against certain TV stations illustrates this. The Iraqi Governing Council has threatened to use these provisions to ban broadcast outfits it deems to ‘incite violence’. So far, it has banned *Al Arabiya TV* from using official Iraqi satellite uplinks, while in September 2003, both *Al Jazeera TV* and *Al Arabiya TV* were banned from entering official premises for two weeks as punishment for broadcasting footage of

⁸⁷ *Erdogdu and Ince v. Turkey*, 8 July 1999, Application Nos. 25067/94 and 25068/94, para 54.

⁸⁸ *Brandenburg v. Ohio*, 395 US 444 (1969).

⁸⁹ *Jersild v. Denmark*, September 1994, Application No. 15890/89, paras. 33-34.

masked individuals who threatened to kill members of the Governing Council.⁹⁰ The nexus between the reporting by these broadcasters of dissenting voices and any public disorder is unclear at best, and a clear attempt to silence legitimate voices at worst. These bans certainly appear to be in clear breach of the standards articulated above.

Any laws that inhibit the ability of the press to report on matters of public interest must be regarded with the utmost suspicion. As the European Court of Human Rights has stated:

Very careful scrutiny is required where measures taken or sanctions imposed by a national authority are capable of discouraging the participation of the press in debate over matters of legitimate public concern.⁹¹

It is hard to imagine a matter of greater public interest in Iraq than the ongoing saga of violence and the attacks against various international and local actors.

Certain provisions in the Penal Code are particularly problematical. The offence of ‘shouting to provoke dissent’, in Article 214, could be committed by anyone who participates in a demonstration. It is hard to ascertain what risk promoting Zionism, as prohibited under Article 201, might pose to Iraq whereas the abuse of similar provisions in other countries in the region to prevent reporting about Israel are far from theoretical. Article 215 is vague both in its reference to ‘public security’, which is an extremely flexible concept, and with regard to the concept of ‘tarnishing the country’s reputation.’ Following decades of Ba’ath party rule, it is unclear how reputation the Iraq has left to tarnish and, as noted above under defamation, restrictions of this sort simply cannot be justified. All of these provisions may easily be abused to stifle government critics and should therefore be repealed or suspended. Careful consideration should be given to whether it is necessary to replace these provisions, but if this is deemed necessary, their interim replacement provisions should be redrafted carefully to respond to a clear national security risk.

Recommendations:

- All existing national security and public order offences should either be repealed or suspended.
- If replacement measures are deemed necessary, these should be in the form of interim measures, employing clear and unambiguous language which restricts only expression that intentionally incites violence or serious illegal disorder, and where the risk of such consequences is serious and imminent.

V.1.4 Freedom of Assembly

Pursuant to CPA Order No. 19, the organisers of any ‘march, assembly, meeting or gathering’ need to notify the CPA of the location of the gathering, the maximum number

⁹⁰ ‘Iraqi leaders ban Arab TV network’, BBC-Online, 24 November 2003: <http://news.bbc.co.uk/1/hi/world/middle_east/3233876.stm>; ‘Arab stations in Iraq face curbs’, BBC-Online, 23 September 2003, <http://news.bbc.co.uk/1/hi/world/middle_east/3131152.stm>.

⁹¹ *Bladet Tromsø and Stensaas v. Norway*, 20 May 1999, Application No. 21980/93, para. 64.

of participants and details concerning the names and addresses of the organisers at least 24 hours in advance.⁹² Furthermore, such gatherings may not last for more than four hours,⁹³ while gatherings within 500 meters of CPA premises or coalition forces facilities are prohibited.⁹⁴ Gatherings on roadways may not exceed such numbers as the CPA deems will not ‘unnecessarily obstruct pedestrian or vehicular traffic’; such limit to be provided to the organisers within 12 hours of receiving notice of a planned gathering.⁹⁵ Prior authorisation is required for organisers or participants in any public gathering in more than one location on any given day.⁹⁶ Finally, prior authorisation is required for gatherings during peak traffic hours.⁹⁷ Violations of the Order may be punished with up to one year in prison.⁹⁸ Section 2 of CPA Order No. 19 suspends Articles 220-222 of the Penal Code, because they “unreasonably restrict the right to freedom of expression and the right of peaceful assembly”.⁹⁹ These restrictions are justified by reference to the need to ‘protect public health, welfare and safety’ and the Order notes, in an operative section: “The CPA is determined to prevent the exploitation of demonstrations by elements intent of causing death or injury.”¹⁰⁰

We appreciate the tense security situation in Iraq at present but we do not consider that these can justify the stringent terms and conditions imposed by the Order. Although time and place restrictions, such as the restriction on protesting in the vicinity of military installations, might be justifiable given the present situation, other limitations in the Order are not.

The restrictions relating to the maximum number of participants are particularly unreasonable. Demonstrations almost always normally disrupt pedestrian and vehicular traffic and the Order appears to leave it to the sole discretion of the ‘Approving Authority’ – the Coalition Force Commander or a Divisional or Brigade Commander – to determine whether such disruption is ‘reasonable’, a term which is too vague to be meaningful. The need for authorisation for peak hour roadway marches is not even subject to a requirement of reasonableness and would, as a result, appear to be in the sole and unfettered discretion of the Approving Authority. It may be noted, in this context, that the scope of the Order is extremely broad, applying not only to demonstrations, but to assemblies, meetings and even gatherings, however that might be defined. Finally, the Order as drafted leaves open the possibility that the authorities, upon receiving notification of a gathering, may prohibit it. This should be clarified. There also does not appear to be any requirement to provide written reasons for any limitations which the authorities impose on demonstrations.¹⁰¹

⁹² CPA Order No. 19, CPA/ORD/09 July 2003/19, Section 4.

⁹³ *Ibid.*

⁹⁴ *Ibid.*, Section 3(3).

⁹⁵ *Ibid.*, Section 3(2).

⁹⁶ *Ibid.*, Section 3(1).

⁹⁷ *Ibid.*, Section 4.

⁹⁸ *Ibid.*, Section 7.

⁹⁹ *Ibid.*, Section 2.

¹⁰⁰ *Ibid.*, Section 1(2).

¹⁰¹ E.g. *Thomas v. Chicago Park District* (2002) 534 U.S. 316, 122 S.Ct. 775 (Supreme Court of the United States).

Recommendations:

- CPA Order No. 19 should be reviewed to limit the restrictions placed on freedom of assembly to those that are strictly necessary, bearing in mind the present circumstances.
- The scope of the Order should be clarified, in particular as to the types of gatherings to which it applies.
- CPA Order No. 19 should be amended to clarify whether or not the authorities may refuse to authorise a demonstration and, if so, the grounds on which such refusal may be based should be set out clearly and narrowly in the Order.
- CPA Order No. 19 should place clear and reasonable conditions on when the maximum number of participants in a roadway gathering may be limited and on when authorisation for a peak hours roadway gathering may be refused.

V.1.5 Other Offences

- Article 305 of the Penal Code makes it a crime, punishable by up to two years' imprisonment, publicly to incite others to withdraw capital invested in banks or public funds, or to sell or not to purchase State bonds or other government securities.
- Article 403 of the Penal Code makes it a crime, punishable by up to two years' imprisonment, to possess for publication any material "that violates the public integrity or decency".
- Article 404 of the Penal Code makes it a crime, punishable by up to one year' imprisonment, to sing or broadcast indecent or obscene songs or statements.
- Article 438 of the Penal Code makes it a crime, punishable by up to two years' imprisonment, to publish private information where this causes offence.

Additional content restrictions are found in the Law of Publications.¹⁰² Articles 16-21 of this Law ban the publication of a number of materials, including anything that is offensive to the government, anything that would violate general moral values or anything that runs counter to Iraqi policies. Other materials may be published only with official permission, including any statements 'attributed to' government figures, minutes of closed court sessions or decisions of the council of ministers. Violations of the Law of Publications may be punished by licence suspension or revocation, while the owner and/or editor may be sentenced to a maximum of thirty days' imprisonment.

The various restrictions noted above are all highly problematic from a freedom of expression perspective and fail the three-part test for restrictions outlined above. No journalist should need official permission to quote public officials and no restrictions should be placed on the publication of materials simply on the basis that they are critical of, or offensive to, the government, including the occupying powers. That would run counter to the well-established principle that "it is ... incumbent upon [the media] to impart information and ideas of public interest. Not only does it have the task of imparting such information and ideas; the public also has a right to receive them. Were it

¹⁰² Note 67.

otherwise, the press would be unable to play its vital role of ‘public watchdog.’”¹⁰³ The other restrictions either pursue illegitimate aims, are overly vague or restrict freedom of expression far beyond what can be considered “necessary in a democratic society”. For example, it is unclear what constitutes the ‘public integrity’ that Article 403 prohibits violating, yet offenders are liable to a two-year sentence if found guilty of contravening this woolly concept. Other examples of fundamentally flawed prohibitions include Article 305, that would prohibit most investment advice and Article 438, that would hinder most investigative reporting.

Recommendation:

- All of the restrictions noted above should be suspended immediately. Over the longer term, a future sovereign Iraqi government may wish to revisit them to assess whether or not to simply repeal them all or to amend them so as to bring them into line with international and constitutional guarantees of freedom of expression.

V.2 Print Regulation

Under the Law of Publications,¹⁰⁴ all owners of “political periodicals” must be over the age of 25, have Iraqi nationality and possess a government-approved ‘merit certificate’ issued by the journalists’ union.¹⁰⁵ The chief editor must have a ‘high academic degree’. All publications must be licensed by the Ministry of Information. A licence application may be refused on ‘public interest’ grounds; refusals may be appealed to the Council of Ministers. When a chief editor resigns, the publication must reapply for its licence. Under Article 84 of the Penal Code, if the editor is convicted of a felony, the publication’s licence may be suspended for up to three months.

The Law of Publications further provides that non-Iraqis may publish only with the approval of both the foreign ministry and the authorities of their own country. Non-nationals may not import any material into the country that can be regarded as ‘interfering in Iraq’s internal affairs’ or ‘infringing on Iraq’s foreign policy’, and all foreign correspondents must be licensed by the Ministry of Information.

Violations of the Law of Publications may be punished by licence suspension or revocation, while the owner and/or editor may be sentenced to a maximum of thirty days imprisonment.

International human rights courts have held that licensing requirements for individual journalists are incompatible with freedom of expression. In an Advisory Opinion concerning a compulsory licensing scheme for journalists in Costa Rica the Inter-American Court of Human Rights clearly stated the principle:

[T]he compulsory licensing of journalists does not comply with the (right to freedom of expression) because the establishment of a law that protects the freedom and

¹⁰³ *Castells v. Spain*, note 19, para. 43.

¹⁰⁴ Note 67.

¹⁰⁵ *Ibid.*, Article 3.

independence of anyone who practices journalism is perfectly conceivable without the necessity of restricting that practice only to a limited group of the community.¹⁰⁶

The same case affirmed that restrictions on who may practise journalism, or occupy certain journalistic positions, were incompatible with the guarantee of freedom of expression. Similarly, the Joint Declaration issued by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression states:

- Individual journalists should not be required to be licensed or to register.
- There should be no legal restrictions on who may practise journalism.¹⁰⁷

The requirements that all chief editors hold a ‘high academic degree’, that no-one may own a periodical, however small, without possessing a government-approved merit certificate and that owners must be over the age of 25 are all clearly incompatible with this principle. The requirement of a merit certificate also breaches the principle that any regulatory powers over the media be exercised by bodies that are independent of government.¹⁰⁸

Although international law does not at present rule out purely technical registration schemes for mass media organisations, they serve no purpose and can exert a chilling effect on freedom of expression and hence are increasingly being questioned. If such a regime is nevertheless maintained, the register should be run as a purely administrative matter, akin to company registration. The information required should be lodged with an administrative body and registration should be automatic upon the submission of the relevant documents. Thus, a technical registration scheme for mass media organisations is compatible with the guarantee of freedom of expression only if it meets the following conditions:

- the authorities should have no discretion to refuse registration once the requisite information has been provided;
- registration should not impose substantive burdens and conditions upon the media; and
- the registration system should be administered by bodies which are independent of government.¹⁰⁹

The regime provided under the Law of Publications signally fails to meet these standards: it is administered by a government department; there is wide discretion to refuse registration on vague undefined grounds of ‘public interest’; registration may be

¹⁰⁶ *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note 21, paragraph 79.

¹⁰⁷ Note 32.

¹⁰⁸ *Ibid.*

¹⁰⁹ See, for example, *Gaweda v. Poland*, 14 March 2002, Application No. 26229/95 (European Court of Human Rights) and *Constitutional Rights Project and Media Rights Agenda v. Nigeria*, 31 October 1998, Communication nos. 105/93, 130/94, 128/94 and 152/96 (African Commission on Human and Peoples’ Rights). See also the Joint Declaration by the three special mandates for the protection of freedom of expression, note 32.

suspended upon, for example, a conviction for defamation or a breach of the Law on Publications; and re-registration is necessary whenever the chief editor changes.

The restrictions imposed on foreign publications and non-Iraqis are equally incompatible with international standards on freedom of expression, which apply, ‘regardless of frontiers’. The system of permissions ensures full government control over foreign media activities and the restrictions regarding material deemed to interfere in internal affairs or infringe on Iraq’s foreign policy are extremely vague and open to abuse on political grounds.

Recommendations:

- The Law on Publications should be repealed in its entirety.
- Any future Iraqi government should resist the idea of requiring the print media to register. However, if a registration system is introduced, it should be administered by an independent body and should be purely administrative in nature, in accordance with the standards articulated above.
- Importation of foreign publications should be subject to restriction only where such publications breach legitimate laws of general application.

V.3 Broadcast and Film Regulation

The Law on Telecommunications¹¹⁰ establishes the State Post, Telegraph and Telephone Company as the pivotal body in the communications sector, licensing broadcasters and other telecommunications providers. The Law provides that licensing policies are determined by the Board of Directors but provides little further detail. Broadcasting without a licence is punishable by two years’ imprisonment or a 1,000 dinar fine. In addition to this law – which, as it was never repealed, continues in force – the CPA has introduced a separate order to provide for the licensing of telecommunications services and equipment. Order No. 11¹¹¹ regulates “licensing and frequency spectrum management on behalf of the people of Iraq”, establishing the Ministry of Transport and Communications as the regulatory body for the licensing of all “commercial telecommunications services in Iraq.”¹¹² Telecommunications services are defined as including all telecommunications and radio services, including broadcasting. The Ministry will control, plan, administer and license the entire radio frequency spectrum. Applications for broadcast licences are to be made to the Ministry, but no procedure or substantive criteria have been specified for the consideration of applications.

The Law on Censorship of Classified Material and Cinema Films¹¹³ designates the Ministry of Information as the agency responsible for censoring all films produced or imported into Iraq. Article 2 of this Law states that films shall be banned if they:

- advocate atheism, sectarianism, the corruption of morals or crime;
- promote acts of subversion or the use of violence;

¹¹⁰ Law No. 159 of 1980.

¹¹¹ CPA Order No. 11, CPA/ORD/8 JUNE 2003/11.

¹¹² The Order fails to specify the current status of the 1980 Law on Telecommunications.

¹¹³ Law No. 64 of 1973.

- affect public order and internal security;
- encourage the consumption of intoxicating substances, drugs or gambling;
- promote reactionary, chauvinist, racist, anti-Arab or regional ideas;
- favour defeatism;
- serve imperialism, Zionism and their “props”;
- do not serve the aims, interests and aspirations of the masses;
- harm the Arab nation, its aims or fateful causes;
- offend friendly States or discredit and offend national liberation movements in the world;
- are of such a poor intellectual and artistic standard as to offend good taste and to fail to tackle a useful theme; or
- are not dubbed or sub-titled into Arabic, excluding scientific, medical, training, documentary, musical, sports and animated films.

Films produced by the Ministry of Defence are exempted from Ministry of Information censorship, as are films produced by the State broadcaster, provided they have been examined by an internal committee. Violations of the law may be punished by up to six months’ imprisonment.

As outlined in Section III.5 above, international law establishes that all regulatory bodies in the communications sector should be independent of the government and any other political or economic interests.¹¹⁴ In particular, regulatory bodies should be appointed through a transparent and democratic process, for example by a parliamentary body. Its members should be appointed on the basis of their expertise, serve a specified term and be protected from political, economic or any other form of undue interference. All regulatory processes, and in particular the licensing process, should be transparent, based on fair, predetermined criteria relevant to broadcasting, and should include an opportunity to appeal for judicial review of specific decisions.

The two regimes described above, being administered by government departments, clearly fail to meet these key conditions. The transfer by the CPA of responsibility for broadcasting to the Ministry of Transport and Communications, in particular, fails to address the serious problem of the risk of political interference in broadcasting, probably even exacerbating it, and does not contribute to the “[creation] of conditions in which the Iraqi people can freely determine their own political future”, as mandated by the UN Security Council.¹¹⁵ Moreover, the overall broadcasting regime lacks the detail required to ensure that licensing processes are fair and that they promote pluralism in the use of the radio spectrum, a key obligation under international human rights law.

We are of the view that it is appropriate for the CPA to put in place an interim broadcasting regime. A measure of this sort can be expected to have very significant implications for the future of broadcasting and indeed democracy in Iraq, and hence needs to be considered carefully in light of the importance of leaving these matters to Iraqis. At the same time, some regulatory order needs to be imposed on broadcasting to

¹¹⁴ *E.g.* Council of Europe Recommendation 2000(23), note 44.

¹¹⁵ UN Security Council Resolution 1483(2003), note 59, paragraph 4.

ensure respect for rights, as well as to ensure orderly government, as mandated by Article 64 of Geneva Convention IV. However, any broadcasting regime should be developed with maximal Iraqi input, in a manner that is in accordance with international human rights obligations.

In line with this, CPA Order No. 11 should be amended to provide for the appointment of an independent interim broadcast regulator, appointed by the CPA together with the Governing Council. International mandates in other territories have established such bodies – an example is the Interim Media Commission that was established in Kosovo in 1999 – and these could provide inspiration to those administering Iraq. The interim regulator could be formed as a commission, representing the diversity of Iraqi society. The Order establishing such a body should clearly specify its functions and lay down clear procedures and criteria for the allocation of licences, including the possibility of an appeals process where licence applications are refused. In line with the best comparative standards, consideration should be given to providing for independent telecommunications regulation in the new interim constitution currently being prepared, as well as in the new permanent constitution that will eventually be drafted.¹¹⁶ In light of the rapid growth in the number of broadcasters, this issue needs to be addressed with some urgency. In the longer term, a sovereign Iraqi government should prepare a new broadcasting law to provide for a comprehensive regime for broadcast regulation, in line with international and constitution standards.

The censorship regime for films also seriously breaches international standards on freedom of expression. The Law on Censorship employs both clearly illegitimate grounds for censorship along with extremely vague terms which together make it possible to ban practically any film. Examples of the former include restrictions on material that “favours defeatism”, “promotes reactionary ideas”, “harms the Arab nation” or that fails to “serve the aims, interests and aspirations of the masses”. Examples of excessively broad or vague restrictions include “affect public order and internal security”, “promotes chauvinist or racist ideas” and “offend good taste”.

International law regards prior scrutiny regimes with extreme suspicion,¹¹⁷ although they have been accepted in certain limited circumstances, for example to classify films to protect minors. It does not, however, recognise as legitimate regimes which effectively grant wide discretion to the government to ban material based on vague and subjective standards; this would fail the requirement that restrictions on freedom of expression are “formulated with sufficient precision to enable the citizen to regulate his conduct.”¹¹⁸

Recommendations:

- The Law on Telecommunications should be suspended while the Law on Censorship

¹¹⁶ This was done, for example, in South Africa. See Constitution of the Republic of South Africa, Act 108 of 1996, Article 192.

¹¹⁷ *Olmedo Bustos et al. v. Chile ("The Last Temptation of Christ" Case)*, 5 February 2001, Series C No. 73 (Inter-American Court of Human Rights). On prior restraint generally, see *The Observer and Guardian v. the United Kingdom*, note 23.

¹¹⁸ As elaborated in Section III.3, above.

should be repealed immediately.

- The CPA should significantly amend Order No. 11 to provide for an independent interim regulatory body and an open, clear licensing system for the telecommunications sector designed, among other things, to promote freedom of expression and a pluralistic broadcast sector.
- Efforts should be made to ensure the inclusion of a requirement of an independent regulatory body in the new constitution.
- A sovereign Iraqi government should make it a priority to put in place a comprehensive broadcasting regime, in line with international standards.
- No prior censorship regime should be applied to films. A sovereign Iraqi government may wish to institute some sort of classification scheme to protect minors.

V.4 State Media

Under the Ba'ath party regime, the Ministry of Culture and Information occupied a pivotal role in the information sphere. It carried out a number of regulatory functions in the communications field, such as licensing print media (discussed above) and musical recordings and censoring films. It also had firm control over both the print and the broadcast media, publishing and/or controlling a variety of print titles, including through the State-owned Jamaheer press house, and controlling both the State broadcasters and the 'independent' broadcasters owned and run by Saddam Hussein's immediate family. It is not surprising that it came to be seen as a by-word for propaganda and censorship.

Article 1 of the Law on the Ministry of Culture and Information¹¹⁹ sets out the 'aims and objectives' of the Ministry of Culture and Information. These include a number of vague aims that are not compatible with a commitment to freedom of expression and to a free, independent and pluralistic media. The Ministry includes among its functions the obligation to:

- "popularize, deepen and cement the thought and principles of the Arab Ba'ath Socialist Party in the country and the Arab homeland";
- "seek unification of the information fundamentals of the Arab media as an expression of the Arab homeland's intellectual and cultural unity";
- "cultivate culture and arts in all their spheres and to develop them according to the principles of the Arab Ba'ath Socialist Party and goals of the great 17-30 July revolution";
- "combat colonialist, Zionist, racist, reactionary, capitalist and anti-Arab trends";
- "cultivate and develop Iraqi national culture and arts of the various ethnic communities in accordance with the principles of the Arab Ba'ath Socialist Party and within a notion of unity of national culture and arts"; and
- "interact with world culture and arts through the humanitarian view of the Arab Ba'ath Socialist Party and the great 17- 30 July revolution."

Under the 1971 Law of the Jamaheer Press House, the Ministry of Information controls a number of print titles.¹²⁰ During the Ba'ath party regime, the Jamaheer Press House

¹¹⁹ Law No. 94 of 1981.

¹²⁰ Law of the Jamaheer Press House, No. 98 of 1971, Revolutionary Council Resolution No. 850 (17 June

published a number of publications, including not only newspapers but also magazines, books and bulletins,¹²¹ and was financed mainly through the annual government grant made to the State Press and Printing Enterprise.¹²² The Jamaheer Press House was run by a board of directors appointed by the Minister of Culture and Information.¹²³ In practice, many of these titles have ceased to exist while various of the State-owned printing presses have been looted or appropriated by private actors. However, according to the letter of the law, all of these properties still belong to the State of Iraq and fall under the general direction of the Ministry of Information.

In a democratic Iraq, this situation is neither sustainable nor appropriate. It is normal for ministries of culture to promote cultural activities, for example through granting financial subsidies to cultural groups. However, the role of the Ministry of Culture and Information as provided by law goes far beyond this, functioning as an arm of the State system of propaganda and information control. This is not an appropriate function for a ministerial department in a modern democracy. It should, therefore, be reformed into a modern government cultural department, with no control over the public media or over regulatory functions in the media and communications field. All legislation authorising it to function as a propaganda organ should be repealed immediately, including the laws referred to above, and, with the exception of official documents such as the State Gazette, cultural materials and other materials that would fall within the remit of a modern culture department, all publications formerly published under its direction should be privatised or, alternatively, be transformed into public service media. This is the case particularly for the few government newspapers that have survived the war (primarily *Al Sabah*). Similarly, because of the potential for political interference with the availability and price of newsprint, State-owned printing presses should be privatised.

We note that, in practice, the Governing Council may already have abolished the propaganda and media-related functions of the ministry. CPA Memorandum No.6 listing the approved interim ministers selected by the Governing Council names Mr Mufid Muhammad Juwad al-Jaza'iri as the new interim "Minister of Culture", not "Minister of Culture and Information".¹²⁴ It is not apparent from the CPA Memorandum that any of the other ministers listed has taken on the 'information' portfolio. This is an encouraging sign that we believe must be built upon.

With regard to public broadcasting, we note that the previous State broadcaster was, to all intents and purposes, a tightly controlled arm of the Ministry of Culture and Information. The continued operation of such a broadcaster is clearly not a viable option for a future, democratic Iraq. However, we are concerned that the way in which the former State broadcasters has been revived under CPA authority leaves much to be desired in terms of its independence.

1971).

¹²¹ *Ibid.*, Article 3.

¹²² *Ibid.*, Article 6.

¹²³ *Ibid.*, Article 9.

¹²⁴ CPA Memorandum No. 6, CPA/MEM/2 Sep 2003/06, Annex A.

Since the ousting of Saddam Hussein's regime in April 2003, those parts of the former State broadcasting network that were still operational have been run by a US defence contractor, Science Applications International Corporation (SAIC), which has also restored the capability to broadcast via satellite. Contracted through the US authorities, SAIC ran the former State broadcaster under the banner of the "Iraqi Media Network" (IMN). Satellite services were started in May 2003 and, in July 2003, IMN Television was reported to be broadcasting terrestrially on three different frequencies. IMN Radio has been reported to be broadcasting on AM and FM.¹²⁵ In January 2004, it was announced that the CPA has awarded a USD96m contract to restore or rebuild the broadcasting facilities that were destroyed during the war to further develop the IMN, providing it with 30 radio and TV transmitters, three broadcast studios and 12 bureaus around Iraq.¹²⁶ IMN is to be built into a national media conglomerate consisting of two national TV channels, two national radio channels, an all-news satellite channel and the *Al Sabah* newspaper. Content for the broadcasting stations will be provided under the auspices of a Lebanese company, the Lebanese Broadcasting Corporation International (LBCI), a premier Middle Eastern media network.¹²⁷ The tender for the restoration of IMN as a national broadcasting network, while stressing that programme content should be balanced and accurate, does not require IMN to be independent, in structure or in content.¹²⁸

There is no clear information on the precise legal linkages between the CPA and IMN, but in practice it is clear that US authorities have an important say in programme content. CPA officials appear in numerous of its broadcasts, including weekly appearances by Paul Bremer, the US-appointed administrator, that some have claimed are reminiscent of Saddam Hussein's former presidential appearances.¹²⁹ IMN programming is described as veering towards US propaganda¹³⁰ and some of its former staff have even described it as an "irrelevant mouthpiece for Coalition Provisional authority propaganda, managed news and mediocre programs."¹³¹

We are concerned that in its present set-up, the IMN will not be able to operate in the Iraqi public interest. It lacks structural and organisational independence from the coalition authorities, and its mandate is insufficiently clear. This has resulted in the widespread public conception that the IMN is no more than a coalition mouth-piece.¹³² The CPA's intentions for the IMN's further development fail to address these key issues.

¹²⁵ 'Broadcasting in Iraq', <<http://www.al-bab.com/arab/countries/iraq/broadcast.htm>>, compiled from various sources including BBC Monitoring and regional media.

¹²⁶ 'Harris Corporation Awarded \$96 Million Contract For Development of the Iraqi Media Network', press release issued by Harris Inc., 9 January 2004, <<http://www.harris.com>>.

¹²⁷ *Ibid.*

¹²⁸ See the tender published by the Pentagon for redeveloping the IMN:

<<http://dccw.hqda.pentagon.mil/downloads/Iraqi/W74V8H-04-R-0001.doc>>.

¹²⁹ W. Pincus, 'Speeches Called Propaganda', *Washington Post*, 29 October 2003.

¹³⁰ *Ibid.*

¹³¹ 'US Journalist Quits Pentagon Iraqi Media Project Calling it US Propaganda', transcript of Democracy Now!, syndicated US radio programme, 14 January 2004: <<http://www.democracynow.org/>>. Along similar lines, see 'Iraqi TV was coalition's 'stuff of dreams'', *Guardian newspaper*, 9 July 2003, <<http://media.guardian.co.uk/broadcast/story/0,7493,994192,00.html>>.

¹³² As evidenced by the CPA's own research, which indicates that in the competitive satellite market only

Given that elections of some sort are likely to be imminent, and given the importance of the media in the democratic process, we believe that it is crucial that the IMN should be provided with a clear mandate to operate as a public service broadcaster, and that a governing structure is established that will guarantee IMN's operational independence from undue political or economic pressures. As was made clear in the case of Afghanistan following the ousting of the Taliban regime, an independent and pluralistic media, including the establishment of a public service broadcaster, is vital to creating conditions of democracy.¹³³

We recognise that developing a fully-fledged public service broadcaster takes some time. However, State-controlled broadcasters cannot provide the kind of independent programming needed to fulfil the people's right to know and, furthermore, are probably doomed to failure in an open media market, as evidenced by the low market-share of IMN in the competitive satellite broadcasting market. One option would be for this process to be managed by the same regulatory body that we recommend be established for the broadcast sector generally. Among the first steps to be taken should be the establishment of a clear, public service mandate, and the appointment of a new, independent governing body that is broadly representative of Iraqi society. Another important part of the transformation is to stop the automatic regular appearances on IMN by CPA officials: if coalition authorities have announcements to make, this should be done through regular press conferences which, if they are newsworthy, will no-doubt be reported in the media.¹³⁴

The ARTICLE 19 Principles described in Section III.5, above, set out a number of ways of ensuring that public service broadcasters are independent, including that they should be overseen by an independent body, such as a Board of Governors. The institutional autonomy and independence of this body should be guaranteed and protected by law in the following ways:

6. specifically and explicitly in the legislation which establishes the body and, if possible, also in the constitution;
7. by a clear legislative statement of goals, powers and responsibilities;
8. through the rules relating to appointment of members;
9. through formal accountability to the public through a multi-party body;
10. by respect for editorial independence; and
11. in funding arrangements.¹³⁵

Any interim arrangement should incorporate these minimum standards.

We further recommend that the IMN-run *Al-Sabah* newspaper be privatised immediately, as outlined above. We do not believe that the arguments in favour of public service

6% of the audience finds IMN to be a credible source of news: <http://www.cpa-iraq.org/audio/20031117_Nov-16-ISR-media_habits_survey.html>.

¹³³ *Declaration of the International Seminar on Promoting Independent and Pluralistic Media In Afghanistan*, adopted 5 September 2002, Kabul, Afghanistan, with the support of the Afghan ministry of information.

¹³⁴ See Council of Europe Recommendation (1996)10, note 35, Principle VI.

¹³⁵ *Access to the Airwaves*, note 34, Principle 35.1.

broadcasting, primarily that it plays an important role in promoting pluralism in a broadcasting market of limited frequencies, are applicable to the print sector, at least in the Iraqi context. Furthermore, we are concerned that the primary motivation for keeping this newspaper within the public sector is not to promote pluralism but rather to retain some public influence in the newspaper market.

Recommendations:

- The Law on the Ministry of Culture and Information should be repealed immediately. The rules governing the new Ministry of Culture should ensure that it operates as a modern government cultural department, with no control over the public media and with no regulatory powers in the media and communications field.
- The State broadcaster should be transformed into a public service broadcaster, along the lines set out above.
- All other State media enterprises, including film and broadcasting and any print media still functioning, should be privatised.

V.5 Miscellaneous

V.5.1 Freedom of Information

During the Ba'ath regime, no freedom of information laws were in effect in Iraq. The internationally recognised right to access information held by public bodies was not protected and the concept of the 'public's right to know' was unheard of. On the contrary, official information was closely guarded and a number of criminal law provisions were enacted to penalise the disclosure of state information. Still in force, these include the following:

- Article 178(2) of the Penal Code makes it a crime, punishable by up to two years' imprisonment, to broadcast or disclose secrets relating to the defence of the State.
- Article 182 of the Penal Code makes it a crime, punishable by detention, to publish or broadcast any governmental material the publication of which has been prohibited;
- Article 228 of the Penal Code makes it a crime to publish proceedings of secret sessions held by the National Assembly or, dishonestly and ill-intentionally, to publish proceedings of the Assembly's open sessions;
- Article 327 of the Penal Code makes it a crime, punishable by up to three years' imprisonment, for a public official or agent to release information obtained in the course of duty or relating to a contract or transaction to a person from whom s/he is required to withhold it, if this results in the interests of the State being harmed.
- Article 437 of the Penal Code makes it a crime, punishable by up to two years' imprisonment, to divulge secrets obtained through employment or professional activities, except when the aim is to report or prevent a crime.

Under international law, freedom of information, including the right to access information held by public authorities, is guaranteed as an aspect of freedom of expression. Any restrictions on the right to freedom of information – for example, to protect national security or privacy – must be narrowly interpreted and convincingly established as necessary in a democratic society. The provisions quoted above are all highly problematic in this regard.

First, Articles 178(2) and 327 criminalise the disclosure of any ‘secrets relating to the defence of the state’ and harming ‘the interests of the state’ through disclosure of material obtained through employment. Both these provisions are vaguely worded; ‘the interests of the state’ is a very broad formulation, as is information ‘relating to the defence of the state’, which would include, for example, the number of employees at the Defence Ministry. Furthermore, Article 178(2) is phrased as an absolute prohibition, criminalising disclosure even if no harm results. Both provisions also fail to provide for a public interest override.

Principles 15 and 16 of the Johannesburg Principles state:¹³⁶

Principle 15: General Rule on Disclosure of Secret Information

No person may be punished on national security grounds for disclosure of information if (1) the disclosure does not actually harm and is not likely to harm a legitimate national security interest, or (2) the public interest in knowing the information outweighs the harm from disclosure.

Principle 16: Information Obtained Through Public Service

No person may be subjected to any detriment on national security grounds for disclosing information that he or she learned by virtue of government service if the public interest in knowing the information outweighs the harm from disclosure.

In certain cases, it may be beneficial to the public interest for certain information to be disclosed even if it does impinge on concerns relating to national security interests. A journalist may, for example, come into the possession of defence procurement documents that disclose corruption within the military. Even though this might include sensitive information relating to national defence, publication would bring to light misspending of public funds and thus be in the public interest.

As Principle 16 makes clear, protection for disclosure in the public interest should not only extend to the media. Those who, in the course of their employment, come across classified material that discloses wrongdoing should also benefit from protection if they decide, in good faith, to release it. Protection for so-called ‘whistleblowers’ is a vital element in freedom of information and encourages good administrative practices at all levels of the civil service.

Article 437 is similarly flawed. First, as is the case with the protection of reputation, confidences such as those created through employment can adequately be protected through the civil law or as a matter of employment. Provisions such as this have no place in the Penal Code. Second, although Article 437 includes a limited ‘public interest’ exemption allowing for the disclosure of material that would disclose or prevent the commission of a criminal offence, this needs to be broadened to include all disclosures made in the public interest. For example, information received in confidence might reveal

¹³⁶ *Johannesburg Principles on National Security, Freedom of Expression and Access to Information*, note 85.

a threat to the environment or to public safety. In such circumstances, disclosure should be protected.

Finally, Articles 182 and 228 are both fundamentally flawed. Article 182 would allow the governmental to stamp 'secret' anything that, if published, might harm its political interests while Article 228 would criminalize the media for publishing information received by them through leaks from closed sessions of legislative bodies.¹³⁷

In addition to the repeal of these provisions, we recommend that the CPA and Iraqi Governing Council should enact measures to introduce an access to information regime for the authorities currently in power. We also advocate the inclusion of a specific guarantee of freedom of information in the new constitution.

In his 1998 Annual Report, the Special Rapporteur declared that freedom of information includes the right to access information held by the State: “[T]he right to seek, receive and impart information imposes a positive obligation on States to ensure access to information, particularly with regard to information held by Government in all types of storage and retrieval systems....”¹³⁸ His views were welcomed by the UN Commission on Human Rights.¹³⁹

The Special Rapporteur further developed his commentary on freedom of information in his 2000 Annual Report to the Commission on Human Rights, noting its fundamental importance not only to democracy and freedom, but also to the right to participate and realisation of the right to development.¹⁴⁰ He reiterated his “concern about the tendency of Governments, and the institutions of Government, to withhold from the people information that is rightly theirs”.¹⁴¹

ARTICLE 19 has published a key standard setting work on this topic, *The Public's Right to Know: Principles on Freedom of Expression Legislation*.¹⁴² This has been endorsed by, among others, the UN Special Rapporteur on Freedom of Opinion and Expression in his 2000 Annual Report.¹⁴³ These principles may be summarised as follows:

10. **Maximum disclosure:** Freedom of information legislation should be guided by the principle of maximum disclosure.
11. **Obligation to publish:** Public bodies should be under an obligation to publish key information of their own motion.

¹³⁷ We assume that any such sessions would be limited to meetings of parliamentary committees discussing classified intelligence material, for example.

¹³⁸ Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1998/40, 28 January 1998, para. 14.

¹³⁹ Resolution 1998/42, 17 April 1998, para. 2.

¹⁴⁰ Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2000/63, 18 January 2000, para. 42.

¹⁴¹ *Ibid.*, para. 43.

¹⁴² (London: June 1999).

¹⁴³ Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, note 140, para. 43.

12. **Promotion of open government:** Public bodies must actively promote open government.
13. **Limited scope of exceptions:** Exceptions should be clearly and narrowly drawn and subject to strict “harm” and “public interest” tests.
14. **Processes to facilitate access:** Requests for information should be processed rapidly and fairly, and any refusal to disclose should be subject to an appeal to an independent body.
15. **Costs:** Individuals should not be deterred by excessive costs from making requests for information.
16. **Open meetings:** Meetings of public bodies should be open to the public.
17. **Disclosure takes precedence:** Laws which are inconsistent with the principle of maximum disclosure should be amended or repealed.
18. **Protection for whistleblowers:** Whistleblowers – individuals who release information on wrongdoing – should be protected, along the lines noted above in relation to Article 437 of the Penal Code.

Recommendations:

- The restrictions on publishing or disclosing material that would harm national security or defence should be subject to a public interest override, allowing for the publication of material which it is in the public interest to disclose. Articles 178(2) and 327 of the Penal Code should either be repealed or be amended as necessary.
- Article 437 of the Penal Code should be repealed and, if necessary, replaced with appropriate civil law provisions protecting disclosures in a wider range of circumstances.
- Articles 182 and 228 of the Penal Code should be repealed.
- An interim access to information regime should be enacted by the CPA and the Iraqi Governing Council immediately, and the right to access to information should be written into the constitution. In the longer term, a sovereign Iraqi government should adopt a fully-fledge freedom of information law, in accordance with the principles set out above.

V.5.2 Syndicate of Journalists

The Iraqi Journalists Syndicate, which is still operational, was constituted through a 1969 Law and was run, initially, through the Ministry of Culture and Information.¹⁴⁴ The 1969 Law, which continues in force and forms the Syndicate’s constitution, states that the aims of the Syndicate shall include to “struggle against imperialism and Zionism” and to “stand against the enemy”.¹⁴⁵ Amongst the requirements for membership is that an applicant has to be Iraqi, must not have been convicted for defamation and should, generally, be “of good reputation, standing and behaviour”.¹⁴⁶

It is wholly inappropriate for a journalists’ association to be established by law. Moreover, a number of the stated aims of the Syndicate are political and are totally

¹⁴⁴ Law of the Syndicate of Journalists, Law No. 178 of 1969.

¹⁴⁵ *Ibid.*, Article 3.

¹⁴⁶ *Ibid.*, Article 9.

inappropriate in a legal regulation affecting freedom of expression, while its membership requirements exclude all non-Iraqis, even permanent residents. We recommend, therefore, that the Law be repealed immediately. Instead, it should be made clear that journalists are free to form themselves into associations of their own choice, independent from government.

Recommendations:

- The Law of the Syndicate of Journalists should be repealed immediately and it should be made clear that Iraqi journalists are free to form new, independent association(s).