

IILHR MEMO
ON
IMPLEMENTING INTERNATIONAL HUMAN RIGHTS
RELATED TREATY OBLIGATIONS IN IRAQ

Introduction

Iraq is a State Party to several human rights-related treaties that require implementation measures.¹ This memorandum discusses potential conflicts in the authority for implementing treaties under the Iraqi Constitution and lays out a basic process for pursuing treaty implementation.

I. Treaty Implementation and Iraqi Federalism

The Iraqi Constitution provides exclusive power for treaty ratification to the federal government, with the responsibility for enacting treaty laws lying with the Council of Representatives.² However, disputes may arise when the subject matter of treaties concerns policy areas that the Iraqi Constitution gives regions or governorates sole or preemptive lawmaking power over.³ The Council of Representatives can take two main options when such disputes arise. First, it can claim that its exclusive lawmaking power pursuant to treaty ratification necessarily confers upon it the power to enact treaty implementation legislation, which regions and governorates cannot contradict. Second, it can acknowledge that the treaty implementation power in these circumstances lies partly or exclusively with the regions and governorates, and negotiate cooperative mechanisms for treaty implementation.

Option 1: Exclusive Federal Treaty Implementation Power

The first option, where the Council of Representatives assumes exclusive treaty implementation power, can be illustrated by the current state of affairs in the United States. The United States, like Iraq, has a federal system of government in which legislative powers are divided between the federal government and states (regional governing units). Although the

¹ Iraq has signed onto or ratified the following human rights-related treaties: The International Covenant on Civil and Political Rights; Convention on the Elimination of All Forms of Discrimination against Women; International Convention on the Elimination of All Forms of Racial Discrimination; International Covenant on Economic, Social and Cultural Rights; Convention on the Rights of the Child; Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict; Optional Protocol to the Convention on the Rights of the Child on the sale of children child prostitution and child pornography; Protocol against the Smuggling of Migrants by Land, Sea and Air; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. See The United Nations Treaty Database.

² See Iraqi Constitution art. 110 (designating treaty ratification power as an exclusive federal power); Iraqi Constitution art. 61 (designating to the Council of Representatives the power to enact laws ratifying treaties).

³ *Id.* art. 114-15.

Constitution limits federal power to certain enumerated subjects, the United States Supreme Court determined in *Missouri v. Holland*, 252 U.S. 416, 432 (1920), that the United States Congress could legislate pursuant to a treaty even if constitutional federalism concerns would otherwise bar Congress from legislating in the absence of the treaty.

Another example of this option is Malaysia, which (like Iraq) maintains a federal democratic state. Despite the fact that the Malaysian Constitution expressly divides legislative power between the federal government and the states (regional governing units), the federal government appears to have exclusive treaty making power.⁴ The Council of Representatives may similarly attempt to secure legislative power to implement treaties in areas – such as criminal justice – that might otherwise traditionally be reserved for the regions and governorates. Such an attempt could be subjected to review by the Federal Supreme Court.⁵

Option 2: Shared Treaty Implementation Power Between the Federal and Regional Governments

The second option would be to acknowledge that the regions and governorates have the power to implement treaties that concern certain subject matters, and to establish a cooperative relationship to secure treaty implementation. This approach can be illustrated by human rights treaty implementation in Canada since the Supreme Court of Canada ruled, in the *Labour Conventions Case*, that the federal government cannot legislate to implement treaties in legislative areas that would otherwise be reserved for the provinces (regional governing units).⁶ Thus because the Canadian federal government nonetheless retains treaty signing and ratification power, it typically seeks out the consent and support of the provincial governments before it decides to enter into treaties. Canada has further established a Continuing Committee of Officials on Human Rights, on which both federal and provincial officials sit, to help secure the implementation of Canada's human rights treaty obligations.

South Africa serves as another example of constitutionally mandated shared power between the federal and provincial governments, with each government unit having some areas of exclusive legislative competence.⁷ South Africa ensures legislative compliance with international human rights treaties through the South African Human Rights Commission, which works as a liaison between international human rights treaty bodies and South African federal and regional legislatures to ensure compliance with treaty obligations.⁸ If Iraq looks to share treaty implementation power with provincial governments, it should establish a similar national human rights institution (further addressed below).

⁴ ABDUL GHAFUR HAMID, *Treaty-Making Power in Federal States with Special Reference to the Malaysian Position*, 30 J. OF MALAYSIAN AND COMP. L. 65 (2003).

⁵ See Iraqi Constitution art. 93 (providing the power to interpret the Constitution and settle disputes between the federal government and the governments of the regions and governorates).

⁶ *Canada v. Ontario*, 1 D.L.R. 673 (1937) (“Labour Conventions Case”).

⁷ See Constitution of South Africa Schedules 4, 5 (articulating the relative powers, broken down by subject matter, of the federal and provincial government).

⁸ For more information on the South African Human Rights Commission reference its website at http://www.sahrc.org.za/sahrc_cms/publish/cat_index_75.shtml.

II. The Treaty Implementation Process

Once the Council of Representatives determines its role in the implementation of a particular treaty, it should pursue the following steps to carry out treaty implementation:

- 1) Review all relevant existing laws to determine whether they conform to treaty obligations.

This review would need to be directed at relevant federal, regional, and local laws. Compliance with international law requires that laws promulgated at any level of government within a State Party be consistent with treaty obligations. In interpreting provisions of a treaty, Iraq should look to the ordinary meaning of the terms of the treaty in the context of its object and purpose.⁹ For ambiguous treaty provisions, reference can be made to the *Travaux Préparatoires* (preparatory work), State Party practice, or General Comments and views on cases from the authoritative treaty body.

- 2) Where existing laws are insufficient for or inconsistent with meeting treaty obligations, Iraq should do one of the following:
 - a. Amend existing laws to bring them in line with treaty obligations
 - b. Pass additional laws that uphold the treaty obligations
 - c. Enter a reservation, statement of understanding, or declaration to account for a potential discrepancy between Iraqi law and treaty obligations

A reservation is often entered upon treaty ratification when Iraq is unwilling or unable to comply with a specific treaty obligation, although some treaties do not by their terms allow for reservations. Moreover, reservations must be consistent with the “object and purpose” of the treaty.¹⁰ In some cases, Iraq may be unsure as to whether it has interpreted a treaty provision in such a way as to be in compliance. In these cases, it should issue a statement of understanding or declaration explicating its interpretation of a particular treaty provision.

- 3) Work with a competent authority or create a competent authority to administer treaty reporting obligations.

Human rights treaties often require substantial periodic reporting on the progress of implementation that in turn requires significant time, resources, and expertise to administer. The United Nations recommends, in accordance with the Paris Principles, creating a national human rights institution that would be tasked with preparing national human rights reports for the various treaty bodies.¹¹ The national human rights institution would have the derivative power of analyzing existing and proposed

⁹ Vienna Convention on the Law of Treaties art. 31, UN Doc. A/Conf.39/27; 1155 UNTS 331; 8 ILM 679 (1969).

¹⁰ *Id.* art. 19(c).

¹¹ Paris Principles relating to the Status and functioning of National Institutions for Protection and Promotion of Human Rights (“Paris Principles”), G.A.Res. 134, UN GAOR, 48th Sess., UN Doc. A/RES/48/134 (1993), available at [http://www.unhchr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/A.RES.48.134.En?Opendocument](http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/A.RES.48.134.En?Opendocument).

legislation to determine the potential human rights impacts, propose its own human rights legislation, and ensure the harmonization of legislation around human rights principles.¹²

Conclusion and Recommendations

The Council of Representatives should decide whether it wants to vie for exclusive control or partial control of treaty implementation power under Iraq's Constitution. Exclusive control is the recommended route for bypassing an otherwise prolonged consent and negotiation process with the regions and governorates when human rights treaties touch on subjects that might otherwise be in the realm of local control. Moreover, the Council of Representatives should begin a review of all relevant legislation to determine whether Iraq's human rights treaty obligations are being met. Where possible, the Council of Representatives should adopt legislation pursuant to interpretations of treaties that are internationally accepted and in accordance with broader human rights norms.

The Council of Representatives is currently considering legislation to establish a Human Rights Commission that would operate independently of the Iraqi government. Moreover, a Ministry of Human Rights already exists and has taken substantial responsibility for human rights reporting including undertaking to prepare Iraq's Universal Periodic Review for the U.N. Human Rights Council. The Council of Representatives should clarify which entity will take primary responsibility for monitoring Iraq's implementation of human rights treaties. Whichever institution takes the lead should seek compliance with the Paris Principles and accreditation with the International Coordinating Committee of national human rights institutions.

¹² *Id.*