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**The Arab Charter on Human Rights**

**Mohamed Mattar, Professor of Law and**

**Executive Director, The Protection Project at JHU-SAIS**

**1.**

I am really happy to be here at this great institution, the International Institute for Human Rights.

It is nice to have all of you. I see faces from many countries, including my own, Egypt.

Our issue for four hours is the Arab Charter on Human Rights.

- Adopted by the League of Arab States in 2004
- And entered into force in 2008, when seven countries ratified the Charter and we needed seven instruments of ratification under article 49 of the Charter
- Today, Saudi Arabia, Qatar, United Arab Emirates, Kuwait, Bahrain, Yemen, Iraq, Jordan, Palestine, Syria, Algeria, Libya, and Sudan are parties to the Charter

I am not sure how these countries are doing today:

- There is a war going on between Hamas and Israel in Gaza;
- There is a serious conflict between Shia and Sunni in Iraq and Christians are fleeing the country;

- There is a civil war in Syria and a president who just won elections for a new three-year term;
- There is a policy of exclusion of the Muslim Brotherhood in Egypt and tensions at the Libyan border;
- There is instability in Yemen, the adjacent neighbor to the Gulf States

I believe that by now all of you have a good idea about international human rights conventions based upon the Universal Declaration on Human Rights

Whether it is the International Covenant on Civil and Political Rights

Or the International Covenant on Economic Social and Cultural Rights

The Convention on Racial Discrimination

The Convention against Torture

The Convention on the Elimination of all Forms of Discrimination against Women

The Convention on the Rights of the Child

The Convention on the Rights of People with Disabilities

And the Convention on the Rights of all Migrant Workers and Members of their Families

These are the international legal instruments that require reporting and, as you all know, reporting is one of the few mechanisms that we have for the enforcement of international law rules and norms.

In 2009, an Arab Human Rights Committee was established to receive reports on the status of human rights.

To my knowledge, Jordan, Algeria, Bahrain and Qatar have already submitted reports to the Committee.

I also believe that you are familiar with regional human rights conventions

The European Convention on the Protection of Human Rights and Fundamental Freedoms

The American Convention on Human Rights

The African Charter on Human and People's Rights

So, the first question that I would like to address with you is the relationship between the Arab Charter on Human Rights and International Human Rights law.

Some argue that with international convention, why do we need regional ones?

I believe that a regional convention, such as the Arab Charter, may strengthen international human rights law.

Of course, the Arab Charter, while adhering to the international standards on human rights, responds to the social and cultural and political characteristics of the region.

One is illiteracy:

Between 2005 and 2008 the total illiterate population reached more than sixty million, an increase of approximately one million since the turn of the century. Nevertheless, the average adult illiteracy rate in the region has increased from 67 percent to 72 percent over the past decade.

Article 41 of the Charter acknowledges the serious problem of illiteracy in the Arab world and provides that “[t]he eradication of illiteracy is a binding obligation upon the State . . . .”

Another one is Harmful Traditional Practices:

Those practices, which persist in some parts of the Arab world, include female genital mutilation, child marriages, honor killings, female infanticide, and violence against women.

Article 39 states that measures taken by states parties to recognize the right to health shall include the “suppression of traditional practices which are harmful to the health of the individual.”

A third one is Social Values:

Article 33 provides that “[t]he family is the natural and fundamental group unit of society; it is based on marriage between a man and a woman,” an explicit rejection of same-sex marriage, which is reflective of societal views in the region.

As Tariq Ramadan observes, “the moral condemnation of homosexuality remains the majority opinion of all religions, and Islam is no exception.”

Article 33 also provides for the protection of vulnerable populations, including women, children, adolescents, mothers, the elderly, and persons with special needs. It also calls upon states to provide their youth with the best opportunities in a region where more than half of the population is below the age of twenty-five.

A fourth is the Status of Women:

In some Arab countries women are prevented from access to justice on an equal basis with men.

A first example is that in some Arab countries female testimony in courts counts only half the worth of male testimony.

In a landmark case decided by the Court of Appeal in Morocco, it was argued that the marriage contract that was executed between two Moroccans in France was invalid because one of the witnesses to the contract was a woman, which is in violation of Islamic law.

The Court disagreed holding that “testimony in Islam is not restricted to men.” In fact, “in Islamic jurisprudence there are matters that may not be witnessed except by women...as in female defects and suckling...” and that Islam allows in a case of “necessity” the testimony of anyone who may not meet the strict requirement of a witness so that the rights are preserved.

The Court stated that what is required is that a witness should be just regardless of his or her gender. The Court emphasized that “these principles aim at achieving justice which is now a universal concept that is based on equality and liberty and rejection of discrimination on basis of sex or race or color” and that “these basic tenants are established in Islamic Sharia.”

The Court concluded that “the presence of a woman as a witness to the marriage contract does not violate the public order in Morocco which is derived from the principles of Islamic Sharia, the internal values of Moroccan society, and the universal principles of human rights.”

A second example is that in Saudi Arabia and Kuwait women are denied the right to be judges, which prevents women from equitable access to justice.

One of the unique articulations of the Arab Charter is the explicit provision of article 12 on the right of access to justice as separate from the right to a fair trial.

A fifth is the Islamic religion, and you see this in some of the articles of the charter.

The most important is article 3(3), which provides that:

“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 Shariah, other divine laws and by applicable laws and legal instruments. Accordingly, each State party pledges to take all the requisite measures to guarantee equal opportunities and effective equality between men and women in the enjoyment of all the rights set out in this Charter.”

The article raises the question of women’s rights in the Charter:

- Some may argue that the article limits women’s rights by its reference to Islamic Shariah
- And Islamic Shariah provides for rules that raise questions regarding equality between men and women, such as the double inheritance rule, the double witness rule, and the double compensation rule

- Also problematic are early marriage, violence against women and other harmful customary practices
- Perhaps the drafters of the Arab Charter were not completely accurate in using the phrase “positive discrimination” because under international law the term discrimination refers to the color red

R stands for restriction, E stands for exclusions, D stands for distinctions, which I do not believe were intended to be imposed on the rights of women under the Charter.

Consequently, the Charter has to be interpreted in its entirety and article 3(3) should be interpreted in light of other articles on women’s rights. And the Charter covers women’s rights in several other articles (HANDOUT 1)

Unlike other regional conventions, as you see from the handouts that focus on the traditional approach to women’s rights under what we call the non-discrimination clause.

In addition, positive discrimination here means special measures that may be taken to enhance women’s rights or what we can call affirmative action or, as the CEDAW Convention refers to

“temporary special measures in that accelerating the de facto equality between men and women shall not be considered discrimination”

Examples of positive discrimination in favor of women in Islam include, for example, her first right to child custody, or imposing the duty of maintenance on the man.

The adoption of special measures to accelerate the equality between men and women is a common and established European principle, adopted also by the European Court of Human Rights.

For example, in the case of Kalanke v. Bremen, the court recognized that special additional measures may be necessary to “counteract the prejudicial effects on women in employment which arise from social attitudes, behaviour and structures.”

The court has also said that although they may appear discriminatory, special measures “are in fact intended to eliminate or reduce actual instances of inequality which may exist in the reality of social life.”

In another case, *Marschall v. Land Nordrhein-Westfalen*, a tenured male teacher challenged the denial of his application for promotion to an elevated career bracket after he had been informed that a female candidate was being sought for the position.

The court determined that where there are far fewer female than male candidates for a position, and where candidates are subjected to objective criteria and are found to be equally qualified, the female candidate is to be prioritized; however, such priority is overridden if one or more of the relevant selection criteria “tilts the balance in favour of the male candidate.”

## 2.

I would like to invoke here article 43 of the Charter, which provides that “nothing in this Charter may be construed or interpreted as impairing the rights and freedoms...set forth in international...human rights instruments, which the States have adopted or ratified...including the rights of women.”

This is how the Arab Charter should be interpreted and this is the principle of the supremacy of international law and international conventions over a regional convention. And this is what we call the saving clause, which is designed to solve possible conflicts of laws.

So, every time you read a provision in the Arab Charter, you have to keep an eye on the international standards.

Let me give you an example: articles 9 and 10 of the Charter prohibit human trafficking and trafficking in human organs. The supremacy principle means that we should read article 9 and 10 in accordance with articles 6 and 7 of the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. (HANDOUT 2)

This means that it is not enough for Arab States to prohibit or criminalize human trafficking. International law requires that a state also provide assistance and protection to victims of trafficking.

I have handouts for you on human trafficking, which is a problem in Arab countries

- Sometimes it takes the form of child marriage
- Sometimes domestic service constitutes a form of trafficking

I travel around the Arab world and I get the question whether recruiting Muslims to do Jihad in Syria or Iraq is a form of human trafficking.

Of course, recruiting children in armed conflicts is human trafficking and the Lebanese law expands the concept of human trafficking to include recruiting people to commit an act of terrorism.

This reference to international law should be made by an Arab judge deciding a domestic case.

I think that international and regional instruments should be considered in domestic courts. This is what we call the “supremacy clause” or the “savings clause”.

And there have been some good examples:

- The Supreme Constitutional Court of Egypt holding the unconstitutionality of article 73 of the law of the State Council of 1972, which prohibited a candidate of the State Council to be married to a foreigner. The Court made it clear that this prohibition was a violation of the constitution. In doing so, it made reference to article 16 of CEDAW that provides for freedom of marriage.
- Another example, this time from Iraq, where the Iraqi Appellate Court held that a husband did not have the right to prevent his wife from traveling because this would violate her right to freedom of movement, as provided in article 42 of the Iraqi Constitution of 2005 and article 13 of the Universal Declaration of Human Rights
- In fact, international law may appeal a domestic law when there is a contradiction. For instance, in a landmark case at the Egyptian Supreme

State Security Court the defendant, an employee of the National Railway system were accused of going on strike to force the government to meet their financial demands. Although article 124 of the Egyptian penal code explicitly prohibits employee strikes, the Court held that article 124 contradicted article 8 of the ICESCR, which guarantees the right to strike.

- In addition, a Court may apply international law to fill a gap in domestic law. In a 2009 case before the Iraqi Personal Status Court the issue was raised as to whether a Christian husband and wife were subject to Muslim disobedience rules that allow a husband to file a lawsuit asking his disobedient wife to return to the marital home.

The Court concluded that the rules of Islamic Sharia are not applicable to Christian marriages and in the absence of any parallel rule in Christian practices, the Court applied article 16 of CEDAW, which provides for the principle of equality in marriage and article 5 which calls for the elimination of harmful customary practices that are based on the inferiority of women. The Court also relied on article 23 and 24 of the ICCPR, which provide for the equality of men and women.

However, the application of international law in Arab domestic courts may be limited by adherence to Islamic law.

As you can see from the handouts, Arab countries make reservations to provisions of international conventions such as the right to change your religion. (HANDOUT 3)

The Administrative Court of Egypt, for instance, found a law prohibiting any activities of the Bahai faith that did not violate the right to religion, established by article 18 of the UDHR, because those protections extend only to the three divine religions.

Similarly, in a landmark case, brought before the Administrative Court of Egypt an Egyptian Muslim converted to Christianity and attempted to have this change reflected in his ID, with his new Christian name and religious belief.

However, the Court held that although Egypt has ratified the ICCPR, which guarantees the right to religion, Egypt made a reservation based upon the Islamic rule that denies Muslims the right to convert.

### 3.

This brings me to minorities' rights and how these rights are observed in the Arab world. (HANDOUT 4)

Another problem with minorities being denied basic rights

- Egypt, for example, has a significant Christian minority representing 8 to 10% of the population
- In Syria 10% of the population is Christian, but most of them fled the country
- In Iraq Sunnis are the minority that constitutes 32 to 37% of a population that has a 60 to 65% Shia majority
- Lebanon is an example of several minorities, including 40% of Christians and 27% Shia and another 27% of Sunni Muslims

The Arab Charter makes clear in article 25 that “Persons belonging to minorities shall not be denied the right to enjoy their own culture, to use their own language and to practice their own religion. The exercise of these rights shall be governed by law.”

The United States Department of States International Religious Freedom Report lists Saudi Arabia as one of the “countries of particular concern”:

- The government denies anyone “the practice of any religion other than Islam”

The Arab Charter is very clear, as you can see from the handouts, in guaranteeing freedom of religion (HANDOUT 5)

- “The government continues to revise textbooks, removing objectionable content. However, significant objectionable content remains”

The Arab Charter is very clear in calling upon states to incorporate human rights in educational curricula

Article 41(5) provides: “The States parties shall endeavour to incorporate the principles of human rights and fundamental freedoms into formal and informal education curricula and educational and training programmes.”

And we need reform of our legal education. Our education is still based on emphasis of theory over practice, substance over procedure, and absence of a role for students.

I am delighted that there is a new legal clinical movement in the Arab world and now we have clinics in Egypt, Iraq, Jordan, Lebanon, Palestine, Qatar, Oman, Kuwait, Bahrain, and Morocco.

As you can see, the 53 provisions set for the Arab people a comprehensive bill of rights. However, the question is always how are these provisions of the Charter to be enforced?

First, state parties to the Arab Charter must take the necessary legislative measures to bring the national laws in conformity with the Charter.

Article 44 states that “The states parties undertake to adopt, in conformity with their constitutional procedures and with the provisions of the present Charter, whatever legislative or non-legislative measures that may be necessary to give effect to the rights set forth herein.”

This process of compliance should start with constitutional reform

Morocco had its new constitution in 2011, establishing a Committee on the Elimination of Discrimination against Women and a National Council on Human Rights with a National Rapporteur to address individual complaints

To a lesser extent, the 2011 Constitution of Jordan provides for rights and freedoms of the Jordanian people. However, the constitution fails to include the principle of equality between men and women as required by article 2 of CEDAW.

The good news is that the Jordanian Constitution provided for the establishment of a Constitutional Court and, as you know, in the Arab world constitutionality is based on Islamic Sharia and if you are in Iran a law has to comply with principles of Islamic Sharia, as well as principles of democracy.

Some areas of concern in national legislation include: (HANDOUT 6)

Honor Killings:

- Jordan's Penal Code excuses from the standard penalty a husband who kills or injures and adulteress wife
- The Penal Code of Syria exonerates perpetrators of "honor crimes"
- The Penal Code of Iraq prescribes a short prison sentence for a husband who kills an adulteress wife

Violence against Women:

- The Penal Code of Iraq provides that there is no crime when a man exercises his right to discipline his wife
- In Iraq, adulteress women are always punished, regardless of where the act of adultery was committed, whereas men are punished only if the act of adultery is committed in the marital home.
- In Yemen, rapists are not punished if they marry their victims

Workers' rights:

- In Qatar, Oman and the United Arab Emirates, domestic workers, including cooks, drivers and nurses are excluded from the scope of application of the labor law.

Freedom of association:

- In Bahrain, Tunisia and Egypt, laws governing the establishment and operation of NGOs allow the government to reject applications, dissolve and NGO without judicial oversight and prohibit an NGO from receiving foreign funds.

I argue that this legislative review should consider the various Arab regional conventions, including:

- The Arab Convention on Freedom of Association of 1977
- The Arab Declaration on the Rights of The Child of 1983
- The Arab Convention on the Employment of Women of 1976

I also argue that this legislative review should also be based on Arab Model Laws. This is a process of unification and harmonization of the law that started with the Sana'a strategy in 1981.

The first model law was adopted in 1981 on personal status.

We had two good model laws in 2012:

- One on combating human trafficking, which in article 19 abolishes the statute of limitations
- Another on combating corruption, which also provides for the non-applicability of statutory limitations to corruption crimes, unlike the Arab anti-corruption convention of 2010, which only provides for a long statute of limitation

#### 4.

The Charter calls for the establishment of the Arab Human Rights Committee.

However, the Committee has only the authority to issue “comments”, “recommendation”, and “concluding observations”. But these do not have a binding effect.

The Committee does not have jurisdiction to receive individual complaints regarding human rights violations committed by the states in contrast to the regime provided by the American Convention and the African Charter.

So, perhaps it is a good idea to establish, like the Europeans, an Arab Human Rights Court. In fact, Bahrain has submitted to the League of Arab States a proposal to establish an Arab Court for Human Rights.

An Arab Court on Human Rights should take in consideration the experience of the three regional Court of human rights

- The European Court of Human Rights, established in 1959
- The Inter-American Court of Human Rights established in 1978
- And the African Court on Human and People's Rights established in 2002

Lessons from these three established courts should be learned so we can avoid an excessive caseload and ensure allocation of the necessary financial resources for the work of the court and guarantee compliance with its judgments.

- An Arab Court of Human Rights should allow petitions to be submitted by states, individuals, and non-governmental agencies.
- The judgments of the Court should be binding upon the states and the Court should have the competence to require a state to pay damages for human rights violations and to amend national laws that are inconsistent with the Charter.
- The Court should also issue declaratory or interpretive decisions on issues of human rights. Such a court would thus become the highest authority entrusted to make determinations of human rights issues in the Arab world and would provide an effective mechanism for the enforcement of the rights stipulated in the Charter.

These are some of the issues that I wanted to highlight with you. On the one side, we now know how the Arab Charter defines the rights of the Arab people and on the other side we have to ask the question of relevancy, tangible impact and enforcement and implementation.

Thank you.