



## COMMENT

on

## Draft Journalists Protection Law of Iraq

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### **I. Introduction**

1. In this Comment, ARTICLE 19 sets out its concerns about the draft “Journalists Protection Law” [*sic*] (hereinafter the “Draft Law”) that has recently been submitted to the Iraqi Parliament for its approval.<sup>1</sup> ARTICLE 19’s analysis of the Draft Law is informed by international human rights law, in particular those international legal standards and principles on the right to freedom of expression, as protected by Article 19 of the International Covenant on Civil and Political Rights (hereinafter “ICCPR”), which Iraq ratified on 25 January 1971.<sup>2</sup> It is recalled that Article 19 ICCPR states:

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<sup>1</sup> The translation of the Draft Law, which was obtained by IraqSlogger in the original Arabic, is reproduced in full in Part IV. of this Comment. In recent years ARTICLE 19 has produced numerous reports on the state of media freedom in Iraq. See, most notably, *Free Speech in Iraq: Recent Developments* (London, August 2007).

<sup>2</sup> See UN Treaty Collection [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-)

1. *Everyone shall have the right to hold opinions without interference.*
  2. *Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*
  3. *The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*
    - (a) For respect of the rights or reputations of others;*
    - (b) For the protection of national security or of public order (ordre public), or of public health or morals.*
2. As a result of ratifying the ICCPR, Iraq is not only bound as a matter of international law by the provisions of the ICCPR, but is obliged to give effect to that treaty through national legislation.<sup>3</sup>
3. At the outset, ARTICLE 19 notes that, at only eighteen short articles, the Draft Law is very brief and, as its title suggests at least, its specific purpose is to provide journalists in particular with “protection”. ARTICLE 19 welcomes the apparent intention underlying this Draft Law to shore up the protection of journalists in Iraq. At the same time, ARTICLE 19 notes that the “protection of journalists” is a relatively unusual subject for national legislation concerning the media which instead tends to focus on issues such as broadcasting regulation and freedom of information. Indeed, the “protection of journalists”, specifically in situations of armed conflict, has been viewed as a subject of the concern for international actors, rather than for the enactment of domestic legislation.<sup>4</sup> Yet the particular context of Iraq – where more journalists (139) have been killed since the beginning of 1992 to date than in any other country in the world and where there is an ongoing situation of armed conflict – arguably warrants the attention of national legislators on the protection of journalists.<sup>5</sup> However, it is questionable whether the Draft Law actually fulfils its apparent objective of protecting journalists. Hence, ARTICLE 19’s analysis of the Draft Law proceeds on the basic premise that the protection of journalists necessarily requires the full protection of journalists’ human rights, in particular their freedom of expression upon which the exercise of their profession and a healthy democracy depends. In ARTICLE 19’s view, the brevity and narrow focus of the Draft Law on the protecting of journalists obscures the fact that what many, indeed most,

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[4&chapter=4&lang=en](#) Iraq is also a member of the League of Arab States which has adopted the Arab Charter on Human Rights which at Article 32 guarantees the right to information and freedom of expression.

<sup>3</sup> Articles 2(1)(b), 14(1) and 16, Vienna Convention on the Law of Treaties 1969.

<sup>4</sup> Security Council Resolution 1738 on the protection of journalists in armed conflict nevertheless recalls that “journalists, media professionals and associated personnel engaged in dangerous missions in areas of armed conflict shall be considered as civilians and shall be respected and protected as such ....” and “[a]ffirms that it will address the issue of protection of journalists in armed conflict strictly under the agenda item ‘protection of civilians in armed conflict’”; A/RES/1738 (2006), 23 December 2006. See Article 79 of the Additional Protocol I regarding the protection of journalists engaged in dangerous professional missions in areas of armed conflict. For commentary on the issue, see Alexandre Balguy-Gallois, “The Protection of Journalists and News Media Personnel in Armed Conflict” *International Review of the Red Cross* Vol 86 No 853 [2004] 37-67.

<sup>5</sup> See statistics provided by the Committee to Protect Journalists for the period between 1 January 1992 to 8 July 2009 <http://www.cpj.org/deadly/index.php>

of the substantive provisions achieve is the exact opposite – significant restrictions of journalistic freedom of expression and other human rights in Iraq at a time when their reinforcement is most needed. In ARTICLE 19’s view, such restrictions on journalistic freedom of expression and other human rights are in clear violation of Iraq’s international legal obligations.

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

## **II. Comments on the Draft Journalists Protection Law**

5. In this section ARTICLE 19 explains the fundamental flaws of the Draft Law from an international human rights perspective, with a specific focus on freedom of expression, and highlights recommendations for amending the Draft Law.
6. In ARTICLE 19’s view the Draft Law should begin by strengthening the weak protection of the right of freedom of expression in the Article 38 of the Iraqi Constitution, by recalling Iraq’s international human rights obligations on that right.<sup>6</sup>

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

7. ARTICLE 19 notes that the personal scope of the Draft Law is very restrictive: it applies to journalists defined as “one who works for press (outlets) that may be read, heard or viewed, and who is affiliated with the Iraqi Journalists Syndicate” (Article 16). Besides requiring journalists to be affiliated with the Syndicate in violation of the right to freedom of expression (which is discussed further in Part D below), this provision reflects a narrow understanding of journalism. If the Draft Law is to protect the full range of journalists, it should expressly stipulate at an early stage that it applies to all persons involved in a journalistic process.

**Recommendation: The Draft Law should provide that its protections apply to all persons involved in a journalistic process providing information to the public, including editors, commentators, freelance and part-time authors, bloggers and citizen journalists. The protections should apply no matter the format or medium including print, broadcast, electronic, Internet and books. It should also apply to all those with a professional relationship to journalists including media organisations, editors, printers, distributors and telecommunications providers.<sup>7</sup>**

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<sup>6</sup> As approved by referendum on 15 October 2005. For a critique of constitutional provisions on the right to freedom of expression and freedom of the press see *Free Speech in Iraq: Recent Developments* (London, August 2007), chapter one.

<sup>7</sup> The proposed scope reflects that which is suggested for a comprehensive law on protection of journalists’

8. We have organised the remainder and bulk of our comments and recommendations according to four themes: (a) the protection of journalists; (b) compensation for injured journalists and the families of killed journalists; (c) restrictions on the rights of journalists; (d) regulation of the profession of journalism.

**A. *The protection of journalists***

9. Several provisions of the Draft Law together provide for a “system of protection for journalists” in particular against physical attacks. Article 1 of the Draft Law states:

*Any violation against a journalist while he is performing his journalistic role is considered to be an assault tantamount to a violation against a civil servant while he is performing his official duties. The offender is to be punished by the legally provided sentences (for violations against) a government employee.*

10. There are several fundamental weaknesses with this provision. *First*, several terms in this provision are legally imprecise or overly broad. It is unclear as to what is meant by “violation” which is not defined anywhere in the Draft Law; it is ambiguous whether it actually means physical attacks (probably) or some other interference with journalists’ work. The scope of “official duties” is similarly unclear and the difference, if one exists at all, between civil servant and government employee is not indicated. *Second*, any “violation against a journalist” is placed on the same legal footing as “a violation against a civil servant performing while he is performing his duties”. Sentences for violations against journalists are supposed to be the same as those legally provided for violations against a government employee. This is problematic partly because it clearly allocates a higher degree of protection to journalists and of civil servants/government employees as compared with other individuals by punishing violations against these individuals more severely. Yet there is no justification within international human rights law for such a provision privileging the rights of journalists performing their duties in this manner. All human beings have the same human rights, such as the rights to life and to be free from torture, cruel, inhuman or degrading treatment, which should be protected by the state through *inter alia* the establishment of independent and impartial investigations into violations of these rights. This provision as it stands falls foul of Iraq’s obligations under Article 26 ICCPR on equality before and equal protection of the law.<sup>8</sup> *Third*, the higher level of rights protection for journalists *en par* with that accorded to government employees potentially compromises the independence of journalists and consequently their “vital role of watchdog”.<sup>9</sup>

**Recommendation: Article 1 should be amended to provide that state authorities, such as state police, shall be obliged to conduct independent and impartial investigations into any crimes committed against journalists (such as physical attacks**

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sources. See David Banisar, *Silencing Sources: An International Survey of Protections and Threats to Journalist’s Sources* (Privacy International, 2007) at 96.

<sup>8</sup> Article 26 ICCPR states: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” Article 1 of the Universal Declaration on Human Rights states: “All human beings are equal in dignity and rights”.

<sup>9</sup> *Sunday Times v United Kingdom* (1979) 2 EHRR 229 at para 50(b) (European Court of Human Rights).

**upon, threats made to and disappearances of journalists) and other individuals in Iraq. Such a provision should already be part of Iraqi law.**

11. Article 6 of the Draft Law states:

*The state is to establish an effective capability to protect the journalists and media outlets, and to investigate the crimes to which they are subjected.*

12. Whilst this provision sets out the state's intention to establish an "effective capability", there is no indication as to what that effective capability involves in practice. One might imagine however that such effective capability would include a fully fledged and effective system of law and order that would protect everyone in Iraq, and not one that would protect solely journalists (narrowly defined) as this provision suggests. Indeed, the state has a positive duty under international law to establish an independent, impartial and effective investigation into physical attacks on *anyone* within its jurisdiction of the state.<sup>10</sup> Another potential problem with the concept of "effective capability" as expressed in this provision is that it may be used to restrict journalists' rights to practice their profession whilst purporting to "protect" them.

**Recommendation: Article 6 should provide that the state should ensure that the criminal justice system (including the police, prosecutors, defence lawyers and the courts) is adequately resourced to be able to conduct independent and impartial investigations into crimes committed against journalists and other individuals in Iraq. Such a provision should already be part of Iraqi law.**

13. Article 7 of the Draft Law then states:

*The security agencies are to conduct immediate investigations in the case of any journalist being subjected to any kind of threat or harm, and to make every effort to punish the perpetrators.*

14. This provision places security agencies at the heart of the protection of journalists: they are the bodies who are responsible for conducting investigations into attacks on journalists and also, most disturbingly, "to make every effort to punish the perpetrators". The term "security agencies" could encompass private security firms, who have had a particularly enhanced presence in Iraq since 2003. Yet, it should be the role of the state's own law enforcement officials, in other words the police, to conduct independent, impartial and effective investigations into attacks or threats on journalists – or on anyone. Furthermore, it is not be the role of security agencies to punish perpetrators of attacks on individuals, but should solely be the responsibility of a jurisdictionally competent, independent and impartial judicial system to conduct fair and public hearings to determine promptly the guilt or innocence of the accused, and in the case of the former, the sentences according to law.<sup>11</sup>

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<sup>10</sup> See UN Human Rights Committee, General Comment No 6 on the right to life (article 6), 30 April 1982 para 4; UN Human Rights Committee, General Comment No 7 on the torture or cruel, inhuman or degrading treatment or punishment (article 7), 30 May 1982 para 1; UN Human Rights Committee, General Comment No 31 (nature of the general legal obligation imposed on states parties to the covenant), 26 May 2004 paras 8, 15 and 18 in particular.

<sup>11</sup> Article 14 ICCPR. See also Basic Principles on the Independence of the Judiciary (1990), adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders (1985) both adopted at the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders,

**Recommendation: Article 7 should be amended to provide that the state’s law enforcement officials shall conduct independent and impartial investigations into any crimes committed against journalists or any other individuals in Iraq. It should also provide that anyone accused of a crime against a journalist or any other person shall be entitled to a fair and public hearing by a competent, independent and impartial court or tribunal established by law. Any judgment rendered shall be delivered its decision promptly and according to law. Such a provision should already be part of Iraqi law.**

***B. Compensation for injured journalists and the families of killed journalists***

15. Closely connected to the system for the protection of journalists established through the articles described above, there are various provisions which together form a system for compensating victims of physical attacks who happen to be journalists. Article 9 states:

*The state will be responsible for the care for families of martyrs of the press by appropriating pensions for them.*

16. This provision suggests that the state is willing to take look after the welfare of families of journalists killed in the course of their work. Whilst this appears a laudable goal, there is no reason why the families of journalists should receive special benefits over and above those of individuals who were not journalists and have also been killed whilst performing their chosen professions.

**Recommendation: Article 9 should be omitted.**

17. Article 10 of the Draft Law then states:

*The state will appropriate salaries for journalists who are subjected to disability because of their work, if the disability is greater than 50 percent.*

18. This provision suggests that the state would be willing to provide for disabled journalists, only if their disability constituted more than 50%. This provision discriminates against non-journalists (or all those engaged in journalistic activities who do not fit the definition of journalist provided by the Draft Law) who have become disabled but also against those who have suffered disability of less than 50%. It is also predicted that would be also be difficult to prove whether the threshold of 50% had been reached in the cases of many journalists disabled because of their work. The provision is also problematic from the perspective of journalists who have been disabled for all or much of their lives or have become disabled for reasons unrelated to their work.<sup>12</sup>

**Recommendation: Article 10 should be omitted.**

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

<sup>12</sup> See further provisions of Convention on the Rights of Persons with Disabilities, entered into force 3 May 2008. Iraq is not yet a signatory to the Convention. However, a fundamental obligation of State Parties under the Convention is “to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability” (emphasis added) (Article 4(1)). As of 26 August 2009, there were 142 signatories and 65 States Parties to the Convention.

19. Article 11, like Articles 9 and 10 before it, grants significant welfare benefits to journalists in Iraq which are undoubtedly far beyond what an ordinary person Iraq would receive. It states:

*The state is responsible for health care of journalists, and to make outlays for treatment expenses inside and outside the country if the injury or disability occurred because of their journalistic work.*

20. Whilst it would be tempting to accept such benefits for journalists, in ARTICLE 19's opinion, journalists should not be privileged in this manner simply on the basis of their profession.

**Recommendation: Article 11 should be omitted.**

### ***C. Restrictions on the rights of journalists***

21. ARTICLE has serious concerns about the plethora of ways in which the Draft Law curtails journalists' right to freedom of expression.
22. On the issue of the arrest and detention of journalists, Article 2 of the Draft Law states:

*The journalist is not to be arrested or detained because of his work as a journalist except by a court order and after notifying the Iraqi Journalists Syndicate and the participation of its representative in the investigation.*

23. At first blush this provision appears to assert the principle that a journalist should not be detained simply for going about his or her chosen profession as a journalist in the usual manner. After a closer reading, however, it becomes apparent that this provision is more about framing certain criteria for the circumstances under which a journalist may actually be arrested and detained: there needs to be a court order, the Iraqi Journalists Syndicate should be notified and a representative of the Syndicate should participate in the investigation. Yet, these procedural criteria do not satisfy the substantive requirements for legitimate detention under international human rights law. First, that no one may be detained otherwise than in accordance with national law;<sup>13</sup> and second, that the implementation of national law shall not be arbitrary.<sup>14</sup> Moreover, there is no suggestion that an objective threshold for the circumstances in which an individual may be arrested, such as "reasonable suspicion". Depending on the scope of Iraqi criminal law on the law enforcement powers to arrest and detain individuals in Iraq more generally, this provision may actually lower the protection of journalists in relation to other individuals in Iraq, rather than serving to enhance it.

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<sup>13</sup> Article 9(1) ICCPR.

<sup>14</sup> The Human Rights Committee has emphasised that "arbitrariness" is not equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability". See *Van Alphen v Netherlands*, Communication 305/88 Views of the Human Rights Committee adopted 23 July 1990, para 5.8. For the Committee, detention can only be considered arbitrary "if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context". *A v Australia*, Communication 560/93, Views of the Human Rights Committee, adopted 3 April 1997, para 9.2. See also Article 5(1)(a)-(f) European Convention on Human Rights.

**Recommendation:** Article 2 should provide that no journalist or other individual should be subject to arbitrary arrest or detention. It should also provide that no journalist or other individual shall be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established by law.

24. The Draft Law also deals with journalists' rights of access to information. Article 3 of the Draft Law states:

*The journalist has the right to access any information in the custody of the government departments and public institutions to transmit them to the public. These bodies are not entitled to refuse the journalist's request to obtain information except in the case that revealing the information would cause great damage to the national interests, in a greater way than the damage that would obtain if this information were not published, and were concealed from the public.*

25. The first sentence of this provision impresses the established principle that journalists have a right to state-held information and may relay that information to the public. The second sentence appears to establish a kind of public interest test for exceptions to the principle of disclosure of information to journalists, although it is excessively broad. According to international standards on the right of access to information, *all requests* for information – regardless of whether they are made by journalists or members of the public – made to public bodies should be met unless the public body can show that the information falls within the scope of a limited range of exceptions as permitted under a strict three part test: (1) the information must relate to a legitimate aim listed in the law; (2) disclosure must threaten to cause substantial harm to that aim; and (3) the harm to the aim must be greater than the public interest in having the information.<sup>15</sup> This provision falls well short of reflecting this three part test on exceptions to the principle of maximum disclosure.
26. Furthermore, Article 3 does not indicate whether the protection of journalists' rights of access to information by this Draft Law differs in any way from the protection of the right of the public at large to access information – although it suggests it might. There is no justification, however, for any difference in treatment of journalists and members of the public as holders of the right of access to information.

**Recommendation:** Article 3 should be amended to provide that everyone (both journalists and other non-journalists) have the right of access to information. It should further state that a body may not refuse to indicate whether or not it holds a record, or refuse to communicate information, unless the harm to the protected interest outweighs the public interest in disclosure. The state should also adopt a comprehensive freedom of information law.

27. Article 4 of the Draft Law concerns an integral part of freedom of expression and “one of the basic conditions for press freedom”, the protection of sources.<sup>16</sup> It states:

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<sup>15</sup> See ARTICLE 19, *Principles on Freedom of Information Legislation* (June 1999).

<sup>16</sup> The leading case in the system of the European Convention of Human Rights is that of *Goodwin v United Kingdom* (1996) 22 EHRR 123. The European Court of Human Rights stated in that case: “[h]aving regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure



*The journalist has the right not to reveal the sources of information, unless it is necessary to prevent a crime or discover the perpetrator (of a crime), on the condition that a court order be issued by the court concerned in the matter. Claims for compensation are not permitted after three months of the date of issue (of the court order).*

28. This provision falls below international,<sup>17</sup> regional<sup>18</sup> and national<sup>19</sup> standards on the issue. Following established principles on the protection of journalistic sources, the provision should state that a journalist has the right not to reveal the sources of information, unless it is necessary to prevent a major or serious crime (such as murder, manslaughter, severe bodily injury) or for the defence of a person accused of having committed a major crime.<sup>20</sup> In addition, all other alternative measures must be exhausted and there must be a fair and public hearing of the journalist concerned before an order for disclosure may be issued.<sup>21</sup>

**Recommendation: Article 4 should be amended to provide that journalists should not be required to disclose the identity of their confidential sources, unpublished materials, notes, documents or other materials that may reveal information about their sources or journalistic processes. It should provide that any request to obtain information should be strictly limited to the most serious of cases and only be approved by an independent judge in a fair and public hearing and subject to appeal to an impartial body.<sup>22</sup>**

29. Seizure of journalistic material is a more direct intrusion into journalistic activity than an order to reveal sources and may be considered a more extreme measure to achieve similar ends.<sup>23</sup> In this regard Article 5 of the Draft Law states:

*It is not permitted to confiscate the journalist's equipment except by order of the court, and that (the confiscation) be necessary to prevent a crime or in the investigation of (a crime).*

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cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest” at para 39.

<sup>17</sup> Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr Abid Hussein, submitted pursuant to Commission resolution 1997/27.

<sup>18</sup> Declaration of Principles of Freedom of Expression, Adopted 27 June 1981, OAU Doc CAB/LEG/67/3 rev.5; entered into force 21 October 1986; Concluding Document of the Vienna Meeting 1986 of Representatives of the Participating States of the Conference on Security and Cooperation in Europe; Inter-American Declaration of Principles of Freedom of Expression, October 2000.

<sup>19</sup> At the national level, over 100 countries around the world have given journalists specific legal rights to protect their sources. See the comprehensive international survey of source protection, David Banisar, *Silencing Sources: An International Survey of Protections and Threats to Journalist's Sources* (Privacy International, 2007).

<sup>20</sup> See Explanatory Memorandum to Recommendation No R (2000) 7 of the Committee of Ministers to member states on the rights of journalists not to disclose their sources of information at paras 40-41.

<sup>21</sup> See above at paras 40, 41 and 48.

<sup>22</sup> See further the criteria for disclosure indicated in the “Proposed Guidelines on Protection of Journalists’ Sources” in David Banisar, *Silencing Sources: An International Survey of Protections and Threats to Journalist's Sources* (Privacy International, 2007) at 96.

<sup>23</sup> The European Court of Human Rights has considered that such a search when conducted with a view to uncover a journalist’s source is even more a “drastic measure than an order to divulge the source’s identity” and therefore may undermine the protection of sources to an even greater extent than such an order. *Roemen and Schmit v Luxembourg*, Application No 51772/99, Judgment of 25 February 2003 para 57.

30. This provision seems open to abuse by state authorities as it affords very wide powers to state authorities who might wish to rely on it, without any real justification at all or inadequate justification, in order to confiscate a journalist's material or equipment on the pretext that it is necessary to prevent or investigate a crime. Searches and seizures of journalistic material are one of the most obvious interferences with the right to freedom of expression and consequently must meet the conditions of the three part test contained in Article 19(3). First, the interference must be provided for by law. This requirement will be fulfilled only where the law is accessible and "formulated with sufficient precision to enable the citizen to regulate his conduct."<sup>24</sup> Second, the interference must pursue a legitimate aim. The list of aims in Article 19(3) of the ICCPR is exclusive in the sense that no other aims are considered to be legitimate as grounds for restricting freedom of expression. Third, the restriction must also be necessary to secure one of those aims in the sense that there must be a "pressing social need" for the restriction. Furthermore, the reasons given by the State to justify the restriction must be "relevant and sufficient" and the restriction must be proportionate to the aim pursued.<sup>25</sup> The three part test imposes a justifiably severe burden on the state to demonstrate that confiscation of journalistic material was appropriate in the circumstances.
31. According to regional human rights jurisprudence, measures such as confiscation or seizure of journalistic material must demonstrate that the balance between the interests at stake, namely the protection of sources on the one hand and the prevention and punishment of crime on the other has been preserved. State authorities must show that the reasons to justify the particular interference with the journalist's freedom of expression are both relevant and sufficient in demonstrating that the measure was proportionate.<sup>26</sup> It should also be considered that besides violating the right to freedom of expression, a provision on the confiscation of equipment has implications for the right to respect for private life and the protection of property.<sup>27</sup>

**Recommendation: Article 5 should provide that any searches of a journalist's home or office should not be used to circumvent rules on the protection of sources (indicated above) and shall be presumed to be invalid. It should indicate that the state has the burden of demonstrating that any search or seizure was provided for by law, pursued a legitimate aim, and was necessary and proportionate in the circumstances. It should also provide that any materials obtained in violation of rules on the protection of sources should not be admissible as evidence in any proceeding.**<sup>28</sup>

32. Notwithstanding the challenges to the protection of sources of Articles 4 and 5, Article 8 of the Draft Law imposes restrictions on journalists' freedom of expression which are likely to be even more susceptible to abuse by state actors if this Draft Law is adopted. That provision states:

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<sup>24</sup> *Sunday Times v United Kingdom* (1979) 2 EHRR 229 at para 49 (European Court of Human Rights).

<sup>25</sup> *Lingens v Austria*, Application No 9815/82, Judgment of 8 July 1986, paras 39-40 (European Court of Human Rights).

<sup>26</sup> *Roemen and Schmit v Luxembourg*, Application No 51772/99, Judgment of 25 February 2003 (European Court of Human Rights).

<sup>27</sup> On privacy see Article 17 ICCPR and Article 8 of the European Convention on Human Rights; on the right to property see Article 1 of the First Protocol of the European Convention on Human Rights.

<sup>28</sup> See further the criteria for disclosure indicated in the "Proposed Guidelines on Protection of Journalists' Sources" in David Banisar, *Silencing Sources: An International Survey of Protections and Threats to Journalist's Sources* (Privacy International, 2007) at 96 and 97.

*Journalists are permitted to carry out their work without interference on the part of the security forces unless there is legitimate justification.*

33. Any restriction on the freedom of expression of journalists or any other individuals needs to meet all the criteria contained in Article 19(3) ICCPR. The simple requirement that there needs to be a “legitimate justification” for the restriction, a term which is likely to be given a broad interpretation by the security forces acting on behalf of the state, falls far short of those standards.

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

#### ***D. Regulation of the profession of journalism***

34. A series of provisions in the Draft Law serve to regulate the profession of journalism, and in so doing go beyond the specific objective of journalists protection. These provisions establish the Iraqi Journalists Syndicate as a locus of power and control over the profession of journalism, and in so doing serve to threaten the independence of journalists. Most notably, Article 16 states:

*A journalist is one who works for press (outlets) that may be read, heard, or viewed, and who is affiliated with the Iraqi Journalists Syndicate.*

35. This provision indicates that affiliation with the Iraqi Journalists Syndicate is obligatory for anyone wishing to be a journalist in Iraq (and to receive protection under the Draft Law). The provision therefore effectively establishes a form of licensing scheme for journalists in breach of the right to freedom of expression. The right to work as a journalist belongs to everyone, irrespective of qualifications. This provision simultaneously puts a significant degree of political power in the hands of the Iraqi Journalists Syndicate and potentially restricts the independence of all journalists wishing to operate in Iraq. In the respect, ARTICLE 19 points out to a comparative jurisprudence on this issue by the Inter-American Court of Human Rights. In responding to arguments put forward by Costa Rica and its supporters that a requirement for journalists to become members of a *colegio* (association) was legitimate, the Inter-American Court found that licensing through restrictions placed upon access to journalism, harmed rather than enhanced public order, was counterproductive to the public’s right to be informed and failed to meet the necessity test for restrictions on freedom of expression. The Inter-American Court concluded that a scheme establishing compulsory membership in an association prescribed by law for the practice of journalism such as would be established by Article 16 is a violation of freedom of expression.<sup>29</sup> This position has been supported at the international and national levels.<sup>30</sup>

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<sup>29</sup> *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion, OC-5/85 of 13 November 1985, Series A No 5 (Inter-American Court of Human Rights).

<sup>30</sup> See the 2004 declaration of the three special mandates – the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of Media and the OAS Special Rapporteur on Freedom of Expression – which stated: “Individual journalists should not be required to be licensed or to register”; Special

**Recommendation: Article 16 should be omitted.**

36. There are other provisions which purport to tie the journalists' activities with the syndicate. For instance, Article 12 states:

*It is incumbent upon the presidents of the local and foreign media institutions working in Iraq to sign business contracts with the journalists that are working in their institutions according to forms prepared by the Iraqi Journalists Syndicate (enumerating) the rights of the institution and the employee. A copy of the contract is to be submitted to the Syndicate.*

37. This provision indicates that all media organisations working in Iraq are obliged to sign business contracts with journalists working for them on the basis of “forms” prepared by the Iraqi Journalists Syndicate which set out the respective rights of the media organisation and journalist. Given that all media organisations and journalists are compelled to sign such contracts, it seems that the signature of such a contract is a condition for both the operation of media enterprises but also the profession of a journalist. Thus, the provision establishes a *de facto* registration scheme, albeit with a Syndicate. International human rights bodies have expressed their concern that registration requirements on the print media are “unnecessary and may be abused and should be avoided.”<sup>31</sup> Depending on the degree of personal details of journalists contained in these contracts and whether journalists are told that they will be submitted to the syndicate, the provision might also infringe upon the privacy rights of the journalists.

**Recommendation: Article 12 should be omitted.**

38. Also, Article 13 of the Draft Law states:

*It is not permitted to dismiss a journalist from his work except after notifying the Journalists' Syndicate of the pretexts for the dismissal. If the Syndicate has conducted an arbitration stage between the journalist and the institution, the provisions stated in the labour law will apply after the expiration of the contract.*

39. The word “pretext” means excuse or ruse. The employer organisation should be required to give much more than an excuse under national law for the dismissal of a journalist. Under national labour law provisions, employers should be required to provide at minimum valid reasons for the dismissal and, in the event that employment is terminated without such reasons, the right to compensation or other appropriate relief.<sup>32</sup> This provision should not therefore imply that labour law applies only after the expiration of the contract; such rules should apply before and through even in the case of arbitration between the journalist and the institution.

**Recommendation: Article 13 should be amended to provide that employed journalists and other employed individuals should be protected from unfair dismissal under national labour laws. It should indicate that these laws should**

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Mandates Joint Declaration of 18 December 2003.

<sup>31</sup> See above the Joint Declaration of the Special Mandates, adopted 18 December 2003.

<sup>32</sup> See Article 24 Revised European Social Charter; Article 7(d) San Salvador Protocol to the American Convention on Human Rights; and Termination of Employment Convention 1982 (ILO Convention No 158).

**provide that employers are required to provide valid reasons for a dismissal, and in the event that employment is terminated without such reasons, the right to compensation or appropriate relief.**

40. There are other provisions governing the profession of journalism which cause concern. Article 14 states:

*The journalist has the right to attend conferences, general sessions and public meetings in order to perform his professional work*

41. This provision is at best unnecessary and at worst potentially restrictive if it is relied upon to impose restrictions that do not meet the three part test contained in Article 19(3). It is significant that the right of journalists to meet with sources in private, which is how sources are usually consulted, is not acknowledged by this provision.

**Recommendation: Article 14 should be omitted.**

42. Finally, the Draft Law unrealistically asserts its supremacy over the regulation of journalism in Article 15 which states:

*The law is the only authority over journalists in the conduct of their work.*

43. Other laws – at the national level (such as labour, civil and criminal legislation) and international level (e.g. international human rights and international humanitarian instruments) – are clearly relevant and apply to the work of journalists operating in Iraq. To suggest otherwise is misleading.

**Recommendation: Article 15 should be omitted.**

### **III. Summary of recommendations (in a chronological order)**

- **The Draft Law should provide that its purpose is to implement Iraq’s international legal obligations on the right to freedom of expression as protected by Article 19 ICCPR.**
- **The Draft Law should provide that its protections apply to all persons involved in a journalistic process providing information to the public, including editors, commentators, freelance and part-time authors, bloggers and citizen journalists. The protections should apply no matter the format or medium including print, broadcast, electronic, Internet and books. It should also apply to all those with a professional relationship to journalists including media organisations, editors, printers, distributors and telecommunications providers.**
- **Article 1 should be amended to provide that state authorities, such as state police, shall be obliged to conduct independent and impartial investigations into any crimes committed against journalists (such as physical attacks upon, threats made to and disappearances of journalists) and other individuals in Iraq. Such a provision should already be part of Iraqi law.**

- **Article 2 should provide that no journalist or other individual should be subject to arbitrary arrest or detention. It should also provide that no journalist or other individual shall be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established by law.**
- **Article 3 should be amended to provide that everyone (both journalists and other non-journalists) have the right of access to information. It should further state that a body may not refuse to indicate whether or not it holds a record, or refuse to communicate information, unless the harm to the protected interest outweighs the public interest in disclosure. The state should also adopt a comprehensive freedom of information law.**
- **Article 4 should be amended to provide that journalists should not be required to disclose the identity of their confidential sources, unpublished materials, notes, documents or other materials that may reveal information about their sources or journalistic processes. It should provide that any request to obtain information should be strictly limited to the most serious of cases and only be approved by an independent judge in a fair and public hearing and subject to appeal to an impartial body.**
- **Article 5 should provide that any searches of a journalist's home or office should not be used to circumvent rules on the protection of sources (indicated above) and shall be presumed to be invalid. It should indicate that the state has the burden of demonstrating that any search or seizure was provided for by law, pursued a legitimate aim, and was necessary and proportionate in the circumstances. It should also provide that any materials obtained in violation of rules on the protection of sources should not be admissible as evidence in any proceeding.**
- **Article 6 should provide that the state should ensure that the criminal justice system (including the police, prosecutors, defence lawyers and the courts) is adequately resourced to be able to conduct independent and impartial investigations into crimes committed against journalists and other individuals in Iraq. Such a provision should already be part of Iraqi law.**
- **Article 7 should be amended to provide that the state's law enforcement officials shall conduct independent and impartial investigations into any crimes committed against journalists or any other individuals in Iraq. It should also provide that anyone accused of a crime against a journalist or any other person shall be entitled to a fair and public hearing by a competent, independent and impartial court or tribunal established by law. Any judgment rendered shall be delivered its decision promptly and according to law. Such a provision should already be part of Iraqi law.**
- **Article 9 should be omitted.**
- **Article 10 should be omitted.**
- **Article 11 should be omitted.**
- **Article 12 should be omitted.**

- **Article 13 should be amended to provide that employed journalists and other employed individuals should be protected from unfair dismissal under national labour laws. It should indicate that these laws should provide that employers are required to provide valid reasons for a dismissal, and in the event that employment is terminated without such reasons, the right to compensation or appropriate relief.**
- **Article 14 should be omitted.**
- **Article 15 should be omitted.**
- **Article 16 should be omitted.**

#### **IV. Text of Draft Law on Journalists Protection**

44. The following draft of the Draft Law is taken from the website [www.iraqslogger.com](http://www.iraqslogger.com) and is apparently a translation of an Arabic version of the law.<sup>33</sup>

##### ***The Journalists Protection Law***

*Article 1:*

*Any violation against a journalist while he is performing his journalistic role is considered to be an assault tantamount to a violation against a civil servant while he is performing his official duties. The offender is to be punished by the legally provided sentences (for violations against) a government employee.*

*Article 2:*

*The journalist is not to be arrested or detained because of his work as a journalist except by a court order and after notifying the Iraqi Journalists Syndicate and the participation of its representative in the investigation.*

*Article 3:*

*The journalist has the right to access any information in the custody of the government departments and public institutions to transmit them to the public. These bodies are not entitled to refuse the journalist's request to obtain information except in the case that revealing the information would cause great damage to the national interests, in a greater way than the damage that would obtain if this information were not published, and were concealed from the public.*

*Article 4:*

*The journalist has the right not to reveal the sources of information, unless it is necessary to prevent a crime or discover the perpetrator (of a crime), on the condition that a court order be issued by the court concerned in the matter. Claims for compensation are not permitted after three months of the date of issue (of the court order).*

*Article 5:*

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<sup>33</sup> See [http://www.iraqslogger.com/index.php/post/5877/Full\\_Text\\_Iraqs\\_Draft\\_Media\\_Protection\\_Law](http://www.iraqslogger.com/index.php/post/5877/Full_Text_Iraqs_Draft_Media_Protection_Law)

*It is not permitted to confiscate the journalist's equipment except by order of the court, and that (the confiscation) be necessary to prevent a crime or in the investigation of (a crime).*

*Article 6:*

*The state is to establish an effective capability to protect the journalists and media outlets, and to investigate the crimes to which they are subjected.*

*Article 7:*

*The security agencies are to conduct immediate investigations in the case of any journalist being subjected to any kind of threat or harm, and to make every effort to punish the perpetrators.*

*Article 8:*

*Journalists are permitted to carry out their work without interference on the part of the security forces unless there is legitimate justification.*

*Article 9:*

*The state will be responsible for the care for families of martyrs of the press by appropriating pensions for them.*

*Article 10:*

*The state will appropriate salaries for journalists who are subjected to disability because of their work, if the disability is greater than 50 percent.*

*Article 11:*

*The state is responsible for health care of journalists, and to make outlays for treatment expenses inside and outside the country if the injury or disability occurred because of their journalistic work.*

*Article 12:*

*It is incumbent upon the presidents of the local and foreign media institutions working in Iraq to sign business contracts with the journalists that are working in their institutions according to forms prepared by the Iraqi Journalists Syndicate (enumerating) the rights of the institution and the employee. A copy of the contract is to be submitted to the Syndicate.*

*Article 13:*

*It is not permitted to dismiss a journalist from his work except after notifying the Journalists' Syndicate of the pretexts for the dismissal. If the Syndicate has conducted an arbitration stage between the journalist and the institution, the provisions stated in the labor law will apply after the expiration of the contract.*

*Article 14:*

*The journalist has the right to attend conferences, general sessions and public meetings in order to perform his professional work.*

*Article 15:*

*The law is the only authority over journalists in the conduct of their work.*

*Article 16:*

*A journalist is one who works for press (outlets) that may be read, heard, or viewed, and who is affiliated with the Iraqi Journalists Syndicate.*



*Article 17:*

*The Press Law, number 206 of the year 1968 is cancelled with all its amendments.*

*Article 18:*

*This law is to be considered effective from the date of its publication in the official newspaper.*

**FURTHER INFORMATION:**

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- ARTICLE 19 is an independent human rights organisation that works around the world to protect and promote the right to freedom of expression. It takes its name from Article 19 of the Universal Declaration of Human Rights, which guarantees free speech.