

IN THE APPEAL COURT OF BAGHDAD – AL KARAKH
In the case No.: 93 – S -2010

President of the Intelligence Services

Plaintiff

vs.

Alan Rusbridger and Gaith Salim Abd al Ahad,

Defendants

WRITTEN COMMENTS of
ARTICLE 19: Global Campaign For Free Expression
and International Federation of Journalists

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I. Introduction

1. This Brief is submitted on behalf of ARTICLE 19: Global Campaign for Free Expression (“ARTICLE 19”) and the International Federations of Journalists (“IFJ”), international organizations promoting freedom of expression worldwide. Both organizations are registered charities, independent of all ideologies and governments. For a number of years, ARTICLE 19 and the IFJ have been also working extensively in the countries of the Middle East and Arab world, including Iraq.
2. The aim of this Brief is to inform the Appeal Court of Baghdad about international legal standards on defamation of politicians and public officials and protection of journalists’ sources that can be applied in the present case; in particular those international legal standards on the right to freedom of expression, as protected by Article 19 of the International Covenant on Civil and Political Rights (“ICCPR”), which Iraq ratified on 25 January 1971. As a result of ratifying the ICCPR, Iraq is not only bound by the provisions of the ICCPR as a matter of international law, but is also obliged to give effect to that treaty through national legislation.¹ The Brief also includes review of comparative jurisprudence and best practices on defamation of public officials to provide an idea of positive standards regarding freedom of expression from around the world.
3. The Brief demonstrates that under international and comparative standards, the press is entitled to special protection under the guarantee of freedom of expression due to its important role in informing the public and exercising independent control over governments. In addition, politicians are required to tolerate a higher degree of criticism than ordinary citizens, both because of their key role in the democratic process and because they have knowingly laid themselves open to public scrutiny.
4. ARTICLE 19 and IFJ believe that the present case raises important questions concerning the protection of reputation of public officials and the press freedom in democratic society. Therefore, this Brief aims to assist the judges in this case to address these questions in line with international law binding Iraq.

II. Interest of ARTICLE 19 and IFJ

5. ARTICLE 19 is an established and well-recognized international human rights organization, based in London. It campaigns against censorship in all its forms and works to promote greater freedom of expression and access to information around the world. ARTICLE 19 takes its name and mandate from the nineteenth article of the Universal Declaration of Human Rights which guarantees the right to freedom of opinion and expression. ARTICLE 19 frequently submits written comments/amicus curiae to international and regional courts as well as to courts in national jurisdictions in cases that raise issues touching on the international guarantee of freedom of expression, including defamation.
6. IFJ is the world's largest organization of journalists, representing over 600,000 members in 125 countries. It promotes international action to defend press freedom and social justice through strong, free and independent trade unions of journalists. The IFJ is the organization that speaks for journalists within the UN system and within the international

¹ Articles 2(1)(b), 14(1) and 16, Vienna Convention on the Law of Treaties 1969.

trade union movement. The IFJ supports journalists and their unions whenever they are fighting for their industrial and professional rights and has established an International Safety Fund to provide humanitarian aid for journalists in need.

III. Issues addressed

7. The issue in this case is whether a claim of defamation, based on an article ‘*Six years after Saddam Hussein, Nouri al-Maliki tightens his grip on Iraq*’ published in the Guardian newspaper on 30 April 2009, should be upheld. The plaintiff argued that allegations made by the article about the Prime Minister of Iraq and the Iraqi Intelligence Services were untrue, defamatory and an abuse of press freedom. The first instance court asked the defendants to disclose the sources of the information based on which the article was written. The court also commissioned two expert opinions on whether the article was harmful and defamatory. In its decision, the first instance court relied heavily on the second opinion of five experts, from 8 November 2009, and ruled against the defendants. The court found out that the article did not comply with the 1968 Iraqi Press Law (No 206) and provisions of the Iraqi Constitution for two main reasons:
 - The article was harmful and defamatory as it failed “to consider the reputation of the plaintiff and the symbol” that the President represents; and it violated the provisions of the Iraqi legislation that outlaws the disturbance of public order and attacks on moral values, prohibits the printing and distribution in Iraq of material considered interfering in Iraqi internal affairs or politics, or prohibits the publication of material harming the head of state and the head of government.
 - The author did not mention the names of those he had met and thus had not followed the standards of clarity journalism required.
8. These two basis for the decision raise a number of legal issues, namely:
 - the extent to which the press is entitled to special protection;
 - the extent to which statements on politicians and public officials are entitled to special protection;
 - circumstances where requiring the journalists to disclose the source of information to satisfy the requirement of “clarity of journalism”;
 - and the appropriate standard to be applied in defamation cases involving politicians and public officials.

Hence, the following sections analyze these questions in a greater detail from international perspective and also outline of the test applied for an interference with freedom of expression under the international law.

IV. Restrictions on the Right to Freedom of Expression

9. Iraq’s international legal obligations to respect freedom of expression are, *inter alia*, spelt out in Article 19 of the ICCPR.² Iraq also signed the Arab Charter on Human Rights³ that

² Article 19 of the ICCPR states

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

was adopted by the Arab League in 1994. Article 32 of the amended version of the Arab Charter from 2004 also guarantees freedom of expression.⁴

10. The right to freedom of expression is not absolute. In order to comport with that guarantee, any interference to freedom of expression must meet a strict three-part test. This test has been affirmed by the UN Human Rights Committee, established under the ICCPR, as well as other regional judicial bodies dealing with human rights,⁵ in the following manner.

- *First*, the interference must be provided for by law. This implies not only that the restriction is based in law, but also that the relevant law should be clear and accessible and void of vagueness.
- *Second*, the interference must pursue a legitimate aim. The list of aims in Article 19(3) of the ICCPR is exclusive and no other aims are legitimate for restricting freedom of expression. It is generally accepted that defamation laws serve the legitimate aim of protecting reputations.
- *Third*, only restrictions that are necessary to secure one of these aims are permitted. This part of the test presents a high standard to be overcome by the State seeking to justify the restriction. The reasons given to justify the restriction must be “relevant and sufficient”. Finally, the impact of restrictions must be proportionate⁶ in the sense that the harm to freedom of expression must not outweigh the benefits in terms of the interest protected. A restriction which provided limited protection to reputation but which seriously undermined freedom of expression would not pass the test.

11. As a party to the ICCPR, the courts in Iraq must subject any interference to freedom of information to this test.

V. Argument

A. *Special Protection for the Press*

12. It is widely recognized that the press merits special protection under the guarantee of freedom of expression. This is reflected in the press freedom provisions in many constitutions and in international and comparative jurisprudence. International bodies repeatedly stressed out that it is the mass media that make the exercise of freedom of

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

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

³ Arab Charter on Human Rights, adopted by the Arab League in 1994, updated version from 2004, entered into force on 16 March 2008.

⁴ Article 32 of the Arab Charter states:

1. The present Charter guarantees the right to information and to freedom of opinion and expression, as well as the right to seek, receive and impart information and ideas through any medium, regardless of geographical boundaries.

2. Such rights and freedoms shall be exercised in conformity with the fundamental values of society and shall be subject only to such limitations as are required to ensure respect for the rights or reputation of others or the protection of national security, public order and public health or morals.

⁵ *Mukong v. Cameroon*, 21 July 1994, para 9.7.

⁶ *Morais v. Angola*, 18 April 2005, para 6.8.

expression a reality.⁷ They also noted that the press must be able to impart information and ideas on matters of public interest; as the press not only has the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of exercising independent control of government.

B. Statements with Respect to Politicians and Public Officials

13. The first instance court concluded that the defendants in the present case failed “to consider the reputation of the plaintiff and the symbol” that the President represents; and violated a number of provisions of the Iraqi legislation that prohibit publishing material that harm the head of state and the head of government.

14. In response to this conclusion, ARTICLE 19 and IFJ wish to point out that in a number of jurisdictions, politicians and public officials are required to tolerate a greater degree of criticism than ordinary citizens. There are a number of reasons for this higher standard. *First*, and most importantly, democracy depends on the possibility of open public debate about matters of public interest. Without this, democracy is a formality rather than a reality. Hence, those who hold office in government and who are responsible for public administration must always be open to criticism and any attempt to interfere with such criticism amounts to unacceptable political censorship.⁸ *Second*, public officials have already knowingly and willingly exposed themselves to scrutiny by assuming public functions. *Third*, public officials normally have greater access to the means of communication and hence can respond publicly to any allegations whereas this may not be easy for ordinary citizens. Inasmuch as the *Guardian’s* article concerned the Prime Minister of Iraq and Intelligence Services, these special standards are clearly relevant. This standard has been widely recognized in the regional and national comparative jurisprudence.
 - 14.1. For example, in its very first defamation case, the European Court of Human Rights (“European Court”) emphasized that “*the limits of acceptable criticism are ... wider as regards a politician as such than as regards a private individual*”, as politician “*inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and must consequently display a greater degree of tolerance.*”⁹ This case concerned a conviction of a journalist for defamation of the retiring Austrian Prime Minister (Chancellor). The journalist harshly criticized the Chancellor for agreeing to collaborate with a political party headed by a former Nazis. The journalist used expressions such as “basest opportunism”, “immoral” and “undignified” to describe his attitude. The European Court ruled in favor of the journalist, highlighting the importance of political debates in a democratic society.

 - 14.2. An even greater degree of tolerance applies to criticism of governments. In *Castells vs. Spain*, the European Court held that the “*limits of permissible*

⁷ The Inter-American Court of Human Rights, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, para 34.

⁸ The Judicial Committee of the Privy Council, *Hector v. Attorney-General of Antigua and Barbuda*, [1990] 2 AC 312 (PC), p. 318.

⁹ *Lingens v. Austria*, 8 July 1986, para 42.

criticism are wider with regard to the Government than in relation to a private citizen, or even a politician.”¹⁰ This case concerned the conviction for defamation of an opposition Member of Parliament, who published an article complaining of the inactivity on the part of the authorities with regard to numerous attacks and murders that had taken place in the Basque Country. The article alleged that the police were in collusion with the guilty parties and inferred that the Government was responsible.

- 14.3. In 1994, the Inter-American Commission on Human Rights (“Inter-American Commission”) issued a study on the compatibility of the laws that provide special protection for the honor and reputation of public official with international standards. The Commission held that such laws offended freedom of expression, and noted that, *“in democratic societies political and public figures must be more, not less, open to public scrutiny and criticism. The open and wide-ranging public debate, which is at the core of a democratic society, necessarily involves those persons who are involved in devising and implementing public policy.”*¹¹
- 14.4. In the 2000, the Joint Declaration of the three special international mandates for promoting freedom of expression - the UN Special Rapporteur on Freedom of Expression, the OSCE Representative on Freedom of the Media and the Organization of American States Special Rapporteur on Freedom of Expression – stated that *“at a minimum... defamation laws should reflect the importance of open debate about matters of public concern and the principle that public figures are required to accept a greater degree of criticism than private citizens; in particular, laws which provide special protection for public figures, ..., should be repealed.”*¹²
- 14.5. The principle that politicians and public officials must tolerate a greater degree of criticism has been stressed by courts in a number of national jurisdictions. For example:
- In 1994, in a case where public officials tried to block publication of an autobiography they considered damaging, the Indian Supreme Court ruled that public officials did not have a right of privacy or remedy of action for damages with respect to acts and conduct relevant to their official duties.¹³ As a result, the government and bodies exercising governmental power could not maintain a suit in defamation.¹⁴
 - In 1994, the Hungarian Constitutional Court struck down Section 232 of the Penal Code which provided special protection against defamation for public officials, finding it an unacceptable limitation to freedom of expression.¹⁵
 - In 1985, the Netherlands Supreme Court has held that public figures must tolerate more and sharper criticism than ordinary citizens.¹⁶

¹⁰ *Castells v Spain*, 23 April 1992, para 46.

¹¹ Annual Report of the Inter-American Commission on Human Rights, 1994, p. 210.

¹² Joint Declaration. 30 November 2000.

¹³ *Rajagopal & Anor v. State of Tamil Nadu* [1994] 6 SCC 632 (SC), para. 21.

¹⁴ *Id.*, para. 26.

¹⁵ Decision 36/1994. (VI.24) AB.

¹⁶ *Herrenberg/Het Parool* case, 6 March 1985, *Nederlandse Jurisprudentie* 1985, 437.

- In 1993, the House of Lords of the United Kingdom held that government bodies have no right to sue for defamation, in particular because of the effect this might have on freedom of speech.¹⁷

C. *Disclosure of Journalistic Sources*

15. The first-instance court requested the defendant journalists to disclose their sources. When they refused to do so, the court concluded that they failed to “follow the standards of clarity journalism” and consequently found their article harmful and defamatory. In the respectful opinion of ARTICLE 19 and IFJ, this conclusion is not in conformity with relevant international standards. We present the relevant standards below.
16. The right of journalists to protect the confidentiality of their sources has recognized widely by international and regional bodies. Most notably:
 - 16.1. The annual resolution of UN Commission on Human Rights in 2005 stressed “*the need to ensure greater protection for all media professionals and for journalistic sources*”.¹⁸
 - 16.2. The UN Special Rapporteur on Freedom of Expression found that the protection of sources has a “primary importance” for journalists to be able to obtain information and that the power to force disclosure should be strictly limited. The Special Rapporteur stated that in “*in order for journalists to carry out their role as a watchdog in a democratic society, access to information held by public authorities, granted on an equitable and impartial basis, is indispensable. In this connection, the protection of sources assumes primary importance for journalists, as a lack of this guarantee may create obstacles to journalists' right to seek and receive information, as sources will no longer disclose information on matters of public interest. Any compulsion to reveal sources should therefore be limited to exceptional circumstances where a vital public or individual interest is at stake.*”¹⁹
 - 16.3. In 2000, the Committee of Ministers of the Council of Europe adopted a Recommendation on the right of journalists not to disclose their sources of information.²⁰ The Recommendation states that exceptions to the right to protection of journalistic sources are possible only if disclosure was necessary to protect human life, to prevent major crime or for the defense of a person accused of having committed a major crime. Moreover, it explicitly prohibits the disclosure of information in the context of defamation cases, stating that “*in legal proceedings against a journalist on grounds of an alleged infringement of the honor or reputation of a person, authorities ... may not require for that purpose the disclosure of information identifying a source by the journalist.*”²¹

¹⁷ *Derbyshire County Council v. Times Newspapers Ltd. and Ors* [1993] 1 All ER 1011, p. 1017.

¹⁸ The right to freedom of opinion and expression, Human Rights Resolution 2005/38, E/CN.4/2005/L.10/Add.11, 19 April 2005.

¹⁹ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr. Abid Hussain, submitted pursuant to Commission resolution 1997/27.

²⁰ Recommendation No. R (2000)7 of the Committee of Ministers to Member States, 8 March 2000.

²¹ *Id.*, Principle 4.

- 16.4. The European Court, in the case of *Goodwin v. the United Kingdom*,²² ruled in favor of the journalist who refused to reveal his source that had provided him with information about the financial circumstances of a company. The European Court found the protection of journalistic sources one of the basic conditions for press freedom and without which “*sources may be deterred from assisting the press in informing the public on matters of public interest. As a result, the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected.*”²³
- 16.5. Similarly, the Inter-American Commission stressed out that confidentiality of journalistic sources “*has to do with the granting of legal guarantees to ensure anonymity and to avoid potential reprisals that could arise from the dissemination of certain information. Confidentiality is therefore an essential element in journalism and in the task of reporting on matters of public interest with which society has entrusted its journalists.*”²⁴
17. The international recognition of the right to protection of journalist was followed by adoption of national laws or court decisions confirming the right. Today about twenty state constitutions contain provisions protecting journalistic sources. Moreover, while some national laws allow for exceptions to the right, other offer absolute protection.

D. Standard Required of Publications Regarding Politicians or Public Officials

18. Although politicians have to tolerate a greater degree of criticism, as noted above, they clearly have some right to protection for their reputations and honor. Accordingly, there are some limits on what may be said about them. The international bodies has not established a clear standard in such cases, however, the review of regional and domestic jurisdictions shows that courts have indicated a number of factors to be taken into consideration. Many jurisdictions require only that the media did not act with malice – by publishing a false statement either knowingly or with reckless disregard for the truth - or that the responsible journalist acted reasonably or exercised some measure of professional diligence. Even in the latter case, courts have recognized that publication may be warranted in the public interest even though little or no verification of the facts is possible.
- 18.1. As for the European Court, factors to be taken into account in determining whether a statement is defamatory include the goal of the journalist in making the statements: if the goal is to promote reform or to inform the public, rather than to undermine reputations, there will be a presumption that the statements are protected by the guarantee of freedom of expression.²⁵ The Court also held that good faith of journalist is relevant in determining whether certain statements are defamatory.²⁶

²² *Goodwin v. the United Kingdom*, 27 March 1996, Application No. 17488/90

²³ *Id.*, para. 39.

²⁴ Inter-American Commission on Human Rights, Report on the Situation of Human Rights in Venezuela OEA/Ser.L/V/II.118 doc. 4 rev. 2 29 December 2003.

²⁵ *Thorgeirson v. Iceland*, 25 June 1992; *Oberschlick v. Austria (No. 2)*, 1 July 1997.

²⁶ *Schwabe v. Austria*, 28 August 1992; *Oberschlick v. Austria (No. 1)*, 23 May 1991; *Oberschlick (No.2)*.

- 18.2. In India, in a case involving the intended publication of the autobiography of a convicted criminal which alleged corruption among police officers and public servants, the Supreme Court ruled that no liability will ensue, even if it is based on false facts, unless the defendant acted with actual knowledge of falsity or reckless disregard for the truth. The court added that it was enough for the defendant (member of the press or media) to prove that “he acted after a reasonable verification of the facts; it is not necessary for him to prove that what he has written is true.”²⁷
- 18.3. In Australia, the High Court held that nobody can be responsible for defamation if he/she is under a legal, moral or social duty to make statements as to protect otherwise false and defamatory publications concerning the government and political matters. However, in such cases, journalists and publishers must prove that they have acted reasonably. This implies that they had reasonable grounds to believe the allegations were true, that they did not in fact know they were false and that they took some steps to verify the accuracy of the material. In addition, a response should be sought from the plaintiff and published, unless this proves impossible or would be inappropriate in the circumstances.²⁸
- 18.4. In Hungary, the Constitutional Court decided that false factual allegations which tend to damage the honor of public officials may be punished only if the person making the statement knew or could have known that the allegations were untrue. A defendant in a defamation case involving public officials is therefore required to prove only that statements of fact were not made with conscious knowledge that they were untrue, or with reckless disregard as to their truth.²⁹

VI. Conclusions

19. Freedom of expression has been recognized as a basic condition for democracy and indeed human progress and development. The free flow of information and ideas is important in many walks of life but it is the very lifeblood of a democratic system of government. As a result, it is widely accepted that politicians and public figures must tolerate a greater degree of criticism and scrutiny than ordinary citizens. The media plays a unique role in this regard, keeping the public informed and acting as watchdog of government.
20. These fundamental principles have led courts in many jurisdictions to conclude that when criticizing politicians and public figures, the media cannot be required to meet the high standard of proving the accuracy of all of the information they publish or to disclose their sources. Such requirements would inevitably give rise to excessive media caution and interfere with the flow of information to the detriment of the public interest. In short, they would exert an unacceptable chilling effect on freedom of expression. As outlined above, in many countries, the media is only required to have acted with some degree of professionalism. The precise test varies from country to country – ranging from a simple absence of malice to a requirement of some diligence in checking the accuracy of information – but in each of these jurisdictions the standard is liberal.

²⁷ *Rajagopal*, para. 26

²⁸ *Lange v. Australian Broadcasting Corporation* (1997) 71 ALJR 818 (HC).

²⁹ Decision 36/1994. (VI.24) AB of the Constitutional Court.

21. In sum, this Brief suggests that under international standards and in many countries around the world, the decision of the first instance court in this case would have been completely or partially invalidated. Moreover, it is respectfully submitted that clear guidance from the Appeal Court in Baghdad on the extent of criticism that politicians must tolerate will provide an important protection for legitimate criticism of public officials or public figures throughout the whole country.
22. **This is the opinion of ARTICLE 19 and the IFJ, prepared by the undersigned, and is subject to the decision of this Court.**

JUDr Barbora Bukovska
Senior Director for Law
ARTICLE 19

Aidan White
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