



# A Media Policy for Iraq

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## 1. INTRODUCTION

A free and independent media is crucial to the development of democracy in any country. This is as true in Iraq as it is elsewhere. Without a vibrant media, the free and open debate that is indispensable to the development of public policy cannot take place and the public's right to receive information on matters of public interest from a variety of sources cannot be fulfilled. The media investigate and report on issues of public importance and interest, particularly relating to the political process, the conduct of public officials, the positions taken by government with respect to international issues, corruption, mismanagement or dishonesty in government, and human rights issues, among other things. In addition, the media provide much needed entertainment and they can play an important role in the provision of educational services. It is probably fair to say that the vast majority of people gain almost all of their knowledge about matters outside of their own day-to-day lives from the media. If Iraq is to develop as a free, open and democratic society, it is therefore vitally important that a climate is created within which a free, independent and pluralistic media can thrive.

The development of a free and independent Iraqi media requires the introduction of a Media Policy that balances State intervention in some areas with non-intervention in other areas. The overall goal of the Media Policy should be not only to fulfil the right to freedom of expression of the media, but, as importantly, to fulfil the public's right to receive information on matters of public interest from a variety of sources. It should seek to promote and ensure a free, independent, dynamic and public-spirited media that will provide access for all Iraqis. It should seek to ensure for all Iraqis the right to participate freely, fully and creatively at the community, national and global levels in the expression, exchange and discussion of knowledge, information and ideas, as well as in the management and operations of institutions governing the media. By doing that, it would contribute to building a just, prosperous and equitable society, enriched by its diversity and informed by its values, with its people able to interact as equals and to their mutual benefit with other citizens of the world.

The development and successful implementation of a Media Policy that fulfils these goals is a complex task even in an established, peaceful democracy. In Iraq, it calls for careful consideration and an unwavering commitment by the Government, the international community, local civil society and the media themselves to implement the right to freedom of expression. The Media Policy must be firmly grounded in the newly adopted Constitution and be informed by experience gained in other countries – both established and transitional democracies. And to be successful, the Media Policy must be feasible and provide realistic solutions to the challenges confronting Iraq's media: the continuing incidents of violence against the media, the tough economic environment and the lingering effects of decades of dictatorial rule and secrecy.

This Report aims to inform the Iraqi authorities on the adoption of a Media Policy by outlining the main principles on which such a policy should be based and discussing its main elements.<sup>1</sup> It begins by outlining international and constitutional protection for freedom of

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<sup>1</sup> Our recommendations draw on international and comparative law and practice on media freedom and the right to freedom of expression, including the experience of countries who have recently undergone a transition to democracy, such as Kosovo and Bosnia, countries that are currently in a similar transitional process, such as Sudan, and other countries that have recently committed to reforming their media policy, such as Tanzania. It builds on the results of two preliminary workshops conducted in September 2005 in Amman with members of

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expression. It then sets out the basic principles that should underpin Iraq's new Media Policy and indicates how these principles could be implemented in Iraq. Finally, it outlines the next steps in the process of adopting the Media Policy, for the government, the media, and the international community and other stakeholders.

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parliament, media representatives and other stakeholders.

## 2. FREEDOM OF EXPRESSION IN INTERNATIONAL LAW AND IN THE NEW IRAQI CONSTITUTION

### 2.1 International and Constitutional Protection

Protecting and promoting the right to freedom of expression is central to a media policy. Freedom of expression is the basis of media freedom and it is also fundamental to fulfilling the public's right to know and to receive information from a variety of sources.

Iraq is bound by international law as well as under its own Constitution to respect and implement the right to freedom of expression. Article 38 of the new Iraqi Constitution<sup>2</sup> states:

The State guarantees in a way that does not violate public order and morality:

- a. Freedom of expression, through all means.
- b. Freedom of press, printing, advertisement, media and publication.
- c. Freedom of assembly and peaceful demonstration. This shall be regulated by law.

A number of other provisions are also relevant to the protection of freedom of expression and media freedom. Article 42 guarantees the right to freedom of opinion; Article 40 guarantees the right to freedom of 'communication' and all forms of correspondence, and Article 39 protects the right to freedom of association. Articles 101 and 102(1) stipulate that there shall be a financially and administratively independent "Communication and Media Commission" which will be 'attached' to the Council of Representatives, although its mandate is not specified; and Article 109(6) provides that regulation of telecommunications (which is to be understood as including broadcasting) will be the exclusive domain of the federal government.

The right to freedom of expression has traditionally enjoyed very strong protection under international law. Article 19 of the *Universal Declaration of Human Rights* (UDHR),<sup>3</sup> adopted in 1948, guarantees the right to freedom of expression in the following terms:

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

This provision has now passed into what is known as customary international law, the body of law that is considered binding on all States as a matter of international custom.<sup>4</sup> Freedom of expression finds further protection in a number of international treaties – legal instruments that States have signed up to and are legally bound to protect. For Iraq, the most important of

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<sup>2</sup> Various translations of the Constitution exist. We have used the latest draft provided to us by the Iraqi Ministry of Human Rights. This is a renumbered version which has not to our knowledge been made available on-line. We also note that there is currently a four-month process underway to revise the Constitution. This may or may not result in a change in the level of protection of the right to freedom of expression.

<sup>3</sup> UN General Assembly Resolution 217A(III), adopted 10 December 1948.

<sup>4</sup> For judicial opinions on human rights guarantees in customary international law, see *Barcelona Traction, Light and Power Company Limited Case (Belgium v. Spain) (Second Phase)*, ICJ Rep. 1970 3 (International Court of Justice); *Namibia Opinion*, ICJ Rep. 1971 16, Separate Opinion, Judge Ammoun (International Court of Justice); and *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2<sup>nd</sup> Circuit). For an academic critique, see M.S. McDougal, H.D. Lasswell and L.C. Chen, *Human Rights and World Public Order*, (Yale University Press: 1980), pp. 273-74, 325-27.

these is the *International Covenant on Civil and Political Rights* (ICCPR),<sup>5</sup> an international treaty ratified by some 155 States,<sup>6</sup> Article 19 of which states:

1. Everyone shall have the right to freedom of opinion.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice.

Iraq is bound under international law as well as under its own Constitution to implement and give effect to international human rights treaties to which it is party. Article 8 of the Constitution requires the Iraqi government to “respect its international obligations”.

Reflecting its global recognition, the right to freedom of expression is also protected in the three other regional human rights instruments, at Article 10 of the *European Convention on Human Rights*,<sup>7</sup> Article 13 of the *American Convention on Human Rights*<sup>8</sup> and Article 9 of the *African Charter on Human and Peoples’ Rights*.<sup>9</sup> The right to freedom of expression enjoys a prominent status in each of these regional conventions and, although not directly binding on Iraq, judgments and decisions issued by courts under these regional mechanisms offer an authoritative interpretation of freedom of expression principles in various different contexts.

## 2.2 Restrictions on Freedom of Expression

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

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

A similar formulation can be found in the European, American and African regional human rights treaties.

Article 19(3) of the ICCPR has been interpreted as requiring restrictions to meet a strict three-part test.<sup>10</sup> First, the interference must be provided for by law. This means, first and foremost, that the interference cannot be merely the result of the whim of an official. There must actually be an enacted law or regulation which the official is applying. In other words, only

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<sup>5</sup> UN General Assembly Resolution 2200A(XXI), adopted 16 December 1966, in force 23 March 1976. Iraq ratified the ICCPR on 25 January 1971.

<sup>6</sup> As of January 2006.

<sup>7</sup> Adopted 4 November 1950, in force 3 September 1953.

<sup>8</sup> Adopted 22 November 1969, in force 18 July 1978.

<sup>9</sup> Adopted 26 June 1981, in force 21 October 1986.

<sup>10</sup> See, *Mukong v. Cameroon*, 21 July 1994, Communication No. 458/1991, para. 9.7 (UN Human Rights Committee).

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restrictions which have been officially and formally recognised by those entrusted with law-making capacity may be legitimate. In addition, not all “laws” or “regulations” meet the standard of ‘provided by law’. The law must meet certain standards of clarity and precision so that it is clear in advance exactly what expressions are prohibited.<sup>11</sup> Vaguely worded edicts with potentially very broad application will not meet this standard and are thus illegitimate restrictions on freedom of expression. For example, a prohibition on “displeasing the government” would fail the test on account of vagueness.

Second, the interference must pursue a legitimate aim. The list of aims in Article 19(3) of the ICCPR is exclusive in the sense that no other aims are considered to be legitimate as grounds for restricting freedom of expression.

Third, the restriction must be necessary to secure one of those aims. The word “necessary” means that there must be a “pressing social need” for the restriction. The reasons given by the State to justify the restriction must be “relevant and sufficient” and the restriction must be proportionate to the aim pursued.<sup>12</sup> This has a number of implications. First, it means that if another measure which is less intrusive to a person’s right to free expression would accomplish the same goal, the restriction is not in fact necessary. For example, shutting down a newspaper for defamation is excessive; a retraction, or perhaps a combination of a retraction and a warning or a modest fine, would adequately protect the defamed person’s reputation.

The requirement of “necessity” also means that the restriction must impair the right as little as possible and, in particular, not restrict legitimate speech (known as overbreadth). In protecting national security, for example, it is not acceptable to ban all discussion about a country’s military forces. In applying this, courts have recognised that there may be practical limits on how finely honed and precise a legal measure can be. But subject only to such practical limits, restrictions must not be overbroad.

Finally, the impact of restrictions must be proportionate in the sense that the harm to freedom of expression must not outweigh the benefits in terms of the interest protected. A restriction which provided limited protection to reputation but which seriously undermined freedom of expression would not pass muster. This again is uncontroversial. A democratic society depends on the free flow of information and ideas and it is only when the overall public interest is served by limiting that flow that such a limitation can be justified. This implies that the benefits of any restriction must outweigh the costs for it to be justified.

In applying this test and, in particular, the third part on necessity, courts and others should take into account all of the circumstances at the time the restriction is applied. A restriction in favour of national security, for example, which is justifiable in times of war, may not be legitimate in peacetime.

We note here that Article 46 of the Iraqi Constitution uses a different formulation, stating that rights may be restricted only by law and “insofar as that limitation or restriction does not violate the essence of the right or freedom”. We urge that, bearing in mind Article 8 of the

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<sup>11</sup> *The Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, para. 49 (European Court of Human Rights).

<sup>12</sup> *Lingens v. Austria*, 8 July 1986, Application No. 9815/82, paras. 39-40 (European Court of Human Rights).

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Constitution regarding international obligations, this should not be read as lowering the standard required under Article 19(3) of the ICCPR.

A specific set of principles related to restrictions on national security grounds is set out in the *Johannesburg Principles on National Security, Freedom of Expression and Access to Information*.<sup>13</sup> They recognise that the right to seek, receive and impart information may, at times, be restricted on specific grounds, including the protection of national security. However, national security cannot be a catchall for limiting access to information.

Both the UN Human Rights Committee and the European Court of Human Rights have on several occasions had to deal with cases in which States have sought to justify restrictions on freedom of expression or other human rights by reference to national security considerations.

The UN Human Rights Committee has made it clear that the onus is on the State seeking to justify a restriction based on grounds of national security to prove the existence of a specific threat. In the case of *Jong-Kyu v. Republic of Korea*,<sup>14</sup> for example, the government had claimed that a national strike in any country would pose a national security and public order risk. The Committee held that this failed to pass the necessity part of the test.

In a similar vein, the European Court has warned that laws that restrict freedom of expression on national security grounds must lay down clear and precise definitions, so as to safeguard against abuse.<sup>15</sup> The Court has issued repeated warnings against excessive use of national security laws, in many cases finding violations of fundamental human rights. In a case against Romania, involving data on the applicant that had been gathered by the security services, the Court noted that it had “doubts as to the relevance to national security of the information”.<sup>16</sup> It went on to find a violation of the applicant’s rights.

The Court has also warned against the use of national security laws even in situations of armed internal conflict. While stressing that it would not condone the use of the media as a mouthpiece for advocates of violence, it has said that States “cannot, with reference to the protection of territorial integrity or national security or the prevention of crime or disorder, restrict the right of the public to be informed by bringing the weight of the criminal law to bear on the media.”<sup>17</sup>

## 2.3 Freedom of Expression and Media Regulation

### 2.3.1 General Principles

The guarantee of freedom of expression is central to the functioning of the media and, largely through the media, to fulfilling the public’s right to receive information from a plurality of sources. As the UN Human Rights Committee has stressed, a free media is essential in the political process:

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<sup>13</sup> Adopted in October 1995 by a group of experts in international law and human rights convened by ARTICLE 19 and the Centre for Applied Legal Studies of the University of the Witwatersrand. They have been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression.

<sup>14</sup> July 1995, Communication No. 518/1992.

<sup>15</sup> See, for example, *Klass v. Federal Republic of Germany*, 6 September 1978, Application No. 5029/71.

<sup>16</sup> *Rotaru v. Romania*, 4 May 2000, Application No. 28341/95, para. 53.

<sup>17</sup> *Erdogdu and Ince v. Turkey*, 8 July 1999, Application Nos. 25067/94 and 25068/94, para. 54.



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[T]he free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.<sup>18</sup>

The European Court of Human Rights has consistently emphasised the “pre-eminent role of the press in a State governed by the rule of law.”<sup>19</sup> It frequently reiterates the following statement:

Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.<sup>20</sup>

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

In the Arab world, UNESCO’s *Declaration of Sana’a on Promoting Independent and Pluralistic Arab Media*<sup>23</sup> outlines the basic freedom of expression principles that must be fulfilled in order to allow a free and pluralistic media to establish itself. Endorsed by all Arab States at UNESCO’s 1997 General Conference, the Declaration states that “a free, pluralistic and independent press is an essential component of any democratic society” and lists a number of areas in which action must be taken to achieve true freedom of expression:

Arab governments should cooperate with the United Nations and UNESCO, other governmental and non-governmental development agencies, organizations and professional associations, in order to:

(i) enact and/or revise laws with a view to: enforcing the rights to freedom of expression and press freedom and legally enforceable free access to information; eliminating monopoly controls over news and advertising; putting an end to all forms of social, economic or political discrimination in broadcasting, in the allocation of frequencies, in printing, in newspaper and magazine distribution and in newsprint production and allocation; abolishing all barriers to launching new publications and any form of discriminatory taxation;

(ii) initiate action to remove economic barriers to the establishment and operation of news media outlets, including restrictive import duties, tariffs and quotas for such things as newsprint, printing equipment, typesetting and word processing machinery and

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<sup>18</sup> UN Human Rights Committee General Comment 25, issued 12 July 1996.

<sup>19</sup> *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 63.

<sup>20</sup> See, for example, *Castells v. Spain*, 24 April 1992, Application No. 11798/85, para. 43.

<sup>21</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, para. 34.

<sup>22</sup> *Thorgeirson v. Iceland*, note 19, para. 63.

<sup>23</sup> Adopted 11 June 1996, endorsed by Arab States during the 29<sup>th</sup> Session of the UNESCO General Conference, November 1997 (Resolution 34).

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telecommunication equipment, and taxes on the sale of newspapers or other restrictions on the public's access to news media;

(iii) improve and expand training of journalists and managers, and other media practitioners, without discrimination, with a view to upgrading their professional standards, also by the establishment of new training centers in the countries where there are none, including Yemen.

In addition, the Declaration stresses that State broadcasters should be editorially independent from the government, and that journalists should be encouraged to run media outlets themselves in order to promote plurality:

Journalists should be encouraged to create independent media enterprises owned, run and funded by the journalists themselves and supported, if necessary, by transparent endowments with guarantees that funders do not intervene in editorial policies;

...

State-owned broadcasting and news agencies should be granted statutes of journalistic and editorial independence as open public service institutions. Creation of independent news agencies and private and/or community ownership of broadcasting media including in rural areas should also be encouraged.

Measures taken to regulate the media should conform to two basic and equally important principles. First, the overriding aim of media regulation should be to fulfil the public's right to know by ensuring the availability of a rich variety of information sources. The concept of pluralism is fundamental to both democracy and to the protection of the right to freedom of expression. A society where only a privileged few can exercise their right to freedom of expression effectively is not a free society. Such a situation would breach not only the rights of those who are denied the ability to exercise their right to freedom of expression through the media but also the right of all members of society to be well-informed and to receive information from a variety of sources. Second, any measures that can be said to "interfere with" the exercise of the right to freedom of expression – such as registration requirements, content restrictions or broadcast licensing – must comply with the basic three-part test described in Section 2.2 of this Report: they must be provided by law and be strictly 'necessary' to protect a legitimate interest.

### *2.3.2 Protecting and Promoting Pluralism*

International human rights law requires States to take positive steps to safeguard media pluralism. UNESCO's Sana'a Declaration, endorsed by all its State members, stresses the vital importance to democracy of a pluralistic media.<sup>24</sup> In an often-repeated statement, the European Court of Human Rights has stated:

The Court has frequently stressed the fundamental role of freedom of expression in a democratic society, in particular where, through the press, it serves to impart information and ideas of general interest, which the public is moreover entitled to receive. Such an undertaking cannot be successfully accomplished unless it is grounded in the principle of pluralism, of which the State is the ultimate guarantor.<sup>25</sup>

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<sup>24</sup> Note 23.

<sup>25</sup> *Informationsverein Lentia and others v. Austria*, 28 October 1993, Application No. 13914/88, para. 38.

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

The legitimate objective of safeguarding and indeed strengthening national unity under difficult political circumstances cannot be achieved by attempting to muzzle advocacy of multi-party democratic tenets and human rights.<sup>26</sup>

The protection of pluralism provides one of the main justifications for media regulation, particularly in relationship to the broadcast media. It is internationally accepted that States should regulate the airwaves to provide for a plurality of voices. States should take steps to avoid excessive concentration of media ownership and to ensure that licensing systems for broadcasters promote a diversity of content on the airwaves. With regard to the print media, it is internationally accepted that the best way to encourage pluralism is by abolishing legal and administrative measures that inhibit the establishment of newspapers and magazines. In particular, there should be no licensing systems and, where a registration scheme exists, it should not impose onerous obligations on applicants or allow for registration to be refused. These differences from broadcast regulation are justified by a number of considerations including public ownership of the airwaves, the dominant and intrusive nature of broadcasting and the relatively low cost of setting up print media outlets.

The obligation to promote pluralism also implies that there should be no legal restrictions on who may practise journalism<sup>27</sup> and that licensing or registration systems for individual journalists are incompatible with the right to freedom of expression. In a Joint Declaration issued in December 2003, the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression state:

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

...

Accreditation schemes for journalists are appropriate only where necessary to provide them with privileged access to certain places and/or events; such schemes should be overseen by an independent body and accreditation decisions should be taken pursuant to a fair and transparent process, based on clear and non discriminatory criteria published in advance.<sup>28</sup>

‘Pure’ regulatory measures may not be sufficient to ensure pluralism in the media and, where this is the case, States should also consider providing support measures. These may include general measures aimed at the media sector as a whole, such as the abolition of taxes on print paper and other materials necessary for operating media outlets, as well as direct support for certain types of media outlets, for example those that serve small or minority sections of the audience. Many international bodies have elaborated on the need for positive measures as a way of promoting pluralism in the sector and media freedom generally. A series of Council of Europe instruments has highlighted the need for such measures, recommending that States “take adequate measures, of a financial and fiscal nature, to encourage audiovisual creation

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<sup>26</sup> *Mukong v. Cameroon*, 21 July 1994, Communication No. 458/1991, para. 9.7.

<sup>27</sup> See *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note 21.

<sup>28</sup> Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 18 December 2003, online at: <http://www.unhcr.ch/hurricane/hurricane.nsf/view01/93442AABD81C5C84C1256E000056B89C?opendocument>

and the development of their programme industries”; that States “endeavour, in co-operation, to eliminate tax obstacles to the co-production of audiovisual works of European origin”; that States “grant to co-productions of audiovisual works of European origin the same tax and financial advantages as national productions”;<sup>29</sup> and that States “consider the possibility of introducing, with a view to enhancing media pluralism and diversity, direct or indirect financial support schemes for both the print and broadcast media, in particular at the regional and local levels. Subsidies for media entities printing or broadcasting in a minority language could also be considered.”<sup>30</sup>

States should take care to ensure that if direct support is provided, this takes place on the basis of objective and non-partisan criteria, within a framework of transparent procedures and subject to independent control. If the media are awarded specific benefits, be they financial, fiscal or other, this should be done in a fair, transparent and non-discriminatory manner.<sup>31</sup>

### ***2.3.3 Public Service Broadcasting***

Public service broadcasting – a form of broadcasting that serves the entire public, including minorities, and that is accountable to the public for providing high quality and editorially independent news, information and other output – can make a significant contribution to media pluralism. A number of international instruments stress the important contribution that public service broadcasters make to fulfilling the public’s right to know.<sup>32</sup> UNESCO’s 1996 Declaration of Sana’a stresses that all State-owned broadcasters and news agencies should be editorially independent and pursue a public service mandate; and the 2003 follow-up Declaration of Amman states:

- Public Service Broadcasting (PSB) should be encouraged and further developed in all countries of the region as an important element of society and of citizen participation in the public life and sustainable democratic development;
- PSB is instrumental in providing access to information, especially local and national content and human values, promoting cultural diversity, education and dissemination of knowledge for all;
- PSB should first and foremost provide a service to the entire population, in particular balanced and impartial information needed for independent and informed decision making; therefore, its functional autonomy must be guaranteed by law;<sup>33</sup>

Public service broadcasters should be institutionally and editorially independent from undue political or commercial pressures; and the legislation establishing them should clearly

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<sup>29</sup> Council of Europe Committee of Ministers Recommendation No. R(86)3 on the promotion of audiovisual production in Europe, adopted 14 February 1986.

<sup>30</sup> Council of Europe Committee of Ministers Recommendation No. R(99)1 of the committee of ministers to member states on measures to promote media pluralism, adopted 19 January 1999. See also Recommendation R(93)5 containing principles aimed at promoting the distribution and broadcasting of audio-visual works originated in countries or regions with a low audio-visual output or a limited geographic or linguistic coverage on the European television markets.

<sup>31</sup> See Council of Europe Recommendation R(99)1, note 30.

<sup>32</sup> See, for example, the Declaration of Alma Ata, 9 October 1992 (endorsed by the General Conference of UNESCO at its 28th session in 1995) and the Protocol on the system of public broadcasting in the Member States, Annexed to the Treaty of Amsterdam, Official Journal C 340, 10 November 1997.

<sup>33</sup> Adopted 17 July 2003, Amman; not yet endorsed by UNESCO’s General Conference.

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stipulate and enforce this.<sup>34</sup> In addition, members of the supervisory bodies of publicly-funded broadcasters should be appointed in an open and pluralistic manner and the rules governing them should be defined so as to ensure that they are not at risk of political or other interference.<sup>35</sup>

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

1. to provide quality, independent programming that contributes to a plurality of opinions and an informed public;
2. to provide comprehensive news and current affairs programming, which is impartial, accurate and balanced;
3. to provide a wide range of broadcast material that strikes a balance between programming of wide appeal and specialised programmes that serve the needs of different audiences;
4. to be universally accessible and serve all the people and regions of the country, including minority groups;
5. to provide educational programmes and programmes directed towards children; and
6. to promote local programme production, including through minimum quotas for original productions and material produced by independent producers.<sup>36</sup>

Funding of public service broadcasters must be based on an appropriate, secure and transparent funding framework that guarantees public service broadcasters the means necessary to accomplish their missions.<sup>37</sup> Funding should never be allowed to be used as a means of pressure; if funding is provided directly by the State, then effective measures should be put in place to ensure that the State cannot exert, directly or indirectly, any influence over the editorial independence and institutional autonomy of the public service broadcaster.<sup>38</sup>

### **2.3.4 Regulatory Bodies**

To protect media freedom and the right to freedom of expression, it is imperative that the media operate independently from government control. This ensures the media's role as public watchdog and that the public has access to a wide range of opinions, especially on matters of public interest. This means that a body which regulates the media should never be part of or under the control of a government or other political body.

Under international law, it is well established that bodies with regulatory or administrative powers over both public and private broadcasters should be independent and be protected against political interference. The special mandates on freedom of expression at the United Nations, Organisation for Security and Cooperation in Europe and Organisation of American States have stated, in a Joint Declaration:

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<sup>34</sup> Recommendation No. R (96) 10 on the Guarantee of the Independence of Public Service Broadcasting, adopted 11 September 1996, Guideline I.

<sup>35</sup> *Ibid.*, Guideline III.

<sup>36</sup> See ARTICLE 19's *Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation* (London: 2002), Principle 37.

<sup>37</sup> See Council of Europe Recommendation No. R (96) 10, note 34, Principle V.

<sup>38</sup> *Ibid.*

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All public authorities which exercise formal regulatory powers over the media should be protected against interference, particularly of a political or economic nature, including by an appointments process for members which is transparent, allows for public input and is not controlled by any particular political party.<sup>39</sup>

Regional intergovernmental bodies such as the Council of Europe and the African Commission on Human and Peoples' Rights have also made it clear that the independence of regulatory authorities is fundamentally important to securing media freedom. The latter has adopted a Declaration of Principles on Freedom of Expression in Africa, which states:

Any public authority that exercises powers in the areas of broadcast or telecommunications regulation should be independent and adequately protected against interference, particularly of a political or economic nature.<sup>40</sup>

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

[T]o guarantee the existence of a wide range of independent and autonomous media in the broadcasting sector...specially appointed independent regulatory authorities for the broadcasting sector, with expert knowledge in the area, have an important role to play within the framework of the law.<sup>41</sup>

The Recommendation goes on to note that Member States should set up independent regulatory authorities. Its guidelines provide that Member States should devise a legislative framework that ensures the unimpeded functioning of regulatory authorities and which clearly affirms and protects their independence.<sup>42</sup> The Recommendation further provides that this framework should guarantee that members of regulatory bodies are appointed in a democratic and transparent manner.<sup>43</sup>

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<sup>39</sup> Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 18 December 2003, online at:

<http://www.unhcr.ch/hurricane/hurricane.nsf/view01/93442AABD81C5C84C1256E000056B89C?opendocument>

<sup>40</sup> Adopted by the African Commission on Human and Peoples' Rights at its 32nd Session, 17-23 October 2002.

<sup>41</sup> Recommendation No. R(2000) 23, adopted 20 December 2000.

<sup>42</sup> *Ibid.*, Guideline 1.

<sup>43</sup> *Ibid.*, Guideline 5.

### **3. A NEW MEDIA POLICY FOR IRAQ: BASIC PRINCIPLES AND GOALS**

A new Media Policy for Iraq should set clear and achievable goals for building a vibrant media sector in Iraq, and project realistic deadlines for achieving them. The policy should be rooted in the international and constitutional standards on the right to freedom of expression and information set out in Section 2 of this Report, and its overriding goal should be the development of a framework that will facilitate the fulfilment of the public's right to receive quality information from a wide variety of sources as well as the media's right to freedom of expression. It should empower independent and professional journalism rather than restrain it and it should encourage pluralism and political debate.

This chapter sets out the basic foundations for a media policy and indicates how these may be implemented in Iraq. First, it outlines some basic principles which should underlie the new media policy. Then, it sets out the regulatory measures and other steps that will need to be taken in order to implement those principles.

#### **3.1 Basic Principles**

Building on international human rights law<sup>44</sup> and Iraq's new Constitution, the following principles could be considered as the foundation of a new Iraqi media policy:

1. *A free media shall be fostered which represents all groups and divisions of society, gives independent scrutiny to and comment on the workings of all levels of government and institutions, and serves as the public's watchdog and advocate.*

Only a free and pluralistic media can fulfil the public's right to know and provide the kind of scrutiny and information necessary to ensure that everyone is sufficiently informed on all matters of public interest. 'Pluralism' in this context means that all sections of society should have equitable access to the media and that no group should be excluded. 'Free' does not mean wholly unregulated but, rather, that the media is free to criticise and provide a platform for vigorous debate on any matter of public interest. It is also important to understand that "equitable access" does not mean "equal access": it is not realistic to expect every group, however small, to have its own nationwide newspapers, radio and TV stations. However, measures can be taken to ensure that even small minorities have access commensurate with their number and standing in society, and sufficient to satisfy their information needs. In practice, this means that some government action will be necessary to both stimulate media development and to avoid excessive concentration in the media market. In the transitional period, the international community will also need to play a role in providing media support as well as education and training opportunities.

2. *The media shall be protected from any censorship or illegitimate government interference. Any restrictions imposed on freedom of expression and of the media shall be set out in law, be specifically and narrowly defined to protect a legitimate aim, and be subject to*

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<sup>44</sup> As briefly expressed in Section 2 of this Report.

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*tests of necessity, proportionality and pressing social need, as required by international human rights law.*

Censorship of the media – understood as pre-publication scrutiny of all publications by the government or a government-controlled agency – is fundamentally incompatible with the guarantee of freedom of expression. Any form of interference with the media, whether through direct content requirements or through limits on circulation or the amount of advertising that may be carried, should be in accordance with the three-part test established under Article 19 of the *International Covenant on Civil and Political Rights*, as outlined in Section 2.2 of this Report.

All laws that restrict the content of what may be published or broadcast should be reviewed for compliance with the three-part test. Pending this review, criminal penalties should not be imposed for offences such as defamation.

- 3. No one shall be required to obtain a license to practice journalism as a profession. There shall be no licensing or registration requirement for newspapers, news agencies, magazines, periodicals or other print media, other than pursuant to general rules governing all bodies seeking to engage in commercial activities.*

A licensing requirement for media practitioners, understood as a requirement to seek permission from a central agency, is illegitimate. Even for media outlets, registration requirements, understood as a requirement to lodge certain, limited information regarding the outlet with a central agency, are unnecessary and may be abused, and should therefore be avoided.<sup>45</sup> This principle does not rule out registration of, for example, a newspaper as a commercial entity, under general company laws.

- 4. Broadcast<sup>46</sup> licences shall be issued by an independent broadcasting regulator and shall include only limited rules to give effect to the public interest, taking into account the fact that the airwaves are a limited public resource. Broadcast frequencies shall be allocated in an equitable way, with the overall goal of ensuring diversity on the airwaves.*

Because of the limited availability of broadcast frequencies, broadcast media must be required to obtain a licence before starting broadcasting operations. However, in order to avoid politicisation of the licensing process, licences should be issued by an independent agency and in accordance with clear, fair and non-discriminatory criteria. The overall goal of the licensing process should be to ensure that the public receives as wide a range of programming as possible through the broadcast media.

Licensing processes should ensure the presence of all three tiers of broadcasters within the sector as a whole. Community broadcasting can play an important role in fulfilling the information needs of small communities, as can the national, regional and local publicly funded media of the Iraqi Media Network.

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<sup>45</sup> See the 2003 Joint Declaration by the UN, OAS and OSCE special mandates on freedom of expression.

<sup>46</sup> Excluding Internet-based transmission technologies.



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5. *Public service broadcasting has an important role to play in fulfilling the public's right to know. Efforts shall continue to build the existing Iraqi Media Network into an independent public service broadcaster, accountable to the people of Iraq.*

The Iraqi Media Network should be the only publicly funded<sup>47</sup> media establishment. Its institutional and editorial independence should be guaranteed in law and in practice. It should be governed by an independent board and in accordance with legislation and a charter that sets out clearly its public service goals. An independent body, such as a board of governors, should be responsible for protecting its editorial independence and for ensuring accountability to the public, in accordance with modern democratic standards.

6. *Self-regulation is the best form of media regulation and it shall be encouraged. Journalists shall be allowed to form associations to promote professional standards through training, education and the development of codes of ethics, and to advocate for editorial independence, the rights of journalists and the rights of an independent media.*

Journalists' associations play an important role in strengthening the journalistic profession and promoting professional standards. In addition, they can represent the journalistic profession in debates with others, and promote protection for media freedom and the right to freedom of expression.

7. *The establishment of professional education and training establishments for journalists is essential to the future of the Iraq's media. The government shall take the lead in carrying out the necessary needs assessment and the international community should provide assistance in setting up the necessary educational and training institutions.*

The provision of training and education facilities is crucial in building a professional corps of journalists. This is one area where Iraqi schools, universities and existing journalists associations should work together with the Iraqi government as well as foreign NGOs and donors.

8. *Access to information is crucial to the functioning of the media. The government shall enact legislation providing for a right to access information held by public authorities and it shall take steps to ensure that public decision-making processes and the business of government are open to public scrutiny.*

The right to access information is a fundamental human right in its own regard, and also indispensable to effective journalism. Without information, it would be impossible for the media to publish anything – let alone the kind of public interest stories which are so important in serving the public's right to be informed. In order to perform its role of 'watchdog' in a democratic society, the media needs access to documents and information at the heart of governmental functioning: not just the text of legislation and regulations, but budgetary information, policy papers, correspondence with contractors, and information relating to health and the state of the environment, to give but a few examples. Absent such access, journalists cannot effectively scrutinise governmental action; they would be condemned to rely on 'leaked' documents, second-hand information or even rumours, laying themselves open to defamation suits or other legal threats.

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<sup>47</sup> This Principle should not rule out State support for the media under non-discriminatory support programmes.

9. *Attacks against the media are an attack on democracy itself. The government denounces any violence against the media and shall take effective measures to bring perpetrators to justice as a matter of the highest priority.*

The media cannot function in a climate of fear and violence; and if the media cannot carry out its job of scrutinising government then democracy suffers. The government should make a clear declaration to this effect and allocate sufficient resources to ensuring that the perpetrators of violence against the media are brought to justice as a matter of priority. Iraq police and troops and foreign troops should never target members of the media unless there is clear reason to suspect direct involvement in crime.

### **3.2 Overall Goal: The Development of a Strong, Pluralistic and Independent Media**

The concept of pluralism is fundamental to both democracy and to the protection of the right to freedom of expression. A society where only a privileged few can exercise their right to freedom of expression effectively is not a free society. Such a situation would breach not only the rights of those who are denied the ability to exercise their right to freedom of expression through the media but also the right of society as a whole to be well-informed and to receive information from a variety of sources.

Following the demise of Saddam Hussein's regime, during which the State controlled all media, there has been a near-unbridled growth in the number of media outlets in Iraq. It has been estimated that in 2003 alone, some 200 new magazines and newspapers appeared, although only half of those were reported to have survived the first year.<sup>48</sup> A year after Saddam was removed, Iraq had 90 new television and radio stations. Not all of these survived their first year of operations and currently the National Communications and Media Commission – the body responsible for licensing broadcasters – lists a total of 53 broadcast outlets for the country. While the quality of these outlets varies, quite a few are undoubtedly highly professional. They add to the information available through the Iraqi Media Network, Iraq's public service network that consists of the Al Iraqiya television station, Republic of Iraq Radio and the former State newspaper, *Al Sabaah*.

The new media reflect a wide spectrum of viewpoints and opinions – everyone from previously banned political parties to religious groups now seems to have their own media outlet. While this was to be expected – a similar growth in the number of media outlets was witnessed in the Balkans – this is at the same time a criticism: most media are politically or religiously affiliated, or bankrolled by commercial interests. There are still very few truly independent media outlets in Iraq, an issue that requires attention. In the long run, a collection of highly partisan media outlets is not likely to satisfy the public's right to know, particularly in a politically and socially fractured transitional democracy.

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<sup>48</sup> *Liberated and Occupied Iraq: New Beginnings and Challenges for Press Freedom*, Freedom House Special Report, August 2004, partly quoting BBC Monitoring, pp. 2-3.

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The following paragraphs identify the measures that could be put in place to secure the medium to long-term development of a pluralistic media. Possible measures are divided in two groups: practical and financial support measures, and legal and regulatory measures.

The promotion of public service broadcasting and community media, two kinds of media that can make a significant contribution to improving pluralism, is considered separately, in Section 3.4.1 of this Report.

### 'Practical' measures to promote media pluralism

It is not realistic to expect a pluralistic media to arise in Iraq without any support. Economic conditions in Iraq are as yet not conducive to supporting a media of any kind, let alone a pluralistic one. It is therefore of vital necessity that both the government and the international community, governmental and non-governmental, make a coordinated effort to provide practical support –in the form of money and in terms of equipment and professional support and expertise.

Already, international non-governmental agencies have various support schemes in place and there is a significant amount of media support funding coming into the country, initially through the US-administered Development Fund for Iraq and subsequently through international assistance programmes. Agencies such as UNESCO and others are already contributing and are reported to be creating a media support scheme, providing both grants and loans<sup>49</sup> to support the development of a free and pluralistic media.<sup>50</sup> In the short term, assistance activities should continue, including through expanding a media loans fund,<sup>51</sup> similar to the ones operated in Central and Eastern Europe and in Africa and promised on UNESCO's Iraq website. The provision of equipment and materials would also be highly beneficial, together with professional support and expertise where needed.

It is essential, however, that any support is provided on the basis of fair and non-discriminatory criteria, and that all assistance is properly accounted for. Significant and widespread corruption has been reported in relation to the initial batch of reconstruction funds and serious concerns about spending controls continue to be raised.<sup>52</sup> Recognising both the Iraq government's international obligations to ensure media freedom as well as the on-going international assistance programmes, we recommend that the government and UNESCO, as the UN's lead agency on media freedom, should take a joint lead and publish fair, clear and

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<sup>49</sup> Possibly interest-free.

<sup>50</sup> In the 2004 Belgrade Declaration, issued on the occasion of World Press Freedom Day and endorsed by UNESCO's General Conference, UNESCO was identified as the lead United Nations agency for communications issues and was called upon to reinforce its role in coordinating media support efforts in conflict and post conflict societies:

[http://portal.unesco.org/ci/en/ev.php-URL\\_ID=15654&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/ci/en/ev.php-URL_ID=15654&URL_DO=DO_TOPIC&URL_SECTION=201.html),

para 14.

<sup>51</sup> See UNESCO's Declaration of Sofia, which calls for the establishment of a Media Loans Fund in Central and Eastern Europe.

<sup>52</sup> The International Advisory and Monitoring Board on the Development Fund for Iraq, an audit agency for Iraq set up by the international community with a mandate until the end of 2006, continues to raise serious concerns with regard to all monies received and spent. It has also complained about limited access by external accountants: see, for example, its most recent Statement, made 3 January 2006: <http://www.iamb.info/>. Credible media reports, in less couched terms, have suggested that as much as 98% of the initial USD20 billion provided has not been properly accounted for: 'Beneath Iraq and a Hard Place', More4 (UK TV), 12 January 2005.

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non-discriminatory guidelines on eligibility for media support, whether financial or material, and the conditions for provision of that support.

In the medium and longer term, support measures will continue to be needed to promote a healthy media sector. For example, once a taxation system is put in place, consideration ought to be given to exempting newsprint and other journalistic commodities from value added tax. Special tax schemes are common in other countries<sup>53</sup> and are generally considered a positive and non-discriminatory way of stimulating media development. In addition, more targeted support schemes may become necessary to stimulate minority media, to help media in marginalised areas or to support specific types of media (for example, community media). Longer-term support needs to be even more carefully targeted than short-term measures and should be provided only on the basis of clear, fair and non-discriminatory criteria. The government, in consultation with UNESCO, should take the lead in assessing the kind of measures that may be needed.

Training measures are also key to media pluralism and a range of initiatives need to be put in place to ensure appropriate training for journalists. Closely related to this is the promotion of high professional standards in the media. A key means of achieving this is through self-regulatory systems, including complaints mechanisms. Journalist safety is a particular concern in Iraq. Targeted training in this area is key but, over time, measures have to be taken to improve the overall security situation.

#### Legal measures to promote pluralism and independence

A number of different legal measures need to be put into place to promote pluralism in the media while ensuring its independence. The present legal framework includes a number of content restrictions that unduly limit media freedom and the media's ability to relay stories to the public without fear of sanction. In some cases, restrictions that are in principle legitimate are enforced through excessive sanctions, which also exert a chilling effect on freedom of expression. It is important for the authorities to review the whole legal framework relating to content restrictions affecting the media to ensure that the laws are brought into line with international and constitutional standards in this area.

Information is essential for journalism but the present Iraqi laws both classify an unduly wide range of information and fail to provide for a right to access information held by public bodies. Both problems need to be resolved to ensure open access by journalists, as well as citizens more generally, to publicly held information. Closely related to this is the need to ensure that journalists can protect the confidentiality of their sources of information and that they are free from unreasonable search and seizure.

The regulatory framework for the media is fundamental to promoting pluralism and ensuring independence. Within the print sector, an absence of constraints on entry into the market and, in particular, no registration requirement, or a not unduly onerous registration requirement that does not include discretion to refuse registration, is preferable. There should also be a minimum of constraints on professional journalists, although they may well wish to organise themselves into self-regulatory bodies.

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<sup>53</sup> They can be found in countries as diverse as Ukraine, Vietnam, Russia, Germany and Croatia.

The broadcast sector is different and it is accepted that a licensing system needs to be in place, if only to ensure order in the airwaves. Licensing, however, should specifically aim to promote diversity, in terms both of content and of ownership. This can be done through the licensing process and also by promoting different types of broadcasters: public service, community and commercial.

### **3.3 An Enabling Legislative Framework**

It is crucial to the development of an independent and pluralistic media that the national laws of a country do not restrict freedom of expression beyond what is legitimate under international law. Iraq has ratified the *International Covenant on Civil and Political Rights*<sup>54</sup> and is legally bound to ensure that any laws that restrict freedom of expression pursue a legitimate aim, such as the protection of public order, the reputations or rights of others, national security or public health or morals and that they are “necessary in a democratic society” for the protection of those aims.<sup>55</sup> In addition, the introduction of enabling and protective legal measures is necessary, for example to ensure the protection of confidential journalistic sources.

#### ***3.3.1 Review of Existing Legal Restrictions***

Present-day Iraq has a legacy of laws that restrict freedom of expression far beyond the level permitted under international law. Many of these laws date from the rule of Saddam Hussein, while some of them were introduced by the US-led Coalition Provisional Authority. It is crucial that these all be reviewed and either repealed or, to the extent that they pursue a legitimate purpose, replaced with laws that meet international standards as well as Iraq’s own new constitutional standards.

In the following paragraphs, we summarise the most important of the laws that are in need of review.<sup>56</sup> We note that since the fall of Saddam Hussein’s regime, many of them have not been applied in practice and some almost seem to have been forgotten about. There seems to be very little impetus towards reviewing these laws. However, a review of these laws should not be delayed much longer: they are far too easily revived by a regime that might wish to silence its critics.

##### **3.3.1.1 Insult and Defamation**

Iraq’s Criminal Code includes a number of defamation provisions that restrict freedom of expression far beyond what is legitimate under international law:

- Article 202 makes it a crime, punishable by up to ten years’ imprisonment, to insult “the Arab community or the Iraqi people or any section of the population or the national flag or the state emblem”;
- Article 227 makes it a crime, punishable by up to two years’ imprisonment, to publicly insult a foreign country, flag or national emblem, or an international organization with an office in Iraq;

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<sup>54</sup> Note 5.

<sup>55</sup> Section 2.2 of this Paper elaborates on these conditions at length.

<sup>56</sup> Early in 2004, we published a review of all Hussein-era and CPA laws that conflicted with international standards on freedom of expression. This can be found on <http://www.article19.org> or by emailing [law@article19.org](mailto:law@article19.org).

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

These provisions are highly problematic in a number of respects and will hinder the development of a free media. First and foremost, we do not believe that the criminal law should not be used to protect reputations. While the protection of reputation is a legitimate aim in pursuit of which to restrict freedom of expression, practice in many countries shows that reputation and privacy can adequately be protected through civil law. Use of the criminal law to protect reputation and privacy therefore fails the test under Article 19(3) ICCPR that restrictions on freedom of expression should be "necessary".<sup>57</sup> There is growing international agreement that, particularly in transitional democracies, criminal law provisions are not the right response to defamation. New democracies need a media that is free to criticise public policies and politicians without fear of imprisonment or imposition of another harsh sentence.

The key problem with criminal defamation laws is that a breach may lead to a custodial sentence or another form of harsh sanction, such as a suspension of the right to practise journalism. Even if these are rarely applied, the problem remains, since the severe nature of these sanctions means that their very existence casts a long shadow. Suspended sentences, common in many countries, also exert a significant chilling effect as subsequent breach within the prescribed period means that the sentence will be imposed. All of this is particularly a problem in countries where there is no established tradition of democracy and where courts and politicians may therefore react disproportionately to criticism. The imposition of a thirty-year custodial sentence by Kurdish courts in Iraq in December 2005 is a perfect example of this kind of abuse.<sup>58</sup>

For these reasons, the UN, OAS and OSCE freedom of expression watchdogs released a Joint Declaration in 2002, in which they state:

Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.<sup>59</sup>

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<sup>57</sup> See Section 2.2 of this Paper.

<sup>58</sup> Reporters Without Borders reported that Kamal Sayid Qadir received a 30 year prison sentence for defaming public institutions on 19 December 2005.

<sup>59</sup> Joint Declaration, 11 December 2002: <<http://www.unhchr.ch/html/menu2/i2civfre.htm>>. A number of countries, including Sri Lanka, Ghana, Argentina, Peru, Costa Rica, Paraguay and Ukraine have in the last few

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Our overarching recommendation is that the Iraqi government should follow up on this recommendation and repeal all criminal defamation provisions. New or amended civil law provisions should be introduced that protect reputation but that include adequate safeguards to protect freedom of expression. The civil law should include appropriate defences – such as defences of truth and ‘reasonable publication’ – and require any damages that are awarded to be proportional to the defamation found. The law should also clearly state that public figures, including politicians and senior civil servants, should tolerate more criticism than private individuals; that no one can be found liable for the expression of an opinion (as opposed to the dissemination of a defamatory allegation of fact); and that State institutions are barred from instigating defamation actions.<sup>60</sup>

### 3.3.1.2 State Secrets Laws

Current Iraqi law includes numerous restrictions on what may be published in the name of protecting ‘state secrets’. These include the following:

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

Under international law, freedom of information, including the right to access information held by public authorities, is guaranteed as an aspect of freedom of expression. While, like freedom of expression, this right is not absolute and may be restricted to protect interests such as privacy or national security, such restrictions must be narrowly interpreted and convincingly established as necessary in a democratic society. The provisions quoted above are all highly problematic in this regard.

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

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years abolished criminal defamation laws – either fully or in important respects.

<sup>60</sup> See, generally, ARTICLE 19’s *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation* (London: 2001). Endorsed by, among others, the UN Special Rapporteur on Freedom of Opinion and Expression.

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Finally, both provisions fail to provide for a ‘public interest’ override, which would guarantee that disclosure will take place when the public interest in openness outweighs the harm done to any other State interests.

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

Finally, Articles 182 and 228 are both fundamentally flawed. Article 182 would allow the governmental to stamp ‘secret’ anything that, if published, might harm its political interests while Article 228 would criminalize the media for publishing information received by them through leaks from closed sessions of legislative bodies.<sup>61</sup>

We recommend that the Iraqi government should repeal all of these provisions, and at the same time introduce a statutory access to information regime. We elaborate on this in Section 3.3.2.3 of this Report.

### 3.3.1.3 Public Order Restrictions

Numerous provisions of the Penal Code purportedly protect public order:

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

The Coalition Provisional Authority actually extended the range of prohibited material by adopting CPA Order No. 14, entitled “Prohibited Media Activity”,<sup>62</sup> which prohibits the publication of any material that incites violence, civil disorder, rioting or damage to property or making statements on behalf of the Iraqi Ba’ath Party, amongst other things.

While the protection of public order and security is a legitimate aim for the restriction of freedom of expression, these provisions all go beyond what is “necessary” in a democratic society. Laws restricting freedom of expression to protect public order and national security are legitimate only if carefully tailored to prevent abuse. Restrictions should be

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<sup>61</sup> We assume that any such sessions would be limited to meetings of parliamentary committees discussing classified intelligence material, for example.

<sup>62</sup> CPA/ORD/10 June 2003/14.



unambiguously worded and narrow in scope. They should be engaged only in the context of a clear and close nexus between the expression in question and the national security or public order risk, and they should not restrict frank and open public debate.<sup>63</sup> Blanket bans on certain views from being reported in the media, simply because they are believed to be sympathetic to or to endorse terrorism, for example, are illegitimate. The media has the right, perhaps even an obligation, to report on all matters of public interest, including on activities that are themselves crimes, where these are present in society. They cannot be penalised simply for reporting the existence of these views – indeed, it is their duty to report these views.<sup>64</sup>

The various provisions in the Iraqi Penal Code that impose public order and national security-related restrictions, as well as CPA Order No. 14, fail to meet these standards. The use of CPA Order No. 14 against *Al Jazeera* and *Al Arabiya* TV stations is a good example of how these restrictions may be abused to serve political ends: neither station incited violence, but they frequently air footage showing insurgents. This has attracted fierce criticism from US and Iraqi authorities, and several measures have been taken against the two stations as a result.

The Penal Code provisions quoted above are highly problematic also. The offence of ‘shouting to provoke dissent’, in Article 214, could be committed by anyone who participates in a demonstration. It is hard to ascertain what risk promoting Zionism, as prohibited under Article 201, might pose to Iraq whereas the abuse of similar provisions in other countries in the region to prevent reporting about Israel is far from theoretical. Article 215 is vague both in its reference to ‘public security’, which is an extremely flexible concept, and with regard to the concept of ‘tarnishing the country’s reputation.’ It is unclear what reputation a country, as such, has and, as noted above under defamation, restrictions of this sort simply cannot be justified. All of these provisions may easily be abused to stifle government critics and should therefore be repealed or suspended.

### **3.3.1.4 Restrictions on Publishing ‘False News’**

Various provisions in the Penal Code prohibit the publication of false facts or allegations:

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

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<sup>63</sup> See, generally, the *Johannesburg Principles* etc.

<sup>64</sup> The European Court of Human Rights’ judgment in *Erdogdu and Ince v. Turkey*, 8 July 1999, Application Nos. 25067/94 and 25068/94, is particularly instructive with regard to the exercise of the right to freedom of expression in conflict situations. See particularly paragraph 54 of the judgment.

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

Under international law, it is well-established that criminal prohibitions on spreading rumours or false news are unjustifiable as a restriction on freedom of expression. They fail to take into account the daily pressure that journalists are under to report news in a timely fashion and the public interest in receiving such timely information. Even the very best journalists make mistakes and criminalising such mistakes exerts an unacceptable chilling effect on freedom of expression.

False news provisions are also frequently abused to stifle critical reporting. For these reasons, false news provisions have been ruled by constitutional courts around the world to be incompatible with the right to freedom of expression. In May 2000, for example, a prohibition on false news was struck down by the Supreme Court of Zimbabwe in a case involving two journalists who had published a story alleging there had been a coup attempt in the Zimbabwean army. They were charged with disseminating false news likely to cause fear, alarm or despondency. However, the Supreme Court unanimously and unambiguously struck this provision down as a breach of the guarantee of freedom of expression.<sup>65</sup> Other courts have also held that the offence of ‘spreading false news’ is incompatible with the right to freedom of expression.<sup>66</sup> We therefore recommend that all these provisions are repealed.

### 3.3.1.5 Miscellaneous

At least four other provisions in the Penal Code restrict freedom of expression beyond the extent permitted under international law:

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

Additional content restrictions are found in the Hussein-era Law of Publications. Articles 16-21 of this Law ban the publication of a number of materials, including anything that is offensive to the government, anything that would violate general moral values or anything that runs counter to Iraqi policies. Other materials may be published only with official permission, including any statements ‘attributed to’ government figures, minutes of closed court sessions or decisions of the council of ministers. Violations of the Law of Publications

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<sup>65</sup> *Chavunduka and Choto v. Minister of Home Affairs & Attorney General*, 22 May 2000, Judgement No. S.C. 36/2000.

<sup>66</sup> See, for example, *R v. Zundel*, [1992] 2 SCR 731 (Supreme Court of Canada).

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

The various restrictions noted above are all highly problematic from a freedom of expression perspective and fail the three-part test for restrictions outlined in Section 2.2. No journalist should need official permission to quote public officials and no restrictions should be placed on the publication of materials simply on the basis that they are critical of, or offensive to, the government. The other restrictions either pursue illegitimate aims, are overly vague or restrict freedom of expression far beyond what can be considered "necessary in a democratic society". For example, it is unclear what constitutes the "public integrity" that Article 403 prohibits violating, yet offenders are liable to a two-year sentence if found guilty of contravening this woolly concept. Other examples of fundamentally flawed prohibitions include Article 305, which would prohibit most investment advice, and Article 438, which would hinder most investigative reporting.

### **3.3.2 Enabling Measures**

As well as reviewing the numerous restrictions on freedom of expression that currently exist, consideration should be given to enacting legislation that provides appropriate protection to the media and media professionals. In particular, we recommend that legislation is put in place to protect the confidentiality of journalists' sources, and that the media should benefit from heightened protection against search and seizure. Consideration should also be given to enacting legal measures to protect the media from libel suits that are brought as a form of harassment. Finally, for the media but also for all members of society, it is important that a general access to information law, giving a right to access information held by public authorities, be adopted.

#### **3.3.2.1 Protection of Sources and Protection from Unreasonable Search and Seizure**

The media routinely depend on contacts outside the media for the supply of information on issues of public interest. Individuals sometimes come forward with secret or sensitive information, relying upon the reporter to convey it to a wide audience in order to report wrongdoing within public administration or to stimulate public debate. In many instances, anonymity is the precondition upon which the information is conveyed from the source to the journalist; this may be motivated by fear of repercussions.

In recognition of their importance, international courts have recognised that the media enjoy a special privilege allowing them not to reveal confidential sources of information unless certain stringent conditions are fulfilled. In the seminal case of *Goodwin v. United Kingdom*,<sup>67</sup> the European Court of Human Rights ruled that an attempt to force a journalist to reveal his source for a news story violated his right to freedom of expression. In its decision, the Court emphasised the importance of affording safeguards to the press generally and to the journalists' sources in particular. The Court held:

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<sup>67</sup> *Goodwin v. the United Kingdom*, 27 March 1996, Application No. 17488/90 (European Court of Human Rights).

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Protection of journalistic sources is one of the basic conditions for press freedom.... Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest ... Having 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 [requiring disclosure of a source] cannot be compatible with [the right to freedom of expression] unless it is justified by an overriding requirement in the public interest.<sup>68</sup>

Several international bodies have issued statements to the same effect.<sup>69</sup>

National law and practice in a number of countries grants a high level of protection to the confidentiality of journalistic sources. For example, in France, the Criminal Procedure Code states that journalists called as witnesses in criminal trials may refuse to divulge confidential sources;<sup>70</sup> in Germany, the Federal Constitutional Court has upheld a qualified privilege of confidentiality;<sup>71</sup> and in Japan, the Supreme Court upheld a ruling by the Sapporo District Court that, when giving evidence, journalists may refuse to divulge information about a source unless the information is necessary to safeguard the fairness of a criminal trial.<sup>72</sup>

Like the right to freedom of expression it is derived from, the privilege to maintain confidentiality of sources is not an absolute one – in very limited, clearly defined circumstances, disclosure of information identifying a source may be demanded. Under international law, such disclosure may be ordered by a court if it is necessary in the investigation of a serious criminal offence, or for the purposes of defence against a criminal allegation, and the information required or information of the same probative value cannot be gathered through other means. We recommend that serious consideration is given to enacting legislation along these lines in Iraq.

Analogous to the privilege of confidentiality of sources, the media should also enjoy heightened protection against search and seizure. Searches of media premises and seizure of journalistic material can have a particularly detrimental effect on media freedom. At the moment, the media in Iraq do not enjoy any specific privilege against search and seizure and

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<sup>68</sup> *Ibid.*, para. 39.

<sup>69</sup> See, for example, Conference for Security and Co-operation in Europe, Follow-up Meeting 1986-1989, Vienna, 4 November 1986 to 19 January 1989, Concluding Document, para. 40; *Inter-American Declaration of Principles on Freedom of Expression*, approved by the Inter-American Commission on Human Rights during its 108<sup>th</sup> regular session, 19 October 2000; Council of Europe Committee of Ministers Recommendation to member states No. R (2000) 7 on the right of journalists not to disclose their sources of information, adopted 8 March 2000 (Council of Europe Recommendation); *Declaration of Principles on Freedom of Expression in Africa*, 32<sup>nd</sup> Session.

<sup>70</sup> Article 109, Criminal Procedure Code.

<sup>71</sup> BverfGE 64, 108. See also several state laws, for example paragraph 24(1) of North Rhine Westphalia's Press Law.

<sup>72</sup> *Sasaki v. The Hokkaido News, Inc.*, 930 Hanrei Jihô 44, Sapporo District Court, 30 May 1979; affirmed 937 Hanrei Jihô 16, Sapporo High Court, 31 Aug. 1979; affirmed 30 Minshû 403, S. Ct (Third Petty Bench), 8 March 1980. This case is discussed in L Beer, 'Freedom of Expression: The Continuing Revolution', 53 *Law and Contemporary Problems* (1990), 39, 59. For national laws protecting confidentiality of journalists' sources, see for example Article 11 of the Mass Media Law of Azerbaijan, adopted 7 December 1999, amended 28 December 2001; Articles 1 and 4, Indonesian Press Law, Law No. 40 of 1999; Article 6, Jordanian Press and Publications Law of 1998, as published in the Official Gazette on 1 September 1998; Article 46, Press Act of Malta (1974, as last amended in 2000); and Article 31 of the Austrian Media Act 1981.

complaints about unreasonable raids have been voiced.<sup>73</sup> National laws in a number of countries recognise this privilege, as do international declarations.<sup>74</sup>

### **3.3.2.2 Protection from Abusive Defamation Suits**

As mentioned above, defamation laws have been abused in many transitional democracies by powerful figures who wish to silence their critics in the media. A favoured tactic has been to bring multiple suits, each one with little hope of ultimate success but with the cumulative effect of ‘drowning’ the defendant journalist or media outlet in legal proceedings. This can be a highly effective tactic: no journalist wants to spend days in court defending yet another libel allegation, and few if any have the financial means to retain a lawyer to defend multiple claims.

In response to these concerns, some countries have enacted special laws that provide protection against such lawsuits. In the United States, statutes known as anti-SLAPP laws, designed to help defendants defeat “Strategic Lawsuits Against Public Participation”, are in effect in several states.<sup>75</sup> Georgia’s newly enacted Law on Freedom of Speech<sup>76</sup> provides similar protection, stating that courts may award damages against defamation claimants if their claim is found to be ‘manifestly ill-founded’.<sup>77</sup> The Iraqi government should consider introducing similar legislation in Iraq, in the medium term.

### **3.3.2.3 An Access to Information Law**

Freedom of information – the right to access documents and information held in any form by public bodies – is key to the functioning of the media. It is trite to note that information is the lifeblood of the media. Without information, it would be impossible for the media to publish anything – let alone the kind of public interest stories which are such an important part of media work.

Furthermore, journalists need not just any information; they need good, reliable information, particularly when investigating issues that relate to the functioning of the government or its officials. In order to perform its role of ‘watchdog’ of democratic society, the media needs access to documents and information at the heart of governmental functioning – not just the text of legislation and regulations, but budgetary information, policy papers, correspondence with contractors, and information relating to health and the state of the environment, to name but a few examples. Absent such access, journalists cannot effectively scrutinise governmental action; they would be condemned to rely on ‘leaked’ documents, second-hand information or even rumours, laying themselves open to defamation suits or other legal threats along the way.

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<sup>73</sup> Such as the international protest in response to a US raid on the house freelance broadcast journalist Ali Fadil, who was working with international broadcasters to investigate corruption in Iraq. Several videotapes were taken from his home.

<sup>74</sup> See, for example, Council of Europe Recommendation 2000(7), note 69; Article 56-2, French Criminal Procedure Code, and Article 13 of the UK Police and Criminal Evidence Act.

<sup>75</sup> See, for example, Arkansas Code §§ 16-63-501 - 16-63-508 and Code of Georgia § 9-11-11.1.

<sup>76</sup> June 2004.

<sup>77</sup> Article 18.

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Freedom of information is crucial to the media in other ways, too. The lack of a legal access to information regime allows governments to dominate the flow of official information. If there are no enforceable access laws or regulations, governments can choose which information to release and, almost as importantly, whom to release it to. It is not unknown for governments not only to reward those media that provide sympathetic coverage but also to 'punish' critical and opposition media by refusing to provide it with information.<sup>78</sup> In such a political climate, a free media cannot exist and democracy flounders.

For these reasons, a record number of countries have adopted freedom of information laws in the last ten years and the Iraqi government should introduce effective legislation at the earliest opportunity. Such legislation should clearly state the principle that any information held by or under the control of a public body should be openly accessible to members of the public, unless it is convincingly established that disclosure of the information would do serious harm to a protected interest and there is no overriding public interest in the information. It should also create an easily accessible mechanism through which information can be accessed, require all public bodies to organise their information in such a way that it is easily accessible (which will have obvious administrative benefits), provide a right of appeal and establish an information 'ombudsman' to supervise implementation of the law.<sup>79</sup>

As part of the introduction of freedom of information legislation, the government should also place CPA Order 59, on the protection of 'whistleblowers,' on a formal legislative footing. So-called 'whistleblowers' – individuals who in good faith release information on wrongdoing – play an important role in creating an open, transparent and accountable public service. CPA Order 59 recognises this by ensuring that whistleblowers are protected from retaliation or adverse action against them. If whistleblowing leads to the recovery of public funds, Order 59 provides that up to 25% of the amount recovered may be given to the whistleblower as a 'reward'.<sup>80</sup>

In Section 3.3.1.2 of this Report we criticise a number of criminal law provisions that run counter to principles of freedom of information. The Government should review these provisions and amend or repeal them as necessary to bring them Iraqi law in line with international standards on access to information.

But the Government needs to do more than 'just' introduce legislation: it needs to show real commitment and introduce practices that facilitate the free flow of information. For example, it should commit to providing quality and timely information to journalists; government departments should set up dedicated media offices whose aim is to provide information, and not shield it; and the government should raise awareness amongst civil servants of the importance of transparency in government. All this will not only greatly enhance the functioning of the media, it will also help fight corruption and improve the efficiency of government departments themselves.

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<sup>78</sup> For various examples of this, see *FOI and the Media in Armenia, Azerbaijan and Georgia* (ARTICLE 19, London: 2005).

<sup>79</sup> For an overview of these standards, see ARTICLE 19's *the Public's Right to Know: Principles on Freedom of Information Legislation* and ARTICLE 19's *Model Freedom of Information Law*.

<sup>80</sup> CPA/ORD/1 June 2004/59, Section 3(7).

### 3.4 Media Regulation

Appropriate regulation of the media sector is extremely important to the development of an independent and pluralistic media. Other sections of this Report discuss the substantive measures that are necessary in this regard; this section discusses various regulatory mechanisms that may be put in place for the media. Given the differences between the broadcast media, print media and on-line media, we discuss each of these separately. We also tackle separately the issue of regulation of individual journalists. Finally, we discuss the idea of self-regulation.

Three basic principles must be at the heart of any form of media regulation:

1. the primary purpose of regulation must be to protect and promote a free, independent and pluralistic media;
2. any actual interference with the media – such as a requirement to register – must be kept to a minimum, in line with Article 19(3) of the ICCPR;<sup>81</sup> and
3. any bodies which exercise regulatory power over the media should be protected against political or commercial interference.<sup>82</sup>

#### 3.4.1 The Broadcast Sector

It is almost universally accepted that some regulation of broadcasters is necessary. Regulation is justified on a number of grounds, including the need to ensure order as well as pluralism in the airwaves, the fact that the airwaves are a limited public resource, the dominant and intrusive nature of broadcasting and the prohibitive costs of establishing a major broadcast outlet. At the same time, it is essential that regulation should not be able to be abused to silence those who are critical of the government or who otherwise attract official censure.

The primary means used to balance these competing demands is to allocate regulatory powers in relation to broadcasting to an administrative body which is independent of government. Further protection for freedom of expression is achieved by circumscribing the powers of this body very carefully, so that it may not abuse those powers, and by subjecting its decisions to judicial review. Perfect independence is difficult to achieve but a number of measures can help prevent political or other interference in the work of the regulatory body. At the very minimum, it is essential that the regulator is not part of a ministry or government department but that it is a separately constituted body, answerable to the public through an independent governing board. Appointments to the governing board of the regulatory body should be made in a manner that promotes its independence. The process for appointments should be transparent and fair, and allow for participation by civil society and the general public. Appointments should not be made by a single person or party but rather in a manner which ensures a broad range of input. Once appointed, members should be protected against removal outside of certain extreme circumstances.<sup>83</sup>

In most democratic countries, broadcast regulators undertake two key functions. First, broadcasters are required to obtain a license to operate and the regulator is responsible for

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<sup>81</sup> See *Laptsevich v. Belarus*, 20 March 2000, Communication No. 780/1997 (UN Human Rights Committee).

<sup>82</sup> See the Joint Declaration of the 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 of 18 December 2003.

<sup>83</sup> See, generally, ARTICLE 19, *Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation* (London: ARTICLE 19, 2002).

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overseeing the licensing process. Second, regulators are normally responsible for taking the lead in developing, and applying, codes of broadcasting conduct which normally deal with a range of content and broadcast practice issues.

In Iraq, the National Communications and Media Commission (NMC) has been established by the Coalition Provisional Authority as the regulatory body for broadcasting. It has as its main task the fostering of plurality and competition among Iraq's communications and media services. The independence of the NMC is now recognised in the new Constitution.<sup>84</sup> However, it still functions on the basis of CPA Order No. 65, pending the adoption of a permanent legislative framework. While the substance of that Order does attempt to protect the NMC's independence and ensure that it regulates the airwaves in the overall public interest, the fact that it was constituted by the CPA provides it with little democratic legitimacy. It is, therefore, important that the government introduces legislation at the earliest opportunity to re-establish the NMC, while protecting its mandate and its independence in accordance with the Constitution.

New legislation should ensure that NMC board members represent Iraqi society in all its diversity. This can be achieved in various ways. One way would be to ensure that all main ethnic groups and minorities are represented at the NMC Board. This would have the advantage of providing all groups with 'their' Board member. However, this might result in a deadlocked board with dozens of members who may have conflicting interests and ideas. It may therefore be more fruitful to limit board membership to nine, eleven or fifteen, and require members to serve in their individual capacity (not representing a particular group, party or ethnicity) while requiring that overall board membership should broadly reflect society. CPA Order 65, which limits membership of the Board to nine and which includes rules to ensure that they serve in their individual, expert capacity, could provide a good starting point for new legislation.

Whichever formula is chosen, the process for nominating board members should be democratic and fully transparent, and allow for public input. Board members should be parliamentary appointees, not appointed by the President or government ministers, and rules should be drawn up to prevent conflicts of interest. The overall mandate of the board should be to regulate broadcasting in the overall public interest.

New broadcasting legislation should also establish a clear licensing framework. CPA Order 65 states that the broadcast regulator should licence broadcasters in a manner that "[ensures] that the radio frequency spectrum is used in a manner that recognizes the value and scarcity of this resource", but it provides no other guidance on the licensing principles or the process that is to be used. New legislation should clearly set out the licensing process and require that the spectrum be utilised to fulfil the public's right to receive information from a variety of sources.

The government should also give specific and serious consideration to the promotion of public service broadcasting and to community broadcasting. We elaborate on these two forms of broadcasting below.

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<sup>84</sup> Articles 101 and 102(1).



### 3.4.1.1 Public Service Broadcasting

‘Public service broadcasting’ is a form of broadcasting under public ownership, at least partly publicly funded, that has as its goal to serve the public interest. Its mandate is to provide high quality programming that informs the public, provides entertainment and education, and serves all sections of society. Unlike commercial broadcasters, whose ultimate aim is normally to make money, the mandate of public service broadcasters is to provide broadcast programming as a ‘public service’.

Public service broadcasting can make a particularly important contribution to fulfilling the public’s right to know. Its programming should be independent and non-political, and therefore provide the public with a reliable and independent source of information on matters of public interest. By serving minority needs, public service broadcasting can also make an important contribution to pluralism in the media. Public service broadcasters should be ultimately accountable to parliament.

The idea of public service information provision has traditionally been confined to the broadcast sector. This is related to fulfilling the public’s right to receive quality information in an environment of a limited number of broadcasters, which justifies establishing a separate, publicly accountable outlet. In the print environment, where a huge variety of outlets tend to compete for the attention of readers, establishing a public service outlet is more difficult to justify.

In Iraq, the Iraqi Media Network (IMN) has been envisaged as the country’s public service media network.<sup>85</sup> It comprises Al Iraqiya, the national public service television broadcaster, Radio Iraq, the national radio broadcaster, and *Al Sabaah*, the national public newspaper, and it also includes a network of regional television and radio broadcasters.<sup>86</sup> The three national media have arisen from the ashes of previously State-owned media.

CPA Order No. 66 established the Iraqi Media Network as “the public service broadcaster for Iraq”,<sup>87</sup> thus providing legal authority for the operations of Al Iraqiya, Radio Iraq and the regional broadcasters. The Order refers solely to broadcasting and does not mention the print outlet, *Al Sabaah*. The Order requires IMN to serve as the “institutional framework [to] educate, entertain and inform the people of Iraq” without being “a tool of political or other inappropriate outside interests”.<sup>88</sup> It also elaborates IMN’s public service mandate and sets up a governing structure.

While the intention behind CPA Order 66 is clearly to set up a national public service broadcaster in accordance with international standards, the Order itself provides IMN with little democratic legitimacy. The new government should make it a priority to introduce legislation firmly to establish Al Iraqiya and Radio Iraq as national public service institutions. Such legislation should protect the independence of these broadcasters, including through their funding and governing structure, and clearly set out the broadcasters’ public service mandate. CPA Order 66 may be taken as a starting point; we also refer to ARTICLE 19’s A

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<sup>85</sup> See <http://www.iraqimedianet.net/>.

<sup>86</sup> See, for example, the southern region’s Al Iraqiya: <http://www.imnsr.com/>.

<sup>87</sup> Section 3.

<sup>88</sup> Section 1.

*Model Public Service Broadcasting Law* which provides an example of how best practice standards may be incorporated in a law establishing a public service broadcaster.<sup>89</sup>

In the medium term, it will be crucial to identify a stable source of funding for public service broadcasting. Donor funds cannot continue to sustain IMN and short term direct government grants are susceptible to political interference. Experience around the world shows that stable funding is key to protecting public service broadcasters' independence; yet identifying a stable funding source is highly problematic, particularly in transitional democracies. In established democracies, a licence fee is considered a stable and reliable source of income, but charging such a fee might be problematic in Iraq in the foreseeable future. Consideration could be given, however, to using part of the licence fee paid by commercial broadcasters to fund public service broadcasting; to allowing IMN to raise some of its income through advertising; or to diverting some of the advertising revenue of commercial broadcasters as a cross-subsidy to IMN. In order for such funding methods to be accepted, however, IMN will need to prove itself as a reliable and credible public service broadcaster. A direct government grant could also be considered, provided that the grant is sufficient to guarantee IMN's operations for a period of several years, is indexed against inflation and cannot be withdrawn, reduced or otherwise interfered with by political interests.

Finally, as noted, there are few countries in the world that have a public service print media – while many transitional democracies continue to operate 'State' newspapers, this is usually as a relic from the previous, non-democratic regime. The justification for public service broadcasting – to fulfil the public's right to know in an environment of a limited number of media outlets – cannot be sustained with regard to the print media, where a large variety of media outlets already exist. We therefore recommend that consideration be given to privatising *Al Sabaah* newspaper in the short to medium term. As the newspaper sector in Iraq diversifies and more independent print media outlets are established, the justification for maintaining a nationally funded print outlet diminishes. We note that there has already been a mass walk-out of *Al Sabaah* staff, over the issue of editorial independence, which led to the creation of the rival *Al Sabaah Al Jadeed*, and which has seriously affected *Al Sabaah*'s reputation as an independent provider of news. *Al Sabaah Al Jadeed* is now reported to be the country's second largest print media outlet. This further indicates the limited longer-term sustainability of *Al Sabaah* as a publicly owned print media outlet.

### **3.4.1.2 Community Media**

Community media – media outlets set up on a not-for profit basis by and for distinct communities – can make a crucial contribution to media pluralism and fulfilling the public's right to know and to receive information from a variety of sources. This is particularly true in the field of radio, where set-up costs are lower, the spectrum allows more stations to broadcast than on television and there tends to be greater scope for interaction between the audience and the broadcaster.<sup>90</sup>

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<sup>89</sup> (London: 2005). Available at: <http://www.article19.org/pdfs/standards/modelpsblaw.pdf> .

<sup>90</sup> Formats such as talk-radio and phone-in shows allow for more audience participation than tends to be possible on television, and lead to a great sense of audience 'ownership'. Smaller radio stations can also tailor their news and other output to their audience in a much more targeted fashion than television broadcasters, which adds to the audience's sense of ownership.

At present, there exist a large number of small local radio stations in Iraq, some of them set up with the assistance of foreign donors. One of the first orders of business of the NCMC was, in 2004, to licence the FM bands. This resulted in the establishment of innovative (in the region) talk radio stations such as Radio Djila, which operates with the assistance of Deutsche Welle, and Hot FM, a music station.<sup>91</sup> However, many of the local radio stations now on air are probably better described as commercial stations than as community stations (the definition of community radio being not only that they should seek to serve the information needs of a defined local community, but also that they operate on a non-profit basis and are run by the community they serve). They tend to be driven by commercial interest and may not always best serve the information needs of the community or communities they operate in. This can be particularly detrimental for communities that are so small that it is commercially unattractive to set up a broadcaster specifically serving their needs; or communities that live in an urban area where many other small minorities live alongside each other. Community broadcasting can provide a real and meaningful answer to fulfilling the information needs of such communities, and consideration should be given to further promoting this form of broadcasting. This could be achieved by offering reduced licence fees for true community broadcasters and reserving bandwidth for them in the spectrum plan.

The information needs of small communities could be further fulfilled by the promotion of websites, possibly linked to community radio stations. No legislative provision needs to be made for this – there is no need to licence or register websites – but donors should consider promoting and supporting such initiatives where they arise.

### 3.4.2 The Print Sector

It is generally recognised that it is not necessary to set up specific regulatory regimes to govern the print media. This is based on the idea that, unlike broadcasters, who make use of a limited and public resource, there are no natural constraints on the number of print media outlets in operation and so no need to manage a scarce resource. Under international law, a licensing system for the print media, which involves the possibility of being refused a licence and thereby being prohibited from publishing, is not legitimate. The right to freedom of expression includes the right to establish a print media outlet and, as noted, natural constraints cannot justify limiting this right. CPA Order 65 implements this rule, stating: “The written press shall not require a licence to operate within Iraq”.<sup>92</sup>

On the other hand, *technical* registration requirements for the print media, properly defined as mass circulation, periodical publications, do not, *per se*, breach the guarantee of freedom of expression as long as they meet the following conditions:

- there is no discretion to refuse registration, once the requisite information has been provided;
- the system does not impose substantive conditions upon the media;
- the system is not excessively onerous; and
- the system is administered by a body which is independent of government.

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<sup>91</sup> <http://www.radiodjila.com>.

<sup>92</sup> Section 5(2)(h).

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However, registration of the print media is unnecessary and may be abused, and, as a result, many countries do not require it.<sup>93</sup> At present, no registration system is operational in Iraq and we would recommend that no such system be introduced.

This does not mean that the print media operate in an unregulated environment: they are subject to the same laws that apply to everyone – for example, defamation laws – and, if they have been set up as corporations, or as non-profit bodies, then they are subject to the same rules that apply to other corporations or non-profit bodies.

In fact, one of these laws – the Hussein-era Law of Publications<sup>94</sup> – is highly restrictive and we recommend its full repeal. Described by the UN Special Rapporteur on Iraq as “an important instrument of repression of opinion and expression,”<sup>95</sup> it imposes various restrictions on publications, requires anyone who publishes to have a licence and requires that only university-educated Iraqis may serve as editor-in-chief of a publication. Restrictions such as these have no place in a democratic society. This Law is theoretically still in force and while it is not presently enforced, it could be revived at any moment.

Self-regulation of the print media should be encouraged, as a means of promoting professionalism but also to provide members of the public whose claim that their rights have been violated with a low-threshold remedy. This is discussed in more detail in Section 3.4.6.

### 3.4.3 Commercial Issues

Commercial pressures can threaten pluralism in the media in different ways and there are a number of legal measures that should be put in place to prevent this, including measures to prevent monopolisation of the media market.<sup>96</sup>

In today’s Iraq, there are few restrictions on ownership and a multitude of print publications exist alongside a few dozen radio and television stations. Despite this spectacular growth in Iraqi media since the fall of Saddam Hussein, very few of these new media outlets are truly editorially “independent”; most are in the service of political or commercial paymasters. Some media are allied to political parties; others to religious groups and yet others again are backed by investors inside and outside of Iraq. This is partly due to the fact that the Iraqi economy as yet is not strong or stable enough to sustain a home-grown media: the advertising market is simply too small and print media are unable to price their newspapers at a level that would allow them to make a profit, or break-even.

Under international human rights law, the State has an obligation to take positive measures to promote the growth and development of the media and to ensure that it takes place in a manner which ensures maximum diversity.<sup>97</sup> This means that effective measures should be in

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<sup>93</sup> See Joint Declaration, 18 December 2003.

<sup>94</sup> Law of Publications, No. (206) 1968.

<sup>95</sup> Report to the UN Commission on Human Rights, E/CN.4/1997/57, 21 February 1997, para. 28.

<sup>96</sup> Most countries have general anti-trust laws through which action can be taken against mergers or monopolist acts that would threaten competition in a given sector or consumer interests in general. These laws have some relevance to the media but, given the very specific situation of the media, most countries have introduced sector-specific legislation.

<sup>97</sup> This ‘positive obligation’ is created by the Articles 1 and 19 of the ICCPR. For a legal analysis of what effects this has in practice, see the European Court of Human Rights’ judgment in *Informationsverein Lentia and Others*

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place to prevent undue concentration and to promote diversity of ownership both within the broadcast sector and between broadcasting and other media sectors. Such measures should take into account the need for the broadcasting sector as a whole to develop and for broadcasting services to be economically viable. However, care must be taken not to impose measures that are overly restrictive: international law also requires State to refrain from interfering with the media unless this can be justified as “necessary in a democratic society” in order to protect a legitimate public interest. The State also has an obligation to refrain from imposing restrictions on broadcasters which unnecessarily limit the overall growth and development of the sector.

When the economic conditions in Iraq have improved to the point where a home-grown independent media sector can exist it will therefore be necessary to introduce legislation restricting cross-media ownership and political and religious ownership of broadcast outlets.<sup>98</sup> Thresholds for cross-ownership or for ownership of multiple broadcast outlets should be defined in law, for example in the form of a maximum audience share or based on the revenue of commercial media companies. Consideration should also be given to setting thresholds on capital share limits in commercial media enterprises, which should however take into consideration the size of the media market and the level of resources available in it. Companies which have reached the permissible thresholds in a relevant market should not be awarded additional broadcasting licences for that market. Such legislation should, however, take into consideration the size of the media market and the level of resources available in it. Consideration could also be given to restricting foreign broadcast media ownership, for example by providing that no foreign person or legal person should have a controlling share in a broadcaster.

However, these recommendations come with a serious health warning. Each of these suggested measures are as potentially deadly to the media as they can be beneficial. Ownership restrictions are easily abused for political purposes and even well-intended restrictions on such matters as foreign investment can have the effect of stifling the development of the media sector. We therefore recommend that any such measures are introduced only after thorough consideration, including a long period of consultation with all stakeholders, and that they be implemented by a body which is protected against interference of either a political or commercial nature. It should always be borne in mind that the ultimate aim of these measures should be to promote plurality in the media and fulfil the public’s right to receive information from a variety of sources.

Other ways to limit commercial pressures on the media should also be explored. For example, media outlets should be encouraged to develop editorial charters that separate the editorial responsibilities of the journalistic staff from the owners’ management functions or by legislating a ‘conscience clause’ pursuant to which journalists may refuse to produce pieces that conflict with their conscience. Editorial charters are common in some northern European countries, such as Belgium, the Netherlands and some Scandinavian countries. They work well, partly because there is a long-standing tradition of journalistic freedom in those

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*v. Austria*, 24 November 1993, Application Nos. 13914/88 and 15041/89.

<sup>98</sup> It is internationally accepted that such restrictions are acceptable for the broadcast media, which operate on a limited public resource (the radio spectrum). These restrictions should not be imposed on print or Internet-based media.

countries.<sup>99</sup> Mostly, these agreements are voluntary; although in some countries, legislation has been introduced to enforce editorial charters.<sup>100</sup>

‘Conscience clauses’ have been legislated for in some countries. For example, Georgia’s new and widely applauded Freedom of Speech Law states that journalists have the right “to make editorial decisions based on [their] own conscience”.<sup>101</sup> If a conscience clause is introduced in law, it should be clear exactly what kind of protection it will provide. In some countries, the clause has been interpreted as granting a right for journalists to leave a publication when it changes political direction and be paid compensation;<sup>102</sup> in others, as a right for a journalist to refuse assignments that contradict their ethical and professional values. We recommend that a legislated conscience clause should be included and cover both elements.<sup>103</sup> However, given the important impact on the everyday goings-on at media outlets, we recommend that these measures are widely consulted with all stakeholders; and that voluntary arrangements should be fully explored prior to enacting any legislation.

### 3.4.4 Internet-based Media

Internet-based media, like the print media, should not be licensed and there is no reason to require them to register.

No democratic country presently registers or licences Internet media outlets, and the UN, OSCE and OAS special rapporteurs on freedom of expression and the media have stated “No one should be required to register with or obtain permission from any public body to operate an Internet service provider, website, blog or other online information dissemination system ...”.<sup>104</sup> The only exception to this rule is the possible requirement to register a domain name (such as cnn.com). Applications for domain name registration need to be made with the appropriate registrar for the domain name, often the country-level registrar. As a rule, this should be a body that is independent of the government and registration should be a technical and administrative process. It should not impose any content restrictions or require .iq servers to be hosted inside the physical territory of Iraq. At present, the NCMC is the body responsible for administering the .iq domain.<sup>105</sup>

While a number of Iraqi media have gone on-line, few if any of their websites are registered in the .iq domain administered by the NCMC.<sup>106</sup> It appears that most have instead opted for

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<sup>99</sup> Although it is striking that print media ownership in the Netherlands is among the most concentrated in Europe.

<sup>100</sup> As reported in the Council of Europe’s Recommendation on Pluralism in the Media.

<sup>101</sup> Article 3(2)(d).

<sup>102</sup> There have been several cases concerning this in France. For a discussion, see A. Azurmendi, “On the European Precedent for the Conscience Clause”, *Comparative Media Law Journal*, No. 1 2003: <http://www.juridicas.unam.mx/publica/rev/comlawj/cont/1/cts/cts1.htm>.

<sup>103</sup> See for example the IFJ Principles on the Status of Journalists and Journalism Ethics, May 2003: <http://www.ifj-europe.org/default.asp?index=1627&Language=EN>.

<sup>104</sup> Joint Declaration, 21 December 2005.

<sup>105</sup> Listed by the Internet Assigned Numbers Authority: <http://www.iana.org/root-whois/iq.htm>.

<sup>106</sup> A Google search for the entire .iq domain on 17 January 2006 returned a very rare result of 0 (zero) sites listed in that domain. In fact, even the NCMC itself – the administering authority – is registered as a .org, outside the .iq domain.

.com and other non-Iraqi registrations, possibly because of better reliability of foreign servers.<sup>107</sup>

There is no reason why a regulatory system of any kind should be imposed on Internet-based media. We stress that, like the print media, Internet-based media are subject to the same laws on defamation and incitement to violence that apply to everyone else.

### ***3.4.5 Individual Journalists***

There is no legitimate purpose for requiring journalists to be licensed or registered by a central body, a point which is amply illustrated by the fact that no democratic country has such a licensing or registration system in force. International law strongly disapproves of any licensing or registration regime for individual journalists or media professionals. In this respect, journalism is unlike other professions, such as the medical profession, for which licensing is accepted.<sup>108</sup>

It is similarly illegitimate to require journalists to be members of a certain professional body. In many cases, this is simply an indirect way of limiting access to the profession, and is hence just as illegitimate as more direct forms of this. In other cases, this is a way of seeking to control journalists and to censure those who have in some way annoyed the authorities. All journalists enjoy the right to freedom of association which means that they have the right to join associations of their own choosing, or not to join associations if they do not wish to.

International law also establishes that general conditions on who may practise journalism, such as the requirement of a university degree or a certain age, are not legitimate. Such conditions place unjustifiable restrictions on the right of everyone to express themselves through the print media, regardless of age or any other status. Furthermore, experience in many countries demonstrates that such conditions do not promote any useful social goal; in particular, they are not effective in promoting more professional journalism.

In Saddam Hussein's Iraq, the journalistic profession was tightly controlled – as was the entire media. We do not believe that there can be any justification for reviving these controls and recommend that journalism should remain an unregulated profession. We stress that this does not mean that journalists can operate outside the law: they are subject to the same laws that apply to everyone else. Our recommendation is simply that there should be no laws specifically targeted at or attempting to regulate journalists.

It may be noted that *accreditation* of journalists raises very different issues from *licensing*, although the two are sometimes confused. Accreditation refers to a system whereby journalists are given privileged access to certain functions or locations which are not otherwise fully open to the public, normally due to space limitations but sometimes also for security or other reasons. A classical example is accreditation to Parliament, whereby journalists are often guaranteed access and sometimes granted special privileges or even the

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<sup>107</sup> Although there is no reason why a site registered in the .iq domain could not be hosted on a server outside Iraq.

<sup>108</sup> For a lengthy exposition of the reasons behind this, see the Inter-American Court of Human Rights Advisory Opinion in the question of *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.

use of offices. The rationale for such privileged treatment is that the media are the eyes and ears of the public, ensuring that everyone hears about matters of public interest.

Accreditation schemes should not be able to be used as a means to interfere with or influence the work of journalists, or to exclude journalists known to be critical. Therefore, they should be supervised by an independent body and accreditation decisions should be based on objective criteria. The overall aim of any accreditation scheme should be to accredit as broad a range of journalists as possible, subject only to space constraints. Where space is an issue, considerations such as the number of journalists from a particular media that already have been granted accreditation may be a consideration. Accreditation schemes should never impose substantive restrictions on journalists.<sup>109</sup>

### **3.4.6 Self-regulation**

Self regulation is the best system for promoting high standards in the media.<sup>110</sup> This is particularly the case for the print media. In many countries, self-regulatory regimes have long existed to the general satisfaction of society. A key characteristic of self-regulatory systems is that they use moral and professional persuasion, rather than legal force, to promote better standards. A well-functioning self-regulatory mechanism is a useful complement to privacy and defamation laws insofar as it provides a low-threshold, alternative but effective remedy to individuals whose rights have been breached.

Self-regulatory mechanisms normally involve both campaign codes of conduct or internal guidelines and a complaints mechanism to address breaches of these standards; the latter may be more or less formal. Self-regulatory systems may be instituted across a sector – such as the print media or journalists as a group – as well as within a single media organisation. Large broadcasters such as the British Broadcasting Corporation and the Australian Broadcasting Corporation have adopted detailed internal guidelines which set high standards for their programme output.

Most self-regulatory mechanisms involve only limited sanctions for breach of the code, often simply a requirement to carry a statement by the complaints body recognising the breach. Self-regulatory mechanisms may also provide for a right of reply, although it may be noted that a statement by the complaints body is probably less offensive to freedom of expression than one by the offended party (as is the case with respect to a right of reply). Lodging a complaint is normally free or costs very little. Procedures are simple and fair, so there is no need (and little advantage) to engage a lawyer and decisions are normally reached rapidly, providing quick and effective redress.

Practice in countries around the world has shown that self-regulation can be highly effective. Voluntary measures are set by the profession itself and hence have a great deal of credibility. While the formal sanctions are normally limited, the impact of internal censure is often, of itself, quite a powerful force for change. Furthermore, the primary goal of these systems is to set high professional and ethical standards, not to enforce rules. The vast majority of media

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<sup>109</sup> See, for example, *Gauthier v. Canada*, 7 April 1999, Communication No. 633/1995 (UN Human Rights Committee).

<sup>110</sup> As recognised in the African Commission on Human Rights' *Declaration of Principles on Freedom of Expression in Africa*, adopted at its 32<sup>nd</sup> Session, October 2002.



outlets, as well as individual journalists, are happy to conform to internally set standards that they can trust. Ultimately, effective self-regulation should strengthen media responsibility and professionalism and increase public trust in the media.

The successful implementation of self-regulatory mechanisms is often dependent on appropriate training having been provided to those involved. Often, a significant amount of such training will be necessary in the early phases of establishing a self-regulatory system. Where local resources are scarce, as is the case in Iraq, the international community should make an effort to provide the necessary assistance.

Already, the International Federation of Journalists and UNESCO are supporting an initiative by the Kurdistan Association of Journalists, the Syndicate of Iraq Journalists and the umbrella group of independent journalists, the Iraqi Press Union, to establish a self-regulatory mechanism, possibly through a yet-to-be-created independent 'Media Council'.<sup>111</sup> We are not aware of how far this initiative has progressed, since an initial meeting in Amman in August 2005. The promotion of self-regulation in the print media is also part of the mandate of the National Communications and Media Commission;<sup>112</sup> but we are not aware of any activities undertaken by the Commission in this regard.

We generally recommend that any efforts towards setting up a truly self-regulatory mechanism – whether for media owners, editors or at the level of individual journalists – should be supported. As far as possible, different initiatives should be coordinated in order to ensure a single self-regulatory mechanism that is easily accessible to members of the public. It is essential, however, that any self-regulatory body should be truly self-regulatory – that is, it should be set up with the full involvement and participation of journalists and the media – and that it be shielded from political, commercial or other undue interference.

### **3.5 Education and Training**

Professional and ethical standards among Iraqi journalists have increased significantly in the nearly three years since the initial mushrooming of media outlets following the collapse of Saddam Hussein's regime. At the same time, Iraq's media on the whole have some way to go and a continued investment in training and education facilities is sorely needed. Already in 2004, a media needs assessment carried out by Index on Censorship concluded that "the only long term 'strategic' answer to Iraq's media training needs is to build a system around the universities allied with in-house training in the media industry itself, similar to that which sustains journalism training on an industry-wide scale in Britain, the US and Europe."<sup>113</sup>

Since 2004, a significant number of journalism seminars and trainings have been carried out in Baghdad and in Amman by NGOs such as Internews, Index on Censorship, Arab Press Freedom Watch, ARTICLE 19 and others, often in cooperation with UNESCO. These have provided a significant contribution to improving the level of professionalism in the Iraqi media and raising awareness of human rights issues. In addition, 'training of trainers' seminars have begun to be carried out. However, while the quality of these seminars is often

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<sup>111</sup> As reported by the IFJ: <http://www.ifj.org/default.asp?index=3327&Language=EN>.

<sup>112</sup> CPA Order 65, Section 5(2)(h).

<sup>113</sup> From Index on Censorship's 2004 report to the UK Foreign and Commonwealth Office on media training and development in Iraq, quoted in IoC's December 2004 *Options for media development in Iraq*, p. 11.

very high, they do not even begin to meet the need for training and education. With the exception of training of trainer seminars, which expect their participants to carry out further training of their peers in Iraq, there has been little institutional follow-up to the seminars conducted so far. The kind of structural and institutional training by specialised media freedom experts together with Iraqi schools of journalism, the need for which was highlighted two years ago, has been slow to get off the ground.

In Iraq itself, a few universities and colleges have begun to offer specialised journalism courses. Baghdad University's College of Journalism is offering graduate level journalism studies and several students are currently studying there. Basra University also has a Department of Media Studies and a group of Basra-based journalists and university professors set up another training centre in 2005, the 'Afaq Media Forum'.<sup>114</sup>

However, in themselves, these relatively small initiatives are unlikely to be able to provide for the needs of all (aspiring) Iraqi journalists. A continued investment is needed in the educational and vocational training system, and active exchange programmes should be set up with universities and journalism colleges in other parts of the world. The Iraqi government should take the lead in identifying the exact needs. Such an assessment can be carried out in cooperation with UNESCO, and build on earlier assessment efforts.<sup>115</sup> When the needs assessment has been carried out, the international community should provide the necessary assistance to help set up and/or develop training and educational centres.

### **3.6 Safety**

The security situation in Iraq remains a major obstacle to establishing a free and independent media. Many journalists – especially those few who are brave enough to tackle controversial issues – live in a constant climate of fear. According to Reporters without Borders,<sup>116</sup> as of January 2006, 73 media professionals had been killed in hostile fire in Iraq since 2003 (not counting accidents). Most of them have been Iraqis. This is more than were killed in ten years of conflict in Central American countries, in the late 1970s and 1980s, or in twenty years of the Vietnam conflict (1955-1975).<sup>117</sup> It will obviously not be possible for a healthy, independent and pluralistic media to take root as long as this kind of violence continues.

While improving the security situation is already at the top of the political agenda, more attention should be paid to the particular threats faced by the media, and the repercussions this has not only for media development but for establishing democracy as such. The media play a special role in every democracy: they are the eyes and ears of the public and report on abuses of power, instances of corruption, malfeasance in public life and generally on matters of public interest to the people. If they are unable to carry out this task, for example because they are receiving death threats, the public as a whole suffers because they no longer receive information on matters that are of importance to the country. The media ought therefore to receive particular protection, and whenever a threat is made or a journalist is harmed in a hostile situation, this should be investigated immediately, and real and significant efforts should be made to bring the perpetrator(s) to justice.

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<sup>114</sup> See <http://www.mengos.net/events/05eventsnews/iraq/16august.htm>.

<sup>115</sup> Such as the Index on Censorship report mentioned earlier.

<sup>116</sup> [http://www.rsf.org/special\\_iraq\\_en.php3](http://www.rsf.org/special_iraq_en.php3).

<sup>117</sup> As reported by the CPJ: [http://www.cpj.org/Briefings/Iraq/Iraq\\_danger.html](http://www.cpj.org/Briefings/Iraq/Iraq_danger.html).

Violence against the media is a growing problem around the world. In Iraq, journalists have been kidnapped by insurgents but they have also been killed by Iraqi or coalition forces. It is particularly regrettable that US troops have sometimes appeared to promote the idea that journalists are legitimate targets for military action. The Iraqi State broadcaster was targeted during the first days of the invasion, in 2003, and attacks such as the one on the Palestine Hotel in 2003 have given the impression that journalists can be targeted on the basis of spurious evidence or allegations of involvement in terrorism or insurgency. According to the Committee to Protect Journalists (CPJ), US troops have killed 13 journalists since the war began in 2003, some of them in questionable circumstances.<sup>118</sup> Most of these cases have either not been investigated at all, or the findings have not been made public. The CPJ has harshly criticised this practice, stating: “The findings from the few investigations that have been released have not credibly addressed questions of accountability for shooting deaths, and whether U.S. forces are taking necessary measures to differentiate between combatants and civilians in conflict areas.”<sup>119</sup> Whether this criticism is justified or not, the various cases and the often unsatisfactory (for the victim’s families) outcomes of most of the investigations that have been conducted have done nothing to end the idea that journalists can be attacked and killed with impunity.

Urgent action needs to be taken by all parties to end the problem of violence against journalists in Iraq. US, UK and other coalition troops, as well as Iraqi troops and police, need to take far greater care in their operations against insurgents; and they should never target journalists unless there are clear indications that a person or group are using a journalistic guise to engage in terrorist or other violent activity. Attacks against journalists, regardless of the alleged perpetrator, should always be diligently investigated and the perpetrators brought to justice. The Iraqi Government should make a clear commitment to this end and publicly declare that attacks against the media pose a particular threat to democracy and will be investigated as a matter of priority. Journalists themselves should take greater care to identify themselves as such whenever they are in a hostile situation. The international donor community should assist by making available material such as flak jackets, and by making funding available for hostile environment and safety awareness training.<sup>120</sup>

## 4. NEXT STEPS

The development of a strong, free and pluralistic media in Iraq will be vital to establishing democracy in Iraq. Only a free and pluralistic media can fulfil the public’s right to know and provide the kind of information necessary to ensure that everyone is sufficiently informed on all matters of public interest. We recommend therefore that one of the first orders of business of the newly elected government should be to begin consulting on a new media policy for Iraq, with a view to completing such a policy within one year of taking office. The process of developing the new Media Policy should include all stakeholders: the media, public officials, elected officials, civil society and the wider Iraqi society. The international community should assist by providing resources – both financial and otherwise. The suggested principles and other measures indicated in this Report should be taken into serious consideration.

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<sup>118</sup> [http://www.cpj.org/Briefings/Iraq/Js\\_killed\\_by\\_US\\_13sept05.html](http://www.cpj.org/Briefings/Iraq/Js_killed_by_US_13sept05.html).

<sup>119</sup> <http://www.cpj.org/news/2005/iraq14sept05na.html>.

<sup>120</sup> Iraqi-based media are unlikely to be able to afford the cost of either.

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We recommend that the following steps be taken:

Action	When
<p>1. The <b>Government</b> should consult widely on a Media Policy, and lead on its development, aiming for completion within a year of its taking office. The policy should aim to cover a three to five year period. The development of the Policy should be a collaborative process involving the <b>media, civil society</b> and all other stakeholders. The <b>international community</b> should provide technical assistance as needed.</p> <p>The overall goal of the media policy should be to fulfil the public's right to know and the media's right to freedom of expression by stimulating the development of a free, independent and pluralistic media.</p>	<p><i>Start immediately; to complete by end 2006</i></p>
<p>2. Attacks against the media have severe repercussions for the development of democracy. The <b>Government</b> should declare that violence or threats against the media pose a threat to democracy and make a clear and strong commitment to investigate such matters as a priority.</p>	<p><i>immediately</i></p>
<p>3. Pending the development of the new media policy, the <b>Government</b> should review its existing legal framework with a view to removing all restrictions on freedom of expression that are unconstitutional and that fail to meet the internationally-established three-part test of legality, legitimacy and necessity. Amending legislation must be tabled and discussed in <b>Parliament</b>. We recommend that particular attention is paid to the following provisions:</p> <ul style="list-style-type: none"><li>- Articles 202, 227, 229, 372(1) and (5), 433, 434 and 435 of the Penal Code all criminalise defamation and insult. We recommend their repeal and replacement, if necessary, with appropriate civil law provisions.</li><li>- Articles 178(2), 182, 228, 327 and 437 of the Penal Code all place apparently illegitimate restrictions on publications under the guise of state secrecy. We recommend their repeal.</li><li>- Articles 210, 211, 179 and 180 of the Penal Code all restrict the publication of 'false news'; a type of prohibition that has been seriously discredited by courts in the last two decades as an illegitimate restriction on freedom of expression. We recommend their repeal.</li><li>- Articles 305, 403, 404, and 438 of the Penal Code prohibit various publications on various grounds. All should be urgently reviewed for their constitutionality and compatibility with international law.</li></ul> <p>The <b>international community</b> could provide technical assistance as required.</p>	<p><i>consultation and review to commence in 2006; aim for amending legislation to be tabled in parliament by 2007</i></p>
<p>4. The <b>Government</b> should introduce a package of legal measures to</p>	<p><i>consultation</i></p>

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- enable the right to freedom of expression. Particular consideration should be given to the following:
- the introduction of freedom of information legislation;
  - the introduction of legislation to protect of journalists' sources;
  - the introduction of legislation to protect journalists from unreasonable searches and seizures;
  - the introduction of legislation to protect against abusive defamation suits.
5. The **Government**, in consultation with the **media, academic community** and **civil society**, should take the lead in identifying the educational and training needs for Iraq's media. The **international community** should provide assistance as needed.
6. The **Government** should initiate a review of practical measures needed to stimulate media development. Particular consideration may be given to the establishment of a media loans fund and the provision of equipment, materials and expertise. The **international community** should provide all possible assistance.
7. The **Government** should initiate a review of fiscal, regulatory and other measures to stimulate media development.
8. The **Government** should take steps to introduce legislation in **Parliament** to place the **National Communication and Media Commission (NCMC)** on a legislative footing, providing it with a clear mandate to regulate the broadcast and communications sector in the public interest, protecting its independence from undue political, economic or other pressure, and setting up a sound funding base.
9. As part of the debates on the Media Policy, a broad and inclusive debate should be held to discuss the future of public service broadcasting in Iraq. This debate should be initiated by the Government and include all relevant stakeholders, including the **media and civil society**. This debate should include the question whether a public service print media is desirable.
10. As part of the debates on the Media Policy, a broad and inclusive debate should be held to discuss community broadcasting. This debate should be initiated by the **Government** and include all relevant stakeholders, including the **media** and **civil society**.
11. The **media** should make it a priority to establish a functioning system
- and review to commence in 2006; aim for amending legislation to be tabled in parliament by 2007*
- consultation and review to commence in 2006; multi-annual strategy to be formulated and implementation begun in 2007*
- immediately*
- as economic conditions allow*
- legislation to be tabled in 2006*
- to be discussed as part of media policy debates, in 2006*
- to be discussed as part of media policy debates, in 2006*
- immediately*

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of self-regulation.

12. All **public bodies** should admit journalists to public meetings to cover their proceedings to the maximum extent possible. Journalists should be allowed access on the production of a valid press card. Public bodies such as the national parliament that experience heavy demand for access or who have special facilities for the press, may establish a system to accredit journalists to cover their proceedings. The aim of such systems should be to provide access to as many journalists as possible. Accreditation systems should be operated on the basis of clear, transparent and non-discriminatory criteria, and provide for oversight by either the courts, or a body such as the NCMC. The **NCMC** may produce model criteria. *for completion by 2007*
13. Media owners should take steps to ensure that commercial pressures on journalists and editors are minimised. The **media** should take the lead in developing editorial charters that separate the responsibilities of journalists from the owners' management functions; such charters might include conscience clauses allowing journalists to refuse assignments that go against their convictions (religious or otherwise). *immediately*
14. In the longer term, it will become necessary to introduce legislation restricting cross-media ownership and political and religious ownership of broadcast outlets. Thresholds for cross-ownership or for ownership of multiple broadcast outlets should be defined in law, for example in the form of a maximum audience share or based on the revenue of commercial media companies. Consideration should also be given to setting thresholds on capital share limits in commercial media enterprises, which should however take into consideration the size of the media market and the level of resources available in it. Consideration could also be given to restricting foreign broadcast media ownership, for example by providing that no foreign person or legal person should have a controlling share in a broadcaster. The **National Communication and Media Commission** should take the lead in continually evaluating economic and other conditions and making recommendations for the introduction of legislative and other measures as necessary. The **Government** should take this advisory role of the NCMC seriously. The **international community** may provide technical assistance as necessary. *as dictated by economic conditions*

## **APPENDIX 1: FREEDOM OF EXPRESSION IN INTERNATIONAL LAW**

### **Universal Declaration of Human Rights, Article 19**

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.

### **International Covenant on Civil and Political Rights, Article 19**

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.

**UNESCO Declaration of Sana'a on the Promotion of an Independent and Pluralistic Media**

Resolution 34 adopted by the General Conference at its twenty-ninth session (1997)

We, the participants in the United Nations/United Nations Educational, Scientific and Cultural Organization Seminar on Promoting Independent and Pluralistic Arab Media, held in Sana'a, Yemen, from 7 to 11 January 1996;

*Bearing in mind* Article 19 of the Universal Declaration of Human Rights, which states that "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";

*Recalling* United Nations General Assembly Resolution 59 (I) of 14 December 1946, which states that freedom of information is a fundamental human right, and General Assembly Resolution 45/76 A of 11 December 1990 on information in the service of humanity;

*Recalling* Resolution 104 adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO) at its twenty-fifth session in 1989, focusing on the promotion of "the free flow of ideas by word and image at international as well as national levels";

*Recalling* also resolution 4.3 adopted by the General Conference of UNESCO at its twenty-sixth session "recognizing that a free, pluralistic and independent press is an essential component of any democratic society", and inviting the Director-General "to extend to other regions of the world the action ... to encourage press freedom and to promote the independence and pluralism of the media";

*Further recalling* United Nations General Assembly decision of 20 December 1993 on the observance of World Press Freedom Day on 3 May;

*Noting* with satisfaction resolution 4.6 of the twenty-eighth session of the General Conference of UNESCO (1995), which stressed "the outstanding importance of", and endorsed, the Declarations adopted by the participants of the Seminars, held in Windhoek, Namibia (29 April - 3 May 1991), in Almaty, Kazakhstan (5 - 9 October 1992), and in Santiago, Chile (2 - 6 May 1994), and which expressed its conviction that "the joint UNESCO/United Nations... regional Seminar on Promoting Independent and Pluralistic Arab Media to be held in Sana'a, Yemen in early 1996 will contribute to creating conditions that will enable pluralistic media to develop and participate effectively in the democratization and development processes in the Arab region;"

*Stressing* the growing role of the International Programme for the Development of Communication (IPDC) of UNESCO, whose Intergovernmental Council decided, at its February 1992 session, to give priority to projects which seek to reinforce independent and pluralistic media;

*Noting* the vital need and the importance of access by women to free expression and decision-making in the field of media;



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*Noting* with appreciation the statements made at the opening of the Seminar by the United Nations Assistant Secretary General for Public Information on behalf of the Secretary General and the Assistant Director-General for Communication, Information and Informatics of UNESCO on behalf of the Director-General;

*Expressing* our sincere appreciation to the United Nations and UNESCO for organizing the Seminar;

*Expressing* also our sincere appreciation to all the intergovernmental, governmental and non-governmental bodies, organizations, agencies and foundations which contributed to the United Nations/UNESCO effort to organize the Seminar;

*Expressing* our gratitude to the Government, people, and media organisations and professionals of the Republic of Yemen for their kind hospitality which facilitated the success of the Seminar.

*Fully support* and express our commitment to the principles of the Declaration of Windhoek, acknowledging its crucial importance for promoting free, independent and pluralistic print and broadcast media in all regions of the world and seek practical application of the principles enshrined in this Declaration;

*Welcome* the world-wide trend towards democracy, freedom of expression and press freedom, recognize efforts by a number of Arab countries in this direction and urge all Arab states to participate in this historic process;

*Believe* that the advent of new information and communication technologies contributes to genuine cooperation, development, democracy and peace; acknowledge, however, that these technologies can be used to manipulate public opinion; and note that some governments do exploit the perceived threat of such technologies to justify curtailing of press freedom;

*Deplore* that, in the Arab World, journalists, publishers and other media practitioners continue to be victims of harassment, physical assault, threats, arrest, detention, torture, abduction, exile and murder. They are also subject to economic and political pressures, including dismissal, censorship, curbs on travel as well as passport withdrawals or visa denials. In addition to limitations on the free flow of news and information, and on the circulation of periodicals within countries and across national borders, the media is also subject to restrictions in the use of newsprint and other professional equipment and material. Licensing systems and abusive controls limit the opportunity to publish or broadcast;

*Believe* that arrest and detention of journalists because of their professional activities are a grave violation of human rights and urge Arab governments that have jailed journalists for these reasons to release them immediately and unconditionally. Journalists who have had to leave their countries should be free to return and to resume their professional activities. Those who have been dismissed abusively should be allowed to regain their positions.

Declare that:

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Arab States should provide, and reinforce where they exist, constitutional and legal guarantees of freedom of expression and of press freedom and should abolish those laws and measures that limit the freedom of the press; government tendencies to draw limits/ “red lines” outside the purview of the law restrict these freedoms and are unacceptable;

The establishment of truly independent, representative associations, syndicates or trade unions of journalists, and associations of editors and publishers, is a matter of priority in those Arab countries where such bodies do not now exist. Any legal and administrative obstacles to the establishment of independent journalists' organizations should be removed. Where necessary, labour relations laws should be elaborated in accordance with international standards;

Sound journalistic practices are the most effective safeguard against governmental restrictions and pressures by special interest groups. Guidelines for journalistic standards are the concern of the news media professionals. Any attempt to set down standards and guidelines should come from the journalists themselves. Disputes involving the media and/or the media professionals in the exercise of their profession are a matter for the courts to decide, and such cases should be tried under civil and not criminal codes and procedures;

Journalists should be encouraged to create independent media enterprises owned, run and funded by the journalists themselves and supported, if necessary, by transparent endowments with guarantees that funders do not intervene in editorial policies;

International assistance in Arab countries should aim to develop print and electronic media, independent of governments in order to encourage pluralism as well as editorial independence. Public media should be supported and funded only when they are editorially independent and where a constitutional, effective freedom of information and expression and the independence of the press are guaranteed;

State-owned broadcasting and news agencies should be granted statutes of journalistic and editorial independence as open public service institutions. Creation of independent news agencies and private and/or community ownership of broadcasting media including in rural areas should also be encouraged;

Arab governments should cooperate with the United Nations and UNESCO, other governmental and non-governmental development agencies, organizations and professional associations, in order to:

- (i) enact and/or revise laws with a view to: enforcing the rights to freedom of expression and press freedom and legally enforceable free access to information; eliminating monopoly controls over news and advertising; putting an end to all forms of social, economic or political discrimination in broadcasting, in the allocation of frequencies, in printing, in newspaper and magazine distribution and in newsprint production and allocation; abolishing all barriers to launching new publications and any form of discriminatory taxation;
- (ii) initiate action to remove economic barriers to the establishment and operation of news media outlets, including restrictive import duties, tariffs and quotas for such things as newsprint, printing equipment, typesetting

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and word processing machinery and telecommunication equipment, and taxes on the sale of newspapers or other restrictions on the public's access to news media;

- (iii) improve and expand training of journalists and managers, and other media practitioners, without discrimination, with a view to upgrading their professional standards, also by the establishment of new training centers in the countries where there are none, including Yemen.

Seek the assistance of national, regional and international press freedom and media professional organizations and other relevant NGOs to establish national and regional networks aimed at monitoring and acting against violations of free expression, to create data banks and to provide advice and technical assistance in computerisation as well as in new information and communication technologies with the understanding that UNDP, IPDC and other development partners would consider these needs to be a major priority;

Request UNESCO National Commissions of the Arab States to help in organizing national and regional meetings to enhance press freedom and to encourage creation of independent media institutions.

The international community should contribute to the achievement and implementation of this Declaration.

This Declaration should be presented by the Secretary-General of the United Nations to the General Assembly, and by the Director-General of UNESCO to the General Conference, for follow-up and implementation.

‘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 all frontiers.’

Article 19 of the Universal Declaration of Human Rights

## A Media Policy for Iraq

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