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Comments on the Draft Iraqi *Law on Non-Governmental Organizations* (قانون المنظمات غير الحكومية)

The International Center for Not-for-Profit Law (ICNL) is pleased to provide the following comments on the draft *Law on Non-Governmental Organizations* of the Republic of Iraq approved by the Council of Ministers and sent to the federal parliament in March 2009. ICNL offers these comments in the hopes that they will support Iraqi civil society representatives and government officials as they move forward in the drafting, analysis, and ultimately adoption of a new NGO law for the Republic of Iraq.

Introductory Comments

Laws affecting freedom of association are judged according to the standards set in Article 22 of the *International Covenant on Civil and Political Rights (ICCPR)*, which the Republic of Iraq ratified on 23 March 1976 without reservations. According to Article 22,

“Everyone shall have the right to freedom of association with others... No restrictions shall be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals, or the protection of the rights and freedoms of others.”

Article 24 of the *Arab Charter on Human Rights*, which went into effect on 15 March 2008, contains nearly identical language – as do international treaties in effect in Europe, the Americas, and Africa.¹ According to the strict standards created by these treaties, no restriction of freedom of association is permissible unless it is (1) contained in a written law that is accessible and written in clear language; (2)

About ICNL

ICNL is an international not-for-profit organization that provides technical assistance, research, and education to support the development of appropriate laws and regulatory systems for civil society organizations in countries around the world. ICNL has had the opportunity to provide assistance to civil society law reform projects in over 100 countries, including Afghanistan, Bahrain, Jordan, Palestine, and Yemen. We have worked closely with the US Department of State and Agency for International Development; the United Nations, European Union, World Bank, and other international institutions; the Open Society Institute and other private foundations; and scores of in-country colleagues.

¹ The *Universal Declaration of Human Rights* (Article 20) (1948), the *European Convention on Human Rights* (Article 11) (1950) (ECHR), the *African Charter on Human and Peoples’ Rights* (Articles 10 and 11) (1982), and the *American Convention on Human Rights* (Article 16) (1978) all contain almost identical provisions protecting the freedom of association.

“necessary in a democratic society”; and (3) in the interests of national security, public safety, public order, the protection of health or morals, or the protection of the rights and freedoms of others.

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As of this writing, non-governmental organizations (NGOs) in Iraq are subject to one of three separate laws depending on the region in which they operate. In most of Iraq, including Baghdad and the south and central regions, *Coalition Provisional Order Number 45* (November 2003) governs the registration and operation of NGOs. However, in the Sulaymaniya governorate, *Kurdistan Regional Government Decision Number 297* (December 1999) is the relevant law, and in the remainder of the Kurdistan Region (the governorates of Duhok and Erbil) *Kurdistan National Assembly Law Number 15* (October 2001) applies. Although the specific requirements of each law differ, the laws are quite similar in the sense that each provides for substantial and inappropriate governmental control over Iraqi civil society.

The new federal draft *Law on Non-Governmental Organizations* is an opportunity to remedy decades of tension between government and civil society by creating a modern and enabling legal environment that will promote good governance while empowering NGOs to contribute fully to the reconstruction and rehabilitation of Iraqi social, political, and economic life. The federal draft law will also provide an important benchmark for the evaluation of expected NGO legislation in the Kurdish Regional Government and in any additional Regional Governments that may form in the future – and may well serve as a model for emulation by other Arab states if it embraces international law and best practices.

ICNL has reviewed the federal draft law with these considerations in mind. Our analysis follows.

1. Restrictions on Donations and Grants

Issue: Article 18 of the draft law prohibits NGOs from receiving “donations and grants” “from within the Republic of Iraq or from abroad” without the permission of the Non-Governmental Organizations Department, and also requires individuals who wish to donate to NGOs to notify the NGOs Department ahead of time. The law does not specify how permission is obtained or on what grounds permission will be granted or denied, placing a potentially severe burden in the way of NGO sustainability and survival.

Discussion: *ICCPR Article 22*. As written, Article 18 allows government officials to cut off all donations and grants, both foreign and domestic, with or without cause. Particular NGOs may thus be starved of resources, essentially extinguishing their rights to associate. Such broad discretionary powers simply cannot be reconciled with *ICCPR Article 22*, which as discussed above prohibits any restrictions on freedom of association that are not both “necessary in a democratic society” and in the interests of national security, public safety, public order, the protection of health or morals, or the protection of the rights and freedoms of others. Although the need to protect against money laundering and terrorist financing is a legitimate government interest, the proposed restriction is so heavy-handed and all-embracing as to hinder and deter legitimate donor and grant-making support to NGOs engaged in the activities so critical to the reconstruction and development of Iraq. Indeed, to meet the standard “necessary in a democratic society” any imposed restriction must be the *least intrusive* means available to accomplish the government interest. The proposed restriction, which gives unfettered discretion to government officials to approve or deny donations and grants, is so disproportionate that it does not

meet the *ICCPR* standard – as demonstrated by the fact that other nations routinely meet their obligations to curb illegal uses of funds through less draconian means.

The UN Declaration on Human Rights Defenders. The restrictions on funding imposed by Article 18 are also inconsistent with the United Nations *Declaration on the Right and Responsibility of Individuals, Groups, and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, which affirms that each state has the responsibility to “adopt... the legal guarantees required to” protect human rights and fundamental freedoms (Article 2). Among these rights is the “right, individually and in association with others, to solicit, receive, and utilize resources for the express purpose of promoting and protecting human rights and fundamental freedoms.”² The UN High Commissioner for Human Rights has explicitly stated that the *Declaration’s* protections extend to the “receipt of funds from abroad.”³ In placing restrictions on the flow of foreign funding to human rights defenders, Article 18 is inconsistent with the *Declaration on Human Rights Defenders*.

Practical Effects. The creation of a strong and sustainable civil society depends upon the development of diversified sources of funding for NGOs. When freed from unnecessary and burdensome fundraising restrictions, civil society can become a powerful engine for economic growth. For example, a recent study of 36 developed and developing countries (including, for example, the United States, Canada, Hungary, Poland, South Africa, Egypt, and Morocco) found that civil society accounted for an average of 5.4% of the gross domestic product (GDP) of these countries, employing on average 4.4% of the work force.⁴ In Norway, where restrictions on sources of funding are minor, civil society accounted for \$5.5 billion dollars in expenditures (3.7% of GDP) in 1997; while in Morocco, where restrictions are much more stringent, civil society accounted for only \$270 million in expenditures (about 0.8% of GDP).⁵

The abovementioned study, and several others like it, all suggest that when NGOs are free of inappropriate restrictions on fundraising they can make a powerful contribution to the national economy. As such, legally registered NGOs should be permitted to seek and secure donations and grants directly from international and domestic donors without being restrained by unnecessary and inappropriate government intervention.

Moreover, given the fact that donations and grants are a substantial source of funds for NGOs, it is highly questionable that the NGOs Department would have the capacity to review all donations and transfers to NGOs in advance. At best, a restriction of this type will lead to serious delays in the legitimate work of NGOs; more disturbing is the possibility that this restriction will deter the contribution of badly-needed funds altogether.

² *Declaration on the Right and Responsibility of Individuals, Groups, and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Declaration on Human Rights Defenders)*, United Nations General Assembly Resolution 53/144 (9 December 1998), Article 13.

³ See *Commentary to the Declaration on Human Rights Defenders*, available online at <http://www.ohchr.org/english/issues/defenders/declaration.htm>.

⁴ Lester M. Salamon, S. Wojciech Sokolowski, et. al., *Global Civil Society: Dimensions of the Nonprofit Sector (Volume 2)* (Kumarian Press, 2004), p. 15.

⁵ *Id.* at p. 262, 234.

Recommendation: Delete Article 18.

2. Criminal Penalties

Issue: Article 26 provides for imprisonment of up to three years for any person who (1) is “a member of an organization which has been established contrary to the provisions of this law” or (2) has participated in the activities of a dissolved organization or an organization “whose foundation application was turned down.” In addition, any person who participates in the activities of an NGO that is temporarily suspended can be imprisoned for up to six months.

Discussion: In most countries, general criminal laws, such as those against fraud, embezzlement, and terrorism, already apply to every individual—including those associated with NGOs. Because general criminal laws already apply, there is usually no need to impose additional criminal penalties specific to NGOs. Such criminal penalties are likely to be either redundant when they restate the criminal code, or improper and unfair when they impose additional criminal liability beyond that which normally applies for other individuals.

Equally disturbing, the criminal penalties would potentially be applicable to conduct which is protected under international law. Article 26(2) refers to those who conduct activity in an organization whose foundation application was turned down or dissolved according to this law. Would this be applicable to all dissolved organizations, regardless of the basis for dissolution? What about those organizations which have dissolved voluntarily? To penalize those who carry out activities with unregistered groups – where those groups are engaged in legitimate activity – is a clear violation of freedom of association as enshrined in Article 22 of the *ICCPR*.

As discussed above, international best practice does not contemplate criminal penalties in NGO laws. Even within the Arab region, where criminal penalties are sometimes included in NGO laws, the Iraqi draft law’s provisions provide for much more severe punishments than neighboring countries and will likely have an extremely negative effect upon the development of Iraqi civil society.⁶ When participation in an NGO that is “established contrary to the provisions of this law” is punishable by up to three years’ imprisonment, it is clear that many otherwise qualified individuals will not form or join NGOs for fear that a minor violation of the law might result in a long prison term. Furthermore, individuals associated with existing NGOs may engage in self-censorship and limit their activities out of fear that more controversial activities might invite additional scrutiny and potential imprisonment. This is not to say that association and foundation laws should not contain any sanctions or compliance provisions at all. In order to ensure that the civil society sector practices good governance and remains transparent and accountable, it is appropriate to have special sanctions such as small fines, penalties, loss of tax benefits, and at the greatest extreme dissolution of the organization, for violations peculiar to these types of organizations. However, these compliance provisions must be appropriate and proportional – that is, designed to promote good practices rather than to inhibit the legitimate activities of civil society organizations.

⁶ Indeed, imprisonment of up to three years exceeds any comparable sanctions found in the NGO laws of, among other countries, Algeria, Bahrain, Egypt, Jordan, Oman, Qatar, the United Arab Emirates, and Yemen.

A variety of legal mechanisms designed to ensure transparency and accountability in the civil society sector while avoiding overly burdensome criminal punishments have been used in other countries. For example,

- In Croatia, violations of the *Law on Associations* are punished by monetary fines which are proportional to the severity of the violation, and no additional criminal penalties are imposed (Article 39).
- In Kosovo, the government may “suspend or revoke a registration for violation” of the NGO law only after giving “written notice of the violation and an opportunity” to the NGO to respond to the allegation (*Regulation on the Registration and Operation of Non-Governmental Organizations in Kosovo*, Section 5.2). This is the only sanction contemplated for violation of the NGO law and no additional criminal penalties are imposed.

For most violations of an NGO law—including improper fundraising practices, carrying on substantial business (for-profit) activities, and failing to submit financial and programmatic reports, administrative rather than criminal sanctions are most appropriate. Furthermore, decisions to impose these types of penalties should be made by independent agencies or courts and should be appealable to independent courts.

Recommendation: Delete Article 26. A mechanism providing for penalties, loss of benefits, and dissolution of NGOs in the event of misconduct already exists in Articles 19 and 25; general criminal laws already in place in Iraq provide for imprisonment in case of fraud, embezzlement, terrorism, and other crimes.

3. Registration Procedures

Issue: Articles 6 and 9 of the draft law establish a complicated and unnecessarily confusing registration process that may delay or discourage the formation of new NGOs. In addition, all NGOs are required to re-register every two years, a substantial detriment to the sustainability of civil society as well as a time-consuming burden for both NGOs and government officials.

Discussion: According to Article 9 of the draft law, individuals seeking to register an NGO in Iraq must complete a two-step process that involves filing an “incorporation application” (طلب التأسيس) as well as a “registration request” (معاملة التسجيل) with the Non-Governmental Organizations Department.

First, the NGO founders file an incorporation application with the Department that includes the names of the NGO and its founders, the address of the NGO as “certified by a competent official agency,” the telephone numbers and email addresses of the founders, and several additional documents. The NGOs Department has seven days to accept or reject the application, and if no decision is taken then the application is deemed accepted.

If and when the incorporation application is accepted, the NGO founders then have sixty days to file a “registration request” with the NGOs Department. The registration request must include the documents submitted as part of the incorporation application as well as several additional items, including an estimated budget for the first year of operations and a list of the NGO’s assets. If the founders fail to file

a registration request within sixty days of the acceptance of the incorporation application, then the registration and incorporation are automatically deemed rejected.

If all materials are filed on time, the NGOs Department has sixty days to either issue a registration certificate or notify the applicants in writing that the application has been rejected. A rejection notice must state the reasons for the rejection, and it may be challenged before an administrative court. Registration certificates are valid for two years, meaning that NGOs and government officials must repeat this process throughout the life of the organization.

Several issues are raised by this registration procedure.

Burdensome Two-Step Process. The registration process is unwieldy and unnecessarily difficult for both government officials and NGO incorporators. It is not clear why the incorporation application is separate from the registration request, and it is not clear why an NGO's incorporators must receive a document from the NGOs Department approving the incorporation application only to re-file the approval with the same Department during the registration request phase. If all decisions are made within the NGOs Department, then there does not appear to be any reason for a two-step process. In other words, there is no legitimate government interest in requiring a two-step process. Instead, the registration process should be simplified and streamlined by creating a single one-step process in which applications for registration are filed with all necessary documents at one time.

Discretion to Approve or Reject Applications. Although the draft law embraces international best practices by requiring NGO registration rejections to be made in a written document specifying the grounds for rejection (Article 9(6)), no apparent limits have been placed on the authority of the NGOs Department to reject an application. Because the NGOs Department appears to have the authority to reject an application for any reason, it is not clear on what basis an administrative court might review a rejection, making the right of appeal specified in Article 9(7) ineffective.

According to international law and best practices, denial of registration is only appropriate in the limited cases that are recognized under Article 22 of the *ICCPR*—that is, if the rejection is necessary in a democratic society in the interests of (1) national security or public safety; (2) public order; (3) the protection of public health or morals; or (4) the protection of the rights and freedoms of others. Because the draft law fails to include any standards to guide the discretion of registering officials, the provision opens the door to denial on arbitrary or subjective grounds and thus fails to meet the strict international standard.

In most countries, the grounds for refusal of registration are limited and specified. Article 19 of Afghanistan's *Law on Non-Governmental Organizations* is illustrative: it provides for denial of an application to register only

- a. In case the statute, registration documents, and evidence are contrary to the terms set forth in this law;*
- b. In case the registration documents are not complete; or*

- c. *In case the name of the applicant is so similar to a previously registered governmental or non-governmental organization or to the name of a private company or private enterprise that confusion is likely to result.*

Similar standards are articulated in the civil society laws of Western European and G8 countries. For example, in the United States, state registration officials deny registration only if the Articles of Incorporation fail to contain the information required by law. In England and Wales, registration applications can only be denied if an organization fails to meet the basic legal requirements listed in the law. Canada and Germany adhere to similar standards. We recommend that the Iraqi NGO registration process follow suit, specifying the limited conditions under which a registration application can be denied.

Issuance of Registration Certificate. Commendably, the draft law conforms to international best practice by requiring the NGOs Department to make a decision on registration applications within a fixed time period – that is, within 60 days of “the submission date of the fully completed information and documents” (Article 9(4)). However, the draft law provides no remedy to the NGO if this deadline passes without any decision from the government, and does not provide a mechanism for NGOs to prove that the deadline has passed. In order to make the 60 day deadline effective, the draft law should be revised to (1) mandate that a receipt or some other proof of the filing date be provided at the time of registration and (2) provide a right to seek court intervention if the deadline passes without a response.

Re-Registration. Under the draft law, registration certificates are valid for only two years (Article 9(8)). If an NGO fails to re-register, then it is dissolved and participation in the NGO can be punishable by imprisonment (Article 26). As such, the re-registration requirement is clearly an interference with the right to freedom of association that is invalid unless it meets the strict standard imposed by *ICCPR* Article 22. Even in the absence of criminal penalties, a re-registration requirement is an unnecessary burden on the exercise of free association. It is unlikely that re-registration is justifiable under the *ICCPR* framework. Moreover, the overwhelming majority of NGO laws in the Arab region and around the world do not impose re-registration requirements. Re-registration is a burdensome process for both NGOs and the government; moreover, where NGOs are reporting regularly to the government (as required by Articles 20 – 22), there seems to be no tangible regulatory benefit to the State resulting from the re-registration process.

Recommendation: The overall registration procedure specified in the draft law should be re-examined. Registration should be streamlined into a single procedure rather than a two-step process. The authority of the NGOs Department to reject registration applications should be limited to specific conditions, and the NGOs Department should be compelled to issue a receipt at the time of application. A procedure should be specified that will allow NGOs to seek court intervention if their registration applications are left unanswered. Finally, the re-registration requirement in Article 9(8) should be deleted.

4. Restrictions on Foreign Affiliations

Issue: Article 23(4) provides that NGOs may “subscribe or be affiliated to an organization, board, club, foundation, or network whose headquarters is outside of the Republic of Iraq” only with the

“permission” of the NGO Department. There is no discussion of how permission is obtained or on what grounds it will be granted or denied.

Discussion: Article 19(2) of the ICCPR states:

*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.*⁷

Restrictions on the right to expression must be “proportionate to the legitimate aim pursued” and can only be justified by “imperative necessity.”⁸ Requiring NGOs to seek prior authorization before subscribing or being affiliated with organizations outside of Iraq burdens their ability to “receive and impart information and ideas... regardless of frontiers.” This burden does not appear to be proportionate in light of any legitimate government goal or justifiable by any imperative necessity.

Finally, in practical terms, the requirement that permission be sought before joining or affiliating with foreign organizations may limit the ability of NGOs to respond quickly to urgent demands. For example, in the wake of a natural disaster, Iraqi NGOs organizations would be impeded from joining with foreign organizations to offer assistance immediately after the crisis when it is most needed because they would be forced to wait for government permission to do so.

Recommendation: Delete Article 23(4).

5. Restrictions on the Purchase and Sale of Property

Issue: Although the draft law recognizes that NGOs have “the right to sell of any property” and “the right to possess property,” the exercise of either of these rights is subject to “the approval of the [NGOs] Department” (Article 15).

Discussion: It is not clear what interest is served by requiring NGOs to seek government approval before purchasing or disposing of their property. NGOs are in the best position to determine when the acquisition or sale of property will advance their goals and activities. The NGOs Department, which cannot have extensive knowledge of all fields of work in which NGOs are involved, will not be as well-placed to make this determination. For example, an NGO that provides afterschool programs for youth

⁷ The individual right to free expression extends to NGOs. See *Freedom and Democracy Party (OZDEP) v. Turkey*, (European Court of Human Rights Application No. 23885/94), 8 December 1999 (“the protection of opinions and the freedom to express them is one of the objectives of the freedoms of assembly and association”). The European Court of Human Rights resolves disputes brought against European member states under the *European Convention on Human Rights*. The Court’s decisions are considered to have global significance because the provisions of the *European Convention* on association and expression are virtually identical to those of the *ICCPR* and other conventions. We have therefore included references to the European Court’s decisions where relevant.

⁸ See the following decisions of the European Court of Human Rights: *Open Door and Dublin Well Women v. Ireland* (Application Nos. 14234/88 and 14235/88), 29 October 1992, para. 70; and *Vereinigung Demokratischer Soldaten Oesterreichs and Gubi v. Austria* (Application No. 15153/89), 19 December 1994, para. 37.

may determine to purchase a building to provide students with a place for their activities, based on its knowledge of local facilities, the need for a safe and supervised facility, and the fact that a purchase is the most cost-effective solution in the long term. The NGOs Department, which will not have the same knowledge of the needs of the NGO or the youth who benefit from its programs, might not understand why the NGO needs to own a dedicated facility to advance its goals. Under Article 15, however, the NGOs Department would have the right to override the NGO's decision.

Recommendation: Eliminate the requirement that NGOs receive "the approval of the [NGOs] Department" before purchasing or selling property in Articles 15(3) and 15(4).

6. Limitations on Foreign Nationals

Issue: The draft law provides that non-citizens cannot serve as "the head of the organization or one of its founders or the chairman of its board" (Article 12(6)), and they cannot make up more than 25% of the members of a domestic NGO's membership or board of directors (Article 12(5)(a) and (b)). These restrictions are an arbitrary and discriminatory restriction of the associational rights of foreign nationals residing in Iraq.

Discussion: Article 22 of the *ICCPR* specifies "everyone shall have the right to freedom of association with others," not just citizens. Indeed, Article 2 of *ICCPR* explicitly states that the provisions of the treaty apply to "all individuals within [the] territory [or] subject to [the] jurisdiction" of ratifying parties "without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status" (emphasis added). Thus, a foreigner may not be excluded from the fundamental right to association guaranteed by the *ICCPR*. The right to associate, including the right to head, found, or become a member of an NGO, is protected by the *ICCPR* and as a result must be made available to all persons within the jurisdiction of the member states. To bar a foreign national from establishing, running, or participating in an NGO is a clear infringement of the *ICCPR*. It is far from clear what state interest is served by the limitations on the activities and membership of foreign nationals or how this limitation can be justified as "necessary in a democratic society."

How extensive this restriction will prove to be in practice is at present unclear, but it could have significant consequences for Iraqi civil society. For example, a large international business association with founders from a number of countries could not establish itself as a domestic NGO with headquarters in Iraq, as its founders from other countries could not participate in the organization. This is a loss not only to Iraqi citizens who will lose the opportunity to associate within their own country with organizations with which they might wish to affiliate, but also to the country's economy, which will not benefit from the revenue and jobs that such organizations might create.

Recommendation: Delete the limitations on foreign nationals specified in Articles 12(5)(a), 12(5)(b), and 12(6).

7. Grounds for Dissolution

Issue: The involuntary dissolution process outlined in Article 25 embraces international best practices by providing for involuntary dissolution of an NGO only “by court decision based on the request of the [NGOs] department.” However, several of the grounds for dissolution are too vague for principled application.

Discussion: International norms protecting the right to free association apply to the dissolution of an organization in the same manner that they apply to refusal to register. In other words, per *ICCPR* Article 22, dissolution should only be ordered when it is “necessary in a democratic society in the interest of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

Several of the grounds for dissolution listed in Article 25(2) do not meet this strict test, including if the NGO:

- does not conduct any activities for one year (Article 25(2)(a));
- conducts activities “contrary to its objectives or internal bylaws” (Article 25(2)(b));
- is “unable to meet its commitments and obligations” (Article 25(2)(c)); or
- spends money on purposes contrary to which it has been established (Article 25(2)(d)).

Dissolution is a remedy of last resort that should be utilized only for the most serious abuses and only after notice and an opportunity to rectify the deficiency has been given. Because of the severe nature of the remedy, it is fundamental to good regulatory practice that the grounds for dissolution be limited, clear, and capable of objective application. The grounds listed above fall short of this standard.

These grounds are perhaps better seen as grounds for warning and suspension under the procedure outlined in Article 25(1) rather than the more drastic remedy of organizational dissolution under Article 25(2). But even if these grounds might be more appropriate for suspension rather than dissolution, the vagueness of the language will challenge principled application in either case. It is not clear how a governmental department will determine that an NGO has been inactive for a year, has conducted activities contrary to its internal bylaws, is unable to meet its commitments, or has spent money contrary to the purposes for which it is established.

Recommendation: Amend Article 25(2) by removing conditions (a) through (d) or by moving conditions (a) through (d) to Article 25(1) where they may be listed as grounds for warning and NGO suspension in the event of non-compliance.

8. NGO Founders

Issue: Article 5 of the draft law requires founders of NGOs to (1) be Iraqi nationals; (2) be at least twenty years old; and (3) never have been convicted of a felony or crimes of moral turpitude. In addition, while Article 1 states that both natural and legal persons can serve as founders of NGOs, Articles 5 and 6 suggest that founders must be natural persons only.

Discussion: *Foreign Nationals.* As discussed in Section 6 (“Limitations on Foreign Nationals”), above, prohibiting foreign nationals from serving as founders of NGOs is a violation of the *ICCPR*.

Minors. While it may be appropriate to limit very young children from participating in NGOs without the permission of their parents, the provision preventing on anyone under age twenty from participating in the founding or governance of NGOs is extremely unlikely to be regarded as compatible with the *ICCPR*, which extends the right to freedom of association to “everyone” and not just adults. Article 5 also appears to contravene the *Convention on the Rights of the Child* (ratified by Iraq on 15 July 1994), which explicitly recognizes children’s rights to freedom of association (Article 15). As a practical matter, this kind of provision may deprive Iraqi youth of valuable opportunities to build citizenship and leadership skills by participating in and founding societies of their own. The limitation on minors participating as founding members of NGOs should therefore be deleted.

Convicts. While it is important to ensure the ethical integrity of an organization, Article 5 of the draft law may inadvertently prohibit individuals whose contributions would ordinarily be considered valuable from founding NGOs. For example, Nelson Mandela, who was sentenced and jailed for crimes in apartheid South Africa, could not take part in founding an NGO in Iraq under the draft law. Similarly, individuals who may have been improperly convicted under Ba’ath-era laws may find themselves unable to participate in founding new organizations.

Legal Persons. International best practice allows legal as well as natural persons to serve as founders of NGOs. Otherwise, several socially-beneficial types of organizations could be prevented from forming. For example, a consortium of oil companies interested in donating some of their profits to improve the local community would be prevented from forming their own NGO to receive donations and fund activities. Similarly, a group of NGOs interested in combining efforts to combat poverty would be unable to form an umbrella group dedicated to the more effective coordination of resources. The draft law seems to recognize this fact by specifying that an NGO is “a group of natural or legal persons” in Article 1(1), but Articles 5 and 6 specify procedures for registration by natural persons only. Articles 5 and 6 should be amended to provide procedures for registration by legal persons as well as natural persons.

Recommendation: Delete Article 5(2) to remove restrictions on founders of Iraqi NGOs. Amend Articles 5 and 6 to provide procedures for both legal and natural persons serving as founders.

9. Restrictions on Foreign NGO Activities

Issue: Article 30 of the draft law prohibits foreign NGOs from participating in “political and factional activities” (النشاطات السياسية والفئوية) in the Republic of Iraq.

Discussion. Because there are often separate laws governing political parties, political fundraising, elections, and political campaigning, it may be appropriate to limit the participation of NGOs in endorsement of, and fundraising to support, candidates for public office. However, all NGOs should have the ability to speak freely on matters of public significance, including existing or proposed legislation, state actions, and policies – and as discussed in Section 6 (“Limitations on Foreign Nationals”), above, this right applies to “everyone” and not simply Iraqi citizens.

According to international best practice, NGO laws do not place restrictions on the right of NGOs, including foreign NGOs, to carry out public policy activities such as education, research, advocacy, and the publication of position papers. Such restrictions, in fact, violate international norms protecting freedom of expression and freedom of association and deprive society of valuable points of view. For example, Article 19(2) of the *ICCPR* states:

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.

Prohibitions on “political or factional activities” must therefore be written with great specificity. Disallowed activities should be clearly described, because vague prohibitions on “political and factional activities” can be applied in a discretionary fashion to limit legitimate advocacy activities of NGOs. Article 11(6), which prohibits *all* Iraqi NGOs from “nominating any person for public office or fundraising to support nominees,” is an example of a well-drafted prohibition.

Recommendation: Delete Article 30. Article 11(6) already prohibits all Iraqi NGOs, both foreign and domestic, from engaging in certain inappropriate political and factional activities.

10. Public Benefit Organizations

Issue: The draft law allows the Council of Ministers, at the request of the Minister of State for Civil Society Affairs, to recognize certain NGOs as “public benefit organizations [that are] exempted from income tax, VAT, tariffs and customs duties, and the general sales tax” (Article 19). Unfortunately, important aspects of the public benefit organization (PBO) application process – including the conditions under which PBO status is granted and procedures for applying for PBO status – are left unspecified.

Discussion: The drafters have appropriately recognized that it is important to create a category of public benefit organizations, which may be entitled to greater benefits from the government because they serve the public interest. However, the draft law leaves virtually all rules regarding PBOs unspecified, and grants the Council of Ministers the exclusive right to give or withdraw PBO status – creating a potentially difficult and unwieldy PBO designation process.

Consideration should be given to defining certain rules relating to PBO status in the draft law. By defining basic rules regarding PBOs, the law will provide an appropriate legal basis and guidance for any subsequent legislation or PBO designations. The drafters may also wish to consider allowing the NGOs Department, rather than the Council of Ministers, to make PBO designations. Governmental decisions regarding PBO status require objective standards, sufficient capacity and expertise, and independence from political influence. The Council of Ministers is not likely to meet those criteria.

Recommendation: Expand Article 19 to define the basic rules applicable to PBOs, including the rules for qualification as a PBO and the procedure for gaining PBO status. Alternatively, these issues will need to be addressed through implementing regulations; ICNL would be pleased to provide technical assistance in amending the draft law or in preparing the regulations, as appropriate. In addition, consideration

should be given to designating the NGOs Department rather than the Council of Ministers as the institution qualified to make PBO designations.

11. Conflicts of Interest

Issue: Article 13 of the draft law embraces good governance practices by prohibiting conflicts of interest. While this is a positive and necessary provision, it should be strengthened and clarified.

Discussion: Article 13 states that members of NGOs should (1) “avoid any actual or potential conflicts between their own personal or professional interests and those of the organization;” (2) “reveal any actual or potential conflicts... to the board of directors;” and (3) “not attend meetings or take decisions on matters that may serve their own interests.” While the spirit of these prohibitions is commendable, the provision can and should be strengthened and clarified. For example, a provision that clearly prohibits conflicts of interest might state:

Any member of a governing body shall remove himself from consideration or decision of any matter in which he has a direct or indirect economic interest. A member of a governing body shall be deemed to have an economic interest if any spouse, in-law, or any person within three degrees of family relation has a direct or indirect economic interest.

Any transaction between an organization and an affiliated organization, or between an organization and its members, officers, members of the governing board, or employees shall be prohibited unless the governing body determines after reasonable investigation that the transaction is in the best interests of, and fair and reasonable to, the organization; and that the organization could not have obtained a more advantageous arrangement with reasonable effort under the circumstances.

Recommendation: Clarify and strengthen Article 13 by clearly defining and prohibiting conflicts of interest. Consider adopting the sample language outlined above.

12. Minimum Standards of Governance

Issue: The draft law fails to define certain minimum standards necessary for the proper governance and operation of NGOs, thus missing an important opportunity to ensure that Iraqi NGOs are transparent, accountable, and well-governed.

Discussion: Article 6 of the draft law requires NGO bylaws to contain (1) a “statement of the organizational structure of the organization;” (2) a “mechanism of electing the authorities” of the NGO; and (3) a determination of the governing body empowered to “make a decision of dissolution.” Beyond these statements, no standards of governance are imposed on the NGO.

At minimum, the draft law should require that the governing documents of the NGO identify the highest governing body of the organization (the assembly of members) and should stipulate the minimum number of times it must meet each year. A minimum number of members of the governing body may be defined, although this number should be kept small (for example, two or three). The basic powers of the highest governing body should be spelled out, together with any restrictions on its power to delegate

duties to others. For example, the draft law might reserve to the highest governing body the right to amend the governing documents or to merge or terminate the organization.

Of course, the law should not create inefficient or burdensome governance structures, especially for smaller organizations. The flexibility that the draft law currently gives to NGO founders to design the internal structure and governance of their NGOs should be retained even as new minimum standards are added.

Recommendation: Add one or more provisions to the draft law defining the minimum standards of internal governance that must be present in the bylaws of all registered NGOs.

13. Informal Organizations

Issue: It is not clear from the text of the draft law whether or not informal NGOs (that is, civic organizations that do not require legal personality) are permissible.

Discussion: The draft law defines NGOs as organizations which are “registered and acquired legal personality according to the provisions of this law” (Article 1(2)) but also provides for criminal penalties for individuals who are members of organizations that are “established contrary to the provisions of this law” (Article 26(1)(a)). It is unclear whether or not the draft law is intended to impose a mandatory registration requirement on all NGOs, both formal (with legal personality) and informal (without legal personality).

Under Article 22 of the *ICCPR*, “freedom of association is a right, and not something that must first be granted by the government to citizens.”⁹ Consequently, formal registration of an NGO should not be required in order for individuals to exercise their rights to associate informally (for example, in a weekly book club meeting).

This is not to say that informal groups should be treated equally to registered NGOs in all respects. NGOs that are formally registered are afforded the status of “legal persons,” and as such are entitled to the benefits of that status—typically including the right to enter into contracts, open bank accounts, hire employees, and receive funding. These rights are not granted to informal, unregistered organizations.

Recommendation: Amend Article 1(2) of the draft law to indicate clearly that informal, unregistered organizations are permissible. Consider adopting language similar to that utilized in Kosovo’s NGO law, which states that “the term Non-Governmental Organization (“NGO”) as used in the present regulation shall encompass domestic associations and foundations as defined in... the present regulation... The present regulation does not seek to limit the right of individuals to freedom of association” (*Regulation on the Registration and Operation of Non-Governmental Organizations in Kosovo*, Section 1.2).

Concluding Remarks

One final point that should be raised concerns the fact that the draft law appears to provide only for one type of organizational form – a civil society organization made up of individual members, also known as

⁹ Public Interest Law Initiative, *Enabling Civil Society: Practical Aspects of Freedom of Association Source Book* (Budapest 2003), p.14.

an association. Most civil law countries recognize an additional form based on property rather than membership: the foundation. For example, if a wealthy individual wishes to establish a scholarship fund for local students, there is no need for this fund to establish a general body; a board of directors along with a minimal staff may be sufficient. Likewise, a non-profit research institution may not have membership beyond its employees. ICNL recommends that the Ministry of State for Civil Society Affairs consider drafting a law on foundations subsequent to passage of the *Law on Non-Governmental Organizations*, and we look forward to providing assistance on this matter if and when it is appropriate.

ICNL appreciates the opportunity to comment on the proposed *Law on Non-Governmental Organizations*. We would be pleased to provide additional reference materials and follow-up technical assistance to the extent that this would be helpful for Iraqi civil society organizations, members of parliament, and government and ministry officials.

5 April 2009