

## THE ARAB COURT OF HUMAN RIGHTS: A STUDY IN IMPOTENCE

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Article abstract

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# THE ARAB COURT OF HUMAN RIGHTS : A STUDY IN IMPOTENCE

*Konstantinos Magliveras and Gino Naldi\**

An Arab human rights system remains relatively underdeveloped to this day. On September 7th 2014, the League of Arab States approved the *Statute of the Arab Court of Human Rights* (ACtHR) finalizing a twenty-year process to put in place a human rights mechanism resembling those operating in other regions such as Europe and the Americas. The focus of this article is on the *Statute*, but in view of the fact that the ACtHR's jurisdiction is fundamentally limited to interstate cases concerning the application and interpretation of the *Arab Charter on Human Rights of 2004* (2004 Charter), the 2004 Charter, revising the defunct *Arab Charter on Human Rights of 1994*, is briefly examined and, while progressive in parts, it is found to be imperfect in many ways. The mandate of the Arab Human Rights Committee established thereunder is looked into but its role is found to be extremely limited. The article proceeds to analyze the salient features of the *Statute*, which was concluded independently of the 2004 Charter, and makes comparisons with the other regional systems. The *Statute* is considered flawed because it confers limited powers on the ACtHR; foremost, its competence is restricted to interstate cases only, individuals have no rights of access. Taking the omission of certain judicial functions into consideration the conclusion is that the ACtHR as conceived by the *Statute* is unlikely to prove a forceful guardian of human rights in a troubled region.

À ce jour, le projet d'un système arabe de protection des droits humains demeure relativement sous-développé. Le 7 septembre 2014, la Ligue des États arabes a approuvé le *Statut de la Cour arabe des droits de l'homme* (la Cour), concluant un processus de vingt ans visant à mettre en place un mécanisme de protection des droits humains ressemblant à ceux opérant dans d'autres régions, telles que l'Europe et les Amériques. Bien que l'accent soit mis sur le *Statut* dans cet article, considérant que la juridiction de la Cour est essentiellement limitée aux cas internationaux concernant une mise en œuvre et une interprétation de la *Charte arabe des droits de l'homme* (*Charte de 2004*), la *Charte de 2004*, révisant la défunte *Charte arabe des droits de l'homme de 1994*, est brièvement analysée, et, malgré qu'elle soit en partie progressiste, il est conclu qu'elle souffre de plusieurs imperfections. Le mandat du Comité arabe des droits de l'homme est également considéré, mais son rôle s'avère extrêmement limité. Cet article analyse les principales caractéristiques du *Statut*, qui fut adopté de façon indépendante à la *Charte de 2004*, et accomplit des comparaisons avec les autres systèmes régionaux. Le *Statut* est considéré contenir des failles, puisqu'il confère des pouvoirs limités à la Cour ; en premier lieu, sa compétence est restreinte aux cas inter-étatiques seulement, les individus n'ayant aucun droit d'accès. Prenant en considération l'omission de certaines fonctions judiciaires, la conclusion est que la Cour telle que conçue par le *Statut* a peu de chances de constituer un gardien énergétique des droits humains dans le contexte d'une région troublée.

Un sistema de derechos humanos árabe permanece relativamente sin explotar hasta este día. El 7 de septiembre de 2014, la Liga de Estados árabes aprobó el *Estatuto del Tribunal árabe de derechos humanos* (ACtHR) el último un proceso de veinte años para poner en el lugar un mecanismo de derechos humanos que se parece a aquellos funcionando en otras regiones como Europa y las Américas. El foco de este artículo está sobre el Estatuto, pero en vista del hecho que la jurisdicción del ACTHR fundamentalmente es limitada con casos entre estados que conciernen el uso y la interpretación de la *Carta árabe sobre los derechos humanos de 2004* (la *Carta de 2004*), la *Carta 2004*, revisando la Carta árabe anterior sobre los Derechos humanos de 1994, brevemente es examinada y, mientras es progresivo en partes, es encontrado imperfecto en mucho. El mandato del Comité de Derechos humanos árabe estableció debajo es examinado pero su papel es encontrado para ser sumamente limitado. El artículo analiza los rasgos salientes del Estatuto, que fue concluido independientemente de la *Carta 2004*, y hace comparaciones con otros sistemas

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regionales. El *Estatuto* es considerado dañino porque confiere poderes limitados sobre el ACTHR; principalmente, su competencia es restringida a casos entre sólo estados, los individuos no tienen ningunos derechos de acceso. Tomando la omisión de ciertas funciones judiciales en la consideración la conclusión es que el ACTHR concebido según el Estatuto improbablemente se demuestra como un guarda poderoso de derechos humanos en una región preocupada.

On September 7th 2014, the Member States of the League of Arab States, or Arab League (LAS),<sup>1</sup> approved the *Statute of the Arab Court of Human Rights* (*Statute*), making provision for the establishment of a new regional human rights mechanism.<sup>2</sup> With the Arab human rights system in its infancy, the *Statute* addresses a significant lacuna in the indigenous protection of human rights and in theory could constitute an important step in securing such rights. However, it is true that its worth can only be measured if the Arab Court of Human Rights (ACtHR) is capable of making, or makes, a significant and real contribution to securing the rights of the citizens of the LAS Member States.

The parent body, the LAS, is a regional, intergovernmental organization founded in 1945, with its headquarters in Cairo (Egypt), membership of which is open to independent Arab states.<sup>3</sup> The *LAS Charter* is the organization's constituent instrument, defining its structure and functions. To the modern eye the *LAS Charter* appears rather simplistic in form; its paramount objectives are centered on the strengthening of inter-state relations, upholding the sovereignty and independence of its Member States and enhancing co-operation in economic and financial affairs, and the communications, social, health and cultural fields.<sup>4</sup> The realization of self-determination also appears to have been a motivating force.<sup>5</sup> Nowhere in the *LAS Charter* is any explicit reference made to human rights. It may be unrealistic to have expected much in this regard at the time, given that Arab governments have traditionally maintained a marked reluctance to pay heed to these values but rather adhere to sovereignty-based conceptions of international law.<sup>6</sup> In fact, many of its Member States do not adhere to the values of liberal representative and pluralist democracy to this day.<sup>7</sup> However, the LAS subsequently adopted a human rights

<sup>1</sup> *Charter of the League of Arab States*, 22 March 1945, 70 UNTS 237 (entered into force 11 May 1945) [*LAS Charter*]. See Boutros Boutros-Ghali, "La Ligue des États arabes" (1972) 137 *Collected Courses of Hague Academy of International Law* 1 (Brill Online); Philippe Sands & Pierre Klein, *Bowett's Law of International Institutions*, 6th ed (London: Sweet & Maxwell, 2009) at 241-244; Mervat Rishmawi, *The League of Arab States, Human Rights Standards and Mechanisms*, (Open Society and Cairo Institute for Human Rights Studies, 2015), online: <[www.cihrs.org/wp-content/uploads/2015/12/league-arab-states-manual-en-20151125.pdf](http://www.cihrs.org/wp-content/uploads/2015/12/league-arab-states-manual-en-20151125.pdf)>

[Rishmawi, *The League of Arab States*]

<sup>2</sup> *The Statute of the Arab Court of Justice*, LAS Res 7790, Ministerial Council, 142<sup>nd</sup> Regular Sess, E.A (142) C 3, (2014) [*Statute*]. For English and French translations, online: <[www.acihl.org](http://www.acihl.org)>.

<sup>3</sup> *LAS Charter*, *supra* note 1 at art I. The current membership of the LAS is twenty-two, including Palestine, admitted in 1976. Most of the Member States are from the MENA (Middle East and North Africa) region but the membership stretches to Comoros, Djibouti and Somalia. In 2011 Syria's membership was suspended due to government repression.

<sup>4</sup> *LAS Charter*, *supra* note 1 at art II.

<sup>5</sup> *Ibid*, annexes; Istvan Pogany, "Arab Attitudes Toward International Human Rights Law" (1987) 2 *Conn J Int'l L* 367 at 369-370.

<sup>6</sup> Rishmawi, *The League of Arab States*, *supra* note 1 at 73; Bahey El Din Hassan, "Regional Protection of Human Rights the Arab States In Statu Nascendi" in Janusz Symonides, ed, *Human Rights: International Protection, Monitoring, Enforcement* (Aldershot & Paris: Ashgate & UNESCO Publishing, 2003) at 241. However, a revised charter finalized in 1982 did make mention of human rights but it failed to be adopted, see Sadok Chaabanne, "La Réforme du Pacte de la Ligue des États Arabes" (1982) 86 *RGDIP* 508 at 516. The same happened in 2015, see Rishmawi, *supra* note 1 at 15.

<sup>7</sup> United Kingdom, Foreign & Commonwealth Office, *Human Rights and Democracy: The 2015 Foreign & Commonwealth Office Report* (2016), online: <[www.gov.uk](http://www.gov.uk)>. According to this Report

policy as one of the areas of co-operation among the membership<sup>8</sup> which led in 1968 to the establishment of the Permanent Arab Commission on Human Rights (Permanent Commission), a largely consultative body, rather than a monitoring one.<sup>9</sup> It was only in the 1990s that the LAS earnestly began to pursue a human rights-based path, culminating in the signing of the *Arab Charter on Human Rights (1994 Charter)*.<sup>10</sup> The 1994 Charter never entered into force and was replaced ten years later by a revised *Arab Charter on Human Rights (2004 Charter)*, which became operative in 2008.<sup>11</sup>

A notable feature of the 2004 Charter is the lack of a judicial supervisory organ taking the form of a regional human rights court. Instead, it makes provision for an Arab Human Rights Committee mandated to examine and comment upon state reports detailing the domestic measures taken to implement the rights and freedoms recognized in the 2004 Charter.

During 2012, the project for an Arab human rights court became a priority for the LAS, largely as the result of two developments. First, increased calls for better protection of fundamental freedoms and democratic norms advanced during the popular uprisings in the Arab world, collectively known as the “Arab Spring”.<sup>12</sup> Secondly, proposals for modernizing the LAS so that it was better equipped to address contemporary challenges. Moving relatively swiftly, a draft statute for an Arab court of human rights was prepared and approved in 2014. Despite attracting considerable criticism,<sup>13</sup> the existence of a judicial body, however imperfect, seems, at least in theory, preferable than none at all. At the same time, it should be noted that Arab states do not have much experience of regional courts: since the 1950s, the LAS has attempted unsuccessfully to establish an Arab court of justice as its judicial organ.<sup>14</sup>

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serious human rights concerns were expressed about the following LAS Member States: Iran, Iraq, Saudi Arabia, Somalia, Sudan, Syria and Yemen.

<sup>8</sup> Hassan, *supra* note 6 at 241–43; Boutros Boutros-Ghali, “La Ligue des Etats arabes” in Karel Vasak, ed, *Les dimensions internationales des droits de l’homme* (Paris: UNESCO, 1978) at 634.

<sup>9</sup> *Permanent Arab Commission on Human Rights*, LAS Res 2443, Ministerial Council, 50<sup>th</sup> Regular Sess, (1968). See Rishmawi, *The League of Arab States*, *supra* note 1 at 27–29; AH Robertson & JG Merrills, *Human Rights in the World*, 4th ed (Manchester: Manchester University Press, 1996) at 240–42.

<sup>10</sup> *Arab Charter on Human Rights*, LAS Res 5437, Ministerial Council, 102nd Regular Sess, (1994) [1994 Charter]. For English translation see (1997) 18 Hum Rts LJ 151; for French translation see (1995) 7 RUDH 212. The Permanent Commission was responsible for drafting the 1994 Charter.

<sup>11</sup> 2004 *Arab Charter on Human Rights*, LAS Summit, 16<sup>th</sup> Ordinary Sess, 22 May 2004 (entered into force 15 March 2008) [2004 Charter]. For English translation see Mohammed Amin Al-Midani & Mathilde Cabanettes, “Arab Charter on Human Rights 2004” (2006) 24 BU Int’l LJ 149. See generally Salem Alshehr, “An Arab Court of Human Rights: The Dream Desired” (2016) 30 Arab LQ 34; Mervat Rishmawi, “The Arab Charter on Human Rights and the Arab League of States: An Update” (2010) 10 Hum Rts L Rev 169[Rishmawi, *The Arab Charter on Human Rights*].

<sup>12</sup> Rishmawi, *The League of Arab States*, *supra* note 1 at 14–15; Jordan Paust, “International Law, Dignity, Democracy, and the Arab Spring” (2013) 46 Cornell Int’l LJ 1.

<sup>13</sup> See International Commission of Jurists, *The Arab Court of Human Rights: A Flawed Statute for an Ineffective Court* (2015), online: <[www.icj.org/arab-court-of-human-rights-comprehensive-amendments-required-before-ratification-new-report/](http://www.icj.org/arab-court-of-human-rights-comprehensive-amendments-required-before-ratification-new-report/)>[International Commission of Jurists].

<sup>14</sup> Rishmawi, *The League of Arab States*, *supra* note 1 at 53.

The focus of this article is a critical assessment of the ACtHR, its structure, composition and competences, and the salient features and flaws of its *Statute*, deliberated in Section III. This article highlights the fact that a number of important jurisdictional and procedural issues are absent from the *Statute*. Arguably the most significant of these is the fact that no provision is made for a right of individual petition, the jurisdiction of the ACtHR being limited to interstate cases, an extraordinary state of affairs for a human rights court. The extent to which the ACtHR can act as an effective guarantor of human rights is a key consideration. Where pertinent, comparisons with other regional human rights treaties and courts will be made, thereby drawing attention to the *Statute*'s limitations. The fact that the ACtHR has the capacity to apply and interpret the 2004 *Charter* justifies a brief consideration of the 2004 *Charter* which is provided in Section I. However, the specific rights included in the 2004 *Charter* are similar to those contained in comparable documents, especially the *African Charter on Human and Peoples' Rights (African Charter)*,<sup>15</sup> these have been subjected to repeated and detailed analysis elsewhere and hence there is no need to rehearse those arguments here which in any case are beyond the scope of this article. As the sole supervisory body prior to the creation of the ACtHR, the Arab Human Rights Committee is examined in Section II. Its role is also a limited one. This article therefore reaches the conclusion that the Arab human rights system is feeble and ineffectual.

## I. *The Arab Charter on Human Rights - A Brief Overview*

Given that the ACtHR's formal role is to apply and interpret the 2004 *Charter*, it seems appropriate to give a brief account of the salient features of this instrument. The initial attempt by the LAS at a human rights treaty, the 1994 *Charter*, never attracted the support necessary to enter into force. It was considered fundamentally flawed as it contained provisions incompatible with basic standards of international human rights law, lacking safeguards or effective measures of implementation.<sup>16</sup> In particular, it contained a general limitation clause effectively allowing for the negation of the enjoyment of the *Charter*'s rights and freedoms.<sup>17</sup> The 1994 *Charter* was accordingly described as "a dead letter" and "meaningless".<sup>18</sup>

The 1994 *Charter* was replaced by a revised treaty which was adopted by the 16th Ordinary LAS Summit at Tunis on 22 May 2004.<sup>19</sup> The 2004 *Charter* entered into force in 2008 once it had been ratified by seven LAS Member States.<sup>20</sup> Despite the fact that the 2004 *Charter* has its imperfections, it nevertheless constitutes a major

<sup>15</sup> *African Charter on Human and Peoples' Rights*, 17 June 1981, 1520 UNTS 217 (entered into force 21 October 1986)[*African Charter*].

<sup>16</sup> Hassan, *supra* note 6 at 246-247.

<sup>17</sup> 1994 *Charter*, *supra* note 10 at art 4(a).

<sup>18</sup> Hassan, *supra* note 6 at 246.

<sup>19</sup> See Leila Zerrougui, "The Arab Charter on Human Rights" (2011) 7 *Essex Hum Rts Rev* 7.

<sup>20</sup> By December 2016, it had been ratified by seventeen states.

improvement on the 1994 *Charter* and contains some novel provisions.<sup>21</sup>

The 2004 *Charter* joins the ranks of those regional instruments that contain in a single binding legal document all three categories of human rights, civil and political rights, economic, social and cultural rights and third generation or peoples' rights.<sup>22</sup> It thus reflects in part the position adopted by the *Universal Declaration on Human Rights (UDHR)*<sup>23</sup> and the *Vienna Declaration* which call for parity between the different generations of rights.<sup>24</sup> But neither should it be overlooked that the 2004 *Charter* is also inspired by the Islamic philosophy of rights which is 'theocentric' and places greater emphasis on the nexus between the individual and the wider community. Thus, it focuses more on the collective, rather than the perceived unbridled individualism-cum-licence of the Western classical theory of human rights.<sup>25</sup> While the 2004 *Charter* situates international human rights within the established cultural, societal and religious context, responsive to Arab needs and values, it is encouraging to observe that it asserts in the Preamble the principles of, *inter alia*, the *UDHR* and other international human rights treaties and proclaims as an essential element of human rights "the principle that human rights are universal, indivisible, interdependent and interrelated" (article 1(4)).<sup>26</sup> Moreover, a safeguard clause can be found in article 43 of the 2004 *Charter*<sup>27</sup> to the effect that the *Charter* may not be manipulated so as to weaken national or international standards. Nowhere does the 2004 *Charter* assert explicitly the primacy of Islamic Sharia (religious law, divinely authoritative) if in conflict with contemporary human rights standards;<sup>28</sup> only in the context of positive discrimination in favour of women.<sup>29</sup> No doubt, the Islamic

<sup>21</sup> ParoulaNaskou-Perraki, "The Arab Charter on Human Rights: A New Start for the Protection of Human Rights in the Arab World" (2009) 62 RHDI 117; Mervat Rishmawi, "The Revised Arab Charter on Human Rights: A Step Forward?" (2005) 5:2 Hum Rts L Rev 361; Florence Mulet-Wady, "La Charte arabe des droits de l'homme de 2004: une avancée dans la mise en place d'un système arabe de protection des droits de l'homme?" in Andre S Dizdarevic & Roger Koussetogue Koudé, eds, *Les droits de l'homme défis et mutations: actes des travaux marquant le XXVe anniversaire de l'IDHL* (Paris: L'Harmattan, 2013) at 115.

<sup>22</sup> The African Charter is a leading example of such a treaty. See *African Charter*, *supra* note 15.

<sup>23</sup> *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3<sup>rd</sup> Sess, Supp No 13, UN Doc A/810 (1948) 71.

<sup>24</sup> *Vienna Declaration and Programme of Action*, UN Doc A/CONF/157/23, (1993) 32 ILM 1663[*Vienna Declaration*].

<sup>25</sup> Hassan, *supra* note 6 at 240; Rishmawi, *The League of Arab States*, *supra* note 1 at 73-74; Michele Mangini, "From Transcultural Rights to Transcultural Virtues: Between Western and Islamic Ethics" (2016) 9:1 Eur J Leg Stud 250 at 262-263.

<sup>26</sup> *Vienna Declaration*, *supra* note 24 at Part I, para 5.

<sup>27</sup> 2004 *Charter*, *supra* note 11 at art 43.

<sup>28</sup> On these tensions see, Abdullah Ahmed An-Na'im, "Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives - A Preliminary Inquiry" (1990) 3 Harv Hum Rts J 13. Note the "Cairo Declaration on Human Rights in Islam" in *United Nations, Human Rights: A Compilation of International Instruments, vol II: Regional Instruments* (New York & Geneva: United Nations, 1997) at 477, art 24, a hortatory document adopted by the Organization of the Islamic Conference, now Organization of Islamic Cooperation, which subjects all rights and freedoms contained therein to Islamic Sharia [Cairo Declaration]. See Mangini, *supra* note 25 at 265-267. The 2004 *Charter's* preamble does make reference to the Islamic faith and the Cairo Declaration.

<sup>29</sup> 2004 *Charter*, *supra* note 11 at art 3(3). The International Commission of Jurists is of the view that this provision could undermine women's rights, see *supra* note 13 at 19.

philosophies of law and religion will exert considerable influence in how the 2004 *Charter* is perceived and interpreted.<sup>30</sup>

The 2004 *Charter* allows for derogation in “exceptional cases of emergency” and must be strictly required by the necessity of the circumstances.<sup>31</sup> Measures of derogation must be consistent with the other obligations of States Parties under international law and must also be non-discriminatory.<sup>32</sup> Derogation from certain rights is prohibited and judicial guarantees for their protection cannot be suspended.<sup>33</sup> This provision, which seems to be more stringent than global standards,<sup>34</sup> is a considerable improvement upon the corresponding provision in the 1994 *Charter* which demonstrably failed to do so.<sup>35</sup>

Problematic is the fact that the 2004 *Charter* contains many instances where the rights and freedoms are expressed in general and opaque terms and the substantive content is unenumerated. Too many rights and freedoms are subject to limitations and the dictates of national law.<sup>36</sup> The denunciation of Zionism, initially expressed in the 1994 *Charter*, may seem unfortunate and outdated but can be explained as a political imperative while the Palestinian question remains unresolved.<sup>37</sup> In fact, for many years Arab states have used the human rights discourse not so much to advance the cause of fundamental freedoms in the region but to condemn Israel for its treatment of the Palestinians.<sup>38</sup>

Nevertheless, the 2004 *Charter* is to be commended for taking account of the evolution of international human rights law so that protection is extended to vulnerable groups such as migrant workers, minorities and persons with disabilities.<sup>39</sup> There is no mention as such of the aged<sup>40</sup> or indigenous peoples, but bringing the latter within its scope is not an insurmountable problem.<sup>41</sup> The 2004 *Charter* does not

<sup>30</sup> Bassam Tibi, “The European Tradition of Human Rights and the Culture of Islam” in Abdullah Ahmed An-Na'im & Francis M. Deng, eds, *Human Rights in Africa: Cross-Cultural Perspectives* (Washington DC: Brookings Institution, 1990) at 104; Ann Elizabeth Mayer, “Current Muslim Thinking on Human Rights” in *ibid* at 129; Yougindra Khushalani, “Human Rights in Asia and Africa” (1983) 4 Hum Rts LJ 403 at 408-413. While human diversity may sometimes necessitate that rights be interpreted and applied in a culturally sensitive way that permits “justifiable modifications”, see *Vienna Declaration*, *supra* note 24 at Part I, para 5.

<sup>31</sup> *Vienna Declaration*, *supra* note 24 at art 4(1).

<sup>32</sup> *Ibid*.

<sup>33</sup> *Ibid* at art 4(2).

<sup>34</sup> Zerrougui, *supra* note 19 at 13.

<sup>35</sup> Hassan, *supra* note 6 at 246.

<sup>36</sup> Rishmawi, *The Arab Charter on Human Rights*, *supra* note 12 at 171.

<sup>37</sup> In 1991 the UN General Assembly, in Resolution 46/86, revoked its earlier condemnation of Zionism as a form of racism and racial discrimination.

<sup>38</sup> See Kathleen Cavanaugh, “Narrating Law” in Anver M Emon, Mark S Ellis & Benjamin Glahn, eds, *Islamic Law and International Human Rights Law: Searching for Common Ground?* (Oxford: Oxford University Press, 2012) at 47.

<sup>39</sup> For instance, see 2004 *Charter*, *supra* note 11 at arts 14, 25, 34(5), 40.

<sup>40</sup> The Organization of American States has been the first body to adopt a treaty embodying the rights of the elderly. See *Inter-American Convention on Protecting the Human Rights of Older Persons*, 15 June 2015, OASTS A-70.

<sup>41</sup> This has been achieved in the context of the *American Convention on Human Rights*, 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978) [ACHR]. See e.g. *The Mayagna (Sumo) Awas*



list in great detail the rights of women and children so it is constructive that the safeguard clause in its article 43<sup>42</sup> may not be used to undermine national or international standards, particularly in relation to women, children and minorities.

States that ratify the 2004 *Charter* are under a clear duty to give effect domestically to the rights therein by adopting legislative or other measures.<sup>43</sup> This obligation does not amount to a requirement to incorporate the treaty as such into national law but it should nevertheless result in its practical implementation.<sup>44</sup> Nevertheless, in order to meet their international obligations and better secure human rights, it would be preferable if the *Charter in toto* was incorporated into national law.

Viewed overall, the 2004 *Charter* may be regarded as an adequate human rights treaty notwithstanding the fact that some of its provisions fall short of current norms of international law and human rights.<sup>45</sup> The UN High Commissioner for Human Rights at the time, Louise Arbour, was particularly critical.<sup>46</sup> Safeguards or effective measures of implementation are still insubstantial. These are concerns which the ACtHR, if and when it becomes operative, will no doubt have to address. The ACtHR's approach to the interpretation and application of the Charter's rights and freedoms is awaited with interest; will it exercise restraint and show deference towards national decision-making, or will it seek to enhance the protection of human rights? Just how effective a guarantor of human rights will it turn out to be? These are speculative questions that can only be answered once the ACtHR commences its work. But the African experience suggests that pessimism may be misplaced and that weak institutions on paper may develop into robust guardians. Notwithstanding the early jaundiced view of many that the *African Charter* was fatally flawed and human rights inadequately protected by a feeble Commission<sup>47</sup> over the years, the African

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*Tingni Community v Nicaragua* (2001), Inter-Am Ct HR No 79 (Ser C); *Case of the Río Negro Massacres v Guatemala* (2012), Inter-Am Ct HR No 245 (Ser C); *African Charter*, *supra* note 15. See also *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, Communication No 276/2003 (2009) African Commission on Human and Peoples' Rights.

<sup>42</sup> 2004 *Charter*, *supra* note 11 at art 43.

<sup>43</sup> *Ibid* at art 44. It should be observed that reservations are expressly permitted, *ibid* at art 53(1).

<sup>44</sup> See *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, GA Res 53/144, UNGAOR, UN Doc A/RES/53/144 (1999) at art 2; *Malawi African Association et al v Mauritania*, Communications Nos 54/91, 61/91, 98/93, 164/97–196/97, 210/98 (1999–2000) African Commission on Human and Peoples' Rights at para 84; *Association of Victims of Post Electoral Violence & INTERIGHTS v Cameroon*, Communication No 272/2003 (2009) African Commission on Human and Peoples' Rights at para 108.

<sup>45</sup> Cf International Commission of Jurists, *supra* note 13 at 19–20; Mervat Rishmawi, "The League of Arab States and the Arab Revolts" in Saul Takahashi, ed, *Human Rights, Human Security and State Security: The Intersection*, vol 1, (Santa Barbara: Praeger, 2014) at 165.

<sup>46</sup> UN News Centre, "Arab rights charter deviates from international standards, says UN official", *UN Daily News* (30 January 2008), online: <[www.un.org/news/dh/pdf/english/2008/30012008.pdf](http://www.un.org/news/dh/pdf/english/2008/30012008.pdf)>.

<sup>47</sup> Richard Gittleman, "The African Charter on Human and Peoples' Rights: A Legal Analysis" (1981–1982) 22 *Va J Intl L* 667; Boniface Obinna Okere, "The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: A Comparative Analysis with the European and American Systems" (1984) 6 *Hum Rts Q* 141.

Commission has evolved into a solid and effective guarantor of human rights.<sup>48</sup>

## II. The Arab Human Rights Committee

A significant omission from the *2004 Charter* is that of a complaint mechanism for states and individuals. It provides for an Arab Human Rights Committee (Committee), but as will be seen, its role is extremely limited. The *2004 Charter* does not address the Committee's mandate in great detail but concerns itself mainly with procedural matters regarding the appointment of its members (articles 45 to 48). The reason is that, according to article 45(7) of the *2004 Charter*,<sup>49</sup> the Committee is empowered to establish its own *Rules of Procedure (Rules)* finally adopted in 2014.<sup>50</sup>

The Committee, which became operative in March 2009, is seated in Cairo (Egypt) and is composed of seven members, nationals of State Parties, elected by secret ballot by contracting Parties.<sup>51</sup> Committee members are elected for a four-year term and may be re-elected for one further term.<sup>52</sup> They must be highly experienced and show competence in its field of work,<sup>53</sup> but it does not seem that prior legal experience is a requirement. Committee members serve in their personal capacity and must be independent and impartial.<sup>54</sup>

Article 48 of the *2004 Charter*<sup>55</sup> lays down the Committee's terms of reference and its role is very limited and does not even make provision for a quasi-judicial function. The Committee's role is not that of a guardian or protector of human rights, but supervisory. Unlike other regional human rights supervisory organs which have a dual mandate, scrutinising, on the one hand, periodic state reports on the measures taken to implement the rights and freedoms envisaged in a relevant treaty and, on the other hand, considering individual petitions or interstate complaints on alleged violations,<sup>56</sup> the Committee has been entrusted only with the former function; under article 48 of the *2004 Charter*,<sup>57</sup> contracting parties assume an obligation to submit such reports. However, under its *Rules*, the Committee has assumed the additional mission of interpreting the *2004 Charter* which may provide states with

<sup>48</sup> Chidi Odinkalu, "The Individual Complaints Procedures of the African Commission on Human and Peoples' Rights: A Preliminary Assessment" (1998) 8 *Transnat'l L &ContempProbs* 359.

<sup>49</sup> *2004 Charter*, *supra* note 11 at art 45(7).

<sup>50</sup> Rishmawi, *The League of Arab States*, *supra* note 1 at 41.

<sup>51</sup> *2004 Charter*, *supra* note 11 at art 45(1). See generally Fabienne Quillere Majzoub, "Le Comité arabe des droits de l'homme : un organe nécessaire au sein de la Ligue des États arabes?" (2012) *RTDH* 45.

<sup>52</sup> *2004 Charter*, *supra* note 11 at art 45(3), (4).

<sup>53</sup> *Ibid* at art 45(2).

<sup>54</sup> *Ibid*.

<sup>55</sup> *Ibid* at art 48.

<sup>56</sup> Cf the roles of the African Commission, see African Charter, *supra* note 15 at arts 47-59, 62, and the Inter-American Commission on Human Rights, see *ACHR*, *supra* note 41 at 41-51. The Committee has more in common with the OIC's Independent Permanent Human Rights Commission, for the most part a consultative, advisory and promotional body, with no powers of enforcement. See "The Statute of the OIC Independent Permanent Human Rights Commission" (2011) 50 *ILM* 1152.

<sup>57</sup> *2004 Charter*, *supra* note 11 at art 48.

guidance as to their obligations.<sup>58</sup> The Committee's powers in this context could be important given that it has assumed a quasi-judicial function, similar to the advisory jurisdiction of international judicial bodies, in defining and declaring the extent of fundamental freedoms and duties.

Pursuant to article 48(6) of the *2004 Charter*,<sup>59</sup> the Committee's reports, observations and recommendations are public documents and it is under a duty to disseminate them widely. The Committee examines the reports, comments upon them and makes "the necessary recommendations in accordance with the aims of the *2004 Charter*".<sup>60</sup> The Committee submits annual reports on its activities to the Council, the premier organ of the LAS, with its comments and recommendations. This provides it with the opportunity to hold States Parties accountable. This is the most that the Committee can do under its present powers.

The fact that the Committee's work is published in Arabic only limits its accessibility to a wider audience, a fact that has been criticized.<sup>61</sup> Nevertheless, the Committee carries out its principal mandate, namely, to review periodic reports relating to the domestic implementation of the *2004 Charter*. Although not envisaged in the latter, the Committee also accepts reports from non-governmental organizations (NGOs) and other interested civil society organisations (CSOs) with the proviso that these bodies are located in the contacting party whose report is under examination and that the reports do not focus on individual cases.<sup>62</sup> While such supervision has its uses and can be effective if states accept the Committee's recommendations in good faith, it does little to secure effective legal protection in individual cases.

Although the Committee has taken the opportunity offered by the drafting of its *Rules*<sup>63</sup> to expand its mandate by assuming an interpretative role, this has been but a modest step. At present, the Committee has no right to petition the ACtHR, nor can it consider individual complaints, significant weaknesses. It is disappointing to note that there is no mention whatsoever of the Committee in the *Statute* of the ACtHR; the two bodies appear to exist in a vacuum with no formal relationship. They will operate in parallel, in their different spheres, but never interact. By way of contrast, the African Commission has interpreted its mandate creatively, including through its

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<sup>58</sup> Rishmawi, *The League of Arab States*, *supra* note 1. The African Commission performs such a role under the African Charter, *supra* note 15 at art 45(3); *Rules*, *supra* note 50

<sup>59</sup> *2004 Charter*, *supra* note 11 at art 48(6).

<sup>60</sup> *Ibid* at art 48(3), (4). The Committee can request states to furnish it with more information, *ibid* at art 48(2).

<sup>61</sup> See Marlies Hesselman, "Regional Human Rights Regimes and Humanitarian Obligations of States in the Event of Disaster" in Andrej Zwitter et al, eds, *Humanitarian Action: Global, Regional and Domestic Legal Responses* (Cambridge: Cambridge University Press, 2015) 202 at 207.

<sup>62</sup> Rishmawi, *The League of Arab States*, *supra* note 1 at 44–46. See Maja Christine Wester, "Arab Eyes On The Human Rights Situation in Jordan" (2016), *Dignity Danish Institute Against Torture*, online: <<https://dignityinstitute.org/news-and-events/news/2016/arab-eyes-on-the-human-rights-situation-in-jordan>>.

<sup>63</sup> *Rules*, *supra* note 50.

*Rules of Procedure*, to expand its powers in significant ways.<sup>64</sup> It can thus appoint thematic rapporteurs and working groups and send ‘protection missions’ to conduct on site investigations.<sup>65</sup> The Committee could do worse than follow its example; the adoption of its *Rules* in 2014,<sup>66</sup> so unexceptional, must be considered a missed opportunity, but perhaps this reflected the limit of the achievable. Nevertheless, the fact remains that in the twenty-first century, its limited mandate is a matter of considerable regret.

### III. The Arab Court of Human Rights

The 2004 *Charter* did not follow the model established by the *European Convention on Human Rights (ECHR)* and the *American Convention on Human Rights (ACHR)* and create judicial or quasi-judicial bodies with the competence to adjudicate on complaints alleging violations of treaty obligations by the contracting parties. Such a development had to await the adoption of the *Statute* of the ACtHR in 2014.

The initiative for setting up an ACtHR was accepted on March 26<sup>th</sup> 2013 during the LAS Council Summit at Doha (Qatar) based on a proposal submitted by Bahrain the previous year.<sup>67</sup> In September 2013, the LAS Ministerial Council entrusted a group of experts (the High-Level Committee of Legal Experts of the Member States Concerned with the Preparation of the Draft Charter of the Arab Human Rights Court) with the task of drafting an appropriate text for the *Statute* of the ACtHR. At its fifth meeting, from March 15<sup>th</sup> to March 18<sup>th</sup> 2014, the group finalized the draft statute. The LAS Council Summit meeting in Kuwait approved it in principle but requested revisions from the group of experts.<sup>68</sup> The *Statute* of the ACtHR was finally endorsed on 7 September 2014.<sup>69</sup> Unfortunately, NGOs/CSOs were excluded from the whole process and their concerns about the *Statute*’s failings were ignored.<sup>70</sup>

The *Statute* of the ACtHR was not attached to the 2004 *Charter*; nor was it adopted as a protocol to the LAS Charter. Thus, the ACtHR is conceived as a separate

<sup>64</sup> See Konstantinos Magliveras & Gino Naldi, *The African Union* (Alphen aan den Rijn: Kluwer Law International, 2014) at 257–79; *Rules of Procedure of the African Commission on Human and Peoples’ Rights* (2010), online: <[www.achpr.org/files/instruments/rules-of-procedure-2010/rules\\_of\\_procedure\\_2010\\_en.pdf](http://www.achpr.org/files/instruments/rules-of-procedure-2010/rules_of_procedure_2010_en.pdf)> [African Commission Rules].

<sup>65</sup> *Ibid* at rules 23, 81.

<sup>66</sup> *Rules*, *supra* note 50.

<sup>67</sup> LAS Council Summit, Res 573, 24<sup>th</sup> ordinary Sess, (2013).

<sup>68</sup> LAS Council Summit, Res 593, 25<sup>th</sup> ordinary Sess, (2014), reproduced in Chair UN Group of Arab States, *Letter dated 23 May 2014 from the Permanent Observer of the State of Palestine to the United Nations addressed to the Secretary-General*, UN Doc A/68/900–S/2014/387, (2014). See further LAS Ministerial Council, Res 7726, 141<sup>st</sup> ordinary Sess (2014). The International Commission of Jurists has complained that civil society organizations did not have sufficient input into the drafting process, *supra* note 13 at 10–12.

<sup>69</sup> *Statute*, *supra* note 2. Article 33(1) of the *Statute* specifies that it shall enter into force after seven LAS Member States have ratified it and that it shall become operative one year thereafter.

<sup>70</sup> Rishmawi, *League of Arab States*, *supra* note 1 at 54–55.

judicial organ affiliated to the LAS, and certainly not as its main judicial body. This is manifested in article 2 of the *Statute*,<sup>71</sup> which stipulates that, within the LAS framework, the ACtHR is established as an independent Arab judicial body seeking to consolidate the contracting parties' will to implement their obligations pertaining to human rights and fundamental freedoms, a commitment which arguably extends further than the 2004 *Charter*, as is evident from the reference in article 16 of the *Statute*<sup>72</sup> to other Arab human rights treaties. The ACtHR's nature as an autonomous treaty body is confirmed in the *Statute* by article 16 setting out its jurisdiction and by article 4 creating a discrete body which exercises certain administrative powers,<sup>73</sup> the Assembly of States Parties as opposed to the LAS.

It should be observed from the outset that a number of important substantive and procedural matters regarding the work of the ACtHR have been omitted from the *Statute*. It may be that such details will be provided by the *Rules of Procedure* (ACtHR Rules) but a cynical interpretation may suggest that the LAS Member States are simply keen to exercise tight control over the activities of the ACtHR. The scepticism is reinforced by the fact, although the ACtHR drafts its *Rules*, it is the Assembly of States Parties that adopts them.<sup>74</sup> This is contrary to established international practice.<sup>75</sup>

## A. The Assembly of States Parties

No human rights court exists in a vacuum. The establishment of an Assembly of States Parties (Assembly), composed of a representative of each State Party, is reminiscent of the institutional set up of the Council of Europe and the Organization of American States (OAS).<sup>76</sup> Under the European system, both the Committee of Ministers and the Parliamentary Assembly have roles to play in the election of judges, the carrying out of judgments and the setting of the budget.<sup>77</sup> Under the Inter-American system, the OAS General Assembly has similar functions.<sup>78</sup> Article 4 of the ACtHR *Statute* does not explicitly state all the competencies with which the Assembly will be endowed but leaves this matter to be determined in its bylaws, or rules, which will be adopted once the *Statute* has entered into force. The only competencies laid down in the third paragraph of article 4 of the *Statute*<sup>79</sup> are the election of judges; the acceptance of the ACtHR's annual report; the drawing up of its

<sup>71</sup> *Statute*, *supra* note 2 at art 2.

<sup>72</sup> *Statute*, *supra* note 2 at art 16.

<sup>73</sup> *Ibid* at arts 4, 16.

<sup>74</sup> *Ibid* at art 28.

<sup>75</sup> *European Convention on Human Rights*, 4 November 1950, CETS No 194 at art 26(d), as amended (entered into force 3 September 1953) [ECHR]; *ACHR*, *supra* note 41 at art 60; *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights*, 9 June 1998 at art 33 (entered into force on 25 January 2004), online: <<http://library.umn.edu/africa/courtprotocol2004.html>> [*Protocol on the African Court*].

<sup>76</sup> *Statute*, *supra* note 2 at art 4.

<sup>77</sup> *ECHR*, *supra* note 75 at arts 22(1), 46(2).

<sup>78</sup> *ACHR*, *supra* note 41 at arts 53, 65.

<sup>79</sup> *Statute*, *supra* note 2 at art 4.

budget,<sup>80</sup> and the adoption of a mechanism to ensure that judgments are executed.<sup>81</sup> However, the *Statute* affords to the Assembly other duties as well, which, as will later be argued, appropriates from the ACtHR important functions which are traditionally exercised by international courts. One of these, in relation to the *Rules*, has been mentioned above. It cannot be discounted that the Assembly is intended to keep a close watch on the ACtHR.

## B. Composition of the Court

The ACtHR, seated in Manama (Bahrain),<sup>82</sup> is composed of seven judges, though this may be increased to eleven at the request of the ACtHR and if approved by the Assembly.<sup>83</sup> The ACtHR convenes in chambers of at least three judges to hear the subject matter of disputes.<sup>84</sup> Oddly, the *Statute* makes no mention of how many judges are required for the ACtHR or chambers to be quorate but it may be one of the issues to be determined by the *Rules*.<sup>85</sup> The *Statute* is also silent as to the ACtHR's official and working languages, which *presumably* will be Arabic.<sup>86</sup> Also absent from the *Statute* is any requirement that the different regions and its principal juridical traditions be represented on the ACtHR.<sup>87</sup> The judges must be nationals of State Parties, as opposed to nationals of LAS Member States which may not necessarily have ratified the *Statute*, and no more than one judge may be of the same nationality.<sup>88</sup> Each member state may nominate two of its nationals as candidate.<sup>89</sup> Candidates must possess competence and experience in legal or judicial office and

<sup>80</sup> Presumably the reference here is not only to the Assembly's own budget but also to the ACtHR's budget because, under article 31 of the *Statute*, the former is approved by the Assembly and funded through contracting parties' contributions. Note that the IACHR drafts its own budget subject to the approval of the OAS General Assembly, *ACHR*, *supra* note 41 at art 72.

<sup>81</sup> See further *ACHR*, *supra* note 41 at art 30 stipulating that the Bylaws will also specify the salaries of judges and of the other staff as well as the requirements to secure their independence and availability.

<sup>82</sup> *Statute*, *supra* note 2 at art 3. In exceptional cases, the ACtHR may meet in another country with its approval. The choice of Bahrain, a country with a poor human rights record, as the seat of the ACtHR has attracted criticism, see International Commission of Jurists, *supra* note 13 at 6.

<sup>83</sup> *Statute*, *supra* note 2 at art 5.

<sup>84</sup> *Ibid* at art 24(2).

<sup>85</sup> Cf *Rules of Court of the European Court of Human Rights*, (2016) at rule 20(2), online: <[www.echr.coe.int/Documents/Rules\\_Court\\_ENG.pdf](http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf)> [*ECtHR Rule*]; *ACHR*, *supra* note 41 at art 56; *Rules of Procedure of the Inter-American Court of Human Rights*, (2009) at art 13, online: <<https://www.cidh.oas.org/Basicos/English/Basic20.Rules%20of%20Procedure%20of%20the%20Court.htm>> [*IACHR Rule*]; *Protocol on the African Court*, *supra* note 75 at art 26.

<sup>86</sup> Cf *ECtHR Rule*, *supra* note 85 at art 34(1); *IACHR Rule*, *supra* note 85 at art 20; *Protocol on the African Court*, *supra* note 75 at art 32; *Rules of Court the African Court of Human and Peoples' Rights*, (2009) at rule 18(1),(2), online: <[en.african-court.org/images/Basic%20Documents/Final\\_Rules\\_of\\_Court\\_for\\_Publication\\_after\\_Harmonization\\_-\\_Final\\_English\\_7\\_sept\\_1\\_.pdf](http://en.african-court.org/images/Basic%20Documents/Final_Rules_of_Court_for_Publication_after_Harmonization_-_Final_English_7_sept_1_.pdf)> [*African Court Rules*].

<sup>87</sup> Cf *ECtHR Rule*, *supra* note 85 at rules 24(2)(e), 25(2); *Protocol on the African Court*, *supra* note 75 at art 14(2).

<sup>88</sup> *Statute*, *supra* note 2 at art 5.

<sup>89</sup> *Ibid* at art 6(2). It is disappointing that the *Statute* makes no mention of adequate or balanced gender representation. Cf *ECtHR Rule*, *supra* note 85 at rule 14; *Protocol on the African Court*, *supra* note 75 at art 14(3).

must have the qualifications for appointment to the highest legal or judicial offices in their states, and experience in human rights is preferred.<sup>90</sup> The reference to legal office may suggest persons who have held positions such as that of attorney-general. The preference for human rights expertise is sensible although this has been criticized by the International Commission of Jurists as inadequate.<sup>91</sup> As was mentioned, the judges are elected by the Assembly by secret ballot<sup>92</sup> and in an unusual move, it maintains a reserve list of judges from the candidates that were not elected.<sup>93</sup>

Judges serve a term of office of four years with the possibility of one further renewable period.<sup>94</sup> The *Statute* is silent as to whether the judges are hired on a full-time or part-time basis, only in relation to the president does the *Statute* stipulate that the position is full-time,<sup>95</sup> although they must be at the service of the ACtHR at any time.<sup>96</sup> Vacancies may result from death, resignation, permanent disability or dismissal.<sup>97</sup> In such circumstances, another judge shall be elected to complete the predecessor's term of office unless the vacancy occurs six months prior to the expiration of the judge's term of office, in which case the president may appoint a judge from the reserve list.<sup>98</sup> A judge's removal from office is in the hands of the other judges who must decide that he or she no longer meets the requirements and demands of the office or meets the standards for which he or she was appointed.<sup>99</sup>

Although the *Statute* does not explicitly state that the judges serve in an individual capacity and not as representatives of their states,<sup>100</sup> this condition follows from the judges' duty to perform their tasks with independence and impartiality.<sup>101</sup> However, in order to reinforce the commitment to judicial independence a provision should have been added to the effect that State Parties shall not seek to influence,

<sup>90</sup> *Statute*, *supra* note 2 at art 7.

<sup>91</sup> The International Commission of Jurists, *supra* note 13 at 13-14, argues that the judges should be required to have human rights expertise as is the case with the judges on the IACHR and the African Court on Human and Peoples' Rights [ACtHPR], see *Statute of the Inter-American Court of Human Rights*, (2011) at art 4(1), online: <[www.oas.org/en/iachr/mandate/Basics/statutecourt.asp](http://www.oas.org/en/iachr/mandate/Basics/statutecourt.asp)> [IACHR *Statute*], and *Protocol on the African Court*, *supra* note 75 at art 11(1). Interestingly, the ECHR is silent on the matter, see ECHR, *supra* note 75 at art 21(1).

<sup>92</sup> *Statute*, *supra* note 2 at art 6(1). Nevertheless, the International Commission of Jurists is of the view that the nomination and election process is not sufficiently transparent, *supra* note 13 at 15-16.

<sup>93</sup> *Statute*, *supra* note 2 at art 6(5). This is reminiscent of the post of deputy-judges under the *Statute of the Permanent Court of International Justice*, 16 December 1920, 6 LNTS 379 (entered into force 20 August 1921), abolished by the *Protocol Concerning the Revision of the Statute of the Permanent Court of International Justice*, 14 September 1929, 165 LNTS 353 (entered into force 1 February 1936).

<sup>94</sup> *Statute*, *supra* note 2 at art 8(1). Interestingly, this term of office is the shortest, the judges on the other regional courts serving a term of six years, see ECHR, *supra* note 75 at art 23(1); ACHR, *supra* note 41 at art 54(1); *Protocol on the African Court*, *supra* note 75 at art 15(3).

<sup>95</sup> *Statute*, *supra* note 2 at art 11(3).

<sup>96</sup> *Protocol on the African Court*, *supra* note 75 at art 15(1).

<sup>97</sup> *Ibid* at art 9(1).

<sup>98</sup> *Ibid*.

<sup>99</sup> *Ibid* at art 15(5). Under the ACHR it is the OAS General Assembly that exercises the power of sanctions against judges but only at the judges' request, ACHR, *supra* note 41 at art 73.

<sup>100</sup> Cf ECHR, *supra* note 75 at art 21(2); IACHR *Statute*, *supra* note 91 at art 4(1); *Protocol on the African Court*, *supra* note 75 at art 33.

<sup>101</sup> *Statute*, *supra* note 2 at art 15(1).

induce, pressure or threaten the judges in the discharge of their functions.<sup>102</sup>

A judge who has had previous involvement with a case in any manner whatsoever may not hear that case.<sup>103</sup> In addition, a judge must declare any possible conflict of interest with any case he or she is hearing.<sup>104</sup> A judge who is a national of a state that is a party to a case must recuse himself or herself.<sup>105</sup> International practice is at variance and the only compelling reason to justify it is to avoid any semblance of partiality, but it is probably irreconcilable with the assertion of the judges' independence.<sup>106</sup>

As has been seen, the *Statute's* provisions on the selection of judges have its shortcomings but these problems are not, in theory, insurmountable. They may be addressed by the *Rules*, as has happened in other jurisdictions. A policy of openness and transparency would help bolster faith in the integrity of the ACtHR.

### C. The Question of *Locus Standi*

A crucial consideration that is at the crux of whether any human rights mechanism can amount to an effective guarantor of human rights revolves around the standing made available to individuals. Regrettably, the *Statute* fails this test miserably. Article 19 of the *Statute*<sup>107</sup> envisages a restrictive right of access to the ACtHR in that individuals are completely excluded from approaching it, the right being confined to contracting parties whose citizens, or 'subjects',<sup>108</sup> claim to be victims of human rights violations by another state. Thus, the cases before the ACtHR will be in effect interstate disputes, as no right of individual petition is recognized. In essence, the ACtHR will be nothing more than a toned down version of the International Court of Justice.<sup>109</sup> Universal and regional human rights systems make provision for interstate cases, but their experience is that only rarely does a party institute proceedings against another party; this because political considerations

<sup>102</sup> Cf *Protocol on the African Court*, *supra* note 75 at art 17(1). See International Commission of Jurists, *supra* note 13 at 16.

<sup>103</sup> *Statute*, *supra* note 2 at art 15(4).

<sup>104</sup> *Ibid* at art 24(3).

<sup>105</sup> *Statute*, *supra* note 2 at art 24(4).

<sup>106</sup> The *Protocol on the African Court* also assumes this position, while the *ACHR* is permissive. See *Protocol on the African Court*, *supra* note 75 at art 22 and *ACHR*, *supra* note 41 at art 55(1). The *ECHR* takes a middle point. According to *ECtHR Rule*, judges are prevented from presiding in cases involving a contracting party of which they are nationals. See *ECtHR Rule*, *supra* note 85 at rule 13.

<sup>107</sup> *Statute*, *supra* note 2 at art 19.

<sup>108</sup> This raises the question whether legal persons come within the definition of a 'subject'. Companies have some standing under the *ECHR*, David J Harris et al, *Law of the European Convention on Human Rights*, 2<sup>nd</sup> ed (London: Sweet & Maxwell, 2009) at 795-796.

<sup>109</sup> The International Court of Justice can exercise jurisdiction over many universal human rights treaties, such as the *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) [*CERD*]. In *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russia)*, [2011] ICJ Rep 70 at para 186, the Court reminded the parties that they had a duty to comply with their obligations under *CERD*.



prevail and states shy away from accusing other states of violating human rights.<sup>110</sup> Usually only in the context of grave or massive violations can states be prevailed upon to pursue legal action against another state.<sup>111</sup> But under the *Statute*, a state is limited to exercising its right of diplomatic protection,<sup>112</sup> it is not the case that the contracting parties are deemed to have a collective interest in upholding the provisions of the 2004 *Charter*.<sup>113</sup> The question of third-party intervention to uphold the common good does not arise.<sup>114</sup> Consequently, if State A is persecuting its own nationals, a religious or ethnic minority group for sake of argument, no matter how egregiously, State B would be unable to complain to the ACtHR. Furthermore, only a ‘victim’ can be the subject of a complaint. The possibility of a community interest, a kind of *actio popularis* or challenge *in abstracto* does not come up. The only positive feature in this sorry landscape is the fact that article 19(2) of the *Statute*<sup>115</sup> envisages a right of access for NGOs: contracting parties may, at any time, recognize that NGOs, which are accredited and working in the field of human rights in the contracting party whose subjects allege human rights violations, will have *locus standi*. The African experience demonstrates the invaluable role that NGOs can play in this regard and its worth should not be underrated.<sup>116</sup> Of course, this then begs the question whether states will be willing to accept this discretionary option and, if so, as to the degree to which NGOs will be free from harassment, hindrance and obstruction to perform this task.

If the LAS and its Member States were reluctant to grant individuals automatic or direct access to the ACtHR, it should have been possible to follow the example of the *ACHR*, Africa and the *ECHR*, and have the Committee act as a filter mechanism, endowing it with the sole right to process and refer individual complaints to the ACtHR.<sup>117</sup> This procedure could have been made contingent on a state’s prior

<sup>110</sup> Bruno Simma, “Human Rights Before the International Court of Justice: Community Interest Coming to Life?” in Christian J Tams & James Sloan, eds, *The Development of International Law by the International Court of Justice* (Oxford: Oxford University Press, 2013) 577 at 589-590.

<sup>111</sup> For instance *Cyprus v Turkey* [GC], No 25781/94[2001]IV ECHR 1; *Georgia v Russia (no 1)* [GC], No 13255/07 [2014] ECHR. See further Harris et al, *supra* note 108 at 822, n 52. In 2014 Ukraine lodged complaints, still pending, against Russia concerning events in Crimea and Eastern Ukraine, *Ukraine v Russia*, No 20958/14; *Ukraine v Russia (V)*, No 8019/16.

<sup>112</sup> As in *Georgia v Russia (no 1)*, *supra* note 111, concerning the expulsion of a large number of Georgian nationals from Russia.

<sup>113</sup> *Ireland v United Kingdom* (1978), No 25 ECtHR (Ser A) at para 239; Harris et al, *supra* note 108 at 821-823.

<sup>114</sup> As in *Austria v Italy* (1961), No 788/60EurComm’n HR DR; *Denmark, Norway, Sweden and Netherlands v Greece* (1968), Nos 3321-3/67, 3344/67EurComm’n HR DR.

<sup>115</sup> *Statute*, *supra* note 2 at art 19(2).

<sup>116</sup> *Protocol on the African Court*, *supra* note 75 at art 30(f); *Zitha & Zitha v Mozambique*, Communication No 361/08 (2010) African Commission on Human and People’s Rights at para 106; *Haregewoin Gabre-Selassie and IHRDA (on behalf of former Dergue officials) v Ethiopia*, Communication No 301/05 (2011) African Commission on Human and People’s Rights at paras 61–62. See Nobuntu Mbelle, “The Role of Non-Governmental Organisations and National Human Rights Institutions at the African Commission” in Malcolm Evans & Rachel Murray, eds, *The African Charter on Human and Peoples’ Rights: The System in Practice, 1986–2006*, 2nd ed (Cambridge: Cambridge University Press, 2008) at 289.

<sup>117</sup> Christina Cerna, “The Inter-American Commission on Human Rights: Its Organisation and Examination of Petitions and Communications” in David Harris & Stephen Livingstone, eds, *The*

acceptance of the ACtHR's jurisdiction in accordance with a separate declaration.<sup>118</sup> Furthermore, following international practice, conditions of admissibility could have been put in place to ensure that cases without merit could have been dismissed at an early stage of the proceedings without having to encumber the ACtHR.<sup>119</sup> For the sake of credibility, at the very least the Committee should have been allowed to initiate proceedings before the ACtHR *proprio motu*.<sup>120</sup>

#### D. The Competence of the Court

According to article 16 of the *Statute*,<sup>121</sup> the ACtHR has jurisdiction over all cases and litigation arising from the application and interpretation of the 2004 *Charter* as well as from any other Arab treaty in the field of human rights to which the disputing state is a contracting party.<sup>122</sup> The implementation of the protected rights and freedoms is a matter for the national authorities and not for the ACtHR and this fact is acknowledged by article 18 of the *Statute*<sup>123</sup> which proclaims, *inter alia*, that the ACtHR's jurisdiction is complementary to that of the national courts and does not supplant it.<sup>124</sup> Moreover, article 16(2) of the *Statute*<sup>125</sup> explicitly acknowledges the so-called principle of 'Kompetenz-Kompetenz', namely, that the ACtHR possesses the inherent power to decide itself any challenges to its jurisdiction.<sup>126</sup> Article 24(1) of the *Statute*<sup>127</sup> provides that challenges to the ACtHR's jurisdiction will be examined by a single judge. It seems inappropriate that a single judge should have the responsibility of determining the important questions that may be at stake in preliminary objections. It is perhaps unfortunate that the *Statute* itself has nothing further to say on the subject of preliminary objections although the *Rules* may address it. This has been the case in other jurisdictions.<sup>128</sup>

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*Inter-American System of Human Rights* (Oxford: Clarendon Press, 1998) 65; Magliveras & Naldi, *supra* note 64 at 282–83; JG Merrills & AH Robertson, *Human Rights in Europe*, 4th ed (Manchester: Manchester University Press, 1996) at 271–282.

<sup>118</sup> Cf ACHR, *supra* note 41 at art 62; *Protocol on the African Court*, *supra* note 75 at art 5(3). In *Michelot Yogogombaye v Senegal* (2009), No 001/2008 ACtHPR at paras 35–37, the ACtHPR held in the absence of such a declaration by Senegal it was unable to entertain the case.

<sup>119</sup> Harris et al, *supra* note 108 at 764–786; Magliveras & Naldi, *supra* note 64 at 263–274; Jo M Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (Cambridge: Cambridge University Press, 2003) at 123–133.

<sup>120</sup> Cf *Protocol on the African Court*, *supra* note 75 at art 5(1)(a).

<sup>121</sup> *Statute*, *supra* note 2 at art 16.

<sup>122</sup> The ACtHR's jurisdiction has been criticized as being restrictive, see Fabienne Quillere-Majzoub & Tarek Majzoub, "De l'utilité de la future Cour arabe des droits de l'homme: de quelques réflexions sur son Statut" (2015) 26 RTDH 645.

<sup>123</sup> *Statute*, *supra* note 2 at art 18.

<sup>124</sup> *Anuak Justice Council v Ethiopia*, Communication No 299/05 (2005–2006) African Commission on Human and People's Rights at para 48.

<sup>125</sup> *Statute*, *supra* note 2 at art 16(2).

<sup>126</sup> Cf ECHR, *supra* note 75 at art 32(2); *Protocol on the African Court*, *supra* note 75 at art 3(2). On the approach of the IACHR see, *inter alia*, *Constitutional Court v Peru* (1999), Inter-Am Ct HR, No 55 (Ser A); Pasqualucci, *supra* note 119 at 34–35.

<sup>127</sup> *Statute*, *supra* note 2 at art 24(1).

<sup>128</sup> Cf IACHR Rule, *supra* note 85 at art 36; *African Court Rules*, *supra* note 85 at rule 52. See *Michelot Yogogombaye v Senegal*, *supra* note 118 at para 38.

In relation to the “Arab Treaties”, the 2004 *Charter* does not explain which these might be. A broad reading could extend to any relevant human rights instrument that a State Party has ratified but a safer interpretation is that the reference is to treaties adopted by the LAS; if so, the only such treaty in question is the 2004 *Charter*. However, it is submitted that it can extend to include multilateral instruments adopted under the auspices of the LAS. These include the *Arab Convention against Corruption*,<sup>129</sup> and the *Arab Convention on the Suppression of Terrorism*.<sup>130</sup>

The *Statute* is silent as to the applicable law to which the ACtHR must have regard in determining the cases before it. An ordinary reading of article 16 does not suggest that the ACtHR is limited to taking account of the 2004 *Charter* and the Arab treaties to the exclusion of other international law. It is an accepted practice in international law for a court to rely on norms of international law in order to interpret and apply particular provisions of the treaty under consideration. The phrase ‘application and “interpretation” could allow the ACtHR, if willing, to draw upon other sources of law, including international human rights law, in order to perform its role properly.<sup>131</sup> Thus, whereas the ECtHR is similarly limited in subject matter jurisdiction to the *ECHR*, it has frequently had to take into account other international law.<sup>132</sup> By way of contrast, the ACtHR has expressly been granted a broad jurisdiction.<sup>133</sup> It is not conceivable that the ACtHR could be expected to play a credible and effective role unless it could invoke the relevant norms of general international and human rights law, and of universal and regional human rights treaties. It is important to bear in mind that many of the LAS Member States are parties to United Nations (UN) treaties such as the *International Covenant on Civil and Political Rights*<sup>134</sup> (*ICCPR*) and regional instruments such as the *African Charter*. In view of the *Statute*’s silence on the matter and given a court’s inherent jurisdiction, it is possible to assert with confidence that the ACtHR should be able to resort to this rich body of law.

<sup>129</sup> *Arab Anti-Corruption Convention*, 21 December 2010, LAS English translation online: <star.worldbank.org/star/sites/star/files/Arab-Convention-Against-Corruption.pdf>.

<sup>130</sup> *Arab Convention on the Suppression of Terrorism*, 22 April 1998, LAS (entered into force 7 May 1999), reproduced in United Nations, *International Instruments related to the Prevention and Suppression of International Terrorism* (New York: United Nations, 2008) at 178. See generally Saïd Ihrari, “The Arab and Islamic Convention of the Fight against Terrorism” in Pablo Antonio Fernandez-Sanchez, ed, *International Legal Dimension of Terrorism* (Leiden: Martinus Nijhoff Publishers, 2009) at 357.

<sup>131</sup> See *Arctic Sunrise Arbitration (The Netherlands v Russia)* (2015), Case No 2014-02 at para 190 (PCA).

<sup>132</sup> *ECHR*, *supra* note 75 at art 32(1). For example, in *Cyprus v Turkey*, *supra* note 111, the *ECtHR* had to discuss the international law relating to the recognition of states; in *Medvedyev v France* (2010) No 3394/03 *ECtHR*, both the *UN Convention on the Law of the Sea*, 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) and the customary law of the sea were taken into consideration; in *MSS v Belgium and Greece* (2011), No 30696/09 *ECtHR* account was taken of the *UN Convention relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954).

<sup>133</sup> *Protocol on the African Court*, *supra* note 75 at rule 26(1)(a). See *Frank David Omary & Others v Tanzania* (2014), App 001/2012ACtHPR at paras 71-77.

<sup>134</sup> *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976)[*ICCPR*].

Article 20 of the *Statute* contains the so-called “promissory clause”, whereby LAS Member States, which are not contracting parties to the *Statute*, may declare their acceptance of the ACtHR’s jurisdiction either for specific cases or in general. Such declarations of acceptance of jurisdiction may be based on reciprocity or be unconditional or be time limited.<sup>135</sup>

Article 17 of the *Statute*<sup>136</sup> limits the jurisdictional reach of the ACtHR by adopting the condition *ratione temporis* so that the ACtHR may only take account of facts that occurred after the *Statute* entered into force for the state in question. However, the concept of “continuing violations”, that is, that jurisdiction will not be declined even though the violation had taken place before the state had become a party to the *Statute* because its effects continued to impact after that time, is embedded in international human rights law, and should therefore guide the ACtHR.<sup>137</sup>

Article 18 of the *Statute*<sup>138</sup> enumerates three admissibility requirements, which appear to be exhaustive, which must be satisfied for the ACtHR to be able to proceed with a case. The first condition is the exhaustion of local remedies in the respondent state, as evidenced by a final and definitive judgment given according to the domestic legal system. This proviso is a generally recognised rule of international law<sup>139</sup> and exists in all major human rights instruments.<sup>140</sup> The wording of this provision suggests that the remedy should be a judicial one. Furthermore, international human rights law has established that remedies must be genuine and do not need to be exhausted if they are non-existent, ineffective or unreasonably prolonged.<sup>141</sup>

The second condition is that a case having the same subject matter has not been filed before another *regional human rights court*.<sup>142</sup> It would thus appear that the *Statute* does not provide for the ACtHR’s exclusive jurisdiction and that submitting complaints with the UN treaty bodies would not be disallowed. If this conclusion is correct, it should be possible to file, even simultaneously, complaints before the

<sup>135</sup> *Statute*, supra note 2 at art 22(2).

<sup>136</sup> *Ibid* at art 17.

<sup>137</sup> *Loizidou v Turkey* (1996), No 15318/89 ECtHR; *Blake v Guatemala* (1996), No 27 Inter-Am Ct HR (Ser C); *Amnesty International et al v Sudan*, Communication Nos 48/90, 50/91, 52/91, 89/93, (1999–2000) African Commission on Human and People’s Rights at para 40; *Zitha & Zitha v Mozambique*, supra note 116 at paras 85-94; Harris et al, supra note 108 at 801-803; Pasqualucci, supra note 119 at 110-113.

<sup>138</sup> *Statute*, supra note 2 at art 18.

<sup>139</sup> Chittharanjan Felix Amerasinghe, *Local Remedies in International Law*, 2nd ed (Cambridge: Cambridge University Press, 2004).

<sup>140</sup> *ECHR*, supra note 75 at art 35(1); *ACHR*, supra note 41 at art 46(1)(a); *African Charter*, supra note 22 at art 56(5).

<sup>141</sup> *ACHR*, supra note 41 at art 46(2); *Velásquez Rodríguez v Honduras* (1988), No 4 Inter-Am Ct HR (Ser C); *Cyprus v Turkey*, supra note 111; *Selmouni v France* (1999) No 25803/94 ECtHR; *Democratic Republic of Congo v Burundi, Rwanda and Uganda*, Communication No 227/99 (2005–2006) African Commission on Human and People’s Rights at paras 62-63.

<sup>142</sup> Cf *ACHR*, supra note 41 at art 46(1)(c); *African Charter*, supra note 22 at art 56(7). No comparable rule exists in the *ECHR*.

ACtHR and the UN Human Rights Committee or the UN Committee on the Elimination of Discrimination Against Women or even the African Commission,<sup>143</sup> but curiously not, say, the African Court of Human and Peoples' Rights (ACtHPR). It is not readily apparent why recourse to the ACtHPR would be impermissible but not to the African Commission, except perhaps in relation to the nature of the final decision, whether or not it is deemed legally binding. Naturally, there is no guarantee that the other bodies will accept them.<sup>144</sup> If this was not the intention it might otherwise have been preferable to have used the language of the *ACHR* or the *ECHR* which exclude other international settlement procedure.<sup>145</sup>

The third condition is that the case must be lodged with the ACtHR at the latest six months after the applicant was notified of the final judgment given by the domestic court. The six-month rule might be in line with the European and Inter-American systems<sup>146</sup> but is arguably too short for a region with no prior experience of human rights litigation and should therefore be interpreted flexibly. It would nevertheless have been preferable to have adopted the rule applied by the African system that the case must be submitted within a reasonable period of time.<sup>147</sup>

The ACtHR would additionally need to ensure that the complaint impleads a state party,<sup>148</sup> or that the state accepts the ACtHR's jurisdiction *ad hoc* under article 20 of the *Statute*,<sup>149</sup> and that it possesses jurisdiction *ratione materiae*. The substantive provisions of the 2004 *Charter* therefore assume added importance.

Under article 22 of the *Statute*,<sup>150</sup> the ACtHR is entitled at any stage of the proceedings to assist the litigant parties to reach an amicable settlement "on the basis of human rights principles and values and the rules of justice".<sup>151</sup> This procedure will be confidential. However, should a settlement be reached, the ACtHR shall render a decision, which will not only record briefly the facts but also the solution reached. The case will then be struck off the docket. The Assembly is responsible for monitoring the execution of the decision.

<sup>143</sup> *ICCPR*, *supra* note 134 at art 41. This procedure is optional and none of the LAS Member States have accepted it.

<sup>144</sup> The African Commission has held that it is not precluded from receiving communications identical to those submitted to another international body so long as a decision on the merits has not been reached, *Bakweri Land Claims Committee v Cameroon*, Communication No 260/02 (2002-2003) African Commission on Human and People's Rights at paras 49-53.

<sup>145</sup> *ECHR*, *supra* note 75 at art 35(2)(b); *ACHR*, *supra* note 41 at art 46(1)(c).

<sup>146</sup> *ECHR*, *supra* note 75 at art 35(1); *ACHR*, *supra* note 41 at art 46(1)(b).

<sup>147</sup> *African Charter*, *supra* note 22 at art 56(6).

<sup>148</sup> In *Youseff Ababou v Kingdom of Morocco* (2011) No 007/2011, the ACtHPR lacked jurisdiction because Morocco was not a member of the African Union.

<sup>149</sup> *Statute*, *supra* note 2 at art 20.

<sup>150</sup> *Ibid* at art 22.

<sup>151</sup> Other regional rights courts have such a function, see *ECHR*, *supra* note 75 at art 39; *IACHR Rule*, *supra* note 85 at art 53; *Protocol on the African Court*, *supra* note 75 at art 9.

## E. Certain Procedural Issues

The ACtHR conducts its hearings in public unless it decides, in order to preserve the interests of the parties or to ensure the proper administration of justice, or upon application by the parties, they be held in closed session. The practice of the Inter-American and European systems, that this should happen only in “exceptional circumstances”, seems preferable.<sup>152</sup> The *Statute*’s provisions concerning judgments in contentious cases follow established international standards. Thus, judgments must be taken by a majority,<sup>153</sup> read in open court<sup>154</sup> and dissenting opinions may be attached.<sup>155</sup> A time limit of sixty days once deliberations have ended is imposed upon the bench to issue the judgment.<sup>156</sup> The *Statute* does not empower the ACtHR to order any remedy or reparation or compensatory damages.<sup>157</sup> This is an unfortunate omission which seriously weakens the effectiveness of the ACtHR.<sup>158</sup> The judgments are final and without appeal.<sup>159</sup> However, they may be reconsidered if one or more of the six grounds laid down in article 27(2) of the *Statute*<sup>160</sup> are accepted by the ACtHR. Parties to the original case must lodge an application for reconsideration within six months from the day the judgment was serviced to them. The grounds are both procedural, e.g. breach of an essential procedural rule or the emergence of previously unknown facts, and substantive, e.g. that the ACtHR flagrantly exceeded its jurisdiction or the judgment’s reasoning was not clarified. It is submitted that the latter grounds are tantamount to a right of appeal obliging the ACtHR either to confirm its previous judgment or to annul it. There is no doubt that this provision serves to protect the interests of contracting states, which could use it as a deterrent if, in their opinion, the ACtHR has acted in a proactive manner or simply if they are dissatisfied with its ruling. However, most of these grounds are capable of undermining the ACtHR’s mandate to act in a truly independent way and are therefore disturbing. A notorious example of blatant disregard for the international rule of law was the decision of the Southern African Development Community (SADC) to suspend the organization’s Tribunal in 2010 following findings of human rights violations by Zimbabwe, on the grounds that the Tribunal had exceeded its jurisdiction, and the adoption of a new Protocol on the Tribunal on August 18th 2014 which severely limits its jurisdiction to the point of impotence.<sup>161</sup> Although it remains

<sup>152</sup> *ECtHR Rule*, *supra* note 85 at rule 63(1)(2) *IACHR Statute*, *supra* note 91 at art 24(1).

<sup>153</sup> *Statute*, *supra* note 2 at art 25(1).

<sup>154</sup> *Ibid* at art 25(6).

<sup>155</sup> *Statute*, *supra* note 2 at art 25(2). Separate opinions are not mentioned.

<sup>156</sup> Ninety days in the case of the African Court, see *Protocol on the African Court*, *supra* note 75 at art 28(1).

<sup>157</sup> *Cf ECHR*, *supra* note 75 at art 41; *ACHR*, *supra* note 41 at art 63(1); *Protocol on the African Court*, *supra* note 75 at art 27(1).

<sup>158</sup> The practice of the *IACHR* on reparations provides ample examples of the extensive nature and forms that remedies can take, see Dinah Shelton, “Reparations in the Inter-American System” in David Harris & Stephen Livingstone, eds, *The Inter-American System of Human Rights* (Oxford: Clarendon Press, 1998) 151.

<sup>159</sup> *Statute*, *supra* note 2 at art 25(3).

<sup>160</sup> *Ibid* at art 27(2).

<sup>161</sup> See Gino Naldi & Konstantin Magliveras, “The New SADC Tribunal – Or the Emasculation of an International Tribunal” (2016) 63 *Nethl Intl L Rev* 133.

to be seen how litigant parties will use the capacity under article 27 of the *Statute*<sup>162</sup> to have judgments effectively reviewed and how the ACtHR itself will tackle this matter, arguably these are provisions which are not in line with regional human rights standards which limit revision to the emergence of new facts or evidence.<sup>163</sup> The *Statute* is silent on the correction of errors but this may be addressed by the *Rules*.<sup>164</sup>

The question of the enforcement of judgments, always an issue of concern as regards to the effectiveness of human rights courts, is addressed in article 26 of the *Statute*.<sup>165</sup> In particular, judgments shall be enforced immediately after being served to litigant parties and in accordance with the domestic procedures concerning the execution of final judgments given by national courts.<sup>166</sup> To ensure execution as envisaged in article 26 of the *Statute*<sup>167</sup> contracting parties will have to introduce the necessary changes in their domestic legal orders. As matters now stand, it is not clear from the *Statute* whether supervision of the judgments' execution will rest with the ACtHR itself or the Assembly. Under article 29 of the *Statute*<sup>168</sup> instances of non-compliance with the judgments have to be included in the ACtHR's annual report which will be presented to the Assembly for its approval.<sup>169</sup> What actions the Assembly may take to ensure compliance and secure the execution of judgments is not set out in the *Statute* since the adoption of a mechanism to ensure this awaits the work of the Assembly. It is submitted that the Assembly should be able to refer the matter of a contracting party's persistent refusal to comply to the LAS Council for further action, although it is true to say that there is no institutional link between the two organs. As far as the ECtHR is concerned, the situation is considerably different because its judgments are transmitted to the Committee of Ministers, the decision-making body of the Council of Europe, which is then responsible for supervising their execution.<sup>170</sup> Although it is evident from the language of article 26 of the *Statute*<sup>171</sup> that judgments are binding on the parties to a case, it might have been prudent to have added an explicit provision to that effect in the *Statute*.<sup>172</sup>

There are a number of disturbing omissions in the *Statute*. Foremost is the absence of authority for the ACtHR to indicate or order, either *proprio motu* or at the request of a party to the case, provisional, or interim, measures in cases of extreme seriousness and urgency which are necessary to avert irreparable damage to

<sup>162</sup> *Statute*, *supra* note 2 at art 27.

<sup>163</sup> *ECtHR Rule*, *supra* note 85 at rule 80; *Protocol on the African Court*, *supra* note 75 at art 28(3).

<sup>164</sup> *ECtHR Rule*, *supra* note 85 at rule 81; *African Court Rules*, *supra* note 86 at rule 25(2)(i).

<sup>165</sup> *Statute*, *supra* note 2 at art 26.

<sup>166</sup> This provision appears to be based on that of the *ACHR*, *supra* note 41 at art 68(2).

<sup>167</sup> *Statute*, *supra* note 2 at art 26.

<sup>168</sup> *Ibid* at art 29.

<sup>169</sup> In the Inter-American system, a series of IACtHR judgments concerning Peru resulted in it defying the IACtHR, a serious matter brought to the attention of the OAS, General Assembly, *Annual Report of the Inter-American Court of Human Rights*, vol 2, OEA/Ser.L/V/III.54, Appendix LVII (2001) at 1217.

<sup>170</sup> *ECHR*, *supra* note 75 at art 46(2). See further Elisabeth Lambert Abdelgawad, *The execution of judgments of the European Court of Human Rights, Human rights files, No 19*, 2nd ed (Strasbourg: Council of Europe Publishing, 2008).

<sup>171</sup> *Statute*, *supra* note 2 at art 26.

<sup>172</sup> *ECHR*, *supra* note 75 at art 46(1); *ACHR*, *supra* note 41 at art 68(1); *African Court Rules*, *supra* note 86 at rule 61(5).

individuals, or to preserve the rights of the parties.<sup>173</sup> No provision is made should a party fail to appear before the ACtHR or does not defend the case against it.<sup>174</sup> Neither is any provision made for any contracting party or the LAS Council or any subordinate organization and agency that believes it has a legal interest in a case or could be affected by its decision to petition the ACtHR to intervene.<sup>175</sup> In addition, other procedural matters, relating to written and oral procedures, are not covered.<sup>176</sup> There is no mention of evidence and witnesses.<sup>177</sup> It may be that the *Rules* will address these issues.

## F. Advisory Opinions

According to article 21 of the *Statute*,<sup>178</sup> the ACtHR is endowed with the capacity to issue advisory opinions but the applicants with standing to request an opinion are limited.<sup>179</sup> In particular, contracting parties are not permitted to seek advisory opinions, this right being available only to the LAS Council or to any organizations and agencies subordinate to the LAS and only in regards to legal issues relating to the 2004 *Charter* and other Arab conventions on human rights. It is submitted that the Committee as well as the Permanent Commission qualify as such subordinate bodies. Provided they possess the necessary political will to act proactively, this avenue could be exploited astutely to promote and consolidate human rights in the region. Separate opinions are allowed and, just like majority opinions, they must be reasoned.

## G. Final Matters of Procedure

The procedure for the amendment of the *Statute* is laid down in its article 34.<sup>180</sup> The initiative could come either from the ACtHR itself or from any contracting party, and will be addressed to the Assembly. Amendments shall enter into force one month after being ratified by two-thirds of contracting parties. A problematic aspect is that the amendments will not come into force for all parties but only for those which have accepted them. It follows that until all parties have ratified them the ACtHR will be forced to apply both the revised and the original *Statute* depending on whether the applicant and/or the respondent state has or has not accepted the amendments. Peculiar as this might be, it is in line with the workings of

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<sup>173</sup> *ACHR*, *supra* note 41 at art 68(2); *Protocol on the African Court*, *supra* note 75 at art 27(2). Under the *ECHR* interim measures are governed by the Rules, *ECtHR Rules*, *supra* note 85 at rule 39.

<sup>174</sup> *ECtHR Rule*, *supra* note 85 at rule 65; *IACHR Rule*, *supra* note 85 at art 27(1); *African Court Rules*, *supra* note 86 at rule 55. See *Constitutional Court v Peru* (2001), No 55 Inter-Am Ct HR (Ser C).

<sup>175</sup> *ECHR*, *supra* note 75 at art 36; *Protocol on the African Court*, *supra* note 75 at art 5(2).

<sup>176</sup> *IACHR Rule*, *supra* note 85 at Chapters II-III; *African Court Rules*, *supra* note 86 at rule 27(1).

<sup>177</sup> The *IACHR Rules* provide detailed guidance, *supra* note 85 at arts 44-49.

<sup>178</sup> *Statute*, *supra* note 2 at art 21.

<sup>179</sup> Only under the *ACHR* can Member States request advisory opinions, see *ACHR*, *supra* note 41 at art 64.

<sup>180</sup> *Statute*, *supra* note 2 at art 34.



the LAS where decisions reached by a majority (i.e. not by unanimous vote) are binding only upon those Member States which have accepted them.<sup>181</sup>

The *Statute* shall become operative one year after its entry into force.<sup>182</sup> Withdrawal from the *Statute* is envisaged in its article 35 and will be effective one year after written notice is given to the LAS Secretary-General.<sup>183</sup> Cases before the ACtHR which were pending before the withdrawal came into effect shall continue and the withdrawing state “shall not be exempted [...] from its obligations arising from the *Statute* while it was a party to it”.<sup>184</sup> An interesting question is whether withdrawal from the LAS would lead to withdrawal from the ACtHR as well. This is the case under article 58(3) of the *ECHR*, stipulating that those contracting parties ceasing to be members of the Council of Europe shall cease to be parties to the *ECHR* under the same conditions.<sup>185</sup> However, it should be noted that the relationship between the *ECHR* and the Council of Europe is much more integrated compared to that between the 2004 *Charter* and LAS, while the Council of Europe’s Member States are required to ratify the *ECHR*.<sup>186</sup>

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As has already been observed, the *Statute of the Arab Court of Human Rights (Statute)*<sup>187</sup> does not deal with a number of important issues. First and foremost, it does not provide for a right of individual petition. This is arguably its leading failing which undermines the whole project. But neither does it make provision for remedies for victims nor the adoption of provisional measures. The latter omission is especially worrisome and surely limits the capacity of the Arab Court of Human Rights (ACtHR) to intervene in cases where massive human rights violations may be occurring. Moreover, given that the League of Arab States (LAS) has no other juridical organ in place it does not seem unreasonable to expect that the Arab Court of Human Rights (ACtHR) should have been provided with such means. It remains possible that certain of the *Statute*’s defects could be remedied by the *Rules*. Certainly, it is the case that the jurisdiction of the African Court of Human and Peoples’ Rights (ACtHPR) has been suitably complemented by its *Rules*.<sup>188</sup> But there

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<sup>181</sup> *LAS Charter*, supra note 1 at art VII.

<sup>182</sup> *Statute*, supra note 2 at art 33.

<sup>183</sup> *Ibid* at art 35.

<sup>184</sup> *Ibid*.

<sup>185</sup> *ECHR*, supra note 85 at art 58(3).

<sup>186</sup> Council of Europe, *Parliamentary Assembly Resolution 1031* (1994) at para 9. In the Inter-American system, denunciation of the *Charter of the Organization of American States*, 30 April 1948, 119 UNTS 3 (entered into force 13 December 1951), does not bear upon the withdrawn state’s continued participation in the *ACHR*, see *ACHR*, supra note 41 at art 78. The *African Charter* lacks a withdrawal clause.

<sup>187</sup> *Statute*, supra note 2.

<sup>188</sup> Gino Naldi, “Observations on the Rules of the African Court on Human and Peoples’ Rights” (2014) 14 *Afr Hum Rts LJ* 366.

is only so much that the *Rules* can be expected to do and realistically they cannot create a right of individual petition where none exists in the parent instrument.<sup>189</sup> Given its present mandate it is certain that the ACtHR is unlikely to be burdened with work. The ACtHR's membership will be crucial; an activist and courageous bench, drawing on a court's inherent powers or a creative, teleological approach to interpretation, could enhance its protective mandate. But it would have been unrealistic to have expected more from many of the regimes in question. Of course, it is theoretically possible for the LAS to expand the ACtHR's mandate in a future protocol.

Thus far the record of ratifications of the *Statute* is disappointing. Saudi Arabia became the first state to approve it on June 24th 2016.<sup>190</sup> Six more Member States must adopt it before the ACtHR can become operative. A NGO has called on LAS Member States not to ratify the *Statute* until and unless it undergoes thorough revision, e.g. giving individuals direct access to the ACtHR.<sup>191</sup> However, the prospect of a repetition of what happened with the *Arab Charter of Human Rights* of 1994 is not especially appealing, especially if this meant that the region would have to wait many years before the ACtHR were finally set up. To what degree suasion from outside the region could be a factor in strengthening the protective mechanism is difficult to judge when dealing with illiberal regimes. The fact that European governments are, with the adoption of *Protocol No 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms*,<sup>192</sup> seeking to rein in the European Court of Human Rights (ECtHR), calls into question their moral standing, weakens their ability to lead by example and project soft power, and undermines diplomatic efforts to inculcate good practice in other regional bodies. However, it would not be proper to consider the LAS in isolation. While the LAS has the distinction of being one of the oldest regional organizations it is by no means the only such association in that part of the world and many of its Member States are also members of other important regional groupings, such as the African Union<sup>193</sup> and the Organization of Islamic Cooperation (OIC).<sup>194</sup> Undoubtedly, the African Union has

<sup>189</sup> Although the *African Charter* does not employ the terms 'individual complaints' or 'individual procedure', 'communications' 'other than those of State parties' are envisaged under arts 55 and 56.

<sup>190</sup> See Saudi Press Agency, "New Precedent for Saudi Arabia, as it Ratifies Statue of the Arab Human Rights' Court-Kingdom Ambassador to Egypt Says" (2016), online: <[www.spa.gov.sa/viewstory.php?lang=en&newsid=1514142](http://www.spa.gov.sa/viewstory.php?lang=en&newsid=1514142)>.

<sup>191</sup> International Commission of Jurists, "Arab Court of Human Rights: comprehensive amendments required before ratification" (2015), online: <[www.icj.org/arab-court-of-human-rights-comprehensive-amendments-required-before-ratification-new-report/](http://www.icj.org/arab-court-of-human-rights-comprehensive-amendments-required-before-ratification-new-report/)>.

<sup>192</sup> *Protocol No 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms*, 24 June 2013, CETS No 213 (not yet in force). See Gino Naldi & Konstantinos Magliveras, "Protocols No. 14 and No. 15: Undermining the Protective Mechanism of the European Convention on Human Rights" in Doug Hodgson, ed, *International Human Rights and Justice* (New York: Nova Publishers, 2016) at 87.

<sup>193</sup> *Constitutive Act of the African Union*, 11 July 2000, 2158 UNTS 3 (entered into force 26 May 2001). All fifty-five states of the African continent and surrounding island states are members of the African Union.

<sup>194</sup> *Charter of the Organization of Islamic Conference*, 1972, 914 UNTS 111; Revised *Charter of the Organization of Islamic Cooperation*, 2008, online: <<https://www.oic-oci.org/>>[OIC Charter]. There are currently fifty-seven Member States. In order to become a member a state must have a Muslim-

developed a relatively complex human rights system that is reasonably capable of holding Member States to account.<sup>195</sup> Nor should it be overlooked that many of the LAS Member States are already bound to defend and promote human rights as contracting parties to United Nations treaties such as the *International Covenant on Civil and Political Rights*, the *Convention on the Elimination of Discrimination against Women*<sup>196</sup> and the *Convention against Torture*.<sup>197</sup> The 2004 *Charter* and the *Statute*, as regional complements to the protection and promotion of fundamental rights and freedoms, do not therefore constitute the only options. Nevertheless, it must be acknowledged that the states in question tend to accept only minimal oversight.<sup>198</sup> Insofar as the *Statute* itself is concerned, its limited *locus standi* specifications arguably render it fundamentally flawed and unfit for purpose. It is unlikely to be able satisfy the clamour for justice in the region and as such could even act to undermine the faith and the trust of the people in international institutions.

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majority population. See Sands & Klein, *supra* note 1 at 148-149. In 1990 the OIC undertook to safeguard human rights through the Cairo Declaration. The revised *OIC Charter* contains a binding commitment to the protection of human rights and fundamental freedoms, art 1(14). Provision is made for a human rights body, the Independent Permanent Human Rights Commission, *OIC Charter* at art 5(6). Its *Statute* was adopted in 2011 and it is essentially a consultative, advisory and promotional body, with no powers of enforcement, see 2011, 50 ILM 1152.

<sup>195</sup> See Magliveras & Naldi, *supra* note 64 at 199-307; FransViljoen, *International Human Rights Law in Africa*, 2nd ed (Oxford: Oxford University Press, 2012).

<sup>196</sup> *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

<sup>197</sup> *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

<sup>198</sup> For instance, only four LAS Member States, Algeria, Djibouti, Libya, and Tunisia, have accepted the right of individual petition under the *Optional Protocol to the International Covenant on Civil and Political Rights*, 16 December 1966, (entered into force 23 March 1976) 999 UNTS 171.