

Iraq: The New Constitution Must Protect Human Rights

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Iraq: The New Constitution Must Protect Human Rights

1. Introduction

The people of Iraq are now engaged in a process of drafting a new constitution. Article 61 of Law of Administration for the Transitional Period requires the National Assembly to write the draft of the permanent constitution by no later than 15 August 2005. A general referendum on the draft shall be held no later than 15 October 2005.¹

Article 60 of the Law of Administration for the Transitional Period states that “the National Assembly shall write a draft of the permanent constitution of Iraq. This Assembly shall carry out this responsibility in part by encouraging debate on the constitution through regular general public meetings in all parts of Iraq and through the media, and receiving proposals from the citizens of Iraq as it writes the constitution.” It is therefore important that there is an informed debate on the draft constitution. This should include making the drafts of the constitution available for comments, and not only carrying out discussions on general issues.

This is a unique opportunity for Iraq to draft a new Constitution that is inclusive and protects human rights. Very few countries today have the chance to go through this process and to ensure that mistakes of the past including in Iraq and in other countries are not repeated. This is also a chance for Iraq to learn from successes and good examples in other countries.

This document is not a comprehensive discussion of the different provisions that need to be included in the new Iraqi Constitution in order to promote and guarantee human rights. It rather highlights some recommendations that are of particular relevance to Iraq today. The document depends for its analysis on a draft of the constitution that was published in Arabic in Al-Sabah newspaper in Iraq on 26 July 2005. The analysis is primarily related to the Chapter of the draft that is titled “Basic Rights and General Freedoms”. The Law of Administration for the Transitional Period envisages that the “draft permanent constitution shall be presented to the Iraqi people for approval in a general referendum to be held no later than 15 October 2005. In the period leading up to the referendum, the draft constitution shall be published and widely distributed to encourage a public debate about it among the people.” It is not clear from this whether during that period the result of the debate could lead to alteration of the draft. Further, in order for the Iraqi people to participate in a meaningful informed discussion around the draft, this has to start during the period of the drafting. Some drafts have been leaked,² however their status was not known, and there was no clear

¹ This is based on paragraph 2 (c) of Security Council Resolution 1546.

² On 30 June 2005, it is reported that the Iraqi newspaper al-Mada published a version of what it claimed the bill of rights in the constitution. See Nathan J. Brown, Constitution of Iraq: Draft Bill of Rights, Carnegie Endowment for International Peace.

channel for the public at large and those concerned to address a specific body in order to provide comments.

2. Relation between National Law and International Law

The new Constitution should make a specific reference to international law as one of the sources of national legislation.

In case of conflict between national law and international law, the Constitution should specify that international law should prevail. However, the draft Constitution states that Iraq is committed to international treaties as long as they do not contradict the Constitution. This might risk placing Iraq in breach of its international obligations. In a separate provision, the draft Constitution also states that in addition to the rights enshrined in the Constitution, Iraqis will enjoy all rights that are enshrined in international treaties that Iraq is a state party to as long as that does not contradict the provisions of Islam. According to the draft Constitution, Islam is the sources (not a source) of legislation. According to Article 27 of the Vienna Convention on the Law of Treaties, a state may not invoke the provisions of its internal law as justification for its failure to observe its international obligations.

Iraq is a state party to the following human rights treaties, among others:

- The International Covenant on Civil and Political Rights (ICCPR, ratified on 23 March 1976);
- The International Covenant on Economic, Social and Cultural Rights (ICESCR, ratified on 3 January 1976);
- The International Convention for the Elimination of All Forms of Racial Discrimination (CERD, ratified on 13 February 1970);
- The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, ratified on 12 September 1986);
- The Convention on the Rights of the Child (CRC, ratified on 15 July 1994).

Iraq has also ratified a number of important Conventions of the International Labour Organisation, including:

- Convention number 29: Forced Labour (ratified in 1930);

- Convention number 98: Right to Organise and Collective Bargaining (ratified in 1962);
- Convention number 100: Equal Remuneration (ratified in 1963);
- Convention number 105: Abolition of Forced Labour (ratified in 1959);
- Convention number 111: Discrimination (Employment and Occupation) (ratified in 1959);
- Convention number 138: Minimum Age (ratified in 1985);
- Convention number 182: Worst Forms of Child Labour (ratified in 1999).³

Iraq is also a High Contracting Party to several international humanitarian law treaties:

- Convention on the Prevention and Punishment of the Crime of Genocide of 1948
- The Four Geneva Conventions of 1949;
- The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954;
- The Hague Protocol for the Protection of Cultural Property in the Event of Armed Conflict of 1954;
- The Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction of 1972.

All human rights enshrined in international treaties ratified by Iraq, as well as in customary international law, should be an integral part of this Constitution and should be enforceable in courts. For example, Article 2 of the ICCPR states that states party to the Covenant (including Iraq), have the following obligations:

- “(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

³ This list is not exhaustive of all the ILO Conventions ratified by Iraq. It reflects the ratifications related to the important Conventions that reflect the principles of the fundamental rights that are enshrined in the ILO Declaration on Fundamental Principles and Rights at Work of 1998.

(c) To ensure that the competent authorities shall enforce such remedies when granted.”

Further, drafting the constitution should also benefit from the recommendations of the various UN mechanisms, especially the treaty-bodies that made very specific recommendations related to legislation. Many of these recommendations need to be addressed in the new constitution in order to address the problem of having legislation in Iraq that is not consistent with international standards.

The new Constitution should guarantee full implementation of international law into the domestic legal system. This includes providing for the amendment of national law in case of incompatibility with international law. Human rights treaties ratified by Iraq specifically require that. For example, Article 2 (2) of the ICCPR stated that “[w]here not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.”

Further, Amnesty international notes the inclusion of a provision in the draft that protects “tribes”. This provision could contribute to ensuring implementation of ICCPR Article 27, which provides that persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language. However, it is also important to ensure that the Constitution protects the human rights of everyone, without discrimination, that the cultural rights of groups and communities is balanced with the rights of individuals, and that traditional practices of tribes or other minorities are exercised in a way that does not conflict with international human rights standards.

In this regard, AI is concerned to note that the traditional cultural practices of tribes often subordinate women or conflict with the individual's right to life, health or physical integrity, and that many tribes operate parallel justice systems which often have particular negative impact on women, children, fair trial guarantees, and impose punishments that are cruel, inhuman, or degrading. It is essential therefore that if parallel justice systems are to be allowed to continue to function, steps should be taken to ensure that they must not conflict with international human rights standards, as set out in the UDHR, ICCPR and ICESCR and other key human rights instruments, with regard to the principles they apply, the penalties they impose, and the procedures that they follow. If this cannot be done, they must be abolished.

The CEDAW Committee noted that “Discriminatory laws are still on the statute books of many States parties. The co-existence of multiple legal systems, with customary and

religious laws governing personal status and private life and prevailing over positive law and even constitutional provisions of equality, remains a source of great concern.”⁴

3. Indivisibility of All Human Rights

The new Constitution should emphasise that all human rights civil, cultural, economic, political, and social are protected and are indivisible. There is no provision in the draft to that effect. Therefore, all the rights should be included in a unified section of the constitution, guaranteed and enforceable on equal footing. This would truly reflect the equal status of all human rights. The Vienna Declaration and Programme of Action states that “All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.” It is positive that the draft states that rights and duties listed in the draft are not exhaustive. But it is essential that the Constitution makes a statement about the status of international law in the Constitution as detailed above, and emphasizes the indivisibility of rights.

4. Derogations, Limitations, and Restrictions of rights

The new Constitution should guarantee all rights at all times, unless they can be restricted or suspended under specific conditions and consistent with international law. The ICCPR, for example, only allows restrictions on some rights in the Covenant. Restrictions may be imposed on the right to liberty of movement and freedom to choose one’s residence (Article 12.1); freedom of expression (Article 19.3), right to peaceful assembly (Article 20.2); freedom of association (Article 22.2); and to take part in public affairs (Article 25). Such restrictions are allowed generally only if they are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights.⁵ Restrictions of rights are allowed only if in their implementation there is no discrimination on the ground of race, colour, sex, language, religion or social origin.

⁴ CEDAW Committee, Statement to commemorate the twenty-fifth anniversary of the adoption of CEDAW, 13 October 2004.

⁵ Similar limitations or restriction on selected rights or freedoms are found in the ICESCR, the Convention on the Rights of the Child, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. It should be noted that Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Elimination of Racial Discrimination do not allow for the imposition of restrictions on rights contained in these treaties.

In international law, there are a number of rights which explicitly must never be suspended even during states of emergency. The new Constitution should be clear about the declaration of states of emergency, and which rights are allowed to be suspended. These should be fully consistent with international human rights law. According to Article 4 of the ICCPR, emergency measures entailing derogations of human rights can only be taken:

- in time of public emergency which threatens the life of a nation;
- to the extent strictly required by the exigencies of the situation;
- after a state of emergency has been formally proclaimed; and
- other states parties of the ICCPR have been informed.

Emergency measures cannot be inconsistent with other obligations under international law and cannot involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

Among the rights not subject to derogation are: right to life, the prohibition of torture and degrading treatment, prohibition of medical or scientific experimentation without consent, prohibition of slavery, slave-trade and servitude, prohibition of imprisonment because of inability to fulfil a contractual obligation, the principle of legality in the field of criminal law, (i.e. the requirement of both criminal liability and punishment being limited to clear and precise provisions in the law that was in place and applicable at the time the act or omission took place, except in cases where a later law imposes a lighter penalty), the recognition of everyone as a person before the law, and freedom of thought, conscience and religion. The principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. There should be no discrimination in the implementation of measures during states of emergency. Further, in no circumstances a state of emergency can be invoked as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence.⁶

⁶ See The Human Rights Committee, General Comment 29: States of Emergency (CCPR/C/21/Rev.1/Add.11), 2001.

5. Prohibition of Torture, and other Cruel, Inhuman and Degrading Treatment or Punishment

The draft Constitution includes several positive provisions which prohibit all forms of physical and psychological torture. The Constitution also prohibits cruel and inhuman treatment, and the use of evidence extracted under torture, coercion or threat.

Despite these very positive provisions, the Constitution is missing some important guarantees. Such explicit reference to these guarantees is essential given the fact that Iraq so far is not a party to the Convention against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment. The Constitution should define torture in a way that is consistent with international standards, particularly to include that it is prohibited to torture someone to extract information or confession from him or her, or from a third party. The Constitution should define torture in a way consistent with Article 1 of CAT. The prohibition of cruel and inhuman treatment should also be extended to corporal punishments as well. It should be noted that no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture or other cruel, inhuman or degrading treatment or punishment.

There should also be a clear prohibition to expel, return ("refouler") or extradite a person to another state where there are substantial grounds for believing that he or she would be in danger of being subjected to torture. Diplomatic assurances that torture will not take place are never a sufficient guarantee against torture or ill-treatment.

The new Constitution should establish jurisdiction over offences of torture when they are committed in the Iraqi territory under its jurisdiction; when the alleged offender is Iraqi national; and when the victim is Iraqi national. Iraq shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him.

The draft Constitution guarantees the right to seek compensation. However, it should guarantee all the five forms of reparation, which, in addition to compensation, includes rehabilitation, restitution, guarantees of non-repetition, and satisfaction, as elaborated in the "Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law".⁷

⁷ See Commission on Human Rights Resolution 2005/ 35 and the "Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law which are annexed to it".

6. Fair Trials and abolition of Death Penalty

Fair Trial: The draft Constitution includes some important provisions for the guarantees of due process and fair trial. However, there are some important guarantees that are missing. It should guarantee the following, in addition to the provisions already in the draft:

- The presumption of innocence until proven guilty;
- Right to liberty and security of person and the prohibition of arbitrary arrest;
- Right to be informed immediately of the reasons for arrest or detention and of any charges;
- Right to notification in a language that the person understands;
- Right of the detainee to have access to the outside world, including the right to communicate and receive visits;
- Right to trial within a reasonable period of time or to release from detention (not only the right to be brought before a judge within a short period of time (24 hours) as is in the draft now);
- Right to reparation for miscarriage of justice (the draft provides for compensation for torture and not for reparation for miscarriage of justice generally)
- Right for women in custody to be held separately from men, and supervised by female staff;
- Right to trial by a competent, independent and impartial tribunal established by law;
- Right to a public hearing, and the guarantees that judgements are made public. Exclusion of the press and the public can be made only for reasons of morals, public order, or national security in a democratic society (the draft only guarantees public judgement);
- Right to be tried in one's presence;
- Procedures against children in conflict with the law to take account of the juvenile's age, the desirability of promoting the juvenile's rehabilitation, and best interest of the child. Arrest detention and trial of the child should be used as a measure of last resort and in conformity of the CRC;

The Death Penalty: Amnesty International believes that the death penalty should be abolished. It is the ultimate cruel, inhuman and degrading punishment. It violates the right to life. It is irrevocable and can be inflicted on the innocent; moreover, it has never been shown

to deter crime more effectively than other punishments. The international trend is towards the abolition of the death penalty. Therefore, Amnesty International calls on the Constitution Drafting Committee to abolish the death penalty.

International standards place significant restrictions on the death penalty. For example they require that it be limited to the “most serious crimes”, which has been interpreted to mean that it should be “quite exceptional measure”.⁸ Safeguard 1 of the UN Safeguards guaranteeing protection of the rights of those facing the death penalty, endorsed by the UN General Assembly in 1984, states that crimes punishable by death “should not go beyond intentional crimes, with lethal or other extremely grave consequences”. International standards also require that the death penalty can only be carried out pursuant to a final judgement rendered by a competent court. It should not be imposed on children under the age of 18 or carried out on pregnant women. There should be guarantees for the right to seek amnesty, pardon or commutation of the sentence in all cases without exception.

7. Independence of the Judiciary

It is important for Iraq to create or maintain specific mechanisms for promotion and protection of human rights, including through the courts and the judiciary. Therefore, as Principle 1 of the Basic Principles on the Independence of the Judiciary states, the “independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.”

An independent, impartial judiciary plays an essential role in ensuring that human rights are guaranteed to all without distinction. It also requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected. In order to be able to ensure that, the judiciary should be aware of Iraq’s obligations under international law.

It will therefore be important that the Iraq judiciary, as the guardians of the Constitution, is strengthened. This requires that the new Constitution protects the separation of powers. Principle 4 of the Basic Principles of the Independence of the Judiciary requires that “There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.”

⁸ The Human Rights Committee, in its General Comment 6, stated that “the expression ‘most serious crimes’ must be read restrictively to mean that the death penalty should be a quite exceptional measure.” See General Comment number 6: The right to life, 1982, para. 7.

Principle 10 of the Basic Principles requires that “Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.”

8. Crimes under International Law

It is essential that the new Constitution establishes universal jurisdiction for the crimes of genocide, crimes against humanity, war crimes, torture, extra-judicial executions and "disappearances", in order that Iraqi national courts can investigate and, if there is sufficient admissible evidence, prosecute anyone who enters Iraqi territory suspected of these crimes, regardless of where the crime was committed or the nationality of the accused or the victim.

There should be no immunity for past crimes and that there is no time limit on the liability to prosecution of a person responsible for grave crimes under international law. Superior orders, duress and necessity should not be permissible defences. The new Constitution must also establish that Iraq must fully cooperate with investigations and prosecutions by the competent authorities of other states exercising universal jurisdiction over grave crimes under international law and with international courts exercising universal jurisdiction over such crimes. Iraq already has the obligation to practice universal jurisdiction over some crimes according to the Fourth Geneva Convention Relevant to the Protection of Civilian Persons in Times of War

9. Economic, Social and Cultural Rights

The draft constitution does not include effective guarantees to most of the economic, social and cultural rights. The draft currently provides that every Iraqi has the right to education, health care, social security, provision of work, and the state guarantees those within its resources.

A number of constitutions in emerging democracies include protection of economic, social and cultural rights. For example, the Constitutions of the Republic of South Africa and Brazil, include, among other things, protections of rights to education, housing, labour rights

freedom of trade unions, the highest attainable standards of physical and mental health, food, water and social security.⁹

Iraq is a state party to a number of international human rights treaties securing economic, social and cultural rights: (ICESCR, ICERD, ICEDAW, CRC) and therefore has the obligation that the new Constitution should guarantee that Iraqi authorities will take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of economic, social and cultural rights.¹⁰ The constitution does not make reference to the obligation to make progressive realisation of the economic, social or cultural rights.

Among essential economic, social and cultural rights guarantees, the new Constitution should ensure the following:

- adequate standard of living including right to food, water, and housing
- right to education;¹¹
- right to the highest attainable standard of physical and mental health;
- right to work and rights at work;
- freedom of association and the right to organise;¹² and
- cultural rights.

10. Discrimination

The draft Constitution prohibits discrimination on some grounds, which is a positive step. However, there are grounds of discrimination prohibited in international human rights

⁹ See Chapter 2 of the Constitution of the Republic of South Africa: Bill of Rights, at <http://www.polity.org.za/html/govdocs/constitution/saconst.html?rebookmark=1>

¹⁰ This is embodied in Article 2 of the ICESCR and Article 4 of the CRC. For interpretation of these articles see Concluding observations of the Committee on Economic, Social and Cultural Rights: Iraq, (E/C.12/1/Add.17), 12 December 1997, para. 25 and Concluding observations of the Committee on the Rights of the Child: Iraq, (CRC/C/15/Add.94) 26 October 1998, para. 13.

¹¹ This is currently guaranteed in the draft only to Iraqis, while international law makes the obligation that this should be guaranteed to everyone.

¹² See Article 8 of the ICESCR and International Labour Organisation Recommendations 87 and 98. Iraq is a state party only to ILO Convention 98 on Right to Organise and Collective Bargaining.. ILO Conventions 87 and 98 are part of the ILO standards reflecting fundamental principles enshrined in the ILO Declaration on Fundamental Principles and Rights at Work of 1989. See also in relation to the status of freedom of association in the current applicable Iraqi law: Concluding observations of the Committee on Economic, Social and Cultural Rights: Iraq. (E/C.12/1/Add.17), 12 December 1997, para. 16.

law, which should be also prohibited in the Constitution. For example, the draft Constitution does not prohibit discrimination on the basis of national and social origin (rather than nationality), language, wealth, birth, or property.

The current draft guarantees some rights to Iraqis only. For example, the draft constitution provides equality before the law for all Iraqis; equal opportunities are guaranteed to all Iraqis; and that every Iraqi has the right to life, liberty, security of person and privacy. This is not consistent with international law. It is important that the new Constitution prohibits discrimination and protects rights to all those under the jurisdiction of Iraq, according to international human rights law. This is an established principle of international human rights law that is embodied in many provisions of human rights treaties.

International human rights law provides for only specific rights to be limited to citizens only. The ICCPR expressly states that citizens have the right to take part in the conduct of public life, to vote and to be elected. This is the only right in the ICCPR that is limited to citizens.¹³ Article 13 of the ICCPR is specific to aliens and allows for the alien lawfully in the territory of a state to be expelled in pursuance of a decision reached in accordance with law, and to have the right to appeal the decision. Once the alien is lawfully within a territory, his or her freedom of movement within the territory and the right to leave that territory may only be restricted in the same way as all others residing lawfully in the territory of the state can be restricted. This is only to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others (Article 12 of the ICCPR).

All the rights enshrined in the ICESCR are guaranteed for everyone, whether citizens or aliens. However, Article 2 (3) of the ICESCR creates a specific exception to the general rule of equality for developing countries: “Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.” As an exception to the general rule of equality, it should be noted that Article 2 (3) must be narrowly construed, may be relied upon only by developing countries, and only with respect to economic rights. States may not draw distinctions between citizens and non-citizens as to social and cultural rights. Measures taken by States to protect their citizens and economies from non-citizens should not be taken to the detriment of the enjoyment of human rights. As the exception in Article 2 (3) relates only to the obligation to fulfil economic rights, developing countries would still possess obligations to respect and protect economic rights, for example, to avoid discrimination on the basis of citizenship status. It is prohibited to discriminate against non-citizens in relation to working conditions and work requirements, including employment rules and practices with discriminatory purposes or effects.¹⁴

The Constitution should also prohibit discrimination against minorities in the civil, cultural, economic, political and social. For example, there should be no discrimination in fair

¹³ See General Comment No. 15: The position of aliens under the Covenant, 11 April 1986, para. 2.

¹⁴ UN Committee on Elimination of Racial Discrimination, General Recommendation 30: Discrimination against non-citizens (CERD/C/64/Misc.11/rev.3), 46th session.

trial proceedings; right to work and right at work; treatment and equality before the courts, including ensuring translation and interpretation if needed; participation in the conduct of public life; freedom of expression; freedom of association and the right to organise; cultural rights including right to profess and practise own religion, or to use own language; and in the right to education.

11. Women's human rights

The new Constitution should protect and promote equality between men and women. It is not enough that there is prohibition of discrimination on the basis of sex. The Constitution should specifically prohibit discrimination that has the effect or purpose of adversely affecting women's human rights.¹⁵ The Constitution should therefore reflect specifically Article 1 of CEDAW and define discrimination against women as “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”

Amnesty International also recalls Security Council Resolution 1325 which “calls on all actors involved, when negotiating and implementing peace agreements, to adopt a gender perspective, including, inter alia: ... (b) Measures that support local women's peace initiatives and indigenous processes for conflict resolution, and that involve women in all of the implementation mechanisms of the peace agreements; (c) Measures that ensure the protection of and respect for human rights of women and girls, particularly as they relate to the constitution, the electoral system, the police and the judiciary.”¹⁶

Further, many women's groups in Iraq have voiced concerns about certain provisions contained in the current draft, especially the one which stipulates that Islam is the main source of legislation. Amnesty International takes no position with regard to any religion, but is concerned that interpretations of Islamic law may be used to perpetuate discrimination against women and other forms of discrimination. It is essential that discussions around the new Constitution address these concerns and ensure that the constitution prohibits unequivocally discrimination on the basis of gender and promotes women's full rights. Rulings of international human rights bodies emphasize the importance of ensuring that women's rights are not made subject to religious or minority concerns. The Human Rights Committee stressed that “States parties should ensure that traditional, historical, religious or cultural

¹⁵ See CEDAW concluding observation and concluding observations of the Committee on the Elimination of Discrimination Against Women: Iraq. A/55/38, 14 June 2000, para. 182.

¹⁶ Security Council Resolution 1325 on women, peace and security, para. 8.

attitudes are not used to justify violations of women's right to equality before the law and to equal enjoyment of all Covenant [ICCPR] rights."¹⁷

There is discussion among Iraqis that the Constitution will include reference or provisions of special measures or positive discrimination measures in the benefit of women. It should be noted that the adoption of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in CEDAW, but shall in no way entail as a consequence the maintenance of unequal or separate standards. If the new Constitution of Iraq includes provisions allowing for adoption of special measures, it should ensure as well that they shall be discontinued when the objectives of equality of opportunity and treatment have been achieved (Article 4 (1) of CEDAW).¹⁸

As a state party to CEDAW, Iraq is also under the obligation to "modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women."¹⁹ While the draft Constitution includes the positive provision that guarantees equality for women in the political, social, cultural, economic, educational life, this, according to the Constitution should not be inconsistent with provisions of *Shari'a*. Amnesty International believes that guarantees for equality for women's rights should be consistent with international law.

The draft Constitution includes some phrases that reflect stereotyped roles of women. It states for example that the State guarantees the duties of the woman towards the family and work in the society. International law requires that there are certain protections that should be accorded to women in work, including introducing maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances; and providing special protection to women during pregnancy in types of work proved to be harmful to her. These protections are aimed to protect women during maternity. They do not entail any protections due to stereotypical role of women. Article 16 of CEDAW requires state parties to take measures to ensure elimination of discrimination against women in all matters relating to marriage and family relations. It stresses for example the need to ensure "the same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount" (Article 16 (e) of CEDAW). International law places the obligation to care for the child on both parents, and not the mother only. For example, Article 27 (2) of the CRC, to which Iraq is a state party, states "The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development." The state is also asked to encourage the provision of the necessary supporting social services to enable parents to combine family obligations with

¹⁷ Human Rights Committee, General Comment 28: Equality of rights between men and women (CCPR/C/21/Rev.1/Add 10), 29 March 2000.

¹⁸ See also CEDAW Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Iraq. A/55/38, 14 June 2000, para. 189.

¹⁹ Article 5 (1) of CEDAW.

work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities. These clearly are aimed at both parents and not only the woman.

12. Children's Rights

The new Constitution should also guarantee rights of the child in accordance with the Convention on the Rights of the Child (CRC). The Constitution should define the child as "every human being below the age of eighteen years". The Constitution should also require the State to protect the rights of the child as provided in the international and regional conventions ratified by Iraq.

The new Constitution should particularly reflect the four principles of the CRC:

- Article 2 of the CRC: the obligation to respect and ensure the rights set forth in the Convention to each child within their jurisdiction without discrimination of any kind. (principle of non-discrimination)
- Article 3 (1) of the CRC: the best interests of the child as a primary consideration in all actions concerning children. (principle of best interest of the child)
- Article 6 of the CRC: the child's inherent right to life and ensuring to the maximum extent possible the survival and development of the child. (principle of survival and development of the child)
- Article 12 of the CRC: the child's right to express his or her views freely in "all matters affecting the child", those views being given due weight (principle of respect for the views of the child).

The new Constitution should clearly prohibit the recruitment or enlistment of children under 18 years into armed forces (or groups), and their use in hostilities. The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict raises from 15 to 18 years the minimum age for direct participation in hostilities, for compulsory recruitment by states and for any recruitment by non-governmental armed groups. The new Constitution should also prohibit the voluntary recruitment of people under 18. AI opposes the recruitment – whether voluntary or compulsory – and participation of children (people under the age of 18) in armed forces. It takes this position whether they are recruited by governments or armed political groups, believing that the participation of children in hostilities jeopardizes their physical and mental integrity.

The new Constitution should also ensure the right to education including, free compulsory education available to all under the jurisdiction of the state, different forms of secondary education, including general and vocational education. Education should be directed towards the development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations.

The draft Constitution prohibits the employment of children in degrading jobs or in jobs that are not appropriate for their young age. The constitution should be more explicit and clear and should prohibit employment of children in work that is harmful to their morals or health or dangerous to life or likely to hamper their normal development, or which interferes with their education. The Constitution should prohibit the worst forms of child labour, including from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development, and prohibit such employment for all children under the age of 18.²⁰

²⁰ See Article 32 of the Convention on the Rights of the Child and as is defined in ILO Convention 182 (Worst Forms of Child Labour Convention, 1999). Iraq is a state party to both CRC and the ILO Convention 182.