

# The Arab Charter on Human Rights

Leila Zerrougui\*

## 1. Introduction

To start with, I would like to congratulate the organisers of this conference held to mark the 25<sup>th</sup> anniversary of the Essex University Human Rights Centre. I am very honoured to be with you today and to discuss with you, at the request of the organisers, the Arab Charter on Human Rights and its future. I will share with you my experience as Chairperson of the Team of Arab Experts involved in the drafting process of the revised Arab Charter.

Allow me to start with a brief overview of the process leading to the adoption in 2004 of the new Arab Charter on Human Rights. I will then assess a few elements of its contents that could help in the debate.

When approached by the Office of the High Commissioner for Human Rights to be part of a team of Arab experts to assist the League of Arab States in its project of updating the Arab Charter on Human Rights as adopted in 1994, I was confronted by a dilemma. In my view, the establishment of a regional human rights system can only be justified if it aims to achieve a higher level of protection than the one granted by the universal systems, that is to say more protective standards and stronger mechanisms. If a higher level of normative protection cannot be achieved, the added value of such a regional system should at least be the establishment of a judicial mechanism to supervise the implementation of the treaty, with decisions that are binding.

Such a system is, nevertheless, possible only in countries which have not only reached a sufficiently advanced level of political and legal integration, but also, and above all, in which the rule of law and the universality of human rights are no longer subject to debate.

Nonetheless, I knew that beyond mere rhetoric about the Arab Nation, the Arab world is far from integration. Besides, the concepts of rule of law and universality of human rights are met with much resistance in the region. I was sceptical in the light of past failed attempts to put in place a human rights system in the framework of the League of Arab

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\* Leila Zerrougui is Deputy Special Representative of the United Nations Secretary General for the Democratic Republic of the Congo. She is also a Commissioner of the International Commission of Jurists, as well as a counsel to the Supreme Court and Associate Professor at the *Ecole Supérieure de la Magistrature* in Algeria. She served as Chairperson of the Committee of Experts in charge of drafting the revised Arab Charter on Human Rights. From 2000-2004 she was an expert and Special Rapporteur for the UN Sub-Commission on the Promotion and Protection of Human Rights, successively appointed to the positions of Chairperson-Rapporteur of the Working Group on Arbitrary Detention of the Commission on Human Rights, Special Rapporteur on discrimination in the Criminal Justice System, and Member of the Working Group on Minorities. This is a lecture given by Leila Zerrougui as part of the High-Level Panel on the 60<sup>th</sup> Anniversary of the Universal Declaration of Human Rights at the Alumni Conference on the occasion of the 25<sup>th</sup> Anniversary of the Human Rights Centre at the University of Essex, 4–6 July 2008.

States<sup>1</sup> but also in light of the volatile political environment, marked with ongoing occupation of Arab territories and internal conflicts fed by the increased influence of radical ideologies.

On the other hand, I was aware that if the attacks of 11 September 2001 had dramatically undermined decades of human rights achievements at the international level, in the Arab world these same events, which had led to the collapse of Saddam Hussein and the occupation of Iraq, had also destabilised the regimes in a number of countries that for decades had been confronted by growing dissatisfaction and demands for political openness. The traditional allies of the United States, which are generally the least willing to undertake political change, found themselves for the first time confronted by great US pressure for more political openness. This conjunction of internal demands and international pressure was an opportunity worth seizing.

I therefore accepted, although not without reservations, to become a member of the team of Arab experts whose mandate was to assist the League of Arab States<sup>2</sup> in its initiative to ‘modernise’ the Arab Charter on Human Rights and bring it in line with international human rights standards.<sup>3</sup>

## 2. The background to the re-drafting of the Arab Charter on Human Rights

It is in the context I have just described that the initiative to ‘modernize’ the Arab Charter on Human Rights (ACHR) as adopted in 1994 was announced and then endorsed by decision 6302/119 (Part II) of 24 March 2003 of the League of Arab States’ Council (LASC). The Council tasked its intergovernmental human rights body, the Arab Standing Committee on Human Rights,<sup>4</sup> with the redrafting of the Charter. The Secretary General of the League of Arab States explained that the term ‘modernisation’ meant that the Standing Committee should bring the ACHR ‘in line with international human rights standards and

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<sup>1</sup> The first draft declaration on Arab human rights was drafted in 1971 by a committee of experts established by the Council of the League of Arab States, but the project did not materialize. In view of the lack of enthusiasm on the part of the States, the text was reworked and a draft treaty was again submitted to the States in 1983. The League then decided to temporize and await the adoption of the Declaration on Human Rights in Islam by the Organization of the Islamic Conference. It should be noted that parallel to the initiatives of the League of Arab States toward the adoption of an Arab Charter on Human Rights, various initiatives undertaken by Arab non-governmental organizations resulted in draft texts or critically examined the projects of the League. It was only on 15 Sept. 1994 that the League of Arab States finally adopted the Arab Charter on Human Rights, with the objections of seven governments.

<sup>2</sup> The Pact of the League of Arab States was adopted on 22 Mar. 1945 by seven founding states: Egypt, Iraq, Jordan (at that time Transjordan), Lebanon, Saudi Arabia, Syria, and Yemen. Today the League includes 22 Member States: Algeria, Bahrain, the Comoros Islands, Djibouti, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Morocco, Mauritania, Oman, Palestine, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, Yemen, and United Arab Emirates.

<sup>3</sup> Terms of Reference of the Committee of Arab Experts.

<sup>4</sup> The Arab Standing Committee on Human Rights (ASCHR) was created by resolution R 2443/48 (XLVIII), adopted by the Council of the League of Arab States on 3 Sept. 1968. It seems clear in light of resolution R 2443/48 (XLVIII) and the internal regulations of the ASCHR that, both by its composition (delegates from Member States) as well as by its mandate or rules of operation, the ASCHR lacks any real power to monitor the respect of human rights by Member States of the Arab League.

remove any inconsistency therewith'.<sup>5</sup> Contrary to expectations, and far from bringing the ACHR to the level of international human rights standards, the changes to the Charter accepted by the Standing Committee at two extraordinary sessions in June and October 2003 were in fact regressions compared to the 1994 text.<sup>6</sup> Indeed, in many of its articles the new draft set out the principle of the primacy of domestic law in cases of conflict between the normative provisions of the Charter and those of the internal legal system of a Member State. There is also the case of the inclusion of an additional paragraph in Article 2 of the Charter, directly inspired by the Declaration on Human Rights in Islam, stipulating that 'men and women are equal in human dignity, rights and duties within the framework of the objective differences set forth by Islamic law (Shari'a) and by other revealed laws'.

To address this situation and ensure that the Standing Committee benefits from the expertise available within the United Nations, a team of Arab experts, selected from among members of United Nations human rights treaty bodies and special procedures, over which I have had the honour to preside, was established within the framework of a pre-existing Memorandum of Intent between the United Nations Office of the High Commissioner for Human Rights (OHCHR) and the League of Arab States.<sup>7</sup> Six Arab experts, two representing each of the three sub-regions of the Arab world (North Africa, the Middle East, and the Gulf States) and their different legal traditions were retained, but only five accepted the assignment.<sup>8</sup>

When this team of experts met in Cairo at the headquarters of the League of Arab States on 21-26 December 2003, its work was already quite advanced and had benefitted from substantive contributions from international and Arab non-governmental organizations.<sup>9</sup> The opportunity for NGOs to provide comments and input through OHCHR enhanced the credibility of the process and enabled the team of experts to produce a solid draft in line with international human rights standards. It was indeed the first time that other stakeholders were involved in the work of the League of Arab States.

In the region, the involvement of civil society in the process was in itself a major development. The team of experts' added value *vis-à-vis* such an initiative was to convince the most sceptical NGOs to join it, and the result was a great success: the new draft charter proposed by the team of experts was supported by more than forty non-governmental Arab organizations, which published press releases and statements calling for its adoption without amendment.

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<sup>5</sup> Report of the Arab Standing Committee on Human Rights at its special session, Cairo, Oct. 2003, cited in the Report of Arab Group of Experts, Dec. 2003, para. 3.

<sup>6</sup> See among others: *The process of 'Modernizing' the Arab Charter on Human Rights: A disquieting regression*: Position Paper of the International Commission of Jurists, 20 December 2003.

<sup>7</sup> A 'Memorandum of Intent' was signed in April 2002 between the League of Arab States and the OHCHR within the framework of technical assistance and consultative services.

<sup>8</sup> Ibrahim El-Cheddi (Saudi Arabia), Ghalia Ben Hamed Al Thani (Qatar) Ahmed Taoufik Khalil (Egypt), Hatem Kotrane (Tunisia), and Leila Zerrougui (Algeria). OHCHR had also assigned its coordinator for the Arab region, Frej Fenniche, to assist the team of experts and provided the support of Boudjellal Betaher as a consultant.

<sup>9</sup> The team of experts received written memoranda from a number of Arab and international human rights groups. These include the Arab Organization for Human Rights, the Cairo Center for Human Rights Studies, the Arab Lawyers' Union, Amnesty International, and the International Commission of Jurists.

In our work we were guided by two self-imposed principles. Firstly, given the political context in the region, the modernization process must have at its heart non-derogable rights as set out in international instruments but also as later specified by the UN Human Rights Committee's General Comment No. 29 regarding the suspension of some civil and political rights during states of emergency. In other words, we were guided by the need to set out all non-derogable rights in the Charter but also to further limit the opportunities for states to use exceptional measures. Secondly, the text we would propose should not merely be the lowest common denominator among member states. The Charter would be a treaty open to ratification by sovereign member states, which would remain free to ratify it or not. Concretely, we were not seeking to achieve consensus at the expense of substantive human rights issues.

From the outset, I would like to highlight that the experts took a deliberate decision not to address in the text itself the reference in the preamble to the Cairo Declaration on Human Rights in Islam to Zionism as racism, which is not consistent with international human rights standards, in Article 2 of the Charter. We discussed these issues extensively and decided to put them aside, as they would have dragged us into unsolvable polemics over sensitive issues for the League and its member states. Nevertheless we felt that it was our duty to draw the attention of the Secretary General of the League of Arab States and its Standing Committee on human rights to the inconsistencies of the preamble and to remind them of United Nations General Assembly (GA) resolutions 3379 and 46/86 reversing a previous resolution of the GA equating Zionism to racism, in a separate letter which had been transmitted through the then acting High Commissioner for Human Rights.<sup>10</sup>

The draft produced by the team of experts was transmitted to the Secretary General of the League of Arab States and I was invited to present it before the third extraordinary session of the Arab Standing Committee on Human Rights which took place on 4-8 January 2004 in Cairo.

When invited to present our draft to the Arab Standing Committee, we had assumed we would attend the whole session and eventually engage in a dialogue with delegates and further explain our proposals. We then realised that some delegates were opposed to our participation and expected us to leave the room after the opening session. It is worth pointing out, however, that from the beginning of the session the delegations of Algeria, Bahrain, Iraq, Morocco, Palestine, and Tunisia clearly manifested their support for the draft produced by the team of experts and insisted on devoting the session to its examination. Other delegations tried to minimise the contribution of the experts and suggested focusing on a different draft, produced by the Standing Committee in 2003. After much debate, the Committee considered that the proposal by the team of experts was more comprehensive than its own draft and decided to devote the session to its examination, article by article. On the insistence of many delegations, the two experts in attendance, Khalil Taoufik from Egypt, and myself as the representative of OHCHR, were eventually invited to attend and provide clarifications to the Committee when needed.

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<sup>10</sup> Reservations were also made on the provisions of Article 2 D of the new Charter, which states that 'all peoples have the right to resist foreign occupation'. Some international NGOs have sought to clarify that if all peoples have the right to resist foreign occupation, they must do so in accordance with international law and must be consistent with international human rights and humanitarian law.

I seize this opportunity to pay tribute to the determination and efficiency of the then-coordinator of the Arab region at the OHCHR, Frej Fenniche, and to the diplomatic skills of the Chair of the Arab Standing Committee on Human Rights, Khaled Naciri. I would like to stress also the unfailing support of the then Iraqi Minister of Human Rights and the head of the delegation of Bahrain.

It did indeed prove useful to be in the room to bring discussions back on track by restating international standards when amendments not in line with international standards were proposed. Our presence also encouraged the more open delegations to play a positive role. In this regard, I would like to point to the omission of some rights and the weakness of provisions protecting the rights of women, children, persons belonging to minorities and non citizens. The final wording in the Charter would have been even worse without the experts' input.

In light of the sometimes stormy debates, the Standing Committee finalised only 19 of 55 articles during that session. The Committee decided to continue its work on 11-15 January 2004. Unfortunately I could not stay until the end of the session, but Frej Fenniche and Khalil Taoufik continued to assist the Committee.

On 14 January 2004 the Arab Standing Committee on Human Rights finalised the new draft of the Arab Charter on Human Rights. The suggestions formulated by the team of experts had not all been taken into consideration; the Committee had, at times, deviated from the text suggested and from international standards. Some significant improvements to the 1994 text had been introduced, but the adopted Charter still retained some ambiguous provisions and failed to meet the expectations of civil society.<sup>11</sup> Amnesty International,<sup>12</sup> the International Commission of Jurists,<sup>13</sup> and a great number of Arab NGOs<sup>14</sup> highlighted the improvements introduced in the Charter, its weaknesses and its deficiencies and formulated some concrete recommendations to bring the Charter in line with international human rights standards. The draft was nevertheless adopted without such recommended amendments by the Council of the League of Arab States during its 16<sup>th</sup> summit held in May 2004 in Tunis.

### 3. Assessment of the new Arab Charter on Human Rights

Without denying or even minimizing the criticisms expressed, one needs to recognise that, despite its deficiencies and the ambiguities in the formulation, the quality of the new Charter marks a breakthrough compared not only with the charter of 1994, which is obvious, but above all also with the position entertained for so long on cultural specificity that, implicitly or explicitly, aims at challenging the universality of human rights and international human rights standards. In an article analyzing the provisions of the 2004

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<sup>11</sup> See the joint statement of the organizations '*Agir ensemble pour les droits de l'homme*' and the Arab Centre for Education in International Humanitarian and Human Rights Law, made in Geneva before the United Nations Human Rights Commission in April 2004.

<sup>12</sup> Amnesty International, *Re-drafting the Arab Charter : Building for a Better Future*, AI Index, MDE 01/002/2004, <http://www.amnesty.org>

<sup>13</sup> Position Paper and comments by the International Commission of Jurists, December 2003 and February 2004, <http://www.icj.org>

<sup>14</sup> More than 56 Arab human rights NGOs met in Tunis in May 2004 and sent a letter to the heads of state indicating that the project did not meet their hopes and concerns .

Arab Charter, Professor Ahmed Mahiou emphasised that the adoption of the Charter reflects the Arab version of human rights, that it pertains to reach the level of international instruments, and that it seems to bring an end to existing debates over the relativity of conceptions.<sup>15</sup>

This aspect is, in my view, the most important achievement to be retained, alongside the fact that, for the first time and after decades of gestation, Arab states have adopted, unanimously and without reservation, their own binding instrument on human rights.<sup>16</sup> This instrument entered into force on 15 March 2004, i.e. 60 days after its ratification by seven states, and the United Arab Emirates, Jordan, Bahrain, Algeria, Syria, Palestine, and Libya are now bound by the Charter. According to the information available on the website of the Embassy of Saudi Arabia in the US, the Shura Consultative Council ratified the Arab Charter in February 2008,<sup>17</sup> although I have not yet been able to verify this.

One can argue that all these countries, with the exception of the United Arab Emirates and Palestine, have ratified most international human rights instruments.<sup>18</sup> I believe, however, that the importance of the new Charter cannot be minimised. It is the first time that Arab states have together adopted an instrument affirming that all human rights are universal, indivisible, interdependent and interrelated.

Moreover, it is undisputed that the new Arab Charter on Human Rights offers, for a great number of rights, a level of human rights protection similar to that of the universal and regional instruments. It enshrines the principle of non-discrimination (Article 3), the right to life (Article 5), and equality before the law (Article 11), and prohibits any form of slavery, trafficking in human beings, and exploitation of children in armed conflicts (Article 10). It also provides that every citizen has the right to take part in public life, to stand for election and choose his or her representative in impartial elections (Article 24), and protects privacy of family, home, and correspondence (Article 21).

Another field where significant improvements have been achieved is administration of justice (Article 10) and the adoption of the agreed fair trial norms and principles (Article 16 completed by other provisions). The Charter includes a general statement guaranteeing the independence of the judiciary and protecting it from interference, pressure or threat (Article 12); it enshrines the right to liberty and security of persons, prohibits arbitrary arrest and detention (Article 14), torture and cruel, inhuman, or degrading treatments,

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<sup>15</sup> Article available at [www.aidh.org/Biblio/Txt\\_Arabe/Images/charte\\_arabe\\_ddh\\_mahiou\\_2004.pdf](http://www.aidh.org/Biblio/Txt_Arabe/Images/charte_arabe_ddh_mahiou_2004.pdf)

<sup>16</sup> Several states expressed reservations at the adoption of the 1994 Charter, in particular those of the Gulf: Saudi Arabia and the United Arab Emirates pointed out the necessity of conformity of the Charter with Shari'a and the Declaration on Human Rights in Islam; Bahrain, Kuwait, and Oman adopted a waiting position; Yemen and Sudan addressed notes to the Secretariat of the League, the contents of which were not made public.

<sup>17</sup> According to information posted on the website of the Embassy of Saudi Arabia in Washington D.C., [www.saudiembassy.net/2008News/News/RigDetail.asp?cIndex=7698-29k](http://www.saudiembassy.net/2008News/News/RigDetail.asp?cIndex=7698-29k), on 24 February 2008, the Shura (Consultative) Council ratified the Arab Charter on Human Rights in a session chaired by Dr. Saleh bin Homaid.

<sup>18</sup> With the exception of the United Arab Emirates and Palestine, these countries have ratified the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, the International Convention against Torture and other cruel, inhuman or degrading treatments, the International Convention on the Rights of the Child, the International Convention on the Elimination of All Forms of Racial Discrimination and the International Convention on the Elimination of All Forms of Discrimination against Women.

which are considered as crimes not subject to any statute of limitations, and sets out the right to reparation for victims of torture (Article 8). It also prohibits medical experimentation without the consent of the persons concerned (Article 9), restricts capital punishment to the most serious crimes (Article 6), and sets out the principle of legality of offences and penalties (Article 15), the *non bis in idem* principle (Article 19), the prohibition of imprisonment for civil debt (Article 18) and the humane treatment of persons deprived from their liberty (Article 20). The Charter provides for a separate judicial system for juveniles (Article 17).

In other areas the Charter innovates and appears to be ahead of other international instruments, by enshrining the rights of persons with mental or physical disabilities (Article 40) and also by outlawing violence against women and children in the family (Article 33, paragraph 2).

Considering that many Arab states have either been under states of war or states of emergency for decades, the consensus reached in the wording of Article 4 of the Charter, which regulates derogations and limitations in exceptional circumstances, is a major development. The new provision widens the list of non-derogable rights beyond those provided for in the ICCPR, taking into account developments in international law including the right to a fair trial and the right to challenge the lawfulness of detention. It also specifies that a state wishing to derogate from the provisions of the Charter must officially declare it and inform other states parties through the Arab League about the provisions from which they intend to derogate, the reasons for derogation, and the date on which the derogation will end.

One needs, however, to deplore the ambiguities and deficiencies of formulation that remain in the Charter, mainly due to the coexistence of different sources of legitimization of human rights. This is notably the case with equality between men and women: noticeable advances<sup>19</sup> in the new wording of the final paragraph of Article 3<sup>20</sup> are counterbalanced by reference to Shari'a law and by implicit restrictions with reference to domestic legislation with regard to relationships in the private sphere (Article 33). This is also the case with the insertion of a claw-back clause in the provision prohibiting capital punishment for those under 18 years of age at the time of committing a crime (unless provided otherwise in national law) (Article 7), or with the restrictions on the freedom of belief and religion (Article 30).

If such weaknesses or ambiguities may be explained by so-called cultural specificity, the other numerous and problematic provisions that fall below international standards can only be explained by resistance to the rule of law, the essential foundation of any human rights system. Wording is notably vague when formulating certain rights and/or the imposition of restrictions or limitations as provided for in national legislation: this is the case for freedom of association and assembly (Article 24), the rights of persons belonging to minorities (Article 25), freedom of opinion and expression, the rights to seek asylum (Article 32), the

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<sup>19</sup> Article 3 enshrines the principle of non-discrimination, equal opportunities, and effective equality between men and women to enjoy all the rights enshrined in the Charter.

<sup>20</sup> The formulation of Article 3 is a compromise reached after hours of debate. As the representatives of certain countries affirmed that Islam has granted more rights to women than modern legislation, the experts proposed to the Commission that it should be made clear that the reference to Shari'a comes within the framework of positive discrimination towards women.

rights of migrant workers (Article 34), the right to form trade unions and the right to strike (Article 35).

Another area where the contribution of the Arab Charter is quite limited is in the restriction imposed on the mandate of its monitoring body. The revised Charter provides for the creation of an ‘Arab Human Rights Committee’ entrusted only to receive governmental reports and submit its comments and recommendations to the Council of the Arab League of States, via the Secretary General, in its annual report (Article 48).

Compared to the European, inter-American, and African systems, which from their inception granted their supervising bodies the mandate to receive complaints from individuals or NGOs and later provided for judicial or quasi-judicial mechanisms, the solution adopted in the Arab Charter is the weakest and is indicative of a deeply-rooted distrust *vis-à-vis* an effective human rights system.

In contrast with the document adopted in 1994 and that proposed by the Arab Standing Committee on Human Rights in 2003, the new Charter has strengthened the follow-up mechanism thanks to the contribution of the multiple stakeholders involved and the team of experts. The mechanism will be composed of seven members proposed by states and elected by the Council of the League with a four year mandate and the possibility of re-election only once, to promote rotation. Members must have the required experience and competence in the human rights field. Above all, they sit in their personal capacity as independent experts, enjoying the immunities necessary for the achievement of their mission.

#### 4. Conclusion

From what has been said above, it is clear that the new Arab Charter is still far from being in line with international human rights standards and will continue to raise questions. It is nonetheless a significant step forward, and all those involved in the re-drafting of the new Charter must continue to push for its ratification by the remaining states<sup>21</sup> and take action to influence the ongoing process towards the election of the first members of the Committee. It is vital that those who will sit on the Committee have the competence, independence, and legitimacy required to effectively monitor the implementation of the human rights enshrined in the Arab Charter.

Amnesty International has published a report with a number of recommendations concerning this Committee.<sup>22</sup> Amnesty International asks the Secretary-General of the League of Arab States to issue guidance, in written form, to the States Parties to the Charter further explaining the process of nomination and election, as well as the criteria for membership of the Arab Human Rights Committee. The report also provides guidance to states to ensure that the selection process of nominees at the national level and their election is effective and transparent. This initiative is commendable and needs to be strengthened by other actions by multiple stakeholders.

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<sup>21</sup> See fn.17.

<sup>22</sup> Amnesty International, ‘*The Arab Human Rights Committee: Elections of Members and Criteria of Membership*’ AI Index: IOR 65/001/2008, <http://www.amnesty.org>

If the new Committee is composed of a majority of experts with strong personal qualities and independence, it could play an important role in effectively implementing the new Charter. Its consideration and discussion of periodic reports in public session, observations, comments, and recommendations made public, and dissemination of such recommendations would then certainly become effective tools of pressure. As states do not like to be criticised in public, the publicity of the debates and their outcome will have a tremendous impact and could lead to additional positive steps. Indeed, as the Charter allows for the adoption of optional protocols and for the amendments of its provisions (Articles 50 and 52), there is room for the strengthening of the Committee's mandate and for creating greater compliance with international human rights standards within the Charter.