



Free Speech in Iraq: Recent Developments

August 2007

ARTICLE 19, 6-8 Amwell Street, London EC1R 1UQ, United Kingdom
Tel +44 20 7278 9292 · Fax +44 20 7278 7660 · info@article19.org · <http://www.article19.org>

In cooperation with UNDP

ACKNOWLEDGMENTS

This report was drafted by Sophie Redmond, Legal Officer, and edited by Peter Noorlander, Senior Legal Officer, ARTICLE 19. This report draws upon previous ARTICLE 19 publications in respect of media development in Iraq since 2003, all of which are available on ARTICLE 19's website.

ARTICLE 19 would like to thank the United Nations Development Programme (UNDP) which provided full funding for this report. The position taken in this report does not necessarily reflect the views of UNDP.

ARTICLE 19 welcomes any comments, questions or suggestions related to this report.

ARTICLE 19
6-8 Amwell Street
London EC1R 1UQ
United Kingdom
Tel: +44 20 7278 9292
Fax: +44 20 7278 7660
E-mail: law@article19.org

© ARTICLE 19, London.

This work is provided under the Creative Commons Attribution-NonCommercial-ShareAlike 2.5 licence. You are free to copy, distribute and display this work and to make derivative works, provided you: 1) give credit to ARTICLE 19; 2) do not use this work for commercial purposes; 3) distribute any works derived from this report under a licence identical to this one. To access the full legal text of this licence, please visit:

<http://creativecommons.org/licenses/by-nc-sa/2.5/legalcode>.

ARTICLE 19 further requests that you provide a copy of any translations or works derived from this report to us.

INTRODUCTION	3
CHAPTER ONE: CONSTITUTIONAL FRAMEWORK	4
1.1 Article 38	4
1.2 Article 46	5
1.3 Articles 102 and 110	6
CHAPTER TWO: ATTACKS ON THE MEDIA	8
2.1 Violence and threats against the media	8
2.2 The Iraqi Government's Duty to Take Action	9
CHAPTER THREE: THE LEGAL FRAMEWORK	12
3.1 Existing criminal law restrictions	12
3.2 Recent developments in media law and regulation	19
CHAPTER FOUR: FREEDOM OF INFORMATION	23
CONCLUSION	25
APPENDIX: INTERNATIONAL STANDARDS GOVERNING THE RIGHT OF FREEDOM OF EXPRESSION	26
1. The Right of Freedom of Expression in International Law	26
2. Restrictions on Freedom of Expression	27
3. Freedom of Expression and the Media	28
3.1 Media Pluralism	29
3.2 Independence of Media Bodies	30
3.3 Public Service Broadcasting	31
4. Freedom of Information	32
4.1 The Content of Freedom of Information	33

INTRODUCTION

This report gives an overview of some of the progress made, and some of the areas of continuing serious concern regarding the protection and promotion of freedom of expression in Iraq.

With the ratification of the new Constitution in October 2005, a framework of protection of fundamental human rights was established, including a basic guarantee of the right of freedom of expression and an explicit guarantee of structural independence for a national broadcast regulatory body. These are positive developments which provide guidance in the ongoing democratisation process in Iraq, for which the development of a free and independent media is indispensable.

But there is little doubt that the very poor security situation has continued to pose a major threat to freedom of expression, and the media in particular, in Iraq. The dangers faced by journalists have been well-documented and there is little chance that a free, independent and pluralistic media can develop and survive in the current climate. Additionally, we are concerned that quite apart from the security situation, the Iraqi government has done very little to improve the very restrictive regulatory framework for freedom of expression in Iraq. Although, as noted, the 2005 Constitution contains a number of relatively progressive provisions that promote freedom of expression, there has been no legislative follow-up to make these constitutional guarantees an everyday reality. A number of Ba'ath-era criminal laws are still in place, and, in the case of the criminal defamation provisions, have been repeatedly utilised to silence critical voices in the media. In addition, the Iraqi government has introduced a series of ad hoc measures, ostensibly to achieve a degree of order and stability, which in practice are highly restrictive towards the media. For example, a 'media surveillance unit' was established by the Interior Ministry in November 2006, the media were temporarily excluded from reporting on parliamentary proceedings, and various media outlets have been shut down by the Iraqi government. These are unfortunate developments that will not further the democratisation process or help build bridges between the government, civil society groups and the media. We are also concerned at the lack of real leadership in parliament to advance progressive legislative proposals, and a certain wariness regarding human rights initiatives generally.

On a positive note, 2007 has seen progress throughout the country in terms of civil society initiatives and, in Kurdistan in particular, some indications of a more progressive official attitude towards the media and an understanding of the need for government accountability. There are also promising signs that broadcast regulation will be improved, through the likely conversion of Coalition Provisional Authority (CPA) Orders 65 and 66, concerning private and public broadcasting, into Iraqi domestic law.

CHAPTER ONE: CONSTITUTIONAL FRAMEWORK

The new Iraqi Constitution was approved by referendum on 15 October 2005, providing a legitimate and permanent replacement for the interim 2004 Law of Administration for the State of Iraq for the Transitional Period.¹

The new Constitution represents an important step forward in the protection of fundamental human rights in Iraq, including by providing a basic guarantee for the right of freedom of expression and securing the structural independence of the national broadcast regulatory body. The protection of the right of freedom of expression in the Constitution, however, still falls significantly short of Iraq's international human rights obligations as a State Party of the *International Covenant on Civil and Political Rights* (ICCPR).²

The following paragraphs provide an outline of the protected content of the right of freedom of expression in the Constitution, and note the departures from Iraq's obligations under international law in respect of free expression.³

1.1 Article 38

Article 38⁴ provides separate constitutional protection for the right of freedom of expression (Article 38.A) and freedom of the press (Article 38.B). While the latter is in fact an inherent component of the right of freedom of expression, it is helpful that it is accorded separate, express protection in establishing a clear outline of the scope of the constitutionally protected rights.

Regrettably, however, on closer analysis Article 38 provides only a weak basis for the protection of the right of freedom of expression. In particular, Article 38 renders respect for the right of freedom of expression conditional upon respect for public order and morality. This significantly limits the operative scope of the right and introduces the possibility for Iraqi authorities to restrict certain types of expression on the simple basis that these would not accord with notions of public order and morality. This is a significant downgrade from the international law guarantee of freedom of expression which, while allowing for restrictions on grounds of public order and morals, places the onus on the State to show that these restrictions are truly

¹ The Law of Administration for the State of Iraq for the Transitional Period was enacted by the Coalition Provisional Authority (CPA) on 8 March 2004: <http://www.cpa-iraq.org/government/TAL.html>.

² Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976. Iraq ratified the ICCPR on 25 January 1971. Iraq's obligations under international law are outlined in detail in the Appendix to this Report.

³ Iraq's obligations under international law in respect of the right of freedom of expression are outlined in the Appendix to this report. ARTICLE 19 has previously commented on this issue in February 2006, when a submission was made to the Constitutional Review Committee established under Article 142 of the Constitution. This submission can be downloaded from <http://www.article19.org/pdfs/analysis/iraq-proposed-amendments-to-constitution-febru.pdf>.

⁴ 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 process underway to revise the Constitution. This may or may not result in a change in the level of protection of the right of freedom of expression.

“necessary”, meaning that they are proportionate and the least restrictive means available to achieve the aim.⁵

Second, “freedom of expression” is left undefined in the Constitution. Ideally, the Constitution would make it clear that the content of the constitutionally-protected right corresponds to Article 19 of the ICCPR and thus includes the right of seek, receive and impart facts as well as ideas and opinions, across frontiers and through any media. This would ensure, for example, that access to publicly-held information is constitutionally protected, which is omitted from the express terms of Article 38. Although it may be argued that these elements are all implied in the overall guarantee, there is a risk of a restrictive interpretation of Article 38. This risk is compounded by the lack of an express provision in the Constitution requiring the laws of Iraq to be interpreted in accordance with international law. Such a provision is often found in more modern constitutions.

Third, the constitutional guarantee of freedom of expression would have benefited greatly from an explicit prohibition on censorship. The prohibition of censorship – that is, a system in which prior official approval is required for publications or broadcasts – is central to the concept of freedom of expression and has been enshrined in the national constitutions of numerous countries.⁶ While Article 38 protects “[f]reedom of press, printing, advertisement, media and publication”, it fails to provide guidance as to the scope and content of this protection.

1.2 Article 46

Article 46 of the Constitution allows restrictions on the right of freedom of expression to be imposed “by law or on the basis of it, and insofar as that limitation or restriction does not violate the essence of the right or freedom”. We are concerned that, along with the already limited protection for freedom of expression in Article 38, Article 46 creates significant leeway for restrictions to be imposed which are not permitted by international law.

Under Article 19 of the ICCPR, freedom of expression may be restricted only under three cumulative conditions:

- i. the limitation must be provided by law;
- ii. the limitation must pursue a legitimate aim; and
- iii. the limitation must be strictly “necessary”.

This ‘three-part test’⁷ is an essential safeguard to abuse of state power; any public authority or official seeking to restrict the right of freedom of expression should ensure that all three conditions are met. The ‘provided by law’ requirement prevents officials from imposing arbitrary restrictions. It is only legitimate to restrict a fundamental right when legislators have specifically assessed the competing interests and determined that the public or private interest must prevail over the right of freedom of expression. The ‘legitimate aim’ requirement limits the cases in which restrictions may be imposed. Under Article 19 of the ICCPR, the only recognised

⁵ See Article 19(3) ICCPR. See also our comments on Article 46, in the next Section.

⁶ See, for example, the constitutions of Germany, Austria, Switzerland, Portugal, Colombia and Thailand.

⁷ We elaborate on this in the Appendix to this Report.

legitimate aims are safeguarding the rights or reputations of others, and the protection of national security, public order, or public health or morals. This is an exclusive list: restrictions that do not serve one of the legitimate aims listed constitute a violation of the right of freedom of expression. Finally, the “necessity” part of the test requires that any restriction must not just be related to a legitimate aim, but be truly indispensable for its achievement. It should also be strictly proportionate and be used as a last resort only.

1.3 Articles 102 and 110

The Communications and Media Commission

Article 102 establishes the Communications and Media Commission (CMC), the regulatory body for both broadcasting and telecommunications, as a “financially and administratively independent institution” and specifies that it shall be “attached to” the Council of Representatives.

This constitutional enshrining of the structural independence of a regulatory body for the media, and one which is accountable to Parliament rather than a Ministry, is a major step forward in the establishment of democratic institutions in the region and for the protection of the right of freedom of expression. It is essential that the media is permitted to operate independently from government control. This helps safeguard the media’s role in a democracy as public watchdog and the public’s access to a wide range of opinions, especially on matters of public interest.

However, Article 102 fails to clearly delineate the mandate, functions and powers of the CMC, stating instead that “[a] law shall regulate the work of each of these institutions.” We are concerned that this will lead to disagreements over the precise mandate of the CMC and unduly prolong the enactment of the necessary legislation to ‘properly’ establish the CMC.⁸ Already, the CMC has faced difficulties in enforcing its mandate across Iraq. Separate, and conflicting, broadcast and print media regulatory provisions have been introduced in Kurdistan, in apparent contravention of the CMC’s nationwide regulatory mandate.

Exclusive federal remit over broadcast regulation

Article 109 of the Constitution grants the federal authorities, rather than the regional authorities, exclusive remit over the regulation of broadcasting frequencies and mail. This Article affirms the position of the CMC’s exclusive role for broadcast regulation – or at least for broadcasting frequencies – in Iraq. Article 109 could clearly be strengthened, however, to ensure that their regulatory role extends to all broadcast regulatory matters, which is clearly the intent of Article 102.

Independence of public service broadcasters

Finally, while Article 102 protects the independence of a number of public institutions, including the national media regulator, the public service broadcaster is not included in this list. We consider that this is an unfortunate oversight.

⁸ We discuss this in more detail in Chapter 3.

The same underlying reasons for protecting the independence of the media regulatory body also apply to public service broadcasters, such as the Iraqi Media Network. In order for these broadcasters to carry out their functions and serve the public interest, rather than the interests of the government, it is crucial that their governing boards are protected from any form of political or other interference. This is recognised in UNESCO's *Sana'a Declaration* as well as in the 2005 *Declaration of Dakar*, both of which have been endorsed by UNESCO's General Conference.⁹ International bodies and courts around the world have also recognised this principle.¹⁰

⁹ The Declaration of Sana'a was endorsed at the 29th Session of the UNESCO General Conference, November 1997 (Resolution 34). The Declaration of Dakar was endorsed at the 33rd Session of the UNESCO General Conference, October 2005 (Resolution 55). See also ARTICLE 19, *Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation* (London: 2002), Section 10. Accessible at: <<http://www.article19.org/pdfs/standards/accessairwaves.pdf>>.

¹⁰ Recommendation No. R(96)10 of the Committee of Ministers of the Council of Europe to member states on the guarantee of the independence of public service broadcasting, adopted 11 September 1996; the Declaration on Principles of Freedom of Expression in African, Principle VI; and *New Patriotic Party v. Ghana Broadcasting Corp.*, Supreme Court of Ghana, 30 November 1993, Writ No. 1/93, p. 17.

CHAPTER TWO: ATTACKS ON THE MEDIA

Unfortunately, the overall situation in which Iraq's media operates continues to be dire. The very poor security and human rights situation has had a tremendous impact on the Iraqi media, and there have been ongoing indications in 2006 and 2007 that the Iraqi government is not taking appropriate measures to provide protection, or indeed to abstain from imposing highly oppressive censoring measures on the media.

2.1 Violence and threats against the media

Throughout 2006 and 2007, journalists and media workers remained among the most vulnerable groups in Iraq. The conditions under which they operate in Iraq are, by far, the worst and deadliest in the world for their profession. International press freedom organisations estimate that since the beginning of the invasion in March 2003, at least 97 journalists and 37 media support staffers have been killed in the course of their work.¹¹ This is a conservative estimate, with domestic press freedom organisations such as Journalistic Freedoms Observatory and the Iraqi Society for the Defence of Journalists' Rights placing the death toll much higher. The media death toll has increased steadily since 2003, and 32 media workers died in 2006, the largest annual death toll in a single country ever recorded by the Committee to Protect Journalists. In 2006, murder overtook crossfire as the leading cause of journalist deaths in Iraq, with insurgent groups targeting journalists for political, sectarian and Western affiliations.¹² While violence from insurgents posed the greatest threat to journalists, in 2006 Iraqi journalists reported that the US military and Iraqi security forces continued to endanger them and inhibit their work.¹³

Journalists and media workers also face the very real prospect of other forms of attack and harassment in their day to day work. Reporters Without Borders reports that at least 871 journalists and media workers have been arrested since March 2003,¹⁴ and given that many incidents are not reported, it is likely that the real number is much higher. Reporters Without Borders also reports that at least 45 journalists have been kidnapped since the invasion in 2004, and 1,472 have been physically attacked or threatened. Many journalists have also been forced to flee the country after receiving threats or following assassination attempts. The Journalistic Freedoms Observatory, which is the most prominent domestic advocacy group to emerge for journalists, has reported that in the twelve months since March 2006, there have been 123 press freedom violations, which means a press freedom violation occurring every three days.¹⁵

These attacks, and the general deterioration in security, severely affect the ability of the media to do its job and report on matters of public interest. In some parts of Iraq,

¹¹ Committee to Protect Journalists, *On Fourth Anniversary of Iraq Conflict, Press Marks Deadliest Toll*, 15 March 2007, <http://www.cpj.org/news/2007/mideast/iraq15mar07na.html>. More than 80% of those killed have been Iraqis.

¹² Committee to Protect Journalists, *Attacks on the Press in 2006 – Iraq*, <http://www.cpj.org/attacks06/mideast06/iraq06.html>.

¹³ Ibid. By the end of 2006, at least 14 journalists had died from US forces' fire.

¹⁴ Reporters without borders, *Iraq – Annual Report*, http://www.rsf.org/article.php3?id_article=17189&Valider=OK.

¹⁵ Journalistic Freedoms Observatory, *Press Violations Report 2006-2007* (May 2007), p 1.

the media has been brought to a virtual standstill by the continuing violence and lack of protection. A report from Ba'quba in 2007, for example, states that the situation was so critical that media reporting was no longer possible unless carried out in total secrecy, and that satellite television channels from Diyala Governorate had to close their operations there.¹⁶

2.2 The Iraqi Government's Duty to Take Action

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 journalists and media outlets, and the repercussions this has not only for media development but also for establishing democracy as such. When the media are unable to play their role of 'public watchdog', the public as a whole suffers because it no longer receives 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. Furthermore, the Iraqi government should ensure that respect for freedom of expression does not regress further due to lack of security or overly restrictive legal measures to try to impose a degree of order and stability.

Moreover, Iraq is under a number of legal obligations to provide such protection to the media. In December 2006, the UN Security Council issued a Resolution specifically directing all Member States to ensure journalists are protected in situations of armed conflict. The Resolution contained the following clear obligations:

- to ensure that journalists engaged in dangerous professional missions in areas of armed conflicts are recognised as civilians and respected and protected as such;
- to ensure that media equipment and installations are recognised as civilian objects and are not the object of attacks or reprisals;
- to end impunity and prosecute those responsible for serious violations of international humanitarian law; and
- to respect the professional independence and rights of journalists, media professionals and associated personnel.¹⁷

The Iraqi government is also under a number of additional binding international legal obligations to provide protection to the media. As a State Party to the ICCPR, Iraq must "ensure to all individuals within its territory and subject to its jurisdiction the rights recognized" in that Covenant, including the right of freedom of expression.¹⁸ Article 6 requires States to take effective measures to ensure that all, including journalists and media workers, are not arbitrarily or unlawfully deprived of life by the State or its agents, and this includes an obligation to train relevant personnel in respect

¹⁶ UNAMI Human Rights Office, *Human Rights Report 1 January – 31 March 2007*, para 32, <http://www.uniraq.org/FileLib/misc/HR%20Report%20Jan%20Mar%202007%20EN.pdf>.

¹⁷ UN Security Council Resolution 1738 (2006), 23 December 2006. See also Additional Protocol I to the Geneva Conventions, Article 79.

¹⁸ ICCPR, Article 2.

of specific situations in order to minimise the chance of violation;¹⁹ and Article 9 requires States to adopt measures to protect against arbitrary arrest or imprisonment. We note that many of these obligations are given further effect through Iraq's Constitution, thus also placing the Iraqi government under domestic legal obligations in this respect.²⁰

We are concerned that despite these clear legal duties, the Iraqi government has not taken effective action to protect journalists and media professionals or their facilities. Although in August 2006, the Deputy Prime Minister for Security, Dr. Salam Zuba'i, announced that his office would establish a force to protect the media,²¹ no such organisation has in fact been created. Worse still, US and Iraqi security forces themselves have frequently been implicated as the perpetrators of violence. To note just two incidents in an ongoing spate of violence, in May 2007 two armed attacks in one day on privately-owned Radio Djila in Baghdad were allowed to occur despite calls for assistance to the military and police units patrolling nearby.²² In February 2007, US soldiers carried out an armed raid on the Baghdad offices of the Iraq Syndicate of Journalists. During the raid, property was destroyed, State-employed security guards were arrested, and 10 computers as well as 15 electricity generators, which were reserved for families of killed journalists, were confiscated. The confiscation of computers and membership records also suggests that US forces could now target all members of the syndicate.²³ Neither incident appears to have been investigated.

The Iraqi government's lack of action is not for want of national and international pressure and practical suggestions. Numerous international organisations have repeatedly called upon the Iraqi government to provide effective protection for the media, recognising the urgent need to redress the critical situation. The Committee to Protect Journalists provided a list of practical recommendations to Prime Minister a-Maliki in June 2006,²⁴ and in February 2007 Reporters Without Borders called upon the Iraqi authorities and the chief of staff of the coalition forces to "give clear instructions to troops responsible for maintaining order to allow journalists to carry out their work without interference".²⁵ In May 2007, Reporters Without Borders called for the urgent implementation of the Deputy Prime Minister for Security's promise of a special force within the national police, and also recommended that a witness protection programme be set up with the help of countries in the region.²⁶ The International Federation of Journalists furthermore prepared a National Security

¹⁹ See General Comment 6, on Article 6, of 30 April 1982, as elaborated for example, in Concluding Observations of the UN Human Rights Committee: United Republic of Tanzania (1998) UN doc. CCPR/C/79.

²⁰ See Constitution of Iraq, Articles 8, 15, 19(12)(A), and 36, amongst others.

²¹ See the UNAMI Human Rights Report, 1 July – 3 August 2006:

http://www.globalsecurity.org/military/library/report/2006/hr-report_unami_jul-aug2006.htm.

²² Reporters Without Borders, "Police passivity condemned after two armed attacks in one day on radio station", 7 May 2007 http://www.rsf.org/article.php3?id_article=22019.

²³ International Federation of Journalists, "IFJ condemns United States over "outrageous" attack on Iraqi journalists syndicate", 20 February 2007 <http://www.ifj.org/default.asp?index=4652&Language=EN>.

²⁴ Note 37.

²⁵ Reporters Without Borders, "Call for respect and protection of work of journalists", 27 February 2007 http://www.rsf.org/article.php3?id_article=21117.

²⁶ International Free Expression Exchange (IFEX) Alert, "Four journalists killed in less than a week by armed groups; Reporters Without Borders calls for special task force to tackle violence against press", 31 May 2007 <http://www.ifex.org/en/content/view/full/83789/>.

Strategy for Iraqi Media, in consultation with Iraqi journalists' syndicates,²⁷ but this strategy is reliant upon having a government force – of the type proposed by the Deputy Prime Minister for Security – for the media to work in collaboration with.

²⁷ International Federation of Journalists, National Security Strategy for Iraqi Media, 11 May 2007, <http://www.ifj.org/pdfs/IraqiMediaSafetyStrategy110507.pdf>.

CHAPTER THREE: THE LEGAL FRAMEWORK

Over the last few years, ARTICLE 19 has produced several reports examining Iraq's legal and regulatory framework for freedom of expression and we have made various detailed recommendations for improvement.²⁸ We have particularly criticised the predominantly Ba'ath-era criminal laws that can be used to clamp down on dissenting voices, as well as some Orders introduced by the CPA since 2003, recommending that most of the Ba'ath-era criminal law restrictions should be replaced with appropriate civil law provisions and that the remainder of the criminal framework should be amended to be brought in line with human rights requirements.²⁹

None of this has happened. In 2006-7, instead of abolishing or amending repressive legislation, the Iraqi authorities have 'revived' some Penal Code offences to silence media which reported critically on the government or public officials, they have sought to rely upon CPA Order 14 to shut down satellite television stations, and they have also imposed additional restrictions of their own.

In recognition of the truly transitional nature of Orders made by the CPA in 2003 and 2004, we have also recommended that the various Orders enacted by the CPA, and in particular the CPA instruments regulating broadcasting, should be replaced by domestic Iraqi legislation as soon as possible, and that this process should also be used to bring these instruments in line with international human rights law requirements. On this, some progress has been made: draft legislation setting up an independent broadcast regulator is currently before parliament and a draft law has been prepared in respect of the public service broadcaster.

In the following paragraphs, we assess the current status of the legislative framework for freedom of expression, noting positive trends as well as negative developments.

3.1 Existing criminal law restrictions

Under the new Iraqi Constitution all existing laws, including those developed under Saddam Hussein, are considered to continue in effect unless specifically annulled or amended by the Council of Representatives.³⁰ As a result, a large armoury of laws which are highly restrictive of fundamental rights and freedoms and inimical to the provisions of the 2005 Constitution are available to silence legitimate criticism of public officials or government practices. We note that while the most appropriate path forward would have been a comprehensive legislative review of the Ba'ath-era laws, including repeal of those provisions which are inconsistent with the new Constitution

²⁸ In particular, in 2006, ARTICLE 19, in co-operation with UNESCO, produced a comprehensive report entitled *A Media Policy for Iraq* which made detailed recommendations for amending the current regulatory regime and establishing new and independent regulatory bodies: <http://www.article19.org/pdfs/analysis/iraq-media-policy.pdf>. See also ARTICLE 19's 2004 assessment of the legal regulatory framework (<http://www.article19.org/pdfs/analysis/iraq-media-law-analysis.pdf>), and ARTICLE 19's 2006 assessment of the new constitution (<http://www.article19.org/pdfs/analysis/iraq-proposed-amendments-to-constitution-febru.pdf>).

²⁹ CPA Order 7 confirmed that the majority of the provisions of the Penal Code of 1969 continued in effect for the duration of the CPA transitional administration period: http://www.cpa-iraq.org/regulations/20030610_CPAORD_7_Penal_Code.pdf. A number of other Orders were introduced which concerned free expression, such as CPA Orders 11 (now revoked), 14, 19, 65 and 66.

³⁰ Constitution of Iraq 2005, Article 129.

and democratic governance, this is yet to occur. This is concerning, as even if they are not utilised, repressive laws with weighty criminal sanctions cast a long shadow over the media.

Defamation and insult

Defamation and libel are criminal offences in Iraq. Under the Ba'ath-era Penal Code, it is a crime to:

- insult the Arab community, the Iraqi people (including any part of the population), the national flag or any state emblem (Article 202);
- publicly insult any public institution or official (Article 226);
- publicly insult a foreign country, flag or national emblem, or international organisation with an office in Iraq (Article 227);
- insult a public servant or body in the course of its work (Article 229);
- attack the creed of a religious minority, or insult a symbol or person which / who is an object of sanctification, worship or reverence (Articles 372(1) and (5));
- defame another, and if the defamation is published in the media it is considered an aggravating offence (Article 433);
- insult another, including directing abuse which compromises their honour or status or offends them. Publication of such abuse in the media is an aggravating circumstance (Article 434); or
- insult a person in a personal meeting, telephone conversation or private letter (Article 435).

The use of the criminal law to protect reputation is highly problematic in respect of the right of freedom of expression³¹ and practice in many countries demonstrates that reputation and privacy can be adequately protected by civil law. There is growing international agreement that, particularly in transitional democracies, criminal law provisions are not the right response to defamation. Such laws are easily abused and the threat of a prison sentence, large fine or even 'just' a suspended criminal conviction exerts a real chilling effect on speech.³² All of this is particularly a problem in countries that have no established tradition of democracy and where courts and politicians may therefore react disproportionately to criticism.

These concerns have been borne out in recent experiences in Iraq. Defamation law has recently been described as 'hanging over the heads' of the Iraqi media,³³ and a number of journalists have been prosecuted under the recently 'revived' Articles 226 and 433 of the Penal Code for performing their role as the 'public watchdog' in a democratic society - reporting on allegations of misuse of public funds, allegations of mismanagement within public bodies and poor performance of public officials.

³¹ This position is supported by a joint statement by the three special mandates on freedom of expression in the UN, the OAS and the OCSE in 2002, condemning criminal defamation and calling for the repeal of all such provisions globally, and replaced with appropriate civil laws. See the Joint Declaration, 11 December 2002: <<http://www.unhchr.ch/html/menu2/i2civfre.htm>>. A number of countries, including Sri Lanka, Ghana, Argentina, Peru, Costa Rica, Paraguay and Ukraine have in the last few years abolished criminal defamation laws – either fully or in important respects.

³² Suspended sentences also exert a significant chilling effect as subsequent breach within the prescribed period means that the sentence will be imposed.

³³ The New York Times, *Iraqi Journalists Add Laws to List of Dangers*, 29 September 2006, <http://www.nytimes.com/2006/09/29/world/middleeast/29media.html?ex=1317182400&en=e9c56858d3b6f84&ei=5088&partner=rssnyt&emc=rss>.

The most prominent Article 226 cases concern the ongoing prosecution of Ayad Mahmoud al-Tammimi, Ahmed Mutare Abbas and Ali Fayyad al-Dulaimi, who all worked for the daily newspaper *Sada Wasit*, based in the southern city of Kut. In 2004, Mr al-Tammimi and Mr Abbas were imprisoned for five and seven months respectively for allegedly defaming former Wasit provincial governor Mohammad Reda Al-Jashamy. *Sada Wasit* had published articles reporting on allegations of corruption and human rights abuses concerning Mr Al-Jashamy.

Both men were released from jail after serving their sentences, but in December 2005 were charged again with four further counts of defamation under Article 226 for allegedly slandering the police and judicial figures in articles which had been published almost two years prior. One article reportedly criticised the Governor of Wasit, while two other articles criticised the Iraqi judicial system and the Iraqi police in that governorate for violating basic human rights. Mr al-Tammimi and Mr Abbas faced more than ten years in jail or heavy fines if convicted of the four separate counts of violation of Article 226.

In the same proceedings, former *Sada Wasit* reporter Ali Fayyad al-Dulaimi faces two defamation charges stemming from 2005 articles. In one, Mr al-Dulaimi reported on protests in Wasit over lack of services and the governor's performance. Governor Al-Jashaamy brought a defamation charge based on the story. Iraqi police brought a second defamation charge for reporting that said police were corrupt and ineffectual. Mr al-Dulaimi faces up to six months in prison.

In respect of Article 433, there have been a number of prosecutions of journalists who have written critically of public figures and institutions. Kamal Sayid Qadir, a 48 year old Iraqi Kurd with Austrian citizenship, was arrested in October 2005 in Erbil in respect of online articles he had published on *Kurdistanpost* criticising the Kurdistan Democratic Party and its leader, Massoud Barzani, whom he accused of corruption and abuse of power. Mr Barzani is also president of the Kurdistan Region. Mr Qadir was sentenced to thirty years' imprisonment on 19 December 2005 for "endangering national security". On 26 February 2006, the Supreme Court of the Kurdish Region overturned the conviction and ordered a retrial on the charge of "slandering" the Kurdish regional leadership. In March 2006, Mr Qadir was convicted for publishing "defamatory" articles about the authorities in Kurdistan and was sentenced to one and a half years' imprisonment.

In another Article 433 case, Hawez Hawezi, a 31 year old high school teacher and journalist, was detained by the Directorate of Security in Sulemaniya on 30 April 2006 following an article he published in which he had complained about the fact that he had been detained for writing an earlier piece criticising the Kurdish leadership. Mr Hawezi now faces charges of defamation for both articles.

In May 2006, a criminal court in Suleymaniya sentenced Twana Osman, editor-in-chief of *Hawlati* and Asos Hardi, the paper's former editor, to six-month suspended jail terms and fines of 75,000 dinars each (US\$50) for having published an article alleging that Prime Minister Omer Fatah of the Kurdish Regional Government ordered the dismissal of two telephone company employees after they cut his phone line for failing to pay a bill.

Finally, Mastura Mahmood, a 25 year old journalist for the women's weekly paper *Rewan*, faced trial on two separate defamation charges brought in April 2006 by the director of the Halabja Monument, Ibrahim Hawrami, and the general directorate of the security forces. The charges stemmed from an article Mrs Mahmood wrote on March 16 commemorating the 1988 Halabja poison gas attack. Mrs Mahmood interviewed a girl demonstrating in Halabja, and quoted her as saying that the security forces in the town were behaving in exactly the same way as Saddam's Ba'athist party members had done. She was summoned to the Halabja police station on May 2, where she was arrested and released on bail. At the time of writing, her trial was still pending.

Public order restrictions

Numerous provisions of the Penal Code seek to protect public order, making it a crime to:

- promote Zionist or Masonic ideologies, including by joining related institutions, or by promoting these ideologies morally or in any other way (Article 201);
- obtain materials that incite constitutional change or that promote banned ideologies with the aim of publishing them (Article 208);
- shout or sing in a manner that provokes dissent (Article 214); or
- possess (with the aim of publication, trade or distribution) materials that disturb public security or tarnish the country's reputation (Article 215).

The Coalition Provisional Authority further extended the range of prohibited actions and material by adopting CPA Orders 14 and 19. CPA Order 14, entitled "Prohibited Media Activity",³⁴ 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. CPA Order 19, entitled "Freedom of Assembly", prohibits demonstrations within 500 metres of the 'Green Zone', and imposes a requirement of seeking prior authorisation from the CPA in order to conduct a demonstration in any other place.

We remain concerned that the public order restrictions in the Penal Code impose illegitimately broad restrictions on the media and hinder its ability to perform its role, particularly Article 215. Given the current armed conflict, gathering material to report on developments in the conflict could easily trip the prohibition on possessing materials that "disturb" public security. In respect of tarnishing a country's reputation, it is difficult to see what reputation a country, as such, has or why it should legitimately warrant protection. This prohibition is particularly problematic for the pan-Arab satellite television stations which report in both Iraq and abroad on the developments of the conflict in Iraq – an issue of clear public interest.

Our main concern regarding these laws, however, is the current Iraqi government's continuing purported reliance on CPA Order 14 to close down broadcasters.³⁵ Since Prime Minister al-Maliki took office in June 2006, four satellite television stations

³⁴ CPA/ORD/10 June 2003/14.

³⁵ Previous governments, too, relied excessively on CPA Order 14 to shut down media; and ARTICLE 19 outlined these concerns in earlier analyses, see note 28.

have been shut down in Iraq – one temporarily for one month, and the remainder indefinitely, ostensibly on the basis of contravening CPA Order 14:³⁶

- in September 2006, Al-Arabiya's Baghdad facilities were shut down for one month for allegedly inciting "sectarianism" and "violence", without citing any specific offending footage;
- Al-Zawra's Baghdad office and Salahaddin TV's local offices were shut down indefinitely in November 2006 for "inciting sectarian violence", following a broadcast that showed demonstrators holding Saddam Hussein's pictures and protesting his death sentence;
- Al-Sharkiya's Baghdad offices were closed in January 2007 for allegedly inciting to "sectarian violence and to hatred", after showing footage of Iraqis mourning the death of former president Saddam Hussein.

Additionally, the Iraqi government continues to enforce the permanent closure of the Baghdad bureau of Qatar-based satellite channel Al-Jazeera, which was imposed in August 2004. Iraqi officials alleged in August 2004 that Al-Jazeera's reporting on kidnappings had encouraged Iraqi militants and accused the station of being a mouthpiece of terrorist groups and contributing to instability in Iraq.

It should be noted that each of the stations affected are satellite stations, which are often more independent, and critical, of the Iraqi government than traditional terrestrial broadcasters.³⁷

While we agree that Iraq needs appropriate laws to ban all advocacy of national, racial or religious hatred that constitutes incitement to violence, such laws should be appropriately framed³⁸ and adopted in a democratic environment. CPA Order 14 is neither: it was introduced as an urgent interim measure by a temporary governing authority in 2003, and its drafting falls far below the standards required by the ICCPR. Furthermore, subsequent developments highlight the inappropriateness of the Iraqi government directly intervening in broadcast regulation: in 2004 the CMC was established as the national broadcast regulatory body,³⁹ and in 2005 the exclusive remit of the CMC over broadcast regulation was confirmed in the new Iraqi Constitution.

Additionally, we are concerned that the Iraqi government has in fact acted arbitrarily in its purported reliance upon Order 14. Sections 5 and 6 of the Order outline procedural requirements and the granting of a right of appeal where a sanction has been imposed. From the information available, it appears that the government has ordered the closure of each of the broadcast stations without independent investigation of the alleged incitement and, in a number of cases, without even informing the broadcaster of the nature of the allegations against it. No appeals are reported to have been afforded.

³⁶ As reported by the UN Mission in Iraq: <http://www.uniraq.org/>.

³⁷ Reporters Without Borders, "Government Orders Al-Arabiya's Baghdad Bureau Closed For One Month", 8 October 2006, http://www.rsf.org/article.php3?id_article=18798; Committee to Protect Journalists, "CPJ sends new Iraqi Prime Minister press freedom recommendations", 6 June 2006 <http://www.cpj.org/protests/06ltrs/mideast/iraq06june06pl.html>

³⁸ They should follow the requirements of Articles 19 and 20 ICCPR.

³⁹ See CPA Order 65: Iraqi Communications and Media Commission, 20 March 2004 http://www.cpa-iraq.org/regulations/20040320_CPAORD65.pdf.

We would strongly recommend that all these criminal provisions, and in particular CPA Order 14, are immediately repealed. We elaborate on the specific regulatory framework needed for the broadcast sector in Section 3.2 below.

Secrecy laws

The Penal Code includes numerous restrictions on what may be published in the name of protecting ‘state secrets’. It is a crime to:

- broadcast or disclose secrets relating to the defence of the State (Article 178(2));
- publish or broadcast any governmental material the publication of which has been prohibited (Article 182);
- 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 228);
- 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 327); or
- divulge secrets obtained through employment or professional activities, except when the aim is to report or prevent a crime (Article 437).

We are concerned that these provisions result in a far greater degree of governmental secrecy than legitimately may be justified and that these provisions contravene international standards on freedom of information.⁴⁰ We have no doubt that they contribute greatly to the wave of corruption that is engulfing the country.⁴¹

We are also greatly concerned at the access to information restrictions imposed on the media in 2006 and 2007, including the temporary media ‘blackout’ on the proceedings of the Council of Representatives, and the restrictions placed on the media’s ability to attend the sites of bomb attacks. Urgent legal reform is needed in this field. At present, there is no positive protection of the right of freedom of information, and no basis on which to challenge repressive ad hoc measures pursued by the Iraqi government which seek to maintain a culture of secrecy rather than the transparency and accountability required in democratic governance.

In Chapter Four of this report, we discuss separately the need for a freedom of information regime.

Restrictions on Publishing ‘False News’

Various provisions in the Penal Code prohibit the publication of false facts or allegations. It is a crime 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 210);
- publish by any means false information if this disturbs the public peace (Article 211);

⁴⁰ See the Appendix to this Report which outlines the international standards governing freedom of information.

⁴¹ See Chapter 4 below, including the outline of statistics of the incidence of corruption in Iraq in recent times.

- broadcast, in times of war, false or biased information, statements or rumours that may lower the morale of the population (Article 179); or
- broadcast abroad false or biased information concerning the internal situation in Iraq that would undermine financial confidence or tarnish Iraq's international standing (Article 180).

These prohibitions all constitute so-called 'false news' provisions, restrictions on the publication of anything that contains incorrect facts. International human rights law is highly critical of such prohibitions: they allow for no mistakes, even if journalists have checked and double-checked their facts, and 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. Furthermore, such provisions can be misused to stifle controversial opinions on the basis of the authorities alleging falsity. For these reasons, false news provisions have been ruled by constitutional courts around the world to be incompatible with the right of freedom of expression.⁴²

Furthermore, the Penal Code provisions also extend the prohibition to "biased" information, a particularly vague concept which could be used to punish the publication of any information considered negative, controversial, or that only applies to one sector of the population.

In November 2006, the Interior Ministry created an internal 'surveillance unit' to enforce some of these provisions and require all media outlets to publish or broadcast corrections to any news report deemed by the unit to be 'false'. Refusal to do so would result in prosecution. The Interior Ministry had earlier ominously warned that it would "take all necessary measures against media that broadcast mendacious reports" and that it would "not hesitate to prosecute in order to prevent them from diverting Iraqis from the fight against terrorism."⁴³

Miscellaneous

At least four other provisions in the Penal Code restrict freedom of expression beyond the extent permitted under international law. It is a crime to:

- publicly 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 305);
- possess for publication any material "that violates the public integrity or decency" (Article 403);
- sing or broadcast indecent or obscene songs or statements (Article 404); or
- publish private information where this causes offence (Article 438).

Additional prohibitions are found in the Ba'ath-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

⁴² See, for example, *Chavunduka and Choto v. Minister of Home Affairs & Attorney General*, 22 May 2000, Judgement No. S.C. 36/2000 (Supreme Court of Zimbabwe); and *R v. Zundel*, [1992] 2 SCR 731 (Supreme Court of Canada). See also Concluding Observations of the UN Human Rights Committee: Cameroon (1999) UN doc. CCPR/C/79/Add.116, para 24, Armenia (1998) UN doc. CCPR/C/79/Add.100, para 20, Uruguay (1998) UN doc. CCPR/C/79/Add.90, para 10, Slovakia (1997) UN doc. CCPR/C/79/Add.79, para 22, and Mauritius (1996) UN doc. A/50/44, paras 19, 27.

⁴³ As reported by Reporters Without Borders, amongst others:
http://www.rsf.org/print.php3?id_article=20133.

anything that runs counter to Iraqi policies. Other materials may be published only with official permission, including any statements ‘attributed to’ government figures, minutes of closed court sessions or decisions of the council of ministers. Violations of the Law of Publications may be punished by licence suspension or revocation, while the owner and/or editor may be sentenced to a maximum of thirty days’ imprisonment.

The various restrictions noted above are all highly problematic from a freedom of expression perspective. For example, 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, or they are overly vague or restrict freedom of expression far beyond what is legitimate. 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 prohibition. Other examples of fundamentally flawed prohibitions include Article 305, which would prohibit most investment advice, and Article 438, which would hinder most investigative reporting.

While these provisions have not to our knowledge been recently used, they can, like the other provisions, be ‘revived’ at any time. For this reason, we urge the repeal of these provisions which are inconsistent with the letter and spirit of the new Constitution and international standards governing the right of freedom of expression.

3.2 Recent developments in media law and regulation

There have been a number of significant recent legislative developments in the area of media law and freedom of expression. Since the adoption of the Constitution, the most prominent developments have been the tabling of draft legislation in respect of the status of the national broadcast regulator, the CMC, and the preparation of draft legislation in respect of the status of the public service broadcaster, the Iraqi Media Network. We are also aware of the development of a broad law ‘On Freedom of Expression’, which to our knowledge has not however been tabled in Parliament. We warmly welcome all these developments, which are of positive intent and have occurred within a very challenging context.

At the same time, we are concerned at various ad hoc regulatory measures that seem to have been put in place to control any media reporting of matters deemed controversial by the government, including the bans outlined above in respect of reporting on the proceedings of the Council of Representatives in November 2006 and the restrictions on the media in accessing the site of a bomb attack.

Broadcasting and media regulation

Currently, Iraqi broadcasters – and to some extent, print and internet media as well – are governed by two Orders issued by the CPA: Order 65, which set up a regulatory system for broadcasting and which ‘established’ the CMC, and Order 66, which created the Iraq Media Network, a public service media system that includes Al Iraqiya, Radio Iraq, and Al Sabaah newspaper.

In 2006, two new draft laws to convert CPA Orders 65 and 66 into domestic Iraqi legislation were proposed, namely a Broadcasting Bill and a Public Service Broadcasting Bill. While the Public Service Broadcasting Bill does not appear to have progressed significantly, the Broadcasting Bill, drafted by CMC itself, was tabled before parliament in late 2006. Both bills contain a wide range of measures to ensure the structural and operative independence of the Iraqi Media Network and CMC, along with a number of key provisions outlining their mandate and functions. Both constitute a significant step forward in the establishment of democratic institutions in Iraq and, while they could be improved further to bring them in line with international best practice standards, implementation in their current form would set an example in the region.

There is serious need for a new broadcasting law to replace Order 65. At present, Order 65 is not fully implemented and in practice, the licensing process in particular is highly opaque. Not only is it difficult to determine which broadcasters hold a valid CMC-issued licence, regional authorities have also assumed responsibility for issuing broadcast licences, despite the fact that this practice contravenes both CPA Order 65 and Article 102 of the Constitution. We are concerned, therefore, at the lack of progress of the current legislative initiative to replace Order 65: it has not moved passed the first stage of consideration and seems to have been 'on hold' for nearly ten months. During that time, the Iraqi government has shut down four broadcast stations, and imposed a number of ad hoc reporting restrictions. An effective, clear and fair regulatory framework implemented by an independent regulatory body is urgently required.

Another particularly significant development is the legislative trend of describing the full content and meaning of right in legislation. An Iraqi campaign group, Pledge for Iraq (Ahad Al-Iraq),⁴⁴ supported by an expatriate Iraqi organisation called The Iraq Foundation,⁴⁵ has recently prepared a draft Freedom of Expression Law designed to protect and promote this right. It outlines the content of the right of freedom of expression, and includes provisions outlining the purpose and objectives of the right, specific provisions relating to media freedom, provisions governing how and when free expression can be limited, and provisions relating to the associated right of freedom of assembly.

There have also been legislative developments in the Kurdistan region, moving towards a limited form of self-regulation by the print media. The Kurdistan Journalists' Syndicate (KJS), one of the two journalists' associations in Iraq recognised by the International Federation of Journalists, has proposed a draft Press Law to govern the print media, which would prohibit the Kurdistan Regional Government from imprisoning journalists. It would also remove the requirement of government authorisation to publish a newspaper, requiring instead that journalists register with the KJS. While the KJS draft has been criticised by some as curbing press freedom,⁴⁶ the KJS considers that its draft would be the most progressive press

⁴⁴ See <http://e.ahdaliraq.net/>.

⁴⁵ <http://www.iraqfoundation.org>.

⁴⁶ The Institute for War and Peace Reporting has criticised the draft Press Law on the basis that it is imprecise, particularly regarding reporting of security issues and subjects deemed to undermine personal freedoms and public traditions. See Institute for War and Peace Reporting, *Contribution to discussion on failings of Kurdish press law*, April 2007, http://iwpr.net/?p=icr&s=f&o=335380&apc_state=henpicr

law in the Middle East region.⁴⁷ In addition to the KJS draft bill, two other draft bills to protect the print media have been submitted separately to the Kurdistan National Assembly in 2007.⁴⁸ One of these draft bills was prepared by a group of academics at the Salahuddin University and proposes the establishment of an independent media council.

There has also been significant development in support for press freedom within the Kurdistan Regional Government, which could translate into progressive legislative measures in the near future. In October 2006, the President of the Kurdistan Regional Government promised to journalists that they would not be prosecuted if they criticised him in their writing, and he encouraged them to report on public officials who fail their public duties. In early 2007, the Minister of Culture of the Kurdish Regional Government stated that he had proposed a provision in a draft law which would replace imprisonment with a fine for journalists convicted of defamation, echoing the Press Law initiative of the KJS.

Reporting restrictions

As noted above, in recent months, the Iraqi government has put in place various reporting bans and other measures to restrict media reporting of 'controversial' issues.

In November 2006, following the execution of former president Saddam Hussein, a two-week prohibition on the media attending parliamentary sessions was imposed and live broadcast of parliamentary debates were suspended. The Speaker of the Council of Representatives claimed that press interviews with parliamentarians had only served to exacerbate tensions within the community and that a media blackout was justified. The ban was, however, criticised widely as unconstitutional. During the same two-week period, two satellite television stations were shut down indefinitely by the Iraqi government for broadcasting footage of Iraqis mourning the death of Saddam Hussein, holding photos of the former president and criticising his death sentence. Such footage was deemed to constitute incitement to sectarian violence.⁴⁹

In February 2007, the Prime Minister issued a decree empowering military commanders to arrest people without warrant, monitor private communications and restrict the activities of civil society groups in Baghdad. The decree, which lays down an overall 'security plan' for Baghdad, is phrased in broad and vague terms, and gives military commanders significant discretion. It will remain in force for an indefinite period of time. We are concerned that it will have a significant impact on the media's ability to gather information and that journalists now face the prospect of arbitrary arrest in the course of their duties.⁵⁰

Further restrictions on the ability of the media to gather information and report were imposed in May 2007, when the Interior Ministry issued a directive prohibiting journalists from accessing the scene of a bomb attack for at least one hour after the event. While the Interior Ministry stated that the purpose of the directive was to ensure that evidence is not disturbed and journalists are not endangered, Iraqi

⁴⁷ *Bloody Years for Journalists in Iraq*, www.antiwar.com, 3 January 2007

<http://www.antiwar.com/ips/salih.php?articleid=10257>.

⁴⁸ UNAMI Human Rights Office, *Human Rights Report 1 January – 31 March 2007*, para 34, <http://www.sigir.mil/reports/quarterlyreports/Apr07/Default.aspx>

⁴⁹ See Section 3.1, above.

⁵⁰ As reported by Human Rights Watch: <http://hrw.org/english/docs/2007/02/23/iraq15393.htm>.

journalists have commented that the prohibition is more primarily directed at limiting coverage of unwelcome news, and that the government would prefer that their source of news is information which has been filtered through the Interior Ministry.⁵¹

Finally, there have also been indirect legislative threats to the right of freedom of expression, such as the draft Civil Society Law prepared by the Ministry of Civil Society in early 2006. This proposed harsh penalties on both national and international civil society organisations in respect of a broad range of legitimate activities.⁵² While the draft Law has since been rescinded, the new Minister of State for Civil Society has confirmed that a new proposal will be developed.

⁵¹ See <http://jurist.law.pitt.edu/paperchase/2007/05/iraqi-interior-ministry-bans-cameras.php>.

⁵² UNAMI Human Rights Office, *Human Rights Report, 1 January -28 February 2006*, para 32, <http://www.uniraq.org/documents/HR%20Report%20Jan%20Feb%2006%20EN.PDF>.

CHAPTER FOUR: FREEDOM OF INFORMATION

The right of have access to information held by, or under the control of, public bodies, often referred to as ‘freedom of information’, is not currently expressly recognised in Iraq. While Article 36 of the Constitution, which protects freedom of expression, may be interpreted to provide an indirect guarantee, there is no explicit recognition of the right in the Constitution or in other legislation. In addition, decades of dictatorial rule and secrecy in government still cast their shadow and have a lingering effect on the attitudes of civil servants and public officials. There is a significant legacy of Ba’ath-era state secrets laws, none of which have yet been amended or annulled by the Council of Representatives. All of this has resulted in a lack of transparency in present-day Iraq which has allowed corruption to thrive and human rights violations to go unchecked.

A number of civil society organisations have, however, begun campaigns to improve transparency and see the adoption of a freedom of information law in Iraq. One of the foremost efforts has been conducted by the Center for Transparency and Anti-Corruption, an Iraqi NGO that is associated with Transparency International. The Center recently conducted a public survey on the importance of enacting a freedom of information legislation. Of 2000 people and organisations questioned, 90% favoured the introduction of such a law. We understand that there is currently at least one draft FOI Bill which has been prepared by Iraqi civil society and which has been circulated for public consultation.

Implementing government transparency measures, however, has proven a difficult task. One particularly concerning development has been the revival of Section 136(b) of the Law on Criminal Proceedings,⁵³ which was suspended by the CPA in 2004 on the basis of being “deficient ... with regard to fundamental standards of human rights”.⁵⁴

Section 130(b) states that “if the act is punishable by law and the magistrate finds that there is sufficient evidence for a trial, a decision is issued to transfer the accused to the appropriate court.” Section 136(b) provides that no case concerning an act done in the course of duty may go to trial without the permission of the minister of the affected government agency. Accordingly, the purpose of Section 136(b) is to permit some ministerial discretion in whether a prosecution in respect of an act done in the course of duty should proceed to trial once it has been established that sufficient evidence exists.

The current Iraqi government has, however, sought to re-interpret Section 136(b) in a wholly different light – one which is inconsistent with the Law on Criminal Proceedings. The Iraqi government has relied on Section 136(b) to prevent corruption allegations from even reaching the investigative courts for preliminary assessment of evidence. The Prime Minister’s Office has ordered the Commission on Public Integrity not to refer any case to the investigative courts without the prior approval of the Prime Minister. According to the quarterly report of the Special Inspector General for Iraq Reconstruction (SIGIR) published in April 2007, Section 136(b) had been

⁵³ Law 23 of 1971.

⁵⁴ Coalition Provisional Authority, *Memorandum Number 3 (revised) on Criminal Procedures*, Preamble. See <http://www.cpa-iraq.org/regulations/>.

relied on to block investigation of allegations of corruption raised by the Commission on Public Integrity in 48 cases concerning 102 individuals.⁵⁵

This is particularly concerning in the context of the Commission on Public Integrity's recent estimates that corruption costs Iraq \$5 billion annually, and Transparency International's Corruption Perceptions Index, which found that out of 163 countries surveyed in 2006, only two countries (Myanmar and Haiti) were more corrupt than Iraq.⁵⁶ There is also legitimate concern that the revival of Section 136(b) may be unconstitutional, as the suspension of the provision was still effective when the new Iraqi Constitution was passed in 2005.⁵⁷ Whether or not a law can continue to remain in force if it was suspended at the time when the Constitution was passed raises a constitutionality issue which needs to be resolved.

It is hoped that progress can be made in the near future on adopting and implementing freedom of information legislation in Iraq, and that the far-reaching framework of secrecy laws discussed here and in the previous chapter is repealed. The recent developments concerning government accountability are particularly concerning and need to be addressed as a matter of priority.

⁵⁵ Special Inspector General for Iraq Reconstruction, Quarterly Report April 2007, p 101
<http://www.sigir.mil/reports/quarterlyreports/Apr07/Default.aspx> (the SIGIR report)

⁵⁶ Transparency International, *Corruption Perceptions Index for 2006*,

http://www.transparency.org/policy_research/surveys_indices/cpi/2006

⁵⁷ Under Article 126 of the Constitution, pre-existing laws, including CPA Orders, remain in force unless they are specifically annulled or amended by the Council of Representatives.

CONCLUSION

The recent developments concerning free expression point to worrying trends within the Iraqi government: hostile and punitive treatment of media which seeks to promote democratic goals such as government transparency and accountability; a reluctance to implement the fundamental human rights guarantees contained in the 2005 Constitution; a lack of commitment to providing even basic safety for media workers and their facilities despite legal obligations to do so; and regressive steps in respect of combating corruption and the maintenance of state secrets laws.

These trends do not bode well for media development in Iraq in the near future, which is in turn essential for the development of democratic governance and the protection of human rights. We strongly recommend that the Iraqi government ensures greater priority is given to media development in 2007 and 2008. Our main concern is that the security agenda, while clearly a legitimate first priority, must not be used as a justification for curtailing human rights and restricting the activities of the media and its ongoing development. Due recognition should be given to the crucial role which the media performs in the democratisation process and in the facilitation of relations between the government and its citizens. A positive basis for establishing this relationship exists in the 2005 Constitution, and appropriate measures should be taken to give effect to these constitutional guarantees.

APPENDIX: INTERNATIONAL STANDARDS GOVERNING THE RIGHT OF FREEDOM OF EXPRESSION

1. *The Right of Freedom of Expression in International Law*

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

Everyone has the right of freedom of opinion and expression; this right includes the right of hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.⁵⁸

The UDHR, as a UN General Assembly resolution, is not directly binding on States. However, parts of it, including Article 19, are widely regarded as having acquired legal force as customary international law since its adoption in 1948.⁵⁹

The *International Covenant on Civil and Political Rights* (ICCPR),⁶⁰ a treaty ratified by over 160 States, including Iraq,⁶¹ imposes formal legal obligations on State Parties to respect its provisions and elaborates on many of the rights included in the UDHR. Article 19 of the ICCPR guarantees the right of freedom of expression in terms very similar to those found at Article 19 of the UDHR:

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

Freedom of expression is also protected in all regional human rights instruments, at Article 32 of the *Arab Charter on Human Rights*,⁶² Article 10 of the *European Convention on Human Rights*,⁶³ Article 13 of the *American Convention on Human Rights*⁶⁴ and Article 9 of the *African Charter on Human and Peoples' Rights*.⁶⁵ The right of 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. For example, the Inter-American Court of Human Rights has explicitly recognised the right of access information held by public bodies as an integral component of the right of freedom of expression;⁶⁶ and the European Court of Human Rights has issued final judgments in

⁵⁸ UN General Assembly Resolution 217A(III), adopted 10 December 1948.

⁵⁹ See, for example, *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2nd Circuit).

⁶⁰ UN General Assembly Resolution 2200A(XXI), adopted 16 December 1966, in force 23 March 1976.

⁶¹ Iraq ratified the ICCPR on 25 January 1971.

⁶² As revised 22 May 2004, League of Arab States, reprinted in 12 Int'l Hum. Rts. Rep. 893 (2005). Not yet in force.

⁶³ Adopted 4 November 1950, in force 3 September 1953.

⁶⁴ Adopted 22 November 1969, in force 18 July 1978.

⁶⁵ Adopted 26 June 1981, in force 21 October 1986.

⁶⁶ See Section 4 below.

more than 150 cases involving freedom of expression issues, ranging from defamation to national security issues.⁶⁷

Freedom of expression is a key human right, in particular because of its fundamental role in underpinning democracy. At its very first session, in 1946, the UN General Assembly adopted Resolution 59(I) which states: “Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated.”⁶⁸ As the UN Human Rights Committee has said:

The right of freedom of expression is of paramount importance in any democratic society.⁶⁹

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

Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man ... it is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no ‘democratic society’.⁷⁰

2. Restrictions on Freedom of Expression

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

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

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

A similar formulation can be found in the European, American and African regional human rights treaties. These have been interpreted as requiring restrictions to meet a strict three-part test.⁷¹ International jurisprudence makes it clear that this test presents a high standard which any interference must overcome. The European Court of Human Rights has stated:

⁶⁷ As elaborated below, judgments of the ECHR are directly binding on the UK, one of the occupying powers, who is legally bound to implement the rights stated in the European Convention to everyone within its jurisdiction. For the duration of military occupation, this includes that part of Iraq under the UK.

⁶⁸ 14 December 1946.

⁶⁹ *Tae-Hoon Park v. Republic of Korea*, 20 October 1998, Communication No. 628/1995, para. 10.3.

⁷⁰ *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72, para. 49. Statements of this nature abound in the jurisprudence of courts and other judicial bodies around the world.

⁷¹ See, *Mukong v. Cameroon*, 21 July 1994, Communication No. 458/1991, para. 9.7 (UN Human Rights Committee).

Freedom of expression ... is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.⁷²

First, the interference must be provided for by law. This requirement will be fulfilled only where the law is accessible and “formulated with sufficient precision to enable the citizen to regulate his conduct.”⁷³ 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.⁷⁴

3. Freedom of Expression and the Media

The guarantee of freedom of expression applies with particular force to the media, including the broadcast media and public service broadcasters. The European Court of Human Rights has consistently emphasised the “pre-eminent role of the press in a State governed by the rule of law.”⁷⁵ It has further stated:

Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.⁷⁶

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

[T]he free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.⁷⁷

The Inter-American Court of Human Rights has stated: “It is the mass media that make the exercise of freedom of expression a reality.”⁷⁸ 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 of receive them. Were it otherwise, the press would be unable to play its vital role of ‘public watchdog’.”⁷⁹

⁷² See, for example, *Thorgeirson v. Iceland*, note 75, para. 63.

⁷³ *The Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, para. 49 (European Court of Human Rights).

⁷⁴ *Lingens v. Austria*, 8 July 1986, Application No. 9815/82, paras. 39-40 (European Court of Human Rights).

⁷⁵ *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 63.

⁷⁶ *Castells v. Spain*, 24 April 1992, Application No. 11798/85, para. 43.

⁷⁷ UN Human Rights Committee General Comment 25, issued 12 July 1996.

⁷⁸ *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.

⁷⁹ *Thorgeirson v. Iceland*, note 75, para. 63.

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

Whilst the press must not overstep the bounds set [for the protection of the interests set forth in Article 10(2)] ... it is nevertheless incumbent upon it to impart information and ideas of public interest. Not only does it have the task of imparting such information and ideas; the public also has a right of receive them. Were it otherwise, the press would be unable to play its vital role of “public watchdog”.⁸⁰

3.1 Media Pluralism

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

An important aspect of States’ positive obligations to promote freedom of expression and of the media is the need to promote pluralism within, and ensure equal access of all to, the media. As the European Court of Human Rights stated: “[Imparting] information and ideas of general interest ... cannot be successfully accomplished unless it is grounded in the principle of pluralism.”⁸¹ The Inter-American Court has held that freedom of expression requires that “the communication media are potentially open to all without discrimination or, more precisely, that there be no individuals or groups that are excluded from access to such media.”⁸²

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.⁸³

The obligation to promote pluralism also implies that there should be no legal restrictions on who may practise journalism⁸⁴ and that licensing or registration systems for individual journalists are incompatible with the right of freedom of expression. In a Joint Declaration issued in December 2003, the UN Special

⁸⁰ See *Castells v. Spain*, note 76, para. 43; *The Observer and Guardian v. UK*, 26 November 1991, Application No. 13585/88, para. 59; and *The Sunday Times v. UK (II)*, 26 November 1991, Application No. 13166/87, para. 65.

⁸¹ *Informationsverein Lentia and Others v. Austria*, 24 November 1993, Application Nos. 13914/88 and 15041/89, para. 38.

⁸² *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note 78, para. 34.

⁸³ *Mukong v. Cameroon*, 21 July 1994, Communication No. 458/1991, para. 9.7.

⁸⁴ See *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note 78.

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.⁸⁵

3.2 Independence of Media Bodies

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

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

All public authorities which exercise formal regulatory powers over the media should be protected against interference, particularly of a political or economic nature, including by an appointments process for members which is transparent, allows for public input and is not controlled by any particular political party.⁸⁶

Regional bodies, including the Council of Europe and the African Commission on Human and Peoples' Rights, have also made it clear that the independence of regulatory authorities is fundamentally important. The latter 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.⁸⁷

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

[T]o guarantee the existence of a wide range of independent and autonomous media in the broadcasting sector...specially appointed independent regulatory

⁸⁵ 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> >.

⁸⁶ Note 85.

⁸⁷ Adopted by the African Commission on Human and Peoples' Rights at its 32nd Session, 17-23 October 2002.

authorities for the broadcasting sector, with expert knowledge in the area, have an important role to play within the framework of the law.⁸⁸

The Recommendation goes on to note that Member States should set up independent regulatory authorities. Its guidelines provide that Member States should devise a legislative framework to ensure the unimpeded functioning of regulatory authorities and which clearly affirms and protects their independence.⁸⁹ The Recommendation further provides that this framework should guarantee that members of regulatory bodies are appointed in a democratic and transparent manner.⁹⁰

3.3 Public Service Broadcasting

The advancement of pluralism in the media is also an important rationale for public service broadcasting. A number of international instruments stress the importance of public service broadcasters and their contribution to promoting diversity and pluralism.⁹¹

A key aspect of the international standards relating to public broadcasting is that State broadcasters should be transformed into independent public service broadcasters with a mandate to serve the public interest.⁹² The Council of Europe has issued a Recommendation that stresses the need for public broadcasters to be fully independent of government and commercial interests, stating that the “legal framework governing public service broadcasting organisations should clearly stipulate their editorial independence and institutional autonomy” in all key areas, including “the editing and presentation of news and current affairs programmes.”⁹³ Members of the supervisory bodies of publicly-funded broadcasters should be appointed in an open and pluralistic manner and the rules governing the supervisory bodies should be defined so as to ensure they are not at risk of political or other interference.⁹⁴

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;

⁸⁸ Recommendation No. R(2000) 23, adopted 20 December 2000.

⁸⁹ *Ibid.*, Guideline 1.

⁹⁰ *Ibid.*, Guideline 5.

⁹¹ 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. See also Recommendation No. R (96) 10 on the Guarantee of the Independence of Public Service Broadcasting, adopted 11 September 1996.

⁹² See *ARTICLE 19 Broadcast Regulation Principles*, note 9, Principle 34. See also the Declaration of Sofia, adopted under the auspices of UNESCO by the European Seminar on Promoting Independent and Pluralistic Media (with special focus on Central and Eastern Europe), 13 September 1997, which states: “State-owned broadcasting and news agencies should be, as a matter of priority, reformed and granted status of journalistic and editorial independence as open public service institutions.”

⁹³ Council of Europe Committee of Ministers Recommendation No. R (96) 10E, 11 September 1996, Guideline I.

⁹⁴ *Ibid.*, Guideline III.

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.⁹⁵

Finally, the funding of public service broadcasters must be “based on the principle that member states undertake to maintain and, where necessary, establish an appropriate, secure and transparent funding framework which guarantees public service broadcasting organisations the means necessary to accomplish their missions.”⁹⁶ Importantly, the Council of Europe Recommendation stresses that “the decision-making power of authorities external to the public service broadcasting organisation in question regarding its funding should not be used to exert, directly or indirectly, any influence over the editorial independence and institutional autonomy of the organisation.”⁹⁷

4. Freedom of Information

The right of access information held by public bodies, often referred to as ‘freedom of information’, is a fundamental human right recognised in international law. It is crucial as a right in its own regard as well as central to the functioning of democracy and the enforcement of other rights. Without freedom of information, State authorities can control the flow of information, ‘hiding’ material that is damaging to the government and selectively releasing ‘good news’. In such a climate, corruption thrives and human rights violations can remain unchecked.

The right of access information held by or under the control of a public body has been guaranteed through Article 19 of the UDHR and through Article 19 of the ICCPR. Both Article 19 of the UDHR and Article 19 of the ICCPR have been interpreted as imposing an obligation on States to enact freedom of information laws. The UN Human Rights Committee, the body established to supervise the implementation of the ICCPR, has long commented on the need for States to introduce freedom of information laws. In its 1994 Concluding Observations on the implementation of the ICCPR in Azerbaijan, for example, the Committee stated that Azerbaijan “should introduce legislation guaranteeing freedom of information...”⁹⁸

In 2006, the Inter-American Court of Human Rights expressly affirmed that the right of access information held by public authorities is an enforceable right under the ‘general’ international law guarantee of freedom of expression.⁹⁹ Furthermore, international bodies such as the United Nations Special Rapporteur on Freedom of

⁹⁵ ARTICLE 19 Broadcast Regulation Principles, note 9, Principle 37.

⁹⁶ Recommendation No. R (96) 10E, note 93, Principle V.

⁹⁷ *Ibid.*

⁹⁸ UN Doc. CCPR/C/79/Add.38; A/49/40, 3 August 1994, under “5. Suggestions and recommendations”.

⁹⁹ *Claude Reyes & Ors v Chile* Judgment of 19 September 2006, Series C No 151.

Opinion and Expression¹⁰⁰ have repeatedly called on all States to adopt and implement freedom of information legislation.¹⁰¹

Various international treaties, including the UN Convention against Corruption, also require States Parties to adopt and implement freedom of information laws.

A rapidly growing number of States have recognised the importance of the right of freedom of information and have implemented laws giving effect to the right. In the last fifteen years, a range of countries including India, Uganda, Angola, Mexico, South Africa, South Korea, Israel, Japan, Sri Lanka, Thailand, Trinidad and Tobago, Guatemala, the United Kingdom and most East and Central European States have adopted freedom of information laws. In doing so, they join a large number of other countries that have enacted such laws some time ago, including Sweden, the United States, Finland, the Netherlands, Australia and Canada.

4.1 The Content of Freedom of Information

A survey of international law and best practice shows that to be effective, freedom of information legislation should be based on a number of general principles. Most important is the principle of maximum openness: any information held by a public body should in principle be openly accessible, in recognition of the fact that public bodies hold information not for themselves but for the public good. Furthermore, access to information may be refused only in narrowly defined circumstances, when necessary to protect a legitimate interest. Finally, access procedures should be simple and easily accessible and persons who are refused access should have a means of challenging the refusal in court.¹⁰²

In his 2000 Annual Report to the UN Human Rights Commission, the UN Special Rapporteur endorsed ARTICLE 19's overview of the state of international law on freedom of information as published in *The Public's Right of Know: Principles on Freedom of Information Legislation* and called on Governments to revise their domestic laws to give effect to the right of freedom of information. He particularly directed States' attention to nine areas of importance:

[T]he Special Rapporteur directs the attention of Governments to a number of areas and urges them either to review existing legislation or adopt new legislation on access to information and ensure its conformity with these general principles. Among the considerations of importance are:

¹⁰⁰ The Office of the Special Rapporteur on of Opinion and Expression was established by the UN Commission on Human Rights, the most authoritative UN human rights body, in 1993: Resolution 1993/45, 5 March 1993.

¹⁰¹ See, for example, the Concluding Observations of the Human Rights Committee in relation to Trinidad and Tobago, UN Doc. No. CCPR/CO/70/TTO/Add.1, 15 January 2001. 14. The comments of the UN Special Rapporteur on freedom of Opinion and Expression are discussed at length below.

¹⁰² For an overview of these general principles, see ARTICLE 19's *The Public's Right of Know* (London: 1999) (ARTICLE 19 FOI Principles), available online at: <http://www.article19.org/pdfs/standards/accessairwaves.pdf>.

These Principles are the result of a study of international law and best practice on freedom of information and have been endorsed by, amongst others, the UN Special Rapporteur on Freedom of Opinion and Expression in his report to the 2000 session of the United Nations Commission on Human Rights (UN Doc. E/CN.4/2000/63, annex II), and referred to by the Commission in its 2000 resolution on freedom of expression (Resolution 2000/38). They were also endorsed by Mr. Santiago Canton, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression in his 1999 Report, Volume III of the Report of the Inter-American Commission on Human Rights to the OAS.

- Public bodies have an obligation to disclose information and every member of the public has a corresponding right of receive information; “information” includes all records held by a public body, regardless of the form in which it is stored;
- Freedom of information implies that public bodies publish and disseminate widely documents of significant public interest, for example, operational information about how the public body functions and the content of any decision or policy affecting the public;
- As a minimum, the law on freedom of information should make provision for public education and the dissemination of information regarding the right of have access to information; the law should also provide for a number of mechanisms to address the problem of a culture of secrecy within Government;
- A refusal to disclose information may not be based on the aim to protect Governments from embarrassment or the exposure of wrongdoing; a complete list of the legitimate aims which may justify non-disclosure should be provided in the law and exceptions should be narrowly drawn so as to avoid including material which does not harm the legitimate interest;
- All public bodies should be required to establish open, accessible internal systems for ensuring the public’s right of receive information; the law should provide for strict time limits for the processing of requests for information and require that any refusals be accompanied by substantive written reasons for the refusal(s);
- The cost of gaining access to information held by public bodies should not be so high as to deter potential applicants and negate the intent of the law itself;
- The law should establish a presumption that all meetings of governing bodies are open to the public;
- The law should require that other legislation be interpreted, as far as possible, in a manner consistent with its provisions; the regime for exceptions provided for in the freedom of information law should be comprehensive and other laws should not be permitted to extend it;
- Individuals should be protected from any legal, administrative or employment-related sanctions for releasing information on wrongdoing, viz. the commission of a criminal offence or dishonesty, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty or serious failures in the administration of a public body.¹⁰³

This constitutes strong and persuasive guidance to States on the content of freedom of information legislation.

One of the key issues in freedom of information law is defining when a public body can refuse to disclose information. In the context of freedom of information, the ‘general’ test for restrictions on freedom of expression under Article 19(3) ICCPR requires that a public body must release information unless the following three conditions are met:

1. The information concerns a legitimate protected interest listed in the law;
2. Disclosure threatens substantial harm to that interest; and
3. The harm to the protected interest is greater than the public interest in having the information.¹⁰⁴

¹⁰³ *Ibid.* 44.

¹⁰⁴ See ARTICLE FOI 19’s *The Public’s Right of Know*, note 102, at Principle 4.

The first condition means that freedom of information laws must contain an *exhaustive* list of all legitimate interests on which a refusal of disclosure is based. This list should be limited to matters such as law enforcement, the protection of personal information, national security, commercial and other confidentiality, public or individual safety, and protecting the effectiveness and integrity of government decision-making processes.¹⁰⁵

Once it has been established that the information falls within the scope of a legitimate aim listed in the legislation, the second part of the test requires that it must be established that disclosure of the information would cause substantial harm to that legitimate aim. The simple fact that the information requested falls within the scope of a listed legitimate interest does not mean non-disclosure is justified. This would create a class exception that would seriously undermine the free flow of information to the public: instead, the public body must demonstrate that the disclosure of the information would cause substantial harm to the protected interest.

The third part of the test requires the public body to consider whether, even if disclosure of information causes serious harm to a protected interest, there is nevertheless a wider public interest in disclosure. For instance, in relation to national security, disclosure of information exposing instances of bribery may concurrently undermine defence interests and expose corrupt buying practices. The latter, however, may lead to eradicating corruption and therefore strengthen national security in the long-term. In such cases, information should be disclosed notwithstanding that it may cause harm in the short term.

Cumulatively, the three-part test is designed to guarantee that information is only withheld when it is in the overall public interest. If applied properly, this test would rule out all blanket exclusions and class exceptions as well as any provisions whose real aim is to protect the government from harassment, to prevent the exposure of wrongdoing, to avoid the concealment information from the public or to preclude entrenching a particular ideology.

¹⁰⁵ *Ibid.*