



# INTERNATIONAL COMMISSION OF JURISTS

Commission internationale de juristes - Comisión Internacional de Juristas

*" dedicated since 1952 to the primacy, coherence and implementation of international law and principles that advance human rights "*

## **Position paper of the International Commission of Jurists 20 December 2003**

### **The process of “modernizing” the Arab Charter on Human Rights:**

#### **a disquieting regression**

#### **List of recommendations**

Advanced as early as 1970, the idea of a protective human rights instrument for the Arab region only took concrete form in 1994, with the adoption by the members of the League of Arab States of the Arab Charter on Human Rights. Signed by only one State and never ratified, the Arab Charter was subjected to a process of “modernization” decided in 2003 by the Council of the League of Arab States. The revision and updating of the text of the Charter in light of international human rights standards was judged necessary to enhance the poor level of success the Charter had enjoyed and to respond to the different criticisms formulated both by certain Arab States as well as by various non-governmental organizations, both Arab and international.

The text of the Arab Charter on Human Rights as adopted in 1994 which already fell short of international human rights standards, has been revised by representatives of the Member States within the Permanent Arab Commission on Human Rights during its extraordinary sessions of June and October 2003 devoted to “modernization” of the Arab Charter on Human Rights. Examination of the provisions contained in the text of the Arab Charter on Human Rights reveals patent normative as well as institutional inadequacies in both the Charter itself and the proposed revisions.

The ICJ considers that any process of “modernization” of the Arab Charter on Human Rights should reinforce universal standards in this area at the regional level, as set forth in the relevant international instruments, as well as protection of these rights, as required by the Vienna Declaration and Program of Action.<sup>1</sup> This criterion of conformity with universal human rights standards is indispensable for evaluating the process of reform of the Arab Charter on Human Rights.

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<sup>1</sup> Paragraph 37 of the Vienna Declaration and Program of Action adopted by the World Conference on Human Rights on 25 June 2003, A/conf.157/23, 12 July 1993, states that:

*“[r]egional arrangements play a fundamental role in promoting and protecting human rights. They should reinforce universal human rights standards, as contained in international human rights instruments, and their protection. The World Conference on Human Rights endorses efforts under way to strengthen these arrangements and to increase their effectiveness, while at the same time stressing the importance of cooperation with the United Nations human rights activities...[It] reiterates the need to consider the possibility of establishing regional and subregional arrangements for the promotion and protection of human rights where they do not already exist.”* (Emphasis added)

Hence, the international Commission of Jurists makes the following recommendations:

1. In order to avoid the League of Arab States being constantly confronted with the absence of a reference to human rights promotion and protection in the aims and purposes of the organization when it seeks to develop its activities in the area of human rights, an amendment should be envisaged to the Charter of the League of Arab States including the promotion and protection of human rights among the purposes of the organization. This would seem all the more justified as the League is a regional organization in the sense of Chapter VIII of the United Nations Charter and as it is no longer disputed that, since massive human rights violations can be considered by the Security Council as constituting a threat to peace or a breach of the peace, the prevention of these violations at the regional level absolutely constitutes both a necessity and a guarantee for the preservation of the regional autonomy in terms of security sought by the League.
2. It is important that necessary amendments be introduced to the text of the Arab Charter on Human Rights so that the rights guaranteed by the Charter are also accompanied by monitoring mechanisms required to ensure that they are effectively respected.
3. The ICJ calls for a revision of the composition, mandate and powers of the Permanent Arab Commission on Human Rights in order to make it a real monitoring body for respect of human rights by the State Parties.
4. One of the fundamental reforms to be envisaged for eliminating the relation of subordination of the Commission to the Council of the League is the election of independent members and the granting of genuine decision-making power to the Commission in place of its current power simply to make recommendations to the Council of the League, which exercises decision-making authority. To that end, the experiences of the African Commission of Human and Peoples' Rights and the Inter-American Commission on Human Rights are instructive. A redefining of the functions of the Permanent Arab Commission on Human Rights should be envisaged. The existence of this commission moreover will have to be taken into account in the text of the Arab Charter on Human Rights and the question of the relations to be maintained between the Permanent Arab Commission on Human Rights and the Committee of Experts charged with monitoring the application of the Charter will have to be determined.
5. Recalling resolution 2003/76 of the United Nations Commission on Human Rights encouraging the participation of non-governmental organizations in the process of "modernizing" the Arab Charter on Human Rights, the ICJ invites the League of Arab States to revise and expand the conditions under which NGOs can enjoy consultative status with the League so as to ensure a broad participation by national and international NGOs in its activities. A rapid modification would permit the participation of national and international NGOs in the elaboration of the "modernized" version of the Arab Charter on Human Rights. In the interim given the importance of the process of "modernization" of the Arab Charter on Human Rights, the ICJ calls on the Permanent Arab Commission on Human Rights and the League of Arab States to allow the participation of all NGOs interested in this process during its January 2004 session.
6. Any reference to cultural, religious or civilization-based specificities should be interpreted and understood as a specific effort by a region to reinforce the principle of the universality,

indivisibility and complementarity of human rights and should in no case be considered as a means of eclipsing or even denying the universality of such standards or as a justification for their violation. As regards the recourse to notions such as the *sharia*’ or the reference to Islamic law to which the Arab Charter refers, notably in the preamble, such recourse to notions of uncertain legal import and which are susceptible to varied or even contradictory interpretations should be limited as much as possible. Finally, if these references are necessary, dynamic and progressive methods of interpretation should be privileged .

7. The ICJ is of the opinion that in the case of normative conflicts between the Declaration on Human Rights in Islam and the provisions of the International Bill of Human Rights, the latter should prevail, inasmuch as the issues involved are ones of positive law (conventional or customary) binding the members States of the League of Arab States, and many of these provisions enjoy the status of imperative norms of international law, such as for example the prohibition of slavery and servitude. Consequently there could not be any question of their being derogated by a regional instrument.
8. The ICJ invites the authors of the Arab Charter to remove the condemnation of Zionism in the preamble and in its article 1 in order to devote the Charter exclusively to protection of human rights in the Arab region, without digressions of a political nature liable to obscure the Charter’s basic purpose.
9. The ICJ is gravely concerned by the insertion of a supplementary paragraph in article 2 of the Charter, directly inspired by the Declaration on Human Rights in Islam, stipulating that men and women are equal in human dignity, rights and duties within the framework of the objective differences decreed by Islamic law (*sharia*’) and by other revealed laws. Such a provision strips the principle of non-discrimination on the basis of sex of its substance and amounts to a negation of the prohibition of discrimination on the basis of sex. It is in flagrant contradiction with international standards and the CIJ calls for this paragraph to be deleted. The recourse to non-juridical concepts or to concepts only vaguely defined should be avoided.
10. All persons subject to the jurisdiction of a State party should enjoy the rights set forth in the Charter, with the exception of certain political rights, in particular the right to vote and to be elected, which can be reserved only for citizens.
11. In the opinion of the ICJ, the insertion of the notion of “*tashri*” is problematic insofar as the recourse to a vaguely defined juridical concept liable to varying or even contradictory interpretations by the States Parties endangers the juridical security of persons and must therefore be rejected.
12. The ICJ calls for insertion in the Charter of a provision on the primacy of obligations ensuing from the Charter over the obligations of internal law and for affirmation of the obligation for the States Parties to take all measures necessary for the exercise and enjoyment of the rights established in the Charter.
13. The ICJ urgently calls for the establishment in the final version of the Arab Charter of the following rights hitherto omitted:
  - the right not to be held in slavery or servitude;
  - the principle of equality between men and women (in wording devoid of ambiguity and without juridical subterfuges allowing the established right to be denied);

- the absolute prohibition of the death penalty for minors;
  - the absolute prohibition of the death penalty for persons suffering from any kind of mental illness;
  - prohibition of the death penalty for political crimes;
  - eventual abolition of the death penalty altogether;
  - freedom of religion in all its components, including the right to adopt the religion or conviction of one's choice;
  - prohibition of imprisonment for civil debt;
  - freedom of expression; and
  - political rights in all their components, including the right to vote and to be elected.
14. The ICJ considers it indispensable that the Arab Charter on Human Rights guarantees the right to a fair trial by an independent and impartial court established by law and exhaustively set forth the judicial guarantees that every accused person should enjoy.
15. The right to security should be guaranteed and the obligation for States to take all reasonable and appropriate protection measures to assure the right to security of person should be affirmed.
16. The ICJ calls for the unequivocal establishment of the rights of minorities in a separate article.
17. The ICJ also calls for recognition of freedom of association without limiting its exercise to specific areas of social life.
18. In the view of the ICJ, the insertion in the Arab Charter of a general clause of derogation should be excluded. Moreover, restrictions on rights guaranteed should be limited to measures strictly necessary and proportional to the interest to be protected, and the reasons for restriction of protected rights must not be vague or excessively general. The modalities of the exercise of rights guaranteed, when these are defined by the internal law of States, can constitute veiled restrictions, which should be eliminated from the final text of the Charter.
19. In light of international jurisprudence and General Comment No. 29 of the Human Rights Committee on the question of derogation of rights guaranteed, the ICJ recommends inclusion in the list of non-derogable rights at least the following rights and principles:
- Right to life ;
  - Prohibition of torture and other cruel, inhuman or degrading treatment or punishment, and medical or scientific experiments conducted without the free consent of the person concerned;
  - Prohibition of slavery, the slave trade and servitude;
  - Recognition of everyone as a person before the law;
  - Prohibition against imprisoning a person on the ground of inability to fulfil a contractual obligation;
  - Principle of legality in penal matters, by virtue of which criminal responsibility and punishments must be defined in clear and precise provisions of a law that was in force and applicable at the moment that the action or omission took place, except in cases where a subsequent law provides for a less severe punishment;
  - All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person;
  - Prohibition against taking of hostages, abductions or unacknowledged detention;

- Prohibition against arbitrary deprivations of liberty or non-observance of fundamental principles of fair trial;
- Right to a fair trial by a competent, independent and impartial tribunal established by law;
- Right to take proceedings before a court, in order that court may decide without delay on the lawfulness of a detention;
- Obligation to ensure effective internal remedies against any violation of the provisions of the Charter and respect of fundamental judicial guarantees;
- Principle according to which only a court of law can try and convict an individual for a criminal offence;
- Respect for the presumption of innocence.

20. It is important to introduce the necessary amendments to the Arab Charter on Human Rights to ensure that the rights guaranteed are matched by monitoring mechanisms necessary to ensure effective respect of such rights.

21. The ICJ invites the League of Arab States to review the modalities of participation by NGOs in its work and advocates express recognition of the possibility for NGOs to refer matters to the mechanisms monitoring application of the Charter, including in the framework of individual communications.