

The Arab Court of Human Rights: A Flawed Statute for an Ineffective Court



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International Commission of Jurists
P.O. Box 91
Rue des Bains 33
Geneva
Switzerland

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Executive summary

Following the popular uprisings that took place in several countries in the Middle East and North Africa (MENA) region from late 2010 onwards, and that led to the toppling of several authoritarian regimes, calls and initiatives for reforming the League of Arab States (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. 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 International Commission of Jurists (ICJ) welcomes the idea of establishing an Arab Court of Human Rights. An effective, independent and impartial regional human rights court could make an enormous contribution to the effective enjoyment of human rights of persons in the LAS region and to holding the LAS States accountable for human rights violations. Providing a judicial avenue at the Arab regional level to seek and obtain effective remedies and reparation for human rights violations is particularly important because in most of the LAS States, accountability for the perpetrators of these violations remains elusive. Justice for the victims, including access to effective remedies and reparation, continues to be largely unavailable. In addition, the Arab Human Rights Committee, the body that monitors the Arab Charter of Human Rights' implementation, lacks the mandate and competencies to receive and adjudicate individual complaints, to receive and consider alternative reports, and to address urgent human rights situations in the LAS member States.

However, the Statute of the Arab Court of Human Rights, as adopted, will not be able to meaningfully address these deficiencies or protect rights. If it is to serve as a foundation for the establishment of a genuine human rights court, the Statute must be fully amended to accord with international standards, including through a consultative and transparent process.

Indeed, both the process of adopting the Arab Court Statute and its content have fallen short of international standards.

Over the past three years, the entire process of the "reform" of 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. The identity of the members of the expert committee that drafted the Statute and its mandate and methods of work were never publicized. The various drafts were never officially publicized nor subject to any meaningful consultation with civil society organizations and other key stakeholders. The LAS Secretariat and most of the LAS member States have refused to engage with civil society organizations, to consider any recommendations formulated by them with a view to amending the draft Statute, or to even answer their requests for meetings.

As a result of this opaque process, the Statute for the Arab Court, adopted by the Ministerial Council of the LAS on 7 September 2014, falls well short of regional and international human rights standards. The deficiencies are manifest, particularly those provisions relating to the Arab Court's jurisdiction; the guarantees of the independence of the Arab Court, including the independence of its judges; the admissibility of cases; and access to the court for victims of human rights violations.

The Statute restricts access to the Arab Court to "any State party, who one of its subjects claims to be a victim of a human rights violations" and to accredited NGOs that are permitted, at the discretion of a State party, to submit cases on behalf of individuals.

Based on decades of experience of existing regional human rights courts and UN human rights treaty bodies, States, typically for diplomatic and political reasons, almost never make use of interstate complaints procedures regarding human rights issues. Access for individuals and the Arab Human Rights Committee was provided for in earlier drafts but deleted from the

final version of the Statute that was approved. By denying individual victims the right to have direct recourse to the Court, the Statute defeats the very purpose and *raison d'être* of a regional human rights court.

The Statute should therefore be amended to ensure direct access to the Court for all individuals within the territory of a State party, or subject to its jurisdiction, when they claim to be a victim of a violation of a right that comes under the jurisdiction of the Court. Obstacles that may limit NGO access to the Court should also be removed, including the requirement that the States themselves accept such access. Standing to bring a complaint should not be restricted only to NGOs accredited in a respondent State. Other avenues to access the Court should also be provided, including for individuals or NGOs to join proceedings as interested parties or to submit *amicus curiae* briefs, third party interventions or expert opinions.

In addition, the Statute does not adequately ensure the independence and impartiality of the Court and its judges. In particular, provisions on the selection and the independence of the judges and the Court have to be amended and enhanced to ensure that the judges on the Court have a high level of expertise, integrity, and, independence. To this end, the nomination of candidates and election of judges should be based on transparent and non-discriminatory procedures that protect against undue, inappropriate or unwarranted State interference, and that take full account of appropriate personal and legal qualifications, gender balance, and a fair representation of different legal systems. Judges should sit in their individual capacity, not as representatives of their home State, and serve for a single, lengthy term with a guaranteed pension. Furthermore, judges should 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 incorporating all due process guarantees. The UN Basic Principles on the Independence of the Judiciary should be incorporated in all matters relating to the independence of the Court and its judges.

Reforms are also required to the Statute's provisions relating to the subject matter jurisdiction and applicable law of the Arab Court. These reforms should ensure that the Court, when applying the provisions of the Arab Charter, will not construe the Charter in a manner that conflicts with States' other obligations under international law. The Court should apply the most protective standard of human rights law that applies in the State concerned. In certain key respects, indeed, the Arab Charter falls short of international human rights standards, including those relating to the right to life, equality between men and women, the prohibition of cruel, inhuman or degrading treatment, and the right to freedom of thought and conscience.

The Statute's provisions on the requirement to exhaust local remedies should also be reformed to ensure that they are not overly restrictive. The Arab Court should have extensive discretion to decide on the admissibility of cases, with a view to ensuring maximum protection of human rights.

In order for the Court to be effective in protecting the rights of individuals it must be competent to prescribe interim or provisional measures, which may be taken prior to a final judgment, where the applicant might face an imminent risk of serious, irreversible or irreparable harm. In addition, the Statute contains insufficient provisions regarding the protection of victims, witnesses and other participants in proceedings before the Court by States parties. There are also no specific obligations on the Court's host State, Bahrain, to provide the necessary guarantees for the Court, including for judges and staff to operate in defence of human rights free from undue interference, constraints or pressures. The decision to designate Bahrain as the host State raises further concerns given the sustained crack down pursued by the Bahrain authorities against opposition leaders, human rights defenders and peaceful protestors in violation of their rights to freedom of assembly and expression.

Furthermore, mechanisms should be put in place to ensure that the judgments of the Court are executed, including providing for an independent and effective monitoring mechanism and enabling the Court to prescribe specific measures to be adopted by States in order to execute the Court's judgments.

The ICJ therefore calls on the LAS member States:

- i) To refrain from ratifying the adopted Statute, unless and until critical amendments are made, as outlined below; and
- ii) To ensure that all stakeholders, including, among others, civil society organizations, victims of human rights violations and their representatives, Bar Associations, judges and academics are given the opportunity to participate meaningfully in all stages of the process of establishing the Arab Court and of its eventual operationalization, including by initiating a transparent and inclusive process to amend the adopted Statute so as to ensure its full accordance with international standards.

Amendments to the adopted Statute should:

- i) Incorporate the UN Basic Principles on the Independence of the Judiciary in all matters relating to the independence of the Arab Court and the career of its judges;
- ii) Provide for transparent and inclusive procedures for nomination, election and appointment of judges that protect against undue, inappropriate or unwarranted interference;
- iii) Ensure that the nomination, election and appointment of judges are based on specified and clearly defined criteria, including, among other things, appropriate personal and legal qualifications, gender balance, fair representation of different legal systems, and recognized competence and experience in the field of human rights;
- iv) Ensure that judges are elected for a single, lengthy term with a view to limiting any inappropriate or unwarranted interference or influence in the process of electing judges;
- v) Ensure that judges sit on the Court in their personal capacity and not as representatives of their national States;
- vi) Ensure that the Court is exclusively competent to establish its rules of procedure and remove any provision that gives the Assembly of States Parties competence to discuss and adopt such rules or to determine the conditions of the Court's internal administration;
- vii) Provide that the Arab Court is to 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 or other Arab human rights treaties so as to prevent inconsistency or conflict in the application of those provisions with any other international legal obligations of States parties;
- viii) Ensure that the requirement to exhaust local remedies does not have the effect of preventing rights holders from accessing the Arab Court when unable to access an effective remedy in their home states and, to this end, ensure that the Court is competent to assess the effectiveness of domestic 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 human rights violations;
- ix) Ensure 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;
- x) Remove any obstacles that might limit NGOs' 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;

- xi) Ensure that the States 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;
- xii) 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;
- xiii) Ensure that the States parties provide for the effective protection of victims and other participants in the proceedings, including by ensuring that they are not subjected to any form of pressure, reprisals or ill-treatment as a result of their participation in proceedings before the Court;
- xiv) Provide for an independent and effective monitoring mechanism that supervises the execution of the Court's judgements;
- xv) 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;
- xvi) 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; and
- xvii) Ensure that the designated host State is willing and able to provide the necessary guarantees for the Court, including judges and staff, to operate in defence of human rights and free from any undue interference, constraints or pressures, as well as for the protection of victims, their representatives, witnesses, and civil society associations from reprisal and restrictions.

I. Procedure establishing the Arab Court of Human Rights

The proposal to establish an Arab Court of Human Rights was one of a number of recent reform initiatives regarding the League of Arab States (LAS) human rights system, in particular sparked by the uprisings that have swept across many of the countries of the Middle East and North Africa (MENA) region beginning in late 2010. These uprisings helped to expose the dismal state of human rights in the region, the weakness of human rights guarantees, and the lack of effective enforcement and redress mechanisms for victims of human rights violations.

It was in this context that on 24 October 2011 the Secretary General of the LAS, Nabil Al Araby, appointed 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."¹ Details about the Brahimi Commission were not made public, including with regard to its composition, methods of work and the extent of the outreach or consultation, if any, with various stakeholders, in particular representatives of civil society. Indeed, even the outcome of its work, including the final report of the Brahimi Commission, was never made public.

As a separate initiative, on 15 January 2012 the government of Bahrain submitted 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 body of Arab legal experts, with "elaborating a report on the establishment of the Arab Court, in light of regional experiences on establishing similar courts."²

The reports of both the Brahimi Commission and the body of Arab legal experts, neither of which is publicly available, were submitted to the Secretary General of the LAS, Nabil Al Araby. The Secretary General in turn submitted them to the Doha Arab Summit in March 2013.

The Doha Summit adopted two separate decisions "thanking the high-level independent Commission presided over by Mr Brahimi that prepared its report on the reform and the modernization of the League of the Arab States";³ "approving the establishment of an Arab Court for Human rights"; "mandating a high level committee of legal experts 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."⁴

In September 2013, the Ministerial Council of the LAS approved a decision to establish the Arab Court of Human Rights with its seat in Bahrain.⁵ A draft Statute for the Court was elaborated and approved "in principle" at the Arab Summit meeting in March 2014, in Kuwait. The Summit's decision entrusted the expert committee to finalize the draft Statute and to

¹ See Djazairi, "Lakhdar Brahimi chairs an independent committee to modernize the common Arab system", 24 October 2011, available at <http://www.djazairi.com/elbilad/49737> last accessed 14 January 2015.

² Decision No.7489 of the LAS Ministerial Council of 10 March 2012, available on the LAS website, Ministerial Council at the level of Foreign Ministers section, at: <http://www.lasportal.org/ar/councils/lascouncil/Pages/LasCouncilMinistrialDetails.aspx?RID=43#tab0> last accessed 24 March 2015.

³ Decision No.572 of the LAS Summit Council of 26 March 2013, available on the LAS website at: <http://www.lasportal.org/ar/summits/Documents/القرارات.pdf> last accessed 24 March 2015.

⁴ Decision No.573 of the LAS Summit Council of 26 March 2013, Id.

⁵ Decision No.7656 of the LAS Ministerial Council of 1 September 2013, available on the LAS website, Ministerial Council at the level of Foreign Ministers section, at: <http://www.lasportal.org/ar/councils/lascouncil/Pages/LasCouncilMinistrialDetails.aspx?RID=13#tab0> last accessed 24 March 2015.

submit it to the approval of the LAS Ministerial Council.⁶ Following the “in principle” approval, a conference was organized in Bahrain by the LAS and the Bahrain National Institution for Human Rights on 25 and 26 May 2014, ostensibly to discuss the establishment of the Arab Court with stakeholders,⁷ but in reality as a platform for the LAS Secretary General to announce that the expert committee of the LAS had already completed its work and that the final draft would be submitted for the approval of the Ministerial Council in its next meeting.⁸ The conference was widely attended by representatives from LAS member States, the Arab Parliament, national human rights institutions, the Arab Human Rights Committee, officials from the Bahrain Ministry of Foreign Affairs and domestic and international civil society organizations.

Given extensive concerns regarding the drafting process for and the content of the draft Statute, the ICJ and sixteen other leading national and international human rights organizations sent a letter on 31 August 2014 to the LAS Ministers of Foreign Affairs, urging them to defer action on the adoption of the Statute.⁹ A delegation from the ICJ and other national and international organizations visited Egypt from 31 August to 5 September 2014 with a view to engaging with State representatives and high-ranking officials from the LAS and to delaying adoption of the Statute so as to allow for consultation and reconsideration of the flawed text. Requests for meetings with the LAS Secretary General and other LAS senior officials went unanswered. Some States representatives indicated that they would share the concerns expressed by the ICJ and other organizations with the Ministerial Council with a view to deferring action on its adoption, but it is unclear whether they acted on those undertakings.

On 7 September 2014, the Ministerial Council of the League adopted a version of the Statute that differed significantly from the draft circulated at the May 2014 conference, including by removing the ability of the Arab Human Rights Committee to refer cases to the Court.¹⁰ No information has emerged about the process by which the Statute was adopted, including whether there was a vote on it. As a general practice, though not pursuant to any formal rule, decisions of the Ministerial Council are taken by consensus. The Statute was opened for ratification on 4 November 2014.¹¹ According to article 33 of the Statute, the Statute will enter into force following ratification by seven States. The Statute is said to be operative one year after it has come into force.¹² At the time of publishing, no State had ratified the Statute.

a. Lack of consultation, participation and transparency in the Statute process

Article 25 of the International Covenant on Civil and Political Rights (ICCPR), to which most LAS States are party,¹³ provides for the right and the opportunity to take part in the conduct of public affairs, including through direct means. The Human Rights Committee, in

⁶ Decision No.593 of the LAS Summit Council of 26 March 2014, available at: <http://www.lasportal.org/ar/summits/Documents/2025%20العادية%20الدورة%20القمة%20مستوى%20على%20العربية%20الدول%20جامعة%20مجلس%20قرارات.pdf> last accessed 24 March 2015.

⁷ Conference Agenda for 25-26 May 2014, available at <http://www.nihr.org.bh/Media/pdf/ac/04.pdf> last accessed 9 March 2015. Background information and outputs of the conference are available at: <http://en.nihr.org.bh/events/s54/Arab-Court.aspx> last accessed 9 March 2015.

⁸ Speech of the Secretary General of the LAS, Dr Nabil Elaraby, available at: <http://en.nihr.org.bh/administrator/Media/pdf/ArabCourt/HE%20Dr.%20Nabil%20El%20Araby,%20Secretary%20E2%80%93%20General,%20Arab%20League.pdf> last accessed 9 March 2015.

⁹ Open letter of 31 August 2014 to LAS Ministers of Foreign Affairs signed by the ICJ and others, available at: <http://icj.wppengine.netdna-cdn.com/wp-content/uploads/2014/09/Advocacy-letter-31-August-2014-FINAL.pdf> last accessed 14 January 2015.

¹⁰ Resolution 7990 of the Ministerial Council of the LAS, 7 September 2014.

¹¹ Statement of the LAS of 4 November 2014.

¹² The Statute, article 33.

¹³ LAS states that have not ratified or acceded to the ICCPR include Oman, Qatar, U.A.E., Comoros, and Saudi Arabia.

interpreting article 25, has affirmed that this right is a “broad concept which relates to the exercise of political power, in particular the exercise of legislative, executive and administrative powers. It covers all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels.”¹⁴

The UN Declaration on Human Rights Defenders similarly affirms the right of all persons “individually and in association with others, to have effective access, on a non-discriminatory basis, to participation in the government of his or her country and in the conduct of public affairs.”¹⁵ The UN Declaration adds that the right to participate “includes, inter alia, the right, individually and in association with others, to submit to governmental bodies and agencies and organizations concerned with public affairs criticism and proposals for improving their functioning and to draw attention to any aspect of their work that may hinder or impede the promotion, protection and realization of human rights and fundamental freedoms.”¹⁶

The right of civil society organizations and other stakeholders to participate, in particular on issues pertaining to human rights and rule of law issues, is also specifically recognized in other international standards. For example, in its 2014 resolution on Civil Society Space the Human Rights Council urged States to, “engage with civil society to enable it to participate in the public debate on decisions that would contribute to the promotion and protection of human rights and the rule of law, and of any other relevant decisions” and stressed, in particular, the “valuable contribution of civil society in providing input to States on the potential implications of legislation, when such legislation is being developed, debated, implemented or reviewed.”¹⁷ Such participation extends to the international level. Indeed, the Human Rights Council highlighted “the essential role of civil society in subregional, regional and international organizations, including in support of the organizations’ work, and in sharing experience and expertise through effective participation in meetings in accordance with relevant rules and modalities.”¹⁸

In this connection, the principle of participation necessarily extends to the involvement of individuals and civil society in discussions surrounding reform of the Arab human rights system and the establishment of an Arab Court of Human Rights, including the drafting of the Court’s Statute. For participation to be meaningful, transparent, inclusive, consultative and effective processes and procedures must be provided for. The UN Declaration on Human Rights Defenders affirms the right of everyone, individually or in association with others, and for the purpose of promoting and protecting human rights and fundamental freedoms, “to know, seek, obtain, receive and hold information about all human rights and fundamental freedoms, including having access to information as to how those rights and freedoms are given effect in domestic legislative, judicial, and administrative systems”¹⁹ and “to communicate with non-governmental or intergovernmental organizations.”²⁰ Similarly, the Human Rights Council has recognized “the right of everyone, individually and in association with others, to unhindered access to communication with subregional, regional, and international bodies.”²¹ This includes communicating with regional mechanisms such as the League of Arab States on issues pertaining to the promotion and protection of human rights.

¹⁴ Human Rights Committee, General Comment 25, U.N. Doc. CCPR/C/21/Rev.1/Add.7, (1996) para 5.

¹⁵ Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (the UN Declaration on Human Rights Defenders), UN General Assembly, A/RES/53/144, (1999), article 8(1).

¹⁶ *Id.*, article 8(2).

¹⁷ Human Rights Council, Resolution on Civil Society Space, A/HRC/27/L.24, (2014), paras 7 and 8.

¹⁸ Human Rights Council, Resolution on Civil Society Space, A/HRC/27/L.24, (2014), para. 12.

¹⁹ UN Declaration on Human Rights Defenders, *supra* at note 15, article 6(a).

²⁰ UN Declaration on Human Rights Defenders, *supra* at note 15, article 5(c).

²¹ Human Rights Council, Resolution on Civil Society Space, A/HRC/27/L.24, (2014), para 12. See also Human Rights Council, Resolution on Cooperation with the United Nations, its representatives and mechanisms in the field of human rights, UN Doc. A/HRC/24/L.17/Rev.1 (2013), para. 1.

The LAS Secretariat appointed the expert committee that drafted the adopted Statute. It is unknown whether any consultations were made in the appointment process. Neither the identities of the expert members nor the mandate and working methods of the committee were ever publicized. The entirety of the drafting process, including the committee's meetings, was opaque and conducted behind closed doors, thus contravening basic principles of inclusive participation and transparency. Despite their repeated requests, the ICJ and other civil society organizations and stakeholders were not given the opportunity to provide their general input or to comment on the drafts of the adopted Statute. A number of civil society organizations were finally invited by the Bahrain Human Rights Institution to a conference on the Court from 25 to 26 May 2014 in Bahrain. The conference, however, was neither intended to be, nor in fact was, of any utility to the Statute drafting process, as the LAS Secretary General announced at the time that the expert committee had already finalized its work and draft. Indeed, the draft that was adopted by the Ministerial council was finalized, approved by the members of the expert committee, and referred to the Ministerial Council on 15 May, almost two weeks before the Bahrain conference.

The LAS has a long history of resorting to opaque procedures and excluding civil society organizations from their decision-making processes. However, the process of establishing the Arab Court of Human Rights and for adopting its statute sets a new low point, even by the LAS' standards. To establish an Arab human rights court to assume jurisdiction over cases of human rights abuses without consulting victims of such abuses or their representatives, including civil society organizations acting on their behalf, or other stakeholders, raises serious concerns about the willingness of those who initiated the process to establish an effective and operable human rights court.

The ultimate outcome has been a Statute of the Arab Court that does not accord with international human rights standards and best practices and fails to provide an effective remedy for victims of human rights violations.

The ICJ therefore calls on the LAS member States:

- i) To refrain from ratifying the adopted Statute, unless and until critical amendments are made, as outlined below;
- ii) To initiate a transparent and inclusive process to amend the adopted Statute so as to ensure its full accordance with international standards;
- iii) To ensure that the LAS secretariat makes public all information relating to the process and procedure of amending the adopted Statute, including relevant information about the committee or individuals entrusted with conducting this process and their methods of work; and
- iv) To ensure that all stakeholders, including, among others, civil society organizations, victims of human rights violations and their representatives, Bar Associations, judges and academics are given the opportunity to participate meaningfully in all stages of the process of establishing the Arab Court and of its eventual operationalization, including by providing comment or other input on proposed amendments to the adopted Statute.

II. The independence and impartiality of the Arab Court and its judges

The Statute of the Arab Court, in general terms, affirms the independence of the Court and the independence of judges.²² However, many of the other provisions relating to the selection, tenure and dismissal of judges fail to safeguard this independence and fall short of international standards. The UN Basic Principles on the Independence of the Judiciary (the UN Basic Principles) set out the universal minimum requirements in this respect, including in relation to the qualifications, selection, conditions of service and tenure, immunity,

²² Article 2 and article 15 of the Statute.

suspension and removal of judges.²³ Concerns about the Arab Court with reference to the UN Basic Principles and other applicable international standards are set out below.

a. Qualifications and criteria for judges' nomination and election

Under the Statute, candidates have to be persons of "recognized integrity and commitment to high moral values." In addition, they "must possess competence and experience in legal or judicial office. They must also possess the qualifications required for appointment in the highest judicial or legal offices in their countries, and preference shall be given to whoever has experience in the field of human rights."²⁴ Not more than one judge from the same State may serve on the Arab Court at the same time.²⁵

Under the UN Basic Principles, judges must be "individuals of integrity and ability with appropriate training or qualifications in law."²⁶ Building on this principle, other regional human rights courts require judges to be of high moral character and integrity, who possess the highest professional qualifications, competence and experience required for appointment to the highest judicial offices.²⁷ International criminal tribunals apply similar criteria. Article 36(3)(a) of the International Criminal Court (ICC) Statute provides: "The judges shall be chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices." The UN human rights treaty bodies that carry out quasi-judicial functions in adjudicating individual complaints also contain criteria for the selection of members. For instance, under 28(2) of the ICCPR, members of the Human Rights Committee shall be "persons of high moral character and recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience."²⁸ UN special procedures mandate holders, some of whom also examine complaints, are selected on the basis of: "(a) expertise; (b) experience in the field of the mandate; (c) independence; (d) impartiality; (e) personal integrity; and (f) objectivity."²⁹

The qualifications and criteria for judges of the Arab Court, by contrast, are also inadequate for a judge sitting on a human rights court. These qualifications should have been extended

²³ 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. See also, the Burgh House Principles on the Independence of the International Judiciary, June 2004, Burgh House, Hampstead, London.

²⁴ Article 7 of the Statute.

²⁵ Article 5 of the Statute.

²⁶ UN Basic Principles, principle 10.

²⁷ See article 21 of the European Convention on Human Rights (ECHR), 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, article 52 of the American Convention on Human Rights and article 4 of the Statute of the Inter-American Court of Human Rights

²⁸ See also: Para (b) of Economic and Social Council resolution 1985/17 of 28 May 1985 establishing the Committee on Economic Social and Cultural Rights; article 8(1) of the International Convention on the Elimination of all forms of Racial Discrimination (CERD) establishing the Committee on the Elimination of Racial Discrimination; article 17(1) of the Convention on the Elimination of all forms of Discrimination against Women (CEDAW) establishing the Committee on the Elimination of Discrimination against Women; article 17(1) of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) establishing the Committee Against Torture; article 5 of the Optional Protocol to the CAT (CAT-OP) establishing the Subcommittee on Torture; article 43(2) of the Convention on the Rights of the Child (CRC) establishing the Committee on the Rights of the Child; article 72(1) and (2) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CPMW) establishing the Committee on Migrant Workers; article 34(3) and (4) of the International Convention on the Rights of Persons with Disabilities (CRPD) establishing the Committee on the Rights of Persons with Disabilities; and article 26(1) of the International Convention for the Protection of all Persons from Enforced Disappearance (CED) establishing the Committee on Enforced Disappearances.

²⁹ Resolution 5/1 on the Institution-building of the United Nations Human Rights Council, 18 June 2007, para. 39.

so as to require, and not simply give preference to jurists with, expertise in international human rights law. An earlier draft of the Statute required judges to have at least 10 years' experience in the field of human rights. However, this provision was later removed. The omission of any specific requirement that judges have expertise in human rights makes it likely that at least some judges on the Arab Court will lack the appropriate ability, training and qualifications, in accordance with international standards and good practice. There is less risk of such an outcome from other regional bodies. For instance, judges at the Inter-American Court of Human Rights (the Inter-American Court) are elected from among jurists "of recognized competence in the field of human rights."³⁰ The same or similar standards are required for members of all of the UN treaty bodies.³¹ Similarly, judges at the African Court on Human and Peoples' Rights (the African Court) are elected from among jurists "of recognized practical, judicial or academic competence and experience in the field of human and peoples' rights."³²

The Statute of the Arab Court also contains no specific requirement to take account of the equitable representation of gender, geographic region, and legal systems, nor any anti-discrimination clause. These omissions are well out of line with international standards and developments in practice in other regions. In the selection of judges, the UN Basic Principles prohibit discrimination on any basis, except nationality where this is a requirement for judicial office.³³ The Burgh House Principles on the Independence of the International Judiciary (the Burgh House Principles) recommend that, although appropriate qualifications should be the overriding consideration, "procedures for nomination, election and appointment should consider fair representation of different geographic regions and the principal legal systems, as appropriate, as well as of female and male judges."³⁴

Guidelines issued by the Committee of Ministers of the Council of Europe regarding the nomination of candidates as judges for the European Court of Human Rights (the European Court) contain requirements to ensure gender balance on the Court.³⁵ In the African system gender representation has to be taken into account both when nominating and electing judges to the African Court.³⁶ In addition, when electing judges, the electing body is required to ensure that across the African Court there is representation of the main regions of Africa and of their principal legal traditions.³⁷ When electing members to the Human Rights Committee, the ICCPR requires "equitable geographical distribution of membership and to the representation of the different forms of civilization and of the principal legal systems."³⁸ UN human rights bodies also recommend that at the national level measures should be taken to

³⁰ Article 4 of the Statute of the Inter-American Court of Human Rights.

³¹ Article 28(2) of the ICCPR; para (b) of Economic and Social Council resolution 1985/17 of 28 May 1985; article 8(1) of the CERD; article 17(1) of the CEDAW; article 17(1) of the CAT; article 5(2) of the CAT-OP; article 43(2) of the CRC; article 72(1) CPMW; article 34(3) of the CRPD; and article 26(1) of the CED.

³² Article 11 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.

³³ UN Basic Principles, principle 10.

³⁴ Burgh House Principles, principle 2.2

³⁵ Guidelines of the Committee of Ministers on the selection of candidates for the post of judge at the European Court of Human Rights. Adopted by the Committee of Ministers of the Council of Europe, 29 March 2012, CM(2012)40 final, part II, 8.

³⁶ Respectively article 12(2) and 14 (3) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.

³⁷ Article 14(2) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.

³⁸ Article 31(2), ICCPR. See also para (b) of Economic and Social Council resolution 1985/17 of 28 May 1985; article 8(1) of the CERD; article 17(1) of the CEDAW; article 17(1) of the CAT; article 5(3) of the CAT-OP; article 43(2) of the CRC; article 72(2)(a) CPMW; article 34(4) of the CRPD; and article 26(1) of the CED.

ensure fair balance among judges for both women and minorities.³⁹ The ICC Statute requires account to be taken of the need for the representation of the principal legal systems of the world, equitable geographical representation and fair representation of female and male judges.⁴⁰

The practice of international courts in the election of judges has shown that women tend to be under-represented.⁴¹ The lack of any requirement in the Statute of the Arab Court is likely to result in the under-representation of women on the Arab Court. This is particularly important given the barriers that women face in accessing judicial office in many countries in the MENA region.

The failure to include a requirement for the representation of geographical regions and legal traditions could also result in a Court that lacks adequate representation of the regions and legal systems of the MENA region. Indeed, the Arab region contains a wide variety of legal systems that are either influenced or directly draw from a plurality of traditions. Finally, the Statute of the Arab Court does not ensure a diversity of expertise on particular rights areas, including those recognized by the Arab Human Rights Charter.

b. Nomination and election procedure

Pursuant to article 6 of the Statute, the seven judges of the Arab Court are to be elected by the Assembly of States Parties through a vote by secret ballot from a list of candidates.⁴² States parties may nominate two candidates for election.⁴³

The UN Basic Principles require the procedure for selecting judges to “safeguard against judicial appointments for improper motives”, and prohibit discrimination on any grounds, with the exception that a requirement that a candidate be a national of the country concerned is not to be construed as discriminatory.⁴⁴ The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (the African Guidelines) similarly provide that the process of appointment “shall be transparent and accountable” and that the method of selection “shall safeguard the independence and impartiality of the judiciary.”⁴⁵ In addition to these requirements, the Burgh House Principles add that “Information regarding the nomination, election and appointment process and information about candidates for judicial office should be made public, in due time and in an effective manner....”⁴⁶

The Statute falls short of these international standards. Pursuant to its provisions, States are not required to follow transparent procedures set forth in law in nominating and electing candidates to sit on the Arab Court. There is no requirement that nomination procedures be open and allow for application by all candidates who meet the qualifications set out in the Statute and be widely publicized. By contrast, in the European System, the Parliamentary Assembly and Committee of Ministers of the Council of Europe have both issued resolutions and guidance to ensure rigorous, consistent, fair and transparent national selection

³⁹ Concluding Observations of the Human Rights Committee on Sudan, UN Doc. CCPR/C/79/Add.85, para. 21; Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/11/41, para. 34.

⁴⁰ Article 36(8)(a) of the Rome Statute of the ICC.

⁴¹ Hao Duy Phan, *A Selective Approach to Establishing a Human Rights Mechanism in Southeast Asia*, Martinus Nijhoff Publishers, 2012, p.210.

⁴² The Assembly of State Parties consists of one representative of each State party to the Statute (article 4 of the Statute).

⁴³ Article 6(2) of the Statute.

⁴⁴ UN Basic Principles on the Independence of the Judiciary, principle 10. See also, the Burgh House Principles, principle 2.3.

⁴⁵ ACHPR Principles and Guidelines, Principle A.4(h).

⁴⁶ Burgh House Principles, principle 2.4.

procedures.⁴⁷ In particular, widespread public and open calls for candidates are required and final lists of candidates are to be made public.⁴⁸

In consonance with international standards it is also important that the nomination procedure include wide consultations with and assistance by civil society, including associations of judges and lawyers.⁴⁹

c. Independence and impartiality of judges

Although the Statute of the Arab Court requires judges to be independent, it omits an express requirement that they serve on the Court in their individual capacity. While this requirement is in and of itself a core element of an independent judiciary, the omission of express reference may lead to misapprehension in this respect.

Judges must be able to exercise their functions free from any direct or indirect interference or influence by any person or entity. This is recognized not only in the UN Basic Principles,⁵⁰ but also in article 12 of the Arab Charter, which provides that “[a]ll 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.”⁵¹

A cornerstone principle in protecting judges from interference and influence is ensuring that Judges sit on the court in their personal capacity. Judges in human rights courts, even if nominated by States, do not represent them and should not be seen to do so. Unless the Statute is appropriately amended, the Arab Court will be alone among regional human rights courts, including the European Court, the Inter-American Court and the African Court, not to require judges to sit in their personal capacity.⁵²

d. Term of office

Also key to ensuring judges’ independence and impartiality is their term of office. Under article 8 of the Statute, “[j]udges shall be elected for a four-year term, and they may be re-elected for a second non-renewable tenure.”

The ICJ considers it inappropriate for judges to be subject to service of renewable tenures in most situations, and particularly in international courts. During the drafting process of the Statute, the ICJ called for the amendment of the draft provisions on term of office to ensure that judges would be elected for a single, lengthy term. This approach would have reflected a trend of best practice in international tribunals, as evidenced in the Statute of the ICC and

⁴⁷ Council of Europe, Parliamentary Assembly, Resolution 1646 (2009) *Nomination of candidates and election of judges to the European Court of Human Rights*. For details of all the measures taken by the Parliamentary Assembly see, *Procedure for electing judges to the European Court of Human Rights*, Committee on Legal Affairs and Human Rights, 10 January 2013, AS/Jur/Inf (2013) 02

⁴⁸ Council of Europe, Parliamentary Assembly, Resolution 1646 (2009) *Nomination of candidates and election of judges to the European Court of Human Rights*, paras 2 and 4.1. Guidelines of the Committee of Ministers on the selection of candidates for the post of judge at the European Court of Human Rights. Adopted by the Committee of Ministers of the Council of Europe, 28 March 2012, CM(2012)40 final, parts III and V.

⁴⁹ Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, adopted by resolution of the General Assembly, 8 March 1999, A/RES/53/144, article 8; Resolution of the Human Rights Council, Civil Society Space, 23 September 2014, A/HRC/27/L.24, paras.7 and 12.

⁵⁰ See for example, principles 2 and 4 of the UN Basic Principles.

⁵¹ See also, Burgh House Principles, principle 1.1; The African Guidelines, principle 4(f).

⁵² Article 21(2) of the European Convention on Human Rights, article 4(1) of the Statute of the Inter-American Court of Human Rights and article 11(1) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights. Members of the Human Rights Committee are subject to the same requirements, ICCPR, article 28(3).

the European Court.⁵³ A single lengthy term of office limits inappropriate or unwarranted interferences or influences in the process of electing judges and thus enables 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.

e. Suspension and removal from office

Article 15(5) of the Statute provides that “[j]udges may not be dismissed or their tenure terminated except with the agreement of the rest of the judges that a judge among them no longer meets the requirements of his office and its demands or meets the standards for which he has been selected.”⁵⁴

The Statute does not clearly define the grounds and the procedure according to which judges may be dismissed from office or have their tenure terminated. International standards make clear that any allegation of judicial misconduct must be investigated independently, impartially, thoroughly and fairly and adjudicated in the context of fair proceedings before a competent, independent and impartial body, in which a judge’s rights are respected. The disciplining of judges must be based on established standards of judicial conduct. Sanctions, including disciplinary measures, suspension or removal, must be proportionate.⁵⁵

The ICJ considers that the Statute should have provided for the suspension or removal of judges only on the basis of specified, well defined grounds, including reasons of incapacity or behaviour that renders judges unfit to discharge their duties. In this regard, the Rome Statute of the ICC provides that a judge can only be removed from office if he or she “Is found to have committed serious misconduct or a serious breach of his or her duties under this Statute, as provided for in the Rules of Procedure and Evidence; or (b) Is unable to exercise the functions required by this Statute.”⁵⁶

The Statute of the Arab Court also fails to provide that 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. By contrast other international Courts spell out standards for removal. For example, the ICC’s Rome Statute provides that judges “whose conduct or ability to exercise the functions of the office as required by this Statute is challenged under this article shall have full opportunity to present and receive evidence and to make submissions in accordance with the Rules of Procedure and Evidence.”⁵⁷

The Rules of Court of the African Court provide that when the procedure for suspension or removal from office has been triggered “the President or, if the circumstances so require, the Vice-President, shall inform the Member of the Court concerned accordingly, in a written statement which shall include the grounds thereof and any relevant evidence. He/she shall, subsequently, at a private session of the Court specially convened for the purpose, be afforded an opportunity of making a statement, of furnishing any information or explanations he/she wishes to give, and of supplying answers, orally or in writing, to any questions put to him/her. At a further private session, at which the Member of the Court concerned shall not be present, the matter shall be considered; each Member of the Court shall state his/her opinion and, if requested, a vote shall be taken.”⁵⁸

⁵³ Rome Statute of the International Criminal Court, article 36(9)(a); European Convention on Human Rights, article 23(1).

⁵⁴ Article 15(5) of the Statute.

⁵⁵ UN Basic Principles, principles 17 to 20; ACHPR Principles and Guidelines, Section A, principle 4(q); Burgh House Principles, principles 3.1 & 17; Committee of Ministers (CoM) of the Council of Europe Recommendation (2010)12, para. 69.

⁵⁶ Rome Statute, article 46(1).

⁵⁷ Rome Statute, article 46(4).

⁵⁸ Rule 7(1), Rules of Court, African Court on Human and Peoples’ Rights.

f. Rules of Procedure

Article 28 of the Statute provides that the Court shall establish its rules of procedure. However, the rules must be submitted to the Assembly of States Parties for discussion and adoption. In elaborating the rules of procedure, the Court can rely on "experts and specialists it deems necessary."

The requirement of independence extends not only to the independence of individuals judges but also to the court itself. The Burgh House Principles recognize that "[w]here a court is established as an organ or under the auspices of an international organisation, the court and judges shall exercise their judicial functions free from interference from other organs or authorities of that organisation. This freedom shall apply both to the judicial process in pending cases, including the assignment of cases to particular judges, and to the operation of the court and its registry."⁵⁹ In addition, the Burgh House Principles affirm that "[t]he court shall be free to determine the conditions for its internal administration, including staff recruitment policy, information systems and allocation of budgetary expenditure."⁶⁰

The Arab Court is vulnerable to having its independence further undermined by the requirement that its rules of procedures be submitted to States parties to the Statute for discussion and adoption. Procedures designed to secure the independence of the Court and the independence and impartiality of the judges could thus be subject to revision and amendment, or veto, by the Assembly of States Parties.

As a general matter, judicial bodies should be competent to elaborate and adopt their own rules of procedure. Most other international human rights courts and non-judicial mechanisms also have the exclusive competence to set their own rules of procedure. For example, the Protocol establishing the African Court provides: "The Court shall draw up its Rules and determine its own procedures. The Court shall consult the Commission as appropriate."⁶¹ Article 60 of the American Convention on Human Rights provides that while the Statute of the Court is to be drawn up by the Court and submitted to the General Assembly for approval, "[i]t shall adopt its own Rules of Procedure." Pursuant to the European Convention on Human Rights, the plenary of the European Court adopts the rules of court.⁶² Similarly, the human rights treaty bodies, such as the Human Rights Committee, establish their own rules of procedure.⁶³

The ICJ therefore calls on the LAS member States and secretariat to amend the Statute with a view to:

- i) Incorporating the UN Basic Principles on the Independence of the Judiciary in all matters relating to the independence of the Arab Court and the career of its judges;
- ii) Providing for transparent and inclusive procedures for nomination, election and appointment of judges that protect against undue, inappropriate or unwarranted interference;
- iii) Ensuring that the nomination, election and appointment of judges are based on specified and clearly defined criteria, including, among other things, appropriate personal and legal qualifications, gender balance, fair representation of different

⁵⁹ Burgh House Principles, principle 1.2.

⁶⁰ Burgh House Principles, principle 1.3.

⁶¹ Article 33, Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.

⁶² Article 25(d), European Convention on Human Rights.

⁶³ Article 39(2), ICCPR. See also, article 10(1) of the CERD; article 19(1) of the CEDAW; article 18(2) of the CAT; article 10(2) of the OP-CAT; article 43(8) of the CRC; article 75(1) CPMW; article 34(10) of the CRPD; and article 26(6) of the CED. And see Provisional Rules of Procedure adopted by the Committee on Economic, Social and Cultural Rights at its third session (1989), E/C.12/1990/4/Rev.1.

- legal systems, and recognized competence and experience in the field of human rights;
- iv) Ensuring that judges are elected for a single, lengthy term with a view to limiting any inappropriate or unwarranted interference or influence in the process of electing judges;
- v) Ensuring that judges sit on the Court in their personal capacity and not as representatives of their national States;
- vi) Ensuring that judges can only be suspended or removed from office for reasons of incapacity or behavior that renders them unfit to discharge their duties, following a detailed, 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; and
- vii) Ensuring that the Court is exclusively competent to establish its rules of procedure and remove any provision that gives the Assembly of States Parties competence to discuss and adopt such rules or to determine the conditions of the Court's internal administration.

III. Subject matter jurisdiction of the Court (article 16)

Article 16 of the Statute grants the Court jurisdiction over "all cases and litigation arising from the application and interpretation of the Arab Charter on Human Rights or any other Arab treaty in the field of human rights to which the disputing States are party."

The Preamble to the Statute notes that an "Arab Court of Human Rights will contribute to the realization of the purposes and objectives of the Arab Charter on Human Rights." The particular manner in which the Court would make such a contribution is in providing for access to an effective judicial remedy for violations of rights under the Arab Charter. This is necessarily the primary purpose of this and any human rights court.

Much of the Charter, and the iteration of rights expressed under it, is consonant with universal human rights standards, and in some respects exceeds them. For example, the Charter ensures rights to individuals with mental or physical disabilities,⁶⁴ prohibits violence against women and children in the family,⁶⁵ and guarantees the independence of the judiciary.⁶⁶ However, certain aspects of the Charter do not wholly accord with universal standards. For example, 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 the Convention on the Elimination of all forms of Discrimination against Women (CEDAW), to which almost all LAS States are party.⁶⁷ By limiting equality within the framework of *Shari'a* and other divine laws, article 3 has the potential to impair or nullify 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, the Arab Charter permits 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."⁶⁸ The UN Convention on the Rights of the Child (CRC), to which all LAS States are party, absolutely prohibits the imposition of a death sentence, or life imprisonment without the possibility of release, for crimes committed by persons under 18 years of age.⁶⁹ The

⁶⁴ Article 40 of the Arab Charter of Human Rights, 22 May 2004.

⁶⁵ *Id.* at article 33(2).

⁶⁶ *Id.* at article 12.

⁶⁷ Sudan has not yet ratified CEDAW.

⁶⁸ *Id.* at article 7.

⁶⁹ Article 37(a) of the CRC.

ICCPR provides that a "sentence of death shall not be imposed for crimes committed by persons below eighteen years of age."⁷⁰ This prohibition is now part of customary international law.

Further, although the Arab Charter prohibits subjecting any individual to "physical or psychological torture or to cruel, degrading, humiliating or inhuman treatment,"⁷¹ 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 the ICCPR. It also does not prohibit cruel, inhuman or degrading punishment.

Additionally, international law guarantees the right to freedom of thought, conscience and religion, 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."⁷² However, under article 30(1) of the Arab Charter, this right is guaranteed "except as provided for by law."⁷³ This 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, clearly conflicts with international human rights law and standards and has the potential to erode the very essence of these rights.

For these reasons, the ICJ has persistently called for the Charter to be amended in line with international standards, so as to fully guarantee the right to life and prohibit capital punishment, prohibit cruel, inhuman or degrading punishment, ensure the equality of men and women, and guarantee the right to freedom of thought, conscience and religion.⁷⁴

In addition to the Arab Charter, article 16 of the Statute extends the Court's jurisdiction to "any other Arab treaty in the field of human rights to which the disputing states are a party." So far, the only existing Arab human rights instrument is the Arab Charter. The ICJ believes that the subject matter jurisdiction of the court should have been primarily, if not exclusively, restricted to the Arab Charter. Such an approach would have been consistent with other regional systems: both the European Court and the Inter-American Court subject matter jurisdictions are respectively restricted to the European Convention on Human Rights and the American Convention on Human Rights.⁷⁵

While the Court should not have jurisdiction over provisions in other instruments, it is imperative that the Court, when applying the provisions of the Arab Charter or "other Arab treaties", construe and interpret them in a manner consonant with States' other obligations under international law, including human rights treaties.

The Arab Court when interpreting the Arab Charter is bound by the interpretative tools specific to the field of international law that are spelt out in the Vienna Convention on the Law of Treaties (the Vienna Convention).⁷⁶ According to article 31(1) of the Vienna

⁷⁰ Article 6 of the ICCPR.

⁷¹ Article 8 of the Arab Charter of Human Rights, 22 May 2004.

⁷² Article 18 of the ICCPR.

⁷³ Article 30(1) of the Arab Charter of Human Rights, 22 May 2004.

⁷⁴ For a more detailed analysis of the changes required to the Arab Charter to ensure conformity with international standards see the joint ICJ-FIDH position paper, Proposed Arab Court of Human Rights: Rewind the process and get it right, March 2014, available at <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/03/MENA-Arab-Court-Position-Paper-2014-Eng.pdf>

⁷⁵ Respectively article 32(1) of the European Convention on Human Rights, article 2 of the Statute the Inter-American Court of Human Rights, article 62(3) of the American Convention on Human Rights and article 2 of the First Optional Protocol to the International Covenant on Civil and Political Rights.

⁷⁶ Articles 31-33 of the Vienna Convention on the Law of Treaties. These tools have reached customary status and were considered by the European Court of Human Rights in 1975 (before the Vienna Convention entered into force in 1980) as enunciating "in essence generally accepted principles of

Convention, a treaty should be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose." This requires human rights treaties to be interpreted in a manner that ensures that the rights enshrined therein are effective in practice. Given the object and purpose of human rights treaties and the principle of effectiveness, such treaties should not be narrowly construed. Instead, when construing a treaty, the most favourable interpretation regarding the protection of human rights should be used. These principles have been repeatedly referred to and affirmed by the European Court, Inter-American Court and the African Commission of Human Rights.⁷⁷ Human rights treaties should also be considered living instruments and therefore interpreted in line with present conditions. This principle has been adopted and made effective by the European Court and later taken up by the Inter-American Court.⁷⁸

In addition, article 31(3) of the Vienna Convention provides that subsequent agreements, State practice that demonstrates agreement on interpretation, as well as relevant rules of international law shall also be taken into account in interpreting the treaty.⁷⁹ In this regard, regional human rights courts, frequently, have recourse to the jurisprudence of other judicial or quasi-judicial bodies⁸⁰ and declaratory instruments⁸¹ as interpretative tools. Indeed, the African Charter specifically provides that the African Commission on Human Rights is to "draw inspiration from international law on human and peoples' rights."⁸² The ICJ considers that the Arab Court can and should draw inspiration from international and regional human rights

international law", *Golder v. The United Kingdom*, ECtHR, Application No.4451/70, Judgment of 21 February 1975, para 29.

⁷⁷ See for example, *Klass and others v. Germany*, ECtHR, Application no. 5029/71, Judgment of 6 September 1978, para. 34; *Hilaire, Constantine and Benjamin et al. Case*, IACtHR, Judgment of June 21 2002, para.186; *Mapiripán Massacre v. Colombia*, IACtHR, Judgment of 15 September 2005, para.106; *Scanlen and Holderness v Zimbabwe*, Communication no. 297/05, African Commission of Human Rights, 3 April 2009, para. 115; and *Aminu v. Nigeria*, Communication no. 205/97, African Commission of Human Rights, 11 May 2000, para.18.

⁷⁸ In *Tyrer v. the United Kingdom* the ECtHR stated that "[t]he Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions." *Tyrer v. the United Kingdom*, ECtHR, judgment of 25 April 1978, para. 31. Similarly, the IACtHR has stated that "[t]he Court has pointed out, as the European Court of Human Rights has too, that human rights treaties are live instruments, whose interpretation must go hand in hand with evolving times and current living conditions." *Mapiripán Massacre v. Colombia*, IACtHR, Judgment of 15 September 2005, para 106.

⁷⁹ Article 31(3)(a)-(c) of the Vienna Convention. Article 32 provides for supplementary means of interpretation where ambiguity remains or an interpretation is absurd or unreasonable.

⁸⁰ For example in the *Mamatkulov and Askarov* case the European Court of Human Rights stated: "The Court observes that the ICJ, the Inter-American Court of Human Rights, the Human Rights Committee and the Committee against Torture of the United Nations, although operating under different treaty provisions to those of the Court, have confirmed in their reasoning in recent decisions that the preservation of the asserted rights of the parties in the face of the risk of irreparable damage represents an essential objective of interim measures in international law." *Mamatkulov and Askarov v. Turkey*, ECtHR, Applications nos. 46827/99 and 46951/99, Judgment of 4 February 2005, para.124. In the case of *The Last Temptation of Christ (Olmedo-Bustos et al.) v. Chile* the Inter-American Court of Human Rights quoted the European Court of Human Rights to bolster its argument about the importance of the right to freedom of expression in democratic societies, "*The Last Temptation of Christ*" (*Olmedo-Bustos et al.*) v. *Chile*, IACtHR, Judgment of February 5 2001, para 69. See also, *Proposed amendments to the naturalization provision of the Constitution of Costa Rica*, IACtHR, Advisory opinion of 19 January 1984, para.49, where the Court referred to other relevant international treaties, including the CEDAW, to determine current trends in international law. Consequently, whether or not Costa Rica was party to the Conventions was not relevant.

⁸¹ Regional human rights courts frequently cite international instruments, especially UN principles and declarations. For example, the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials have been cited in cases involving alleged violation of the right to life

McCann and Others v. The United Kingdom, ECtHR, Application no.18984/91, Judgment of 27 September 1995, para. 139 and para 99. Judgment of July 4 2007, IACtHR, Case of *Zambrano Vélez et al. v. Ecuador*, para. 86.

⁸² Article 60 of the African Charter on Human and Peoples' Rights.

conventions, as interpreted by their supervisory bodies. The Arab Court should employ these other instruments and their jurisprudence as an interpretive tool.

The ICJ therefore calls on the LAS member States and Secretariat to amend the Statute with a view to:

- i) Providing that the Arab Court is to 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 or other Arab human rights treaties so as to prevent inconsistency or conflict in the application of those provisions with any other international legal obligations of States parties.

The ICJ also calls on the on the LAS member States and Secretariat to:

- ii) Ensure that the Arab Charter accords with international human rights standards, so as to fully guarantee the right to life and prohibit capital punishment, prohibit cruel, inhuman or degrading punishment, ensure the equality of men and women, and guarantee the right to freedom of thought, conscience and religion.

IV. Admissibility of cases (article 18)

Article 18 of the Court's Statute provides that "[t]he jurisdiction of the Court is complementary to the national judiciary and does not supplant it. The Court may not hear a case in the following cases:

- 1) Non-exhaustion of local remedies in the respondent State by a final and definitive judgment according to the national legal regime.
- 2) The case with the same subject matter has been filed before another regional human rights court.
- 3) The case has been filed six months after the notification of the claimant of the definitive judgment."

The ICJ welcomes the inclusion of the principle of complementarity between the Arab Court and national courts in the Statute. As a general rule, national courts should be competent to adjudicate cases alleging violations of rights guaranteed under both national and international law, including international treaties to which the State is a party. However, the ICJ notes that situations may arise in respect of many LAS States where the judiciary may not be fully independent or where the court system may not be able to effectively administer justice. In a State where the executive exercises undue influence or control over the justice system; there is a lack of qualified judicial personnel; there is endemic corruption; and/or there are delays in delivery and execution of judgments, rights cannot be effectively guaranteed by national judicial systems.

Article 18 of the Statute contains a flat requirement for a final and definitive judgment according to the national legal regime before the Court can consider a case. The Arab Court must 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 adjudicate complaints of human rights violations. The Arab Court must be able to ensure that the exhaustion of local remedies is not used as a means to prevent rights holders from gaining access to the Court. If article 18 were to apply without the possibility of making such an assessment, it would impair the effectiveness of the Court to enforce the Charter's provision and provide for an effective remedy against human rights violations in the States parties.

Various UN and regional mechanisms provide more precise language on the exhaustion of local remedies, which safeguard against the undermining of the effectiveness of proceedings through a rigid or absolutist application of the exhaustion requirement. For example, the complaint procedures 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.”⁸³ The Optional Protocols to the ICCPR and the ICESCR also expressly recognize an exception to the exhaustion of domestic remedies rule when domestic remedies are “unreasonably prolonged”⁸⁴ In addition, the Human Rights Committee has clarified the scope of the requirement to exhaust domestic remedies under the ICCPR-OP adding that the remedies provided by the State have to be available and effective.⁸⁵ The Committee has stated that remedies need not be exhausted if they “objectively” have no prospect of success.⁸⁶ The Human Rights Committee has also ruled that the domestic remedies rule may not preclude a case being heard where the State is unwilling or unable to provide legal aid for a claimant that is indigent.⁸⁷

Article 35(1) of European Convention on Human Rights provides: “The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.” Pursuant to article 35(4), the European Court determines the admissibility of cases. The European Court has acknowledged the need for flexibility as regards the exhaustion of domestic remedies.⁸⁸ The Court has stated that the rule is “neither absolute nor capable of being applied automatically.”⁸⁹ In interpreting article 35(1), the Court has repeatedly stated that the remedy should be “an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant’s complaints and offered reasonable prospects of success.”⁹⁰ The Court has also found that there are special circumstances that absolve the applicant from the requirement of exhausting domestic remedies.⁹¹ For example, the passive attitude of national authorities in the face of serious allegations of misconduct or infliction of harm by State agents was held not to preclude a claim before the Court in case of non-exhaustion of local remedies.⁹²

In the African system, admissibility requirements for both the African Court and the Commission provide that cases must be sent “after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged.”⁹³ 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.”⁹⁴

⁸³ This includes article 4(1) of CEDAW-OP, article 2(d) of CRPD-OP, and article 7(e) of the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure.

⁸⁴ Article 5(2)(b) of ICCPR-OP and article 3(1) of the ICESCR-OP.

⁸⁵ *Guillermo Ignacio Dermot Barbatto et al. v. Uruguay*, Human Rights Committee, Communication No. 84/1981, views on 21 October 1982, U.N. Doc. CCPR/C/OP/2 at 112 (1990), para 9.4.

⁸⁶ *Earl Pratt and Ivan Morgan v. Jamaica*, Human Rights Committee, Communication No. 210/1986 and 225/1987, views on 6 April 1989, U.N. Doc. CCPR/C/35/D/210/1986 (1989), para 12.3.

⁸⁷ *Henry v. Jamaica*, Communication No. 230/1987, U.N. Doc. CCPR/C/43/D/230/1987 (1991), para 7.3.

⁸⁸ In *Ringeisen v. Austria* the ECtHR ruled that the European “Commission [of Human Rights] was therefore quite right in declaring in various circumstances that there was a need for a certain flexibility in the application of the rule” of exhaustion of domestic remedies. *Ringeisen v. Austria*, ECtHR, Application no.2614/65, Judgment of 16 July 1971, para 89.

⁸⁹ *Kozacıoğlu v. Turkey*, ECtHR, Application no. 2334/03, Judgment of 19 February 2009, para 40.

⁹⁰ *Selmouni v. France*, ECtHR, Application no. 25803/94, Judgment of 28 July 1999, para 76. See also, *Akdivar and Others v. Turkey*, ECtHR, Application no.21893/93, Judgment of 16 September 1996, para 68. *Vaney v. France*, ECtHR, Application no. 53946/00. Judgment of 30 November 2004, para 53.

⁹¹ *Selmouni v. France*, ECtHR, Application no. 25803/94, Judgment of 28 July 1999, para 76.

⁹² *Akdivar and Others v. Turkey*, ECtHR, Application no.21893/93, Judgment of 16 September 1996, para 68.

⁹³ Articles 50 and 56(5) of the African Charter on Human and Peoples’ Rights and article 6(2) of the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights.

⁹⁴ *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*,

In the Inter-American system, the Inter-American Convention makes explicit that there is no requirement to exhaust domestic remedies 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.”⁹⁵

The Inter-American Court has repeatedly stated that: “when it is shown that remedies are denied for trivial reasons or without an examination of the merits or if there is proof of the existence of a practice or policy ordered or tolerated by the government, the effect of which is to impede certain persons from invoking internal remedies that would normally be available to others” then “resort to those remedies becomes a senseless formality.”⁹⁶ The Inter-American Court has also made a similar ruling to the Human Rights Committee regarding the inapplicability of the domestic remedies rule where an indigent has been unable to obtain legal counsel.⁹⁷

The European Court,⁹⁸ African Commission on Human and Peoples’ Rights,⁹⁹ the Inter-American Court¹⁰⁰ and the Human Rights Committee¹⁰¹ have considered that the fear of reprisals against the victim or his or her legal representatives for filing a complaint or pursuing proceedings in domestic courts does not preclude the possibility of bringing a complaint even if domestic remedies have not been exhausted.

In addition to the strict requirement to exhaust domestic remedies, the ICJ is also concerned about the Statute’s reference to the use of the “national legal regime” as a yardstick to assess whether or not the judgment is final or definitive. The ICJ considers that the text of the European Convention on Human Rights and the American Convention on Human Rights, respectively articles 35(1) and 46(1)(a), that assess the exhaustion of domestic remedies according to “generally recognised rules of international law” as best practice in this regard.¹⁰² Requiring procedures to strictly respect the formality of the domestic order will drastically restrict the ability of judges at the Arab Court to consider cases admissible in situations where domestic remedies available to the applicant fail to meet international standards and, thus, warrant further review of the case by a regional human rights court. The

Communication No. 232/99, African Commission on Human and Peoples' Rights, 6 November 2000, para.19.

⁹⁵ Article 46(2) of the American Convention on Human Rights.

⁹⁶ Judgment of July 29 1988, IACtHR, *Velásquez Rodríguez*, para. 68. Judgment of January 20 1989, IACtHR, *Godínez Cruz Case*, para. 71. Judgment of March 15 1989, IACtHR, *Fairén Garbi and Solís Corrales*, para. 93

⁹⁷ Advisory Opinion on the Exceptions to the Exhaustion of Domestic Remedies (Arts. 46(1), 46(2)(a) and 46 (2)(b) of the American Convention on Human Rights), IACtHR, OC-11/90, (1990), para 31.

⁹⁸ *Akdivar and Others v. Turkey*, ECtHR, Application no.21893/93, Judgment of 16 September 1996, paras 73-75.

⁹⁹ *Sir Dawda K. Jawara v. Gambia*, Communication 147/95, African Commission of Human Rights, 11 May 2000, para 36.

¹⁰⁰ Advisory Opinion on the Exceptions to the Exhaustion of Domestic Remedies (Arts. 46(1), 46(2)(a) and 46 (2)(b) of the American Convention on Human Rights), IACtHR, OC-11/90, (1990), para 35.

¹⁰¹ *Irving Phillip v. Trinidad and Tobago*, Human Rights Committee Communication No. 594/1992, views on 20 October 1998, para 6.4.

¹⁰² The Human Rights Committee also relied on general principles of international law to read down the requirement of exhaustion of domestic remedies. In *Pratt and Morgan v. Jamaica* it stated: “That the local remedies rule does not require resort to appeals that objectively have no prospect of success, is a well established principle of international law and of the committee’s jurisprudence.” *Earl Pratt and Ivan Morgan v. Jamaica*, Human Rights Committee Communication No. 210/1986 and 225/1987, views on 6 April 1989, U.N. Doc. CCPR/C/35/D/210/1986 (1989), para 12.3.

European Court has repeatedly relied on generally recognized rules of international law to identify grounds absolving applicants from exhausting local remedies.¹⁰³

In relation to article 18(2) of the Statute, while it is in the interest of the Court not to have a case brought before more than one forum, it is unclear from the wording of the article 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 cases must be brought by the same party in order to fall within article 18(2).

The language of article 18(2) should be amended in line with UN and regional courts and mechanisms. The Human Rights Committee under the ICCPR, similar to other treaty body complaints mechanisms, 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."¹⁰⁴ In interpreting this provision, the Human Rights Committee has 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."¹⁰⁵

The European system provides that a case will not be admissible where it is "substantially the same as a matter" that "has already been submitted to another procedure of international investigation or settlement and contains no relevant new information."¹⁰⁶ The European Court has interpreted this strictly to mean that the matter will be considered substantially the same when "it concerns the same persons, facts and complaints."¹⁰⁷

Finally, regarding the six-month time limit for filing a claim, flexibility is required to this limit, particularly where the remedy does not meet international standards. The Inter-American Commission on Human Rights' Rules of Procedure state that in cases where the exceptions to the exhaustion of domestic remedies rule applies, "the petition shall be presented within a reasonable period of time, as determined by the Commission." In addition, in terms of calculating the time period for bringing a claim, "the Commission shall consider the date on which the alleged violation of rights occurred and the circumstances of each case."¹⁰⁸ The European Court has ruled that absent an effective remedy "the period runs from the date of the acts or measures complained of, or from the date of knowledge of that act or its effect or prejudice on the applicant."¹⁰⁹

The ICJ therefore calls on the LAS member States and secretariat to amend the Statute with a view to ensuring that:

- i) The requirement to exhaust local remedies does not have the effect of preventing rights holders from accessing the Arab Court when unable to access an effective remedy in their home states and, to this end, ensure that the Court is competent to assess the effectiveness of domestic remedies, including instances where procedures are unduly prolonged or unlikely to bring effective relief, as well as the

¹⁰³ *Akdivar and Others v. Turkey*, ECtHR, Application no.21893/93, Judgment of 16 September 1996, paras 67 and 71 to 77. See also *Oosterwijk v. Belgium*, ECtHR, Application no.7654/76, Judgment of 6 November 1980, 36-40

¹⁰⁴ Article 5(2)(a) of the ICCPR-OP1. See for example, also article 4(2)(a) of the CEDAW-OP, and article 3(2)(c) of the ICESCR-OP.

¹⁰⁵ *Duilio Fanali v. Italy*, Human Rights Committee, Communication No. 75/1980, U.N. Doc. CCPR/C/OP/2, views on 31 March 1983, para. 7.2.

¹⁰⁶ Article 35(2)(b) of the European Convention on Human Rights.

¹⁰⁷ *Karoussiotis v. Portugal*, ECtHR, Application no.23205/08, Judgment of 1 February 2011, para.63.

¹⁰⁸ Article 32(2) of the Inter-American Commission on Human Rights Rules of Procedure.

¹⁰⁹ *Nicolova and Vandova v. Bulgaria*, ECtHR, Application no.20688/04, Judgment of 17 December 2013, para 106.

- ability and willingness of local courts to effectively and meaningfully address human rights violations;
- ii) When determining whether or not a domestic judgment is final or definitive, the Arab Court relies on generally recognized rules of international law rather than exclusively national legal regimes;
- iii) The scope of a “case with the same subject matter” is restricted 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; and
- iv) The six-month time limit for filing a complaint is removed and the Court is exclusively competent to determine, based on the circumstances of each case, whether the complaint was presented within a reasonable period-of time.

V. Access to the Court (article 19)

Article 19 of the Statute restricts access to the Arab Court to “[a] State party, whose subject claims to be a victim of a human rights violation.” It also provides that “State parties can accept, when ratifying or acceding to the Statute or at any time later, that one or more NGOs that are accredited and working in the field of human rights in the State whose subject claims to be a victim of a human rights violation have access to the Court.” No access to the Court is granted to individuals.

Article 19 is likely to eviscerate the effectiveness of the Court. States, typically for diplomatic and political reasons, almost never make use of interstate complaints procedures regarding human rights issues. This is borne out by the decades of experience of existing regional human rights courts and UN human rights treaty bodies. For example, to date, no inter-state complaint has even been lodged before any of the UN treaty-bodies. There is nothing to suggest that the situation will be any different with respect to the Arab Court.

The right of individual access is a critical and, indeed, indispensable component of any human rights court that purports to remedy human rights violations. One of the earlier drafts of the Statute to which the ICJ had access contained provision for such a right of access. However, in the final version of the Statute this provision was removed. The ICJ and other human rights organizations strongly condemned the removal of individual access from the Statute.¹¹⁰ Without this element, the Arab Court is likely to be an empty chamber, seized of few cases, if any, and certainly not an effective instrument of justice for the LAS region. The Statute will not serve as a tool to bring justice to victims of human rights violations unless it is amended with a view to ensuring access to all individuals within the territory of a State party, or subject to its jurisdiction, when they claim to be a victim of a violation of a right that comes under the jurisdiction of the Court.

The weakness of the Statute’s access provisions were compounded by another amendment that was made to the Statute prior to its approval. In the draft of the Statute presented at the 25-26 May 2014 conference in Bahrain article 19 of the Statute permitted the Arab Human Rights Committee to refer cases to the Arab Court when it fails to reach an “amicable settlement in the case of an individual complaint.” The viability of this provision was called into question, including by the ICJ, given that the Committee currently has no competence to consider individual complaints and the Statute was silent as to how this competence would be extended. No proposal appears to have been made by any State party to the Arab Charter, or considered by the LAS Ministerial Council, for amendment to the Arab Charter that would give the Committee the competency to consider individual complaints and therefore secure the effectiveness of article 19. Instead, reference to access by the Arab Human Rights Committee to the Arab Court was removed. In fact, it is not clear how the provision allowing for the Arab Human Rights Committee to refer cases to the court was incorporated and removed from the 25-26 May draft.

¹¹⁰ Open letter to Ministers of Foreign Affairs of the member States of the LAS, 31 August 2014. Available in English and Arabic at <http://www.icj.org/arab-league-should-postpone-action-to-establish-a-court-of-human-rights/> last accessed 4 December 2014.

Similarly problematic are the provisions relating to NGO access to the Arab Court. NGOs are only able to access the Court where they have been accredited, ie pre-approved, by a State party "whose subject claims to be a victim of a human rights violation". A State is unlikely and cannot be relied upon to exercise its discretion to accredit an NGO where it is seeking to hold that State to account. Individual access under this provision is likely to remain illusory.

The Statute provides for no additional means by which individuals or organizations may access the Court, such as joining proceedings as interested parties or submitting *amicus curiae* briefs, third party interventions or expert opinions.

The Statute is far out of step with other human rights systems, each of which recognize the right of individual complaint as a core feature. The European Convention on Human Rights, for example, provides for complaints by States parties as well as any person, NGO or group of individuals claiming to be a victim of a violation by any one of the States parties to the Convention.¹¹¹ In addition, even where an individual or NGO is not party to the proceedings, the President of the Court may "in the interest of the proper administration of justice" invite "any person concerned who is not the applicant to submit written comments or take part in hearings."¹¹² Many NGOS, including the ICJ, make regular use of this possibility.

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 where States parties have made a declaration accepting such applications.¹¹³ There is no requirement that individuals and NGOs have a concrete connection to a case, such as by being a direct victim of a violation, in order to be able to access the Court. Individuals and NGOs can also submit communications before the African Commission who may decide to bring the case before the African Court.¹¹⁴

Under the African Court's Rules of Court, even where a State has not made a declaration accepting individual and NGO access, the Court, if it "deems it necessary", can hear the individual or NGO that initiated the communication to the Commission.¹¹⁵ In addition, the Court has broad powers to hear as a witness or expert or in any other capacity any person whose evidence, assertions or statements it deems likely to assist it in carrying out its task.¹¹⁶ To this end, the Court may ask any person or institution of its choice to obtain information, express an opinion or submit a report to it on any specific point.¹¹⁷

The American Convention on Human Rights provides for access to the Inter-American Court through referral by the Inter-American Commission and through complaints by States parties.¹¹⁸ However, the cases referred to the Court by the Commission will have had their genesis in individual communications received by the Commission. Indeed, access to the Commission is broad in scope. Article 44 of the American Convention on Human Rights provides: "Any person or group of persons, or any nongovernmental entity legally recognized in one or more States of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party." In

¹¹¹ Article 34 of the European Convention on Human Rights.

¹¹² Article 36 of the European Convention on Human Rights. The procedure for submitting requests to intervene is set out in Rule 44 of the Rules of Court.

¹¹³ Article 5(3) and article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.

¹¹⁴ Article 55 of the African Charter on Human and People's Rights, Rules 93 and 118 of the Commission's Rules of Procedure and article 5(1)(a) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.

¹¹⁵ Rules of Court of the African Court, rule 29(3)(c).

¹¹⁶ Rule 45(1) of the Rules of Court. See also Rule 46.

¹¹⁷ Rule 45(2) of the Rules of Court.

¹¹⁸ Article 61 of the American Convention on Human Rights.

addition, once a case has been referred to the Inter-American Court, victims of human rights violations can submit pleadings, motions, and evidence separately from the Commission.¹¹⁹

The Statute also fails to include any provision relating to the status of victims and the role they should play before the Arab Court. 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 Statute of the Arab Court should have provided not only for remedy and reparation for victims, but also for their full participation, including with legal representation. These measures could have been complemented by internal rules of procedures and with practices that respect victims' rights in order to ensure the Court's efficacy.¹²⁰

In sum, the Statute of the Arab Court fails to provide the most fundamental function of a human rights Court. A Court established pursuant to its terms is likely to remain an empty shell, with the vast majority of victims of human rights violations unable to access it by any means.

The ICJ therefore calls on the LAS member States and Secretariat to amend the Statute with a view to:

- i) 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;
- ii) Ensuring that the Court is competent to invite any concerned person who is not the applicant to submit written comments or to take part in hearings;
- iii) Removing any obstacles that might limit NGOs' 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;
- iv) Ensuring that the States 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; and
- v) Providing 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.

The ICJ also calls on the LAS member States and Secretariat to revise the Arab Charter and the Statute of the Arab Court to ensure that the Arab Human Rights Committee is empowered to receive individual complaints and to refer cases to the Arab Court.

VI. Victim and witness protection

In addition to greatly restricting access to the Arab Court, the Statute also fails to affirm and guarantee the obligation of States parties to ensure fully the protection of victims, witnesses and others that participate in proceedings, and ensure that no reprisals are taken against them. Article 23(5) provides, "The witnesses and the representatives of the parties shall enjoy legal and material protection as indicated in the Rules of Court, all facilitations shall be provided to them to carry out their role before the Court." However, this provision does not

¹¹⁹ Rules of Procedure of the Inter-American Court of Human Rights, Approved by the Court during its LXXXV Regular Period of Sessions, held from November 16 to 28, 2009, article 25(1). Where there are several victims, a common intervener is appointed (article 25(2) of the Rules of Court). The victims or their representatives are also kept informed of events throughout the proceedings. See, for example, article 39 of the Rules of Court.

¹²⁰ 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: rule 63 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.

refer to victims that do not participate as witnesses. It also does not specifically establish the obligation of all States parties to ensure the protection of all participants before the Court.

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 in Principle 10 affirms that measures should be taken to ensure victims' "safety, physical and psychological well-being and privacy, as well as those of their families."¹²¹ Similarly, the Rome Statute requires the ICC to "take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses."¹²² In so doing, the ICC must take all relevant factors into account, including age, gender, health, and the nature of the crime.¹²³ Such protections are provided for in many other international and regional human rights courts and mechanisms. For example, the protocol establishing the African Court explicitly establishes that "[a]ny person, witness or representative of the parties, who appears before the Court, shall enjoy protection and all facilities, in accordance with international law, necessary for the discharging of their functions, tasks and duties in relation to the Court."¹²⁴ Similarly, the Optional Protocol to the ICESCR provides: "A State Party shall take all appropriate measures to ensure that individuals under its jurisdiction are not subjected to any form of ill-treatment or intimidation as a consequence of communicating with the Committee pursuant to the present Protocol."¹²⁵ The Inter-American system also has protection measures in place to prevent States instigating proceedings against victims, witnesses, or expert witnesses, and exerting pressure on them or on their families on account of declarations or opinions delivered before the Court.¹²⁶

Regional mechanisms have in many instances resorted to the use of interim and precautionary measures to bolster the protection of victims.¹²⁷ As discussed below, reference to the availability such measures is also missing from the Statute.

The ICJ therefore calls on the LAS member States and secretariat to amend the Statute with a view to:

- i) Ensuring that the Arab Court is required to take all appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses involved in proceedings before the Court; and

¹²¹ 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

¹²² Article 68(1) of the Rome Statute of the ICC. Under article 68(1) the prosecutor is also required to take such measures.

¹²³ Additional measures designed to protect victims and witnesses are set out at articles 68(2)-(5) of the Rome Statute.

¹²⁴ Article 10(3) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.

¹²⁵ Article 13 of the ICESCR-OP.

¹²⁶ Article 54 of the Rules of Court of the Inter-American Court of Human Rights. In addition, article 34 of the European Convention on Human Rights requires States parties "not to hinder in any way the effective exercise of th[e] right" to access the court through submission of complaints. When interpreting the scope of this protection the European Court has stated that "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." (*Aksoy v. Turkey*, ECtHR, Application No. 21987/93, Judgment of 18 December 1996, para. 105.) Although these protections are directed at the right of individual petition, they demonstrate an affirmation of the obligation to protect users of the Court.

¹²⁷ 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

- ii) Ensuring that the States parties provide for the effective protection of victims and other participants in the proceedings, including by ensuring that they are not subjected to any form of pressure, reprisals or ill-treatment as a result of their participation in proceedings before the Court.

VII. Judgments, interim measures and advisory opinions

Under the Statute, judgments of the Court are “executable”.¹²⁸ The Court must deliver the judgment within 60 days of the conclusion of the Court’s deliberations.¹²⁹ Petitions for reconsideration can be made: “a) If the judgment includes a breach of an essential 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 the party’s ignorance of the fact was not a result of negligence on his part; c) If the judgment does not clarify the reasons on which it is based; d) If the Court flagrantly exceeds its jurisdiction; e) If a deceit, fraud or falsification liable to influence the judgment took place; [or] f) In the event of an influence over a member of the Court that led him to change his opinion in the case.”¹³⁰

The Court may also issue advisory opinions “at the request of the League’s Council, or any organizations or agencies subordinate to the League of Arab States, issue an opinion around any legal issue related to the Charter or any other Arab document related to human rights.”¹³¹

The ICJ is concerned that, while the Statute provides for the Court’s judgments to be final and executable, it does not provide for any monitoring mechanism that supervises the execution of these judgments and does not provide for any enforcement measures in case of non-compliance. The only provisions relating to monitoring and enforcement that exist is a requirement for the Arab Court to prepare an annual report listing cases of non-compliance with its judgments, which is to be submitted to the Assembly of States Parties. However, the Statute is silent as to how the Court will obtain the information required for this report and what options are available to the Assembly of States Parties upon receipt of the report.¹³² Further, although the Statute requires the elaboration of a bylaw by the Assembly of States Parties, which must include a mechanism for the execution of judgments, there is nothing to guarantee the effectiveness of this mechanism.¹³³ The ICJ believes that specific monitoring and enforcement measures should have been included in the Statute itself.

Other regional systems have far more robust monitoring and enforcement mechanisms. For example, the European Convention on Human Rights contains an express obligation for States parties to a case to implement the judgments of the European Court.¹³⁴ In addition, it establishes a system to supervise the execution of judgments, which is the Committee of Ministers.¹³⁵ In supervising the execution of judgments the Committee of Ministers not only looks at whether the victim’s situation has been remedied (payment of just satisfaction, cessation of the violation and restitution *in integrum* to the situation prior to the violation), but also whether “general measures have been adopted, preventing new violations similar to

¹²⁸ Article 26 of the Statute.

¹²⁹ Article 25(1) of the Statute. The Court must deposit the judgment, including its reasons, with the registrar within 30 days of its delivery (article 25(5)).

¹³⁰ Article 27(2).

¹³¹ Article 21 of the Statute.

¹³² Article 29 of the Statute.

¹³³ Article 4(3) of the Statute.

¹³⁴ Article 46(1) of the European Convention on Human Rights.

¹³⁵ Article 46(2) of the European Convention on Human Rights states: “The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.” The Committee of Ministers is composed of the foreign ministers of each member state of the Council of Europe.

that or those found or putting an end to continuing violations.”¹³⁶ Therefore, the supervision of the execution of judgments goes beyond the individual situation of the victims to the case to reach the root-causes that allowed the violations to occur. Where the Committee is uncertain as to how a judgment should be interpreted, it can apply to the European Court for a statement of clarification.¹³⁷

In case of non-compliance with European Court judgments the Committee of Ministers may adopt interim resolutions “to express concern and/or to make suggestions with respect to the execution.”¹³⁸ In the face of States’ failure to execute the Court’s judgment the Committee of Ministers has adopted more than one interim resolution.¹³⁹ In general, the case of non-compliance is placed on the agenda of each human rights meeting of the Committee of Ministers and remains there until the respondent state provides information on the payment of the just satisfaction awarded by the Court or other individual measures.

The Committee of Ministers may also bring infringement proceedings against a State refusing to abide by a judgment of the Court.¹⁴⁰ The Committee’s rules state that such a measure will only be taken in “exceptional circumstances” without elaborating further.¹⁴¹ Finally, non-compliance with the court’s judgment can lead to a suspension of the right to representation and a request by the Committee of Ministers to withdraw, according to article 3 and 8 of the Statute of the Council of Europe.¹⁴²

The Statute of the Arab Court also fails to provide for the Court to order or even recommend specific measures to be adopted by member States in order to execute the judgments. The Statute could have been enriched by drawing guidance from extensive practice developed over decades by regional human rights courts to ensure States execute judgments. For example, the Inter-American Court issues compliance orders to States and holds hearings to monitor the State’s compliance. In 2010 the Inter-American Court held 15 hearings in relation to 22 cases and issued 40 compliance orders.¹⁴³ The Inter-American Court has derived these powers from “the powers inherent in its jurisdictional function of monitoring compliance with its judgments.”¹⁴⁴ These compliance hearings can be held in public. Finally, the Court has assisted states by setting down guidelines to comply with reparation orders.¹⁴⁵

The ICJ considers 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.

¹³⁶ Rule 6(2) of the Rules of the Committee of Ministers of the Council of Europe for the supervision of the execution of judgments and of the terms of friendly settlements. (Adopted by the Committee of Ministers on 10 May 2006 at the 964th meeting of the Ministers’ Deputies.)

¹³⁷ Article 46(3) of the European Convention on Human Rights.

¹³⁸ Rule 16 of the Rules of the Committee of Ministers of the Council of Europe for the supervision of the execution of judgments and of the terms of friendly settlements.

¹³⁹ In the case of *Loizidou v. Turkey* the Committee of Ministers issued two resolutions one in 2000 and another in 2001 before Turkey complied with the payment of satisfaction to the claimant on the 2 December 2003: Committee of Ministers of the Council of Europe, Interim Resolution DH (2000) 105 concerning the judgment of the European Court of Human Rights of 28 July 1998 in the case of *Loizidou* against Turkey, adopted on 24 July 2000; Committee of Ministers of the Council of Europe, Interim Resolution DH (2001) 80 concerning the judgment of the European Court of Human Rights of 28 July 1998 in the case of *Loizidou* against Turkey adopted on 26 June 2001.

¹⁴⁰ Article 46(4)-(5) of the European Convention on Human Rights.

¹⁴¹ Rule 11(2) of the Rules of the Committee of Ministers of the Council of Europe for the supervision of the execution of judgments and of the terms of friendly settlements.

¹⁴² The African Court, pursuant to article 29(2) of the Protocol on the African Court, also has a monitoring mechanism overseen by the Executive Council (previously the Council of Ministers).

¹⁴³ Annual report of the Inter-American Court of Human Rights 2010, p.10.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*, page 4.

In order to guarantee the effectiveness of the Arab Court, careful consideration ought to have been given to ensure that States parties fulfil 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 States 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. In this regard, it would be appropriate to establish a monitoring body that is not composed of representatives of States parties, as is the Assembly of States Parties.¹⁴⁶

In addition to inadequate monitoring and execution provisions, the Statute does not provide for the Court to order interim measures 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, in some jurisdictions called "provisional measures" or "precautionary 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 this case the Arab Court. 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.

The ICJ and other organizations therefore called for interim measures to 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. Other regional mechanisms as well as UN treaty body communication procedures offer pertinent examples in this respect. 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."¹⁴⁷ The Inter-American Commission may, "on its own initiative or at the request of a party", request that State parties adopt precautionary measures "in serious and urgent situations presenting a risk of irreparable harm to persons or the subject matter of a pending petition or case..."¹⁴⁸ The African Court at the request of a party may also issue interim measures "which it deems necessary to adopt in the interest of the parties or of justice."¹⁴⁹ The African Court may even convene an extraordinary session to decide on interim measures to be taken if it deems the matter to be extremely urgent.¹⁵⁰ UN treaty bodies, including those that monitor the implementation of the ICCPR, the Convention on Economic Social and Cultural Rights, the CEDAW, the CAT, the CRC, the Convention on the Rights of Persons with Disabilities and the International Convention for the Protection of all Persons from Enforced Disappearance, also provide for interim measures.¹⁵¹

¹⁴⁶ Article 4(2) of the Statute.

¹⁴⁷ Rule 39(1) of the Rules of the Court, the European Court of Human Rights, available at http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf

¹⁴⁸ Rule 25(1) Rules of Procedure of the Inter-American Commission on Human Rights, available at <http://www.oas.org/en/iachr/mandate/Basics/rulesiachr.asp>. See also, article 26(1) of the Rules of Procedure of the Inter-American Court of Human Rights.

¹⁴⁹ Rule 51(1), Rules of Court, African Court on Human and Peoples' Rights.

¹⁵⁰ Id. at Rule 51(2)

¹⁵¹ Provision for interim measures are included in: rule 92 of the Rules of Procedure of the Human Rights Committee, CCPR/C/3/Rev.10, 11 January 2012; article 5(1) of ICESCR-OP; rule 94(3) of the Rules of Procedure of the Committee on the Elimination of Racial Discrimination, CERD/C/35/Rev.3, 1 January 1989; article 5(1) of CEDAW-OP; rule 114 of the Rules of Procedure of the Committee against Torture, CAT/C/3/Rev.6, 1 September 2014; article 6 of CRC-OP; article 64(1) of the Rules of Procedure of the

The ICJ therefore calls on the LAS member States and secretariat to amend the Statute with a view to:

- i) Providing for an independent and effective monitoring mechanism that supervises the execution of the Court's judgements;
- ii) Ensuring that the Court is competent to prescribe specific measures to be adopted by States in order to execute the Court's judgments; and
- iii) Ensuring 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.

VIII. Seat of the Court

Article 3 of the Arab Court Statute provides that the seat of the Court is Manama, Bahrain, and that the Court may convene in any other location as it deems appropriate, with the approval of that second country.

As affirmed in numerous UN and other independent human rights reports, the human rights situation in Bahrain in recent years has been abysmal.¹⁵² Over the last four years in particular, the Bahraini authorities have pursued a sustained, violent crackdown against opposition leaders, human rights defenders and peaceful protesters in violation of their rights to freedom of expression and freedom of assembly. In so doing, 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 detention and unfair trials before both ordinary and exceptional courts. These human rights violations continue unabated, as does impunity for them.¹⁵³ Hosting the Arab Court in a State that is not only responsible for such violations, but also fails to ensure any form of accountability for them, undermines both the credibility and effectiveness of the Court.

The ICJ believes that the decision to designate the host country should be based on a high degree of commitment to and implementation of universal human rights law and standards by the State party. Indicia in that regard would be ascribing to and effectively implementing the core human rights instruments. A State with a record of widespread or systematic human rights violations should be excluded from consideration. In addition, the host country must be willing and able to provide the necessary guarantees for the Court, including judges and staff, to operate in defence of human rights free from any undue interference, constraints or pressures. Such guarantees include the protection of victims, their representatives, witnesses, and civil society associations and their members from reprisal and restrictions. Article 23(5) of the Statute, which refers to the protection of witnesses and representatives of parties only, does not specifically impose any obligations on the host State.

Committee on the Rights of Persons with Disabilities, CRPD/C/1, 5 June 2014; and article 31(4) of the CED.

¹⁵² See for example, Report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya, A/HRC/25/55/Add.3, 28 February 2014, paras 35-47; Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, A/HRC/23/39/Add.2, 30 May 2013, paras 22-35; Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez A/HRC/19/61/Add.4, 29 February 2012, paras 14-23; see also Human Rights Watch reports, 'Criminalizing Dissent, Entrenching Impunity', May 2014; and 'Interfere, Restrict, Control', June 2013.

¹⁵³ See for example: The Report of the Bahrain Independent Commission of Inquiry, available at <http://www.bici.org.bh/BICIreportEN.pdf>; ICJ press release, Bahrain: authorities to fully cooperate with UN Mechanisms and implement recommendations of Commission of Inquiry, April 2013, <http://www.icj.org/bahrain-authorities-to-fully-cooperate-with-un-mechanisms-and-implement-recommendations-of-commission-of-inquiry/>; and 'Bahrain: Children in a Maze of Injustice', Amnesty International, available at <http://www.amnesty.org/en/library/info/MDE11/057/2013/en>.

The ICJ therefore calls on the LAS member States and secretariat to amend the Statue with a view to:

- i) Reconsidering the decision to designate Bahrain as a host country of the Arab Court, and ensuring that such a decision is based on the commitment and compliance of the concerned State party with universal human rights; and
- ii) Ensuring that the designated host State is willing and able to provide the necessary guarantees for the Court, including judges and staff, to operate in defence of human rights and free from any undue interference, constraints or pressures, as well as for the protection of victims, their representatives, witnesses, and civil society associations from reprisal and restrictions.

Annex I - Statute of the Arab Court of Human Rights

Unofficial translation

Preamble

The States Parties to this Statute,

Proceeding from their belief in human dignity as fortified by God, the realization of justice and equality, and the rule of law and its role in protecting human rights,

Affirming the purposes and objectives of the Charter of the League of Arab States,

Believing in the human right to a free, dignified life,

Determined to continue to promote and protect human rights,

Affirming that the Arab human rights conventions to which relevant States are party, including the Arab Charter on Human Rights, represent a legal framework for the individual in the Arab countries for the enjoyment and exercise of his rights,

Continuing their efforts to establish justice, which constitutes the cornerstone for the establishment of peace,

Expressing their conviction that the establishment of an Arab Court of Human Rights will contribute to the realization of the purposes and objectives of the Arab Charter on Human Rights,

On the basis of the decision of the League's Council in a summit meeting on March 26, 2013 no. 573/AS(24),

Have agreed on the following:

Article 1

Definitions

For the purposes of this Statute, the following words and phrases shall carry the attached meaning unless otherwise indicated by the text:

The Court: The Arab Court of Human Rights.

The Charter: The Arab Charter on Human Rights.

The League: The League of Arab States.

The Secretary-General: The Secretary-General of the League of Arab States.

The President: the President of the Court.

The Vice-President: the Vice-President of the Court.

The Statute: the Statute of the Court.

The States Parties: The States Parties to the Statute.

The Member States: The Member States of the League.

The Assembly: The Assembly of States Parties.

The Bylaw: The Bylaw of the Assembly.

The Rules: The Rules of Court.

The Registrar: The Registrar of the Court.

Article 2

Establishment of the Court

Within the framework of the League of Arab States, an Arab Court of Human Rights shall be established as an independent Arab judicial body that aims at consolidating the State Parties' will in implementing their obligations regarding human rights and his freedoms; its composition, jurisdiction and method of work shall be governed by the Statute and the Rules of Court.

Article 3

Headquarters

The Court's headquarters shall be in Manama - Kingdom of Bahrain. The Court may convene on an exceptional basis in any other State with prior consent from the host State.

The Court shall conclude a headquarters' agreement with the host State that shall be adopted by the Assembly.

Article 4

The Assembly

1. An Assembly of State Parties shall be established pursuant to the Statute.
2. Each State Party shall have one member representing it on the Assembly, the representative can be accompanied by substitutes and advisers.
3. The Assembly shall adopt the Bylaw that determines the dates on which it shall convene and its competencies, including the election of judges, the adoption of the Court's annual report, drawing up its budget and adopting a mechanism to ensure the execution of judgments.
4. The Assembly shall hold its meetings at least once every year, or as may be decided according to the requirements of work and according to what is determined in its Bylaw.
5. States that are not parties to the Statute can attend the Assembly's meetings when discussing the Rules of Court without having a right to vote.

Article 5

Composition of the Court

The Court shall be comprised of seven judges who are nationals of State Parties. Their number can be increased to eleven judges at the request of the Court and on the Assembly's approval. The Court may not include in its primary or reserve membership more than one judge of the same nationality.

Article 6

Selection of judges

1. The Assembly shall elect the judges by secret ballot from a list that contains the names of candidates.
2. Each State Party – at the request of the Secretary-General within 90 days after the Statute's entry into force – may nominate two of its nationals as candidates.
3. The candidates referred to in paragraph 1 that receive the highest number of votes shall be selected as primary judges.
4. If more than one candidate receives an equal number of votes, the voting process shall be carried out again and at each round the candidates that receive the fewest number of votes shall be eliminated.

5. The Assembly shall establish a list of reserve judges from among the candidates that were not elected as primary judges according to the number of votes that they received.

Article 7

Selection criteria

It is a condition that candidates have recognized integrity and commitment to high moral values and, in addition, they must possess competence and experience in legal or judicial office. They must also possess the qualifications required for appointment in the highest judicial or legal offices in their countries, and preference shall be given to whoever has experience in the field of human rights.

Article 8

Judges' term of office

1. Judges shall be elected for a four-year term, and they may be re-elected for a second non-renewable tenure. Regarding primary judges that were elected in the first elections, the tenure of three of them shall end after two years. They shall be selected by the drawing of lots by the President of the Assembly – or whoever replaces him – immediately after the completion of the elections.

2. The judges' duties shall end with the end of their tenure.

3. The Secretary-General shall circulate – six months before the end of the judges' tenure – a written memo to the State Parties, requesting every State to name its candidates within the following ninety days. The Secretary-General notifies the States with the list of candidates sixty days before the start of the new judges' tenure, and invites the Assembly to convene to elect the new judges within thirty days.

Article 9

Judicial vacancies

1. The judge's position shall be considered vacant in case of death, resignation, dismissal or if the judge sustains a disability that permanently precludes him from carrying out his tasks. The judge's position must be filled at the earliest possible opportunity. If the position becomes vacant six months prior to the expiration of the judge's term of office, no elections are required. In this case, the President of the Court may appoint a judge from the list of reserve judges referred to in paragraph five of article 6 according to his seniority on the list.

2. The judge that wishes to resign shall present a request to the President. The resignation shall not take effect until after the President has approved it. The Assembly shall be informed of the resignation. If the President wishes to resign he shall present his resignation to the Assembly. The resignation shall not take effect until after the Assembly has given its approval.

3. The judge that has replaced a primary judge that left office before the end of his tenure shall serve the remaining time of that judge's tenure, taking into account the provisions of article 5.

Article 10

The start of tenure and the oath

The judges' tenure shall start with them taking the legal oath before the president of the Assembly starting with the eldest and proceeding in descending order of age and in the presence of all judges with the following formula: "I swear by God Almighty to perform my duties with integrity and impartially and independently and to preserve the secrecy of deliberations."

Article 11

The presidency of the Court

1. The Court shall elect a President and Vice-President from among its members for a term of two years; they may be re-elected once.
2. The President shall administer the Court's work, represent the Court before the judiciary and third parties, and preside over its sessions, as well as carry out other tasks defined in the Rules of Court.
3. The President shall perform his work on a full-time basis and reside in the country where the Court is headquartered.
4. The Vice-President shall replace the President in case of contingent and temporary absence. In case the office of the President is vacated the Court shall elect a new President to replace him for the remaining term of office.
5. In case of absence of the President and the Vice-President the President's tasks shall be carried out by other judges according to the rules of seniority that are laid down in article 12.

Article 12

Seniority of judges

1. The seniority of primary judges comes after that of the President and the Vice-President according to the date they assumed office or their age if the date of assumption to office is the same.
2. If two or more judges have the same seniority and age there shall be recourse to the drawing of lots.

Article 13:

The office of the Registrar

The Court shall appoint the registrar and an adequate number of staff from among the nationals of State Parties; the Rules of Court shall determine the method of their appointment.

Article 14

Privileges and immunities

1. Members of the Court shall enjoy, while exercising their functions, the same 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; their benefits and their wages shall be exempted from all taxes.
2. The Court's headquarters, its buildings, staff and documents shall enjoy the same privileges and immunities granted to the League of Arab States and its staff.

Article 15

Independence and autonomy of judges

1. The judges shall carry out their tasks with impartiality and independence; they shall be at the service of the Court at any time.
2. Judges may not – in any circumstances whatsoever and at any time even after the end of their tenure – be held accountable for the opinions they have expressed or decisions they have taken during their tenure.
3. Judges may not carry out work or activities that may interfere with or influence their impartiality or the requirements of their office, as indicated in the Rules of Court.

4. The judge may not hear a case that he was previously involved with as an agent, attorney or advisor for one of the parties or as a member of a domestic or international court, commission of inquiry or arbitration or in any other capacity. In case of doubt, the Court shall have the authority to take a decision in that regard.

5. Judges may not be dismissed or their tenure terminated except with the agreement of the rest of the judges that a judge among them no longer meets the requirements of his office and its demands or meets the standards for which he has been selected.

Article 16

Jurisdiction of the Court

1. The Court shall have jurisdiction over all cases and litigation arising from the application and interpretation of the Arab Charter on Human Rights or any other Arab treaty in the field of human rights to which the disputing States are party.

2. The Court shall settle any dispute that may arise over its jurisdiction to hear a complaint, petition or case.

Article 17

Temporal jurisdiction

The Court may only look into facts that are committed after the entry into force of the Statute with regards to the State in question.

Article 18

Admissibility of the case

The jurisdiction of the Court is complementary to the national judiciary and does not supplant it. The Court may not hear a case in the following cases:

- 1) Non-exhaustion of local remedies in the respondent State by a final and definitive judgment according to the national legal regime.
- 2) The case with the same subject matter has been filed before another regional human rights court.
- 3) The case has been filed six months after the notification of the claimant of the definitive judgment.

Article 19

Right to access the Court

1. A State party, whose subject claims to be a victim of a human rights violation, has a right to access the Court on the condition that the claimant State and the respondent State are party to the Statute, or if it has accepted the jurisdiction of the Court as referred to in article 20 of the Statute.

2. State parties can accept, when ratifying or acceding to the Statute or at any time later, that one or more NGOs that are accredited and working in the field of human rights in the State whose subject claims to be a victim of a human rights violation have access to the Court.

Article 20

Acceptance of the Court's jurisdiction

1. Member States who are not party to the Statute may declare at any time that they accept the Court's jurisdiction, whether the declaration applies to a particular case or is a general acceptance of jurisdiction.

2. The declaration may be conditional on reciprocity, unconditional or for a specific period of time.
3. The declarations shall be deposited with the Secretary-General and copies sent to Member States.

Article 21

Advisory opinions

1. The Court may, at the request of the League's Council, or any organizations or agencies subordinate to the League of Arab States, issue an opinion around any legal issue related to the Charter or any other Arab document related to human rights.
2. The Court shall give reasons for the advisory opinions it issues, and every judge has the right to issue a separate opinion independent of the Court's opinion.

Article 22

Amicable settlements

1. The Court - at any stage of the case - may cooperate with the disputing parties with the objective of reaching an amicable settlement on the basis of the principles and values of human rights and the rules of justice.
2. Proceedings conducted pursuant to paragraph 1 of this article shall be secret.
3. If an amicable settlement is reached, the Court shall issue a decision striking the case from the docket; a brief statement of the facts and the solution reached shall be sufficient.
4. The decision referred to in paragraph 3 of this article shall be referred to the Assembly, which shall monitor its execution.

Article 23

Public nature of proceedings and representation of the parties

1. The Court shall convene in public sessions, with the exception of cases in which the Court decides otherwise to preserve the interests of the parties and ensure the proper administration of justice, or at the request of the parties.
2. Deliberations shall be closed and confidential.
3. The commencement of proceedings shall be in writing.
4. Each party shall have the right to be represented before the Court; he may select his representative as provided for by the Rules of Court.
5. The witnesses and the representatives of the parties shall enjoy legal and material protection as indicated in the Rules of Court, all facilitations shall be provided to them to carry out their role before the Court.

Article 24

Chambers of the Court

1. Challenges to the Court's jurisdiction shall be examined by a single judge.
2. The Court shall convene in chambers comprised of at least three judges in each chamber to hear the subject matter of disputes.
3. A judge shall declare every circumstance in which there is a possible conflict of interest with the cases they are examining.
4. A judge may recuse himself from hearing the case before him if he is a national of a State that is party to the dispute.

Article 25

Issuance of judgments

1. The Court shall issue its judgments by a majority of votes, within 60 days of the date of the conclusion of the Court's deliberations.
2. In situations where the judgment was issued by a majority, a judge with a dissenting opinion may register his opinion in a separate document that shall be annexed to the judgment.
3. Judgments shall be final and not subject to appeal. The Court can reconsider its judgments in the circumstances indicated in article 27.
4. The Court has the authority to interpret the judgments it issues and to rule on requests regarding omissions that occur in the ruling.
5. The Court shall deposit the judgment, including the merits and reasoning of the judgment, before the Registrar within 30 days of its delivery.
6. Judgments shall be read out in open court, and the President of the Court shall notify them to the parties to the dispute in writing.

Article 26

Execution of judgments

The judgment issued by the Court shall be executable in relation to the State parties to the dispute; it shall be enforced in the State parties directly as is if it was a final executable judgment issued by their competent judiciary.

Article 27

Petition for reconsideration

1. The Court may reconsider its judgments pursuant to a request from a party to the case within six months of the date of notification of the judgment.
2. A petition for reconsideration of the Court's judgment shall be accepted in the following instances:
 - a) If the judgment includes a breach of an essential 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 the party's ignorance of the fact was not a result of negligence on his part.
 - c) If the judgment does not clarify the reasons on which it is based.
 - d) If the Court flagrantly exceeds its jurisdiction.
 - e) If a deceit, fraud or falsification liable to influence the judgment took place.
 - f) In the event of an influence over a member of the Court that led him to change his opinion in the case.

Article 28

Rules of Court

The Court shall draft its own Rules of Court, for which it may consult those experts and specialists it deems necessary, and shall refer them to the Assembly for discussion and adoption.

Article 29

Report

1. The Court shall prepare an annual report about its work that includes a list of cases in which judgments were issued and a list of judgments that the parties did not comply with in their execution.
2. The President of the Court shall submit the report to the Assembly for approval.

Article 30

Judges' compensation and salaries

The Assembly's Bylaws shall specify the wages, benefits, and allowances for judges, the Registrar and staff commensurate with their appointed tasks and the requirements of their independence and availability.

Article 31

The Court's budget

The Court shall draw up its draft budget, and submit it to the Assembly through the President of the Court for approval. The budget shall be funded through the contributions of State Parties.

Article 32

Signature, ratification and accession

1. The Statute shall be opened for signature to Member States immediately upon adoption. Instruments of ratification shall be deposited with the Secretary-General.
2. State Members may deposit their instruments of accession to the Statute before the Secretary-General.

Article 33

Entry into force

This Statute shall enter into force after seven of the Member States have ratified it and deposited the instruments of ratification; the Statute shall be operative one year after it has entered into force.

With regards to States that ratified or acceded to the Statute after it came into force, the Statute shall enter into force one year after the deposit of instruments of ratification or accession.

Article 34

Amendments

The Statute may be amended through the Assembly at the initiative of any State Party or at the proposal of the Court; the Assembly shall rule on the amendment within six months of the amendment's presentation to it. The amendment shall enter into force one month after two thirds of the State Parties deposit the instruments of ratification.

The amendment shall take effect in relation to each State that ratifies it after its entry into force and one month after the State deposits its instrument of ratification with the Secretary-General.

Article 35

Withdrawal

Each State Party may withdraw from the Statute by a written notification addressed to the Secretary-General of the League; the withdrawal shall take effect one year after the date of the delivery of the notification.

The State shall not be exempted – because of its withdrawal – from its obligations arising from the Statute while it was a party to it; the withdrawal shall not affect the the continuation of the examination of any case pending before the date on which the withdrawal came into effect.

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March 2015 (for an updated list, please visit www.icj.org/commission)

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**International
Commission
of Jurists**

P.O. Box 91
Rue des Bains 33
CH 1211 Geneva 8
Switzerland

t +41 22 979 38 00

f +41 22 979 38 01

www.icj.org