

Article 43 of the Arab Charter on Human Rights: Reconciling National, Regional, and International Standards

Mohamed Y. Mattar*

Article 43 of the Arab Charter on Human Rights states, “Nothing in this Charter may be construed or interpreted as impairing the rights and freedoms protected by the domestic laws of the States parties or those set forth in the international and regional human rights instruments which the states parties have adopted or ratified, including the rights of women, the rights of children and the rights of minorities.” Article 43 thus addresses the interaction between the Arab Charter on Human Rights and the domestic laws of Arab states. It also addresses the relationship between the Charter and international law. In analyzing these interactions, I argue that interpretation of the rights stipulated in the Charter should not be impaired by domestic laws that may restrict such rights. Instead, I explain that the Charter, as a regional convention, should be read in accordance with the principles of international treaty interpretation. I conclude that the Article 43 mandate requires a review of domestic legislation to ensure compatibility with the Charter as well as the incorporation of international law in domestic courts.

INTRODUCTION

Regional human rights conventions have a unique potential to contribute to the realization of human rights. As mechanisms that inhabit the legal space between the international and national levels, they are well placed to impact and draw from both. Accordingly, they have the capacity to couple universal human rights norms and principles with sensitivity and responsiveness to the social and cultural particularities of a region. Regional human rights conventions and systems for their enforcement notably play an important role in the European, Inter-American and African contexts, and a human rights initiative within the Association of Southeast Asian Nations (“ASEAN”) is currently emerging. An enforceable human rights instrument for the Arab world holds promise for the promotion of human

* Mohamed Y. Mattar is a Senior Research Professor of International Law and the Executive Director of The Protection Project at The Johns Hopkins University School of Advanced International Studies (SAIS).

rights, accountability for their violation, and enhanced access to justice for populations in the region.

Important groundwork for this development is already in place. In May 2004, the League of Arab States adopted the Arab Charter on Human Rights (“Arab Charter” or “the Charter”)¹ “[t]o place human rights at the centre of the key national concerns of Arab States . . .”;² “[t]o teach the human person in the Arab States pride in his identity, loyalty to his country, attachment to his land, history and common interests . . .”;³ “[t]o prepare the new generations in Arab States for a free and responsible life in a civil society that is characterized by solidarity . . .”;⁴ and “to entrench the principle that all human rights are universal, indivisible, interdependent and interrelated.”⁵ In accordance with the Arab Charter on Human Rights, a Bill of Rights for the Arab world was established for the first time, including civil and political rights⁶ as well as economic, social, and cultural rights.⁷

The Arab Charter has a long drafting history. The idea of an Arab Convention on Human Rights was first postulated in 1960 by members of the Union of Arab Lawyers at a conference in Damascus.⁸ The notion was again put forward in 1968 at the first meeting of the Arab Commission on Human Rights.⁹ In 1985, the Commission adopted a draft charter and sent it to the League of Arab States Council for ratification; however, the draft was rejected in January 1987.¹⁰ The Commission prepared another draft, which was approved by the League of Arab States Council on September 15, 1994.¹¹ However, scholars and critics pointed out that the Charter failed to

1. League of Arab States, Arab Charter on Human Rights, May 22, 2004, *reprinted* in 12 INT'L HUM. RTS. REP. 893 (2005) (entered into force Mar. 15, 2008) [hereinafter Arab Charter]. For an English translation of the Arab Charter, see the University of Minnesota Human Rights Library, *available* at <http://www1.umn.edu/humanrts/instree/loas2005.html>.

2. *Id.* art. 1(1).

3. *Id.* art. 1(2).

4. *Id.* art. 1(3).

5. *Id.* art. 1(4).

6. *See id.* art. 5 (right to life), art. 14 (right to liberty and security), art. 16 and art. 13 (judicial guarantees), art. 21 (right to privacy), art. 27 (right to freedom of movement), art. 32 (right to freedom of expression), art. 33 (right to a family), art. 24 (right to political participation, including public affairs, elections, and public office and the right to association and assembly), art. 8 (right not to be submitted to torture or to cruel, inhuman, or degrading treatment), art. 30 (right to freedom of belief, thought, and opinion), art. 28 (right to political asylum), art. 29 (right to a nationality), and art. 31 (right to private property).

7. *See id.* art. 34 (right to work), art. 35 (right to form and join trade unions), art. 36 (right to social security), art. 37 (right to development), art. 38 (right to an adequate standard of living), art. 39 (right to health), art. 40 (right of persons with disabilities), art. 41 (right to education), and art. 42 (right to intellectual property).

8. Mohammed Amin Al-Midani, *The Enforcement Mechanisms of the Arab Charter on Human Rights and the Need for an Arab Court of Human Rights*, 3 THE PROTECTION PROJECT J. OF HUM. RTS. AND CIV. SOC'Y. 61, 63 (2010).

9. *Id.*

10. *Id.*

11. Council of the League of Arab States, Arab Charter on Human Rights, Sept. 15, 1994, *reprinted* in 18 HUM. RTS. L.J. 151 (1997).

adequately protect some fundamental rights,¹² allowed for far-reaching derogations and expansive restrictions of a number of these fundamental rights,¹³ and lacked an enforcement mechanism.¹⁴ In part for this reason, the 1994 Charter received only one signature (Iraq in 1996) and no ratifications.¹⁵

In 2002, the League of Arab States Council adopted two resolutions calling for a revision and update of the 1994 version of the Arab Charter.¹⁶ A Committee of Experts was established in 2003 with the intention of bringing the Arab Charter in line with international human rights standards.¹⁷ In 2004, the Arab Commission on Human Rights met and adopted the Committee of Experts' proposed texts, with some amendments.¹⁸ The new version of the Charter was adopted at the League of Arab States Summit in Tunisia on May 23, 2004.¹⁹ The Charter entered into force on March 15, 2008, after seven instruments of ratification were obtained as required by Article 49(2). At present, 12 of the 22 members of the League of Arab States have ratified the Charter: Algeria, Bahrain, Iraq, Jordan, Libya, Palestine, Qatar, Saudi Arabia, Syria, United Arab Emirates, Yemen, and Kuwait.²⁰

In 2009, an Arab Human Rights Committee was established under the Charter to receive reports from states parties on the status of human rights under their jurisdictions.²¹ Under the Charter, "[t]he States parties under-

12. See Mervat Rishmawi, *The Revised Arab Charter on Human Rights: A Step Forward?*, 5 HUM. RTS. L. REV. 361, 369–71 (2005).

13. See INT'L COMM'N OF JURISTS, POSITION PAPER ON THE PROCESS OF "MODERNIZING" THE ARAB CHARTER ON HUMAN RIGHTS: A DISQUIETING REGRESSION para. 18 (2003).

14. See Mohammed Amin Al-Midani & Mathilde Cabanettes, *Arab Charter on Human Rights 2004*, 24 B.U. INT'L L.J. 147, 148 (2004) (in the introduction to an English translation of the 2004 Arab Charter, noting that "[t]he main weakness with the 1994 version was the lack of any human rights enforcement mechanism . . .").

15. Press Release, Al-Karama For Human Rights, Arab Charter on Human Rights: Written in 1994, It is Enforced in 2008 (Mar. 21, 2008), available at http://en.alkarama.org/index.php?option=com_content&view=article&catid=17%3Acommuniqu&id=72%3Aarab-charter-on-human-rights-written-in-1994-it-is-enforced-in-2008&Itemid=197.

16. Rishmawi, *supra* note 12, at 362.

17. *Id.* at 362–63.

18. *Id.* at 363.

19. For an extensive discussion of the Arab Charter, its history, and criticisms it has sustained, see Mervat Rishmawi, *The Arab Charter on Human Rights and the League of Arab States: An Update*, 10 HUM. RTS. L. REV. 169 (2010); Mervat Rishmawi, *Arab Charter on Human Rights (2004)*, in THE MAX PLANCK ENCYC. OF PUB. INT'L LAW (R. Wolfrum ed., 2008), available at <http://www.mpepil.com>; Rishmawi, *supra* note 12.

20. See, e.g., Arab League Urges Egypt to Join Arab Charter, RIANOVOSTI, Apr. 1, 2012, <http://en.rian.ru/world/20120401/172528299> (Algeria, Bahrain, Jordan, Libya, Palestine, Qatar, and Saudi Arabia); Iraqi Council of Representatives, The Decree on the Accession of the Republic of Iraq to the Arab Charter on Human Rights, Feb. 23, 2012, available at http://parliament.iq/Iraqi_Council_of_Representatives.php?name=articles_ajsdyawqwqjdasdba46s7a98das6dasda7das4da6sd8asdsawewqeqw465e4qweq4wq6e4qw8eqwe4qw6eqwe4sadjk&file=print&sid=6528 (Iraq).

21. Arab Charter, *supra* note 1, art. 45. See, e.g., Mervat Rishmawi, *The Arab Charter on Human Rights*, SADA, (Oct. 6, 2009), <http://carnegieendowment.org/2009/10/06/arab-charter-on-human-rights/6cj1>.

take to submit reports to the Secretary-General of the League of Arab States on the measures that they have taken to give effect to the rights and freedoms recognized in this Charter and on the progress made towards the enjoyment thereof.”²² The Secretary-General is supposed to transmit the reports to the Arab Human Rights Committee.²³ However, to date, only four of the twelve countries that have ratified the Charter have submitted such reports (Jordan, Algeria, Bahrain, and Qatar), which were subsequently reviewed by the Committee.²⁴ It remains to be seen whether the Arab Charter on Human Rights will be recognized by the countries that ratified it as a regional instrument that should be followed, either in drafting new legislation or interpreting existing legislation.

The adoption and entry into force of an Arab human rights instrument is a major step forward for the region. However, a number of concerns persist which raise issues of implementation and compliance and which point to important questions about future progress. I will argue that a legislative review process should be conducted by state parties to the Arab Charter to ensure compliance with the various rights and freedoms embodied in the Charter. I will point to some problematic examples of domestic legislation contrary to international legal standards. I will also posit that an expansive judicial interpretation of the Charter should be used by courts to ensure that domestic laws are interpreted in light of international standards, including the Charter provisions. Finally, I will articulate a need for the establishment of a regional court for enforcement of the Charter’s protections.

The issues highlighted in this article derive in part from the unique position of the Arab Charter as a regional instrument, including the tensions potentially created between domestic legal regimes and standards of international law. Any attempt to reconcile these frameworks must therefore look to their treatment in the regional Charter itself, in particular through an analysis of the savings clause embodied in Article 43, which provides:

Nothing in this Charter may be construed or interpreted as impairing the rights and freedoms protected by the domestic laws of the States parties or those set forth in the international and regional human rights instruments which the States parties have adopted or ratified, including the rights of women, the rights of the child and the rights of persons belonging to minorities.²⁵

22. Arab Charter, *supra* note 1, art. 48.

23. *Id.* art. 45.

24. See Jordan, *the First Arab Country to Submit Its Report on Its Commitment to the Arab Charter on Human Rights*, AL-RIYADH (Apr. 1, 2012), <http://www.alriyadh.com/2012/04/01/article723423.html> (in Arabic); *Inviting Civil Society Organizations to Discuss the Report of Algeria on Human Rights*, ECH-CHAAB (June 11, 2012), http://www.ech-chaab.net/old/index.php?option=com_content&task=view&id=17875&Itemid=98 (in Arabic).

25. Arab Charter, *supra* note 1, art. 43. Rights of women are covered under the Convention on the Elimination of all Forms of Discrimination against Women of 1979 and its Optional Protocol of 2000. The rights of the child are protected in accordance with the Convention of the Rights of the Child of

Accordingly, a number of questions emerge regarding the interplay of national, regional and international frameworks. For instance, how effective an instrument is the Arab Charter for safeguarding the rights of those under its jurisdiction? Can an individual file a lawsuit in a national court when his rights under the Arab Charter have been violated by his own state? Can an individual, without incorporation of the Charter into domestic law, claim its rights directly in national courts? To what degree are states parties responding to their responsibilities under the Charter?

To get at the heart of such inquiries, three more basic questions must be addressed. First, how are rights defined by the Arab Charter? Second, do these definitions produce conflicts between national laws of Arab states and the Arab Charter? Third, to what extent does international human rights law affect the interpretation of the rights defined by the Arab Charter?

In the sections that follow, I will address these three questions in turn, as entry points into a more comprehensive study of the Arab Charter's contents and implications. Part I will consider the substantive civil, political, economic and social rights set out in the various provisions of the Arab Charter. The distinguishing features of the Arab Charter will be discussed in light of its Arab particularities, with special emphasis on the proper interpretation of women's rights. Part II will debate the relationship between national laws and the Arab Charter, and how these national laws balance individual rights against the public interest. This discussion points to the need for a legislative process to ensure that existing national laws are in conformity with the Arab Charter. Finally, Part III will analyze the effects of the various international human rights treaties on the Charter, especially those addressing women, children and minority rights. This Article will show that implementation of international human rights treaties is restricted by reservations made by Arab countries in light of Islamic Shariah. References to international law in domestic courts as well as to individual complaints will be used to show that an individual complaint mechanism is essential to ensure the proper implementation of the rights enshrined in the Charter. In conclusion, this Article will call for the establishment of an Arab Court of Human Rights.

It is my contention that the Arab Charter on Human Rights provides a comprehensive human rights instrument that may serve as a source for rec-

1989 and its two optional protocols (the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography and the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict). The rights of minorities are addressed in article 27 of the Covenant on Civil and Political Rights as well as the UN Declaration on the Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities. A regional human rights instrument that some Arab countries are party to is the African Charter on Human and Peoples' Rights (African (Banjul) Charter on Human and Peoples' Rights, June 27, 1981, 1520 U.N.T.S. 217 (entered into force Oct. 21, 1986) [hereinafter African Charter]). These countries are: Algeria, Comoros, Djibouti, Egypt, Libya, Mauritania, Somalia, Sudan, and Tunisia. See *Ratification Table: African Charter on Human and Peoples' Rights*, AFRICAN COMM'N ON HUMAN AND PEOPLE'S RIGHTS, <http://www.achpr.org/instruments/achpr/ratification/> (last visited Sept. 29, 2012).

ognition and enforcement of human rights and fundamental freedoms in Arab countries. In particular, the Arab Charter provides a unique framework for incorporating international human rights obligations into domestic laws, some of which are currently inconsistent with international human rights norms. The Arab Charter, if properly interpreted and enforced, can serve as a tool to resolve these existing inconsistencies in favor of international legal standards.

I. THE DISTINGUISHING FEATURES OF THE ARAB CHARTER ON HUMAN RIGHTS

While the Arab Charter on Human Rights is based on many of the norms stipulated in international human rights law, especially the International Covenant on Civil and Political Rights (“ICCPR”),²⁶ as well as the International Covenant on Economic, Social, and Cultural Rights (“ICESCR”),²⁷ the Charter as a regional instrument reflects the specific traditions, problems, and challenges of the Arab world. One of the areas in which the Charter attempts to reconcile international standards with domestic practices, especially those that rely on Islamic Shariah, is women’s rights. I will argue that the Charter provides strong protections for women’s rights and that what the Charter calls “positive discrimination” in favor of women in accordance with Islamic Shariah should be understood in light of the text of the Charter in its entirety. This understanding extends to the application of Article 43, which requires that the provisions of the Charter be interpreted in light of international legal standards for women’s rights.

A. Arab Particularities Reflected in the Arab Charter

The preamble to the Charter reflects its regional focus: (a) “. . . faith of the Arab nation in the dignity of the human person whom God has exalted ever since the beginning of creation”; (b) “the Arab homeland is the cradle of religions and civilizations”; (c) “. . . the noble Islamic religion and the other divinely revealed religions”; (d) pride in the Arab homeland’s history as a nation that has “played a major role in spreading knowledge between East and West . . .”; and (d) “[r]ejecting all forms of racism and Zionism” as well as foreign occupation.²⁸

26. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, S. TREATY DOC. NO. 95-20, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

27. International Covenant on Economic, Social and Cultural Rights art. 25, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR].

28. Arab Charter, *supra* note 1, art. 2(2) provides that “[a]ll peoples have the right to national sovereignty and territorial integrity.” *Id.* art. 2(4) states that “[a]ll peoples have the right to resist foreign occupation.” *Id.* at 2(3) makes a strong statement against Zionism: “All forms of racism, Zionism and foreign occupation and domination constitute an impediment to human dignity and a major barrier to the exercise of the fundamental rights of peoples; all such practices must be condemned and

Several provisions also reflect the particularities of the Arab region. For instance, Article 41 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”²⁹ Between 2005 and 2008, the total illiterate population reached more than sixty million, an increase of approximately one million people since the turn of the century.³⁰ Nevertheless, the average adult literacy rate in the region has increased from 67 percent to 72 percent over the past decade.³¹ 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.”³² Those practices, which persist in some parts of the Arab world, include female genital mutilation,³³ child marriages,³⁴ honor killings,³⁵ female infanticide,³⁶ and violence against women.³⁷ 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

efforts must be deployed for their elimination.” The reference to Zionism has been criticized. See Paroula Naskou-Perraki, *The Arab Charter on Human Rights: A New Start for the Protection of Human Rights in the Arab World*, 62 REVUE HELLÉNIQUE DE DROIT INT’L 117, 121 (2009) (Greece) (“[the reference to Zionism] should have been set aside due to the political dimension of the statement as it refers to the policies of a particular state and it is considered to be unnecessary for the purposes of an international instrument on the protection of human rights.”).

29. Article 41 provides:

1. The eradication of illiteracy is a binding obligation upon the State and everyone has the right to education; 2. The States parties shall guarantee their citizens free education at least throughout the primary and basic levels. All forms and levels of primary education shall be compulsory and accessible to all without discrimination of any kind.

Arab Charter, *supra* note 1, art. 41.

30. U.N. EDUC., SCIENTIFIC, AND CULTURAL ORG., REG’L BUREAU FOR EDUC. IN THE ARAB STATES – BEIRUT, EFA REGIONAL REPORT FOR THE ARAB STATES 26 (2011). The report notes that “Egypt and Morocco account for nearly half of the regional adult illiterates. Algeria, Sudan and Yemen also are countries where adults [sic] illiterates surpass five million each.”

31. *Id.*

32. Arab Charter, *supra* note 1, art. 39. The U.N. defines harmful traditional practices to include female genital mutilation, son preference, early pregnancy, female infanticide, violence against women, and early marriage and dowry. See U.N. Office of the High Comm’r for Human Rights, Fact Sheet No. 23, Harmful Traditional Practices Affecting the Health of Women and Children (1995), <http://www.ohchr.org/Documents/Publications/FactSheet23en.pdf>.

33. See, e.g., Alexi Nicole Wood, *A Cultural Right of Passage or a Form of Torture: Female Genital Mutilation from an International Law Perspective*, 12 HASTINGS WOMEN’S L.J. 347, 362 (2001) (noting that female genital mutilation is performed in Egypt, Yemen, Oman, and the United Arab Emirates).

34. See, e.g., Lauren S. Willard, *Egyptian Seasonal Marriages: Human Trafficking Under the Veil of Child Marriage*, 4 THE PROTECTION PROJECT J. HUM. RTS. & CIV. SOC’Y 21, 25–30 (2011).

35. See, e.g., Kathryn Christine Arnold, *Are the Perpetrators of Honor Killings Getting Away with Murder? Article 340 of the Jordanian Penal Code Analyzed under the Convention on the Elimination of All Forms of Discrimination Against Women*, 16 AM. U. INT’L L. REV. 1343, 1353–71 (2001); Lama Abu Odeh, *Honor Killings and the Construction of Gender in Arab Societies*, 58 AM. J. COMP. L. 911, 913–16 (2010). See generally Phyllis Chesler, *Are Honor Killings Simply Domestic Violence?*, 2 MIDDLE E. Q. 61 (2009).

36. See, e.g., U.N. Secretary-General, United Nations Secretary-General’s Campaign to End Violence against Women, *Violence against Women: The Situation* (Nov. 2009), http://www.un.org/en/events/endviolenceday/pdf/UNiTE_TheSituation_EN.pdf.

37. See, e.g., Nafissatou Diop-Sidibé et al., *Domestic Violence Against Women in Egypt—Wife Beating and Health Outcomes*, 62 SOC. SCI. & MED. 1260, 1273 (2006) (confirming that “as elsewhere, wife beating is prevalent in Egypt”).

marriage,³⁸ which is reflective of societal views in the region. The same article also provides for the protection of vulnerable populations, including women, children, adolescents, mothers, the elderly, and persons with special needs.³⁹ It also calls upon states to provide their youth with the best opportunities⁴⁰ in a region where more than half of the population is below the age of twenty-five.⁴¹ The Arab countries have one of the highest youth unemployment rates in the world.⁴² Additionally, the Charter emphasizes collective work to preserve the common culture, history, and traditions of the Arab people. For instance, Article 42 provides that “[t]he state parties shall work together and enhance cooperation among them at all levels, with the full participation of intellectuals and inventors and their organizations, in order to develop and implement recreational, cultural, artistic and scientific programmes.”⁴³

*B. Access to Justice, Fair Trial, Compensation, and Enforcement:
Elements of the Right to Remedy*

The Charter provides for a very comprehensive Bill of Rights, which includes some rights that are either not explicitly mentioned in other regional conventions or not articulated in such detail.⁴⁴ One of the unique

38. Arab Charter, *supra* note 1, art. 33(1). As said by Tariq Ramadan, “The moral condemnation of homosexuality remains the majority opinion of all religions, and Islam is no exception.” Tariq Ramadan, *Islam and Homosexuality* (2009), <http://www.tariqramadan.com/spip.php?article10683&lang=fr>. See generally Andrew K.T. Yip, *Reflections on Islam and Homosexuality*, 19 ANTHROPOLOGY TODAY 19 (2003); M. Basheer Ahmed, *Homosexuality—An Islamic Perspective*, 38 J. ISLAMIC MED. ASS’N OF N. AM. 27 (2006).

39. Article 33(2) states:

The State and society shall ensure the protection of the family, the strengthening of family ties, the protection of its members and the prohibition of all forms of violence or abuse in the relations among its members, and particularly against women and children. They shall also ensure the necessary protection and care for mothers, children, older persons and persons with special needs

Arab Charter, *supra* note 1, art. 33(2).

40. *Id.* (“[the State and society] shall provide adolescents and young persons with the best opportunities for physical and mental development.”).

41. U.N. DEV. PROGRAMME, REG’L BUREAU FOR ARAB STATES, ARAB HUMAN DEVELOPMENT REPORT 3 (2009), available at <http://www.arab-hdr.org/publications/other/ahdr/ahdr2009e.pdf> (noting that approximately 60 percent of the population in Arab countries is less than 25 years old, making it “one of the most youthful regions in the world”).

42. INT’L LABOUR ORG., GLOBAL UNEMPLOYMENT TRENDS FOR YOUTH 14 (2012) states that “North Africa and the Middle East stand out in terms of their overall unemployment problem, and these are the only two regions where the unemployment rate exceeded 10 per cent in 2011 for the population aged 15 and above In 2011, the youth unemployment rate stood at 26.5 per cent in the Middle East and at 27.9 per cent in North Africa.”

43. Arab Charter, *supra* note 1, art. 42(3).

44. Some regional charters include specific rights that are not mentioned in international law or that are specific to the region. For instance, the African Charter requires state parties to “undertake to eliminate all forms of foreign economic exploitation, particularly that practiced by international monopolies.” African Charter, *supra* note 25, art. 21(5). The African Charter has been criticized on several grounds and in particular for its references to individual duties that may be used to infringe upon individual rights. See, e.g., *id.* arts. 27–29. See generally Makau Wa Mutua, *The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties*, 35 VA. J. INT’L L. 339 (1995). The

articulations of the Arab Charter is the explicit provision for the right of access to justice as separate from the right to a fair trial.⁴⁵ Article 13 states that “[e]veryone has the right to a fair trial,”⁴⁶ and Article 12 provides that everyone has “the right to seek a legal remedy.”⁴⁷ The Charter provides for the right to compensation for victims of torture, arbitrary arrest and detention, and for those whose innocence is determined by a final court judgment;⁴⁸ the Charter likewise provides for “the right to seek a legal remedy before courts of all levels.”⁴⁹

Article 23 is also significant, providing that “[e]ach State party to the present Charter undertakes to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy . . .”⁵⁰ Recognizing that the enforcement of rights protection is contingent upon a

African Charter also fails to provide for the right of privacy, the right to vote and be elected, the right to marry, and the right of a national not to be expelled, and it does not include a derogation clause. See Mirna E. Adjami, *African Courts, International Law, and Comparative Case Law: Chimera or Emerging Human Rights Jurisprudence?*, 24 MICH. J. INT’L L. 103 (2002) for a discussion of the African Charter. See also George William Mugwanya, *Realizing Universal Human Rights Norms through Regional Human Rights Mechanisms: Reinvigorating the African System*, 10 IND. INT’L & COMP. L. REV. 35 (1999); Gino J. Naldi & Konstantinos Magliveras, *The Proposed African Court of Human and Peoples’ Rights: Evaluation and Comparison*, 8 AFR. J. INT’L & COMP. L. 944 (1996).

45. By comparison, the European Convention provides for the right to a fair trial once an individual is in court, but it does not provide for a separate right of access to courts. European Convention for the Protection of Human Rights and Fundamental Freedoms art. 6, Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953) [hereinafter ECHR]. This issue arose in *Golder v. United Kingdom*, 18 Eur. Ct. H.R. (ser. A) (1975), in which a prisoner was denied access to legal counsel by the prison authority when wishing to file a libel suit against a prison officer. The court interpreted article 6 to include access to justice. *Id.* at 14 (concluding that article 6 “secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal”). See Dragoljub Popovic, *Prevailing of Judicial Activism over Self-Restraint in the Jurisprudence of the European Court of Human Rights*, 42 CREIGHTON L. REV. 361, 380–81 (2009) (discussing the Court’s conclusions in the *Golder* case).

46. Arab Charter, *supra* note 1, art. 13(1). The right to a fair trial is recognized as a human right. This principle is included in article 10 of the Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR]. See also ICCPR, *supra* note 26; American Convention on Human Rights art. 8, Nov. 21, 1969, S. TREATY DOC. NO. 95-21, 1144 U.N.T.S. 123 (entered into force July 18, 1978) [hereinafter American Convention].

47. Arab Charter, *supra* note 1, art. 12.

48. The right to compensation is provided by articles 14(7), 19(2), and 8(2) of the Arab Charter, *supra* note 1. The United Nations General Assembly Resolution on 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 states:

Compensation should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as: (a) Physical or mental harm; (b) Lost opportunities, including employment, education and social benefits; (c) Material damages and loss of earnings, including loss of earning potential; (d) Moral damage; (e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.

G.A. Res. 60/147, ¶ 20, U.N. Doc. A/RES/60/147 (Mar. 21, 2006) [hereinafter Basic Principles and Guidelines].

49. Arab Charter, *supra* note 1, art. 12. Article 13 “guarantee[s] to those without the requisite financial resources legal aid to enable them to defend their rights.” *Id.* art. 13.

50. *Id.* art. 23.

compliant judicial process, Article 44 of the Charter further requires states to provide effective mechanisms⁵¹ in domestic law for the enforcement of legal rights.⁵²

Many constitutions of Arab states provide for the equal treatment of citizens under the law.⁵³ However, in many of those states, women are not afforded the same access to justice. Obstacles such as low levels of legal literacy among female populations, the discounting of female testimony in courts to only half the worth of male testimony,⁵⁴ and the denial of women's right to be judges⁵⁵ are preventing them from equitable access to justice. In addition to high fertility and low labor force participation, women's overall lack of economic power in the region limits their access to

51. Everyone who has fallen victim of a violation of international human rights has the right to equal and effective access to justice; enhancing access to justice would require observing state obligations in accordance with international human rights law. Such obligations include ensuring an adequate legal framework. See Basic Principles and Guidelines, *supra* note 45, ¶ 1.

52. *Id.* ¶ 17 provides:

States shall, with respect to claims by victims, enforce domestic judgements for reparation against individuals or entities liable for the harm suffered and endeavour to enforce valid foreign legal judgements for reparation in accordance with domestic and international legal obligations. To that end, States should provide under their domestic laws effective mechanisms for the enforcement of reparation judgements.

Additionally, the Arab Charter provides:

When their existing legislative or non-legislative measures do not effectively ensure the implementation of the rights enunciated in this Charter, the States parties undertake to take, in conformity with their constitutional procedures and with the provisions of the present Charter, whatever legislative or non-legislative measures that may be necessary for the implementation of these rights.

Arab Charter, *supra* note 1, art. 44.

53. CONSTITUTION OF SYRIA, 25 Apr. 1964, as amended Mar. 13, 1973, Feb. 27, 2012, art. 33(3) (Sana Arab News Agency trans.), available at <http://sana.sy/eng/337/2012/02/23/401178.htm> ("Citizens shall be equal in rights and duties without discrimination among them on grounds of sex, origin, language, religion or creed."); CONSTITUTION OF THE HASHEMITE KINGDOM OF JORDAN, 1 Jan. 1952, art. 6(i), available at http://www.kinghussein.gov.jo/constitution_jo.html ("Jordanians shall be equal before the law. There shall be no discrimination between them as regards to their rights and duties on grounds of race, language or religion."); CONSTITUTION OF THE PEOPLE'S DEMOCRATIC REPUBLIC OF ALGERIA, 19 Nov. 1976, as amended Nov. 28, 1996, art. 29 (The Permanent Mission of Algeria to the U.N. trans.), available at <http://www.algeria-un.org/default.asp?doc=-const> ("All citizens are equal before the law. No discrimination shall prevail because of birth, race, sex, opinion or any other personal or social condition or circumstance."). See also Sanja Kelly, *Hard-won Progress and a Long Road Ahead: Women's Rights in the Middle East and North Africa*, in *WOMEN'S RIGHTS IN THE MIDDLE EAST AND NORTH AFRICA: PROGRESS AMID RESISTANCE* 12 (Sanja Kelly & Julia Breslin eds., 2010) ("Apart from Saudi Arabia, all countries in the MENA region have clauses in their constitutions that guarantee the equality of all citizens. Specific provisions calling for equality between the sexes have been adopted in Algeria, Bahrain, Iraq, Libya, Oman, Palestine, Qatar, Syria, and Tunisia. While the constitutions of Egypt, Jordan, Lebanon, Kuwait, Morocco, the UAE, and Yemen do not include gender-based nondiscrimination clauses, they do declare that 'all citizens are equal under the law.'").

54. Kelly, *supra* note 43, at 5. The Qur'an explicitly states: ". . . and get two witnesses, out of your own men, and if there are not two men, then a man and two women, such as ye choose, for witnesses, so that if one of them errs, the other can remind her. The witnesses should not refuse when they are called on (For evidence). Disdain not to reduce to writing (your contract) for a future period, whether it be small or big: it is juster in the sight of Allah, More suitable as evidence, and more convenient to prevent doubts among yourselves. . ." THE HOLY QUR'AN, translated by Yusuf Ali, 2:282.

55. Kelly, *supra* note 50, at 8, 17 (noting that women are barred from serving as judges in Saudi Arabia and Kuwait, respectively).

social safety nets and legal protections.⁵⁶ At 28 percent, the Arab region has the lowest rate of economically active women in the world.⁵⁷

*C. Women's Rights and the Problem of Positive Discrimination
under Islamic Shariah*

The typical approach to protecting women's rights under international law relies on a nondiscrimination clause prohibiting discrimination on the grounds of sex.⁵⁸ However, the Arab Charter offers a novel treatment of women's rights. While this treatment is susceptible to criticism and misunderstanding, it may also be one of the Charter's greatest contributions to human rights law, as it could, if interpreted correctly, potentially offer greater protection and advocacy for women's rights.

By contrast, other regional human rights instruments exemplify the more typical approach to ensuring women's rights through nondiscrimination clauses. The African Charter on Human and Peoples' Rights provides that "[t]he State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman . . . as stipulated in international declaration and conventions."⁵⁹ The American Convention on Human Rights states, "[a]ll persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law."⁶⁰ The European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") addresses nondiscrimination in Article 14: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex."⁶¹ Moreover, Protocol No. 12 to the ECHR reaffirms that "the principle of non-discrimination does not prevent States Parties from taking measures in order to promote full and effective equality, provided that there is an objective and reasonable justification for those measures."⁶² In addition, the recently adopted Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Vio-

56. See Liliana Trofin and Mădălina Tomescu, *Women's Rights in the Middle East*, 2(1) CONTEMP. READINGS IN L. & SOC. JUST. 152, 154–56 (2010).

57. Kelly, *supra* note 53, at 5.

58. This approach is followed by various international conventions, such as the International Convention on the Elimination of All Forms of Racial Discrimination *pmbl.*, *opened for signature* Mar. 7, 1966, S. TREATY DOC. NO. 95-18, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969); ICCPR, *supra* note 26, art. 2(1); and the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families art. 1(1), *opened for signature* Dec. 18, 1990, 2220 U.N.T.S. 3 (entered into force July 1, 2003).

59. African Charter, *supra* note 25, art. 18(3).

60. American Convention, *supra* note 46, art. 24.

61. ECHR, *supra* note 44, art. 14.

62. Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms *pmbl.*, *opened for signature* Apr. 11, 2000, E.T.S. NO. 177 (entered into force Jan. 4, 2005).

lence⁶³ obligates states parties to take necessary legislative and other measures to protect women from violence and specifies that no such measures shall be considered discrimination.⁶⁴

While these other regional instruments are limited to a simple statement of the nondiscrimination principle, the Arab Charter places more explicit emphasis on women's rights. Like other regional charters, the Charter provides for the principle of nondiscrimination, making it a state obligation "to ensure to all individuals . . . the right to enjoy the rights and freedoms . . . without distinction on grounds of . . . sex."⁶⁵ Yet the Charter goes beyond this approach and imposes a positive obligation to implement the principle of equality, explicitly stating that "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."⁶⁶ In addition, the Charter applies the principle of equality specifically in the areas of work⁶⁷ and education⁶⁸ and calls for ensuring "the partnership between men and women with a view to achieving national development goals."⁶⁹ The Charter calls upon states to prohibit "all forms of violence or abuse" against women and provides for "the necessary protection and care for mothers."⁷⁰ The Charter also explicitly provides for special protection and safety for women in the place of work.⁷¹ Finally, the Charter prohibits inflicting the death penalty on pregnant women. The Charter thus provides different forms of protection for women, many of which are not explicitly stipulated in other regional conventions.⁷²

The emphasis on women's rights in the Charter reflects the concern of its drafters that women in Arab countries face disadvantages that their counterparts in other regions of the world do not experience to the same extent. Such disadvantages are evident in the concluding observations of the

63. Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, *opened for signature* May 11, 2011, C.E.T.S. No. 210.

64. Article 4 of the Convention reads in part as follows:

1. Parties shall take the necessary legislative and other measures to promote and protect the right for everyone, particularly women, to live free from violence in both the public and the private sphere. . . . 4. Special measures that are necessary to prevent and protect women from gender-based violence shall not be considered discrimination under the terms of this Convention.

Id. art. 4.

65. Arab Charter, *supra* note 1, art. 3(1).

66. *Id.* art. 3(3).

67. *Id.* art. 34(4) ("There shall be no discrimination between men and women in their enjoyment of the right to effectively benefit from training, employment and job protection and the right to receive equal remuneration for equal work.").

68. *Id.* art. 41(2) ("All forms and levels of primary education shall be compulsory and accessible to all without discrimination of any kind.").

69. *Id.* art. 41(3).

70. *Id.* art. 33(2).

71. *Id.* art. 34(2).

72. *Id.* art. 7(2) ("The death penalty shall not be inflicted on a pregnant woman prior to her delivery or on a nursing mother within two years from the date of her delivery; in all cases, the best interests of the infant shall be the primary consideration.").

United Nations Committee on the Elimination of Discrimination against Women (“CEDAW”) on the various reports submitted by the Arab countries.⁷³

The Committee’s remarks highlight some of the country-specific laws and challenges that the Arab Charter’s emphasis on gender was intended to address. For instance, the Committee has expressed concern about issues of trafficking in women, violence against women, lack of access to justice for domestic migrant workers, and harmful customary practices such as early marriage.⁷⁴ The Committee has focused on the absence of unified personal

73. Women in the Arab world often share the same problems and disadvantages, which are repeatedly addressed in the concluding comments of the Committee on the Elimination of Discrimination against Women. *See, e.g., infra* note 74.

74. In its remarks on the report of Bahrain, the committee expressed concern regarding women and girls who are trafficked into the state. In this regard, the committee recommended that the state of Bahrain “effectively implement the recently adopted law on human trafficking and introduce and implement a strategy that includes measures of prevention, prosecution, and punishment of offenders, as well as measures to protect and rehabilitate victims and reintegrate them into society.” Comm. on the Elimination of Discrimination against Women, Concluding Observations: Bahrain, 42nd Sess., Oct. 20–Nov. 7, 2008, ¶ 27, U.N. Doc. CEDAW/C/BHR/CO/2 (Nov. 14, 2008) [hereinafter Concluding Observations: Bahrain]. The committee also encouraged Bahrain to increase its cooperation with other countries in their fight against human trafficking. *Id.* The committee also noted that the government still does not have any formal procedure in place to identify victims of human trafficking. *See id.* ¶ 26. In its observations on Egypt, the committee was seriously concerned about the increase in all forms of violence against women. Comm. on the Elimination of Discrimination against Women, Concluding Observations: Egypt, 45th Sess., Jan. 18–Feb. 5, 2010, ¶ 23, U.N. Doc. CEDAW/C/EGY/CO/7 (Feb. 5, 2010) [hereinafter Concluding Observations: Egypt]. In this regard, the committee condemned the provisions in the Egyptian Penal Code that release perpetrators, or reduce their sentences, thereby implicitly condoning violence against women. *Id.* ¶ 23. The committee also condemned a new form of trafficking in girls emerging in Egypt, namely “tourist marriages” or “temporary marriages” of young girls to non-Egyptians. *Id.* ¶ 27. These marriages often involve children under the age of eighteen who are forced into a state of sexual servitude for their “husbands.” The committee exhorted Egypt to prioritize its combat against violence against women and to adopt all necessary measures required to address the issue. Concluding Observations: Egypt, ¶ 24. It moreover urged the state to adopt its general recommendation No. 19, as well as to adopt a comprehensive law criminalizing violence against women in all its forms. *Id.* For more on seasonal marriages, see Lauren S. Willard, *Egyptian Seasonal Marriages: Human Trafficking Under the Veil of Child Marriage*, 4 THE PROTECTION PROJECT J. HUM. RTS. & CIV. SOC’Y 21, 21–84 (2011). Also regarding nonconsensual marriage and its link with violence against women, in its observations on Yemen, the committee expressed “extreme concern” over Yemen’s Law No. 25/1999, which legalizes marriages of girls under the age of fifteen with the consent of their guardians. Comm. on the Elimination of Discrimination against Women, Concluding Observations: Yemen, 41st Sess., June 30–July 18, 2008, ¶ 379, U.N. Doc. CEDAW/C/YEM/CO/6 (July 9, 2008). The committee concluded that such nonconsensual marriages constituted “a clear setback for women’s rights and . . . amount[ed] to violence against them.” *See id.* In its concluding comments on Saudi Arabia, the committee expressed dissatisfaction with the lack of information on the status of non-Saudi Arabian women residing in the Kingdom, in particular, female domestic migrant workers and their children, who may lack access to health services and education. Comm. on the Elimination of Discrimination against Women, Concluding Comments: Saudi Arabia, 40th Sess., Jan. 14–Feb. 1, 2008, ¶ 23, U.N. Doc. CEDAW/C/SAU/CO/2 (Apr. 8, 2008) [hereinafter Concluding Comments: Saudi Arabia]. In the case of the United Arab Emirates, the committee was concerned about female domestic (migrant) workers not being aware of their rights, being subject to mistreatment and abuse, and not having easy access to justice. Comm. on the Elimination of Discrimination against Women, Concluding Observations: United Arab Emirates, 45th Sess., Jan. 18–Feb. 5, 2010, ¶ 36, U.N. Doc. CEDAW/C/ARE/CO/1 (Feb. 5, 2010) [hereinafter Concluding Observations: UAE]. The committee further noted that domestic workers are particularly vulnerable to assault because their employers often

status codes or family laws in a number of Arab countries, which instead base family law and related provisions on varying religious interpretations and affiliations.⁷⁵ The Committee further noted a more general pattern of discrimination against women in the area of family law,⁷⁶ as well as the persistence of a number of stereotypes related to women's role in society, which may contribute to their status as a vulnerable group.⁷⁷

confiscate their passports and because harassed domestic workers have no remedy other than to resign. *Id.* The committee stated:

The Committee urges the State party to strengthen the legal protection of foreign workers by adopting legislation and policies aimed at preventing abuses . . . and to prosecute offenders, both recruiters and employers, and at raising awareness of workers' rights and ensuring their access to legal aid and complaint mechanisms. The committee also urges the State party to guarantee equal application of all labour laws to women and men regardless of their nationality.

Id. ¶ 37. In its concluding remarks on Syria, the committee was concerned that perpetrators of violence against women could enjoy impunity under the present Penal Code. Comm. on the Elimination of Discrimination against Women, Concluding Comments: Syria, 38th Sess., May 14–June 1, 2007, ¶ 19, U.N. Doc. CEDAW/C/SYR/CO/1 (June 11, 2007) [hereinafter Concluding Comments: Syria].

75. For example, in regard to Lebanon, the committee recommended adopting a unified personal status code to include all women, regardless of their religion. Comm. on the Elimination of Discrimination against Women, Concluding Comments: Lebanon, 40th Sess., Jan. 14–Feb. 1, 2008, ¶ 19, U.N. Doc. CEDAW/C/LBN/CO/3 (Apr. 8, 2008) [hereinafter Concluding Comments: Lebanon]. In regard to Bahrain, the committee also expressed concern that family relations are not subject to a uniform codified family law due to the “sectarian interpretational and jurisprudential differences between Sunni and Shia.” Concluding Observations: Bahrain, *supra* note 74, ¶ 38. For a discussion of the Sunni and Shia division in the Muslim world, see VALI NASR, *THE SHIA REVIVAL: HOW CONFLICTS WITHIN ISLAM WILL SHAPE THE FUTURE* (2007). The author concludes that “in the Arab world, the treatment of Shias as outsiders – as “lesser Arabs” – has always found justification in the accusation that they are Iranian, and that their demand for rights is nothing more than a modern-day reenactment of the Iranian-led *sho'oubi* revolt against Arab rule in the early centuries of Islam” *Id.* at 108. The author also notes that “many Arab regimes warn of the hidden “Shia agenda” and have depicted the Shia as the Iranian fifth column. In Iraq, Saudi Arabia, and Bahrain, such claims have been or are used to help justify dictatorship.” *Id.* at 109.

76. In the case of Syria, for example, the committee has called on the government to amend its Personal Status Law to ensure equal rights for women and men in regard to “marriage, divorce, custody and inheritance.” Concluding Comments: Syria, *supra* note 74, ¶ 33. In relation to Tunisia, the committee was dissatisfied that many of the basic Islamic rules governing marriage adversely affect the status of women by not placing them on equal footing with men. Comm. on the Elimination of Discrimination Against Women, Concluding Observations: Tunisia, 47th Sess., Oct. 4–22, 2010, ¶ 60, U.N. Doc. CEDAW/C/TUN/CO/6 (Oct. 22, 2010). In particular, the committee expressed concern over the prohibition of marriage between a Muslim woman and a non-Muslim man, the dowry as a condition for the validity of marriage, the husband's role as “head of the household,” and the lack of equality of parental responsibility between husband and wife. *Id.* The committee noted that despite a decline in adult illiteracy rates due to the implementation of the National Adult Education Program, women and persons residing in rural areas continue to see high rates of illiteracy. *Id.* ¶ 40. And in Jordan, of concern to the committee was the requirement of a guardian for marriage, polygamist marriages, and unequal inheritance rights. Comm. on the Elimination of Discrimination Against Women, Concluding Observations: Jordan, 51st Sess., Feb. 13–Mar. 2, 2012, ¶ 49, U.N. Doc. CEDAW/C/JOR/CO/5 (Mar. 9, 2012).

77. For example, in regard to Lebanon, the committee noted that stereotypes pertaining to the role of men and women in society often lead to low participation of women in political and public life and dictate their role in the labor market. Concluding Comments: Lebanon, ¶ 24. Regarding Morocco, the committee expressed concern for persistent stereotypical attitudes about women's roles and responsibilities, both in society as well as in the family, adding that such views are “a root cause of the disadvantaged position of women in all areas, including the labour market, and in political and public life . . .” Comm. on the Elimination of Discrimination against Women, Concluding Comments: Morocco, 40th

As reflected in the Committee's concluding observations, the status of women in the Arab world is not fully equal to men, whether in the areas of political participation, employment, education, access to justice, or their overall role in society. Recommendations put forth by the Committee should be implemented. However, the recommendations may be difficult to apply when they appear contradictory to the basic and settled principles of Islamic Shariah, especially regarding polygamy,⁷⁸ the double inheritance rule,⁷⁹ the requirement of dowry for the validity of marriage,⁸⁰ the prohibition of marriage between a Muslim woman and a non-Muslim man,⁸¹ and other issues of personal status.

Sess., Jan. 14–Feb. 1, 2008, ¶ 18, U.N. Doc. CEDAW/C/MAR/CO/4 (Apr. 8, 2008) The state party is encouraged to address the hidden cultural patterns and norms that support discrimination against women in all areas of their life. The committee recommends that the state implement comprehensive awareness-raising campaigns to promote greater understanding of the concept of equality between women and men “with a view to changing stereotypical attitudes and negative cultural norms about the responsibilities and roles of women and men in the family and society, in accordance with article 5(a) of the Convention.” *Id.* ¶ 19. While the committee noted the adoption of the new Family Code, which entered into force February 2004, it criticized several aspects of the new law, including judicial authorization of marriage at an age less than 18 years old and the retention of the institution of polygamy even if it is subject to restrictions under the code and may not be authorized by a judge except in exceptional cases. *Id.* ¶ 36. In regard to Libya, the committee noted that women are not able to travel abroad with their children without first obtaining permission of the children's father. Comm. on the Elimination of Discrimination Against Women, Concluding Observations: Libyan Arab Jamahiriya, 43rd Sess., Jan. 19–Feb. 6, 2009, ¶ 17, U.N. Doc. CEDAW/C/LBY/CO/5 (Feb. 6, 2012). Furthermore, women are often underrepresented in political and public life, particularly within the executive branch and diplomatic and public service. *Id.* ¶ 29. The committee, however, expressed satisfaction with the amendment of Law No. 10 of 1984 regulating marriage and divorce to “prohibit polygamy without the written consent of the first wife and authorization from the court.” *Id.* ¶ 6. For the United Arab Emirates, the committee also noted that despite the active participation of women in the private sector, women nonetheless are portrayed as mothers in school curricula and the media. Concluding Observations: UAE, *supra* note 74, ¶ 24. And in Saudi Arabia, the committee also referred to the fact that the Saudi Basic Law of Governance does not embody the principle of equality between women and men. Concluding Comments: Saudi Arabia, *supra* note 74, ¶ 13. Furthermore, the committee noted with concern that some practices of the state, such as the concept of male guardianship over women and the ban of women from driving, are contributing to “the prevalence of a patriarchal ideology with stereotypes and the persistence of deep-rooted cultural norms, customs and traditions that discriminate against women and constitute serious obstacles to their enjoyment of their human rights.” *Id.* ¶ 15. Article 8 of the Saudi Arabian Basic Law provides for the general principle of equality. BASIC LAW OF GOVERNANCE OF SAUDI ARABIA, Mar. 5, 1992, art. 8 (“The system of governance in the kingdom of Saudi Arabia is based on justice, consultation ‘Shoura’ and equality according to Shari’ah [the law of Islam].”). For a discussion of the Basic Law, see A. Michael Tarazi, *Recent Development: Saudi Arabia's New Basic Laws: The Struggle for a Participatory Islamic Government*, 34 Harv. Int'l L.J. 258 (1993).

78. THE HOLY QUR'AN, translated by Yusuf Ali, 4:3: “If ye fear that ye shall not be able to deal justly with the orphans, Marry women of your choice, Two or three or four; but if ye fear that ye shall not be able to deal justly (with them), then only one . . . to prevent you from doing injustice.”

79. THE HOLY QUR'AN, translated by Yusuf Ali 4:11: “Allah (thus) directs you as regards your Children's (Inheritance): to the male, a portion equal to that of two females: if only daughters, two or more, their share is two-thirds of the inheritance; if only one, her share is a half.”

80. THE HOLY QUR'AN, translated by Yusuf Ali 4:4: “And give the women (on marriage) their dowry as a free gift; but if they, of their own good pleasure, remit any part of it to you, Take it and enjoy it with right good cheer.”

81. THE HOLY QUR'AN, translated by Yusuf Ali 2:221: “Do not marry unbelieving women (idolaters), until they believe [. . .] Nor marry (your girls) to unbelievers until they believe.”

The Arab Charter addresses some of the concerns raised by the Committee and others who advocate for women's rights in the Arab World, as well as by those who criticize the way women's rights are applied in the region. To this end, the Charter allows for what it calls "positive discrimination" in favor of women. Article 3(3) provides that,

[m]en 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, [by] other divine laws and by applicable laws and legal instruments.⁸²

Some states may interpret this article to limit women's rights, especially if they seek to take advantage of such limitations in their national laws. Conversely, others may see a limited role for Shariah in the interpretation of the Charter, which does not refer to Shariah except in the context of women's rights.⁸³ Under this view, "positive discrimination" may be interpreted as "special measures" that may be taken to enhance women's rights.⁸⁴ The Charter provision should be read using this second approach because it enables an interpretation in accordance with international law.

Affirmative action in favor of women may be justified in some situations, as exemplified in international and other regional instruments. Article 4(1)

82. Arab Charter, *supra* note 1, art. 3(3).

83. The only other reference to Islamic Shariah is in the preamble, which recognizes the noble Islamic religion and the divinely revealed religions. *Id.* pmb1. The preamble also refers to the Cairo Declaration of Human Rights in Islam of 1990. *Id.* The Cairo Declaration provides in article 6 that "[w]oman is equal to man in human dignity, and has her rights to enjoy as well as duties to perform, and has her own civil entity and financial independence, and the right to retain her name and lineage." Cairo Declaration on Human Rights in Islam, art. 6(a), GAOR, 4th Sess., U.N. Doc A/CONF.157/PC/62/Add.18 (Aug. 5, 1990) [hereinafter Cairo Declaration]. The Declaration recognizes the divine nature of these rights. It states in the preamble:

Believing that fundamental rights and freedoms according to Islam are an integral part of the Islamic religion and that no one shall have the right as a matter of principle to abolish them either in whole or in part or to violate or ignore them in as much as they are binding divine commands, which are contained in the Revealed Books of Allah and which were sent through the last of His Prophets to complete the preceding divine messages and that safeguarding those fundamental rights and freedoms is an act of worship whereas the neglect or violation thereof is an abominable sin, and that the safeguarding of those fundamental rights and freedoms is an individual responsibility of every person and a collective responsibility of the entire Ummah.

Id. pmb1.

84. For instance, Sudan reserves 112 seats in the national assembly (25 percent) for women. Sudan's 2008 National Elections Act provided for a 25% quota for women in any Legislative Assembly. See *Sudan (Republic of Sudan)*, QUOTA PROJECT, <http://www.quotaproject.org/uid/countryview.cfm?country=196> (last visited Sept. 29, 2012). See also National Elections Act (2008) (Sudan). A quota system is codified in the Iraqi constitution, which provides in article 49(4) that "the elections law shall aim to achieve a percentage of representation for women of not less than one-quarter of the members of the Council of Representatives." Article 49, Section 4, Doustour Jounhouriat al-Iraq [The Constitution of the Republic of Iraq] of 2005 (U.N. Assistance Mission for Iraq trans.), available at http://www.uniraq.org/documents/iraqi_constitution.pdf. See also Mohamed Y. Mattar, *Unresolved Questions in the Bill of Rights of the New Iraqi Constitution: How Will the Clash between "Human Rights" and "Islamic Law" Be Reconciled in Future Legislative Enactments and Judicial Interpretations*, 30 *FORDHAM INT'L L. J.* 126, 129-30 (2006).

of the UN Convention on the Elimination of All Forms of Discrimination against Women provides that “temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination”⁸⁵ In several cases, the European Court of Justice recognized the legality and non-discriminatory nature of such measures when utilized to counteract prejudice, discrimination or inequality faced by women.⁸⁶ I read the positive discrimination established in favor of women

85. CEDAW, *supra* note 88, art. 4(1).

86. In the case of *Kalanke v. Bremen*, the court recognized that such additional measures may be necessary to “counteract the prejudicial effects on women in employment which arise from social attitudes, behaviour and structures.” Case C-450/93, *Kalanke v. Bremen*, 1995 E.C.R. I-03051, ¶ 20. 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.” Case C-409/95, *Marschall v. Land Nordrhein-Westfalen*, 1997 E.C.R. I-06363, ¶ 26. In *Marschall*, 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. *Id.* ¶¶ 6–7. 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.” *Id.* ¶ 35. See also Case C-407/98, *Abrahamsson v. Fogelqvist*, 2000 E.C.R. I-05539. In *Abrahamsson*, because both candidates were determined to be equally qualified, the positive discrimination measures were found to have been properly taken. *Abrahamsson*, ¶ 62. In another case brought before the European Court of Justice, a female candidate was refused admission to a practical legal training course and argued that the selection criteria discriminated against women because of the preference accorded to applicants who had completed compulsory military or civilian service, which can be done only by men. Case C-79/99, *Schnorbus v. Land Hessen*, 2000 E.C.R. I-10997, ¶ 16. Although the court found that the preference amounted to indirect discrimination, the policy was regarded as “objective in nature and prompted solely by the desire to counterbalance” the effects of the delayed progress of those applicants who were required to undertake military or civilian service. *Id.* ¶ 44. Thus, the preferential treatment given to such candidates was determined not to contradict the principle of equality. *Id.* ¶ 45. Another case, *Badeck v. Hessischer Ministerpräsident*, deals with positive action for women in the German civil service. Case C-158/97, *Badeck v. Hessischer Ministerpräsident*, 2000 E.C.R. I-1875. Germany adopted a law that required sectors where women were underrepresented to fill more than half of their posts with suitably qualified female candidates and that also provided for the assessment of these candidates to take into account the “capabilities and experience which have been acquired by looking after children or persons requiring care in the domestic sector (family work),” as long as they were important to the candidates’ overall suitability and capability. *Id.* ¶ 10(1). A number of applicants argued that these measures of positive discrimination were contrary to the principle of equal treatment by giving special treatment to a certain group. The court held that measures promoting women’s participation in sectors where they are underrepresented are acceptable as long as they do not “automatically and unconditionally give priority to women when women and men are equally qualified” and as long as they allow for the conduct of an objective assessment of candidates that takes into account their unique personal situations. *Id.* ¶ 23. Therefore, the court found that the positive action law was not discriminatory and that criteria such as taking into account the domestic experiences and capabilities of candidates are “manifestly intended to lead to an equality which is substantive rather than formal, by reducing the inequalities which may occur in practice in social life.” *Id.* ¶ 32. In another case brought before the European Court of Justice, a male employee of the Dutch Ministry of Agriculture complained that the ministry’s policy of reserving subsidized places in its nursery service for the children of female employees only was in violation of equal treatment. Case C-476/99, *Lommers v. Minister van Landbouw, Natuurbeheer en Visserij*, 2002 E.C.R. I-2891, ¶ 20. However, the court declared that it was well known that women more often than men do not embark on or abandon a career for reasons linked to child-care and that it was a reasonable assumption that the established inadequacy of child-care facilities was therefore likely to play a decisive role in decisions by women to give up employment.

under the Charter in light of these international and regional stipulations of women's rights. Again, I rely here on Article 43, which requires that the Charter be interpreted in accordance with regional and international norms.

Perhaps the drafters of the Arab Charter were not completely accurate in using the phrase "positive discrimination"⁸⁷ because under international law the term "discrimination" refers to distinctions, limitations, restrictions and exclusions,⁸⁸ which were not intended to be imposed on rights of women under the Charter. The Charter's phrase should not be mistaken as implying that discrimination as conceived under international law is justified against women. Rather, as noted earlier, the Charter is clear in adopting the principle of non-discrimination toward women.⁸⁹ Accordingly, "positive discrimination" must mean something more affirmative.

My conclusion is that the drafters intended to refer to areas of the law where a rule provides for different stipulations for women than men, and then to frame such stipulations to enhance women's rights or to protect women rather than to discriminate against them.⁹⁰ A number of these areas exist under Islamic Shariah. For instance, the father of a child has an obligation to provide and care for the mother. Further, a mother has the first right to child custody under Islamic rules, which favor the maternal lineage.⁹¹ Another example of positive discrimination is the rule that specifically requires the husband to provide for his family, including his wife and children. This rule is stipulated in the Cairo Declaration on Human Rights in Islam that provides for the principle of equality between men and women by stating in Article 6 that "[w]oman is equal to man in human dignity,

Id. ¶ 16. Therefore, giving priority to the children of female ministry officials was "the result of the Ministry's determination to tackle inequalities existing between male and female officials" and "[t]he creation of subsidised nursery places is precisely the kind of measure needed to help to eliminate this de facto inequality" *Id.* ¶ 21. The court held that this practice was not discriminatory, as long as male officials who were single parents were also given access to the nursery care. *Id.* ¶ 50.

87. Some argue that while the charter "is not all bad" it is "highly problematic from the perspective of gender equality. It provides only for 'effective equality' between men and women and it expressly endorses what is referred to as 'positive discrimination established in favour of women by the Islamic Shariah [and] other divine laws.'" Carole Petersen, *Bridging the Gap?: the Role of Regional and National Human Rights Institutions in the Asia Pacific*, 13 *ASIAN-PAC. L. & POL'Y J.* 174, 196 (2011) (quoting the Arab Charter).

88. Convention on the Elimination of All Forms of Discrimination against Women art. 1, Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981) [hereinafter CEDAW].

89. Arab Charter, *supra* note 1, art. 3(3).

90. It has been argued that Shari'a guarantees certain rights for women due to their status in Islam such as the right to equality of status, worth and value, right to education, right to own and dispose of property, right to inheritance and dower, right to maintenance, right to custody of children, and right to obtain a divorce. See Saeid Rahaei, *The Rights of Refugee Women and Children in Islam*, *FORCED MIGRATION REV.*, Jan. 2009, at 4–5. See generally S.A. Jackson, *Islam and Affirmative Action*, 14 *J.L. & REL.* 405 (1999–2000).

91. See, e.g., Personal Status Law (Law No. 51/1984), art. 194 (Kuwait); Decree to Implement Law No. 70.03 as the Family Code (Dahir No. 12 1/04/22), art. 171 (2004) (Morocco); See also JAMAL J. NASIR, *THE ISLAMIC LAW OF PERSONAL STATUS* 173–74 (1990) ("[a]ll schools, Sunni and Shia alike, hold that the mother, whether she is separated or living with her husband, has the first claim to the custody of her infant").

and has her own rights to enjoy as well as duties to perform, and has her own civil entity and financial independence, and the right to retain her name and lineage.”⁹² The same article states that “[t]he husband is responsible for the maintenance and welfare of the family,”⁹³ and thus does not contemplate any contradiction between the principle of equality and a rule that is supposedly designed to protect women. This duty of maintenance, however, should not be imposed in consideration for the wife’s duty to obey.⁹⁴ Nor should it imply that the husband is the head of the household. For instance, Moroccan family law explicitly provides for the shared responsibility of the household between husband and wife.⁹⁵ This is how Article 3(3) of the Charter should be interpreted. It is not intended to justify or endorse discrimination against women or any type of gender inequality. Instead, it is designed to emphasize the protective measures that Islamic Shariah grants women.

II. THE RELATIONSHIP BETWEEN NATIONAL LAW AND THE ARAB CHARTER

This section explores the relationship between the Arab Charter as a regional legal instrument and existing national laws. Does the Charter require the interpretation of its provisions to conform to national law? Is there a supremacy of national law over the Charter? Article 43 of the Arab Charter does not fully resolve these questions when it states that “[n]othing in this Charter may be construed or interpreted as impairing the rights and freedoms protected by the domestic laws of the states parties.” The most plausible interpretation, which is consistent with the object and purpose of a regional human rights convention, is that if national law provides for greater protection of rights and freedoms than provided in the Charter, these national rights and freedoms should be observed and respected. However, as explored in Part III, if the national protections are weak, interna-

92. Cairo Declaration, *supra* note 8383, art. 6(a).

93. *Id.* art. 6(b).

94. LYNN WELCHMAN, WOMEN AND MUSLIM FAMILY LAWS IN ARAB STATES 97–98 (Annelies Moors et al. eds., 2007) (“The codes thus give legal regard to ‘disobedience’ in situations where the wife refuses to go to or has departed the marital home ‘without *shar’i* reason’ or refuses without good reason to travel with her husband, and has refused to respond to a court ruling for her return on the basis of a claim for *ta’a* submitted by the husband.”). See also Law No. 25 of 1920 (Law of Maintenance and Personal Status), as amended by Law No. 100 of 1985, art. 1 (Egypt); Law No. 25 of 1929, as amended by Law No. 100 of 1985, art. 11(2) (Egypt).

95. Family Code (Moudawana) (Feb. 5, 2004), art. 51(3) (Morocco). The law includes several provisions for the equality of husband and wife. For a general discussion about the Moudawana, see Laura A. Weingartner, *Family Law & Reform in Morocco—The Mudawana: Modernist Islam and Women’s Rights in the Code of Personal Status*, 82 U. DET. MERCY L. REV. 687 (2005); Mala Htun & S. Laurel Weldon, *State Power, Religion, and Women’s Rights: A Comparative Analysis of Family Law*, 18 IND. J. GLOBAL LEGAL STUD. 145 (2011); Ann M. Eisenberg, *Law on the Books vs. Law in Action: Under-enforcement of Morocco’s Reformed 2004 Family Law, the Moudawana*, 44 CORNELL INT’L L.J. 693 (2011).

tional human rights standards should direct the interpretation of any conflict of laws.

A. *Defining Rights and Freedoms of the People in Accordance
with Domestic Law*

The Arab Charter makes several references to domestic law, especially as it may limit individual rights. Under the Charter, “no one shall be deprived of his liberty except on such grounds and in such circumstances as are determined by law and in accordance with such procedure as is established thereby.”⁹⁶ Political rights may not be restricted unless as “prescribed by law” and as “necessary in a democratic society in the interests of national security or public safety, public health or morals or the protection of the rights and freedoms of others.”⁹⁷ Right to movement and choice of residence may be restricted only for “compelling reasons of national security.”⁹⁸ Freedom of religion “shall be subject only to such limitations as are prescribed by law and are necessary in a tolerant society that respects human rights and freedoms for the protection of public safety, public order, public health or morals or the fundamental rights and freedoms of others.”⁹⁹ Right to participation in public life¹⁰⁰ and the right to form trade unions¹⁰¹ may also be restricted. I maintain that these limitations or restrictions must be narrowly interpreted so as not to contradict the essence of the individual right itself or to hinder its exercise. For instance, a state may restrict the rights of Muslims to do pilgrimage on health grounds to prevent spreading disease, but it should not make the travel of a wife from one country to another contingent on her obtaining approval from her husband.

References in the Arab Charter to national laws may be problematic where they weaken the protection of the individual right by qualifying it with a more restrictive domestic law. For example, according to the Charter, “States parties shall take such measure as they deem appropriate, in accordance with their domestic laws on nationality. . . .”¹⁰² On this logic, provided that their fathers are known, children are not allowed to acquire nationality through the mother in the following Arab states: Bahrain,¹⁰³

96. Arab Charter, *supra* note 1, art. 14(2).

97. *Id.* art. 24.

98. *Id.* art. 26.

99. *Id.* art. 30.

100. *Id.* art. 24(7).

101. *Id.* art. 35(2).

102. *Id.* art. 29(2).

103. The Bahraini Citizenship Act states:

A person shall be deemed a Bahraini national in the following cases: A. If he is born in Bahrain or abroad and his father, at the time of birth, was a Bahraini national. B. If he is born in Bahrain or abroad and his mother, at the time of birth, was a Bahraini national, providing that his father was either unknown or not legally to be related to his father.

Citizenship Act (Law No. 8/1963), *amended by* Law No. 12/1963, art. 4 (Bahr.).

Lebanon,¹⁰⁴ the United Arab Emirates,¹⁰⁵ Saudi Arabia,¹⁰⁶ Oman,¹⁰⁷ Jordan,¹⁰⁸ and Syria.¹⁰⁹

As another example, the Charter also provides that

[m]en and women of marrying age have the right to marry and to found a family according to the rules and conditions of marriage. No marriage can take place without the full and free consent of both parties. The laws in force regulate the rights and duties of the man and woman as to marriage, during marriage and at its dissolution.¹¹⁰

The aforementioned law on marriage and other aspects of personal status are wholly based on Islamic Shariah, and in this context, there may be a clash between the general principles of human rights in international legal in-

104. Decree Law 15 of 19 Jan. 1925 (Lebanese Nationality), art. 1 (Leb.), amended by Decree Law of 11 Jan. 1960 specifies: "Is considered Lebanese: Every person born of a Lebanese father. Every person born in the Greater Lebanon territory and did not acquire a foreign nationality, upon birth, by affiliation. Every person born in the Greater Lebanon territory of unknown parents or parents of unknown nationality."

105. Citizenship and Passport Law (Fed. Law No. 17/1972), art. 2 (U.A.E.), states that a person who is born inside or outside the country, whose father is Emirati, is a citizen by virtue of the law. Should there be no legal father, the person should be considered a citizen if the mother is Emirati.

106. Article 7 of the Saudi Arabian Nationality Regulations states:

A Saudi is the person who is born inside or outside the Kingdom of Saudi Arabia whose father is a Saudi national; or whose mother is a Saudi national and father of unknown nationality or without nationality; or who is born inside the Kingdom of Saudi Arabia and his parents are unknown. A foundling is considered born in Saudi Arabia unless otherwise proved.

Nationality Regulations, 1374 H (Resolution No. 4, dated 25/1/1374), art. 7 (Saudi Arabia), amended by Royal Decree No. 20, dated 12/11/1379 H. Article 8 reads:

Saudi Arabian Nationality may be granted to any person who is born inside the Kingdom of Saudi Arabia of an alien father and a Saudi mother if the following conditions are fulfilled: A. He makes Saudi Arabia his permanent residence when he reaches the age of maturity. B. He is of good conduct and has not been indicted on a penal crime or punished with imprisonment for a period exceeding six months for an indecent act. C. He knows the Arabic language well. D. He shall submit an application for Saudi Arabian nationality within one year after he reaches the age of maturity.

Nationality Regulations, 1374 H (Resolution No. 4, dated 25/1/1374), amended by Royal Decree No. 14, dated 24/5/1405 H, art. 8 (Saudi Arabia).

107. The Omani Nationality Law states that a person who was born inside or outside the country who has an Omani father shall be deemed an Omani national. Nationality Law (Law No. 3/1983) (Oman). Whoever has an Omani mother is of Omani nationality if the father is unknown or if his identity cannot be proven religiously. *Id.*

108. Law on Nationality (Law No. 6/1954) (Jordan) (last amended 1987). According to article 3(3), "Any person whose father holds Jordanian nationality" is a national. Article 3(4) allows that the following individuals are nationals: "Any person born in the Hashemite Kingdom of Jordan of a mother holding Jordanian nationality and of a father of unknown nationality or of a Stateless father or whose filiation is not established."

109. Nationality Law (Leg. Decree No. 276, dated 15/9/1389 H and 24/11/1969), art. 3 (Syria) reads: "The following shall be considered as Syrian Arabs *ipso facto*: A. Anyone born inside or outside the country to a Syrian Arab father. B. Anyone born in the country to a Syrian Arab mother and whose legal family relationship to his father has not been established."

110. Arab Charter, *supra* note 1, art. 33(1).

struments and the rules of Islamic Shariah.¹¹¹ Similarly, Article 30(1) provides, “[e]veryone has the right to freedom of thought, conscience and religion, and no restrictions may be imposed on the exercise of such freedoms except as provided for by law,”¹¹² but some national laws or judicial interpretations thereof, as I will discuss later, may prohibit conversion from Islam to another religion.¹¹³

B. *The Derogation Clause: An Expanded Negative List*

The Arab Charter, like most regional and international human rights instruments, includes a derogation clause.¹¹⁴ However, in addition to restricting the invocation of the clause to “exceptional situations of emergency which threaten the life of the nation and the existence of which is officially proclaimed,” the Charter limits measures of derogation to those which “are not inconsistent with [states’] other obligations under international law and do not involve discrimination solely on the grounds of race, colour, sex, language, religion, or social origin.”¹¹⁵ The Charter further ex-

111. Karl Kreuzer examines four of these rules, differences of religion as a bar to marriage and to interstate inheritance, polygamy, repudiation of wives (*telaq*) and discrimination of female interstate heir. See Karl Kreuzer, *Clash of Civilizations and Conflict of Laws*, 62 REVUE HELLÉNIQUE DE DROIT INT’L 629, 632 (2009) (Greece). Kreuzer considers the public policy exception as a tool to enforce universal human rights rules, “where in the case of violation. . . , the refusal to apply the violating foreign rule is not intended to preserve national interests but aims at defending fundamental values of the international community of States and thereby of all human beings.” *Id.* at 683. He explains:

where the evaluation of the result of the application of foreign law is based not on national but universal values the function of the public policy doctrine changes: protection of universal values instead of national principles. The public policy exception is transformed from an instrument protecting national interests to a tool preserving universal standards. National public policy turns into an instrument to implement international human rights.

Id. at 684.

112. Arab Charter, *supra* note 1, art. 30(1).

113. Case no. 22566/2009/Administrative Court, (Chamber of Economic and Investment Disputes) (Egypt). For a discussion of the case, see George Sadek, *El Gobary v Minister of Interior, Petition, Case no. 22566; ILDC 1780 (EG 2009)*, OXFORD REPORTS ON INT’L LAW IN DOMESTIC COURTS (June 13, 2009).

114. Article 4(1) states:

In exceptional situations of emergency which threaten the life of the nation and the existence of which is officially proclaimed, the States parties to the present Charter may take measures derogating from their obligations under the present Charter, to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the grounds of race, colour, sex, language, religion or social origin.

Arab Charter, *supra* note 1, art. 4(1). The derogation clause is restricted as follows in Article 4(2):

In exceptional situations of emergency, no derogation shall be made from the following articles: article 5, article 8, article 9, article 10, article 13, article 14, paragraph 6, article 15, article 18, article 19, article 20, article 22, article 27, article 28, article 29 and article 30. In addition, the judicial guarantees required for the protection of the aforementioned rights may not be suspended.

Id. art. 4(2).

115. *Id.* art. 4(1).

pands this “negative list” to include Articles 5,¹¹⁶ 8,¹¹⁷ 9,¹¹⁸ 10,¹¹⁹ 13,¹²⁰ 14,¹²¹ 15,¹²² 18,¹²³ 19,¹²⁴ 20,¹²⁵ 22,¹²⁶ 27,¹²⁷ 28,¹²⁸ 29,¹²⁹ and 30.¹³⁰ The

116. *Id.* art. 5 (“1. Every human being has the inherent right to life. 2. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”).

117. *Id.* art. 8. (“1. No one shall be subjected to physical or psychological torture or to cruel, degrading, humiliating, or inhuman treatment. 2. Each State party shall protect every individual subject to its jurisdiction from such practices and shall take effective measures to prevent them. The commission of, or participation in, such acts shall be regarded as crimes that are punishable by law and not subject to any statute of limitations. Each State party shall guarantee in its legal system redress for any victim of torture and the right to rehabilitation and compensation.”).

118. *Id.* art. 9 (“No one shall be subject to medical or scientific experimentation or to the use of his organs without his free consent and full awareness of the consequences and provided that ethical, humanitarian, and professional rules are followed and medical procedures are observed to ensure his personal safety pursuant to the relevant domestic laws in force in each State party. Trafficking of human organs is prohibited in all circumstances.”).

119. *Id.* art. 10 (“1. All forms of slavery and trafficking in human beings are prohibited and are punishable by law. No one shall be held in slavery and servitude under any circumstances. 2. Forced labor, trafficking in human beings for the purposes of prostitution or sexual exploitation, the exploitation of the prostitution of others or any other form of exploitation or the exploitation of children in armed conflict are prohibited.”).

120. *Id.* art. 13:

1. Everyone has the right to a fair trial that affords adequate guarantees before a competent, independent, and impartial court that has been constituted by law to hear any criminal charge against him or to decide on his rights or his obligations. Each State party shall guarantee to those without the requisite financial resources legal aid to enable them to defend their rights. 2. Trials shall be public, except in exceptional cases that may be warranted by the interests of justice in a society that respects human freedoms and rights.

121. *Id.* art. 14(6) (“Anyone who is deprived of his liberty by arrest or detention shall be entitled to petition a competent court in order that it may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or the detention is unlawful.”).

122. *Id.* art. 15 (“No crime and no penalty can be established without a prior provision of the law. In all circumstances, the law most favorable to the defendant shall be applied.”).

123. *Id.* art. 18 (“No one who is shown by a court to be unable to pay a debt arising from a contractual obligation shall be imprisoned.”).

124. *Id.* art. 19 (“1. No one may be tried twice for the same offense. Anyone against whom such proceedings are brought shall have the right to challenge their legality and to demand his release. 2. Anyone whose innocence is established by a final judgment shall be entitled to compensation for the damage suffered.”).

125. *Id.* art. 20 (“1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. 2. Persons in pre-trial detention shall be separated from convicted persons and shall be treated in a manner consistent with their status as unconvicted persons. 3. The aim of the penitentiary system shall be to reform prisoners and effect their social rehabilitation.”).

126. *Id.* art. 22 (“Everyone shall have the right to recognition as a person before the law.”).

127. *Id.* art. 27 (“1. No one may be arbitrarily or unlawfully prevented from leaving any country, including his own, nor prohibited from residing, or compelled to reside, in any part of that country. 2. No one may be exiled from his country or prohibited from returning thereto.”).

128. *Id.* art. 28 (“Everyone has the right to seek political asylum in another country in order to escape persecution. This right may not be invoked by persons facing prosecution for an offence under ordinary law. Political refugees may not be extradited.”).

129. *Id.* art. 29 (“1. Everyone has the right to nationality. No one shall be arbitrarily or unlawfully deprived of his nationality. 2. States Parties shall take such measures as they deem appropriate, in accordance with their domestic laws on nationality, to allow a child to acquire the mother’s nationality, having due regard, in all cases, to the best interests of the child. 3. No one shall be denied the right to acquire another nationality, having due regard for the domestic legal procedures in his country.”).

130. *Id.* art. 30 (“1. Everyone has the right to freedom of thought, conscience, and religion and no restrictions may be imposed on the exercise of such freedoms except as provided for by law. 2. The

Charter expressly stipulates that “[i]n addition, the judicial guarantees required for the protection of the aforementioned rights may not be suspended.”¹³¹ It has been observed that while other regional and international conventions¹³² contain similar derogation clauses, this list of non-derogable rights “is the longest one among the international instruments on the protection of human rights.”¹³³ In the context of the interplay between the Charter and international law, this expanded negative list is particularly significant in that it shows that the Charter does not allow a state to deviate from its duties to protect the rights of its people except in very limited cases. Even these limited cases do not allow for the derogation of a number of rights that the Charter sees as particularly fundamental. These include the right to life, the right not to be subject to torture, the right to be free from human trafficking, the right to a fair trial, the right not to be subject to unlawful arrest or detention, the right not to be punished or penalized except in accordance with an existing provision of the law, the right not to be imprisoned for non-payment of a debt, the right not to be tried twice for the same offense, the right not to be detained except for a legal cause, the right to be recognized as a person before the law, the right to movement, the right to political asylum, the right to a nationality, and the right to freedom of religion. It is significant that under its obligations as a state party to the Charter,¹³⁴ a state may not suspend any of these rights by adopting a national law that is contradictory to, incompatible with, or inconsistent with the rights stipulated in accordance with the Charter.

freedom to manifest one’s religion or beliefs or to perform religious observances, either alone or in community with others, shall be subject only to such limitations as are prescribed by law and are necessary in a tolerant society that respects human rights and freedoms for the protection of public safety, public order, public health, or morals or the fundamental rights and freedoms of others. 3. Parents or guardians have the freedom to provide for the religious and moral education of their children.”)

131. *Id.* art. 4(2).

132. See ICCPR, *supra* note 26, art. 4; ECHR, *supra* note 44, art. 15; American Convention, *supra* note 46, art. 27.

133. Naskou-Perraki, *supra* note 28, at 133.

134. Arab Charter, *supra* note 1, art. 4:

1. In exceptional situations of emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States parties to the present Charter may take measures derogating from their obligations under the present Charter, to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. In exceptional situations of emergency, no derogation shall be made from the following articles: article 5, article 8, article 9, article 10, article 13, article 14 (h), article 15, article 18, article 19, article 31, article 20, article 22, article 27, article 28 and article 29. In addition, the judicial guarantees required for the protection of the aforementioned rights may not be suspended.

3. Any State party to the present Charter availing itself of the right of derogation shall immediately inform the other States parties, through the intermediary of the Secretary-General of the League of Arab States, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

C. *The Limitation Clause: Balancing Individual Rights
against the Public Interest*

While the Arab Charter does not contain a general limitation clause, which would limit the enjoyment or application of certain individual rights based upon the public interest, the Charter instead limits certain individual rights. The Universal Declaration of Human Rights (“UDHR”) contains a general limitation clause. Article 29 of the UDHR allows for two kinds of scenarios in which limitations of individual rights are permissible: where limiting an individual’s rights is necessary either to allow others to exercise their rights or for a society to achieve its objectives. In other words, under international standards, individual rights may be subject to limitations that “are determined by law” only for the purposes of “securing due recognition and respect for the rights and freedoms of others” and “of meeting the just requirements of morality, public order, and the general welfare in a democratic society.”¹³⁵

Accordingly, in the international legal framework, it is presumed that restrictions may be imposed on the exercise of some rights; the main inquiry is whether these restrictions are justified and reasonable in a given case. A test adopted by some courts is the principle of proportionality.¹³⁶ Proportionality has been found to include two main components: legality, which means the limitation must be “prescribed by law,” and legitimacy, “which is fulfilled by compliance with the requirements of proportionality in the *regular sense*.”¹³⁷ The application of the principle of proportionality, therefore, requires the use of a balancing test between the public interest and the individual interest. Another means of limiting rights is the “least drastic means test,” in which the government must show that the measures taken impair the right as little as reasonably possible to achieve the legislative objective.¹³⁸

The same principles of proportionality should apply to the various rights stipulated in the Arab Charter. In fact, the Arab Charter’s lack of a general interest limitation clause makes it less permissive of limitations or restric-

135. UDHR, *supra* note 46, art. 29.2.

136. See generally Richard Clayton, *Regaining a Sense of Proportion: The Human Rights Act and the Proportionality Principle*, 5 EUR. HUM. RTS. L. REV. 504 (2001). The principle of proportionality developed as a means of limiting the discretionary powers of the police on the basis that the state requires special permission where it infringes a citizen’s civil liberties. In *Brown v. Stott*, the court held that “[t]he European Convention (1950) is the descendant of the Universal Declaration of Human Rights (1948) which in article 29 expressly recognized the duties of everyone to the community and the limitation on rights in order to secure and protect respect for the rights of others.” DRA No. 3, 2000 WL 1720425, at *33 (Privy Council (Scot.) Dec. 5, 2000). The court also observed that article 17 of the European Convention prohibits individuals from abusing their rights to the detriment of others. *Id.*

137. Aharon Barak, *Proportionality and Principled Balancing*, 4 L. & ETHICS HUM. RTS. 1, 3 (2010) (emphasis in original).

138. AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS 337 (2012).

tions on individual rights than other regional human rights instruments.¹³⁹ The tests of proportionality must be observed by Arab national laws so that any limitations or restrictions on individuals' rights and freedoms are narrowly designed, justifiable, reasonable and only imposed to serve the public interest.¹⁴⁰ As will be indicated, many of the Arab national laws do not meet these tests. I argue in the next section that these laws must therefore be subject to review and modification.

D. Necessary Legislative Measures to Bring National Laws into Conformity with the Arab Charter

A final implication of Article 43 is that states parties to the Arab Charter must take the necessary legislative measures to bring their national laws into conformity with the Charter. Article 44 explicitly requires such measures, providing, "The state 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."¹⁴¹ These legislative measures should include, first and foremost, constitutional amendments, given that a constitution is the basic law that defines the rights of the people.¹⁴² With the Arab Spring, new constitutions were adopted in some countries. These new constitutions should fully guarantee the rights and freedoms of the people and protect them against violations by the state.

In some countries, the process of implementing these standards is already underway. For example, the Moroccan Constitution of 2011, for the first time includes a new section entitled "Fundamental Freedoms and

139. See, e.g., American Convention, *supra* note 46, art. 32(2) ("The rights of each are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society.")

140. In its recent report, released on July 28, 2011, the UN Special Rapporteur on the situation of human rights defenders states that for any restriction on the right to freedom of association to be valid, it must meet three criteria: (1) it must be provided by law (2) it must be necessary in a democratic society and (3) such limitations may only be imposed in the interest of national security or public safety or public order. UN SPECIAL RAPPORTEUR ON THE SITUATION OF HUMAN RIGHTS DEFENDERS, COMMENTARY TO THE DECLARATION ON THE RIGHT AND RESPONSIBILITY OF INDIVIDUALS, GROUPS AND ORGANS OF SOCIETY TO PROMOTE AND PROTECT UNIVERSALLY RECOGNIZED HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS 43–44 (2011) (by Margaret Sekaggya). The Special Rapporteur has observed that "national laws regulating the functioning of NGOs impose severe restrictions on their regulation, funding, management and operation" and that "registration requirements have been used arbitrarily or restrictively to void protection for . . . [these] NGOs." *Id.* at 38. The Special Rapporteur recommends that NGOs be allowed to carry out their activities without having to register and that "States should not criminalize or impose criminal penalties for . . . participating in unregistered activities." *Id.* at 45.

141. Arab Charter, *supra* note 1, art. 44. Non-legislative measures may include establishing an action plan, a specialized human rights institution, releasing a report on the status of human rights, or improving conditions of prisons and correctional facilities.

142. See, e.g., Article 13, Doustour Jomhouriat al-Iraq [The Constitution of the Republic of Iraq] of 2005 (U.N. Assistance Mission for Iraq trans.), available at http://www.uniraq.org/documents/iraqi_constitution.pdf ("This constitution is the preeminent and supreme law in Iraq and shall be binding in all parts of Iraq without exception."); *Id.* arts. 14–46, providing for a comprehensive Bill of Rights and Liberties.

Rights.”¹⁴³ These liberties and rights are in full conformity with international human rights conventions and the standards of the Arab Charter, including by providing for full equality between men and women.¹⁴⁴ To ensure the full implementation of this provision, the constitution establishes a committee on the elimination of discrimination against women.¹⁴⁵ In addition, the new constitution explicitly prohibits torture and other cruel, inhuman, or degrading treatment or punishment,¹⁴⁶ forced disappearance, and arbitrary detention.¹⁴⁷ It also contains seventeen new articles that safeguard the presumption of innocence,¹⁴⁸ the right to a fair, public and speedy trial;¹⁴⁹ and due process.¹⁵⁰ It also guarantees access to information¹⁵¹ and freedom of the press,¹⁵² in addition to the parliamentary opposition’s right to freedom of expression, to actual participation in the legislative process, to actual participation in monitoring the government’s policies, and to benefit from public funding.¹⁵³ Furthermore, it provides a new section on good governance which offers further guarantees against corruption.¹⁵⁴

To a lesser extent, the 2011 Constitution of Jordan also puts greater emphasis on the rights of the people. However, the constitution imposes limits on the following rights by ensuring that they are in accordance with the law, customs, or public order or morality: freedom of worship and religion,¹⁵⁵ the right to be free from arbitrary detention,¹⁵⁶ the right to freedom of movement and residency,¹⁵⁷ the right to privacy of the home,¹⁵⁸ the right

143. CONSTITUTION OF MOROCCO, 14 Dec. 1962, *as amended* July 1, 2011, tit. 2 (Jeffri J. Ruchti trans.), available at http://www.ancl-radc.org.za/sites/default/files/morocco_eng.pdf. This marks a departure from the previous constitution of 1996, which only provided for basic rights and did not provide for a specific section for liberties and fundamental rights. *See, e.g., id.* arts. 8, 9, and 10.

144. *Id.* art. 19.

145. *Id.*

146. *Id.* art. 22.

147. *Id.* art. 23.

148. *Id.* arts. 23, 119.

149. *Id.* art. 120 (right to a fair and speedy trial); art. 123 (right to a public trial).

150. *Id.* art. 118.

151. *Id.* art. 27.

152. *Id.* art. 28.

153. *Id.* art. 10.

154. *Id.* arts. 154–71. The new Moroccan constitution also establishes a National Council on Human Rights, with a national rapporteur to address the complaints of citizens regarding the public administration. *Id.* art. 162. More importantly, the constitution redefines Morocco as a multicultural and multi-linguistic state, as it recognizes the Berber language (Tamazight) as an official language, and provides for special protection for Al-Hassania as an integral part of the unified Moroccan cultural identity. *Id.* art. 5. The constitution also restricts the King’s power in the selection process to appoint the head of the government from the winning political party in the parliamentary election. *Id.* art. 47. Finally, it limits parliamentary immunity to the right to freedom of expression. *Id.* art. 64.

155. CONSTITUTION OF THE HASHEMITE KINGDOM OF JORDAN, 1 Jan. 1952, art. 14, available at http://www.kinghussein.gov.jo/constitution_jo.html.

156. *Id.* art. 8.

157. *Id.* art. 9.

158. *Id.* art. 10.

to personal property,¹⁵⁹ the right to freedom of opinion,¹⁶⁰ freedom of the press,¹⁶¹ the right to address public officials,¹⁶² the right to private communication,¹⁶³ the right to appointment to public office,¹⁶⁴ the right to form trade unions,¹⁶⁵ and the right to establish societies and political parties “provided that the objects of such societies and parties are lawful, their methods peaceful, and their by-laws not contrary to the provisions of the constitution.”¹⁶⁶ It has been observed that the new constitution of Jordan fails to include the principle of equality between men and women as required by CEDAW¹⁶⁷ and as provided in the nondiscrimination clause of the Arab Charter, and does not explicitly provide for the principle by which national laws are interpreted in accordance with international human rights law.¹⁶⁸ However, it is significant that a constitutional court has been established for the first time that will have jurisdiction to review laws and interpret the constitution.¹⁶⁹

In addition to constitutional amendments such as these, a number of national laws must be adopted to give effect to the various provisions of the Charter. This is particularly important inasmuch as provisions of the Charter often enshrine greater protection of individual rights than currently contained in many national laws. For instance, the Charter prohibits human trafficking,¹⁷⁰ although not every party to the Charter has specific anti-trafficking legislation at the national level.¹⁷¹ Similarly, the Charter prohibits violence against women,¹⁷² but only Jordan has a comprehensive law

159. *Id.* art. 11.

160. *Id.* art. 15(i).

161. *Id.* art. 15(ii).

162. *Id.* art. 17.

163. *Id.* art. 18.

164. *Id.* art. 22.

165. *Id.* art. 23(f).

166. *Id.* art. 16(i).

167. The Convention on the Elimination of All Forms of Discrimination against Women states: States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle.

CEDAW, *supra* note 87, art. 2. See also Riyad Al-Subh, *Reform of the Jordanian Constitution from a Human Rights Perspective*, submitted to the conference on “Human Rights in Arab Constitutions,” Beirut, Leb., p. 22 (Jan. 7–8, 2011), available at <http://www.aahrn.net/en/content/human-rights-arab-constitutions-compilation-articles-arab-scholars-presented-aahrn-conferenc> (in Arabic).

168. See Al-Subh, *supra* note 166, at 22.

169. CONSTITUTION OF THE HASHEMITE KINGDOM OF JORDAN, 1 Jan. 1952, arts. 58–61, available at http://www.kinghussein.gov.jo/constitution_jo.html.

170. Arab Charter, *supra* note 1, art. 10(1) (“All forms of slavery and trafficking in human beings are prohibited and are punishable by law.”).

171. For the status of Arab legislation on human trafficking, see Mohamed Y. Mattar, *Human Rights Legislation in the Arab World: The Case of Human Trafficking*, 33 MICH. J. INT’L L. 101 (2011).

172. Arab Charter, *supra* note 1, art. 33(2) (“The State and society shall ensure the protection of the family, the strengthening of family ties, the protection of its members, and the prohibition of all forms

prohibiting domestic violence.¹⁷³ In fact, it is not unusual for legislation in the Middle East to condone violence against women,¹⁷⁴ and the widespread acceptance, in both society and national law, of honor killings in the region makes domestic prosecution of such killings very difficult.¹⁷⁵ Article 340(i) of Jordan's Penal Code, for instance, states that he who catches his wife¹⁷⁶ committing adultery with another, and . . . kills, wounds, or injures one or both of them is excused from the standard penalty.¹⁷⁷ A similar law is prescribed in Article 548 of the Syrian Penal Code, which exonerates perpetrators of "honor crimes."¹⁷⁸

The treatment of domestic violence under national laws is another area of concern. For instance, Article 41 of the Iraqi Penal Code provides that there is no crime in cases where a man exercises his right to discipline his wife, a teacher exercises his right to discipline a student, or parents exercise their right to discipline minor children.¹⁷⁹ Islamic Shariah assigns men the dual role of "protectors and maintainers of women" and grants permission to "beat them (lightly)."¹⁸⁰ In addition, Article 377 of the Iraqi Penal Code punishes the adulteress (wife) and the adulterer regardless of the place where the act was committed, whereas the husband is punished for adultery only if he committed the act in the marital home.¹⁸¹ Article 409 prescribes a short prison sentence not to exceed three years if a husband murders his wife upon finding her committing adultery.¹⁸² In Syria, Article 489 of the

of violence or abuse in the relations among its members, and particularly against women and children.").

173. Protection from Domestic Violence Law (Law No. 6/2008) (Jordan).

174. See Rushmi Ramakrishna, *Universal Rights, Non-Universal Process: Confronting Culturally Grounded Human Rights Abuses*, 30 U. PA. J. INT'L L. 1383, 1403 (2008–2009) ("Traditionally throughout the Middle East, legislatures have provided leniency to those men who murder women in the name of honor.").

175. See John Alan Cohan, *Honor Killings and the Cultural Defense*, 40 CAL. W. INT'L L.J. 177 (2010) ("For example, Jordan, Syria, . . . [and] Egypt, among other nations, have laws allowing for a partial or complete defense against criminal charges on the basis that the act was an honor killing.").

176. Mahram refers to a relative of the opposite gender; or unmarriageable kin. This concept may refer to both blood relatives, as well as relatives of the spouse.

177. PENAL CODE art. 340(i) (Jordan). Article 340(ii) continues: "He who catches his wife or one of his female mahrams with another in an unlawful bed, and he kills or wounds or injures one or both of them, benefits from a reduction in penalty." *Id.* art. 340(ii). Further, the Jordan Penal Code states that "he who commits a crime in fit of fury caused by an unlawful and dangerous act on the part of the victim benefits from a reduction in penalty." *Id.* art. 98.

178. PENAL CODE art. 548 (Syria) ("He who surprises his wife or one of his ascendants, descendants or sister committing adultery or illegitimate sexual act with another and he killed or injured one or both of them benefits from a reduced penalty, that should not be less than 2 years in prison.").

179. PENAL CODE art. 41 (Iraq).

180. THE HOLY QUR'AN, translated by Yusuf Ali, 4:34: "Men are the protectors and maintainers of women, because Allah has given the one more (strength) than the other, and because they support them from their means. Therefore the righteous women are devoutly obedient, and guard in (the husband's) absence what Allah would have them guard. As to those women on whose part ye fear disloyalty and ill-conduct, admonish them (first), (Next), refuse to share their beds, (And last) beat them (lightly); but if they return to obedience, seek not against them Means (of annoyance): For Allah is Most High, great (above you all)."

181. PENAL CODE art. 377 (Iraq).

182. *Id.* art. 409.

Penal Code exempts rapists from punishment if they marry their victims.¹⁸³ Finally, the Personal Status Law of Yemen was amended in 1999 to allow the marriage of girls younger than 15 years old if there is consent from the girl's guardian.¹⁸⁴

National laws contain numerous other areas of concern. It is not within the scope of this Article to outline them all. However, it should be noted that these laws affect the functioning and openness of society. For instance, a number of Arab states have labor laws that fail to protect domestic workers,¹⁸⁵ leaving them vulnerable to abuse and exploitation.¹⁸⁶ Moreover, laws concerning the establishment and operation of non-governmental organizations and other associations are restrictive, granting the government wide discretion to reject an NGO's status application,¹⁸⁷ dissolve an NGO without judicial oversight,¹⁸⁸ and prohibit an NGO from receiving foreign funds without the approval of the competent authorities.¹⁸⁹

Clearly, integration of the Charter's prohibition of violence against women as well as its other individual rights protections into national law would greatly help in addressing such issues. These problematic national laws, and others like them, should be reviewed and modified to ensure compliance with the international standards reflected in the Arab Charter. To this end, a legislative review process should be undertaken with reference to regional standards set by the League of Arab States, including, importantly, the Arab Charter. That review process should also consider domestic laws in light of several other conventions related to human rights and fundamental freedoms that have been adopted by the League. These include the Arab Convention on Freedom of Association,¹⁹⁰ the Arab Declaration on the Rights of the Child,¹⁹¹ and the Arab Convention on the Employment of

183. PENAL CODE art. 489 (Syria).

184. Law of Personal Status (Law No. 24/1999) (Yemen).

185. *See, e.g.*, Labour Law art. 3 (Law No. 14/2004) (Qatar) (excluding domestic workers, such as drivers, nurses, and cooks); Labour Law art. 2 (Royal Decree No. 35/2003) (Oman) (excluding domestic service workers inside and outside of the house as well as cooks); Labour Law (Law No. 8/2003) (U.A.E.) (excluding domestic workers). *See also* Law of 23 Sept. 1946 (Labour Code) art. 7 (Leb.).

186. *See, e.g.*, U.S. DEP'T OF STATE, OFFICE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS REPORT, BAHRAIN, KUWAIT, QATAR, SAUDI ARABIA; UNITED ARAB EMIRATES (2012).

187. *See, e.g.*, Law of Associations, Social and Cultural Clubs, Special Committees Working in the Field of Youth and Sports and Private Institutions art. 3 (Law No. 21/1989) (Bahr.) (providing for the rejection of associations, cultural or social clubs, private institutions working in the field of youth and sports, and specialized agencies established in opposition to public order or morals, or for the purpose of disrupting the government).

188. The law of Tunisia also allows the government to seize its property, and prosecute its members for "membership in an illegal organization." Law on Associations (Law No. 154/1959) (Tunis.).

189. *See, e.g.*, Law No. 84 of 2002 (Law on Non-Governmental Organizations) art. 17 (Egypt) (concerning the establishment and operation of associations in Egypt, including penalties applicable to those breaking the law).

190. League of Arab States, Arab Convention on Freedom of Association, 1977.

191. League of Arab States, Arab Declaration on the Rights of the Child, 1983.

Women.¹⁹² Unfortunately, hardly any of these conventions are taken into consideration when national laws are adopted or amended.

A comprehensive legislative review process should also consider several model laws related to human rights that have been adopted by the League of Arab States. Most recently, these model laws have addressed phenomena such as human trafficking, electronic crimes, and corruption.¹⁹³ These model laws should serve as a guide for Arab parliamentarians when they draft domestic legislation with human rights implications.¹⁹⁴ For example, the alarming rates of corruption in the Middle East and North Africa have received considerable attention.¹⁹⁵ The League adopted the Arab Convention against Corruption in 2010¹⁹⁶ and the Arab Model Law against Corruption in 2012.¹⁹⁷ Both anti-corruption instruments seek to enhance measures that facilitate and support Arab cooperation in the prevention of

192. League of Arab States, Arab Convention on the Employment of Women, 1976. For other examples of conventions promulgated by the League of Arab States, see also League of Arab States, Arab Convention on the Suppression of Terrorism, 22 Apr. 1998, *available at* <http://www.unhcr.org/refworld/publisher/LAS,,3de5e4984,0.html> (last visited Jul 30, 2012); League of Arab States, Arab Convention for Anti-Money Laundering and Combating the Financing of Terrorism, 21 Dec. 2010, *available in at* <http://www.amlu.gov.jo/AMLU/Images/634297095125378489.pdf> (in Arabic); League of Arab States, Arab Convention against Illicit trafficking in Narcotic Drugs and Psychotropic Substances, 22 June 2001, *available at* http://adala.justice.gov.ma/production/Conventions/ar/Conv_Arabe/CA_Lutte_Trafic_Drogue.htm (in Arabic); League of Arab States, Arab Anti-Corruption Convention, 21 Dec. 2010, *available at* http://www1.worldbank.org/finance/star_site/Arab-Forum/documents/Arab-Convention-Against-Corruption.pdf [hereinafter Arab Anti-Corruption Convention]; League of Arab States, Arab Convention on Labour Inspection, 1998; League of Arab States, Arab Convention on the Rehabilitation and Employment of the Handicapped, 1993; League of Arab States, Arab Convention on the Employment of Minors, 1996; and League of Arab States, Arab Convention for the Protection of Copyright, 1981.

193. ARAB MODEL LAW AGAINST CORRUPTION (League of Arab States 2012). *See also* ARAB MODEL LAW ON CRIMES WITHIN ICC JURISDICTION (League of Arab States 2004); ARAB MODEL LAW ON WEAPONS, AMMUNITIONS, EXPLOSIVES AND HAZARDOUS MATERIAL (League of Arab States 2002), *available at* <http://www.international.gc.ca/informalmeetinggeneva2007/arab-model-law-en.asp>; ARAB MODEL LAW ON SUPERVISING MINORS (Council of the Arab Ministers of Justice 2002); ARAB MODEL LAW ON JUVENILES' JUSTICE (League of Arab States 1996); ARAB MODEL LAW ON TRAFFICKING IN PERSONS (League of Arab States 2012); ARAB MODEL LAW ON PRISONS ORGANIZATION (League of Arab States 2000); ARAB MODEL FAMILY LAW (League of Arab States 1988).

194. *What are the Arab Ministers of Justice looking for in Cairo?* AZZAMAN INT'L NEWSPAPER, Feb. 13, 2012, *available at* <http://www.azzaman.com/?p=1826> (in Arabic). *See also* ARAB CENTER FOR LEGAL AND JUDICIAL RESEARCH, THE STATUS OF THE LEAGUE OF ARAB STATES (2012). In 1981, the Sana'a Strategy for the Unification of Arab Legislation emphasized the need for unification, while taking into consideration the circumstances of every Arab country. *See id.* In 1982, the Basic Law of the Council of Arab Ministers of Justice established committees for the preparation of model laws. However, these model laws are not binding, so that they serve solely as a guide for national legislators. The first model law that was adopted by the League of Arab States was the Law of Personal Status in 1988. The Council embarked on drafting model laws in the various traditional areas of the law. For a discussion of the work of the League of Arab States in the unification and harmonization of the law, see Abdulla H. Al Kilani, *The Efforts of the League of Arab States in Preparing Arab Model Laws*, Presented to the Regional Conference on Harmonization of the Law: the Hague Conference, Unidroit and UNCITRAL (Sept. 10-11, 2012) (on file with author).

195. *See generally* TRANSPARENCY INT'L, ANNUAL REPORT 2011 (2011), *available at*: http://www.transparency.org/news/feature/annual_report_2011 (last visited Aug. 2, 2012).

196. Arab Anti-Corruption Convention, *supra* note 191.

197. ARAB MODEL LAW AGAINST CORRUPTION (League of Arab States 2012).

and fight against corruption; promote transparency, accountability, and rule of law; and encourage civil society participation.¹⁹⁸ Entire chapters of the Convention and the Model Law are dedicated to preventing corruption in both the public and private sectors.¹⁹⁹ These tools also require Arab countries to criminalize offenses for a wide range of acts of corruption.²⁰⁰ Whether they be conventions or model laws, these regional instruments should be fully utilized in any legislative drafting or legislative review process to ensure compliance with the Charter, which requires that national laws be adopted to give effect to the rights stipulated in the Charter.

III. THE EFFECT OF INTERNATIONAL HUMAN RIGHTS LAW ON THE ARAB CHARTER

This section focuses on the relationship between the Arab Charter and international law. According to Article 43, provisions of the Arab Charter should be interpreted in light of international law. I will argue that this process of interpretation will strengthen the protection of rights and freedoms granted by the Arab Charter. I will also argue that domestic courts should interpret national laws in accordance with the regional standards embodied in the Arab Charter and the international principles that are incorporated in the various international conventions. I will conclude by proposing an individual complaint mechanism to ensure the enforcement of the rights stipulated in the Charter.

A. *The “Savings Clauses”: Resolving Possible Conflicts of Norms*

Another mechanism for resolving tensions between national, regional and international standards is the savings clause written into Article 43 of the Arab Charter. Savings clauses are aimed at ensuring that treaties do not abridge rights and are commonplace in international and regional human rights instruments.²⁰¹ For instance, Article 30 of the Universal Declaration

198. Arab Anti-Corruption Convention, *supra* note 191, art. 2; and ARAB MODEL LAW AGAINST CORRUPTION, art. 2 (League of Arab States 2012).

199. Arab Anti-Corruption Convention, *supra* note 191, ch. 2, art. 10; ARAB MODEL LAW AGAINST CORRUPTION, art. 4 (League of Arab States 2012).

200. Arab Anti-Corruption Convention, *supra* note 191, art. 4; ARAB MODEL LAW AGAINST CORRUPTION, art. 4 (League of Arab States 2012). The Anti-Corruption Convention does not provide for the non-applicability of statutory limitations to corruption crimes although the Arab Model Law against Corruption does. ARAB MODEL LAW AGAINST CORRUPTION, art. 4 (League of Arab States 2012). However, article 6(6) of the Convention provides that each State Party shall establish under its domestic law a long statute of limitations period for any offence established in accordance with this Convention. Arab Anti-Corruption Convention, *supra* note 191, art. 6(6).

201. *See, e.g.*, U.N. Charter art. 103 (“In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present charter shall prevail.”). This provision “is not a simple rule of priority – it also includes or removes any wrongfulness in the breach of the conflicting norm.” Marko Milanovic, *Norm Conflict in International Law: Whither Human Rights?*, 20 DUKE J. COMP. & INT’L L. 69, 76–77 (2009-2010).

of Human Rights states that “[n]othing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedom set forth herein.”²⁰² Article 47 of the ICCPR²⁰³ and Article 25 of the ICESCR²⁰⁴ provide that “[n]othing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.” At the regional level, the ECHR has a similar provision that further adds “or at their limitation to a greater extent than is provided for in the Convention.”²⁰⁵

International conventions dealing with specific rights also contain savings clauses. Article 23 of CEDAW states that, “[n]othing in the present Convention shall affect any provisions that are more conducive to the achievement of equality between men and women which may be contained: (a) in the legislation of a State Party; or (b) in any international convention, treaty or agreement in force for that State.”²⁰⁶ A similar condition appears in the Convention on the Rights of the Child (CRC), giving priority in case of a conflict to provisions that “are more conducive to the realization of the rights of the child.”²⁰⁷ The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families also favors “more favourable rights or freedoms granted to migrant workers and members of their families” in “[t]he law or practice of a State Party” or “[a]ny bilateral or multilateral treaty in force for the State Party concerned.”²⁰⁸ The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief provides that nothing in the declaration “shall be construed as restricting or derogating from any right defined in the Universal Declaration of Human Rights and the International Covenants on Human Rights.”²⁰⁹

It has been observed that these savings clauses address the possible “risk of conflict between the regimes, resulting either from the lack of conformity between the definitions themselves or from differences in international procedures to protect the rights, particularly as interpreted by the control bodies;” and that “[t]here is no policy reason why a regional organization

202. UDHR, *supra* note 45, art. 30.

203. ICCPR, *supra* note 26, art. 47.

204. ICESCR, *supra* note 27, art. 25.

205. ECHR, *supra* note 44, art. 17.

206. CEDAW, *supra* note 87, art. 23.

207. Convention on the Rights of the Child art. 41, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) [hereinafter CRC] (“Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the right of the child and which may be contained in: (a) The law of a State party; or (b) International law in force for that State.”).

208. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families art. 81(1), Dec. 18, 1990, 2220 U.N.T.S. 3 (entered into force July 1, 2003).

209. Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55, U.N. GAOR, 36th Sess., Supp. No. 51, U.N. Doc. A/36/684, at art. 8 (Nov. 25, 1981).

should not be able to confer broader rights than universal organizations. The goal of uniformity should not lead to the acceptance of the lowest common denominator.”²¹⁰

In this context, it is important to interpret the savings clause embodied in Article 43 of the Arab Charter to ensure that any conflict between domestic law and the various provisions of the Charter is resolved in accordance with the international standards reflected in the Charter provisions. The jurisprudence around savings clauses in other international human rights instruments provides a strong foundation for such an interpretive framework. However, such conflicts between national and international law are only one dimension of the possible tensions. As Article 43 makes clear, there may also be a tension between the regional and international levels. Another question therefore arises concerning how to reconcile any discrepancy between the rights embodied in the various international conventions, including those providing for the rights of women, children and minorities, and the rights provided in the Charter.

*B. Interpretation of the Arab Charter in Light of International Law:
The Article 43 Mandate*

Article 43 addresses the issue of international law not embodied in the Charter, and prescribes which laws should apply if a provision of the Arab Charter violates international law. This tension exists between several provisions of the Charter and relevant international human rights instruments. For instance, the Charter discriminates between citizens and noncitizens regarding the right to association and assembly,²¹¹ right to education,²¹² and right to work.²¹³ Article 6 of the Charter provides that a “sentence of death may be imposed only for the most serious crimes.”²¹⁴ In this regard, the ICCPR provides that “[e]very human being has the inherent right to life. . . . In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes.”²¹⁵ While prohibiting imposition of the death penalty on persons under 18 years of age, the Arab Charter allows for the application of “the laws in force at the time of commission of the crime.”²¹⁶ Moreover, in some Arab states, national laws

210. Theodor Meron, *Norm Making and Supervision in International Human Rights: Reflections on Institutional Order*, 76 AM. J. INT'L L. 754, 761–62 (1982). Meron observed that “[o]ne should not assume, however, that the rights recognized under regional instruments are necessarily more comprehensive than the rights recognized by the UN Covenants. Thus, the European Convention on Human Rights and its Protocols safeguard 19 different rights, while the Political Covenant safeguards 23.” *Id.* at 761.

211. Arab Charter, *supra* note 1, art. 24 (“Every citizen has the right . . . [t]o freely form and join associations with others, [and] [t]o freedom of association and peaceful assembly.”).

212. Arab Charter, *supra* note 1, art. 41(2) (guaranteeing only citizens “free education at least throughout the primary and basic levels.”).

213. Arab Charter, *supra* note 1, art. 34 (“The right to work is a natural right of every citizen.”).

214. Arab Charter, *supra* note 1, art. 6.

215. ICCPR, *supra* note 26, art. 6.

216. Arab Charter, *supra* note 1, art. 7.

allow for the imposition of the death penalty for a person under 18 years of age,²¹⁷ which is in violation of the provisions of the ICCPR,²¹⁸ the CRC,²¹⁹ and the Charter.²²⁰ Although the Charter provides that “[n]o one shall be subjected to physical or psychological torture or to cruel, degrading, humiliating, or inhuman treatment,”²²¹ it does not guarantee the same protection with regard to punishment, as laid out, *inter alia*, in Article 7 of the ICCPR and the Convention against Torture.

The Arab Charter expressly defines the relationship between the Charter and international law, stating that “[n]othing in this Charter may be construed or interpreted as impairing the rights and freedoms . . . set forth in the international and regional human rights instruments which the states parties have adopted or ratified . . .”²²² In addition to this general principle, the Charter provides for the interpretation of the Charter’s provisions in light of international norms and standards regarding specific individual rights, such as the rights of children. For instance, the Charter calls upon states to protect children against “economic exploitation” and prohibits work that may be hazardous to the child or interfere with his or her education or be harmful to his or her health and development.²²³ The Charter explicitly states that to achieve these objectives, states must provide a minimum age of employment, regulation of working hours and conditions, and appropriate sanctions to ensure the effective implementation of these rules, “having regards to the relevant provisions of other international instruments.”²²⁴ The preamble to the Charter clearly affirms the principles enshrined in the Charter of the United Nations, the UDHR, the ICCPR,²²⁵ and the ICESCR. This reference to international legal instruments means that an international rule has supremacy over a regional rule embodied in the Charter. This also means that the rules in the Charter must be inter-

217. This is the case in Yemen and Saudi Arabia. See generally HUMAN RIGHTS WATCH, *THE LAST HOLDOUTS: ENDING THE JUVENILE DEATH PENALTY IN IRAN, SAUDI ARABIA, SUDAN, PAKISTAN AND YEMEN* (2008).

218. ICCPR, *supra* note 26, art. 6(5).

219. CRC, *supra* note 206, art. 37(a).

220. Arab Charter, *supra* note 1, art. 8.

221. *Id.*

222. *Id.* art. 43. Similarly, the ICCPR provides that:

[t]here shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any state party to the present covenant pursuant to law, conventions, regulations, or custom on the pretext that the present covenant does not recognize such rights or that it recognizes them to a lesser extent.

ICCPR, *supra* note 26, art. 5(2). The ICCPR also states that “[n]othing in this convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any high contracting party or under any other agreement to which it is a party.” *Id.* art. 53.

223. Arab Charter, *supra* note 1, art. 34(3).

224. *Id.*

225. To date, Oman, Saudi Arabia, Qatar and United Arab Emirates have not ratified the ICCPR. See *Status of Treaties, International Covenant on Civil and Political Rights*, U.N. TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en [Hereinafter *Status of ICCPR*] (listing parties to ICCPR).

preted in light of the international rule. Further, this interpretation process requires an expansive reading of the rights stipulated in the Charter.

In practice, this means all rights embodied in the Charter should be read in light of broadly-related rights guaranteed by international law. Article 23 of the Charter provides for the effective remedy of any violation of an individual's rights or freedoms under the Charter. This article should be interpreted in light of Article 2(3) of the ICCPR, which requires that such remedies be determined by a competent judicial, administrative, or legislative authority and that the remedies be enforced. Similarly, the Charter's provision on freedom of religion²²⁶ should be interpreted with regard to Article 18 of the ICCPR, which defines the right to freedom of religion to include the "freedom to have or to adopt a religion or belief of his choice"²²⁷ and provides that "no one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice."²²⁸

As previously stated, the Charter provides for the application of domestic laws regarding marriage, both during marriage and at its dissolution.²²⁹ This provision should not be interpreted to negate the principle of equality between men and women in marriage under international family law, because to do so would be contrary to international standards. However, a number of Arab states²³⁰ have made reservations regarding the principle of equality stipulated in Article 16 of CEDAW. Some of these reservations are general, such as those by Saudi Arabia;²³¹ some are more specific, such as those by Qatar.²³² In this regard, Article 43 would seem to apply only to

226. Arab Charter, *supra* note 1, art. 30(1) ("[e]veryone has the right to freedom of thought, conscience, and religion.")

227. ICCPR, *supra* note 26, art. 18(1).

228. *Id.* art. 18(2).

229. Arab Charter, *supra* note 1, art. 33(1).

230. To date, Somalia and Sudan are not party to CEDAW. See *Status of Treaties, Convention on the Elimination of All Forms of Discrimination against Women*, U.N. TREATY COLLECTION, http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en (listing parties to CEDAW).

231. Saudi Arabia's reservations read as follows:

1. In case of contradiction between any term of the Convention and the norms of Islamic law, the Kingdom is not under obligation to observe the contradictory terms of the Convention.
2. Article 9, paragraph 2, The Kingdom does not consider itself bound by paragraph 2 of article 9 of the Convention and paragraph 1 of article 29 of the Convention.

Status of Treaties, Convention on the Elimination of All Forms of Discrimination against Women (Saudi Arabia), U.N. TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en.

232. Qatar's reservations are as follows:

1. Article 2 (a) in connection with the rules of the hereditary transmission of authority, as it is inconsistent with the provisions of article 8 of the Constitution.
2. Article 9, paragraph 2, as it is inconsistent with Qatar's law on citizenship.
3. Article 15, paragraph 1, in connection with matters of inheritance and testimony, as it is inconsistent with the provisions of Islamic law.
4. Article 15, paragraph 4, as it is inconsistent with the provisions of family law and established practice.
5. Article 16, paragraph 1(a) and (c), as they are inconsistent with the provisions of Islamic law.
6. Article 16, paragraph 1(f), as it is inconsistent with the provi-

those provisions of international conventions that the states parties have ratified without reservations, as will be discussed in the following section. Such reservations may limit the international protections afforded to the rights of the people, whether through national laws or through the Charter itself.

The same argument could be made with regard to Articles 9²³³ and 10²³⁴ of the Charter, which prohibit human trafficking and trafficking in human organs. Interpreting Article 43 to mean that international standards shall have supremacy over regional documents means that Articles 9 and 10 of the Charter should be read in accordance with Articles 6²³⁵ and 7²³⁶ of the United Nations Protocol to Prevent, Suppress, and Punish Trafficking in

sions of Islamic law and family law. The State of Qatar declares that all of its relevant national legislation is conducive to the interest of promoting social solidarity.

...

3. In accordance with article 29, paragraph 2, of the Convention, the State of Qatar declares, under the terms of that text, that it does not consider itself bound by paragraph 1 of that article.

Status of Treaties, Convention on the Elimination of All Forms of Discrimination against Women (Qatar), U.N. TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en.

233. Article 9 provides:

No one shall be subjected to medical or scientific experimentation or to the use of his organs without his free consent and full awareness of the consequences and provided that ethical, humanitarian and professional rules are followed and medical procedures are observed to ensure his personal safety pursuant to the relevant domestic laws in force in each State party. Trafficking in human organs is prohibited in all circumstances.

Arab Charter, *supra* note 1, art. 9.

234. Article 10 states:

1. All forms of slavery and trafficking in human beings are prohibited and are punishable by law. No one shall be held in slavery and servitude under any circumstances. 2. Forced labor, trafficking in human beings for the purposes of prostitution or sexual exploitation, the exploitation of the prostitution of others or any other form of exploitation or the exploitation of children in armed conflict are prohibited.

Id. art. 10.

235. Article 6 provides:

1. In appropriate cases and to the extent possible under its domestic law, each State Party shall protect the privacy and identity of victims of trafficking in persons, including, inter alia, by making legal proceedings relating to such trafficking confidential. 2. Each State Party shall ensure that its domestic legal or administrative system contains measures that provide to victims of trafficking in persons, in appropriate cases: (a) Information on relevant court and administrative proceedings; (b) Assistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders, in a manner not prejudicial to the rights of the defence. 3. Each State Party shall consider implementing measures to provide for the physical, psychological, and social recovery of victims of trafficking in persons, including, in appropriate cases, in cooperation with non-governmental organizations, other relevant organizations, and other elements of civil society, and, in particular, the provision of: (a) Appropriate housing; (b) Counselling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand; (c) Medical, psychological and material assistance; and (d) Employment, educational, and training opportunities. 4. Each State Party shall take into account, in applying the provisions of this article, the age, gender and special needs of victims of trafficking in persons, in particular the special needs of children, including appropriate housing, education and care. 5. Each State Party shall endeavour to provide for the physical safety of victims of trafficking in persons while they are within its territory. 6. Each State Party shall ensure that its domestic

Persons, Especially Women and Children. Consequently, it is not enough for an Arab state to prohibit or criminalize trafficking in human beings. International law requires that a state also provide assistance and protection to victims of trafficking. Therefore, although the Arab Charter does not explicitly refer to protection and assistance for victims of trafficking, these obligations may be inferred under Article 43 of the Charter, which requires an expansive interpretation of the rights provided by the Charter.

Similarly, minority rights under the Charter should be interpreted in light of the developments in international law, where there has been a shift in focus from individual rights to the recognition of the rights of minorities as a group, as seen in the United Nations General Assembly's Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities.²³⁷ In this regard, Article 25²³⁸ of the Charter could be interpreted as recognizing the rights of minorities.²³⁹ Minorities constitute large segments of the population in many countries in the Arab world.

legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered.

United Nations Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime art. 6, Nov. 15, 2002, 2237 U.N.T.S. 319 (entered into force Dec. 25, 2003).

236. Article 7 reads:

1. In addition to taking measures pursuant to article 6 of this Protocol, each State Party shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases. 2. In implementing the provision contained in paragraph 1 of this article, each State Party shall give appropriate consideration to humanitarian and compassionate factors.

Id. art. 7.

237. Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, G.A. Res 47/135, U.N.GAOR, 47th Sess., Supp. No. 49 (Vol. I), U.N. Doc. A/47/49 (Vol. 1), at 210 (Dec. 18, 1992). This interpretation can be inferred from General Comment No. 23 regarding article 27 of the ICCPR:

Although the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion. Accordingly, positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, in community with the other members of the group.

Human Rights Comm., General Comment No. 23: The Rights of Minorities (Art. 27), ¶ 6.2, U.N. Doc. CCPR/C/21/Rev.1 (Apr. 8, 1994). On that subject, see more generally Yousef T. Jabareen, *Toward Participatory Equality: Protecting Minority Rights under International Law*, 41 ISR. L. REV. 635 (2008).

238. Arab Charter, *supra* note 1, art. 25 ("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.").

239. Iraq's constitution states:

First: Islam is the official religion of the State and is a foundation source of legislation: A. No law may be enacted that contradicts the established provisions of Islam B. No law may be enacted that contradicts the principles of democracy. C. No law may be enacted that contradicts the rights and basic freedoms stipulated in this Constitution. Second: This Constitution guarantees the Islamic identity of the majority of the Iraqi people and guarantees the full religious rights to freedom of religious belief and practice of all individuals such as Christians, Yazidis, and Mandaean Sabians.

Article 2, Doustour Joumhouriat al-Iraq [The Constitution of the Republic of Iraq] of 2005 (U.N. Assistance Mission for Iraq trans.), available at http://www.uniraq.org/documents/iraqi_constitution.pdf. Article 14 states: "Iraqis are equal before the law without discrimination based on gender, race,

Egypt, for example, has a significant Christian minority representing an estimated 8 to 12 percent of the population.²⁴⁰ In Syria, 10 percent of the population is Christian, while²⁴¹ Shiites, Alawites, Ismailis, and the Druze together constitute a minority of 16 percent.²⁴² In the United Arab Emirates, Shia are also a minority, accounting for an estimated 15 percent or fewer of the population.²⁴³ Conversely, Sunnis are a minority in Iraq, constituting 32 to 37 percent of a population that has a 60 to 65 percent Shiite majority.²⁴⁴ Lebanon is an example of several minorities converging within one country,²⁴⁵ with 40 percent of Lebanese citizens belonging to various Christian denominations,²⁴⁶ and Sunni and Shia Muslims each making up

ethnicity, nationality, origin, color, religion, sect, belief or opinion, or economic or social status.” *Id.* art. 14. Article 4 states:

First: The Arabic language and the Kurdish language are the two official languages of Iraq. The right of Iraqis to educate their children in their mother tongue, such as Turkmen, Syriac, and Armenian shall be guaranteed in government educational institutions in accordance with educational guidelines, or in any other language in private educational institutions. Second: The scope of the term “official language” and the means of applying the provisions of this article shall be defined by a law and shall include A. Publication of the Official Gazette, in the two languages; B. Speech, conversation, and expression in official domains, such as the Council of Representatives, the Council of Ministers, courts, and official conferences, in either of the two languages; C. Recognition and publication of official documents and correspondence in the two languages; D. Opening schools that teach the two languages, in accordance with the educational guidelines; E. Use of both languages in any matter enjoined by the principle of equality such as bank notes, passports, and stamps. Third: The federal and official institutions and agencies in the Kurdistan region shall use both languages. Fourth: The Turkomen language and the Syriac language are two other official languages in the administrative units in which they constitute density of population. Fifth: Each region or governorate may adopt any other local language as an additional official language if the majority of its population so decides in a general referendum.

Id. art. 4. Article 125 states: “This Constitution shall guarantee the administrative, political, cultural, and educational rights of the various nationalities, such as Turkomen, Chaldeans, Assyrians, and all other constituents, and this shall be regulated by law.” *Id.* art. 125. See generally Mohamed Y. Mattar, *Unresolved Questions in the Bill of Rights of the New Iraqi Constitution: How Will the Clash between “Human Rights” and “Islamic Law” Be Reconciled in Future Legislative Enactments and Judicial Interpretations?*, 30 FORDHAM INT’L L.J. 126 (2006).

240. U.S. DEP’T OF STATE, INTERNATIONAL RELIGIOUS FREEDOM REPORT: EGYPT 2010 (2010). See also CIA, THE WORLD FACTBOOK: EGYPT (2012), <https://www.cia.gov/library/publications/the-world-factbook/geos/eg.html> (last visited Oct. 12, 2012).

241. U.S. DEP’T OF STATE, INTERNATIONAL RELIGIOUS FREEDOM REPORT: SYRIA 2010 (2010).

242. *Id.*

243. U.S. DEP’T OF STATE, INTERNATIONAL RELIGIOUS FREEDOM REPORT: UNITED ARAB EMIRATES 2010 (2010).

244. U.S. DEP’T OF STATE, INTERNATIONAL RELIGIOUS FREEDOM REPORT: IRAQ 2010 (2010).

245. Lebanon is unique in the Arab world for the number of officially-recognized religious minorities (18 in total) residing in the country, especially relative to its small geographic size. For a discussion of the various minority groups comprising the Lebanese cultural complexity, U.S. DEP’T OF STATE, INTERNATIONAL RELIGIOUS FREEDOM REPORT: LEBANON 2010 (2010) [hereinafter RELIGIOUS FREEDOM REPORT: LEBANON]. The historical political complexity of the multi-confessional nature of the Lebanese Republic is reflected in the Lebanese Constitution, which states that “[t]he abolition of political confessionalism shall be a basic national goal and shall be achieved according to a staged plan.” LEBANESE CONSTITUTION, 23 May 1926, with its amendments, pmbl., available at <http://www.presidency.gov.lb/English/LebaneseSystem/Documents/Lebanese%20Constitution.pdf>.

246. RELIGIOUS FREEDOM REPORT: LEBANON, *supra* note 244.

27 percent of the population.²⁴⁷ This demographic diversity makes an expansive reading of Article 25 of the Charter an important legal necessity.

*C. Direct References to International and Regional Instruments
in Domestic Courts*

International legal instruments set universal standards for the realization of human rights.²⁴⁸ While international and regional bodies play an important role in the interpretation and monitoring of human rights treaties, for the rights enshrined therein to be given proper effect, domestic courts must be able to refer to these instruments and interpret them in the context of national law.²⁴⁹ Only then can the possible tension between international norms and domestic practices be resolved and national legislation be interpreted in light of universal standards of human rights and fundamental freedoms. To ensure the effective implementation and enforcement of the rights guaranteed by the Arab Charter, domestic courts in Arab states must be willing to refer to and rely on the Charter, as well as to other international legal instruments referred to by Article 43 as rules of interpretation.

Important precedents for this exercise exist in some domestic courts in the region. Some courts have utilized the principles of international law to support the application of domestic laws. Other times, international legal standards have been used to guide the application of domestic law. In a number of cases, courts have even referred to the Arab Charter and other regional conventions. Most significantly, several courts have filled gaps in domestic law and applied international law in the absence of a national rule, or repealed domestic laws that contradict international law.

Here I will review several decisions from the Egyptian legal system as an example of the practices of reconciling domestic law with international standards, especially in the area of civil and political rights. I chose these examples, in part, because Egypt provides a particularly compelling case for incorporating international law into domestic jurisprudence. References to

247. *Id.*

248. To ensure realization of universal standards of human rights, the nine core human rights conventions of the United Nations that oblige states to report on progress made in human rights are: International Convention on the Elimination of All Forms of Racial Discrimination (1965); International Covenant on Civil and Political Rights (1966); International Covenant on Economic, Social and Cultural Rights (1966); Convention on the Elimination of All Forms of Discrimination against Women (1979); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984); Convention on the Rights of the Child (1989); International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990); International Convention for the Protection of All Persons from Enforced Disappearance (2006); and Convention on the Rights of Persons with Disabilities (2006).

249. See, e.g., Lord Hoffman, Judicial Standards Board Annual Lecture: The Universality of Human Rights (Mar. 19, 2009), arguing that human rights are “universal in abstraction but national in application.” See generally Richard Carver, *A New Answer to an Old Question: National Human Rights Institutions and the Domestication of International Law*, 10 HUM. RTS. L. REV. 1 (2010); M. Shah Alam, *Enforcement of International Human Rights Law by Domestic Courts in the United States*, 10 ANN. SURV. INT’L & COMP. L. 27 (2004).

other jurisdictions will also be made, including Iraq, Lebanon, and Palestine.

In Case No. 23/16, the Supreme Constitutional Court of Egypt considered the constitutionality of Article 73(6) of the Law of the State Council (Law No. 47/1972), which prohibited a candidate for the state council from being married to a foreigner. The Supreme Constitutional Court held that the prohibition was a violation of the constitution, particularly of the rights to privacy, marriage, and family life enshrined therein, and in doing so referred to Article 16 of the UDHR; Articles 6 and 16 of CEDAW; the Convention on Consent to Marriage, Minimum Age for Marriage, and Registration of Marriages; Article 5 of the Convention on the Elimination of All Racial Discrimination; and Article 23 of the ICCPR.²⁵⁰

Egypt's Supreme Constitutional Court also ruled that a law providing that "the President of a political party shall be jointly responsible with the Editor-in-Chief of a newspaper of the party regarding any publications therein" was unconstitutional because of its basis in "punishment by analogy," which is not permitted in the area of criminal law.²⁵¹ The court relied on Article 66 of the constitution, which states that "there shall be no crime or punishment except in accordance with the law," and Article 67, which provides "a presumption of innocence of a person until proven guilty," in accordance with Article 11 of the UDHR.²⁵²

In an action filed by the Association for Freedom of Thought and Expression, the Cairo Administrative Court held that restrictions imposed by the National Telecommunication Regulatory Authority (NTRA) on bulk mobile text messages were unconstitutional and ordered a cessation of the im-

250. Another example is a decision issued by the Egyptian Supreme Constitutional Court in which the plaintiff argued that article 15 of Law No. 17/1983, the law governing the legal profession, was unconstitutional. *See* Case no. 6/13/1992/Supreme Constitutional Court (Egypt). In challenging the constitutionality of this provision, the plaintiff relied on articles 40 (equality before the law) and 69 (right to a defense and a lawyer of one's own choosing) of the Egyptian constitution. The plaintiff argued that article 15 of the law governing the legal profession arbitrarily discriminated between lawyers. He argued that all lawyers enjoy similar legal status and, moreover, share the same obligations in relation to, for example, fees and professional ethics. Such discrimination was, he argued, unconstitutional. In addition, he argued that article 15 constituted an abuse of legislative power because the legislature excludes a certain class of lawyers from appearing before courts of first instance, thus restricting their right to earn a living. The Supreme Constitutional Court found in favor of the plaintiff that article 15 was indeed unconstitutional, because it violated the right to a defense, the right to choose a lawyer, and the right to equal protection before the law. The court, in reaching its conclusion, relied on the Sixth Amendment of the U.S. Constitution (right to a speedy trial and confrontation of witnesses) and article 6 of the ECHR (right to a fair trial).

251. Case no. 25/1995/Supreme Constitutional Court (Egypt).

252. Article 11 states:

(1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence. (2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

UDHR, *supra* note 46, art. 11.

plementation of the NTRA decree, which subjected bulk SMS (short message services) to monitoring by requiring companies licensed to provide such services to obtain permits in advance.²⁵³ In concluding that this requirement constituted a violation of the right to information guaranteed by Articles 45,²⁵⁴ 47,²⁵⁵ and 48²⁵⁶ of the constitution, the court referred to Article 19 of the UDHR.²⁵⁷ The court also stated that the right to knowledge is related to the right to development stipulated in Article 1 of the ICCPR.²⁵⁸

In a case involving the suspension of a television broadcasting license for political reasons, the Egyptian Administrative Court emphasized the right of every individual to enjoy certain freedoms, including the right to knowledge, information, and expression under the Egyptian constitution, and found that the decree in question was invalid. The court supported its ruling with reference to Articles 19²⁵⁹ and 12 of the UDHR,²⁶⁰ as well as to the French Declaration on the Rights of Man and of the Citizen.²⁶¹ In another case, the Administrative Court determined that an administrative de-

253. Case no. 1430/65/2010/Cairo Administrative Court (Egypt).

254. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept. 1971, *as amended*, May 22, 1980, May 25, 2005, March 26, 2007, art. 45, *available at* http://www.sis.gov.eg/en/LastPage.aspx?Category_ID=208 (“The law shall protect the inviolability of the private life of citizens. Correspondence, wires, telephone calls, and other means of communication shall have their own sanctity and secrecy and may not be confiscated or monitored except by a causal judicial warrant and for a definite period according to the provisions of the law.”).

255. *Id.* art. 47 (“Freedom of opinion is guaranteed. Every individual has the right to express his opinion and to disseminate it verbally, in writing, illustration or by other means within the limits of the law.”).

256. *Id.* art. 48 (“Freedom of the press, printing, publication and mass media shall be guaranteed. Censorship on newspapers is forbidden. Warning, suspension or abolition of newspapers by administrative means are prohibited. However, in case of declared state of emergency or in time of war, limited censorship may be imposed on newspapers, publications and mass media in matters related to public safety or for purposes of national security in accordance with the law.”).

257. UDHR, *supra* note 46, art. 19 (“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”).

258. Article 1 states:

(1) All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development.

(2) All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence. (3) The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

ICCPR, *supra* note 26, art. 1.

259. UDHR, *supra* note 45, art. 19 (“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive, and impart information and ideas through any media and regardless of frontiers.”).

260. *Id.* art. 12 (“No one shall be subjected to arbitrary interference with his privacy, family, home, or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”).

261. Declaration of the Right of Man and the Citizen [France], 26 August 1789.

cision denying a seriously ill political prisoner, whose life was possibly threatened, the right to seek medical treatment during his five-year imprisonment was a violation of applicable statutory law and the Egyptian constitution. In its decision, the Administrative Court referred to Article 10 of the ICCPR, which provides that persons deprived of their liberty shall not be treated in an inhumane manner.²⁶²

Another right that has been upheld by domestic courts through reference to general principles under international law is the right to movement. For instance, in an Iraqi case, a husband sought to prohibit his wife from traveling abroad with their children without his approval. The Iraqi Appellate Court²⁶³ held that the 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 2005²⁶⁴ and Article 13 of the Universal Declaration of Human Rights.²⁶⁵ Furthermore, the court held that a marriage contract does not give a husband any privilege over his wife; the contract instead stipulates equality in the rights and duties of the husband and the wife, as similarly provided for in Article 16 of the CEDAW.²⁶⁶ The husband's prevention of his wife's travel constituted a violation of her right to equality and to be free from discrimination. In another case,²⁶⁷ the Palestinian High Court of Justice based its decision on provisions in the ICESCR. There, the plaintiffs had submitted applications for change of residency status from Gaza to Ramallah, where the plaintiffs actually lived. Their applications were denied by the Palestinian Ministry of Interior on the grounds that Israel would refuse the applications when notified of the Ministry's decision. The court held that the Ministry was obligated to take all necessary steps within its jurisdiction to accept the applications. In its decision, the court emphasized that every citizen has the right to movement and choice of his place of residency, in accordance with the Palestinian Basic Law²⁶⁸ and international legal instruments, including the ICESCR.²⁶⁹ In another Egyptian case, in determining the validity of a decision requiring all employees of government ministries to obtain the

262. Case no. 4884/62/2009/Supreme Administrative Court (Egypt).

263. High Judicial Council/Appellate Court, decision of June 27, 2011 (Iraq).

264. Article 42, Section 1, Doustour Joumhouriat al-Iraq [The Constitution of the Republic of Iraq] of 2005 ("Each Iraqi enjoys the right of free movement, travel, and residence inside and outside Iraq.").

265. UDHR, *supra* note 45, art. 13(2) ("Everyone has the right to leave any country, including his own, and to return to his country.").

266. CEDAW, *supra* note 87, art. 16 ("States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women . . . (c): The same rights and responsibilities during marriage and at its dissolution.").

267. Case no. 359/2009, High Court of Justice (Palestine).

268. Basic Law (2003), art. 20 (Palestine) ("Freedom of residence and movement shall be guaranteed within the limits of the law.").

269. ICESCR, *supra* note 27, art. 12(1) ("Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.").

administration's approval before traveling outside of Egypt, the Administrative Court stated that the constitutional principle of equality is grounded in the principles of Islamic Shariah and the UDHR.²⁷⁰

In other cases, standards of international law have been utilized to interpret domestic law. This can be seen, for example, in courts' application of the concept of the best interests of the child, drawing from the Convention on the Rights of the Child (CRC), in a number of children's rights cases. In Lebanon, the Juvenile Court Judge²⁷¹ held that two minors, who were physically and emotionally abused by their father, were in a dangerous situation according to the provisions of national and international law. The judge wrote that the minors were deprived of a standard of living adequate to meet their physical and mental needs, as mandated by Article 27 of the CRC.²⁷² Further, they lived in an insecure and unhealthy environment that cruelly harmed their physical, mental and social development, as prohibited by Articles 16²⁷³ and 32²⁷⁴ of the CRC. The court assigned the legal rights to the upbringing and guardianship of the minors to a care house, thereby incorporating Article 3 of the CRC,²⁷⁵ which provides that the best interest of the child shall be a primary consideration in all actions affecting the child.²⁷⁶ Another case in Lebanon involved two parents who went before a

270. Case no. 24734/62/2008/Supreme Administrative Court (Egypt).

271. Juvenile Court, Case no. 297, 2009 (Leb.)

272. CRC, *supra* note 206, art. 27(1) ("States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.").

273. *Id.* art. 16(1) ("No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.").

274. *Id.* art. 32(1) ("States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.").

275. *Id.* art. 3.

276. Juvenile Court, Case no. 297, 2009 (Leb.). In another case, involving domestic violence between parents that caused deviant sexual behavior of the child, the Lebanese Juvenile Court Judge referred to the CRC to assess whether the child was in a dangerous situation in accordance with articles 16, 19 and 24 of the CRC. Juvenile Court, Case no. 257, 4 Aug. 2009 (Leb.). Article 16 of the CRC states:

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.

2. The child has the right to the protection of the law against such interference or attacks

CRC, *supra* note 206, art. 16. Article 19 states:

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

Id. art. 19(1)–(2). Article 24 states:

Juvenile Court Judge²⁷⁷ seeking guardianship of a newborn baby they found in a park after he was abandoned by his birth parents. The Judge referred to Articles 3²⁷⁸, 19²⁷⁹, and 20²⁸⁰ of the CRC in his ruling in favor of the two

1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.

2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures: (a) To diminish infant and child mortality; (b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care; (c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution; (d) To ensure appropriate pre-natal and post-natal health care for mothers; (e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents; (f) To develop preventive health care, guidance for parents and family planning education and services.

3. States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.

4. States Parties undertake to promote and encourage international co-operation with a view to achieving progressively the full realization of the right recognized in the present article. In this regard, particular account shall be taken of the needs of developing countries).

Id. art. 24. Article 34 of the CRC provides:

States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent: (a) The inducement or coercion of a child to engage in any unlawful sexual activity; (b) The exploitative use of children in prostitution or other unlawful sexual practices; (c) The exploitative use of children in pornographic performances and materials).

Id. art. 34. The Court held that the child must be removed from his home to protect him from being a victim of sexual abuse, which is considered to be a dangerous situation according to the CRC. The Court thus granted a national committee guardianship over the minor. Juvenile Court, Case no. 257, 4 Aug. 2009 (Leb.).

277. Juvenile Court, Case no. #, 12 Aug. 2008 (Leb.).

278. Article 3 provides:

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. 2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures. 3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

CRC, *supra* note 206, art. 3.

279. *Id.* art. 19(1) (“States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.”)

280. *Id.* art. 20(1) (“A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.”).

plaintiffs. The Judge found that abandoning the newborn baby constituted a severe form of physical and mental violence and negligent treatment, as articulated in Article 19 of the CRC. In accordance with Article 20, alternative care for the baby had to be ensured without any delay, thus giving the plaintiffs guardianship rights of the baby as long as they could provide the necessary support and fulfill the baby's best interests.²⁸¹

In some cases, courts have also relied on regional human rights conventions,²⁸² including the Arab Charter. Egypt's Administrative Court has referred to the Arab Charter, despite a country's having not yet ratified it in a

281. An additional case in Lebanon in 2009 also involved the Juvenile Court Judge. *See* Juvenile Court, Case no. #, 16 Oct. 2009 (Leb.). A minor was convicted of drunkenness and insulting police officers, charges that carry a sentence of imprisonment according to the Lebanese Penal Code. Legislative Decree 340 of 1 Mar. 1943 (Criminal Code) (Leb.), arts. 383, 622, *available at* <http://www.wipo.int/wipolex/en/details.jsp?id=6653> (in Arabic). The Judge, however, referred to article 3 of the CRC in his decision to place the minor on probation and ban him from frequenting nightclubs, which states that "1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." CRC, *supra* note 206, art. 3. Article 3 stipulates that the best interest of the child must be a primary consideration in all action concerning the child. *Id.* According to the Court, it would be in best interest of the minor to replace an imprisonment sentence with a preventative, therapeutic, and restorative punishment, which would prevent the minor from separation from his parents and his accustomed environment. In a custody case in Lebanon decided by the Juvenile Court Judge (Juvenile Court, Case no. #, 31 July 2008 (Leb.)), a mother sought to maintain custody of her seven-year-old daughter after the Family Court ruled that custody must be transferred to the father after the child reaches the age of seven. The mother claimed that transferring custody would not be in the best interest of the child due to the child's strong bond with her mother and lack of a relationship with her father. The Court held that the father has the right to custody of his daughter and that the mother must facilitate the slow transfer of custody to the father to achieve the best interest of their child. *See* CRC, *supra* note 206, art. 3. *See also id.* art. 18 ("1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.")

282. In a case concerning environmental protection, the Supreme Constitutional Court of Egypt decided that article 2 of Law No. 48/1982, concerning the protection of the Nile River and other waterways from pollution, was not unconstitutional, because it was in accordance with article 1 of the ICCPR, the UN Declaration on the Right to Development, article 8(1) of the ICESCR, and article 26 of the American Convention on Human Rights. *See* Case no. 34/15/1996/Supreme Constitutional Court (Egypt). The American Convention on Human Rights states that:

The states parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.

American Convention, *supra* note 46, art. 25. The Charter of the Organization of American States promotes positive intervention by the state to protect the environment. Charter of the Organization of American States, Apr. 30, 1948, 119 U.N.T.S. 3, *as amended by* Protocol of Buenos Aires, Feb. 27, 1967, O.A.S. TREATY SERIES NO. 1-A, 721 U.N.T.S. 324, art. 95(c)(1). Similarly, considering a law requiring students of private elementary schools to pay more for their health care than students in state elementary schools, the Supreme Constitutional Court referred to the rights to education guaranteed by article 26 of the Universal Declaration of Human Rights, article 13 of the ICESCR, and the UNESCO Convention against Discrimination in Education, as well as article 17 of the African Charter. *See* Case no. 40/16/1995/Supreme Constitutional Court (Egypt). The court held that the law in question was unconstitutional because it violated the principle of nondiscrimination embodied in the Egyptian constitution as well as the aforementioned international instruments. *Id.*

case concerning a government employee who complained that the lack of a minimum wage in Egypt violated Article 34 of the Labor Code, which provides for the establishment of a National Council for Wages authorized to determine a minimum wage for the country. Since its establishment in 2003, the Council has failed to set a minimum wage, even though Article 34 expressly required it to do so upon establishment. Indeed, the Council affirmatively decided not to establish a minimum wage. Invoking the court's occasional fealty to international law, the plaintiff also complained that the failure to establish a minimum wage violated various other constitutional provisions, as well as provisions in the UDHR, the ICESCR, and the Arab Charter on Human Rights.²⁸³ He further argued that a minimum wage should not be set arbitrarily, but must guarantee that the worker can maintain a reasonable standard of living, taking inflation into account. The court found in favor of the plaintiff and ordered the state to establish a suitable minimum wage.

In other cases, international law has been used to repeal a rule of domestic law. In a landmark case at the Egyptian Supreme State Security Court,²⁸⁴ the defendants, employees of the national railway system, were accused of going on strike to force the government to meet their financial demands, which led to a disruption in the functioning of the railway and resulted in financial losses. Although Article 124 of the Egyptian Penal Code²⁸⁵ explicitly prohibited employee strikes, the court held that the article contradicted international law, in particular the ICESCR which guarantees the right to strike.²⁸⁶ Ultimately the court repealed Article 124, pursuant to Egypt's obligation to ensure the right to strike under the international covenant. It is significant that the court not only referred to international law to support its holding, but directly applied it and repealed the contradictory national law.

283. The court placed particular reliance on the International Labor Organization Minimum Wage-Fixing Machinery Convention (International Labor Organization Minimum Wage-Fixing Machinery Convention, June 16, 1928, 39 U.N.T.S. 3.), as well as article 7 of the ICESCR, which establishes the state's obligation to *inter alia* provide fair and equal remuneration for work of equal value and to ensure that workers are able to earn a decent living for themselves and their families in accordance with the other provisions set out in the ICESCR. See ICESCR, *supra* note 27, art. 7 ("The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular: (a) Remuneration which provides all workers, as a minimum, with: (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work; (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant; (b) Safe and healthy working conditions; (c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence; (d) Rest, leisure, and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.").

284. Case no. 4190/1986/Supreme State Security Court (Egypt).

285. Law No. 58 of 1937 (Criminal Code of 1937, *reformed in* 1952), art. 124 (Egypt).

286. ICESCR, *supra* note 27, art. 8(d) ("The right to strike, provided that it is exercised in conformity with the laws of the particular country.").

Finally, in another category of cases, international law has been directly applied in the absence of an applicable domestic rule. The general rule is that once an international convention is ratified by the state, it becomes part of the national law, although it may have a supreme status in the legal pyramid. Consequently, judicial references to these international conventions, whether to interpret national laws or to directly apply an international rule in the absence of a national provision, do not require an additional legislative mandate. However, some laws do explicitly stipulate such a mandate. For example, the Syrian law on combating trafficking in persons clearly states that “in all cases where there is no provision in this legislative decree, the relevant substantive rules stipulated in the laws and international conventions in force in Syria shall be observed.”²⁸⁷ 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 in accordance with the Iraqi Law of Personal Status. In the absence of any parallel rule in Christian practice, the court concluded that rules of Islamic Shariah are not applicable to Christian marriages²⁸⁸ and stated that the Iraqi Constitution recognizes the plurality of religions, protecting individuals from any religious compulsion and providing explicitly for the right of religious faith.²⁸⁹ The court applied international law, referring to the CEDAW, especially to Article 16, 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. Additionally, the court also relied on Articles 23 and 24 of the ICCPR, which provide for the equality of men and women. The court characterized a request for a return to the marital home for disobedience as a form of violence against women, an abuse of rights, and a breach of the marriage contract, which is based on love, affection, and respect, according to the court. The significance of this case is that in the absence of a relevant provision in domestic law, the court applied international law directly, filling the gap.

It must be noted, however, that the interpretation of international conventions is sometimes influenced by Islam where it is the official religion of the State²⁹⁰ and Islamic Shariah is the source of legislation.²⁹¹ In an Egypt-

287. Crimes of Trafficking in Persons art. 19 (Law No. 3) (Syria). Unlike the Omani Law on Combating Human Trafficking, which states that “[i]n the absence of a provision in this law, the provisions of the Omani Penal Code or the Criminal Procedures Law shall comply.” Law on Combating Human Trafficking (Royal Decree No. 126/2008), art. 21 (Oman) (official translation).

288. Baghdad Court of Appeals, Rusafa, Case no. 52, 31 May 2009 (Iraq).

289. *See* Articles, 3, 42, 47, Doustour Jounhouriat al-Iraq [The Constitution of the Republic of Iraq] of 2005.

290. *See* CONSTITUTION OF THE PEOPLE’S DEMOCRATIC REPUBLIC OF ALGERIA, 19 Nov. 1976, *as amended* Nov. 28, 1996, art. 2; CONSTITUTION OF THE KINGDOM OF BAHRAIN, Feb. 14, 2002, art. 2; CONSTITUTION OF THE HASHEMITE KINGDOM OF JORDAN, 1 Jan. 1952, art. 2; KUWAITI CONSTITUTION, Nov. 11, 1962, art. 2; CONSTITUTION OF LIBYA (1969), art. 2; CONSTITUTION OF THE REPUBLIC

tian case the Administrative Court found that a law prohibiting any activities of the Bahá'í faith did not violate the right to religion established by Article 18 of the UDHR because those protections extended only to the three divine religions of Islam, Christianity, and Judaism.²⁹²

In a landmark case similarly brought before the Administrative Judicial Court of Egypt, an Egyptian Muslim²⁹³ converted to Christianity, and subsequently sought government recognition of his conversion. The plaintiff attempted to have the personal information on his identification card changed to reflect his Christian name and his new religious beliefs.²⁹⁴ However, the court held that the constitutional guarantee of freedom of religion may be restricted by certain higher interests, especially those related to safeguarding public order and moral values. The court also held that Egypt was an Islamic country and the principle of freedom of religion was only applicable to non-Muslims; therefore, people born Muslims were prohibited from converting to any other religion. Furthermore, the court noted that

OF MALDIVES (1998), art. 7; CONSTITUTION OF MAURITANIA (1991), art. 5; BASIC LAW OF THE SULTANATE OF OMAN [CONSTITUTION], Nov. 6, 1996, art. 2; CONSTITUTION OF QATAR, June 8, 2004, art. 1; BASIC LAW OF SAUDI ARABIA [CONSTITUTION], Mar. 5, 1992, art. 1; CONSTITUTION OF UNITED ARAB EMIRATES, Dec. 2, 1971, *as amended* May 20, 1996, art. 7; CONSTITUTION OF THE REPUBLIC OF YEMEN, Apr. 22, 1990, *as amended* Sept. 29, 1994, art. 3.

291. See Article 2, Doustour Jomhouriat al-Iraq [The Constitution of the Republic of Iraq] of 2005; CONSTITUTION OF THE KINGDOM OF BAHRAIN, Feb. 14, 2002, art. 2; CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept. 1971, *as amended*, May 22, 1980, May 25, 2005, March 26, 2007, art. 2; KUWAITI CONSTITUTION, Nov. 11, 1962, art. 2; BASIC LAW OF THE SULTANATE OF OMAN [CONSTITUTION], Nov. 6, 1996, art. 2; CONSTITUTION OF QATAR, June 8, 2004, art. 1; CONSTITUTION OF THE REPUBLIC OF SUDAN, July 1, 1998, art. 65; CONSTITUTION OF SYRIA, 25 Apr. 1964, *as amended* Mar. 13, 1973, Feb. 27, 2012, art. 3(2); CONSTITUTION OF UNITED ARAB EMIRATES, Dec. 2, 1971, *as amended* May 20, 1996, art. 7; and CONSTITUTION OF THE REPUBLIC OF YEMEN, Apr. 22, 1990, *as amended* Sept. 29, 1994, art. 3.

292. Case no. 16834/2006/Administrative Judicial Court, (Egypt); Case no. 18971/52/2006/Administrative Judicial Court, (Egypt).

293. Case no. 22566/2009/Administrative Court, (Chamber of Economic and Investment Disputes) (Egypt). For a discussion of the case, see George Sadek, *El Gobary v Minister of Interior, Petition, Case no 22566; ILDC 1780 (EG 2009)*, OXFORD REPORTS ON INT'L LAW IN DOMESTIC COURTS (June 13, 2009).

294. The plaintiff converted from Islam to Christianity in 1973 and was baptized by the Egyptian Coptic Orthodox Church in Egypt as well as by the Roman Orthodox Church in Cyprus in 2005. In 2009, the plaintiff submitted an application at the Registry Office at the Ministry of Interior asking to officially change his name from Maher Mohamed El Gohary to Peter Athanasius and his religion from Islam to Christianity on his personal identification card. However, the Office refused his request without providing a reason. The plaintiff argued that Article 18 of the International Covenant on Civil and Political Rights, which Egypt signed in 1967 and ratified in 1982, granted him freedom of religion and belief. Article 18 of the ICCPR requires that Member States provide their citizens with "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." ICCPR, *supra* note 46, art. 18. It also affirms that "no one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice." *Id.* Additionally, the plaintiff argued that Article 48 of the Egyptian Constitution of 1971 provided for freedom of belief by explicitly stating that "the State shall guarantee the freedom of belief and the freedom of practice of religious rites." CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept. 1971, *as amended*, May 22, 1980, May 25, 2005, March 26, 2007, art. 46 "The State shall guarantee the freedom of belief and the freedom of practice of religious rites." Accordingly, the plaintiff contended that the Registry Office denied him the right to freely register his religion. Case no. 22566/2009/Administrative Court, (Chamber of Economic and Investment Disputes).

Egypt had ratified the ICCPR with a reservation, namely that the covenant would be ratified to the extent that it does not conflict with the supreme law of the land, Islamic Shariah.²⁹⁵ According to the court, applying Article 18 of the ICCPR to Muslims who wished to convert to Christianity would contradict Article 2 of the Egyptian Constitution of 1971,²⁹⁶ which states that Islamic Shariah is the primary source of legislation, because Islamic Shariah denies Muslims the right to convert.

Ultimately, in the event of a conflict between ICCPR and Shariah, national courts have held that Islamic Shariah takes precedence. However, conversion from Islam to another religion has been subject to various interpretations, one of which does not sanction mere conversion from Islam to Christianity and limits penalties to cases in which a person's conversion divides the community.²⁹⁷ This interpretation is more consistent with the basic Quranic principle that there is no compulsion to religion.²⁹⁸

These cases are important precedents for how domestic courts may utilize regional and international instruments in disputes over fundamental rights. Significantly, while Article 43 calls for the supremacy of international conventions over the rules of the Charter, reservations made by states to these conventions on the basis of Islamic Shariah should be narrowly interpreted so these reservations do not impede the basic objectives of the conventions' protections. This approach is supported by the Quran itself which calls upon states to fulfill their international obligations.²⁹⁹

D. *Access to International Justice When Domestic Judicial Remedies Fail: A Proposal for an Individual Complaint Mechanism*

Article 52 of the Arab Charter provides for the possibility of one or more optional protocols.³⁰⁰ It is my contention that this provision could open the door for an additional protocol establishing a mechanism for individual petitions concerning violations of the rights and freedoms protected in the Charter. Such petitions would complement the individual complaint sys-

295. See *Status of Treaties, International Covenant on Civil and Politic Rights (Egypt)*, U.N. TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en. See generally Nathan J. Brown, *The Supreme Constitutional Court of Egypt on Islamic Law, Veiling and Civil Rights: An Annotated Translation of Supreme Constitutional Court of Egypt Case No. 8 of Judicial Year 17 (May 18, 1996)*, 21 AM. U. L. REV. 437 (2006).

296. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept. 1971, *as amended*, May 22, 1980, May 25, 2005, March 26, 2007, art. 2 ("Islam is the religion of the state and Arabic its official language. Principles of Islamic law (Shari'a) are the principal source of legislation.").

297. Cherif Bassiouni, *Leaving Islam is not a Capital Crime*, CHICAGO TRIBUNE, Apr. 2, 2006, http://articles.chicagotribune.com/2006-04-02/news/0604020336_1_islam-death-penalty-prophet-muhammad.

298. THE HOLY QUR'AN, translated by Yusuf Ali, 2:256.

299. THE HOLY QUR'AN, translated by Yusuf Ali, 5:1 ("O ye who believe! fulfil (all) obligations.").

300. Arab Charter, *supra* note 1, art. 52 ("Any State party may propose additional optional protocols to the present Charter and they shall be adopted in accordance with the procedures used for the adoption of amendments to the Charter.").

tems that are recognized under a number of international treaties.³⁰¹ This enforcement mechanism would offer a vehicle through which individuals who might otherwise not be able to seek redress could bring a complaint.

The individual complaint mechanism for enforcement of the ICCPR illustrates how this might operate. Within the League of Arab States, only five out of the 17 member states that are party to the ICCPR³⁰² have signed its First Optional Protocol,³⁰³ which establishes a mechanism for individuals to lodge complaints regarding violations of the Covenant.³⁰⁴ Of the five states, Libya and Algeria have produced the most jurisprudence.³⁰⁵

Several complaints submitted against Libya have involved allegations of torture, forced disappearances, unlawful arrest, arbitrary detention, and restrictions on freedom of movement, which are common practices in a dictatorship.³⁰⁶ The views of the Committee in relation to complaints brought against Libya reveal a pattern of claims involving some element of persecution by the state.

The individual complaint mechanism is designed to complement and strengthen the domestic enforceability of international human rights obligations.³⁰⁷ In this regard, individuals are obliged to exhaust all domestic remedies before an individual communication with the UN Human Rights Committee is admissible.³⁰⁸ However, in states where domestic judicial mechanisms are deemed ineffective, the Committee may be willing to infer that domestic remedies have indeed been exhausted. For example, a com-

301. For a discussion of the individual complaint mechanism under the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, see Mohamed Y. Mattar, *Access to International Criminal Justice for Victims of Violence Against Women Under International Family Law*, 23 EMORY INT'L L. REV. 141 (2009).

302. Oman, Qatar, Saudi Arabia, the United Arab Emirates (and Palestine, which cannot accede to international conventions but is a member of the League of Arab States) are not party to the ICCPR. Status of ICCPR, *supra* note 224.

303. Those states that have also acceded to the Optional Protocol are Libya (May 16, 1989), Algeria (September 12, 1989), Somalia (January 24 1990), Djibouti (November 5, 2002), and Tunisia (June 29, 2011).

304. First Optional Protocol to the International Covenant on Civil and Political Rights art. 1, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 302 (entered into force Mar. 23, 1976) [hereinafter *Optional Protocol to the ICCPR*] (“A State Party . . . recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant.”)

305. Algeria has had twelve complaints against it since it ratified the Optional Protocol in 1989, although only ten of these are available online. The Human Rights Committee has issued nine views on complaints submitted against Libya since ratification in 1989.

306. *See, e.g.*, U.N. Human Rights Comm., Commc'n No. 1640/2007, 99th Sess, July 12-30, 2010, U.N. Doc CCPR/C/99/D/1640/2007 (Sep. 14, 2010).

307. *See, e.g.*, Mohamed Y. Mattar, *Comparative Models of Reporting Mechanisms on the Status of Trafficking in Human Beings*, 41 VAND. J. TRANSNAT'L L. 1355 (2008).

308. *See* Optional Protocol to the ICCPR, *supra* note 303, art. 2 (“Subject to the provisions in article 1, individuals who claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the Committee for consideration.”).

U.N. Human Rights Comm., Commc'n No. 1295/2004, 90th Sess, July 9-27, 2007, U.N. Doc CCPR/C/90/D/1295/2004, ¶ 3.1 (Aug. 29, 2007).

munication submitted to the Committee alleged that domestic remedies could not be exhausted because Libya did not offer any effective remedies for human rights violations involving political opponents. The petitioner alleged that his family feared reprisal from the police should they attempt to pursue a claim in the Libyan courts.³⁰⁹ The Committee found itself able to consider the complaint.³¹⁰

A complaint brought against Algeria in the context of forced disappearances was also deemed admissible, despite the complainant's failure to exhaust domestic remedies, because of the lack of investigation or trial at the national level and the length of time it would take to pursue the case through the national courts.³¹¹ The Committee further noted that the state party's offer of civil damages was not an adequate alternative to the enforcement of its obligation to prosecute and punish violations of the ICCPR.³¹²

These complaints reflect the status of human rights in the Arab world prior to the Arab Spring, when state violations of human rights were widespread, domestic remedies were lacking, and the voices of victims were rarely heard.³¹³ It is in this context that the lack of a complaint mechanism

309. *Id.*

310. *Id.* ¶ 5.2.

311. U.N. Human Rights Comm., Comm'n No. 1588/2007, 99th Sess., July 12–30, 2010, U.N. Doc CCPR/C/99/D/1588/2007, ¶ 8.3 (Sep. 16, 2010).

312. *Id.*

313. For example, according to the U.S. Department of State, in Egypt prior to the revolution, [t]he government limited citizens' right to change their government and extended a state of emergency that has been in place almost continuously since 1967. Security forces used unwarranted lethal force and tortured and abused prisoners and detainees, in most cases with impunity. Prison and detention center conditions were poor. Security forces arbitrarily arrested and detained individuals, in some cases for political purposes, and kept them in prolonged pretrial detention. The executive branch exercised control over and pressured the judiciary. The government partially restricted freedom of expression. The government's respect for freedoms of assembly, association, and religion was poor, and nongovernmental organizations (NGOs) continued to face restrictions.

U.S. DEP'T OF STATE, 2010 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: EGYPT 1 (2011). In Tunisia,

[d]uring the year there were significant limitations on citizens' right to change their government. There were reports of at least one arbitrary or unlawful killing. Local and international nongovernmental organizations (NGOs) reported that security forces tortured and physically abused prisoners and detainees and arbitrarily arrested and detained individuals. Security forces acted with impunity, sanctioned by high-ranking officials. There were also reports of lengthy pretrial and incommunicado detention. Severe government-imposed restrictions on freedoms of speech, press, and association worsened in the period leading to and following the October 2009 elections. The government remained intolerant of public criticism, and there were widespread reports it used intimidation, criminal investigations, the judicial system, arbitrary arrests, residential restrictions, and travel controls to discourage criticism. Corruption among government officials was a problem.

U.S. DEP'T OF STATE, 2010 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: TUNISIA 2 (2011). In Libya,

[c]itizens did not have the right to change their government. Continuing problems included reported disappearances, torture, arbitrary arrest and imprisonment, lengthy pretrial and sometimes incommunicado detention, official impunity, and poor prison conditions. Denial of fair public trial by an independent judiciary, detention and imprisonment of persons on political grounds, and the lack of judicial recourse for alleged human rights violations were

within the Charter is particularly significant. While the Charter provides an oversight mechanism in the form of the Arab Human Rights Committee, this Committee has limited functions.³¹⁴ The Committee has the authority to issue “comments,” “recommendations,” and “concluding observations”³¹⁵ but these do not have a binding effect.³¹⁶ The Committee does not have jurisdiction to receive individual complaints regarding human rights violations committed by the states, in contrast to the regimes provided by the African Charter³¹⁷ and the American Convention.³¹⁸ These cases also indicate a need for a regional complaints mechanism that would be accessible to individuals whose rights are violated by the state, and who are not granted a remedy, once such persons have exhausted all domestic judicial venues, or where no such venues are accessible. Drawing on the precedents of the ICCPR’s First Optional Protocol, particularly with regards to Arab countries, a regional complaint mechanism would be a valuable means of ensuring domestic enforcement of rights provided by the

also serious problems. The government significantly restricted media freedom and continued to restrict freedom of speech (including Internet and academic freedom). It continued to severely impede the freedom of assembly, freedom of association, and civil liberties. The government did not protect the rights of migrants, asylum seekers, and refugees, and in some cases participated in their abuse. Other problems included restrictions on freedom of religion; corruption and lack of transparency; discrimination against women, ethnic minorities, and foreign workers; trafficking in persons; and restriction of labor rights.

U.S. DEP’T OF STATE, 2010 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: LIBYA 1 (2011).

314. See generally Rizgen Kadir and Heve Hassan, *The Monitoring Body of the Arab Charter on Human Rights: A Critical and Comparative Study*, 35 KUWAIT U. J.L. 399 (2011). For a recent discussion of the functions of the Committee, see Mohammed Al-Midani, *Human Rights in the League of Arab States*, 3 HUM. RTS. J. 109 (2012).

315. Arab Charter, *supra* note 1, art. 48.

316. Article 48 describes the reporting functions of the committee as:

1. The States parties undertake to submit reports to the Secretary-General of the League of Arab States on the measures they have taken to give effect to the rights and freedoms recognized in this Charter and on the progress made towards the enjoyment thereof. The Secretary-General shall transmit these reports to the Committee for its consideration. 2. Each State party shall submit an initial report to the Committee within one year from the date on which the Charter enters into force and a periodic report every three years thereafter. The Committee may request the States parties to supply it with additional information relating to the implementation of the Charter. 3. The Committee shall consider the reports submitted by the States parties under paragraph 2 of this article in the presence of the representative of the State party whose report is being considered. 4. The Committee shall discuss the report, comment thereon and make the necessary recommendations in accordance with the aims of the Charter. 5. The Committee shall submit an annual report containing its comments and recommendations to the Council of the League, through the intermediary of the Secretary-General. 6. The Committee’s reports, concluding observations and recommendations shall be public documents which the Committee shall disseminate widely.

Id. See also Al-Midani, *supra* note 8.

317. African Charter, *supra* note 25, art. 41 (“The Secretary-General of the Organization of African Unity shall appoint the Secretary of the Commission. He shall also provide the staff and services necessary for the effective discharge of the duties of the Commission. The Organization of African Unity shall bear the costs of the staff and services.”).

318. American Convention, *supra* note 46, art. 44 (“Any person or group of persons, or any non-governmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party.”).

Charter. I thus advocate the creation of an individual complaints mechanism under the Arab Charter to fill this gap.

CONCLUSION

As a result of the Arab Spring, positive changes in citizens' rights and freedoms are being seen across the Arab region. In Tunisia, the transitional government lifted the ban on access to information, allowing Tunisians freer access to the internet.³¹⁹ In 2011, Tunisians voted for a new assembly and interim government in the country's first free election after the overthrow of Zine el-Abidine Ben Ali.³²⁰ Egypt also voted in its first free election, and a member of the Muslim Brotherhood was elected President.³²¹ King Abdullah of Saudi Arabia has announced plans for women to be permitted to vote and run in municipal elections and to be eligible for appointment to the Shura Council.³²² For the first time in its history, the Kingdom sent women to compete in the Olympic Games.³²³ In July 2012, Libya's first free elections after the fall of Gadhafi resulted in women winning 16.5 percent of party seats in the General National Congress, a marked shift from the past.³²⁴ The successful election of these 33 Libyan women is in part due to the newly instituted "zipper system" wherein parties must alternate their candidate lists between male and female contenders, which led to an astounding 545 women running for office out of 1,206 candidates from political parties overall.³²⁵ All of these changes are very encouraging.

In the meantime, there have also been setbacks. The quota system in Egypt, whereby 64 parliamentary seats were reserved for women in the next national elections,³²⁶ has been repealed.³²⁷ The raids on both domestic and international civil society organizations in Egypt do not reflect a new

319. FREEDOM HOUSE, Tunisia: Freedom on the Net 2012, available at <http://www.freedomhouse.org/report/freedom-net/2012/tunisia>.

320. See *Tunisia Votes in Historic Free Election*, BBC NEWS, Oct. 23, 2011, <http://www.bbc.co.uk/news/world-africa-15416702>; Bouazza Ben Bouazza, *Tunisian Islamist Leader Re-Elected as Party Head*, ASSOCIATED PRESS, July 17, 2012, (<http://bigstory.ap.org/article/tunisian-islamist-leader-re-elected-party-head>).

321. *Egyptians Vote in Landmark Presidential Election*, BBC NEWS, May 23, 2012, <http://www.bbc.co.uk/news/world-middle-east-18167224>.

322. *Women in Saudi Arabia to Vote and Run in Elections*, BBC NEWS, Sept. 25, 2011, <http://www.bbc.co.uk/news/world-us-canada-15052030>.

323. *London 2012 Olympics: Saudi Arabian Women to Compete*, BBC NEWS, July 12, 2012, <http://www.bbc.co.uk/news/world-middle-east-18813543>.

324. Dominique Soguel, *Libya's Elections Give Women a Good Starting Point*, UPI NEWS, July 19, 2012, http://www.upi.com/Top_News/World-News/2012/07/19/Libyas-elections-give-women-a-good-starting-point/WEN-9691342733884/.

325. *Id.*

326. An amendment in June 2009 to Law 38 of 1972 of the People's Assembly (Lower House) reserved 64 seats in the Lower House of the Egyptian Parliament for women. *Egypt Passes Quota Law for Women MPs*, AGENCE FRANCE PRESS, June 15, 2009, <http://www.google.com/hostednews/afp/article/ALeqM5gH8D5VTDPI9EcRonsRacAAIZQGxA>.

policy of government support for NGOs and should not be justified on the grounds that these organizations are receiving foreign funds or interfering with the national affairs of the country.³²⁸

Against this backdrop, the Arab Charter can serve as a valuable regional instrument to ensure progress by Arab states in the area of human rights. The Arab Charter provides that a state party thereto “undertakes to ensure to all individuals subject to its jurisdiction the right to enjoy the rights and freedoms set forth” in the Charter.³²⁹ As previously indicated, the Charter provides that “the states parties undertake to adopt . . . whatever legislative or non-legislative measures that may be necessary to give effect to the rights set forth” in the Charter.³³⁰

In light of the current political, social and legal landscape of the Arab states, and given the gaps in the Arab Charter’s enforcement mechanism, the time is ripe to establish the first Arab Court of Human Rights.³³¹ In fact, the government of Bahrain has submitted to the League of Arab States a proposal to establish an Arab Court for Human Rights,³³² which was well received by the League of Arab States. The League is considering preparing a study on the topic.³³³ The study, in my judgment, should take into consideration the experience of the three regional courts 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 Peoples’ Rights, established in 2002. Lessons from these three established courts show that while an Arab Court of Human Rights must ensure access to justice and provide for effective remedies to the Arab people, it should avoid an excessive case load that may hinder the functioning of the court,³³⁴ must work to guarantee compliance with its judgments,³³⁵ and should ensure allocation of the necessary financial resources for the

327. The quota requirement was eliminated by virtue of amendments to Egyptian electoral law promulgated in 2011 by the Supreme Council of the Egyptian Armed Forces, which took power following the ouster of President Hosni Mubarak. The decree stated: “Taking into consideration the provisions of Article XVI of the Law of the People’s Assembly, the number of candidates of any list must be equal to two thirds of the number of seats designated to the constituency, provided that at least half of them are workers and peasants, with no non-worker or non-peasant candidate follows a candidate other than those. In all cases, the list shall include at least a female candidate.” See Decree Law No. 123 of 2011 (To Amend Provisions of the Law on the People’s Assembly, Law No. 38 of 1972), Sep. 27, 2011, art. 2, ¶ 5, available at http://www.sis.gov.eg/En/LastPage.aspx?Category_ID=1195.

328. See, e.g., *Egypt Unrest: NGO Offices Raided in Cairo*, BBC NEWS, Dec. 29, 2011, <http://www.bbc.co.uk/news/world-middle-east-16357795>; *Egypt to Charge 43 Over NGOs*, CNN, Feb. 6, 2012, <http://www.cnn.com/2012/02/05/world/africa/egypt-ngos/index.html>.

329. Arab Charter, *supra* note 1, art. 3(a).

330. Arab Charter, *supra* note 1, art. 44.

331. For a discussion on an Arab court of human rights, see Al-Midani, *supra* note 8.

332. Memorandum of the Representative of the Kingdom of Bahrain No. 38 (Jan. 15, 2012) (regarding the establishment of an Arab Court of Human Rights).

333. *Id.*

334. See generally Christina G. Hioureas, *Behind the Scenes of Protocol No. 14: Politics in Reforming the European Court of Human Rights*, 24 BERKELEY J. INT’L L. 718 (2006).

335. See generally Shai Dothan, *Judicial Tactics in the European Court of Human Rights*, 12 CHI. J. INT’L L. 115 (2011–2012)

work of the court.³³⁶ 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.

To respond to the human rights demands of the Arab Spring,³³⁷ Arab states should undertake a comprehensive review of domestic legislation taking into account their overall human rights records and obligations. Those states that are not party to the international legal instruments that allow individual legal complaints should consider ratifying them, thus providing their people with an international vehicle for seeking justice and equity. Importantly, to implement the demands generated by the Arab Spring, the Arab Charter should be used to hold Arab states accountable for ensuring the human rights and human dignity of the Arab people, who must be fully educated about their basic rights. Past court decisions in several Arab countries interpreting fundamental rights in accordance with international law are valuable precedents for how this may be done. The Arab Charter calls explicitly upon states to “incorporate the principles of human rights and fundamental freedoms into formal and informal education curricula and education and training programs.”³³⁸ Arab states should allow civil society to function properly and without unnecessary limitations, as the Arab Charter envisions current and future generations living in a civil society “founded on a balance between awareness of rights and respect for obligations, and governed by the values of equality, tolerance and moderation.”³³⁹

In a region where religion greatly affects the daily lives of people, it therefore becomes apparent that the “noble Islamic religion and the other divinely-revealed religions,”³⁴⁰ namely Christianity and Judaism, must be utilized as a tool to promote tolerance, non-discrimination, and acceptance of others. Broad religious precepts support the implementation of human

336. See generally James L. Cavallaro & Stephanie Erin Brewer, *Re-evaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court*, 102 AM. J. INT'L L. 768 (2008).

337. See generally Jordan J. Paust, *International Law, Dignity, Democracy, and the Arab Spring*, Keynote Address at the Cornell International Law Journal Symposium (Apr. 30, 2012) (draft); Lisa Anderson, *Demystifying the Arab Spring: Parsing the Differences Between Tunisia, Egypt, and Libya*, 90 FOREIGN AFF. 2 (2011); Marion Dixon, *An Arab Spring*, 38 REV. AFR. POL. ECON. 309 (2011); Nadine Naber, *Women and the Arab Spring: Human Rights from the Ground Up*, 2 U. MICH. J. 11, (2011); Tobias Schumacher, *The EU and the Arab Spring: Between Spectatorship and Actorness*, 13 INSIGHT TURKEY 107 (2011).

338. Arab Charter, *supra* note 1, art. 41(5).

339. *Id.* art. 1(3).

340. *Id.* pmb.

rights values advanced by the Charter. Prominent texts from all three religions call for justice and equality among all people. The Qur'an instructs believers to "stand out firmly for Allah, as witnesses to fair dealing, and let not the hatred of others to you make you swerve to wrong and depart from justice."³⁴¹ During the Great Pilgrimage, the Prophet further stressed that "[your] God is one and your forefather (Adam) is one. An Arab is not better than a non-Arab and a non-Arab is not better than an Arab, and a red (i.e. white tinged with red) person is not better than a black person and a black person is not better than a red person, except in piety."³⁴² Similarly, the Christian Bible establishes that all people are united in divinity, and asserts that "[there] is neither Jew nor Gentile, neither slave nor free, nor is there male and female, for you are all one in Christ Jesus."³⁴³ The sentiment of non-discrimination appears in the Torah as well, which prescribes, "Do not pervert justice; do not show partiality to the poor or favoritism to the great, but judge your neighbor fairly."³⁴⁴

With these religious values and international law principles in mind, national laws should be reviewed and amended to ensure their compliance with the basic civil, political, economic, social, and cultural rights stipulated in the Charter. National courts should adopt an expansive understanding of the rights and freedoms of the Arab people in light of the Charter, which should be interpreted in accordance with international law. The Arab Charter on Human Rights provides a comprehensive and adequate platform for human rights promotion and protection in the region, provided that its provisions are properly interpreted in light of international standards embodied in international conventions. The preceding sections have argued that such an approach – which reconciles national, regional and international standards to ensure the greatest protection of human rights – is the only means of ensuring the effective implementation of the Charter. This is what Article 43 mandates.

341. THE HOLY QUR'AN, translated by Yusuf Ali, 5:8.

342. The Last Sermon of Muhammad.

343. *Galatians* 3:28.

344. *Leviticus* 19:15.

