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Proposed Arab Court of Human Rights: Rewind the process and get it right

In 2004, the League of Arab States (LAS) adopted a revised Arab Charter of Human Rights (the Charter),¹ after a highly contentious and problematic charter of 1994 had failed to attract a single State party. The Charter, which presently has 14 States parties,² has the potential to ensure better protection for human rights and freedoms in its States parties. In particular, the Charter provides for an Arab Human Rights Committee,³ composed of seven independent experts, as a body tasked to monitor its implementation by member States. Under article 48 of the Charter, the Committee is charged with receiving reports from member States, discussing their contents, providing comments, and making recommendations in accordance with the aims of the Charter.

The Arab Human Rights Committee was established in 2009. Unlike its counterpart bodies in the UN human rights treaty system, or regional systems in Africa and the Americas, the Arab Committee is not competent to receive and adjudicate individual complaints on violations of the Charter's rights. While it does review State reports, unlike those committees, it has so far declined to meaningfully consider alternative reports, for example from civil society, regarding the human rights situation in member States. Moreover, there does not as yet appear to be any established procedures by which the Committee might seize itself of crisis situations, in response to which they might take robust action, such as conducting an inquiry or recommending a political response by the LAS. Finally, there seems to be little public knowledge about the Charter and its protections, even in States that have become party, and public officials and judicial bodies do not frequently invoke the Charter, even though it constitutes binding law.

Consequently, the protections of the Charter have so far remained illusory; the rights have gone largely unrealized, and the LAS human rights system remains predominantly ineffective. Reforming this system is therefore necessary with the objective of making it effective as a forum of exchange among civil society and LAS States; as an institution that is capable of responding to serious human rights situations arising in member States, including situations

¹ The Charter came into force on 15 March 2008, after the seventh state ratified it in accordance with article 49(2), which states "The present charter shall enter into effect two months from the date on which the seventh instrument of ratification is deposited with the secretariat of the League of Arab States." Available at <https://www1.umn.edu/humanrts/instree/loas2005.html> .

For a background and analysis on the process of revising the Charter, see Hassiba Hadj Shraoui, *Modernising the Arab Charter on Human Rights*, 2004 ICJ Yearbook, available at <http://icj.wengine.netdna-cdn.com/wp-content/uploads/2004/01/ICJ-Yearbook-2004-ICJ-yearbook-2004-eng.pdf>

² States that have ratified include: Algeria, Bahrain, Iraq, Jordan, Kuwait, Lebanon, Libya, Palestine, Qatar, Saudi Arabia, Sudan, Syria, the United Arab Emirates and Yemen. See: http://www.lasportal.org/wps/portal/las_ar_humanrights/inpage!/ut/p/c5/vY3NDoIwEISfhQcw2xJCwxFDwfKnQkXsxWBIBTEBIPQpxcTr3gy7h42mdmZDwTMeyuGqiweVXcrGshBmGeEE34PIw8w1kjRvaBbmYsQr4ORzg54IMom-7yfqezIr5luPHxF8ZGEG-69gonEGSxJSbAIUfGOa2nO1NSJTUafS7xlteHZ0Ql4nW2i8OE9XJSKe3GmDPVvk4RF3A1wb-HM3VN7F5AolNp3lmv8kWX-IHVvh9ZiK2-Yb2lr2gsjsMCn/dl3/d3/L2dBISEvZ0FBIS9nQSEH/?pcid=dcece004a3e7a18b9f8bd526698d42c

³ The Committee was established in March 2009 and began receiving State reports the following year.

of crisis; and to provide a credible assessment of the fulfilment by States of their human rights obligations and recommendations that would assist them in improving compliance. Critically, consonant with other regional human rights systems, the LAS should provide for individuals to have access both to judicial and non-judicial avenues to seek and obtain effective remedies and reparations for human rights violations.

Following the popular uprisings that erupted in several countries in the Middle East and North Africa (MENA) region from 2011 onwards (the "Arab Spring"), and that led to the toppling of several authoritarian regimes, calls and initiatives for reforming the LAS system, including the human rights system, have emanated from both the LAS itself and some States parties to the Charter, as well as from civil society organizations.⁴ Prominent among these reform proposals, was the establishment of a regional judicial body to adjudicate complaints of human rights violations, the Arab Court of Human Rights (the Arab Court).

The idea of an Arab Court is highly welcome. However, the ICJ and FIDH are concerned that during the last three years, the entire process of reforming the LAS human rights system, including the establishment of an Arab Court, has been conducted behind closed doors and through opaque procedures, thus contravening basic principles of inclusive participation and transparency.

Our organizations are also concerned that as a result of this opaque process, the draft statute for the Arab Court of Human Rights (the Draft Statute), elaborated by an expert committee and expected to be submitted for approval during the Arab Summit in March 2014, falls well short of regional and international human rights standards. The deficiencies are manifest, particularly those provisions relating to the Court's jurisdiction; the guarantees of the independence of the Court, including the independence of its judges; the scope of the requirement of the exhaustion of local remedies; and the adequacy of access to the court for victims.

This Draft Statute, which has not been made public by the LAS, but to which our organizations had access, must be substantially and meaningfully amended if it is to serve as a basis for the establishment of a competent, independent, and impartial Arab Court for human rights, empowered to receive complaints from individuals, groups, and organizations, and to issue binding decisions in respect of violations of universally accepted human rights.

Our organizations also believe that for any reform process of the LAS human rights system to be meaningful, it should be inclusive, transparent and wide-ranging.

I. Continuing concerns regarding the Arab Charter

The adoption of the Arab Charter in 2004 was an important milestone for human rights protection in the LAS region.⁵ The Charter, a great advance forward from the 1994 charter, for the most part adequately incorporates global human rights standards, and in some respects exceeds them. For example, the Charter ensures rights to individuals with mental or physical disabilities,⁶ prohibits violence against women and children in the family,⁷ and

⁴ See "The Arab League and Human Rights: Challenges Ahead", May 2013 available at <http://fidh.org/en/north-africa-middle-east/League-of-Arab-States/the-arab-league-and-human-rights-challenges-ahead-13857>; "No Protection for Anyone: The Role of the Arab League in Protecting Human Rights," Cairo Institute for Human Rights Studies, re-edition 2014; and "On the eve of the Arab Summit Cooperation with civil society, a key pillar to Arab League Reform", March 2012, available at <http://www.cihrs.org/?p=1892&lang=en>

⁵ For further analysis, see "The Arab Charter on Human Rights", Leila Zerrougui, available at <http://projects.essex.ac.uk/ehrr/V7N2/Zerrougui.pdf>, and "The Revised Arab Charter on Human Rights: A Step Forward?", Mervat Rishmawi, available at <http://hrlr.oxfordjournals.org/content/5/2/361.extract>

⁶ Article 40 of the Arab Charter of Human Rights, 22 May 2004.

⁷ Id. at article 33(2).

guarantees the independence of the judiciary.⁸ However, the ICJ and FIDH are concerned that in a few key respects, the Arab Charter falls short of international human rights standards. For example, the Arab Charter allows for the imposition of a death sentence for individuals under the age of 18, where “*stipulated in the laws in force at the time of the commission of the crime.*”⁹ The UN Convention on the Rights of the Child, to which all LAS States are party, absolutely prohibits in article 37(a) the imposition of a death sentence, or life imprisonment without the possibility of release, for crimes committed when a person was under 18 years of age. Article 6 of the International Covenant on Civil and Political Rights (ICCPR), to which most of the LAS States are party,¹⁰ provides that a “*sentence of death shall not be imposed for crimes committed by persons below eighteen years of age.*” This prohibition is now part of customary international law.

Further, article 3 of the Arab Charter provides “*Men and women are equal in respect of human dignity, rights and obligations within the framework of the positive discrimination established in favour of women by the Islamic Shari’a, other divine laws and by applicable laws and legal instruments.*” This provision is not in conformity with international standards on equality of men and women, including under the ICCPR and Convention on the Elimination of all forms of Discrimination against Women (CEDAW), to which almost all LAS States are party.¹¹ Limiting equality within the framework of *Shari’a* and other divine laws has the potential of impairing or nullifying the recognition, enjoyment and exercise of human rights by women on a basis of equality with men, in particular on issues relating to marriage, family relations and personal rights.

In addition, while the Arab Charter prohibits subjecting any individual to “*physical or psychological torture or to cruel, degrading, humiliating or inhuman treatment,*”¹² the Charter fails to define what constitutes an act of torture or other ill-treatment, consistent with international standards, including the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and ICCPR, or to prohibit cruel, inhuman or degrading punishment. Additionally, while the right to freedom of thought, conscience and religion is guaranteed under international law, including the freedom to “*have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching,*”¹³ under the Arab Charter, the right to freedom of thought, conscience, and religion is guaranteed in article 30(1) “*except as provided for by law.*”¹⁴ Allowing for a sweeping exception, unconstrained by requirements of purpose, necessity, and proportionality, goes far beyond the restrictions already provided for in article 30(1) and article 18(3) of the ICCPR. This provision clearly conflicts with international human rights law and standards, and has the potential to erode the very essence of these rights.

Given these concerns, the Charter should be amended with a view to establishing its full conformity with universal human rights standards, including in particular the right to life, the prohibition of cruel, inhuman or degrading punishment and freedom of thought, conscience and religion.

II. Concerns regarding the process of establishing the Arab Court of Human Rights

The objective of establishing an Arab Court of Human Rights is one of various initiatives to reform the LAS human rights system, in particular following the uprisings that began in numerous MENA countries since 2011. These uprisings helped to expose the dismal state of

⁸ Id. at article 12.

⁹ Id. at article 7.

¹⁰ LAS states that have not ratified or acceded to the ICCPR include Qatar, U.A.E., Comoros, and Saudi Arabia.

¹¹ Sudan has not yet ratified CEDAW.

¹² Article 8 of the Arab Charter of Human Rights, 22 May 2004.

¹³ Article 18 of the ICCPR.

¹⁴ Article 30(1) of the Arab Charter of Human Rights, 22 May 2004.

human rights in the region, the weakness of human rights guarantees, and the lack of effective enforcement and recourse mechanisms for victims of human rights violations.

In this context, the Secretary General of the LAS, Nabil Al Araby, appointed on 24 October 2011 the former Algerian Minister of Foreign Affairs, Lakhdar Brahimi, as the President of an independent commission of "Arab personalities with the relevant expertise on the work of the LAS," to make "propositions and recommendations on the reform and the modernisation of the LAS, in particular its role and the mechanisms that governs its work."¹⁵ Few details have emerged about this commission, including its composition, methods of work, and the extent of any outreach to various stakeholders, in particular representatives of civil society. Indeed, even the outcome of its work, including the report of the Brahimi Commission, has never been made public.

Separately, the government of Bahrain submitted on 15 January 2012 a proposal to the 137th Ministerial Council of the LAS on the establishment of an Arab Court of Human Rights. In decision 7489 of 10 March 2012 the Ministerial Council welcomed the initiative of Bahrain and entrusted the LAS Secretariat, with the assistance of a commission of Arab legal experts, with "elaborating a report on the establishment of the Arab Court, in light of regional experiences on establishing similar courts."¹⁶

Both the reports of the Brahimi Commission and the Arab legal experts were submitted to the Secretary General of the LAS, who in turn submitted them to the Doha Arab Summit in March 2013.

The Doha Summit approved decisions "welcoming the report of the independent commission presided over by Mr Brahimi on the reform and the modernization of the League of the Arab States," "approving the establishment of an Arab Court for Human rights," "mandating a high level commission of jurists from the States parties to elaborate the Court's statute" and "urging those States who didn't ratify the Arab Charter yet to do so".¹⁷

In September 2013, the Ministerial Council approved a decision to set up the Arab Court of Human Rights in Bahrain.¹⁸ A Draft Statute for the Court has been produced and is expected to be submitted to the next Arab Summit meeting in March 2014, in Kuwait, for approval.

The ICJ and FIDH welcome the efforts to strengthen the human rights system and establish a judicial enforcement mechanism. However, for these efforts to be meaningful and effective, they must be based on a transparent procedure and an inclusive process. Not only government representatives from the LAS States parties, but also international, regional and national civil society organizations, members of the bar and judiciary, academic and independent experts, and other relevant stakeholders should be consulted, have their views heard and take an active role in the reform process.

¹⁵ See:

<http://massai.ahram.org.eg/News/2/130220/%D8%AA%D9%82%D8%A7%D8%B1%D9%8A%D8%B1/%D8%A7%D9%84%D8%A3%D8%AE%D8%B6%D8%B1-%D8%A7%D9%84%D8%A5%D8%A8%D8%B1%D8%A7%D9%87%D9%8A%D9%85%D9%89-%D9%8A%D8%AA%D8%B1%D8%A3%D8%B3-%D9%84%D8%AC%D9%86%D8%A9-%D9%85%D8%B3%D8%AA%D9%82%D9%84%D8%A9-%D9%84%D8%AA%D8%AD%D8%AF%D9%8A%D8%AB-%D9%85%D9%86%D8%B8%D9%88%D9%85%D8%A9-.aspx>

¹⁶ Bahrain Ministry of Foreign Affairs, <http://www.mofa.gov.bh/egovservices/achr/InfoEn.aspx>

¹⁷ See decisions n° 572 and 573 of the LAS summit council of 26 March 2013, available at: <http://www.lasportal.org/wps/wcm/connect/d289c9804f0a09648a349ea79d151c73/%D8%A7%D9%84%D9%82%D8%B1%D8%A7%D8%B1%D8%A7%D8%AA.pdf?MOD=AJPERES>

¹⁸ Decision n° 7656 of the LAS Council of 1st September 2013, available at: <http://www.lasportal.org/wps/wcm/connect/c24da10040f2884a84a79ca79d151c73/Binder1.pdf?MOD=AJPERES>

The ICJ and FIDH are concerned that neither the LAS Secretariat, in appointing the Brahimi Commission and the commission of Arab legal experts, nor the Summit and Ministerial Councils of the LAS, have provided for a participatory process to reform the LAS human rights system, including the establishment of the Arab Court of Human Rights. Most importantly, the reports of the various established commissions and the Draft Statute of the court have not been made public, and therefore cannot be subject to wide discussion or consultation.

The ICJ and FIDH believe that, under these circumstances, submitting the Draft Statute to the approval of the Arab Summit at this stage would severely undermine the rights of individuals and groups in the LAS States parties to meaningfully participate in the process of establishing an Arab Court of Human Rights. Most critically, it would result in a less effective judicial mechanism for human rights protection.

The ICJ and FIDH also consider that for the Arab Court to be effective, it should be seated in the venue of a State that has evinced a serious commitment to meeting its human rights obligations under both international and national law and has a solid record to show for it. Only such a host State would provide the necessary guarantees for the court to operate in defence of human rights and free from any undue interference, constraints, or pressures. The State must not only be in a position to respect and protect the rights of its own people, but also the rights of visiting human rights defenders who engage with the court.

The ICJ and FIDH are concerned that over the last three years, in pursuing a sustained, violent crackdown against opposition leaders, human rights defenders and peaceful protesters in violation of their rights to freedom of assembly, the Bahraini authorities have been responsible for a catalogue of gross human rights violations, including cases of unlawful killings, torture and other ill-treatment, arbitrary arrest and detentions and unfair trials before ordinary and exceptional courts. These human rights violations continue unabated, as does impunity for them.¹⁹ Hosting the Arab Court in a State that not only is responsible for such violations, but also fails to ensure any form of accountability for them, would undermine both the credibility and effectiveness of the Court.

The ICJ and FIDH call on the Summit and Ministerial Councils of the LAS to reconsider the decision of designating Bahrain as the host country of the Arab Court, and ensure that such a decision is based on the commitment and compliance of the concerned State party with universal human rights.

III. Provisions of concern in the Draft Statute of the Court

1. Selection of judges and independence of the Court

The Draft Statute affirms the independence of the court and the independence of judges.²⁰ The judges of the Arab Court, numbering either seven or 11 as alternative options in the Draft Statute, are to be elected by the Assembly of States parties through a vote by secret ballot from a list of candidates.²¹ State parties may nominate two candidates for election, who are "*of high moral character and integrity, and must possess competence and experience in legal or judicial office...They must also possess the qualifications required to high judicial office in their countries (with at least 10 years' experience in the field of human*

¹⁹ See for example: The Report of the Bahrain Independent Commission of Inquiry, available at <http://www.bici.org.bh/BICIreportEN.pdf>; and Bahrain: Children in a Maze of Injustice, Amnesty International, available at <http://www.amnesty.org/en/library/info/MDE11/057/2013/en>.

²⁰ Article 2 and article 15 of the Draft Statute.

²¹ The Assembly of State parties consists of one representative of each State party to the Statute. See article 4 of the Draft Statute.

rights).²² Not more than one judge from the same country may serve on the Court at the same time.²³

In addition, under article 8, "*judges are to be elected for a five-year term and may be re-elected only once.*" Judges "*may be dismissed and their terms terminated only in exceptional cases, when two-thirds of judges decide that the concerned judge no longer meets the requirements or demands of the office, or the criteria on the basis of which he was selected.*" Under article 14, in exercising their functions, "*judges shall enjoy the privileges and immunities granted to representatives of member states of the League of Arab States pursuant to the Agreement on Privileges and Immunities of the League of Arab States.*"

In all provisions relating to the independence of the Arab Court and its judges, including judges' qualifications, selection, conditions of service and tenure, immunity, suspension and removal, the Draft Statute should incorporate international standards, which at minimum include the UN Basic Principles on the Independence of the Judiciary.²⁴

The ICJ and FIDH believe that judges of the Arab Court, as with other international courts, should be of high moral character, independence, impartiality, and integrity; who possess the highest professional qualifications, competence and experience required for appointment to the highest judicial offices.²⁵ For the Arab Court, those qualifications should also be expanded to include particular expertise in international human rights law and public international law. The Statute should ensure an equitable gender apportionment, and a fair representation as among the legal traditions. Every effort should be made to ensure a diversity of expertise on the Court on particular rights areas.

The Statute should provide that in nominating candidates to sit on the Arab Court, States parties should follow transparent procedures, set forth in law, that include wide consultations with and assistance by civil society, including associations of judges and lawyers. Nomination procedures should be open, and allow for application by all candidates who meet the qualifications set out in the Statute.

Judges must be able to exercise their functions free from any direct or indirect interference or influence by any person or entity, as required under international standards. This is provided not only in UN standards,²⁶ but also in article 12 of the Arab Charter, which states "*All persons are equal before the courts and tribunals. The States parties shall guarantee the independence of the judiciary and protect magistrates against any interference, pressure or threats. They shall also guarantee every person subject to their jurisdiction the right to seek a legal remedy before courts of all levels.*" Accordingly, judges should have guaranteed tenure until the expiry of their term of office.

Article 8 envisages that judges would serve for a renewable five-year term. The ICJ and FIDH believe that careful consideration ought to be given to amending article 8 of the Draft Statute with a view to ensuring that judges are elected for a single, lengthy term – perhaps nine years. This approach would reflect a trend of best practice in international tribunals, as evidenced in the statute of the International Criminal Court and the European Court of Human Rights. This would limit inappropriate or unwarranted interferences or influences in

²² Articles 6 and 7 of the Draft Statute.

²³ Article 5 of the Draft Statute.

²⁴ See also the Burgh House Principles on the Independence of the International Judiciary, available at http://www.ucl.ac.uk/laws/cict/docs/burgh_final_21204.pdf

²⁵ See article 21 of the European Convention on Human Rights (ECHR), and article 11 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights.

²⁶ See for example, Principles 2 and 4 of the Basic Principles on the Independence of the Judiciary, Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

the process of electing judges and would, thus, enable them to exercise their judicial functions in an independent manner. A judge should not be placed in a position of having to rule on the conduct of the very State upon which he or she depends for the renewal of tenure.

The Statute should adequately provide for fair procedures and legitimate grounds for dismissing and terminating the judges' terms of office. The ICJ and FIDH consider that the judges of the Arab Court should be subject to suspension or removal only for specified, well defined grounds, including reasons of incapacity or behaviour that renders judges unfit to discharge their duties. Dismissal and removal must only be pronounced following a fair and appropriate procedure, established in advance, that ensures the rights of the concerned judge to a fair hearing in line with due process guarantees reflected in international standards.

2. Applicable law and jurisdiction of the Court

Article 16(1) of the Draft Statute gives the Court jurisdiction "*over all cases and disputes arising from the interpretation or application of the Arab Charter on Human Rights and this Statute. Its jurisdiction extends to all issues referred to it related to the application or interpretation of any other human rights conventions to which the complainant State and the respondent State are a party.*" While the Statute does not specifically identify all applicable law, article 16 suggests that the Court will apply (a) The Arab Charter of Human Rights; (b) the Statute of the Court; and (c) Human rights treaties to which the member States to the Statute are a party.

As noted above, the ICJ and FIDH believe that the Arab Charter should be amended with a view to establishing its full conformity with universal human rights standards, including the right to life and the prohibitions on capital punishment, the prohibition of cruel, inhuman or degrading punishment, the equality of men and women, and the right to freedom of thought, conscience and religion. In the interim, if the Court is to be established before such amendments are introduced, the Court must interpret the Charter in light of international human rights law and standards and the international legal obligations that are incumbent upon LAS States to respect.

The ICJ and FIDH are concerned that the Draft Statute extends the jurisdiction of the Court to all "*issues referred to it related to the application or interpretation of any other human rights conventions to which the complainant State and the respondent State are a party*".

If adopted, this provision would give the Court jurisdiction to decide cases on obligations flowing from international conventions, including, among others, the nine human rights treaties and their optional protocols established under the United Nations systems,²⁷ and regional conventions, including, for a number of states, the African Charter of Human and Peoples' Rights. Because the Court would thus effectively assume overlapping jurisdiction with the supervisory bodies established under these conventions to monitor their

²⁷ There are 10 core human rights instruments, including 9 human rights treaties and the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. These instruments include: the International Covenant on Civil and Political Rights (ICCPR); the International Convention on Economic, Social and Cultural Rights (ICESCR); the Convention on the Elimination of All Forms of Racial Discrimination (ICERD); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); the Convention on the Rights of the Child (CRC); the International Convention on All Migrant Workers and Members of Their Families (ICRMW); Convention on the Rights of Persons with Disabilities (CRPD); and the International Convention for the Protection of All Persons from Enforced Disappearances (CPED); and the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OP-CAT).

implementation,²⁸ there is a risk that the Court and these bodies may issue conflicting and contradictory decisions on the application and interpretation of the human rights conventions. This would, in turn, negatively impact on the guarantees of legal certainty relating to the scope, meaning, application and interpretation of States' legal obligations under these conventions.

It is the view of both the ICJ and FIDH that while the Arab Court can and should draw inspiration from international and regional human rights conventions as interpreted by their supervisory bodies, the Court should not substitute itself for these bodies by having jurisdiction over breaches of obligations and resulting violations of these other instruments. Rather they should employ those other instruments and their jurisprudence as an interpretive tool. In addition, they should ensure that their own interpretation of the Arab Charter does not conflict with those other international instruments, especially when this would create a conflict with a State's existing treaty obligations.

3. Admissibility of cases

Article 17 of the Court's Draft Statute provides that, "[t]he jurisdiction of the Court is complementary to the national courts and does not supplant them. The Court may not hear a case unless it meets the following conditions:

- 1) All means of local remedies have been exhausted.
- 2) No other case with the same subject matter has been filed before another regional human rights court."

The ICJ and FIDH agree with the provisions of the Draft Statute with regard to complementarity between the Arab Court and national courts. As a general rule, national courts should be competent to adjudicate cases alleging violations of rights guaranteed under national and international law, including international treaties to which the State is a party. However, the ICJ and FIDH note that situations arise in respect of some LAS States, where the judiciary may not be fully independent and the courts' systems may not be able to effectively administer justice. Where the executive exercises undue influence or control over these systems, there is a lack of qualified judicial personnel, there is endemic corruption and/or there are delays in delivery and execution of judgments, the rights in these countries cannot be effectively guaranteed by national judicial systems.

If the aim of establishing an Arab Court of Human Rights is to assist in the enforcement of the Charter's provision and to provide for an effective remedy against human rights violations in the States parties, article 17 should be amended with a view to ensuring that the exhaustion of local remedies is not used as a means to prevent rights holders from gaining access to the Court. The Court should therefore be competent to assess the effectiveness of these domestic remedies, including instances where procedures are unduly prolonged, as well as the ability and willingness of local courts to effectively and meaningfully address human rights violations.

Inspiration can be drawn from the provisions of various UN and regional mechanisms that provide more precise language on the exhaustion of local remedies. For example, the Optional Protocols allowing individual communications before UN Treaty Bodies typically provide that domestic remedies do not have to be exhausted where "*the application of remedies is unreasonably prolonged or unlikely to bring effective relief.*"²⁹ Similarly, in the

²⁸ Under the UN system, the human rights treaty bodies include: the Human Rights Committee; the Committee on Economic, Social and Cultural Rights; the Committee on the Elimination of Racial Discrimination; the Committee against Torture; the Subcommittee on the Prevention of Torture; Committee on the Rights of the Child; Committee on Migrant Workers; Committee on the Rights of Persons with Disabilities; and the Committee on Enforced Disappearances.

²⁹ This includes article 4(1) of OP-CEDAW, article 2(d) of OP-CRPD, and article 7(e) of the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure. Article 3(1) of the ICESCR-OP also limits the exhaustion of domestic remedies where the application would be "unreasonably prolonged."

African system, the African Charter provides that "all local remedies, if they exist," must be exhausted, "unless it is obvious to the Commission that the procedure of achieving these remedies would be unduly prolonged."³⁰ In interpreting the exhaustion of local remedies, the Commission stated that it "never held the requirement of local remedies to apply literally in case where it is impractical or undesirable for the complainant to seize the domestic courts in the case of each violation."³¹ In the Inter-American system, there is no requirement of exhaustion if:

- a. the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated;
- b. the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or
- c. there has been unwarranted delay in rendering a final judgment under the aforementioned remedies."

In addition, while it is in the interest of the Court to not have an issue brought before more than one forum, it is unclear from article 17(2) whether cases on the same "subject matter" extend to include issues that are substantially related to the original claim or those that may be found to stem from the same incident. Moreover, it is unclear as to whether the same party must raise the claim.

The language of article 17(2) should be narrowed with a view to bringing it in line with international and regional mechanisms. The Optional Protocols to various UN treaties, including the ICCPR, which recognizes the competence of the Human Rights Committee to receive and consider individual communications, affirms that the Committee "shall not consider any communication from an individual unless it has ascertained that: (a) The same matter is not being examined under another procedure of international investigation or settlement."³²

In interpreting this provision, the Human Rights Committee affirmed that "the concept of 'the same matter' within the meaning of article 5 (2) (a) of the Optional Protocol had to be understood as including the same claim concerning the same individual, submitted by him or someone else who has the standing to act on his behalf before the other international body."³³

4. Access to the Court

Article 18 of the Draft Statute grants the following a right of access to the Arab Court:

- a. A State Party whose citizen alleges being a victim of a human rights violation;
- b. Non-governmental organizations (NGO) accredited in the respondent State; and
- c. Individuals belonging to the respondent State, which is a party to the Statute.

A pre-condition to access is that the "complainant State" or the "respondent State" is either a party to the Statute or makes a declaration to accept the jurisdiction of the Court as provided for by article 19 of the Draft Statute.³⁴

The ICJ and FIDH are concerned over the imprecise wording of the article, as it refers both to "citizens" and "individuals belonging" to a State party. Article 18 should be amended with a

³⁰ Articles 50 and 56(5) of the African Charter on Human and Peoples' Rights.

³¹ Free Legal Assistance Group and Others v. Zaire, African Commission on Human and Peoples' Rights, Comm. No. 25/89, 47/90, 56/91, 100/93 (1995), para. 37. In another case, the Commission declared a communication as admissible "based on the principle of constructive exhaustion of local remedies," where the complainant fled his home country for fear of his life. See: John D. Ouko v. Kenya, African Commission on Human and Peoples' Rights, Comm. No. 232/99 (2000), para. 19.

³² Article 5(2)(a) of the ICCPR-OP1. See for example, also article 4(2)(a) of the OP-CEDAW, and article 3(2)(c) of the ICESCR-OP.

³³ Duilio Fanali v. Italy, Communication No. 75/1980, UN Doc.Supp 40 (A/38/40) at 160(1983), para. 7.2

³⁴ Article 19 of the Draft Statute.

view to ensuring that, when an individual claims to be a victim of a violation that falls under the jurisdiction of the Court by any of the contracting parties, all individuals within the territory of a State party, or subject to its jurisdiction, can have access to the Arab Court. This is consistent with the implementation of the requirements of the Arab Charter itself, which in article 12 provides that courts "*shall also guarantee every person subject to their jurisdiction the right to seek a legal remedy before courts of all levels.*" It should be recalled that the enjoyment of human rights is universal and, with only a very few exceptions, rights cannot be made contingent on citizenship status. States parties to the Statute should not hinder in any way the effective exercise of the right to access the Court by any person or group of individuals.

Article 18 should also be amended with a view to removing any obstacles that might limit NGO access to the Court. Under the current Draft Statute, an NGO must be accredited in the respondent State in order to bring a complaint before the Court.

In addition to the limitations on NGOs in lodging a case against a State party in which they are not based, the ICJ and FIDH are both concerned that in many LAS countries, a number of organizations continue to be denied legal registration and accreditation by local authorities due to restrictive laws. In general, NGOs should be established freely and without prior authorization or accreditation from the authorities. Article 18 of the Statute should therefore be amended to ensure that NGOs that are unable to legally register due to restrictive laws and policies in States parties are guaranteed access to the Court.³⁵

Good practices in this regard may be found in other regional human rights systems. The European Court of Human Rights, for example, accepts "*applications from any...non-governmental organization...claiming to be the victim of a violation by one of the High Contracting Parties.*"³⁶

In the African system, individuals and NGOs with Observer status before the African Commission have the possibility to bring a case concerning human rights violations to the Court's attention. They also may present communications before the African Commission who may decide to bring the case before the African Court. The possibility granted to individuals and NGOs to submit cases to the Court is not limited to having a particular interest in bringing a case to Court such as by being a direct victim of the violation.

The Draft statute of the Arab Court should also be amended with a view to providing for other avenues of access to the Court, including for individuals or NGOs to join proceedings as interested parties or to submit information as *amicus curiae* or through expert opinions.

Finally, the ICJ and FIDH deplore that the Draft Statute fails to include any provision relating to the status of victims and the role they should play before the Arab Court. Our organizations believe that, for a remedy to be effective in cases involving serious human rights violations committed by individuals and by States, it is fundamental to guarantee victims an important role in supra-national legal proceedings. The Draft Statute of the Arab Court should provide not only for remedy and reparation for victims, but also for their full participation, including with legal representation. These measures should be complemented by the Court's internal rules of procedures and with practices that respect victims' rights in order to ensure the Court's efficacy.³⁷

In accordance with international standards, the Statute of the Court should also affirm the responsibility of States to ensure the protection of victims, witnesses, and others that

³⁵ Id. at article 18.

³⁶ Article 34 of the European Convention on Human Rights

³⁷ For example, the Court's Rules of Procedure should include the possibility of *in camera* hearings, when it is in the interest and protection of parties. See for example: Article 63(2) of the Rules of the European Court of Human Rights and article 43(2) of the Rules of the Court of the African Court on Human and Peoples' Rights.

participate in proceedings, and ensure that no reprisals are taken against them. For example, the UN 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 provide for appropriate measures to be taken to ensure victims' "safety, physical and psychological well-being and privacy, as well as those of their families."³⁸ The European Court has underscored the importance of the protection of victims, confirming "it is of the utmost importance for the effective operation of the system of individual petition...that applicants or potential applicants are able to communicate freely with the Commission without being subjected to any form of pressure from the authorities to withdraw or modify their complaints."³⁹ The ICJ and FIDH note the use of interim and precautionary measures by other regional mechanisms to bolster the protection of victims and, as discussed in more detail below, encourages their inclusion in the Statute.⁴⁰

5. Judgments, interim measures and advisory opinions

Under the Draft Statute, judgments of the Court are final and binding. The Court shall deposit the judgment, including its reasons, within 30 days.⁴¹ Petitions for reconsideration can be made: "a) if the judgment includes a breach of a basic procedural rule; b) if a fact with a decisive impact on the judgment emerges that was unknown at the time of the decision by both the Court and the petitioning party, provided that this was not a result of negligence; c) if the judgment does not clarify its reasons; d) if the Court flagrantly exceeds its jurisdiction; e) if the opposing party engaged in deceit, falsification, or fraud liable to influence the judgment; or f) in the event of illicit influence over a member of the Court."⁴²

The Court may also issue advisory opinions *at the request of a member State or any organizations or agencies subordinate to the League of Arab States...related to the Charter or any human rights document.*⁴³

The ICJ and FIDH are both concerned that while the Draft Statute provides for the Court's judgments to be final and binding, it does not provide for any monitoring mechanism that supervises the execution of these judgments, nor does it provide for the Court to order or even recommend specific measures to be adopted by member States in order to execute the judgments.

The ICJ and FIDH believe that the full execution of judicial decisions is a basic element of the rule of law and a fundamental component of due process rights, without which the right to effective remedies and reparation in cases of human rights violations cannot be realized.

In order to guarantee the effectiveness of the Arab Court of Human Rights, careful consideration ought to be given to ensure that State parties are fulfilling their obligations in executing and abiding by the Court's judgments, including by ensuring that an independent monitoring body is entrusted with supervising such execution, and that the Court itself is competent to indicate to the State parties the measures which need to be taken in order to fully execute and give effect to the Court's judgments, including, where other measures have been ineffective, the possibility of issuing sanctions.

³⁸ UN 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, Resolution Adopted by the General Assembly, 21 March 2006, A/RES/60/147

³⁹ Aksoy v. Turkey (Appl. No. 21987/93), 18 December 1996, para. 104

⁴⁰ For example, in the case of three individuals petitioning the Inter-American Commission, the Commission granted precautionary measures requiring the state of Nicaragua "to protect the lives and physical integrity" of the three men. The threat against one of the individuals was from the President of Nicaragua. Anaya v. Nicaragua, Decision of Precautionary Measures, available at http://www.worldcourts.com/iacmhr/eng/decisions/1999.02.12_Anaya_v_Nicaragua.pdf

⁴¹ Article 25 of the Draft Statute.

⁴² Article 26 of the Draft Statute.

⁴³ Article 20 of the Draft Statute.

The Draft Statute should be amended with a view to ensuring these elements.

The Draft should also be amended in order to provide for provisional or interim measures, which may be prescribed prior to the issuance of a final judgment. Virtually all international courts, including human rights courts as well as UN treaty bodies and regional mechanisms, provide for the possibility of interim measures. The capacity to prescribe interim measures is a critical function of any judicial or quasi-judicial body adjudicating disputes, and is particularly indispensable for the disposition of individual complaints of human rights violations.

Interim measures generally serve the purpose of preserving the rights claimed by a party to a dispute, until such time as the dispute can be settled by the relevant competent organ. In the case of a human rights dispute, the most effective human rights mechanism will be one that is capable not only of dispensing justice, but also of performing a preventative function. In this regard, interim measures must be available to stop a harm before it can occur or to stop an ongoing harm from continuing or at least mitigating the effects of that harm. The prescription of interim measures can serve to prevent irreparable damage to a victim or potential victim before a complaint can be adjudicated.

In this regard, interim measures should be provided for in the Statute to enable the Arab Court to intervene in cases where the applicant might face an imminent risk of a serious, irreversible or irreparable harm. Examples in this respect can be drawn from other regional mechanisms, as well as UN treaty body communication procedures.⁴⁴ The European Court, for example, may issue interim measures that it considers "*should be adopted in the interests of the parties or of the proper conduct of the proceedings.*"⁴⁵ The Inter-American Commission may request that state parties adopt precautionary measures "*in serious and urgent cases, and whenever necessary according to the information available...on its own initiative or at the request of a party...to prevent irreparable harm to persons.*"⁴⁶ The African Court may also issue interim measures at the request of a party "*which it deems necessary to adopt in the interest of the parties or of justice.*"⁴⁷ The Court may even convene an extraordinary session to decide on interim measures to be taken if it deems the matter to be extremely urgent.⁴⁸

III. Recommendations

In light of the above, the ICJ and FIDH call on the States of the LAS and the LAS Summit, Ministerial Council, and Secretariat to:

- I) Delay the adoption of the Arab Court Statute, so as to provide for sufficient time for further consideration of the draft in a transparent process that includes consultation with all relevant stakeholders;**
- II) Ensure that the reports of the Brahimi Commission and the Arab legal expert commission as well as the Draft Statute of the Arab Court are made public and available on the website of the LAS and are adequately disseminated, so as to allow for a comprehensive public dialogue about them;**

⁴⁴ The provision of interim measures are included in: Article 5(1) of OP-CEDAW; Article 5(1) of ICESCR-OP; Article 4(1) of CRPD; Article 31(4) of the CPED; and article 6 of the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure.

⁴⁵ Rule 39 of the Rules of the Court, the European Court of Human Rights, available at http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf

⁴⁶ Rule 25(1) Rules of Procedure of the Inter-American Commission on Human Rights, available at http://www.corteidh.or.cr/sitios/reglamento/ene_2009_ing.pdf

⁴⁷ Rule 51(1), Rules of Court, African Court on Human and Peoples' Rights, available at [http://www.african-](http://www.african-court.org/en/images/documents/Court/Interim%20Rules%20of%20Court/Final_Rules_of_Court_for_Publication_after_Harmonization_-_Final__English_7_sept_1_.pdf)

[court.org/en/images/documents/Court/Interim%20Rules%20of%20Court/Final_Rules_of_Court_for_Publication_after_Harmonization_-_Final__English_7_sept_1_.pdf](http://www.african-court.org/en/images/documents/Court/Interim%20Rules%20of%20Court/Final_Rules_of_Court_for_Publication_after_Harmonization_-_Final__English_7_sept_1_.pdf)

⁴⁸ Id. at Rule 51(2)

- III) To this end, ensure that all stakeholders, including civil society organizations, are able to comment on the Draft Statute and participate meaningfully in all stages of the process of establishing the Arab Court and of its eventual operationalization;**
- IV) Reconsider the decision to designate Bahrain as a host country of the Arab Court, and ensure that such a decision is based on the commitment and compliance of the concerned State party with universal human rights;**
- V) Amend the Arab Charter for Human Rights with a view to establishing its full conformity with universal human rights standards, including, among others, the right to life, the prohibition of cruel, inhuman or degrading punishment, the equality of men and women, and the right to freedom of thought, conscience and religion;**
- VI) Amend the Draft Statute of the Arab Court with a view to ensuring its full compliance with international and regional standards and mechanisms, and in particular:**
- i) Ensure that the nomination of candidates and election of judges are based on transparent and non-discriminatory procedures that protect against undue, inappropriate or unwarranted interference, and are based on, among other things, appropriate personal and legal qualifications, gender balance, and a fair representation of different legal systems;**
 - ii) Ensure that judges do not act as representatives of their national States, but rather sit on the Court in their individual capacity;**
 - iii) Ensure that during their term of office, judges are free from any form of direct or indirect interference or influence by any person or entity;**
 - iv) Amend draft article 8 so as to ensure that the judges are elected for a single, lengthy term (of approximately nine years) rather than a renewable five-year term;**
 - v) Ensure that judges can only be suspended or removed from office for reasons of incapacity or behaviour that renders them unfit to discharge their duties, following an appropriate procedure, established in advance, and that guarantees the rights of the concerned judge to a fair hearing in line with due process guarantees;**
 - vi) Incorporate the UN Basic Principles on the Independence of the Judiciary in all matters relating to the independence of the Arab Court and its judges;**
 - vii) Amend draft article 16 with a view to limiting the jurisdiction of the Court to cases relating to alleged violations of the Arab Charter on Human Rights, any additional protocols that may subsequently be adopted, as well as the Court's Statute;**
 - viii) Ensure that the Court is not competent to consider violations of other human rights conventions, but should take full account of international human rights law, including the obligations of any State that is party to the case before it, in its interpretation of the provisions of the Arab Charter, and to ensure that such interpretation does not result in a conflict with other international human rights obligations;**
 - ix) Amend draft article 17 with a view to ensuring that the requirement of exhausting local remedies does not have the effect of preventing rights holders from accessing the Arab Court. The Court should be competent to assess the effectiveness of local remedies, including instances where procedures are unduly prolonged or unlikely to bring effective**

relief, as well as the ability and willingness of local courts to effectively and meaningfully address rights violations;

x) Narrow the scope of a “*case with the same subject matter*” under draft article 17 so that only claims brought by the same applicant on the same subject matter before another regional human rights court are precluded from the Arab Court’s jurisdiction;

xi) Amend draft article 18 with a view to ensuring that all individuals within the territory of a State party, or subject to its jurisdiction, can have access to the Arab Court when they claim to be a victim of a violation, by any of the contracting parties, that falls under the jurisdiction of the Court;

xii) Ensure that the State parties to the Statute do not hinder in any way the effective exercise of the right to access the Court by any person or group of individuals, in particular by providing for the effective protection of victims and other participants in the proceedings and by ensuring that they are not subjected to any form of pressure or reprisals as a result of their participation in proceedings before the Court;

xiii) Remove any obstacles that might limit NGO’s access to the Court and ensure that any NGO, not only those accredited in a respondent State, can bring a complaint before the Court against any alleged violation by any of the contracting parties;

xiv) Provide for other avenues of access to the Court, including for individuals and NGOs to join proceedings as interested parties or to submit information as *amicus curiae* or through expert opinions;

xv) Provide for an independent and effective monitoring mechanism that supervises the execution of the Court’s judgements;

xvi) Ensure that the Court is competent to prescribe specific measures to be adopted by States in order to execute the Court’s judgments; and

xvii) Ensure that the Court is competent to prescribe interim measures, which may be taken prior to the issuance of a final judgment, to enable the Arab Court to intervene in cases where the applicant might face an imminent risk of a serious, irreversible or irreparable harm.

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