



Recommendations

for the revision of

Iraq's new Constitution

Focus on Freedom of Expression

London
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1. INTRODUCTION

On 15 October 2005, the Iraqi people ratified the new Constitution of Iraq. Following the long period of Saddam Hussein's dictatorial rule, this Constitution established a new, democratic Iraq, spelling out the basic rights enjoyed by its entire people. While it does not solve the very immediate problems of violence and economic uncertainty, the new Constitution is a significant step on the road towards democracy in Iraq.

It is well-known that the text of the Constitution was hotly debated and that a final text was agreed upon only days before the referendum took place. In order to 'fine-tune' its provisions, Article 137 of the Constitution therefore provides for a four-month period following the election of the first Council of Representatives within which amendments may be made to the Constitution. The amendments will be drawn up by a parliamentary committee, be put to a vote in the Council of Representatives and, if agreed by an absolute majority of the Representatives, be put to the people in a final constitutional referendum.

ARTICLE 19 urges the parliamentary committee charged with the constitutional review to improve constitutional protection for human rights generally, and for freedom of expression and media freedom in particular. While we realise that the constitutional standards as drafted are already exemplary in the region, we are concerned that in various areas the constitutional guarantees still fall short of international human rights standards consented to by Iraq. In particular, we call for the following:

Recommendations:

- Article 36.A should be amended to read as follows:

The State shall guarantee:

A. The right to seek, receive and impart information and ideas through any means and regardless of frontiers.

- The following paragraphs should be added to Article 36:

Prior censorship shall not be allowed other than for the purpose of assessing the suitability for children of material intended for public entertainment.

Neither the establishment of a media outlet nor the practise of journalism shall be subject to prior permission, with the exception of the establishment of broadcasting stations.

- The following clause guaranteeing the right to access information should be included in the Constitution:

Article XX

The State shall guarantee:

(A) The right to access any information held by or on behalf of a public body or body that undertakes a public function.

(B) The right to access any information held by another person and that is required for the exercise or protection of any right.

(C) Legislation must be enacted to give effect to the rights granted in paragraphs A and B

of this clause within two years of the date on which this Constitution takes effect.

- Article 44 should be amended to stipulate which rights are absolute and which may be restricted, and to incorporate the three-part test for restrictions, along the following lines:

The rights and freedoms listed in Articles 36, ..., and ... may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. Such restrictions shall never violate the essence of the right or freedom.

- Article 100 should be amended to spell out the mandate of the National Communication and Media Commission and protect its institutional and operational independence, along the following lines:

The Communication and Media Commission will regulate broadcasting independently and in the public interest, and to ensure a diversity of views broadly representing Iraqi society. Legislation will be enacted to regulate the work of the Communication and Media Commission and to protect its independence from political, commercial or other undue interests.

- Article 100 should be amended to spell out the mandate of the national public service broadcaster and protect its institutional and editorial independence, along the following lines:

The Iraqi Media Network shall provide impartial broadcast content to serve the interests of all Iraqis. Legislation will be enacted to protect its independence from political, commercial and other undue interference within two years of the date on which this Constitution takes effect.

- Serious consideration should be given to re-instating a clause affirming the direct applicability and superior nature of international human rights law in Iraqi law, along the following lines:

All individuals have the right to enjoy the rights stated in international human rights agreements and treaties ratified by Iraq. These rights shall be directly applicable and have priority over ordinary legislation.

The following paragraphs elaborate on these recommendations.

2. CONSTITUTIONAL AMENDMENTS

2.1. Article 36: the right to freedom of expression

2.1.1. *Elements of freedom of expression*

Recommendation:

- Article 36.A should be amended to read as follows:

The State shall guarantee:

- A. The right to seek, receive and impart information and ideas through any means and regardless of frontiers.

Article 19 of the *Universal Declaration of Human Rights*,¹ the ‘gold standard’ of human rights protection, states the right to freedom of expression in the following terms:

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

This is substantially repeated in Article 19 of the *International Covenant on Civil and Political Rights*,² an international treaty ratified by more than 150 States including Iraq. Expressed as such, the right to freedom of expression consists of five important elements:

- the right to hold opinions without interference;
- the right to seek, receive and impart;
- information and ideas;
- through any media; and
- regardless of frontiers.

Each of these elements has important separate meaning. The reference to ‘seeking, receiving and imparting’ unambiguously signifies that freedom of expression includes both the right to express oneself and the right to seek information and receive information from others. The separate mention of ‘information’ and ‘ideas’ means that freedom of expression extends to both factual information and to the exchange of ideas and opinions – a distinction that is crucial in defamation law. The stipulation that freedom of expression may be exercised through any media, and regardless of frontiers, makes it clear that the right applies to expression through the Internet, orally, in writing, through radio, television or any other means; and that it confers a right to receive, seek and impart information and ideas across national borders. The latter is particularly important with regard to use of the Internet and reception of satellite television.

Article 36 of the new Constitution fails to incorporate several of these elements: it does not mention that freedom of expression extends to ‘seeking and receiving’ as well as ‘imparting’; it does not specify ‘information’ and ‘ideas’; and it does not state that the right applies across frontiers. Although it may be argued that these elements are all implied in the overall guarantee, we believe that it would be preferable if they were spelled out. This would leave no room for restrictive interpretation of the right.

2.1.2. Prohibition of censorship

¹ UN General Assembly Resolution 217A(III), adopted 10 December 1948.

² UN General Assembly Resolution 2200A(XXI), adopted 16 December 1966, in force 23 March 1976. Iraq ratified the ICCPR on 25 January 1971.

Recommendation:

- The following paragraph should be added to Article 36:

Prior censorship shall not be allowed other than for the purpose of assessing the suitability for children of material intended for public entertainment.

The prohibition of censorship is so central to the concept of freedom of expression that it has been enshrined in the national constitutions of numerous countries around the world, such as Germany, Austria, Switzerland, Portugal, Colombia, Thailand, the Netherlands, Latvia, Belgium, Japan, Italy, Russia, Poland and Denmark.³

Censorship is traditionally understood as prior interference or prior scrutiny by a State body. No person or media outlet should have to ask the permission of a State body before publishing. This means that no media – be it a newspaper, television programme or any other form of publication – should be required to submit to a State censorship body prior to dissemination. There should also be no interference by the State with the editorial independence of any media outlet. The only circumstance in which a form of prior scrutiny may be applied is in assessing the suitability of movies and other material intended for public entertainment for children. These are fundamental tenets of international law that are reflected in many constitutions as well as in international human rights treaties. Article 13(2) of the ACHR, for example, states:

The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship.

While it may be argued that this guarantee is implicit in Article 36's guarantee of press and media freedom, we believe that it should be included explicitly, leaving no room for restrictive interpretation.

2.1.3. Licensing

Recommendation:

- The following paragraph should be added to Article 36:

Neither the establishment of a media outlet nor the practise of journalism shall be subject to prior permission, with the exception of the establishment of broadcasting stations.

³ Article 5 of the German Constitution; Article 13(2) of the Austrian Basic Law; Article 17 of the Swiss Constitution; Article 38 of the Constitution of Portugal; Article 39 of the Thai Constitution; Article 7(1) and (2) of the Constitution of the Netherlands; Article 100 of the Latvian Constitution; Article 25 of the Belgian Constitution; Article 21 of the Japanese Constitution; Article 21 of the Italian Constitution; Article 29 of the Russian Constitution; Article 54 of the Polish Constitution; Article 77 of the Danish Constitution.

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It is well-established in international law that any licensing requirement for the print or Internet media, or for journalists as individuals, is incompatible with the right to freedom of expression, although licensing of the broadcast media or cinema enterprises may be legitimate.

The seminal case on the licensing or mandatory registration of individual journalists is the 1985 Inter-American Court of Human Rights decision in a case brought by Costa Rica, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*.⁴ The Court ruled unanimously that a licensing or registration requirement for all journalists, effected through compulsory membership of a professional association, constituted a violation of the right to freedom of expression. Other courts, national as well as international, have also held licensing requirements or requirements to join some form of national association as a prerequisite to becoming a journalist to constitute a violation of the right to freedom of expression.

The principle that the journalistic profession should not be licensed also finds support in several international declarations. The African Commission on Human and Peoples' Rights sees licensing requirements as a restriction on entry into the profession and it has stated, in its *Declaration of Principles on Freedom of Expression in Africa*:

The right to express oneself through the media by practising journalism shall not be subject to undue legal restrictions.⁵

The Inter-American Commission on Human Rights, following the Inter-American Court's judgment, has issued a Declaration stating:

Every person has the right to communicate his/her views by any means and in any form. Compulsory membership or the requirement of a university degree for the practice of journalism constitute unlawful restrictions of freedom of expression.⁶

Within Europe, a *Declaration on the Freedom of Expression and Information* was adopted in 1982 by the Committee of Ministers of the Council of Europe. Principle II states that the Member States:

Declare that in the field of information and mass media they seek to achieve the following objectives:

(...)

b) absence of censorship or any arbitrary controls or constraints on participants in the information process....

A Joint Declaration by the UN, OAS and OSCE special mandates on freedom of expression stated simply, "Individual journalists should not be required to be licensed or to register."⁷

⁴ *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.

⁵ Declaration on Principle of Freedom of Expression in Africa, African Commission on Human and Peoples' Rights, October 2002.

⁶ Inter-American Declaration of Principles on Freedom of Expression, approved by the Inter-American Commission on Human Rights during its 108th regular session, 19 October 2000.

⁷ Adopted 18 November 2003.

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Print and on-line media should similarly not be required to obtain a licence in order to publish. As is the case with regard to journalists, a licensing requirement for books, magazines, newspapers or websites would be tantamount to censorship and violate international standards on the right to freedom of expression. Purely technical registration systems, pursuant to which print media outlets are required to provide certain information to the authorities, may be legitimate but only if they allow no discretion to the authorities to refuse registration. However, even apparently ‘benign’ registration regimes can be problematic and there is always a danger of abuse. As a result, the UN, OAS and OSCE special mandates on freedom of expression stated, in a Joint Declaration of 2003:

Imposing special registration requirements on the print media is unnecessary and may be abused and should be avoided. Registration systems which allow for discretion to refuse registration, which impose substantive conditions on the print media or which are overseen by bodies which are not independent of government are particularly problematical.⁸

The UN Human Rights Committee has frequently expressed concern about registration or licensing systems for the print media.⁹ A March 2000 case before the Committee involving Belarus provides a good example of the potential for abuse of registration systems. The applicant had been sanctioned for failure to register a pamphlet of which he had printed just 200 copies, and the pamphlets had been confiscated. In its analysis of the complaint, the Committee first clarified that the registration requirement in itself constitutes a clear interference with the right to freedom of expression, which therefore needs to be justified:

The Committee notes that ... publishers of periodicals ... are required to include certain publication data, including index and registration numbers which, according to the author, can only be obtained from the administrative authorities. In the view of the Committee, by imposing these requirements on a leaflet with a print run as low as 200, the State party has established such obstacles as to restrict the author’s freedom to impart information.¹⁰

The Committee rejected the State’s claim that the registration requirement was necessary to protect public order or the rights of others and held the sanction and confiscation to be a breach of the applicant’s right to freedom of expression.

The national constitutions of various countries, including Turkey, Austria, Colombia, South Korea, Portugal, Paraguay, Afghanistan and the Netherlands all explicitly prohibit licensing requirements for journalists or registration or licensing of the print media, and we recommend that the Iraqi Constitution should follow their example.

2.2. Access to information

Recommendation:

⁸ *Ibid.*

⁹ See, for example, its Concluding Observations on Lesotho’s Initial Report, 8 April 1999, CCPR/C/79/Add.106, para. 23; and its Concluding Observations on Cambodia’s Initial Report, 27 July 1999, CCPR/C/79/Add.108, para. 18.

¹⁰ *Laptsevich v. Belarus*, 20 March 2000, Communication No. 780/1997, para. 8.1.

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- The following clause guaranteeing the right to access information should be included in the Constitution:

Article XX

The State shall guarantee:

- (A) The right to access any information held by or on behalf of a public body or body that undertakes a public function.
- (B) The right to access any information held by another person and that is required for the exercise or protection of any right.
- (C) Legislation must be enacted to give effect to the rights granted in paragraphs A and B of this clause within two years of the date on which this Constitution takes effect.

The right to access information held by or on behalf of public bodies, often referred to as ‘freedom of information’, is a crucially important aspect of the right to freedom of expression. In what is now an oft-quoted phrase, ARTICLE 19 noted in 1999 that “information is the oxygen of democracy”¹¹ and the specialist international bodies protecting freedom of expression are agreed that “[t]he right to access information held by public authorities is a fundamental human right”.¹² Like freedom of expression, freedom of information is important not only as a fundamental right in its own regard, but is also key to the enforcement of other rights, including economic and social rights, as well as to the functioning of democracy. Without freedom of information, State authorities can control the flow of information, ‘hiding’ material that is damaging to the government and selectively releasing ‘good news’. In such a climate, corruption thrives and human rights violations can remain unchecked.

The importance of the right to freedom of information in the fight against corruption is also reflected in several international treaties on this subject. The UN Anti-Corruption Convention, for example, explicitly requires States to implement freedom of information legislation,¹³ while the Inter-American Convention against Corruption places the right to freedom of information in the wider context of enabling civil society to monitor the activities of public bodies.¹⁴

Although in international human rights law, freedom of information is understood to be part and parcel of the right to freedom of expression, recent constitutional practice has been to provide explicit protection to it. This sends a strong signal to public bodies that they are expected to operate transparently, moving away from the culture of secrecy that often pervades these bodies.

A large number of the constitutions adopted in recent times provide explicit protection for the right to access information held by public bodies. Some older constitutions are also being

¹¹ ARTICLE 19, *The Public’s Rights to Know* (London: 1999), Preamble.

¹² 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, 6 December 2004, online at <http://www.cidh.org/Relatoria/showarticle.asp?artID=319&IID=1>.

¹³ UN Convention against Corruption, adopted by UN General Assembly resolution 58/4 of 31 October 2003. Article 13 provides that States should “[ensure] that the public has effective access to information”.

¹⁴ Inter-American Convention against Corruption, 29 March 1996. Article 3 requires States to take ‘preventive measures’ in the fight against corruption, including mechanisms that allow civil society monitoring. ‘Access to information’ has been adopted by the Committee of Experts as one of the indicators in this regard (see <http://www.oas.org/juridico/english/followup.htm>).

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revised with this in mind. The new Norwegian constitution is instructive on the need for explicit constitutional protection of access to information held by public bodies. Although Norway's 1814 Constitution protected freedom of expression and freedom of the press, this was revised in 2004 specifically to protect freedom of information. The government explained the need for amendment, saying: "The new Article 100 is ... a significantly more complete provision in the sense that it covers all the basic aspects of the right to freedom of expression. The previous provision did not cover ... the right to access to information held by public authorities [which is an] important part of the new Article 100."¹⁵ In tandem with this new provision, the Norwegian Parliament is currently considering a revised and improved Freedom of Information Act.

The new South African Constitution is also worth examining. It goes beyond providing the 'traditional' right of access to information held by public bodies and grants a right of access to information held by a private body where this is necessary to enforce a right. This reflects the idea that in today's society, private bodies, such as corporations, hold much information that is necessary to enforce rights and that it is reasonable to expect private bodies to grant access to that information. South Africa's constitution is furthermore unique in that it not only guarantees the right to access information but also requires the government to pass a law giving effect to that right within three years of its coming into force.¹⁶

Other countries whose constitutions guarantee the right to freedom of information include Finland, Bulgaria, the Philippines and Mexico. We recommend that the guarantee of freedom of information should be given constitutional status in the new Iraq.

2.3. Article 44: restrictions on freedom of expression

Recommendation:

- Article 44 should be amended to stipulate which rights are absolute and which may be restricted, and to incorporate the three-part test for restrictions, along the following lines:

The rights and freedoms listed in Articles 36, ..., and ... may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. Such restrictions shall never violate the essence of the right or freedom.

- The limitation in Article 36 that freedom of expression is guaranteed only in a way "that does not violate public order and morality" should be removed.

Article 44 requires amending in two respects. First, an amendment is necessary to distinguish between rights that are absolute and cannot be restricted, such as the freedom to hold an

¹⁵ As quoted in Norway's fifth periodic report on the implementation of the International Covenant on Civil and Political Rights, November 2004: http://odin.dep.no/ud/norsk/dok/andre_dok/rapporter/032201-220007/ind-bu.html, para. 192.

¹⁶ Article 32(2) and Schedule 6, item 23 of the 1996 Constitution.

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opinion and the right to be free from torture, and those which may under certain circumstances be limited, such as freedom of expression. Second, an additional phrase is needed to make it clear that restrictions to non-absolute rights may be brought only pursuant to law, and when truly ‘necessary’ to pursue one of a limited number of legitimate aims.

2.3.1. Absolute and qualified rights

There are two different kinds of human rights: absolute rights, the enjoyment of which can never be restricted; and qualified rights, whose enjoyment may be restricted in certain, limited circumstances.

Examples of absolute rights are the right to be free from torture and the right not to be held in slavery, as well as the right to hold an opinion. There can be no circumstances in which these rights can justifiably be restricted. No person should ever be tortured; and the State cannot force anyone to adopt or renounce a particular opinion. This is distinct from the right to express an opinion, for example in a newspaper column, which is a qualified right and may be restricted. Other ‘qualified’ rights, the enjoyment of which may under certain circumstances be restricted, include the right to freedom of expression itself, the right to privacy and the right to manifest one’s religion.

Article 44 of the Iraqi constitution fails to make this important distinction and states instead that “any” of the constitutional rights may be restricted by law. This is not in keeping with Iraq’s international obligations and we recommend that it is amended.

2.3.2. Three-part test for restrictions

The right to freedom of expression is not absolute. International law and national constitutions recognise that freedom of expression may be restricted. However, international law sets out strict parameters within which any limitations must remain. Article 19(3) of the ICCPR, ratified by Iraq,¹⁷ lays down the conditions under international law pursuant to which the right to freedom of expression may be restricted:

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.

This has been interpreted as requiring restrictions to meet a strict three-part test:¹⁸

1. the restriction must be provided by law;
2. the restriction must pursue one of the legitimate aims listed in Article 19(3) of the ICCPR; and
3. the restriction must be “necessary”.

In order for a restriction on freedom of expression to be considered ‘legitimate’ under international law, all three of these hurdles must be overcome. It is not sufficient that a

¹⁷ Note 2.

¹⁸ See *Mukong v. Cameroon*, 21 July 1994, Communication No. 458/1991, para. 9.7 (UN Human Rights Committee). See also *The Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, para. 45 (European Court of Human Rights).

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restriction is simply ‘provided by law’, for example: it must also be demonstrated to pursue a legitimate aim *and* be ‘necessary’ for that purpose.

1. Prescribed by law

The ‘prescribed by law’ requirement serves two purposes. First, it prevents freedom of expression from being limited at the discretion of officials. It is only legitimate to restrict a fundamental right where legislators have specifically weighed the competing interests and decided that some other public or private interest overrides the right to freedom of expression. To put it another way, if officials can restrict rights at will, rights have very little meaning. It also follows from this that laws should never leave an official excessively broad discretion. Second, the ‘prescribed by law’ test means that individuals will be able to be aware of the limits to their right to freedom of expression and act accordingly.

2. Legitimate aim

International law only permits restrictions on freedom of expression which serve certain limited overriding public and private interests. The purpose of this part of the test is to prevent abuse of the power to restrict freedom of expression by ensuring that it is done to protect only very important interests. Article 19(3) of the ICCPR clearly lists the very limited aims in pursuit of which freedom of expression may be limited: the rights or reputations of others; and the protection of national security, public order, or public health or morals. This is an exclusive list: restrictions that do not serve one of the legitimate aims listed constitute a violation of the right to freedom of expression.¹⁹

3. Necessary in a democratic society

The third part of the test for restrictions on freedom of expression, which is also found in international law and most constitutions, is that any restriction must not just be related to a legitimate aim, but be *necessary* for its achievement. This part of the test is the most critical element and the basis upon which the vast majority of international and national cases are decided. It ensures that the restriction really does serve to protect the legitimate aim and that it does so in a targeted way whose impact is limited to the harmful speech. In the absence of this requirement, even a clumsy, broadly worded and ineffective measure which had a seriously detrimental effect on freedom of expression would be permitted, if it was somehow related to one of the legitimate aims recognised in Article 19(3).

Iraq’s new Constitution fails to incorporate this three-part test. While Article 44 requires restrictions to be imposed by law, it does not incorporate the necessity requirement nor does it list the restricted aims in pursuit of which a right may be limited. Article 44 does require that restrictions should not “violate the essence of a right or freedom”. While this is a useful addition, it is not the same as the “necessity” requirement: it merely means that a restriction should leave some semblance of the right intact. And instead of incorporating the ‘legitimate aim’ requirement as part of the test on restrictions, as required under international law, the Iraqi Constitution has directly limited the right to freedom of expression in Article 36 as actionable only “in a way that does not violate public order and morality”. This is fundamentally distinct from the three part test required under international law as it can be read effectively to bypass the “prescribed by law” and “necessity” requirements. We recommend that amendments be brought to eliminate the qualifying phrase from Article 36, and to incorporate the full three-part test in Article 44.

¹⁹ See, for example, *Mukong v. Cameroon*, note 18, para. 9.7.

2.4. Article 100: the media regulator

Recommendation:

- Article 100 should be amended to spell out the mandate of the National Communication and Media Commission and protect its institutional and operational independence, along the following lines:

The Communication and Media Commission will regulate broadcasting independently and in the public interest, and to ensure fairness and a diversity of views broadly representing Iraqi society. Legislation will be enacted to regulate the work of the Communication and Media Commission and to protect its independence from political, commercial or other undue influences within two years of the date on which this Constitution takes effect.

In order to protect the right to freedom of expression, it is imperative that the media be permitted to operate independently from government control. This helps safeguard the media's role as public watchdog and the public's access to a wide range of opinions, especially on matters of public interest. It follows that any bodies with regulatory powers over the media should be fully independent and be protected against political interference. This basic principle has been affirmed by, amongst others, the UN Special Rapporteur on Freedom of Opinion and Expression, OSCE Representative on Freedom of the Media and OAS Special Rapporteur on Freedom of Expression,²⁰ as well as by UNESCO's own General Conference.²¹

In line with this principle, a number of national constitutions include explicit guarantees for the independence of media regulatory bodies. The recently adopted South African Constitution is often given as an example; Article 192 guarantees the independence of the broadcast regulator.

Article 100 of the Iraqi Constitution guarantees the financial and administrative independence of the National Communication and Media Commission (NCMC) and specifies that it shall be 'attached' to the Council of Representatives.

While we welcome the explicit mention of the NCMC and its financial and administrative independence, it would be helpful if the Constitution also made it clear what its mandate, functions and powers are. This would avoid future conflict over this crucial body. Similarly, the operational and institutional independence of the NCMC should be guaranteed. It should be clear that NCMC is not only financially or administratively independent, but that it is also independent in its substantive functions, such as the licensing process.

²⁰ Joint Declaration of 18 December 2003. Available at: <http://www.unhcr.ch/hurricane/hurricane.nsf/view01/93442AABD81C5C84C1256E000056B89C?opendocument>
See also the Declaration of Principles on Freedom of Expression adopted by the African Commission on Human and Peoples' Rights at its 32nd Session, 17-23 October 2002, which includes a similar principle.

²¹ Dakar Declaration, 3 May 2005, endorsed by the General Conference on 20 October 2005.

2.5. Independence of the Public Service Broadcaster

Recommendation:

- Article 100 should be amended to spell out the mandate of the national public service broadcaster and protect its institutional and editorial independence, along the following lines:

The Iraqi Media Network shall provide impartial broadcast content to serve the interests of all Iraqis. Legislation will be enacted to protect its independence from political, commercial and other undue interference within two years of the date on which this Constitution takes effect.

The same underlying reasons for protecting the independence of the media regulatory body also apply to public service broadcasters, such as the Iraqi Media Network (IMN). In order for these broadcasters to carry out their functions and serve the public interest, rather than the interests of the government, it is crucial that their governing boards are protected from any form of political or other interference. This is recognised in UNESCO's Declaration of Sana'a as well as in the 2005 Declaration of Dakar, both of which have been endorsed by UNESCO's General Conference.²²

International bodies and courts around the world have recognised this principle. A whole Recommendation of the Committee of Ministers of the Council of Europe is devoted to guaranteeing the independence of public broadcasters.²³ This Recommendation states, among other things: "The legal framework governing public service broadcasting organisations should clearly stipulate their editorial independence and institutional autonomy".²⁴ Principle VI of the Declaration on Principles of Freedom of Expression in Africa, adopted by the African Commission on Human and Peoples' Rights, states, in part:

State and government controlled broadcasters should be transformed into public service broadcasters, accountable to the public through the legislature rather than the government, in accordance with the following principles:

- public broadcasters should be governed by a board which is protected against interference, particularly of a political or economic nature;
- the editorial independence of public service broadcasters should be guaranteed;

The same principle finds support in national case law. For example, the Supreme Court of Ghana has noted: "[T]he state-owned media are national assets: they belong to the entire community, not to the abstraction known as the state; nor to the government in office, or to its party. If such national assets were to become the mouth-piece of any one or combination of the parties vying for power, democracy would be no more than a sham."²⁵

²² Note 21.

²³ Recommendation No. R(96)10 of the Committee of Ministers of the Council of Europe to member states on the guarantee of the independence of public service broadcasting, adopted 11 September 1996.

²⁴ Principle 1.

²⁵ *New Patriotic Party v. Ghana Broadcasting Corp.*, 30 November 1993, Writ No. 1/93, p. 17.

Article 100 of the new Iraqi Constitution protects the independence of a number of public institutions, including the national media regulator. We recommend that IMN is added to the list of bodies whose independence, including its editorial independence, is guaranteed..

2.6. International human rights law

Recommendation:

- Serious consideration should be given to re-instating a clause affirming the direct applicability and superior nature of international human rights law in Iraqi law, along the following lines:

All individuals have the right to enjoy the rights stated in international human rights agreements and treaties ratified by Iraq. These rights shall be directly applicable and have priority over ordinary legislation.

The version of the new Constitution that was agreed by the drafting Committee, before it was put to a Parliamentary vote and subsequent Referendum, included a provision ensuring that the protection of human rights in Iraq would be guaranteed at least at the level set by international human rights treaties. This provision had some value in sending an important signal, but at the same time it did not go much further than re-stating Iraq's general obligations under international law. However, the clause was removed before the final vote as part of a compromise deal on other parts of the constitutional text.

We recommend that the opportunity of the current review should be taken to clearly affirm the applicability of international human rights law in the domestic legal system. International human rights treaties such as the *International Covenant on Civil and Political Rights* place a direct obligation on States to give effect to the rights they contain. Article 2 of the ICCPR provides:

[E]ach State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

In many countries, this obligation is discharged, in part, by providing for the direct enforceability of international law in the domestic legal order. The Human Rights Committee, the body set up to supervise the implementation of the ICCPR, has expressed the strong preference that States should seek to make the rights granted in the ICCPR directly enforceable in the domestic legal system. In its General Comment No. 31, the Committee stated:

Article 2 allows a State Party to pursue this in accordance with its own domestic constitutional structure and accordingly does not require that the Covenant be directly applicable in the courts, by incorporation of the Covenant into national law. The Committee takes the view, however, that Covenant guarantees may receive enhanced protection in those States where the Covenant is automatically or through specific incorporation part of the domestic legal order. The Committee invites those States Parties in which the Covenant does

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not form part of the domestic legal order to consider incorporation of the Covenant to render it part of domestic law to facilitate full realization of Covenant rights as required by article 2.²⁶

The most straightforward way of achieving this is through a constitutional provision to the effect that rights found in international human rights treaties have ‘direct effect’ in the domestic legal system. Examples of such provisions can be found in a number of constitutions, such as those of Bulgaria and the Netherlands. Furthermore, to provide effective implementation, international treaty provisions should prevail over any domestic legislation that is in conflict with it, whether such legislation predates or follows the ratification of the treaty. The French Constitution is one example of a constitution that confers superior status on international treaties. Article 55 of the Constitution states:

Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, in regard to each agreement or treaty, to its application by the other party.

It may be noted that a number of constitutions make specific reference to the incorporation of international human rights law into the domestic legal system. For example, Bosnia and Herzegovina’s new Constitution explicitly states that the provisions of the *European Convention on Human Rights* (the main regional human rights treaty in Europe) are directly applicable and “shall have priority over all other law”.²⁷ Similarly, the Czech Republic’s new Constitution states: “Ratified and promulgated international accords on human rights and fundamental freedoms, to which the Czech Republic has committed itself, are immediately binding and are superior to law.” Afghanistan’s new Constitution goes even further and incorporates the UN Charter as well as the UDHR, even though the latter is not a treaty:

The state shall abide by the UN charter, international treaties, international conventions that Afghanistan has signed, and the Universal Declaration of Human Rights.²⁸

We recommend that the new Iraqi constitution should follow these examples.

²⁶ General Comment 31, on Article 2 of the Covenant: the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 21 April 2004, UN Doc. CCPR/C/74/CRP.4/Rev.6.

²⁷ Constitution of Bosnia Herzegovina, Article II(2).

²⁸ Article 7(1).